and order he thought proper; but the Inspector's opinion therein expressed did not affect the complainant's right to make his complaint before the Deputy Magistrate, nor, we think, warrant its being dealt with otherwise than it would have been if there had been no such report. We have no reason to believe that the case is one in which a summons or warrant should have been issued. Probably it is not; but there has been a material miscarriage in procedure which the petitioner is entitled to have set right. There must be an order setting aside the Magistrate's proceeding and directing him to take the examination of the complainant on his attending for that purpose, and thereupon to proceed, or to dismiss the complaint, as he is empowered to do, by Section 67 of the Code of Criminal Procedure.

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Appellate Jurisdiction (*a*)

Special Appeal No. 206 *of* 1868.

V. SINGAMMA and another... ...*Special Appellants.*

VINJAMURI VENKATACHARLU, natural father and guardian of SRINIVASA CHARLU *alias* RAMANUJA CHARLU..... } *Special Respondent.*

In order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is not essential.

The giving and receiving a boy who is capable of being adopted is sufficient to constitute a valid adoption according to Hindu Law.

THIS was a Special Appeal against the decree of G. D. Leman, the Acting Civil Judge of Guntoor, in Regular Appeal No. 86 of 1865, confirming the decree of the Court of the District Munsif of Bapatla in Original Suit No. 736 of 1864.

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Parthasarathy Aiyangar, for *Rama Row*, for the special appellants, the 1st and 2nd defendants.

The facts sufficiently appear from the following

JUDGMENT:—This was a suit to recover certain inam lands which had been alienated by the 1st defendant to the 2nd and 3rd defendants. The plaintiff sued as the

(*a*) Present: Bittleston and Ellis, JJ.

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adopted son of 1st defendant's deceased husband, the alleged adoption having been made by her under authority from her husband. The adoption was denied, but both the Lower Courts have found that an adoption in fact took place.

When the case came first before this Court on special appeal, we considered the finding of the Lower Appellate Court ambiguous, and accordingly we sent the case back to the Civil Judge for a distinct finding upon the issue, whether there has been any valid adoption of the infant plaintiff according to Hindu Law. This issue has now been found by the Civil Judge in the affirmative; but he adds that it was not proved that the datta homam or any other ceremony, except giving and receiving, was performed at the time of the adoption; and the ground of special appeal is that the adoption, even if true, is invalid, inasmuch as the datta homam was not performed. It is necessary therefore for us to decide in this case whether in order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is essential; and, upon a consideration of the authorities, we are of opinion that it is not.

In the two celebrated treatises on adoption translated by Mr. Sutherland (the *Dattaka Mimansa* and *Dattaka Chandrika)* the observance of the prescribed solemnities (including a burnt sacrifice and recitation of the prayers denominated Vyakrit,) is certainly treated as essential to the validity of the adoption, and to the establishment of the filial relation, in the case at all events of the son given. But the writers of these treatises depend mainly upon the texts of *Vasishta* and *Cannaka* as the authorities for their position, and these texts enjoin in similar terms the observance of various other solemnities on the occasion of an adoption, some of which appear not to be regarded as essential by any commentator.

And in the *Digest* of *Jagannatha* there is a very elaborate commentaryon this very text of *Vasishta,* in which he concludes that the oblation to fire with holy words from the Veda is an unessential part of the ceremony. In the Madras edition (1865) of Mr. Colebrooke's translation at p. 389, the passage will be found in which *Jagannatha* states

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that the adoption is not void if that oblation be omitted; and at p. 391, this passage "If the declared intention be expressed in these words, 'I give him to you as a son, and if the acceptor's intention be thus expressed, 'I take him as a son' he becomes a son; nothing else is required."

This view of the subject has long been entertained by the principal English authorities. *Sir T. Strange* in his Judgment in *Veerapermal Pillay* v. *Naraina Pillay* 1 *Notes of Cases, p.* 117, says "The operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality varying under different circumstances in different parts of India, or at least in the idea of different Pundits and Shastrees, but one opinion is common to all which is indeed frequently repeated in the late translated digest, viz., that nothing of this kind is so essential to the act as, being mistaken or omitted, can have the effect of invalidating the adoption." In another part of the same judgment at p. 133, with reference to the question as to the proper age of the child he says:—"This question of age appears to have undergone a good deal of investigation in the late case of the Rajah Nobkissen at Bengal, in which the mere act of giving and receiving seems to have been considered as alone constituting a valid adoption without regard to limitations or ceremonies as in any degree essential *unless in the case of Brahmins;*" and the same learned Judge in his work on Hindu Law (we quote from the edition of 1830 p. 95) says further:—"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the brahmin, only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire and those who do not keep such fires, *i. e.*, between brahmins and the other classes, it being by the

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former only that the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. And even with regard to brahmins, admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the right for civil purposes; but the contrary is to be inferred, and the conclusion is that its validity for these consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only son or the eldest son of the giver, the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained, but that a lawful one, actually made, is not to be set aside for any informality that may have attended its solemnization."

In support of this conclusion, Sir T. Strange refers not only to the *Digest* of *Jagannatha*, but to the opinions of Mr. Colebrooke and Mr. Ellis, which are collected in the 2nd volume and those opinions, though not all of them in terms quite consistent, seem to us, when considered together, fairly to warrant the conclusion.

At page 126 Mr. Colebrooke quotes the 3 *Digest* 244. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption," and adds, "the adoption being complete, it cannot be annulled." Mr. Ellis says:—"Certainly, however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever, a *fortiori* not on account of any informality." Further at p. 220 we find amongst the remarks of Mr Ellis upon the ritual of the datta homam extracted from the *Datta Mimansa* this statement.—"He concludes the result, with respect to practical use, to be that if the performance of the datta homam be established, the adoption is established; but if otherwise, that the converse does not hold good, and that further evidence may be adduced, ading that in no case can the omission of the ceremony affect an adoption in other respects valid; but that if not performed, when the adoption is from another gotram, it would seem from

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analogy that the son, so adopted, must be Anitya Datta." The supposed distinction between the Nitiya and Anitya Datta is pointed out in the Pundit's answer at p. 121, and Mr. Ellis remarks thereon at p. 122 quoting a text from the *Nirnavasindhu;* and assuming it to exist for any practical purpose, it clearly affects only the status of the descendants of the adopted son, and not that of the adopted son himself. In the present case we do not know whether the adopted son was or was not of the same gotra, and it is unnecessary to follow further the analogy suggested by Mr. Ellis.

The opinion of Mr. Colebrooke at p. 155 that "The unintentional omission of some part of the ceremonies by the adopter would hardly invalidate the adoption, though the wilful omission of the whole by him might have that effect," appears by the context to have reference to an adoption intentionally incomplete and to the omission to perform the ceremony of tonsure and the like in the family of the adopter. The same remark applies to the observation of Mr. Colebrooke at pages 113 and 114. "The answer (of the Pundit) presumes the adoption to have been actually made, and the circumstances stated authorize the presumption. It would be otherwise if it were proved that the party had changed his intention before the essential rites of adoption took place and purposely avoided performing them." Mr. Ellis in his remark on the same case (p. 114), explains the sense in which he considers the datta homam to be necessary by saying, that "with brahmins it is indispensably requisite to produce spiritual benefit." It is, we think, in the same sense that the observation of Mr. Ellis at p. 131 must be understood, to render it consistent with the opinion expressed by him in other passages. In Mr. McNaghten's *Principles of Hindu Law* (Madras edition of 1865) at p. 69, it is said, "It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party with the prescribed form and solemnities;" and in a note reference is made to the *Summary of Hindu Law*, p. 52d, and the *Elements of Hindu Law*, p. 82, for an enumeration of the ceremonies enjoined at adoption, adding, "but the exact observance of these ceremonies is not indispensable,"

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for which *The Digest*, vol. 3, p. 324, and *The Elements of Hindu Law*, appendix pp. 101, 106, are cited.

Further, in the Judicial Committee of the Privy Council as long ago as 1834, the same view appears to have been recognized; for in 2 *Knapp* p. 290, we find Lord Wynford in delivering judgment in *Sootrungun Sutputty* v. *Sabitra Dye*, adverting to the fact that "neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions."

On the other hand, Mr. Justice Strange in his *Manual* expresses an opinion that the omission of the datta homam will invalidate an adoption made by the three higher castes; but he does not cite any authority in support of the position, and we are not aware of any other authorities at all equal in importance to the two treatises on adoption already mentioned.

Even Sir Francis McNaghten in his *Considerations*, where he has criticised so elaborately and severely the judgment of Sir T. Strange in *Veerapermal Pillay's* Case on many questions connected with the Hindu Law of adoption, has not explicitly stated his opinion that any particular ceremony is essential to the validity of an adoption. He refers (p. 119) to the statement of *Vachipati* that "Sudras are incompetent to affiliate a son from their incapacity to perform the sacrament of Homa and prayers prescribed for adoption," but he says that "this dictum is abundantly contradicted by Samiaca and others. And indeed the authorized practice of every day is a sufficient acknowledgment of the right and is in itself enough for the confutation of *Vachipati*." Further after quoting the text of *Vashista* at p. 126, he says, "the ceremonies to be performed at the time of adoption are there described, and some rules are laid down respecting the age, &c., of the boy to be adopted, but these rules do not equally apply to all the castes, and they may be said to be general only and not indispensably applicable to any one caste." Then he quotes a case of a Kritima adoption under the law prevalent in Mithila decided by the Sadr Adawlut in 1795 in which no

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religious ceremony was observed, though (he says) "they ought according to legal strictness to have previously bathed." This was, he had been assured, a great relaxation of strictness in the doctrine which formerly prevailed by the authority of that school, but he suggests that the Courts in their efforts to get rid of superfluous forms, to remove mere ceremony out of the way of justice, ought to be consistent and guide themselves by the same liberal rules. With regard to the Rajah Nobkissen's case, Sir Francis, who was one of the Counsel for the adopted son mentions what it was considered necessary to prove in support of the adoption; and though the case was ultimately settled he says:—"I venture to say (and I am justified in saying so from what was declared by each Judge upon the bench) that Gopeemahen Deb was held bound to prove himself within the prescribed age, to prove that the initiatory ceremonies had not been performed in the family of his natural but in that of his adopting father and to prove not only 'a giving and receiving,' but that all the rites of adoption had been duly observed." The opinions of the Judges thus referred to could only have been given in the course of the hearing, and do not seem to have been quite satisfactory to Sir Francis himself, who in the next paragraph says that he should indeed have thought that the circumstances of that case might have exonerated the complainant from the proof of actual adoption and of its having been attended with all necessary formalities.

The authority of Sir Francis McNaghten cannot therefore, as it seems to us, be regarded as decidedly at variance with that of Sir Thomas Strange on the point which we have now to decide. Those two learned writers are decidedly at variance on the question whether there could be a valid adoption of an only son, but this Court in *Special Appeal* 412 *of* 1862 (*1 Madras High Court Reports* 54) and the Supreme Court of Bengal in *Sreemutty Jaurony Dossee* v. *Srimutty Sebasoondry Dossee* (*Fulton* 75) have upheld the opinion of Sir T. Strange on the ground that such an adoption, though blameable, when done is valid; *factum valet.*

Further, we may refer to the judgment of this Court

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in *Special Appeal* 38 *of* 1863 (1 *Madras High Court Reports* 368) in which it is incidentally observed that the customary rites and ceremonies connected with adoption would probably not be treated as necessary to its legal efficacy as regards the civil rights of the person adopted; and to the allusion made in the judgment of this Court in the Ramnad Case (vol. 2, page 234,) to "all essentials of a valid ceremony," but it is certain that on neither occasion did the Court intend to express any clear opinion, or in the last case any opinion at all, on the point now under consideration.

We were referred by Mr. Parthasarathy Ayangar to the late *Sadr Court Decisions of* 1852 at page 62, *Special Appeal* 74 *of* 1851, but that case only decides that a mere 'foster son' is not entitled to the privileges of an adopted son according to Hindu Law, and the passage quoted from *Nirnaya Sindhu* (of which we have been furnished with a translation) does not appear to us to add much weight to the authority of the *Datta Mimansa and Datta Chandrika.* The same text of *Vashista* already referred to is that on which the author relies; and so in the *Mitakshara* it is the text of *Vashista* which is quoted as the authority for the form of adoption, together with the more general passage from *Menu* :—"he is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water." But these texts are in their language directory only, and the question is what part of the direction given is essential to the validity of the act ?

We have not had the advantage of hearing this case argued on both sides; but, so far as we have been able to examine the authorities, the result in our judgment is that proof of the performance of the datta homam was not in this case essential to the establishment of a valid adoption, and that being the only ground of appeal, this special appeal must be dismissed and the judgment of the Lower Court affirmed.