**ALLAHABAD HIGH COURT**

Titli

Vs.

Alfred Robert Jones

(Mukerji, J.)

30.10.1933

**JUDGMENT**

**Mukerji, J.**

1. This Letters Patent appeal arises out of a matrimonial suit. The suit as it originally instituted was based on the following allegations:

> The petitioner is a European domicile in India and since his very childhood has been deficient in mentality. He had to be looked after by his relations throuf'hout his life. The respondent is a woman of loose character and has been so from her girlhood. Her brothers and brother's son, in October 1930, land on other occasions, several times threatened the petitioner that unless he married the respondent, he would be visited with "dire consequences," that the ground on which those threats were held out was a false one, being to the effect that the petitioner had "deprived the respondent of her caste." The respondent was already married and her husband, Mohammad Ali, was still alive. But in spite of this fact the petitioner, on account of the threats and being an "idiot," went through a form of marriage with the respondent, on lOfch November 1930. On these allegations, the petitioner prayed that, on the ground of his idiocy and on ground that his consent to the marriage-had been obtained by force and fraud, his marriage with the respondent might be declared null and void.

2. The respondent contested the petition and alleged that at the time of the marriage she had been converted into Christianity, according to the Eoman Church, that she was then a widow; that she had never been married to any Mohammad Ali and at the time of the marriage, her husband was not alive; that no relation of hers exercised any undue influence or pressure on the petitioner; that the res. pondent was never a prostitute as alleged in the petition; that the petitioner was not an idiot; that he fully understood the nature of the marriage contract; that the petitioner himself was anxious to marry the respondent and he alone made all the necessary arrangements; that no fraud was ever practiced on the petitioner as-regards the marriage and that the marriage was valid and

lawful in every way. She further stated that the parties had' known each other for a long time.

3. The suit came for a first hearing before one of the learned Judges of this Court who was not the trial Judge, and on 27th June 1932, six issues were framed as. noted at p. 5 of the printed paper-book. Before the learned Judge (King, J,) the petitioner abandoned the plea that the marriage was null and void on the ground that the respondent was married to Mohammad Ali at the time of the marriage-in question. On 7th November 1932, after the Eeverend Father Livesay, a witness for the respondent; had been examined, a petition was filed on behalf of the petitioner that the plaint might be amended and a ground for the declaration that the marriage was void might be added to the plaint, namely, the marriage had not been solemnized according to the rules, rites and ceremonies and customs of the Eoman Catholic Church : see p. 42 of the printed record. This application, was granted on the same day. The next day, on 8th November 1932, a further application for amendment of the plaint was made by the petitioner, and an other ground was sought to be added to the plaint, namely, the marriage was void, because the person performing the marriago was not so authorized under the provisions of the Indian Christian Marriage Act. This was also allowed. The hearing of the evidence in the case was concluded on 7th November 1932 and the judgment was delivered on 14th November 1932. It appears that on the amendment boing allowed, a plea was taken orally on behalf of the respondent that a suit based on the allegation that the marriage was null and void because the proper rites of the Catholic Church had not been observed and because the person performing the marriage was not authorized to do so, could not be maintained in the High Court. The learned Judge, therefore, first tried the question of jurisdiction. He found that he had jurisdiction to hear the amended ease also. On the question of the idiocy of the petitioner, the learned Judge found that he'was not an idiot. On the question whether the marriage was null and void on the ground of fraud and force the learned Judge found that no case had been established. But he added a new issue in the following language : "Did the petitioner consent to the said marriage?" and on this issue the learned Judge came to the conclusion that the petitioner was incapable of giving his consent and, therefore, was incapable of contracting a valid marriage. On the question of the observance of the rites and ceremonies of the Church of Rome and the authority of the priest to solemnize the marriage, the learned Judge came to the conclusion that the necessary rites and ceremonies had not been observed and the marriage was accordingly void. Ho further held that the Reverend Father Livesay, the priest, having failed to perform the rites enjoined by the Church of Eome and having no authority to perform a marriage according to the other provisions of the Christian Marriage Act, the marriage was void. In the result the suit was decreed. The first question that has been argued before us is the question of jurisdiction. The jurisdiction to hear a matrimonial matter was conferred on this High Court by Clause 26 of its Letters Patent. This exercise of jurisdiction is subject to any law that the Indian Legislature may enact from time to time. This is laid down in Clause (35), Letters Patent. Such being the case, we have to look to the Acts passed by the Indian Legislature for our guidance. The Indian Divorce Act, being Act 4 of 1869, in pursuance of which the present suit was originally instituted, defines the extent of the jurisdiction of the High Court with respect to matters coming within the purview of the said enactment. It

runs, so far as is material for our purposes, as follows:

> The jurisdiction now exercised by the High Courts, in respect of divorce a mensa 'et toro and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained and not otherwise....

4. From this clear language of Section 4, it follows that the jurisdiction in matrimonial matters conferred on this High Court by Clause 26 of its Letters Patent is to be exercised in accordance with the provisions of the Divorce Act of 1869, and in aocor-dance with that Act alone. So far as the suit is based on the grounds that the petitioner was an idiot at the time of his marriage and that the consent of the petitioner was obtained by force and fraud, the jurisdiction of the High Court exists, because of the provisions of Section 19, Divorce Act 1869. This Act does not empower the High Court to declare a marriage null and void on the ground that the ceremonies necessary for a marriage enjoined by the Church have not been performed. The reason is simple and is this : Section 4 of the Divorce Act does not allow the High Court to exercise its matrimonial jurisdiction otherwise than under the rules laid down in the Act. The Act nowhere confers on the High Court a jurisdiction to hear a case for a declaration that a certain marriage is void because of non-observance of the essential rites of the Church. A suit based on the ground of non-observance of essential ceremonies must, therefore, be instituted in an ordinary Court of original civil jurisdiction, namely, in the Court of a Munsif or a Subordinate Judge, according to the pecuniary and territorial jurisdiction of such Court. The Indian Christian Marriage Act (Act 15 of 1872), lays down rules as to how a Christian marriage is to be solemnized in India. Section 5 of the Act lays down the rule on the point, and Section 4 says that any marriage not solemnized in accordance with the provisions of Section 5 shall be void. The Act (of 1872) does not specify the Court in which a relief is to be sought by a petitioner. This means that he or she must seek such relief in an ordinary Court of original civil jurisdiction in India and such a Court would be the Court of a Munsif or a Subordinate Judge, as stated above in the Province of Agra. It is no doubt open to the High Court, when such a suit is instituted in the Court of a Munsif or a Subordinate Judge, to transfer it to itself and to try it under its extraordinary original civil jurisdiction. But no such suit is permitted by the law (Section 4, Divorce Act, 1869) to be instituted directly in the High Court. It follows that the learned trial Judge of this Court was not authorized by the law to hear the suit so far as it was based on the plea subsequently added by the petitioner. The view of the law that has been taken by me was taken in the High Court of Calcutta in the case of *E. L. Gasper v. W. Gonsalves*[1] and the same view was taken in Patna in *Lish v. Lish*[2], So far as we are aware only one Court, namely, that of Lower Burma, in *Consterdine v. Smaine A.I.R. 1918 L.B. 83* took a contrary view; but I am not prepared to accept that view as the correct one. I may point out that the learned Counsel for the petitioner could not make any satisfactory answer to the line of reasoning advanced on behalf of the appellant and accepted in this judgment. In one or two cases heard in this Court by Walsh, J., a suit like the present one was heard and decided. But in those cases no question of jurisdiction was ever raised or decided.

These are therefore no authority for a contrary view. I hold that that portion of the suit which is based on the ground that the marriage is void, because certain ceremonies required by the rules and customs of the Catholic Church have not been observed, must be dismissed. In this view, the question of the capacity of Father Livesay to celebrate a marriage does not arise. The priest never professed to be authorized to celebrate the marriage otherwise than as a marriage solemnized in a Church. He did solemnize such a marriage, although he did not observe certain of the rules. The marriage, therefore, cannot be held to be void on the ground that the person who celebrated it was not authorized to do so. As the case may go before His

[1](1874) 13 B.L.R. 109 (Cal)

[2] AIR 1923 Pat 301 : 72 Ind. Cas. 657

Majesty in Council, I may make a few remarks on the merits on this part of the
petitioner's case also. To start with, the amendment sought for was a belated one and could be allowed only on condition of payment of costs by the petitioner to the opposite party. The appellant was, further, entitled to an opportunity to adduce evidence on the new case adopted for the petitioner. The appellant properly takes exception to the procedure of the learned Judge in objection No. 4 of the memorandum of appeal. The facts on which the case for the petitioner is based are told by Father Livesay, whom I have no reason to disbelieve and appear to be as follows: The petitioner went to Eeverend Father Livesay, a secular priest of the Boman Catholic Church at Bhawali. He, at his second visit, proposed that he should be married to the appellant and that the appellant should be converted to Christianity by Father Livesay. 'It was arranged that the appellant should receive instructions into the doctrines and teachings of the Church of Borne before she was converted and that on her conversion she should be married to the petitioner.

5. The appellant thereupon took up her residence in the out offices of the Church and there received instructions in Christianity for two to three weeks. On Monday, 10th November 1930, during the morning service, the appellant was baptized, and in the same afternoon she was married to the petitioner, according to the form of the Boman Church. On Sunday, 9th November, the banns were published. The flaws that are alleged to exist in the marriage of the parties consist of these: First, the rules of the Boman Church require that the banns should be published thrice before the marriage and once at a time, either on a Sunday or any other sacred day and at intervals of a week. The second flaw is that, as it was going to be a mixed marriage, namely, between the petitioner, a follower of a Protestant Church, and the appellant, a Boman Catholic, dispensation of the Bishop should have been obtained prior to the performance of the ceremony of the marriage. The learned trial Judge has held that owing to these flaws the marriage was void, because it was not performed in accordance with "the rules, rites, ceremonies and customs of the Church." That Father Livesay is an ordained priest is not denied; nor is it denied that if the banns had been proclaimed properly, and if the dispensation of the mixed marriage had been obtained, the marriage would be otherwise flawless. The Boman Catholic Bishop of Allahabad, within whose diacese the marriage was performed, has sworn that, according to the doctrines of the Eoman Church, the marriage is a good one, although the flaws mentioned above exist. The Bishop has supported his opinion with a quotation "Legislation in the

New Code of Canon Law by Ayrinhac" in support of his opinion. The learned trial Judge, however, was of opinion that, although the marriage might be good according to the Eoman Church, it was void under the statute law.

6. I fear there is a fallacy in this view. All rules are framed with the ultimata object of doing an act effectively and in such a manner that possible serious defects may be avoided. But there exists always a distinction between rules which are essential and rules which are not essential. The non-observance of essential rules will entail a nullification of the act itself ; while the non-observance of non-essential rules need not lead to the same result. For example, under the Hindu law certain ceremonies including the recitation of certain mantras are enjoined for the due performance of an adoption or a marriage. But it has been repeatodly held that the non-observance of certain rules will not render the marriafie or adoption invalid, while the non-observance of others will lead to a contrary result. In the case of a Hindu adoption what is essential is the giving and taking provided, of course, the boy adopted is eligible for adoption. The religions ceremony may not have been performed, according to the strict rules of the religion. Similarly instances may be quoted from rules of Mahomedan Law. In modern times statutes of procedure make a, clear distinction between an essential and non-essential rule. The Civil Procedure Code of 1908 by Section 99 lays down that no decree shall be reversed or substantially varied ; nor shall a case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court.

7. A similar rule will be found in the Criminal Procedure Code in Section 537.

8. The question, whether the omission of the banns and the omission of the dispensation will make marriage otherwise valid void, is a question which must be decided according to the "rules, rites, ceremonies and customs of the Church." The Church, which lays down the rules, rites, ceremonies and customs, must necessarily also lay down which of such rules, etc., are essential and which are not essential. If the Church says that certain rules should be observed but that non-observance will not render the marriage void, there is nothing in Section 5, Indian Christian Marriage Act (1872), which says that such a marriage is to be declared void by a Court.

9. According to the book "Legislation in the new Code of Canon Law by Arian-hac," the banns are meant to discover if there is any "impediment" in the proposed marriage. Want of banns does not invalidate a marriage celebrated by the Catholic Church: see Article 44 and the note of the said book. The only impediment that existed in this case was that it was going to be a mixed marriage, i.e., of a Protestant to a Eoman Catholic. Article 127 tells the pastor not to celebrate a mixed marriage if he can dissuade the party following the Catholic Church from entering into it. If he cannot he is told to celebrate the marriage according to rites of the Church. Article 129 indicates that a marriage of persons of different but Christian faith, celebrated without a dispensation is not void, but allows the parties to live together. At p. 74 of the book is quoted the rule that a marriage with an impediment that is merely "prohibitive" is not void. There is no

evidence before the Court to contradict the Bishop or to show that the book he relies on does not disclose the correct Church law. In this view of the situation, in my opinion, the marriage in this case is not void under Section 4 of the Act of 1872.

10. The next question that requires determination is whether the marriage is null and void because "the petitioner did not consent to the said marriage." The learned Counsel for the petitioner tried to support the decree of the learned trial Judge on grounds which have been found against him. It will, therefore, be convenient to consider the whole case on the point together.

11. The plea of the petitioner that at the time of the marriage of the parties the appellant had a husband living was abandoned at an early stage of the trial: see at p. 5 the note made by the Judge under the issues. The suit, therefore, went to trial on the questions whether the petitioner was an idiot and whether the marriage had been induced by fraud and force.

12. Although the learned Counsel for the petitioner tried to support the decree of this Court on the basis of allegations of fraud and force, he could not lay before us any evidence worth acceptance to lead us to the eonclusion that any force or fraud had been practiced. As the learned trial Judge has pointed out, no particulars of the fraud were set forth in the plaint or subsequently at the trial. As regards force, the evidence is almost negligible. The petitioner no doubt said that he had been told by appellant's brother and nephew that dire consequences would follow, if he did not marry the appellant. The petitioner never stated clearly what the understood as to the naturo of the dire consequences which were likely to follow on his not marrying the appellant. As we shall show later on, the appellant is far from being an idiot. In the circumstances, the learned Judge was right in disbelieving the story of the exercise of threats said to have been made by the appellant's relations. It was always open to the petitioner, to mention to his sisters that threats were being held out to him. But he never mentioned the fact. The petitioner rides horses, shoots and goes about fishing. In the circumstances it is difficult to believe that poor men living by labour, men in the position of the appellant's relations could really influence his mind by threats of physical violence. I agree, therefore, with the Court below in holding that neither any fraud nor any force was used to induce the petitioner to contract the marriage in question. The main question in fact to be decided in this appeal is whether the petitioner is an idiot.

13. To the question of idiocy the learned Judge has added the question whether the petitioner gave his free consent to the marriage. 13efore I consider this latter aspect of the case, I have to make a few observations. First, the question of consent was never raised in the petition of the plaint and the question of consent is one of fact and could not be treated as a question of law. If, therefore, the question of consent was raised in the mind of the learned Judge, the proper course for him to adopt was to frame an issue, although the case had already closed, and to give the parties an opportunity to adduce evidence on the point. This was not done. The learned Counsel for the parties could not point to any portion of the record to show that the learned Judge ever indicated before he wrote his judgment his intention of trying an issue as to the question of

consent.

14. The next observation that I have to make is that in a case which has been tried on the question whether the petitioner is an idiot or not, it is not open to a trial Court to make a new case based on the ground that, although the peti tioner was not an idiot, he was a feeble minded man who could not have entered into a contract of marriage. The case of *Durga, Bahsh Singh v. Mohammad All Beg* [3]decided by their Lordships of the Privy Council, is entirely pertinent to the present case. There the plaintiff brought a suit on the allegation that he was a lunatic and the mortgage bond in suit had been taken from him while he was suffering from lunacy. The ease of lunacy altogether failed, but the learned Subordinate Judge drew the inference, on the basis of the evidence given to prove his lunacy, that the plaintiff was a man of weak intellect who could be easily influenced improperly to enter into the transaction he sought to dispute in the suit. Their Lordships of the Privy Council said that this could not be permitted and upheld the decree of the Judicial Commissioner of Oudh"; by which the plaintiff's suit had been dismissed.

15. The next observation that I want to make on the point is that want of consent as such does not find place in Section 19, Divorce Act (1869), as one of the grounds for declaring

[3](1905) 27 All. 1

a marriage null and void.

16. The reason why any state of mind which falls short of lunacy of idiocy has not been allowed to be a ground for annulment of a marriage is clear. A marriage is no doubt described as a civil contract, but it is far from being in the nature of an ordinary contract. A contract, which is induced by fraud or force or coercion or misrepresentation is voidable at the instance of the party whose consent has been obtained by such influence and is not void in itself : see Section 19, Contract Act. In the case of marriage it is either void or good. It would be impossible to talk of a marriage as voidable" at the opinion of one of the parties while it should be binding on the other party. The observation to be found in the well-known case of Mossy. Moss (1897) P 263 are very pertinent on the pointy.

17. Persons differ from one another in the degree of intelligence possessed by them. It would be a dire calamity if it could be said as a matter of law that a marriage, entered into by a person who is neither a lunatic nor an idiot, is void, simply because one of the parties lacks in intelligence), although he is able to understand the nature of the bonds of matrimony into which he is entering. As observed by illannan, P. in *Durham v. Durham*[4] the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. In dealing with the question whether the petitioner is an idiot or not I shall show that the petitioner was fully able to understand the nature of the ceremony that was performed at the Church of Bhawali, and thereby gave his consent to the marriage within the meaning of the Indian Contract Act. I will now take up the question of the idiocy of the petitioner. On behalf of the petitioner his next friend, a sister four to six years older than himself, the petitioner himself and two medical gentlemen, who

appear to have been examined as experts were examined to establish the plea of idiocy. I will first consider the evidence of the petitioner's sister, Miss Edith Jones. (After considering her evidence and the evidence of the petitioner, his Lordship held that the petitioner was not an idiot but that he was quite capable of understanding the nature of the ceremony that he went through with the appellant, namely, the marriage, and the judgment proceeded.) There is evidence of two witnesses, whom I have already mentioned, on behalf of the petitioner, and it is necessary to deal with that evidence before the case can be finally decided. Captain Aitchison, the Civil Surgeon of Allahabad, was examined as an expert. He kept the petitioner under his observation for sixteen days and talked to him occasionally, and he expressed the opinion that the petitioner was an idiot and that he was deficient in reasoning power. The witness further abated:

> The term (idiot) varies medically from a man completely a plant to a man who though able to profit a little from education is still unable to manage his own affairs. The petitioner is defi-oient in reasoning power.

18. Later on, the learned doctor told the Court that he had applied Binet and Simon tests and that he had come to the aonolusion stated above. At the end of the questions put by the petitioner's counsel the learned doctor said I do not think he (the petitioner) can give evidence. If the questions put to him are simple, he may answer them, but I do not think he would understand them.

[4](1885) 10 P.D. 80

19. As I have said, the petitioner did give his evidence and intelligently too ; that the questions put to him were not always quite simple and that he did understand them and did answer them like a man who understood the questions. Now the question arises, what is the value of the evidence of Captain Aitchison ; I may mention before going further that, according to Mr. Aitchison's estimate, the petitioner has the mentality of a child of six. The trial Judge rejected his (Captain Aitchison's) opinion that the petitioner was an idiot and came to the conclusion that the petitioner was not an idiot. The learned trial Judge however thought that the petitioner had the mentality of a child of nine, that is to say, was much more intelligent than a child of six. Captain Aitchison was apparently examined as an expert, and we have to consider what is the nature of the evidence that an expert may give and what is the weight which a Court should give to such evidence. The evidence Act deals with the case of expert witnesses in Section 45. It runs as follows:

> When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting (or finger impressions), the opinions upon that point of persons specially skilled in such foreign law, science or art, (or in questions as to identity of handwriting or finger impressions) are relevant facts.

Then Section 51 says:

Whenever the opinion of any living person is relevant, the grounds on which such opinions are based are also relevant.

20. I take it that Captain Aitchison was called as a man of medical science to express an opinion as to whether the mentality of the petitioner was that of an idiot or not. Accepting for the moment, though not deciding, that the word "idiot" is a term of medical significance, according to the witness the term is used medically in a large variety of cases, it being applied to a man who is completely a plant and to a man who though able to profit a little from education is still unable to manage his own affairs. This is a definition which would indeed cover a large variety of cases, and if we apply this definition, we shall have probably to include in the term spendthrifts, who having partly run through their estates apply to the Court of Wards for taking over the management of their estates, on the ground that they are unable to manage their own affairs. These spendthrifts may be unable to manage their own affairs, but it is difficult to say that if, they are Christians and if they are governed by the Divorce Act, their marriages are also liable to be declared null and void owing to their being idiots. Evidently such a definition would not do for our purposes and would not at all fit in with an interpretation of the word "idiot" as used in Section 19, Divorce Act. It is true Captain Aitchison later on stated in his evidence before the Court that his final diagnosis was that the petitioner's was a case of Amentia amounting to idiocy in its more minor form and is definitely more than feeble mindedness.

21. I have already mentioned that in the opinion of Mr. Aitchison the petitioner could not give evidence and that he might be able to answer simple questions, though the learned doctor thought that the petitioner would not be able to understand even simple questions. The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion, so that the Court, although not an expert, may form its own judgment on those materials: Section 51, Evidence Act. In the evidence of Captain Aitchison the materials on which his opinion was formed are, generally speaking, wanting. If he had given the questions which he put from time to time and the answers he got to thoso questions, if he had told us that he observed the petitioner from time to time without the petitioner knowing that he was being watched, and if we had been told what Captain Aitchison observed, we might have been in a position to say whether the opinion of the expert should be accepted or not. The mere mention that a certain kind of tests known as Binet and Simon tests were applied and certain results were obtained, might be relevant as a piece of evidence but would not be conclusive. As is well known, the Binet and Simon tests are applied to children to test their intelligence and they are in the shape of questions which a child of a certain age may be expected to answer. If a child of five answers questions meant for a child of five, it will be taken that it has the intelligence of its age. Similarly a youth of ten may not be able to answer the questions meant for a youth of his age and may be able to answer questions meant for a child of seven, only. In that case he would be supposed to have the intelligence of a child of seven. only. We do not know what questions were

put by Captain Aitchison to Mr. Jones and what answers he received. On the other hand, as I have pointed out, the evidence of the petitioner himself, covering a large area itself, nullifies the opinion of Captain Aitchison that the petitioner has the mentality of a child of six and1 that he is an idiot. The meaning of the term "idiot," according to Murray's English Dictionary, is stated to be a person so deficient in mental or intellectual' faculty as to be inoapable of ordinary acts of reasoning or rational conduct.

22. The petitioner who has a license to hold a gun for shooting, who does go about shooting, who rides a horse, who sometimes goes about fishing, who can compose a letter for himself and write it in a tolerably good hand, who reads books to pass time, who is invited to tea parties, who knows the nature of the transaction in which he entered with the appellant, and indeed who arranged for it with Father Livesay, cannot be called an idiot in the ordinary acceptance of the word, namely, as a person so deficient in mental or intellectual faculty as to be inoapable of ordinary acts of reasoning or rational conduct.

23. We find that the word "idiot" has been used in the Mental Deficiency Act 1913 (Scotland). The object of this Act is to control persons who cannot manage themselves. Four classes of mentally deficient persons are mentioned and the fourth and worst of these is described as an "idiot." The others are imbeciles, feeble minded persons and moral imbeciles. The fact that the legislature chose the word "idiot" to indicate the worst kind of mentally deficient person goes to show that ifc was the fittest word to signify the idea. In this Mental Deficiency Act, 1913, idiots are defined as persons so defective in mind from birth or from, an early age as to be unable to guard themselves against common physical dangers.

24. Certainly this definition cannot be applied to the petitioner.

25. Then we find in the book called Clinical Hand-book of Mental Diseases by Lt. Col. Shaw, I.M.S., that mental diseases are placed under four categories, namely, (1) feable mindedness, (2) imbecility, (3) moral imbecility and (4) idiocy. Idiocy is said to be that state of the mind in which there is a profound mental defect and the person is unteachable. Captain Aitchi-son has described the petitioner as an idiot of the microcephalic type with a monkey face and ears sticking out. This no doubt, is a description of some kind of idiot to be found in medical books, for example, see "a Test Book of Practice of Medicine" edited by E.W. Price, 11th Edition, pp. 1738-41. Having seen the petitioner in Court, I find myself unable to say that he has the face of a monkey or that his head is so small in proportion to his body as to attract attention. His ears, no doubt, do stick out. But no authority has been quoted to us from medical books that a man with small head and a monkey face and sticking out ears must necessarily be an idiot. As I have observed however the petitioner has neither a monkey face nor has a head which is noticeably small in proportion to his body. His head was measured with a tape and the measurement was 20." The inside of the hat measured 19i." Surely this is not an unusually small head. We are not bound by the definition of an "idiot" as found in medical literature. We have to read the word "idiot," used in Section 19,

Divorce Act, as a word used in its ordinary significance. But even if we apply to the word its medical meaning, the petitioner.cannot be called an idiot ; much less can he be called an idiot if we treat the word "idiot" as having been used in its ordinary sense in the English language.

26. I must hold and do hold that I should not allow Captain Aitchison's evidence to override the inference to be drawn from the remaining evidence on the record. (After examining the evidence of the other witnesses, Dr. Eahmat Ilahi, the judgment concluded.) I come to the conclusion that the petitioner is not an idiot within the meaning of Section 19, Divorce Act, that he understood the nature of the marriage transaction in which he entered and that the marriage cannot be declared as a nullity on any of the grounds mentioned in Section 19, Divorce Act, or on the ground of want of intelligent consent. In the result, I would allow the appeal, set aside the decree of this Court and dismiss the petitioner's suit with costs throughout.

**Sulaiman, C.J.**

27. I concur in the order proposed; it is only in deference to the opinion expressed by two learned Judges of this Court, with considerable experience of matrimonial cases, whom we are overruling, that I wish to add a few words separately. Quite apart from the question whether the issue as to the want of necessary ceremonies was properly raised at a late stage in the case, I fully agree that the High Court has no jurisdiction to entertain the suit under the Indian Christian Marriage Act (Act 15 of 1872) on its original side. No doubt under Clause 26, Letters Patent, the matrimonial jurisdiction between persons professing the Christian religion was conferred upon this Court. But under Clause 35, the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council. Whatever wider powers might have been, vested in the High Court, Section 4, Divorce Act (Act 4 of 1869) considerably curtailed it. The jurisdiction then exercised by the High Courts in respect of divorce a mensa et toro, and in all other causes, suits and matters matrimonial, was to be exercised thereafter subject to the provisions of that Act "and not otherwise." Section 7 of the Act did not confer any additional jurisdiction, but merely provided what principles and rules were to be followed, when a suit was properly entertained. It is therefore quite clear that no matrimonial suit, other than those which can fall within the scope of the Divorce Act, can be entertained by the High Court. The grounds on which a suit can be entertained under the Divorce Act are indicated in Section 19. The principles and the rules which are to be followed may, under Section 7, be as nearly as may be conformable to the principles and rules on which, the Courts in England act.

28. The Indian Christian Marriage Act, inter alia, lays down how and by whom marriages are to be solemnized. No section in this Act confers any jurisdiction on the High Court to entertain a suit for a declaration that a marriage-is null and void for want of necessary ceremonies. In the absence of any specific provision to that effect, obviously a suit for a declaration that a marriage is null and void on account of non-conformity with any of the indispensable conditions laid down for its solemnization would lie in the subordinate civil Court. If a suit where pending in such

Court, the High Court may in the exercise of its extraordinary jurisdiction transfer it to its own file; but the High Court has no jurisdicion to entertain a suit under this Act direct. Indeed, it seems that a suit for a declaration that a marriage is null and void on grounds other than those mentioned in Section 19, Divorce Act, would be a suit under the Specific Relief Act only. It is unnecessary in this case to consider whether the marriage in dispute was null and void on account of the omission of any rules, rites, ceremonies or customs. The Indian Christian Marriage Act does not lay down what such rules, rites, ceremonies and customs are. The burden would lie on any party, who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed the marriage itself Iwas void.

29. In the present case the Bishop of Allahabad has stated as his opinion that the non-observance of certain requisites was a mere irregularity and was not fatal. Of course, a Court is not bound to accept the opinion of a religious expert, however high he may be placed in Church. The duty is on the Court itself to decide as between the parties before it as to whether the marriage was void or not. But a decision cannot be given merely because in some religious text books certain things are enjoined or certain other things are prohibited. The question would still remain whether their non-observance is fatal. This question can be answered only if clear texts in religious books of high authority were to lay down in express tormH that the non-compliance with any such provision would render the marriage null and void. It is not a mere matter of an opinion of an expert or a Judge, but a mattor depending entirely on the authority of the texts relied upon. I may add that the loarned advocate for the respondent has drawn our attention to passages in Ayrinhao's Marriage Legislation in The Hew Code on Canon Law which shows what things are forbidden and what are major and minor impediments to marriage. But our attention has not been drawn to any passage where it is said that where a marriage between a Eoman Catholic and a Protestant has been performed the marriage is null and void, or that if banns have been called less than three times the marriage is a nullity. As the question does not arise in this case, I am not called upon to express any final opinion on this point. The petition in this case was based on four grounds out of those mentioned in Section 19, Divorce Act. The case that the appellant had a husband living at the time of marriage was abandoned at the trial. The learned Judge has found that no force or fraud has been established in this case. He has also recorded a finding that:

> I do not think that it can be said that he (the respondent Mr. Jones) is an idiot within the meaning of Section 19 (3), Divorce Act, which classes lunatics and idiots together.

30. The issue of idiocy has been decided in favour of the wife. But these findings are challenged on behalf of the husband. It is nobody's case that Mr. Jones is a lunatic, but it is said that he is an idiot. An "idiot" is not defined in the Divorce Act or the General Clauses Act or in any other Indian Act, but undoubtedly idiocy is a form of congenital insanity. It is a form of insanity due to the absence of development of the mental faculties and intelligence from very childhood. So far

as the definition of an insane person i.e, a man of unsound mind is concerned, there has always been a difference between the points of view of a medical man and a lawyer. I had occasion to point out this difference in the case of *Pancha v. Emperor*[5], There are many persons who would be considered insane by medical men who do not come up to the standard of insanity as prescribed by law. the law has set up a very high standard and the only test which has been laid down is as to whether the person was by reason of unsounduess of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law : B. 84, I.P.C.

31. This, in a 3ense, is the definition borrowed from the opinions of the, fifteen Judges in Daniel McNaughten's case who unanimously laid down that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong.

32. The learned Judges further pointed out that if a person labours under a delusion, he must be considered to be in the same situation as if the facts with respect to which the delusion exists were real, that is, the delusion must have reference to the fact in issue. Anything short of this standard, however much it may be regarded to be a case of insanity according to the medical science, is not insanity as recognized by law. The medical science has a long category of various degrees of abnormality which are thought to be insanity. They include idiocy, imbecility, feeble mindedness and subjectivity to stupor, exaltations, delusions, impulses, etc. Indeed, abnormality in one form or another is considered according to medical books as a species of insanity, but that is not the legal view.

33. It has been argued before us that the word "idiocy" in Section 19 should be taken in a wider sense than insanity. The only Act in England in which idiocy has been defined appears to be the Mental Deficiency Act (3 and 4 Geo. Chap. 5 of 1913). Section 1 contains the definition of "defectives" who are classified into four categories: (a) idiots, i, e., persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers, (b) Imbeciles, i.e., persons in whose case there exists from birth or from an early age mental dofectivenesB not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, (c) I'eoble minded persons, i.e., persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they

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require care, supervision and control for their own protection and for the protection of others, (d) Moral imbeciles, i.e., parsons who from an early age display some permanent mental defect coupled with strong, vicious or criminal propensities on which puuishment ha3 had little or no deterrent effect.

34. No doubt this definition of idiots and the distinction from imbeciles, feeble minded persons

and moral imbeciles is not absolutely binding upon us. All the same this Act furnishes a clue to the underlying distinction and is a good guide to us. lurthormore, this classification and distinction is in perfect accord with medical books of high authority. In Taylor's Medical Jurisprudence, Vol. 1 (5th Edn. at p. 797) it is stated:

> Idiocy is the dementia naturlis of lawyers The term 'idiot' is applied to one who from original defect has never had mental power. Idiocy differs from the other states of insanity in the fact that it is marked by congenital defloieny of the mental faculties. There is not here a perversion, or a loss of what has once been acquired, but a state, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power to fit him for his social position. It commences with life and continues through it, although idiots are said rarely to live beyond the age of 30.

35. He then goes on to point out that a perfect idiot recognizes no one, remembers no one and his mind seems to be blank; he has a more nominal instinct without any will. He also points out that this perfect state of idiocy is often accompanied with great bodily deformity. He however, does not mention prominent ears as any sign. The learned author then goes on to distinguish from this complete form of idiocy a state called imbecility, i.e., idiocy in a minor degree. He says:

> There is a state, scarcely separable from idiocy, in which the mind is capable of receiving some ideas and of profiting to a certain extent by instructions, owing however either to original defect, or to a defect proceeding from arrested development of the brain as a result of disease or other causes operating after birth ; the minds of such persons are not capable of being brought to a healthy standard of intellect, like that of an ordinary person of similar age and social position.

36. Then there are still more minor forms of abnormality with which we are not concerned. It is clear, therefore, that although the precise boundary between idiocy and imbecility cannot be defined, for imbecility when it reaches a high order may verge on idiocy, there is a well marked distinction between the two and there can never be a doubt except as regards those just on the boundary line. The same distinction has been accepted by Lyon and Waddell in their Medical Jurisprudence. In giving the various forms of insanity at p. 30.1 (4th Edn.) they give the first group as amentia or congenital insanity due to the arrest of development of the nerve centres. This is sub. divided into:

> (1) Idiocy or complete amentia where the arrest of development not only affects the higher or intellectual nerve centres but appears also to affect the centres of sensorial perception. Henoe in the fully developed form of complete amentia the individual carrieson a mere vegetable existence not having the sense even to eat or drink. In the more common or less developed form there is a certain amount of intelligence; the individual recognizes his friends, is capable with extreme difficulty of acquiring a certain

amount of education, and is able to make his wants known by sign, or imperfectly articulated words.

(2) Imbecility or partial amentia where there is not that marked want of development of the centres of sensorial perception which is present in idiocy. Imbecility takes two forms :

(a) intellectual imbecility and

(b) moral imbecility. We are not in this case concerned with any other forms which medical science may regard as a species of insanity.

37. Price on Practice and Medicine (p. 1737) draws the same distinction between idiots, imbociles and feeble minded persons. An idiot is one unable to guard against common physical danger and in him there is a total or almost complete absence of intelligence. An imbecile has rudimentary intelligence; whereas a feeble minded person has a yet larger amount of intelligence. It is therefore clear that in order to find that a person is an idiot, it is not sufficient to find that he is a mere imbecile. One cannot be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence. The answer to the 5th question given by the learned Judges in McNaughten's ease related to medical opinion. As it is very often overlooked by Courts when examining a medical expert it is necessary to quote here both the questions and answers:

> Q. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law or whether he was labouring under any, and what, delusion at the time?
>
> A. We think the medical man under the circumstances supposed cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of scienco, in which case such evidence is admissible. But where the facts are admitted or not disputed, arid the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a mattor of right.

38. Section 45, Evidence Act, equally lays down limits within which expert evidence can be taken. Considerable difficulty is always experienced because of the vast difference in the two points of view. A medical man's conception of an insane, a lunatic or an idiot is utterly different from the legal conception. Accordingly, when a medical man makes a bald statement that in his opinion a particular person is an insane or an idiot, his statement is inconclusive. To give an instance in the present case Captain Aitchison, after stating that he thought "as a medical officer that he (Mr. Jones) is an idiot," proceeded:

> The medical definition of an idiot is very wide. The term varies medically from a marr completely a plant to a man who, though able to profit a little from education, is still unable to manage his own affairs. The petitioner is deficient in reasoning power.

39. It is at once apparent how wide is the divergence. Medical opinion, that a person is an idiot because he is unable to manage his own affairs, is useless in an inquiry as to whether the person is an idiot in the eye of the law. A mere opinion that a certain person was not fit to enter into a contract of marriage does not carry usvery far. The development of the plaintiff's faculties of seeing, speaking and hearing have not in the least been arrested. The three symptoms pointed out by the Civil Surgeon, namely, (1) small head, (2), large sticking-out ears and (3) pragnatious jaw, are equally inconclusive. The Civil Surgeon did not mention the measurements of the head of the respondent. We have had them taken. The circumference of Jones's head is 20 inches. The inner circumference of the hat which he wears is of the dimension of 19i inches. No medical authority has been cited before us to show that a person with so small a head must be an idiot. Much less is there any indication in what percentage of cases with small heads of this size, idiocy is found. As regards the large sticking-ouis ears there is still less any authority to support it. Except among a particular hill tribe, the prominence of ears does appear to have been noted as any sure sign of idiocy. Indeed, our common experience would, point to the contrary. Much less is there any material to show in what percentage of cases prominent ears are found to exist among idiots. Pragnatious jaw has been considered to be a symptom of criminality, and as it may be a sign of abnormality it may also be some indication of insanity. But there are no materials before us to show in what percentage of cases pragnatious jaw is found among, insanes. These physiological tests laid down by the Italian School of Anthropology are not accepted as any test worthy of consideration by Courts of law. Differences in physical appearance vary considerably from race to race, and country to country, and they cannot be laid down as any unmistakeable guide to the mental capacity of the person ooncernad.

40. With regard to the Binet-Simon teats : it is quite sufficient to say that these are mere intelligence tests invented for the purpose of finding out the degree of intelligence of school children. They are utterly useless if a person is examined during the course of a trial when there is the possibility of his pretending to be an idiot in order to prove his case. The only possible way is to watch him when he does not suspect that he is observed. Unfortunately the Oivil Surgeon has not noted what tests the respondent did not come up to. These mental tests are purely eliminative in their nature. One can say what an individual is not fit for, what he cannot do. It was therefore necessary to place on the record what Mr. Jones was found to be unfit for or incapable of doing. Unfortunately we have no such record.

41. There are only certain answers given to certain questions which undoubtedly show a very deficient intelligence and memory. But the curious thing is that there is a marked oontrast between those answers and the statement made on oath by Mr. Jones at the trial. The questions and the answers given by Mr. Jones in the witness box cover about four pages and a half of printed matter. With the one solitary exception when Mr. Jones wrongly stated that it would take

about four days to go from Allahabad to Bhim Tal, there is not a single answer which can even be suggested not to have been intelligent, rational or to the point. They bear not even the remotest resemblance to the talk that took place during the private examination of Mr. Jones by the Civil Surgeon. The contrast is so striking that one cannot help feeling that there had been simulation. My learned brother has discussed that statement at length and ill is not necessary for me to cover that giound over again. All that lean say is that having read the entire statement carefully I cannot possibly come to the conclusion that the development of Mr. Jones's intelligence has been arrested to such extent that he is not able to understand what a marriage is and what its consequences are or is incapable of voluntarily consenting to his marriage. As Captain (now Major) Aitohison was examined before the statement of Mr. Jones was recorded, that statement was not placed before the Civil Surgeon and he could not be asked whether in view of the statement which he made in Court he would not change his opinion. The learned doctor admitted that there was a distinction between absolute idiocy and imbecility, but explained that the latter was a less severe form of idiocy. According to his medical notions he no doubt stated that in his'opinion Mr. Jones was an idiot with the intelligence of a child of six years and that he would be prepared to certify that Mr. Jones was of unsound mind. But obviously he was using this phraseology in a rather loose way and in the medical sense only, as his attention was not drawn to the standard of idiocy or unsoundness of mind required by law. And this is why the learned Judge himself could nofc endorse his opinion and had to record a finding that idiocy within the meaning of Section 19(3), Divorce Act, had not been established.

42. It is unnecessary to examine in detail the opinion of the Sub-Assistant Surgeon who has based his opinion on his general impression and also because on one occasion instead of his answering a question about his health satisfactorily, his sister replied on his behalf and on another occasion when asked whether he had had sound sleep he replied in the affirmative while his sister intervened and said no." The only other thing which he can remember is that Mr. Jones once said that he was not constipated while the doctor when feeling his stomach thought that he was. The Sub-Assistant Surgeon apparently overlooked that during the interval of time between the rise from sleep and the question by the doctor he might have had his breakfast or a drink. His statement that Mr. Jones is not capable of managing his business affairs is of hardly any significance. My learned brother has dealt with the omission to frame an issue as regards want of consent. There seems to be no doubt that the learned Judge had this issue in his mind as he has referred to it in his judgment, but as no such issue existed on the record the respondent's counsel might well have understood that no such issue had in fact been framed. This plea was not raised in the petition nor in any of the two applications for amendment filed by the petitioner. It raised a question of fact which, without having been made the subject matter of an issue, could not properly be raised at the trial as it would take the opposite party by surprise. Even if therefore the question were necessary, I would be compelled to seni down an issue on this point for determination after taking evidence of both the parties. But I agroo that the question of consent outside Section 19, Divorce Act, hardly arises. "Where a person is a lunatic or an idiot he is, of course, incapable of understanding the true nature of the transaction and knowing its

consequences. Any consent given by such a person is a consent in form and appearance only and not in substance. On proof of lunacy or idiocy a want of consent follows.

43. Similarly, where force or fraud has been established, the consent obtained by such means is hardly a real consent. It is vitiated as not being a voluntary and free consent. But where consent has been given without any forca or fraud and by a person not a lunatic or idiot, it can hardly be said that there was no consent at all. The grounds on which a marriage can be declared null and void are set forth in Section 19. It may also be conceded that under Section 7, Divorce Act, the Court has to follow the rules and principles accepted by the English Courts. But there is no English authority for the proposition that a consent knowingly and consciously given is not a consent so as to make the marriage binding. In *Durham v. Durham* [7]the President accepted the definition which had been substantially agreed upon by the counsel that there should be a capacity to understand the nature of the contract and the duties and responsibilities which it creates.

44. Of course, a mere comprehension of the words of the promises exchanged at the time of the marriage is not sufficient. The mind must not only be capable of understanding the language used but must also not be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real apprehension of the engagement apparently entered into. The learned Counsel for the respondent has strongly relied on the case of *Moss v. Moss* [8]But there too, although the learned Judge noted that the voluntary consent of the parties is required, he also observed that no marriage is held void merely upon proof that it had been contracted on false representations, unless the party imposed upon has been deceived as to the person and thus has given no consent at all; there is no degree of deception which can avail to set aside the contract of marriage knowingly made; and that in English law when fraud is spoken of as a ground for avoiding a marriage this does not include such fraud as induces a consent but is limited to such fraud as procures the appearance without the reality of consent. Even in cases of men who are partially insane the basis was either a perpetration of fraud by taking advantage of his weakness or an involuntary consent procured by pressure and coercion.

45. Not even any early English case has been cited before us in which a marriage-was actually declared to. be null and void when the want of consent was held to be due to something short of lunacy, idiocy, force or fraud. Much less is there any such case after the exposition of the law relating to unsoundness of mind in Daniel Mc-Naughten's case. A later case of *Harrod v. Harrod*[9] is very instructive. At p. 8 the Vice-Chancelfor explained the two species of unsoundness of mind as follows:

> Unsoundness of mind may ba occasioned either by perversion of intellect, manifesting itself in delusions, antipathies, or the like; or it may arise from a defect of the mind. There is no allegation here of anything like a perversion of the mind, or what is more properly called, mania. With respect to defects of the mind, they are of two kinds: The mind may

> be originally so deficient as to be incapable of directing the person in any matter which requires thought or judgment, which is ordinarily called idiocy; or the defect may arise from the weakening of a mind, originally strong by disease, or some accident of a physical nature, by which memory is lost and the, faculties are paralysed, although there is no perversion of the mind, nor any species of that insanity which is ordinarily called mania.

46. The defendant in that case had tried to put forward a case of simple idiocy invalidating the marriage of a lady, who was shown to have been deaf and dumb and of extremely dull intellect. Other people could not make her comprehend anything; she had never been taught to talk with fingers, nor could she read or write; her mother never allowed her to leave the house alone; she was alsotmable to tell the value of money and she did not know how to give change. The Vice-Chancellor held:

[7]1885) 10 P.D. 80 [9]1854 1 J&K 4

[8](1897) P 263.

> It is clearly the law that the presumption is always in favour of sanity and there is no exception to this rule in the case of a deaf and dumb person; but the onus of proving the unsoundness of mind of such a person must rest on those who dispute her sanity.

47. Even on the evidence for the defence alone he remarked that he should not have been disposed to direct an issue on the question. At p. 14 the learned Vice-Chancellor observed:

> I am therefore of opinion that there is nothing in this case to show that the plaintiff's mother was of unsound mind; and as no case of fraud is alleged, there is nothing more to be done.

48. In the result he held that her marriage was not invalid. It is certainly possible that coercion or fraud may be practiced on an imbecile who has a very weak mind. But this has to be established affirmatively. When lunacy or idiocy is not proved, it cannot be said that there has been any lack of understanding or consciousness. When force or fraud has not been established, it cannot be said that there has been no real consent. A marriage is not like a mere civil contract which may be voidable at the option of one party on grounds mentioned in the Contract Act. It is either good or void; there is no middle course. I agree with my learned brother that on the evidence in this case, which has boen discussed by him at length, it is impossible to hold either that Mr. Jones was an idiot within the meaning of Section 19, Divorce Act, or that he was incapable of giving consent and did not voluntarily consent owing to force or fraud having been practiced upon him after taking advantage of any imbecility of his mind. According to his own statement he understood what he was doing and realized what a marriage meant, and we also know the reason why he now wants to have it set aside.

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