

like a distinct retreat from the position taken up in *Lawless v. Chamberlain*." We suggest that in *Lawless v. Chamberlain* the marriage was treated by Boyd, C., as void *ab initio*, on the ground that without free consent there could be no contract, or, as the Judge expressed it, "*consensus, non concubitus, facit matrimonium*," while in *T. v. B.* the marriage was voidable only.

"It has been debated whether a marriage brought about by duress is void *de facto* as well as *de jure*, so that it does not need the sentence of any Court to pronounce it invalid, or whether it is voidable only. The better opinion would seem to be that it is voidable only. Want of consent (by the principals themselves) may be purged away. A contract void *ab initio* cannot be ratified." Eversley, p. 68.

"The term 'voidable' implies an option to the parties to treat the relationship as binding or not binding. Until set aside it is valid for all civil purposes. When set aside it is rendered void from the beginning. The distinction between void and voidable arose because the temporal Courts prohibited the spiritual Courts from bastardizing the issue of voidable marriages after the death of one of the parties. The jurisdiction in suits for nullity of voidable marriages belonged exclusively to Ecclesiastical Courts." Eversley, p. 59.

It must be confessed, however, that, as Boyd, C., expressed in *Lawless v. Chamberlain*, the opinion that under sec. 28 of the Judicature Act, 1897, the Supreme Court had jurisdiction and power to declare the nullity of a void marriage because no other jurisdiction to do so existed, it is difficult to see why he did not on that ground consider voidable marriages as well as void ceremonies within the jurisdiction and power of the Supreme Court. The King's Ecclesiastical Law as to voidable marriages is part of the common law of England (see *per* Tyndall, C.J., in *Reg. v. Millis*, 10 Cl. & F. 534, at 671), and, therefore, part of the common law of this province, and, while in England that law would be applicable only by Ecclesiastical Courts, it would seem to be applicable here by the Supreme Court, if the interpretation placed on sec. 28 of the Judicature Act, 1897, by Boyd, C., were correct. But we cannot assent to this interpretation of sec. 28 of the Judicature Act, 1897, which reads as follows:—

"The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th of June, 1857, as a Court of Equity, to administer justice in all cases in which there existed no adequate remedy at law."

Boyd, C., referred to this section in *Lawless v. Chamberlain* as though it gave jurisdiction in all cases in which there existed no other adequate remedy. It does not seem as though this section means more than this, that the High Court shall apply those powers which English Chancery Courts exercised prior to 1857 where common law Courts gave no relief. But the Ecclesiastical Courts were common law Courts, and could give relief where nullity was claimed, so that equity had nothing to do with the matter. (*Per* Dr. Lushington, in the Consistory Court of London, in *B. v. M.*, 2 Rob. Ecc. Cas. 580). If there was an "adequate remedy at law" in England, prior to 1857, the section in question gave no power to the High Court here.