

V. CONFUSION OF NULLITY WITH DIVORCE.

Meredith, C.J.C.P., says:—"The conflict of judicial opinion in the Courts of this province has been over the question whether the Courts have the power to decree that *sort of divorce* which follows a finding that the marriage was not a valid one, or to pronounce a declaratory decree as to the validity or invalidity of the marriage."

Speaking of declaration of *nullity* generally as *divorce* does not aid clear thinking on this subject. "Marriage may mean either the acts, agreement or ceremony by which two persons enter into wedlock, or their subsequent relation created thereby:" (Cyc., vol. 26, p. 825).

Suits for nullity apply to the former, not to the latter; they pray the Court to decree "that the *ceremony* of marriage is null and void." (Brown and Watts on Divorce, 8th ed., p. 426.) Suits for divorce pray the Court to decree that "The said marriage may be dissolved"; for judicial separation, "That the plaintiff may be separated from the defendant."

"There can be no adultery if there be no marriage, and it is always held both here and in common law that the first point to be proved in divorce cases is the marriage, which the other party may contest; and if he does not, the form of the sentence in such cases pronounces that there has been a true and lawful marriage as well as a violation of it." (See Sir Wm. Scott, in *Guest v. Shepley*, 2 Hagg. Con. R. 321, in Consistory Court of London.)

A claim for nullity denies that there ever was a valid marriage; for dissolution, or judicial separation, asserts an existing and valid marriage as the very basis of the proceedings. As to void marriages, a learned writer says:—"Civil disabilities, *e.g.*, prior marriage, want of age, idiocy, prohibited degrees, make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all; and any union formed between the parties is meretricious, and not matrimonial. A marriage is termed void when it is good for no legal purpose; and its invalidity may be maintained in any proceeding, in any Court between any parties, whether in the lifetime or after the death of the supposed husband or wife, and whether the question arises directly or collaterally." Eversley, p. 59.

A voidable marriage, however, is valid for all civil purposes until a declaration of nullity has been made by a competent Court. Nevertheless, such a declaration is not a divorce, for the ceremony is declared void *ab initio* (Eversley, p. 59).

VI. THE QUESTIONS FOR SOLUTION.

Peppiatt v. Peppiatt presents two main questions for solution: (1) Has the Supreme Court jurisdiction to make a decree of nullity? (2) Is the consent of parents made essential to a valid marriage of minors by the Marriage Act? Jurisdiction may be inherent or under the Judicature Act; or it may be that jurisdiction exists only by virtue of the Marriage Act, and so is confined to the specific cause therein set forth—lack of the consent to the marriage of minors prescribed by the Act. Whether jurisdiction exists inherently or is asserted under provincial legislation, the constitutional issue is presented—has the provincial legislature power to enact the Marriage