YOUNG VS. YOUNG.

Decision of Chief Justice David P. Lowe, given in the Third District Court, Salt Lake City, May 10, 1875.

Ann Eliza Young, by her Next Friend George R. Maxwell, plaintiff, *vs.* Brigham Young, defendant.

On the 26th day of February last, an order was made in this cause directing the defendant to pay to the plaintiff as alimony *pendente lite*, the sum of $9,500, being at the rate of $500 per month from the commencement of the suit; also to pay her $500 per month subsequently during the pendency of the suit, and $3,000 as attorneys' fees to the attorneys of the plaintiff. It appears that under said order and subsequent proceedings, the attorneys' fees $3,000, and of alimony $500 have been paid. A rule upon the defendant to show cause why he should not be compelled by attachment to further comply with said order, has been granted, to which the defendant has answered, and the plaintiff now moves for an attachment, and the defendant moves to discharge the rule.

A discharge of the rule is asked upon three several grounds. The first that the court has not jurisdiction of the action. The decision of the Supreme Court of the Territory in the case of Cast *vs.* Cast, and the overruling of the demurrer to the complaint in this cause, seem to conclude that question in this court for this case. Any re-agitation of that question should be in the Supreme Court.

The second ground of defense is that an appeal from the order now sought to be enforced has been taken to the Supreme Court. If there were any reasonable ground for holding that under the practice act such an appeal was maintainable, I would most gladly act upon it, and thus hope to obtain the opinion of the Supreme Court upon the order in question; but it seems too plain for doubt that no appeal lies from such an interlocutory order, and that it cannot by any admissible construction be embraced in any one of the provisions of section 328 of the practice act which defines appealable cases. I think, therefore, that the attempted proceedings in appeal are inoperative and nugatory.

There remains for consideration the further ground urged in argument, that upon the pleadings and records, such a state of facts is disclosed as shows it to be inequitable to require the payment of *ad interim* alimony.

The plaintiff in her complaint alleges that she intermarried with the defendant on the 6th day of April, 1868, and sets up facts of negligence and desertion which constitute statutory grounds for divorce. The defendant in his answer makes a qualified denial of the marriage, and alleges by way of avoidance that at the time of such marriage the plaintiff was the lawful wife of James L. Dee, who is still living, and from whom she has never been divorced; that the defendant was lawfully married on the 10th day of January, 1834, to Mary Ann Angell, who then became and still is, his lawful wife. He further alleges in terms, that the marriage with the plaintiff was a plural marriage, entered into according to the doctrine and customs of the Church of Latter-day Saints. The complaint and answer is each upon oath, and it appears from the record as well as from the statement of counsel in argument, that the order for alimony and expenses was made upon the complaint and answer alone, without any other evidence or showing whatever.

It is the general doctrine of the courts in divorce, that before temporary alimony can properly be awarded, the marriage must be admitted by the parties, or established by proofs. 2d Bishop on Mar. & Div., 402-406.

In the very recent case of York *vs.* York, 34 Iowa, 530, it is said, "Alimony is a right that results from the *marital relation*, and the fact of marriage between the parties must be admitted or proved before there can be a decree for it even *pendente lite*." If some exceptional causes to this rule exist, they will be found to proceed upon facts and circumstances having no analogy to the present case. It is also an accepted doctrine that alimony *pendente lite* cannot be claimed as a matter of right, but that its allowance rests in the sound legal discretion of the courts. In Jones *vs* Jones, Chancellor Walworth said, "It is not a matter of right under all circumstances, for the wife who has commenced a suit for a divorce or for a separation, to require the court to direct an allowance to be paid to her by the defendant for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her *ad interim* alimony in all cases." And *ad interim* alimony was refused because there appeared no probability that the plaintiff ought to succeed in the case. 2 Barb. Ch. Rep. 146.

In Worden *vs.* Worden, the vice-chancellor said, "If the answer be true the complainant has no just cause of complaint * * * It is not a matter of course in every case, whatever may be the complexion of it, to make an order for temporary alimony;" and *ad interim alimony* was refused on the ground that it did not appear from all that was before the court that the complainant had a meritorious cause of action. 3 Edwds. Ch. Rep. 387. It is also conceded that the order for temporary alimony when made remains subject to the control of the court, during the pendency of the cause. The present case upon the record is in brief this: The plaintiff alleges a marriage and adequate statutory grounds for divorce. The defendant concedes a marriage, but alleges facts as new matter in avoidance and defence, which clearly show the marriage to be bigamous or polygamous. To these new facts alleged there is no denial. How then does the case stand upon such pleadings? It seems to be supposed that such new matter in the answer is to be deemed as controverted by force of the statute. But this is a mistake when applied to an interlocutory proceeding. The 65th section of the practice act declares, "that every material allegation of the complaint, *when it is verified, not specifically controverted by the answer, shall, for the purpose of the action*, be taken as true. The allegation of new matter in the answer shall, *on the trial*, be deemed controverted by the adverse party." Thus the new matter of the answer is to be deemed controverted only *on the trial*, the statute not prescribing the character in which the new matter is to be regarded for the other purposes of the action, as is done in the same section in reference to the allegations of the complaint. The allegations of new matter, therefore, in the answer, for purposes of the action, other than the trial, must have their ordinary legal effect, and that is to regard them as true, unless actually controverted. And such appears to be the character attributed to the answer in interlocutory proceedings by the supreme court of California under a statute which is identical with the 65th section of our practice act as quoted above. Burnett *vs.* Whitesides, 13 Cal. 156, was an appeal from an order dissolving an injunction, the case having been heard upon complaint and answer alone. The answer denied the equity of the complaint and set up affirmative matter in avoidance, and the court says: "The answer of the defendants is as much proof of the defendants' right, as the complaint of the plaintiff is evidence of his right"; and the order dissolving the injunction was affirmed. Delger *vs.* Johnson, 44 Cal., 182, a very late case, was also an appeal from an order dissolving an injunction which had been heard upon complaint and answer alone, the pleadings being verified. The answer set up new affirmative matter in defense which the court says "if true would justify the court in dissolving the injunction." And in reference to the answer, the court says, "It was held, in Falkinburg *vs.* Lucy, 35 Cal., 52, and many other cases in this court, that when the defendant moves on the complaint and answer, to dissolve an injunction, *the answer will be treated for all the purposes of the motion as an affidavit*," and the injunction having been dissolved upon the uncontradicted new matter of the answer, the order was by the Supreme Court affirmed.

The record of this case, therefore, in view of the provisions of the 65th section of the practice act, and the authorities just cited, does disclose for the purpose of the present inquiry, the uncontradicted fact that the alleged marriage was a bigamous or polygamous marriage. If such a marriage was entered into ignorantly by the complainant, and through the fraud of the defendant, equity will open its doors for her relief; but upon the case as it stands, it is not in the judgment of the court according to the principles of equity and good conscience to enforce the payment of *ad interim* alimony. It appears from the record that the alleged marriage was celebrated in this city, that the plaintiff and defendant both reside in this city. It cannot, therefore, be a difficult or expensive duty of the plaintiff to place upon the record a confutation or some explanation of the unexampled and most extraordinary allegations made if any just explanation exists, and the Court believes that such explanation is due to the common principles of equity and public justice before proceeding further in the direction sought. It would be strange, indeed, if upon such a state of facts uncontroverted by any rule of pleading or of law, and unextenuated by any evidence, it could be imposed as a duty upon a court of equity to direct or enforce the payment of alimony, and thus bestow the apparent, if not indeed the real, sanction of the law upon a practice which is hostile to the civilization of the age, and which the penal statutes of the land visit with condign punishment. The motion for an attachment is denied, and the rule discharged.

Correspondence.

Meetings at Ogden.

SALT LAKE CITY, May 11, 1875.

Editor Deseret News:

On a recent visit to Ogden City, I had the pleasure of attending three meetings during my sojourn in that place.

The first was on Saturday at the *City Hall, where seventeen districts in the interest of the New Order* were represented. Not a dissenting voice was heard to mar the spirit of union and harmony that prevailed throughout the entire meeting. There were about 100 of the principal men of the county present, and all seemed interested and even anxious to see the good cause advance. Funds were gathered for various purposes—the missionaries, the Temple, etc. Donations for the poor and other auxiliaries were before the meeting and met with universal response amidst their own domestic cares, and even cheerfulness marked their action to endorse the suggestions of the President and Bishop.

This is the fairest model of Zion for its age that I have witnessed.

Respectfully, J. Y., Senr.

Killing Lucern.

SALT LAKE CITY, May 6, 1875.

Editor Deseret News:

Recently there have appeared in the NEWS several paragraphs upon the subject of killing lucern, which has induced several reflections in my mind, something like the following—

Is it possible that in this arid and naturally desert country there is a herb, a forage plant, so tenacious of life as to make the matter of killing it a very knotty problem, a solution of which is earnestly sought through the press?

What is lucern? It is a sort of clover, a more rapid grower than common clover, so rapid that in this latitude it may be cut for green fodder nearly every month through the summer. It also makes good hay, and the season's entire yield is very large.

Considering this, it is rather astonishing at first to find people anxious to kill so useful a plant, and a plant so well adapted to this climate and soil.

On second thought, it may be conceded that there are places, such as kitchen and flower gardens and orchards, where it may be desirable to exterminate the free growing lucern.

But on third thought, the suggestion presents itself that a plant so productive, so relishable to cattle, so useful, and possessing such vigorous vitality, is the very identical thing that is wanted to have its seeds scattered broadcast, wherever it will grow, over the prairies and hills, and mountains of this dry and in great part barren land, so that there shall be abundance of feed for the city and settlement cows and the stock on the ranges. A good, productive, forage plant that cannot be killed, except with hard study as to devices and persistent attention in their application, must be the great desideratum, the very thing wanted to utilize the millions of acres of wild range lands throughout the Territory.

The fourth thought is to scatter your spare lucern seed by the bushel on the range wherever it will grow, and harrow it in at the proper season, so that peradventure pasture may be plentiful, and milk and butter and beef more and more abundant. S. O. W. I. T.

BY TELEGRAPH.

AMERICAN.

WASHINGTON, D. C., 10.—Miss Caroline M. Crane, of this city, one of those lost by the *Schiller* disaster, was niece of the wife of Senator Edmunds, of Vt., with whom she passed the winter in this city. She was a highly accomplished young lady, and was on the way to Europe to spend two years with the family of Minister Marsh, and to study art in Italy.

Investigations recently made under the direction of the Secretary of the Treasury and commissioner of Internal Revenue have resulted in the discovery of a well organized and formidable ring, which has been successfully operating for some time in the perpetration of frauds on the revenue in connection with distilleries in the West; the ring had its principal headquarters in St. Louis, Chicago and Milwaukee, and, it appears, had bought up a number of internal revenue gaugers and store keepers in these districts, who have been now dismissed. It is intimated at the department that a number of officers of much higher rank will be relieved soon, if not for participation in these frauds, for neglect of duty in not preventing or discovering them. It is intimated that several internal revenue collectors, and at least two supervisors in the western districts will be speedily superseded.

LITTLE ROCK, Ark., 10. — At Hope, Arkansas, on Saturday, Col. R. H. Gaines, agent for a New Orleans firm, shot and killed Dr. Winn, a hotel keeper, in a personal quarrel.

HAZELTON, Pa., 10.—The M. and L. B. A. had their annual parade here to-day. The demonstration was a success, the entire Lehigh regions being represented. There were 3,647 persons in the procession. Everything passed off quietly, and there has been no disturbance. The men insist that they can hold out for several months.

MILWAUKEE, 10.—A party of officers under the charge of supervisor Hedricks and Captain Brooks, of the secret service division of the Treasury Department, arrived here to-day, and entered upon the work of seizing distilleries, in connection with the collector of the district. The rectifying establishments of A. Schoenfeld and Rindskopf Bros., and the distilleries of Thos. O'Neill, the Kinnickinnick distilling company, L. Rindskopf, Charles Gran, and F. Bergenthal were placed in charge of keepers. It is understood that all the distilleries in the district will be seized, with two exceptions. The character of the evidence upon which the seizures are made is not disclosed.

POTTSVILLE, 10. — To-day three hundred men from Locust Gap went to the Hickory Ridge and Lancaster collieries, and compelled the miners to stop work, giving them to understand that if caught at work again, they would come down with reinforcements and kill the whole party at work and burn the breaker; this is the first open threat made to take life and burn coal property since the strike commenced. After the above threats had been made a private consultation was held, and the men declared that they would stick to the miners' union and fight it out, after which the mob scattered in various directions.

The Enterprise breaker, at Excelsior, was burned last night; supposed incendiarism.

CHEYENNE, 10. — Red Cloud, Spotted Tail, and seventeen other chiefs or Sioux Indians arrived here at noon to-day; they will leave for Washington to-morrow, to treat with the government for the sale of the Black Hills.

Geo. W. Homan, formerly of the Omaha Transfer Co., has entered into a contract with the citizens of this city to put on a daily line of stages from Cheyenne to Harney's Peak in the Black Hills, as soon as the government will permit him to do so.

CHICAGO, 11.—The revenue officers have taken possession of the distilleries and rectifying establishments of Goldsen & Eastmen, Roelle, Goimker & Co., G. G. Russell, P. R. Mason, Byron, Sawyer and the Lake Shore Co., of this city, on the charge of being engaged in the recently discovered frauds on the revenue; it is rumored that other seizures will be made. The establishments of R. Alrici, Bingham Bros., John Busby, Beves & Fraser, F. C. Fader, Quintin Bros., and J. L. Beneker in St. Louis are also seized.

A Washington special sends word that the unearthing of the gigantic frauds in the whisky trade, which resulted in the above seizures, began in St. Louis, under the direct supervision of Maj. G. W. Wishback, editor of the St. Louis *Democrat*, who, having satisfied himself of the existence of a formidable whisky ring, including St. Louis, Chicago, and Milwaukee, obtained authority to ferret them out and, with the aid of Martin Colony, the commercial editor of the *Democrat*, he succeeded fully in doing so. It is said that in St. Louis alone fifty thousand barrels of whisky have escaped the tax through the connivance of the revenue officials with the distillers and rectifiers, and the amount of which the government has been defrauded annually is placed at twelve hundred thousand dollars; of this amount the dishonest revenue officials have received about forty per cent. The mode of swindling comprised the duplicate use of stamps, the refilling of barrels regularly stamped, and various other devices, the successful issue of which depended entirely upon the connivance of revenue officials of various grades. A Washington special says the discovery of these frauds is the real reason for the displacement of Commissioner Douglas, although he was in no manner implicated in them, but his confidence in his system of supposed checks on frauds led him to unconsciously aid the schemes of the various rings. There is great excitement among the distillers and rectifiers in the west, and numerous prosecutions will be commenced at once.

At Leavenworth, Ks., last night, Wm. Embry, editor of the *Appeal* shot and fatally wounded Col. D. R. Anthony, editor of the *Times*. There was a newspaper quarrel between the two, over a matter connected with the Typographical Union. Last night they met in the entrance of the Opera House, and began to quarrel, which culminated in Anthony's striking Embry in the face, and the latter firing three shots from a revolver at Anthony, two of which took effect. The affair produced intense excitement, the Opera House being crowded with people witnessing Janauschek's rendition of Deborah. Embry was arrested and committed to jail. Col. Anthony was postmaster at Leavenworth, and is brother of Susan B. Anthony.

LEWISTON, Me., 11.—Rev. Dr. Geo. Webber, of Kent Hill, suicided this a. m., at this place, by hanging.

WILKESBARRE, Pa., 11.—About thirty men went to work in Hutchinson's mine this a. m.; they marched from their houses in a body and were armed with rifles and revolvers. A crowd of men, women and boys followed them with threats and imprecations, and were only deterred from violence by the weapons of the workmen. The women were particularly bitter with invectives, and at one point in the march nearly precipitated a conflict. Threats were made to have a crowd this evening, when the men came out of the mine, large enough to mob them. Through fear, the authorities were called upon this a. m. by Hutchinson for protection, and a posse is now being raised to go to Kingston this afternoon.

HUNTINGDON, Pa., 11.—H. G. Fisher, of Fisher Bros., and Miller and John Whitehead, of Whitehead and Co., the respective owners of the Excelsior and Ocean collieries, in the Clearfield coal region left here this morning with a large force of workmen, thoroughly equipped and provisioned, and they will, on reaching the collieries, at once resume shipping. A large force was taken up by other parties yesterday, but many were intimidated and returned.