EVENING NEWS.

PUBLISHED DAILY, SUNDAYS EXCEPTED AT FOUR O'CLOCK.

DAVID O. CALDER, EDITOR AND PUBLISHER.

Saturday, October 30, 1875.

NEWS OF THE DAY.

——U. S. troops have been compelled to retreat twice, the past week, in engagements with Cheyenne Indians.

——A man named Small, lost his life by saving two children in danger of losing theirs, on a railroad, at Portland, Me.

——More trouble is expected at Montreal, over the Guibord affair.

——The Carlists claim a great victory in Navarre.

——The Count Von Arnim is to be cashiered from the public service.

——A boating party of six was overturned on the Susquehanna river, and four of them drowned; two of them were on their wedding tour.

——Last night seven prisoners, one of them a murderer under sentence of death, escaped from the prison at St. Joseph, Mo.

——Hailstones as large as pigeon eggs did immense damage the other evening at Rollo, Mo.

——A verdict of murder has been returned by a Cincinnati jury, against an officer who shot and killed a person while arresting him.

——At Athens, O., a colored man and woman left their three small children at home alone, and when they returned the house was burned down and the children burned to death.

——Egyptian troops are invading Abyssinia.

——Considerable damage at Louisville by a storm.

——A prominent citizen of Memphis has given a house and six acres of land for a home for fallen women and indigent children.

——A large English iron firm, employing ten thousand hands, have notified their employees that, owing to depression in trade, their engagements must terminate on the 30th of next month.

WHAT A PITY!

THIS is how the New York *Herald* looks at an awkward situation—

"Sixty-three thousand eighty-four more women than men in Massachusetts, and polygamy a crime."

So certain Christians try to make it out. The Bible in the beginning said, "Be fruitful and multiply and replenish the earth." The pagan Christianity of the present day says, "Some of you may increase and multiply to a certain extent, but if you pass those limited boundaries fine and imprisonment await you." To a large number of Christianity says, "You shall not increase and multiply in the least. Society condemns you to perpetual sterility, because you happen to exceed the number of men. Providence has made a mistake in sending so many women into the world. We have plenty of dishonorable use for them, but all the avenues of honorable maternity are irrecoverably closed to them."

This is the doctrine of the judicial and other persecutors of the Mormons."

A MORE DETERMINED POLICY.

HERE is another squib from Washington, in the San Francisco *Chronicle*—

"New York, October 26.—A special from Washington says: 'As a result of the Presidential visit to Utah during the early part of this month, a more determined policy in regard to the treatment of the Mormon question will shortly be begun. The President is reported as being very decided in the opinion that the Mormons should be treated as persons who intentionally disregard the laws of the country, and who should be made to obey them the same as others.'"

These squibs are of the character of sensational reports, and should be received with due allowance, unless corroborated by less doubtful evidence.

GOOD OUT OF EVIL.

THE San Francisco *Chronicle* thus administers comfort and consolation to the Virginia people in the time of their affliction—

"So far as the first item of damage is concerned, though it has involved a prodigious destruction of property, there is every reason for believing that the enterprise and recuperative energies of the people of Virginia City will prove equal to the emergency, and that within ninety days but little traces of the catastrophe will be visible. The work of rebuilding the burnt district will furnish employment to thousands of men. A new and better class of buildings will take the place of those that have been destroyed. An improved system of sewerage will be introduced, and Virginia City will present altogether a finer and more prosperous appearance than ever before."

THIRD DISTRICT COURT.

YOUNG vs. YOUNG.

The following is the opinion of Judge Boreman, delivered Oct. 29, 1875, as it has been published, we presume, under his revision—

IN THE THIRD DISTRICT COURT, Utah Territory, October Term, 1875.

Ann Eliza Young by Geo. R. Maxwell, her next Friend, *Plaintiff.* vs. Brigham Young, *Defendant.* } Divorce.

I approach the consideration of the question now before me in this case, with much hesitation and solicitude by reason of the fact that the subject of the motion has, prior to its hearing before me, been twice elaborately and ably argued by counsel and passed upon in this court, once by Chief Justice McKean and once by Chief Justice Lowe, the former ruling one way and the latter the other way, in regard to the enforcement of the order which I am asked to enforce.

The facts are substantially as follows: This being a suit for divorce, the plaintiff asked the court to allow her alimony *pendente lite*, and on the 25th day of February, 1875, it was ordered and adjudged that the defendant pay to the plaintiff, $9,500 alimony *pendente lite* and thereafter $500 per month during the pendency of the suit, and $3,000 attorneys' fees to the attorneys of the plaintiff, the said $3,000 to be paid in ten days thereafter, and the $9,500 in twenty days thereafter. The said attorneys' fees not having been paid within the ten days, an application was then made to this court to enforce said order by requiring the defendant to show cause why he should not be punished as for a contempt in not obeying the order. To this the answer of the defendant was made and filed, and after argument, the court (Chief Justice McKean presiding) adjudged that as the order stood unreveked it must be enforced and thereupon adjudged the defendant guilty of contempt, and ordered his imprisonment for the contempt. The $3,000 was at that time paid by the defendant. Afterwards, on the 17th of April, 1875, the time having expired for the payment of the $9,500, and it not having been paid, the plaintiff asked this court (Chief Justice Lowe presiding) to further enforce said order by requiring defendant to show cause why he should not be punished as for contempt for failing to pay said sum adjudged to plaintiff as alimony. The answer to this further requirement having been made and the arguments of counsel heard, the court denied the motion and made the following order:

"This case having been heard on the notice to appear and show cause why he, the defendant, should not be compelled, by attachment, to *comply with the order of this Court* to pay the $9,500 alimony *pendente lite*, now on this day the motion for attachment *is denied* and *the said rule* to appear and show cause heretofore made, *discharged*."

Afterwards, on the 18th day of Oct., 1875, application was again made to this Court to enforce the order for alimony, made on the 25th February last, the same having been complied with only in part. The rule on the defendant to show cause why the same should not be enforced, having been duly executed and answer thereto made by the defendant, the motion, with the affidavits and answer, after argument by counsel, was submitted to Court, and it now becomes my duty to pass upon the matter. In considering the motion, I am first met with the order of this Court requiring alimony to be paid, unrevoked and made some eight months ago, and I am asked to enforce it. The jurisdiction of the Court to make such an order can not and is not questioned. That point was settled by the unanimous concurrence of the Supreme Court of this Territory in the case of Cast vs. Cast, in May 1874, and since then the jurisdiction of said matters by this Court has been the accepted doctrine. The order, therefore, is not void, and if not void, can the Court ignore it and refuse to enforce it, and if it be a matter of discretion, would it be sound discretion so to do? The Court is not, by the defendant's answer, asked to vacate or revoke the order—but simply to refuse to enforce it, and to allow the defendant to disregard it. In the *matter* of Cohen and Jones (5 Cal. 494) these two parties were in custody under an attachment for contempt, and sought to be released upon *habeas corpus*. The Supreme Court of California said that the District Court which committed those parties had jurisdiction, it must be jurisdiction its authority requires. It is a proceeding that the Court may take without motion of either party upon evidence that its orders are disobeyed. It is a power committed to Courts for their own protection; and whilst an order of Court stands upon record unrevoked, and there is a manifest unwillingness to ask the Court to revoke it, the Court cannot stand idly by and see its judgments disregarded and defied.

These conclusions are manifestly decisive of this case. But suppose they are not correct, and that the Court should examine into the validity of the alimony order itself. It is claimed to have been improperly and wrongfully issued. Upon what grounds is it inequitable? It is not claimed either in the answer to the rule or in the argument of the counsel, that the sum allowed is unreasonably large, or that the defendant has not had time to pay it, or that he is unable to pay it. But it is alleged that the answer of the defendant on the merits of the case, contained new matter which was not denied, and not being denied, it was to be taken as true, except "on the trial" when it was deemed to be controverted. To sustain this position, the statute and the opinion of Chief Justice Lowe, heretofore delivered in this case, are cited as authority and no further authority was relied upon, except the decisions referred to in Chief Justice Lowe's opinion.

Let us see whether the decisions thus referred to and the statute support the position assumed by defendant. The statute referred to is Sec. 65 of the Practice Act, and reads as follows:

"Sec. 65. 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."

The cases cited are all cases of injunction granted *without notice*.

The first decision cited was Burnett vs. Whitesides (13 Cal. 156.) The answer in that does not set up affirmative matter, at least not such as was considered by the Supreme Court of California as affirmative matter, for the Court says: "It presents a naked case of a claim of property and for damages made, and this claim denied, and no proof of the claim," and also, "But it is enough for this case to hold that as the entire equity of the bill is denied in the answer, and there is no support of the bill, the injunction should be dissolved." And why? Because the statute of California allowed applications to dissolve injunctions—*when issued without notice*, to be heard upon "the complaint *and the affidavit* on which the injunction issued," on the one side, and, "the affidavits with or without the answer," on the other side, and when the defendant had nothing but his answer to show, and that was sworn to, the Supreme Court of that State said that he might use that as an affidavit, and then by express words of the statute the plaintiff was authorized to use affidavits and not having produced any, of course the other affidavit stood. In Delger vs. Johnson, (44 Cal. 182) this being the other case referred to in support of the defendant's position—it is said that "it was held in Falkenburg vs. Lucy, (35 Cal. 52) and many other cases in this Court, that when a 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 that the plaintiff on the hearing of the motion is entitled to reply to the answer by affidavits," and this is simply because the statute of that State says that when the defendant uses affidavits the plaintiff may do likewise. The answer drops its character of answer, and is accepted as an affidavit and plaintiff is expressly by statute authorized to reply thereto. But such is not the case in proceedings in general, but only in special cases, and nowhere is it allowed for the plaintiff to file counter affidavits except by express provisions of statute. Our Practice Act embodies the ruling of the California courts in our statute, as to injunctions without notice, but no provision of the kind exists in California or this Territory as to the general practice.

1 Cal. Dig. title, "Law of Case," 581. Blackmar vs. Inwager, 5 How. 367. That order granting alimony, therefore, is the law of this case, until set aside or revoked upon a rehearing, and its validity and binding force cannot be questioned.

If this conclusion be correct (and I do not think its correctness can be questioned) then the ruling of Chief Justice Lowe was without authority of law, for he based his conclusions entirely upon alleged defects behind and prior to the order granting the alimony, and claimed that by reason of such prior defects, said order was inequitable and ought not to have been made, and this ground was not set up or claimed in the answer then made to the rule to show cause. The only grounds upon which the defendant asked the Court at that time to refuse to enforce the order were, 1st, that the District Court did not have jurisdiction to make or enforce such an order; and, 2d, that an appeal had been taken from the order, both of which grounds Chief Justice Lowe pronounced untenable.

But it is contended that if that order cannot be brought in question except upon a motion for a re-hearing, the same rule would prohibit the Court from questioning the ruling of the Court (C. J. Lowe presiding) hereafter made discharging the defendant. The ruling of the Court then was simply a denial of a motion, and not an order granted on a motion, and it does not require a motion to be made for a rehearing, except under some rule of the Court to that effect, as in New York. (11 How. Pr. R. 114.) This Court is not asked to do anything with this denial of the motion, or with the discharge then entered. If the ruling of the Court, however, then made cannot be questioned, then the order made prior thereto (C. J. McKean presiding) should not have been questioned, as it was as decisive of the matter as the ruling then made. Chief Justice Lowe simply refused to enforce an order, but did not vacate it, nor was he asked to do so. His refusal, therefore, to enforce the alimony order is not binding upon the Court afterwards any further than the denial of the motion goes, and it cannot affect in any way the subsequent enforcement of the order. The plaintiff was necessarily surprised by the Court denying the motion upon a ground not alleged in the answer thereto, and after the Court had declared the grounds set up in the answer as not good. Can it be possible that such a ruling made in such a way shall preclude further proceedings to enforce the original order? I think not. Even if a motion for re-hearing was, as a general proposition, necessary in such cases, yet such a state of facts as this would fully warrant a Court in not requiring a motion for re-hearing. (Butts vs. Botts, 6 Abb. N. S. 302.) But no such motion for a re-hearing, as I have before stated, is necessary.

Further, the motion now before the Court to enforce its order, is not merely of interest to the parties to this case. The public in all countries have an interest in courts maintaining their authority, and the Court itself is interested in seeing its judgments obeyed and enforced. The proceedings for contempt, therefore, are authorized that courts may uphold their own authority as their duty requires. It is a proceeding that the Court may take without motion of either party upon evidence that its orders are disobeyed. It is a power committed to Courts for their own protection; and whilst an order of Court stands upon record unrevoked, and there is a manifest unwillingness to ask the Court to revoke it, the Court cannot stand idly by and see its judgments disregarded and defied.

These conclusions are manifestly decisive of this case. But suppose they are not correct, and that the Court should examine into the validity of the alimony order itself. It is claimed to have been improperly and wrongfully issued. Upon what grounds is it inequitable? It is not claimed either in the answer to the rule or in the argument of the counsel, that the sum allowed is unreasonably large, or that the defendant has not had time to pay it, or that he is unable to pay it. But it is alleged that the answer of the defendant on the merits of the case, contained new matter which was not denied, and not being denied, it was to be taken as true, except "on the trial" when it was deemed to be controverted. To sustain this position, the statute and the opinion of Chief Justice Lowe, heretofore delivered in this case, are cited as authority and no further authority was relied upon, except the decisions referred to in Chief Justice Lowe's opinion.

Let us see whether the decisions thus referred to and the statute support the position assumed by defendant. The statute referred to is Sec. 65 of the Practice Act, and reads as follows:

"Sec. 65. 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."

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But suppose the answer of the defendant had admitted the facts of the complaint upon which the injunction was asked, and then sought to avoid it by new matter, and the plaintiff had been prohibited from replying or filing counter affidavits, would counsel for a moment claim to have been dissolved. It seems impossible, yet the principle involved there is the same as in the matter before us.

In the general practice, the answer is not proof for the defendant, but simply a pleading. Blankman vs. Vallejo, 15 Cal. 638.

Bostic vs. Dove, 16 Cal. 69. Aside from the statute itself then we find that the authorities offered—the decisions of the California courts, do not support the view taken by the defence. Then let us turn to the statute itself, the section (65) referred to, and under that section it is claimed that the affirmative matters in the answer are to be taken as true, except "on the trial," at which time it is deemed controverted.

There are evidently two meanings to the word "trial," one broad and one limited. Of course it generally refers to the trial of facts, but not always. "On the trial," is the language of the statute, and what does it mean in that connection?

In New York in the case of Warner vs. Kenny, (How. Pr. R. 223) it was decided that a judgment on failure to answer was *a trial* within the meaning of the code. In a later case in that State (Dodds vs. Curry, 4 How. Pr. R. 123,) it was decided that if the plaintiff fails to appear on the calling of the cause and the complaint is dismissed, it is virtually *a trial*. Van Santvoord says that although decided in one case in that State that argument on demurrer was not *a trial* of an issue, yet the majority of the cases seem to regard it in a different light. (1 Van Sant. Pl. 758.)

The Supreme Court of our neighboring Territory of Idaho, proceeding under a Pr. Act. similar to our own, says that: "At common law by a trial was generally understood the examination of issues of fact. But *under the code*, this definition has been extended so as to include the determination of issues of law as well." In that case the question was as to whether exceptions could ever be taken where judgment was rendered without a trial of issues of fact—the statute requiring exceptions to be taken *upon the trial* (just as our Utah statute does), and the court say "that whenever a cause is called to dispose of any issue, whether of law or fact, it is, in contemplation of that section, called *for trial*, so far at least as to require all rulings of the Court, which it is desired to have reviewed in an appellate court, incorporated in a bill of exceptions." (Lamkin *vs.* Sterling, 1 Idaho, 148.)

The Supreme Court of California, speaking of the word "trial," says that "in our judgment there is no reason for believing that the word as used in a sense differing from the definition universally given to it by law writers, viz.: The examination before a competent tribunal, according to the law of the land, of the facts *or law* put in issue in a cause, for the purpose of determining such issue." Anderson vs. Pennie, 32 Cal., 265. The authorities therefore bear out the proposition that on the trial means something more than the final trial of facts.

But let us look at the section (65) referred to, and the Practice Act generally, and see whether the interpretation put upon it by defendant is reasonable.

The Legislature found it necessary to say that the material allegations of the complaint when not "*specifically* controverted by the answer," should, for the purposes of the action, be taken as true. Had the Legislature failed to say this, could the complaint be taken as true? Is it not, by virtue of that clause, so? Is it clear that the complaint is so taken? Would likewise be necessary for an express provision of a like nature respecting the new matter in the answer before it could be considered as true for the purpose of the action, except "on the trial." And it is contended that "trial" here means the final trial, notwithstanding there is no such express provision. Although it is necessary for this express provision respecting the complaint before its allegations can be accepted as true, yet it is claimed that the conclusion that the affirmative matter of the answer is taken as true, is arrived at by inference from the closing paragraph of that section—viz: "the allegation of new matter in the answer shall, *on the trial* be deemed controverted by the adverse party." This does not say on the *final* trial. Had it been so intended, it likely would have been so stated.

As I have before stated, the word "trial" has, in the Practice Act, two meanings; a broad one and a restricted one—one meaning the whole trial of the action, both of law and fact, and the other the trial of the facts of the case. If we say that in this clause, it is used in its broadest term—then could it be done that that is included the whole action, and the trial of all issues both of law and fact—but if used in the more restricted sense, it would only embrace the final trial. We do not think that it makes any material difference, so far as this cause is concerned, whether we consider it used in the one sense or the other, as there is no provision of the statute which requires the new matter to be taken as true, and none is claimed to exist. But at the same time we are inclined to think that it refers to the trial of "*action*"—including facts and law. The trial of the motion for alimony was a trial of facts arising in the case, as that is one branch of this suit—it is not the final trial of facts, but an intermediate one. What right has the court to conclude that "on the trial" refers to *final* trial, even if it refers to a trial of the facts? The sense of "trial" here used is certainly a trial of the action. Let us see then from the statute whether this is a trial of the action or simply a final trial of the facts. In Sec. 18 it says that "*actions* for the following causes shall be *tried* in the county in which the subject matter of the action or some part thereof is situated." Does that allow every matter before and after the final trial in the cause to be disposed of elsewhere? We find also references to issues of law and issues of fact—and "an issue of law shall be *tried* by the court" (Sec. 195). We find also "*trial* by referee," in which he is authorized to "try any or all of the issues in an action or proceeding, whether of fact or law." (Sec. 182.) Also Sec. 188 reads as follows: "An exception is an objection taken *at the trial* to a decision upon a matter of law, whether such trial is by the jury, court or referees, and whether the decision be made during the formation of the jury, or in the admission of evidence, or in the charge to a jury, or at any other time *from the calling of the action* for trial to the rendering of the verdict or decision." If it was intended that *at the time* meant the final trial, then no ruling of court upon any motion or demurrer *prior* to the calling of the case for *final* trial can be excepted to. Such could not have been the intention of the Legislature, as the daily practice of every attorney attests.

The meaning of "trial" here and generally throughout the Practice Act, unless the immediate context shows a more restricted sense, is the "trial of the action"—the trial of every issue both of law and fact, and that the new matter in the answer shall be deemed controverted for every purpose of the trial of the action. In other words, it was intended by these words to supply the place of a reply, which is not allowed under our statute. Such is the interpretation given to it in California, New York and elsewhere generally.

And how unreasonable any other construction. Is it just to say that a party admits the allegations of a pleading when the law does not allow him to deny them? And if the allegations are deemed controverted only on the final trial of the facts, the defendant is at any time entitled to judgment on the pleadings, for in that case there is no final trial of the facts. (Anderson vs. Pennie, 32 Cal. 265.)

Suppose the defendant should ask for judgment on the pleadings, could it be contended for a moment that he was entitled to it? Yet if we accept the construction contended for by the defence, we inevitably come to the conclusion that the defendant is entitled to judgment. Such a position is not reasonable, and cannot be upheld by any Court.

But if the trial referred to is the final trial of the issues of facts, then where do we get any authority for saying that the defendant can rely upon those facts except on the trial? The object of pleadings is to form an issue—but the truth of those issues before they are proven on the trial of the issue, cannot be said to be admitted. There is no statute or rule of pleading to that effect. The new matter then in the answer can no purpose whatever, except upon the trial of the issues, unless it be to notify the adverse party of what the defendant intends to rely upon on the trial. It is necessary for the defendant to state these affirmative matters in order to be allowed to prove them. (1 Van Santvoord Pl. 477.)

And it is evidently intended by the Practice Act, to consider this new matter denied for all purposes of the action. An issue cannot be formed except a matter is affirmed on the one side and denied on the other. Sec. 154 of the Practice Act says: "An issue of fact arises: First. Upon a material allegation in the complaint, controverted by the answer. And *second*, upon a new matter in the answer, except when an issue of law is joined thereon." No issue of law, either by demurrer or motion is joined on the allegation of new matter in the case before us. Then the new matter in the answer has an issue of fact joined on it, and never has an issue of fact joined on it, and never can, for there, of course, to produce the issue there is a denial, as no issue can arise except there be a denial either in fact or in law. No issue is raised here on the new matter by any words or pleading on the part of the plaintiff. It must therefore arise by law, for the statute requires it.

If again an issue of law be raised on the new matter in the answer, by a demurrer there to and the demurrer be overruled, then says Section 67, "If a demurrer to the answer be overruled, the facts alleged in the answer shall still be considered as denied." That denial is before the trial of the facts, and by the word "still" it presupposes the continuance of a former denial—the denial raised by the law. The reply is made by law. And Van Santvoord says that "any answer setting up new matter not constituting a counter claim, is deemed to be controverted, precisely the same as though the plaintiff had put in a reply traversing the allegations." (1 Van Sant. 613.) In New York a counterclaim required a reply, but to no other new matter was it allowed, yet that learned author says that the other new matter is deemed controverted—the same as if a reply had been allowed and filed.

Then we conclude, that neither the decisions nor the statutes support the view that the new matter in the answer is admitted; and we find further that such position is unreasonable, and hence untenable. But it is lastly contended that the order for alimony should not have been made because the marriage was neither proven nor admitted. If this be true, that the fact of marriage is neither proven nor admitted, then the order should never have been made. For the law is settled that one of these things must appear before the Court can grant alimony. The complaint charges marriage of the plaintiff and defendant at a specified time and place, and alleges that for a year after the marriage he lived and cohabited with her, but afterwards treated her in a cruel and inhuman manner and deserted her, did not support her and her children, and that by reason of this course of the defendant her life was miserable; that she and defendant cannot live in peace and union together; that their mutual welfare requires a separation, and that she is wholly without means of support. Had defendant not said anything about the marriage under California rulings and our statute, the marriage was admitted. (Fox vs. Fox, 25 Cal. 567.) (Bennett vs. Bennett, 28 Cal. 599.) But he goes further; and in express words admits the fact of marriage, that the ceremony did take place at the time and place alleged. But he seeks to avoid it by alleging that the plaintiff had a husband then living from whom she was not divorced, and that he had a wife then living from whom he was not divorced. He pleads confession and avoidance, and as part of the avoidance he pleads his own crime. He cannot do this. He cannot set up his own crime as a defense to the action. That doctrine is too well settled. (4 Pick. 223). (Miles vs. Chilton, 1 Robertson 784.)

But if it did, that allegation and the allegation of her former marriage, and all the new matter stands denied under the statute, as I have shown, and cannot be taken as true until proven. This Court cannot on the pleadings say that either plaintiff or defendant had another subsisting marriage relation existing at the date of their intermarriage.

But the defendant not only expressly admits the fact of marriage, but goes further and does not deny the living with and cohabitation with the plaintiff. Therefore, under the 65 section referred to before, these allegations of the complaint which are not denied in the answer, are by express words admitted. Further, he proceeds to show that there is no reason why the plaintiff and defendant cannot live together in peace. Here then is an express admission of a ceremony of marriage, and cohabitation of living together and cohabiting together. What more is necessary to prove a marriage? Under the strictest rule then the marriage is fully admitted, and the very fact that a man asks to nullify and have declared void a marriage, is in itself an admission of the fact of marriage. What does he say and ask this Court to say is void? Certainly a marriage. It could be nothing else.

In such cases the whole current of authorities are in favor of granting alimony *pendente lite*.

Bird vs. Bird, in 1753, (1 Lee ec. cases by Phill. 209,) is perhaps one of the earliest cases of the kind.

In that case the husband brought suit against the wife to annul the marriage on the ground that she had another husband living at the time of her marriage with the plaintiff. This fact was denied by the wife, and she applied for an allowance to enable her to defend the suit. The allowance was granted, notwithstanding the plaintiff insisted that she was not his lawful wife.

Smyth vs. Smyth, 2 Adams, 254; Portsmouth vs. Portsmouth, 2 Adams, 63; Hereforth vs. Hereforth, 2 Abbot Pr. R. (N. S.,) 434. In Smith vs. Smith, (1 Ed. C. R. 254) the Court says: "A novel question is presented here. Although the defendant denies marriage *de facto*, he has not denied cohabitation or living together, nor the other proofs usually required in suit. Is this sufficient to prevent the granting of the application?" So alimony *pendent lite* was allowed. The case before us is a stronger one than this one, for the defendant herein admits the fact of marriage, and admits the cohabitation and living together.

Where the husband brought suit against his reputed wife, to nullify a marriage which he alleged to be void. The wife denied the allegation that the marriage was void, and alimony *pendent lite* was awarded her.

The fact of marriage being admitted, the "presumption is that it was legal, until the contrary shall have been established by the proofs in the cause." (North vs. North, 1 Barb. (C. R. 243.)

In all suits of divorce or for annulling a marriage, if the nullity be promoted by the husband, as soon as the Court is judicially informed that a fact of marriage has taken place, it is competent for the wife to apply for alimony *pendente lite*. (Poynter's Mar. and Div. 247.) Such is also the doctrine of Bishop in his work on Marriage and Divorce.

The case of Brinkley vs. Brinkley (50 N. Y. 184) is a leading case on this question, and in that case the Court says: "When an actual marital relation has been admitted, or shown, and its existence in law is sought to be avoided by some act set up by the husband, and it devolves on him to show that fact, there alimony will be granted until that fact is shown, for the relation actually exists upon which the right to alimony depends, and the objects of the litigation is to annul the actual relation by showing some other fact, the existence of which is denied." "And further, it may be said that any facts and circumstances being shown which are sufficient for a court to presume therefrom an actual marriage, they are also sufficient for a court thereon to found an order granting temporary alimony, though other allegations which are at issue, once being established, would repel such a presumption." Alimony *pendente lite* was granted.

Thus we find that the order for alimony was not improperly made—and stands unrevoked, and not obeyed—and no good reason given for not complying with it. And I am asked to enforce it. A court can not allow its orders to be repudiated, and (Lee 13) disregarded, and continue to maintain its dignity, its self respect and its authority. Were a court in a condition not to be able to enforce its authority, its failures to make efforts to do so might be proper, but when a court can enforce its orders and flatly refuses so to do, it can not long be held in respect or its authority recognized. A court, therefore, is in duty bound to enforce its orders.

There is but one course left open to the court—and that is to enforce the order. It is therefore that judgment of this court that the defendant be imprisoned until the $9,500 alimony and costs of this motion be paid, or until released by the court.