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 unrevoked 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, and having jurisdiction its authority must be obeyed, and thereupon remanded the parties back to the custody of the officer.

In the case of the *Merced Mining Co.* vs. Fremont (7 Cal. 130.) an order of injunction was issued and from this order the defendant appealed, and then disobeyed the injunction. The plaintiff applied to the District Judge for an attachment against the defendant for a contempt of Court in disregarding the injunction. The Judge refused to issue the attachment. The plaintiff then applied to the Supreme Court of California for a *mandamus* to compel the Judge to issue the attachmeht and to hear the matter. The defendant relied upon the fact of the appeal being taken and the undertaking given to relieve him from obeying the injunction. The Supreme Court of California thought otherwise, and issued a *mandamus* to compel the District Judge to issue the attachment, and thus enforce the authority of the District Court, the remedy by appeal being too slow and inadequate.

Thus, except by a direct proceeding to set aside the order granting the alimony, it cannot be questioned, but must be enforced. But still further, this is not an appealable order. Chief Justice Lowe so decided, and his ruling has been accepted as the law of the case, by the parties, as it has not been claimed either in the argument or in the answer of the defendant, that this is an appealable order. For the purposes of this motion, therefore, this is a Court of last resort, and every order made by a Court of last resort is the law of that case and will not be reviewed even by the same Court, except upon a direct proceeding for a rehearing, and *that has not been asked in this case.*

In the divorce case of *Louisa Grim vs. Francis Grim*, 1 E. D. Smith's R. 190, the plaintiff asked and obtained an order directing her husband, the defendant, to pay a certain sum each month, to be applied to the support of plaintiff, and an order was made therein restraining him from disposing of his property until he had filed security for these monthly payments. He, being advised by counsel that the order was void, disobeyed the restraining order and disposed of some of his property. An order was issued for his attachment as for a contempt, and from this the defendant appealed. The Court says that as the defendant had notice of the order being issued and then violated it, the Court will not upon the appeal granting the attachment, review the propriety of issuing the injunction in the first instance.

In Hilton vs. Patterson (18 Abbott's Pr. R. 245) an order was granted which the defendant did not obey, and was attached for contempt in disobeying the order. He then sought to show that the order should not have been made. The Court said that the Court making the order having jurisdiction, the order should have been obeyed or steps taken to have it set aside, and this not being done the Court cannot go back and examine into the propriety of the original order, but that on the rule for defendant to show cause why he should not be committed for contempt, the only questions to be considered have reference to matters subsequent to the original order.

Price vs. Church is a case where the Court made an order for the defendant to pay money into Court, and *afterwards* the suit was dismissed. This dismissal of the bill did not excuse the party from obeying the order and could not prevent its enforcement, and the motion for attachment was allowed.

Clark's Chancery R, 429. In the People vs. Spalding, the defendants had been adjudged guilty of contempt in disobeying an order of injunction. The Chancellor says that the Court had nothing to do with the merits of the cause in which the injunction had been issued, and that while the injunction remained in force, it was the duty of the Court to punish every breach of it, and that in no case can a defendant be permitted to disobey an injunction regularly issued, whatever may be the final decision of the Court upon the merits of the cause. 2 Page, Ch. 326.

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. Butts, 6 Abb. N. S. 302.) But no such motion for a rehearing, 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 ignored.

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. 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 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. 323), 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 seemed 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 statue 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, and that alone, that the complaint is so treated as true? This conclusion being correct, it 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 affirmative, 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—there could be no doubt but that it 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 *tried* by the court" (Sec. 155). 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, 1?3.) Also Sec. 188