JOHN MITCHELL, Plaintiff in error, v**. JAMES JOHNS**, Defendant in error.

HEARD DECEMBER 15, 1921. DECIDED FEBRUARY 1, 1922.

Dosser, C. J., and Witherspoon, J.

1. As the Act of 1916 fixing certain days as legal holidays did not fix any punishment for non-observance thereof, such holidays so declared are not to be regarded with the same sanctity as Sundays, and are not *dies* non.

2. The purpose of a writ of habeas corpus is to release from custody one illegally detained whether under color of some legal authority or not.

3. Ordinarily if it should appear that the prisoner was not lawfully restrained the court would not be warranted in proceeding further, but if such restraint nevertheless exists under native customary law, such law should be considered if the parties are natives.

4. According to the Act of 1905 a civilized man is not allowed to take to wife a native woman already the wife of a native man except upon payment of dowry. A native living with a civilized man in violation of this rule may be delivered from his possession by writ of habeas corpus even though she declares that she is not restrained of her liberty.

Judgment affirmed.

Mr. Justice Witherspoon delivered the opinion of the court:

Habeas Corpus on Writ of Error. This case was brought before us upon a writ of error, sued out by plaintiff in error against certain rulings made by the judge of the court below, in the investigation of a writ of habeas corpus granted by Judge T. E. McCarthy, of the third judicial circuit, Sinoe County, to James Johns, defendant in error. There are three errors assigned, but we will only consider the first and third errors set up in the assignment of errors, the second involving practically the same point raised in the first assignment.

1. Because the defendant in error being petitioner and complainant in the court below, petitioned His Honor T. E. McCarthy resident circuit judge of the third judicial circuit for the issuance of a writ of habeas corpus, requiring plaintiff in error, then defendant, to produce the body of Gehbee Nimpoo, prisoner, in the court on

Friday the 7th day of January, A. D. 1921, which day in law is illegal to determine cases, same being a holiday, it was error in the judge to entertain said illegal petition.

2. Because it was further error in the judge to have ruled that Gehbee Nimpoo, prisoner, be returned to petitioner and complainant, now defendant in error she having made known to the court that she is not and was not at the time of the service of the writ under restraint of defendant now plaintiff in error.

We hold that holidays as are set apart by the Act of the Legislature of 1916 are not *dies non* within the meaning of said Act, that they differ from Sundays which sanctify, and the observance of which is commanded by both the common, and statute laws, and the violation of which is made punishable. The judicial acts performed on such holidays are not illegal *ipso facto,* the statute declaring such days holidays not having commanded any punishment for the nonobservance of the same. The ease at bar there was not therefore improperly brought. We observe further that although the order of the judge was that the defendant produce the prisoner in court on the said 7th day of January that none of the acts was performed by the court and officers on that day. The appearance was filed on the 6th day of January. The defendant's explanation was also made on the 3rd day of January and on the 6th day of January, the parties were notified that the case was assigned for hearing on the 10th day of January, A. D. 1921.

That the Act setting apart said holidays must be construed strictly, and that by the rule of such construction we can not impart to the Act, anything which it does not contemplate.

The office of the writ of habeas corpus, is to release from custody one illegally detained whether that detention be under color of some legal authority or not. Upon the traverse of the writ if it should appear that the prisoner was not unlawfully held or restrained, the trial court would not be warranted to proceed, but in the adjudication of such cases as the one at bar, when the native customary law should be considered and applied, the court in its findings may adhere to such customs as the prevailing law governing the particular case warrants. And when it appears from the evidence that the woman is the wife of the petitioner, the court may go further and order her delivery from the possession of the defendant, even though the woman declares that she is not detained by the defendant.

In the case at bar, it was proved that the woman Gehbee Nimpoo was the wife of petitioner, and further that she was at the time living on the premises of defendant,

the defendant being a civilized man, who by the Act of 1905, is not allowed to take a native woman to wife who is already the wife of a native man except upon the consent and payment of the dowry money to the former husband ; this must be done before and not after taking her to wife.

In our opinion the acts of the court in applying the native customary law to native conditions were correct. The court was acting in harmony with the native customary law when it ordered that the woman be delivered to her husband it having been shown that petitioner had married her under the native customary law prevailing in the section of the country. We cite the case *Manny Gofah and Ana, appellants, v. Peter, alias Debboah Wreh,, appellee* (I Lib. L. R. 458) where this court upheld the Kru customary laws relating to marriage, as the controlling law in the consideration of such matters.

We observe further, that the act providing how the civilized portion of our population may take native girls to wife as set forth in the Act of 1905, no more exists. The Act of 1918, p. 38 having repealed said Act.

The judgment of the court below is hereby affirmed. And it is so ordered.