CHEA GBAY PEAKEH, Petitioner, v. **JAMES NIMROD** alias GBANNIE, Defendant.

ARGUED JANUARY 22, 1913. DECIDED JANUARY 29, 1913.

Toliver, C. J., McCants-Stewart and Johnson, JJ.

1. A writ of certiorari will lie to review an order made in habeas corpus proceedings commanding a defendant to produce the body of the prisoner.

2. When a defendant in habeas corpus makes return that the prisoner named in the writ is not in his custody or power, and was not so at the time of the service of the writ upon him, he is entitled to call and examine witnesses upon an examination into the soundness of his excuse for not producing such prisoner.

Mr. Justice McCants-Stewart delivered the opinion of the court:

Habeas Corpus—Writ of Certiorari. On the 20th day of November, 1912, after the issuance of the writ of habeas corpus a petition was verified by one Gbannie alleging that his wife was being illegally detained by one Peakeh and praying the judge of the Monthly and Probate Court to issue a writ of habeas corpus commanding said Peakeh to show cause for said illegal detention and for such other and further relief as may seem right and equitable.

On the 18th of said November, the judge gave written direction to the clerk of the court to issue such writ, and it was issued with the command to produce the body of one Nabby Debarro, the wife of petitioner on the return day, November 20th, with the day and cause of her detention.

Defendant duly filed a verified return alleging that the said wife of petitioner was not in his power on said return day, nor was she in his power to produce at the time of the service of the writ upon him. The judge then heard some evidence.

Defendant was duly sworn, and was examined by the judge and cross-examined by counsel with substantially this result: The prisoner Nabby was

not in defendant's custody or power at the time the writ of habeas corpus was served upon him; that Nabby and he speak to each other when they meet, but she is not in his house, nor is there any intimacy between them; that three months ago he wanted to make friends with Nabby, but that her father objected, and she is not his friend.

The petitioner was then examined under oath with substantially this result: When he was in Sinoe the defendant "prized" (became intimate with) his wife; on his return home, he asked defendant about his wife ; defendant said he did not have his wife, but his wife continued going to defendant's place; that she sleeps there at night and lives with her father in the day. The judge asked some questions showing that petitioner had, according to native custom, given up the woman, but was claiming from her and her people a balance of forty-eight pounds (£48) due on account of the amount of dower paid by petitioner at the marriage. The judge refused to allow counsel for defendant to cross-examine upon this point, and exception was taken.

Two other witnesses were called, namely, Jim Doe and Toplah who were examined under oath to the following effect:

Jim Doe said he saw Nabby carry food to defendant's house; that she goes there seven o'clock in the evening and leaves at five o'clock in the morning; that Nabby lives at her father's house, and that defendant is not her father; that there are other persons living in defendant's house; that he (the witness) is related to petitioner in habeas corpus and lives in his house.

Toplah said: He went to defendant's house for some money once and Nabby was there ; went there a second time, and Nabby was there, but not defendant; that he saw Nabby there another time ; that Nabby lives at her father's house ; that when he saw her at defendant's house, she was not under detention.

Upon this evidence counsel for petitioner in habeas corpus rested his case for the production of the body of the prisoner.

Counsel for defendant offered to produce evidence in support of defendant's return to show that the prisoner was not in the custody or power of defendant to produce ; the judge refused to hear defendant's evidence "at this stage," to

which ruling defendant's counsel excepted. The judge then made an order commanding defendant to produce the body of the prisoner before him on the day of this hearing at the hour of two o'clock. Defendant's counsel excepted and prayed an appeal to this court. The judge allowed the exception but refused the appeal on the ground that his order was not such a. one as could be appealed from.

At some hour after two o'clock the judge issued a writ of arrest and a commitment, under which defendant was imprisoned.

When the order was made for the production of the body it appears from the records of this court and from the case of *In re Moore,* which has this day been decided, that defendant's counsel applied for and obtained a writ of certiorari, which stayed all further proceedings in habeas corpus.

The question now before this court is whether or not defendant is entitled to any relief under said writ of certiorari.

We have a statute regulating proceedings under the writ of habeas corpus, which is the greatest writ known to the juridical systems of English speaking peoples the world over, as it is the life preserver of every man's personal liberty. Let us examine the provisions of this statute before entering upon a discussion of the merits of the case at bar, and the principles of law relating to it.

The statute divides proceedings under a writ of habeas corpus into three parts, each of which is independent of the other, and in each of which a substantive judgment can be given.

First. Proceedings for the production of the body.
The statute reads : (1) "The writ * * * shall be issued as of right, whenever any person shall * * * satisfy the court or judge that the person named in the petition is restrained of his liberty."

(2) "It shall be the duty of every person upon whom such writ is served * * * to attend at the time and place named therein, and * * * to return to the court or judge * * * said writ, * * * and a return showing the cause of the detention of the prisoner, * * * and to produce before him the body of the prisoner."

(3) "But if he shall make oath before such court or judge that the prisoner * * * is not in his custody or power, and was not so at the time of the service upon him of the writ, he shall be excused for not producing the body of such person, unless the court or judge after examining into the soundness of his excuse * * * direct him to do so; * * * and refusing or failing so to do, he shall be deemed guilty of contempt of court, and shall be punishable therefor."

Second. Proceedings if no return.
The statute reads: "If no return is made * * * it shall be the duty of the court or judge, upon being satisfied that the party * * * was duly served, to issue a writ of arrest against the person * * * and to punish him by fine, imprisonment, or both, and also to compel him to produce the body of the prisoner."

Third. Proceedings upon return and production of body.
The statute reads : "Whenever any prisoner * * * shall appear before any court or judge, it shall be lawful * * * to examine him and any other person or persons upon oath; and if it shall appear proper so to do * * * the court or judge may either discharge the prisoner, or admit him to bail, or remand him."

These three methods of procedure have been described in order to bring into clear relief the particular one, which is involved in the case at bar. It is apparent that this case falls under the first form of procedure.

Petitioner in certiorari prays for relief on the several grounds, among which are the following : (1) because counsel for petitioner was denied permission to ask questions on evidence brought out by the judge; (2) because the judge, having heard evidence on the part of the petitioner in habeas corpus on the issue relating to the production of the body of the prisoner, refused to hear evidence on the part of defendant in habeas corpus, now petitioner in certiorari; and (3) because the judge refused to allow an appeal from his order directing defendant, now petitioner in certiorari, to produce the body of prisoner.

It is unnecessary to consider the objection, that the judge refused cross-examination upon the evidence brought out by himself, and decide how far the discretion of a trial judge extends in the examination and cross-examination, and when it may be controlled by this court, as it was admitted

by both sides on the argument, that the questions asked by the judge were irrelevant and the matter elicited by them immaterial to the issue under examination. It, therefore, remains for this court simply to determine whether (1) the defendant in habeas corpus was entitled to come up to this court with a complaint against the order commanding him to produce the body of the prisoner; and whether (2) there was a fair and reasonable examination by the judge into the , soundness of defendant's excuse for not producing the body of the prisoner.

While the doctrine is settled by a long line of foreign decisions as well as by the decisions of this court that there can be no appeal from an interlocutory judgment; and while we are of the opinion that a reasonable interpretation of our statute governing appeals leads to this conclusion, yet we are of the opinion that the order complained against in the case at bar is not exactly in the nature of an interlocutory judgment, as it involved an element of finality and therefore, we are of the opinion that it is in the power of this court to review such an order under a writ of certiorari.

Judgments of contempt are distinguished from interlocutory judgments, inasmuch as the former are held to affect substantial rights and they are reviewable under writs of certiorari.

In *Newport v. Newport Light Co.* (92 Ky. 445) the court held : "If the receiver of a court, having been ordered to pay over to a party money, which he at least at one time had in his hands, responds that he has already paid the party * * * and the court upon hearing determines that he has not, and the receiver declining to comply with the order of the court * * * is adjudged in contempt. Certainly it will not be claimed that he could not appeal from the judgment."

In *Menage v. Lust field* (30 Minn. 487) it was held that even if punishment is reserved an appeal will lie. And in a New York Supreme Court case (3 Abb. Pr. 301), it was held that an appeal would lie even where committal was suspended for a day set. The contemnor was not bound to wait until he was placed behind prison walls to cry out for relief.

And, so, in the case at bar petitioner technically could have delayed his appeal to this court until he was committed for contempt. But that is a mere matter of form as the statute provides that if he refuse or fail to produce the

body of the prisoner after an order to do so, he shall be punishable for contempt; and the record shows that upon petitioner's failure to produce the body of the prisoner an order of arrest was issued against him, and the record *In re Moore* shows that petitioner was arrested and imprisoned in the county jail.

In *Ex Parte Jackson* (45 Ark. 158) it was held : "The questions arising upon writs of habeas corpus, whether it be the right to bail, or the right to be relieved of improper restraint, * * * are all rights of the gravest importance. It would be a disgrace to any government if the decision of such matters were left to the arbitrary will of one man without appeal or means of correction." An order of the character of the one under consideration when carried into execution results under the statute in punishment for contempt by the indefinite imprisonment of the offender. Now, as there could be an appeal by writ of certiorari to this court by the contemnor from a judgment of contempt, we certainly can review the matter untrammelled by the technical objection, that we should wait until after the imprisonment of the defendant in habeas corpus. But it would be a delay of justice and a burdensome expense to a suitor for this court to send the matter back to await that stage of the case.

In *Cunningham v. Neagle* (135 U. S. 1) Neagle, who was a deputy U. S. Marshal, shot and killed one Terry, while he was making an assault upon Mr. Justice Field, of the U. S. Supreme Court. Neagle was arrested and held without bail to answer in California a charge of murder. A writ of habeas corpus reached the Supreme Court of the United States, and that court discharged Neagle from custody. There was objection that the court could not properly pass upon the case under the form in which it appeared before the court; that a. trial should first be had in California. But the court followed the principle, which it quoted namely: "if you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition."

Where we do not violate any statute or rule of court or abrogate any well settled principle of the common law or of general practice, or abridge or prejudice any right of an opposing party, this court will take the shortest cut to the merits of controversies brought here for review and decision, and will not cause delay or expense to suitors by listening to technical objections especially in habeas corpus which is to be disposed of in a summary manner.

If the defendant in habeas corpus had been imprisoned before making his application for and obtaining the writ of certiorari herein, the same writ would have been issued to bring up the records for a review of this case. Certiorari is allowed to correct errors in contempt proceedings. In *Ver Straeten v. Lewis (77* Iowa 130) certiorari was allowed to review proceedings in contempt where the party was punished for disobeying an injunction; and both in England and the United States the writ is generally allowed to bring up for review by the appellate court the records below relating to proceedings in habeas corpus for the correction of errors and the promotion of justice.

Now, as to the point that there was not a fair and reasonable examination by the judge into the soundness of defendant's excuse for not producing the body of the prisoner, we are of the opinion that when defendant returned that the prisoner was not in his custody or power at the time of the return and was not so at the time of the service of the writ, and made oath before the judge to this effect, he was entitled to his discharge, unless the court upon an examination held otherwise.

Under such a return, a clean-cut issue was joined, and the defendant was entitled to a fair examination, especially as his liberty was at stake. No prisoner faces judge and jury with a stronger claim to a fair and an impartial hearing than does a defendant in habeas corpus. It is true that the matter is disposed of summarily; but summarily does not mean arbitrarily. It simply means that the issue must be disposed of speedily, without delay; that the time usually allowed for pleadings does not apply; that the strict rules of evidence do not prevail; that the ordinary formal procedure prevailing in the trial of a case at law is dispensed with. All trials in personam in admiralty are of a summary character *(Kruger v. Johns,* decided at this term) ; but no judge sitting in admiralty can deny any suitor a fair and an impartial hearing. As a general rule, however, all the testimony received on the hearing of habeas corpus should be competent, material, relevant and
pertinent to all the issues of facts involved (15 Amer. & E Enc. Law, 208, and cases cited).

In the case at bar, the return before the trial judge put in issue the production of the prisoner. That was all. Upon that issue the whole case turned so far as defendant was concerned, because if he could not produce the prisoner, for

the reason that she was not in his custody or power, the case ended, as it would be a farce to ask him to show day and cause of detention.

The judge entered upon a trial of this issue, and there was no evidence elicited to show that defendant was holding the prisoner under detention. All the evidence, even the evidence of and for the petitioner in habeas corpus, showed that the prisoner lived with her father. The evidence which defendant was not permitted to rebut tended to show that she held illicit intercourse with him by night. But this was not the issue. This great writ, which guards every man's liberty can not be used to collect damages for alienating a wife's affection, or damages for her seduction; nor can it be used to collect dower, which was paid for women, who became faithless wives. This writ is used to break chains holding men in bondage, and not to put them there. The defendant in habeas corpus was directed to produce the body of the prisoner with the day and cause of detention. Now, when he answers practically that he could not produce her because he had no custody of or power over her; and when petitioner and his witnesses testified that the prisoner lives in the house and under the roof of her father, it seems a denial of justice to make an order against defendant, while he is standing at the bar pleading for an opportunity to show more fully than he could by his return why it was not in his power to produce the prisoner. Even though all these parties are aboriginal citizens, we can not administer the law so as to favor a wronged husband's claim for the return of the dower he paid at marriage, if thereby we violate natural justice. The judgeship is a public trust, and it should be so used in the administration of justice as to make our aboriginal brethren feel, whenever they come into court, that Liberian law is common justice.

The petitioner in habeas corpus is the husband of the prisoner. He has a right to the writ to secure the release of his wife by whom ever detained ; but the detention is the gravamen of the issue. He must prove detention before he can get relief. He can not use the writ to collect dower money, or to imprison his wife, even if the result of the proceedings would make him her jailer.

It is said : "A husband may have a writ of habeas corpus to procure the release of his wife from the custody of a third person against her will. The only function of the writ in such case, however, is to remove the illegal restraint, if any, and put the woman at liberty to go where she pleases. It cannot be used as a means of compelling a wife to perform her marital duties; and, therefore,

where she is voluntarily, of her own desire and without any restraint, living apart from her husband, the court will not grant a habeas corpus on his application for the purpose of restoring her to his custody." (15 Amer. & Eng. Enc. Law, and cases cited.)

There is not a word in our statute which this principle of law is in conflict with. Injured husbands have their remedy in action for damages, and in other actions. Let them resort to those, if they want money compensation for the injuries inflicted upon them through improper association with their wives. Suitors should not be allowed to use the greatest of all writs as an engine of oppression to squeeze money out of parties, who plead for an opportunity to prove upon the return to such writ, they have no power or control over the erring spouse of the petitioner in habeas corpus. We are of the opinion that where an issue is joined with reference to the detention of a prisoner in' habeas corpus, the examination provided for in the statute should be fully reasonable, fair and impartial.

Therefore, the order appealed from should be vacated, and this cause remanded to the judge, who issued the writ, with instructions to hear the evidence of the defendant and his witnesses, and other witnesses, if they should be produced, with reference to the production of the body of the prisoner, with costs in favor of petitioner in certiorari; and it is so ordered.

L. A. Grimes, for petitioner. *Arthur Barclay,* for respondent.