

were in many respects similar to those which were involved in the case of *McCardle*, the circuit court of the United States having refused to discharge the prisoner on *habeas corpus* from the military custody in which he was held for trial before a military commission on a charge of murder, the cause was removed to the supreme court of the United States by its writ of *habeas corpus*, aided by its writ of *certiorari*. The supreme court, after argument, affirmed its jurisdiction thus to re-examine the decision of the circuit court.¹ A proceeding by *habeas corpus* is deemed a civil proceeding; and hence it cannot be re-examined in the supreme court upon a certificate of division of opinion in the circuit court, as criminal cases can; but, in such a case, judgment is entered in accordance with the opinion of the presiding judge, and thereafter it may be re-examined upon such certificate by the supreme court;² but whether it may be so examined where the decision of the presiding judge is in favor of *discharging* the prisoner is not clear. It remains, however, that no provision exists in the federal law for re-examining in the supreme court the decisions of the inferior federal courts or judges on *habeas corpus*, in cases where the prisoner is discharged. These decisions may result in declaring invalid the police regulations of a state, or even provisions of the state constitution, as will appear from cases already cited; and yet the state has no appeal, writ of error, or other means of bringing the question of the validity of its own constitution and laws to the final determination of the supreme court of the United States,—the tribunal which was established by the constitution for the determination of such questions. A statute which grew out of a temporary emergency, perhaps out of a party exigency, has deprived the federal jurisprudence of this necessary measure; and the most weighty considerations suggest the re-enactment, and perhaps the extension, of that clause of the act of 1867 which gave appeals to the supreme court of the United States in *habeas corpus* cases.

SEYMOUR D. THOMPSON.

St. Louis, Mo.

¹ *Ex parte Yeger*, 8 Wall. 85.

² *Ex parte Mulligan*, 4 Wall. 110, 114; *Ex parte Tom Tong*, 17 Cent. Law J. 89.

Ex parte CASEY.

(*District Court, N. D. New York. September 21, 1883.*)

1. HABEAS CORPUS—POWER AND AUTHORITY OF COURTS TO MODIFY, AMEND, OR SET ASIDE JUDGMENTS, ETC.—ADJOURNED SITTINGS.

A court has ample authority to set aside, modify, or amend its judgments, orders, and decrees at the term at which they are rendered.

2. SAME—CASE STATED.

The petitioner, after being convicted and sentenced by the court, and after stay allowed for an appeal, was a second time brought before the same judge, on an adjourned day of the same term of court, and the first judgment having been set aside, received the same sentence from the court, except that there was a substitution of penitentiaries. *Held*, that the court had full power to set aside or amend its judgment, which was rendered on a previous day of the same term, and that no injury had been done the petitioner, and none of his rights invaded.

Habeas Corpus.

H. C. Clagett, for petitioner.

Martin I. Townsend, U. S. Dist. Atty., opposed.

COXE, J. On Wednesday, March 1, 1882, the petitioner, having been previously convicted of an assault with intent to kill, was sentenced by the supreme court of the District of Columbia to four years' imprisonment in the state prison at Auburn, New York. The execution of this sentence was, on the defendant's motion, postponed to give him an opportunity to appeal. Pending the stay, the court, on the third day of June, 1882, resumed its session, "pursuant to adjournment," the same judge presiding, when the judgment of March 1st was set aside, and the same sentence again pronounced, except that the Erie county penitentiary was substituted for the state prison as the place of confinement.

A discharge is demanded upon the ground that the court had no authority to enter the second judgment. It appears from the copy of the record submitted that the second sentence was passed, not, as is asserted in petitioner's brief, at a subsequent term, but on an adjourned day of the same term. There can be no doubt that the court has ample authority to set aside, modify, or amend its judgments, orders, and decrees at the term at which they are rendered; and the papers in this case do not indicate that any act was committed which at all transcended the well-known powers of the court.

The petitioner had not been imprisoned under the first sentence; its operation had been suspended upon his motion and for his benefit. No injury was done him by the change of penitentiaries and none of his rights were invaded. See Whart. Crim. Pl. & Pr. (8th Ed.) 913; *Miller's Case*, 9 Cow. 730; *U. S. v. May*, 2 McArthur, 512; *Bank v. Withers*, 6 Wheat. 106.

It follows that the discharge must be refused and the prisoner remanded.

UNITED STATES v. McCARTHY.

(Circuit Court, S. D. New York. September 7, 1883.)

1. WITNESS—EXAMINATION—PRIVILEGE—INCRIMINATING ONE'S SELF.

To justify a witness in refusing to testify on the ground that his evidence may incriminate him, reasonable ground must appear to the court to apprehend some proceedings against the witness upon a criminal charge, and some danger to the witness in answering.

2. SAME—REV. ST. § 860.

In the United States courts, since the passage of the act of February 25, 1868, (section 860, Rev. St.,) preventing any such evidence being used against the witness or his property, the reason of the former rule having ceased, the rule should no longer be upheld, nor the privilege of the witness on this ground be sustained.

3. SAME—UNITED STATES CONSTITUTION—FIFTH AMENDMENT.

The constitutional provision (article 5, Amendment) that "no person shall be compelled in any criminal action to be a witness against himself," applies only to evidence in suits or proceedings instituted against the witness himself.

On Certificate from United States Commissioner.