

and does not necessarily rest upon him. In the absence of all evidence upon the subject, we cannot, therefore, presume that the examination and inspection of the particular cars in question had been committed to the plaintiff, and, unless it had, he had a right to assume that the master's duty had been performed by those having it in charge, and that the coupling appliances upon the cars were adequate to the performance of his work, without extraordinary risk or danger." Pages 401, 403, 116 N. Y., and page 397, 22 N. E.

In the present case, was it the duty of the plaintiff below to examine and inspect the cars, to ascertain whether the coupling appliances were in proper condition? The determination of this question should have been submitted to the jury, when it was properly presented, as we think it was, in requested charge No. 22, above set out.

There are many other important questions presented by the assignment of errors, but we do not think it necessary to pass upon them, because the judges are not agreed as to their proper disposition, and as, from those assignments we have considered, it is necessary to reverse and remand, we indulge in the hope that on another trial such questions may be eliminated, or else so ruled that error will not lie thereon. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to award a new trial.

MAXEY, District Judge. I concur in the judgment of reversal as announced by the presiding judge; but I cannot assent to the proposition, maintained by him, that the twenty-second special instruction, requested by the plaintiff in error, should have been submitted to the jury. The trial court properly refused the instruction, because it did not embody correct principles of law. It was the duty of the plaintiff in error, as master, and not that of a mere subordinate employé, as was the defendant in error, to inspect the couplings of the train, with the view of discovering and remedying defects in the appliances. *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491; *Goodrich v. Railroad Co.*, 116 N. Y. 398, 22 N. E. 397; *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756.

MCCORMICK, Circuit Judge, dissents.

In re CRAIN.

(Circuit Court, D. Massachusetts. December 31, 1897.)

No. 679.

1. COURTS-MARTIAL—REVIEW BY HABEAS CORPUS.

In habeas corpus proceedings to review the sentence of a court-martial, the only questions which can be inquired into are as to the jurisdiction of the court over the person of the accused and the offense charged, and whether it acted within the scope of its lawful powers.

2. SAME—AUTHORITY TO CONVENE—PRESUMPTIONS.

The designation of an officer in the proceedings of a naval court martial as "commander in chief" raises the presumption, under article 243 of the regulations for the government of the navy, that he was in command of a fleet or squadron, and was therefore a proper officer to convene the court.

3. SAME—RECITALS OF RECORD.

A recital in the precept forming part of the record of a court-martial, that it was convened by virtue of express authority vested in the officer convening the same by the president of the United States, is sufficient evidence of such authority in habeas corpus proceedings.

4. SAME—ORDER CONVENING.

The order of an admiral designating the officers to compose a general court-martial constitutes a summons, within the meaning of Rev. St. art. 39, § 1624. The fact that by a subsequent order a change is made as to one of the members of the court is immaterial.

5. SAME—FURNISHING ACCUSED WITH CHARGES.

Where the record of a court-martial shows that the accused stated at the beginning of the trial that he had received a copy of the charges and specifications against him, and no objection on that ground was made at the trial, it will be presumed that they were served as required by the statute.

This was a petition for a writ of habeas corpus by Jesse G. Crain, bringing before the court for review the proceedings of a naval court-martial.

Chas. H. Drew, for petitioner.

Boyd B. Jones, U. S. Atty.

COLT, Circuit Judge. Upon careful consideration, I find no sufficient reason for granting this petition. The briefs of petitioner's counsel touch upon many points which cannot properly be considered in the present application. This case is not before the court on writ of error, where the whole proceedings of the trial court might be reviewed; nor can this court question the sentence of the court-martial provided it was a legal sentence. The questions for review in this proceeding are limited.

In *Johnson v. Sayre*, 158 U. S. 109, 118, 15 Sup. Ct. 777, the supreme court, speaking through Mr. Justice Gray, said:

"The court-martial having jurisdiction of the person accused, and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise."

The fundamental inquiry is whether the court-martial has jurisdiction, and this must appear affirmatively in the record of the proceedings before that court. The petitioner was a coxswain in the United States navy at the time of the alleged offense. There can be no question, therefore, but that he was subject to the jurisdiction of a legally constituted court-martial.

Whether this court-martial was legally constituted, and proceeded according to law, are the only material points in the case. It is contended that Admiral Bunce was not such an officer as was qualified to convene a court-martial, within the meaning of article 38 of section 1624 of the Revised Statutes, for the reason that he was not a commander in chief of a fleet or squadron, as required by said article, but was designated in the proceedings of the court-martial as "Commander in Chief U. S. Naval Force, North Atlantic Station." Referring to "Regulations for the Government of the Navy of the United States, 1896" (article 243), we find the following language:

"The title 'Commander in Chief,' when occurring in naval laws, regulations, and other documents, shall be held to refer to the officer in chief command of a fleet or squadron."

Admiral Bunce was designated as commander in chief, and, by the regulations of the naval department, must be presumed to have been in command of a fleet or squadron.

The objection is also made that the record in this case does not show that the court was convened by any "express authority" from the president, as required by article 38. The precept forming part of the record of the court-martial reads as follows:

"By virtue of the express authority vested in me by the president of the United States, in accordance with the provisions of article 38, section 1624, title 15, chapter 10, of the Revised Statutes of the United States, a general court-martial is hereby ordered to convene," etc.

This allegation of the authority of Admiral Bunce to order a court-martial for the trial of the petitioner we deem sufficient. No objection to his authority having been raised during the trial, we do not think it was necessary to attach to the record of the court-martial a copy of his commission from the president.

Article 39 of section 1624 of the Revised Statutes, which requires that as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every general court-martial, was fully complied with. Admiral Bunce, in his letter to Captain Wise, designated eight officers who were to compose the court, and this communication expressly stated that no other officers could be summoned without manifest injury to the service. The order of Admiral Bunce to Captain Wise designating the members of the court was a summons, within the meaning of the statute. The fact that Admiral Bunce subsequently, in another letter to Captain Wise, substituted Lieutenant Berry in place of Lieutenant Comly as a member of the court-martial, is immaterial.

Article 43 provides that the accused shall be furnished with a true copy of the charges against him, with the specifications at the time he is put under arrest, and that he shall be tried on no others. It is contended that the record in this case does not show a compliance with this provision. The record shows that the accused, in reply to an inquiry of the judge advocate, stated that he had received a copy of the charges and specifications preferred against him; but it does not appear that such copy was served upon him at the time of his arrest. Upon this point the supreme court held, in *Johnson v. Sayre*, *ubi supra*, that the word "arrest," in article 43, meant "arrested for trial." In this case the petitioner admitted at the beginning of the trial that he had received a copy of the charges and specifications, and, in the absence of any objection on his part or on the part of his counsel at that time, it must be presumed that he had reasonable notice of the same.

The original order of Admiral Bunce directed the court to convene on board the United States ship *Maine*, at 10 a. m. on Monday, January 11, 1897, or as soon thereafter as practicable. Subsequently, on January 22d, Admiral Bunce issued a second order directing that the court convene on board the United States Steamship *Montgomery* as

soon as practicable after her arrival at Hampton Roads. The court met on January 25, 1897. We are unable to discover any irregularity or anything which was prejudicial to the petitioner in changing the date of the trial. Upon a careful review of the whole record, we find nothing which warrants the court in granting the prayer of the petitioner. Petition denied.

UNITED STATES v. PETTUS.

(Circuit Court, W. D. Tennessee. November 27, 1897.)

No. 2,052.

1. INDICTMENT—DEMURRER.

Counts of a demurrer to an indictment for perjury committed in an election contest will be overruled when the indictment is therein treated as one charging fraud at the election itself, instead of perjury at the contest proceedings.

2. SAME—SUFFICIENCY.

Under Rev. St. § 5392, an indictment for perjury is sufficient if the word "knowingly" is omitted, and the indictment charges the crime as having been "willfully" committed.

3. PERJURY—WHEN INDICTMENT WILL LIE.

An indictment for perjury will lie, though the proceedings in which the alleged perjury was committed are not concluded at the time the indictment is returned.

4. SAME—TRUTH MUST BE ALLEGED.

An indictment which charges perjury with respect to several facts sworn to by accused, and sets forth his testimony thereupon, followed by allegations that such testimony is untrue, and that accused, at the time of his testimony, did not believe such statements to be true, is insufficient, as it does not set forth the truth of the facts in respect to which he is charged with false swearing.

5. INDICTMENT—SUFFICIENCY—SPECIFIC ALLEGATIONS.

A count of an indictment charging perjury, and setting forth several alleged false statements of accused as to several distinct alleged fraudulent transactions occurring at an election, is insufficient if it does not point out the particular fraudulent transaction in regard to which the accused is charged with false swearing.

6. SAME—PERJURY—MATERIALITY OF FALSE STATEMENTS.

A demurrer will lie to a count of an indictment for perjury when it appears that the testimony alleged to be false could not be material in the action in which it was given, under the statement of the issues as contained in such count.

Henry E. Pettus was indicted for perjury committed in an election contest, and demurs to the indictment.

Chas B. Simonton, U. S. Atty., and Thos. M. Scruggs, Asst. U. S. Atty.

Geo. B. Peters, C. P. Roberts, G. T. Fitzhugh, and T. H. Jackson, for defendant.

HAMMOND, J. The suggestion of the district attorney that the vice of the argument in favor of this demurrer is in treating this indictment as if it were one charging frauds committed at the election, whereas it is only an indictment for perjury committed in giving testimony in a contested election case, is quite true, as to several of the grounds of demurrer, and much of the argument. But it is not