IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1277892 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to:John Marshall STUART, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1918

John Marshall STUART, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code Federal Regulations 137.30-1.

By order dated 26 March 1970, an Administrative Law Judge of the United States Coast Guard at New York, New York revoked Appellant's seaman's documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that Appellant, holder of the document above captioned, was on 19 March 1969 convicted by a court of record at Balboa, Canal Zone, for violation of a narcotic drug law of the zone, possession of marijuana.

At the hearing, Appellant was represented by Professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence records of the Magistrate's Court of Balboa, Canal Zone.

In defense, Appellant offered no evidence.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 13 May 1970. Appeal was timely filed and was perfected on 13 April 1971.

FINDINGS OF FACT

On 19 March 1969, Appellant was convicted in the Magistrate's Court, Balboa, Canal Zone, of possession of marijuana in violation of Canal Zone law.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The bases of appeal are stated and discussed *seriatim* in the *OPINION* below.
Appearance: Marvin Schwartz, New York, New York by Burton M. Epstein, Esq.

OPINION

I

Appellant argues that the specification is "jurisdictionally defective" in that it alleges the date of conviction for possession of marijuana and not the date of the actual possession, citing 46 CFR 137.05-20(c) which describes a specification as alleging the date of the "offense."

In a hearing under 46 U.S.C. 239b involving a court conviction the matter in issue is not whether there was unlawful possession of marijuana on a certain date but rather whether a person was convicted of violation of a narcotic drug law. Thus, the conviction is the "offense" for which hearing was had under section 239b.

II

It is next maintained that the judgement of conviction was improperly admitted into evidence because the requirements of Rule 44 of the Federal Rules of Civil Procedure and of 46 CFR 137.20-105 were not met.

The FRCP are rules for procedure in the District Courts of the United States. A proceeding before a Coast Guard Administrative Law Judge is not a proceeding in such a court, and the FRCP do not control.

The matter of 46 CFR 137.20-105 is somewhat different because it is a rule in that Part of the Federal Regulations containing rules of procedure for hearings under R.S. 4450 and 46 U.S.C. 239b. It is therefore appropriate to examine its intent and purported application.

In legislative drafting, the word "shall" connotes the imperative. It imposes a duty on someone, with an adequate sanction for disobedience. It is obvious that this regulation cannot purport to order clerks of courts to certify copies of judgements because it is not within my power to order clerks of courts to certify judgments nor to order a particular clerk to certify a particular record in a particular case. (The regulation itself, incidentally, is mute evidence that the FRCP have never been considered as controlling in hearings under Part 137 since it is not consonant with the District Court rules.)

If the regulation is read the way Appellant would have it, it would exalt the authority of a clerk or deputy clerk of a court over that of the judge himself. The only fair way to read the regulation so as to effectuate its intent is to construe it to mean:

> "A judgement of a court certified by the clerk or deputy clerk thereof is admissible in evidence equally with a copy certified by the judge himself."

This is the way I construe it.

III

The record, Appellant says, does not establish that the John Marshall Stuart who was convicted in the Canal Zone is he, the holder of a merchant mariner's document under the appellation "John Marshall Stuart, Jr." He argues that the decision in Stebbins v. Duncan, 198 U.S. 32 (1882) is not apposite to the instant case, in which the Administrative Law Judge referred to a principle that identify of names gives rise to a *pres*umption of identity of persons because the Stebbins case dealt with the tracing of title through a deed and this case does not. The argument does not impress me, especially since it omits reference to decisions cited in the Stebbins decision itself.

Presumptions vary in their strength. As names increase in their points of identity the strength of the presumption must increase. In colonial America most men had a given name and a surname. When identical middle initials are added the probability of total identity is heightened, and still more so when it is found that the identical middle initials stand for the same name. When identity of, say, two middle initials exists the probability is extremely high. the point is, however, that increasing the points of identity serves only to heighten the probability of an already existing presumption.

Like most presumptions, that deriving from identity of names can be rebutted. No effort was made to rebut it in this case.

The matter of the "junior" does not trouble me. At times parents have a name recorded at birth with "junior" appearing. A person so named may well go for years without using it until a bureaucratic machinery requires him to identify himself by his birth certificate and the the formal record of the agency carries the superfluous "junior" forever. (It is a matter of some interest that Appellant's counsel shortened his name by substititing "M." for "Marshall" without affecting the matter of identity.)

IV

While appellant attacks the Magistrate's Court of the Canal Zone as not being a court of record he recognizes that Decision on Appeal No. 785 has nothing to do with the present case, although he

does, in his POINT V emphasize some language in that decision. The earlier decision turned on the question that court was a "Federal" court such as to render its decision res *judicata* of the issues tried when the same issues are in question in a proceeding under R.S. 4450. It does not matter, as Appellant acknowledges, whether the Magistrate's Court is a Federal court, only whether it is a court of record.

In support of his contention that this court is not a court of record Appellant cites language in Decision on Appeal No. 785 to the effect that the court is one of limited jurisdiction. Whatever the language in that decision is made fully clear by the rule appearing at 46 CFR 137.03-15, in which there is no reference to "limited" or "general" jurisdiction.

More considerable is Appellant's argument that the Magistrate's Court of the Canal Zone is not a court the proceedings of which are "recognized as conclusive evidence in other courts of that jurisdiction," because an appeal from a conviction in that court results in trial de *novo* in the U.S. District court.

To the point here that a conviction in the Canal Zone Magistrate's Court in a case like this causes an offender to be taken to the U.S. District Court for a second offense for which is greater punishment may be imposed that is available to the Magistrate. An unappealed, final conviction in the Magistrate's Court is thus recognized as conclusive in the District Court and meets the test of 46 CFR 137.03-15 to constitute the Magistrate's Court of a court of record.

I may add here that the words "trial de *novo*" are not magic. In Admiralty proceedings in the U.S. court system an appeal to the Court of Appeals is deemed to be a trial de *novo*. *Brooklyn Eastern District Terminal v United States* (1932), 287 U.S. 170.

V

Appellant goes on to argue that the law for violation of which

he was convicted is not a law of the United States, of the District of Columbia or of any state a territory and, thus, that the conviction does not come within the span of 46 U.S.C. 239b.

There is no doubt that a law of the Canal Zone is not a law of the United States, any more than it is of the District of Columbia It is not a law of a State as the term "State" is commonly conceived. Whether it is a law of a territory within the meaning of 46 U.S.C. 239b is a different question. I think it is.

Appellant cites instances of statutes in which the Canal Zone is mentioned in an enumeration of political entitles, particularly Rule 44, FRCP, and 22 U.S.C. 611. These two uses themselves indicate that different concepts are in the minds of legislative drafters depending upon the circumstances under which a law or regulation is prepared and the objects to be achieved. When paragraph (1) of subsection (a) of the Rule applies, in dealing with "domestic" official records, it is not the geographical location of the record that matters but the nature of the jurisdiction which maintains the record. Hence, a "State" of the United States is not considered as included with "United States;" but in Section 611, where the term "United States" is used in a geographical sense, a State is part of the United States.

A very few laws define, for the purposes of those laws, what a territory of the United States is. Some territories have been formally organized as territories by Act of Congress. Some territories have been assumed to be territories and treated as such, e.g.: Eastern Samoa (48 U.S.C. 1661 and 1665). While Appellant strongly insists that there is significance in the use of a capital or a lower case "t" in the word "territory," I cannot accept this since Congress itself is indiscriminate. See, e.g.: 46 U.S.C. 1541 and 1401f (Virgin Islands).

In the absence of any firm and controlling rule as to the scope of the word "territory," and in the absence of a definition, the intent of Congress should be ascertained. The legislative history shows no specific advertence to the problem here involved, but there is no doubt that Congress intended to reach, for the purpose of revoking (or denying) seamen's papers, those person involved with narcotics under circumstances which would not be

reached under R.S. 4450, i.e. when there is no condition of service under authority of the seaman's documents at the time of occurrence of a narcotics offense.

There was little or no need to consider violations of law in foreign countries because of the fact that such violations would be most probably occur while a person was in the service of a vessel, rendering the substantive act amendable to a charge of "misconduct" under R.S. 4450. It was "domestic" law that was of concern because a narcotics offender would be extremely likely to commit a violation unconnected with service on a vessel in a place where he lived, or was employed, or was accustomed to visit. An intent of even-handedness must be presumed in the application of a law, here in the area of seamen's laws most especially where uniformity of laws relative to the documentation, shipment, and discharge of seamen is essential.

I cannot believe that a conviction of a violation of a narcotic drug law of Puerto Rico was to be treated differently from a violation of such a law of the Virgin Islands. I therefore conclude that the Canal Zone is a "territory" within the meaning of 46 U.S.C. 239b, just as Puerto Rico would be. It is also inconceivable that Congress would confer less stature of a law which Congress itself enacted than it would on a law of a territorial legislature.

VI

Appellant urges that this case must be remanded for further hearing in view of the modification of the regulation permitting administrative law judges a limited discretion in framing orders in certain misconduct cases involving marijuana. That modification applies only to cases heard under R.S. 4450 (46 U.S.C. 239). It has no bearing upon cases heard under 46 U.S.C. 239b.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 26 March 1970, is AFFIRMED.

C.R.BENDER
ADMIRAL, UNITED STATES COAST GUARD

Commandant

Signed at Washington, D. C., this 30th day of March 1973.

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