IN THE MATTER OF LICENSE NO. 363734 MERCHANT MARINER'S DOCUMENT NO. Z-998941 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Leland O. DAZEY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1769

Leland O. DAZEY

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

By order dated 29 May 1968, an Examiner of the United States Coast Guard at Houston, Texas revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as third mate on board the SS BEAVER VICTORY under authority of the document and license above captioned on or about 26 May 1967, Appellant, at Yokohama, Japan, wrongfully had in his possession 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 voyage records of BEAVER VICTORY and a record of conviction of an offense in a Japanese court.

In defense, Appellant offered in evidence his own testimony.

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

The entire decision was served on 26 August 1968. Appeal was timely filed on 19 September 1968. Although Appellant had until 15 January 1969 to add to or perfect his appeal, nothing has been received since the original notice of appeal.

FINDINGS OF FACT

On 26 May 1967, Appellant was serving as third mate on board SS BEAVER VICTORY and acting under authority of his license and document while the ship was in the port of Yokohoma, Japan.

On the date, Appellant was arrested by local police on a charge of possession of marijuana in violation of Japanese law. On 27 May 1967, BEAVER VICTORY sailed as scheduled from Yokohama, leaving Appellant behind.

On 12 June 1967, Appellant was indicted in the Yokohama District Court of Justice, charged with unlawful possession of marijuana on 27 May. Appellant was convicted and sentenced in the District Court, No. 9 Criminal Board, on 6 July 1967. Executive of the sentence was suspended for a period of three years.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the findings of the Examiner are not supported by the evidence submitted.

APPEARANCE: Phipps, Smith, Alexander & Herz, Galveston, Texas, by Charles B. Smith, Esq.

OPINION

I

The naked assertion on appeal that the evidence does not support the findings of an examiner can only be constructed, in the light of standards long set for administrative proceedings, as an assertion that the findings are not based upon substantial evidence. (I take the position here that for legal effect the term (substantial" connotes "reliable" and "probative", since I do not believe that evidence which is unreliable and without probative value can be "substantial,") See, with especial application to these proceedings, *O'Kon v Roland*, S.D., N.Y., 1965, 247 F. Supp. 743. When an appellant asserts only that there is a lack of substantial evidence to support an examiner's findings and fails to offer one reason which would tend to indicate a defect, it can scarcely be said that "grounds for appeal" have been stated within the meaning of 46 CFR 137.30-3(b). However, novel considerations, if not novel questions, seem to call for full review, especially since a revocation is involved.

II

Attention must first be given to a document introduced as Investigating Officer's Exhibit "C". This exhibit tends to prove that Appellant was indicated and convicted in a Japanese court of possession of marijuana as alleged in the specification in the instant case.

When offered by the Investigating Officer it was identified thus:

> "I would like to enter into evidence a certified copy of a translation of the Japanese decision rendered in the Yokohama District Court on the 12th of June 1967 and certified to be a true copy and correct copy of such judgement [sic] by the Vice Counsel [sic] of the United States." R-11,12.

Appellant's counsel objected to admission of the document on the grounds that:

(1) a foreign court judgment is not entitled to credibility; and
(2) there was no showing that Appellant was accorded due process under United States law. R-12,13.

When the Examiner asked, "Isn't this the Consular's [sic] report?" The Investigating Officer replied "Yes, sir," and the Examiner announced, "It is the Consular's [sic] report." R-14.

Appellant's counsel declared:

> "It is only is not the Consular's [sic] report, it is only a certification by the Consular [sic] that this is the proper interpretation of a legal document that reports [sic] to be a certified copy of a judgement [sic]" R-14.

Examiner of the Exhibit shows that it was not what the Investigating Officer offered it as, nor was it what the Examiner accepted it to be. It was not even what Appellant's counsel would have allowed it to be.

The Exhibit contains three documents. The basic, in Japanese, is a form running to be equivalent of four letter sized sheets, impressively printed, with stamps and marks over the printed portions,and with handwritten entries of four lines overprinted by stamps in a different color from that used in the stamps over the printed matter.

The second document, of two typewritten pages, purports to be a translation into English of the basic document. The translation is certified to as a true and correct translation by a Japanese employee of the U.S. Coast Guard Merchant Marine Detail in Yokohama. The translation indicates, amount other things, that the basic document is a copy of a Japanese court record certified under the hand and seal of the clerk of the court.

The third document, which is in typical fashion affixed to the others under the seal of a U.S. Consulate, recites only that the translator of the basic document was known to the vice-consul and had acknowledge to that official that she had prepared the translation.

The entire exhibit is not a document admissible in U.S. court proceedings under 28 U.S.C. 1740. Neither is it an"affidavit" of

someone that a translation of foreign document is true and correct. The "certification" by the translator is not sworn to; it is merely "acknowledge" that the translator did the translation.

However, the Exhibit was not such that the Examiner must necessarily have excluded it from evidence. On his first statement that the documents would be admitted, the Examiner correctly stated that, although there was hearsay, the weight, not the admissibility, of the Exhibit would be in question.

III

In discussing the effect of foreign judgments, both counsel and the Examiner spoke loosely, one in terms of "full faith and credit," the other in terms of "*prima facie* case."

With respect to Federal court judgments, the Examiner declared that a Federal court judgment would establish a *prima facie* case. This is an unacceptable understatement. In a proceeding such as this, as to any issue involved, a Federal Court judgment is conclusive if it is adverse to the appellant. (It is not conclusive if in favor of the appellant because of the different standards of proof in criminal, civil, and administrative proceedings.)

With respect to foreign judgments the rule is divisible. Except for cases under 46 U.S.C. 239b, in which Congress has equated a State conviction to a Federal conviction and made the State judgment of conviction conclusive, a "State judgment" is a "foreign judgment" under these proceedings. The "full faith and credit" clause does not directly apply because the parties to the proceeding are not identical. 46 CFR 137.20-11/ recognizes this distinction in declaring that a judgment of conviction in a Federal court is conclusive, while the judgment of conviction in a State court is not conclusive but "constitutes substantial evidence" when the acts involved in the State criminal proceedings are the same as those involved in the proceeding under 46 CFR 137. To say that the State judgment constitutes "substantial evidence" means more than that it barely establishes a *prima facie* case.

Since there may be "substantial" evidence to the contrary

allowed, this means that the State judgment does not only establish a prima facie case but may also be the foundation for ultimate findings by an examiner.

Judgments of courts of other nations are not discussed in the applicable Federal regulations. There is no need for such discussion. The Supreme Court has ruled upon the effect of foreign (other nation) judgments in courts of the United States. In a proceeding under 46 CFR 137 the effect of such judgments can be no less when, as distinguished above, they are adverse to the appellant.

In two landmark decisions handed down the same day, the Supreme Court held that:

(1) When a judgment emanated from a court of a country which would review an American decision on the merits of the case, the judgment of the foreign court was not conclusive upon a U.S. court but was "prima facie evidence only" *(Hilton v Guyot* (1895), 159 U.S. 113); and

(2) When a judgment emanated from a court of a country which would accept an American decision as conclusive, the foreign judgment was conclusive on U.S. courts *(Ritchie v McMullen* (1895), 159 U.S. 235.

No investigating need be undertaken here as to the status accorded American judgments in Japan. Under the weaker situation of the two Supreme Court holdings cited, a Japanese judgment in the instant case would, contrary to the argument of Appellant's counsel, have weight in an American proceedings. Also, when the Examiner gave his opinion that the foreign judgment did not establish a *prima facie* case he was wrong, although he was correct in saying that the evidence could be rebutted. Preliminary to a later discussion of this matter, it is noted that the Examiner in this case heard an attack by way of contrary evidence on the weight of the Japanese conviction and specifically rejected Appellant's testimony on the collateral attack.

IV

It is held here that proof of conviction of an offense by an

American seaman in a foreign country for violation of law of that country, when the seaman is amenable to action under R.S. 4450 (46 U.S.C. 239), especially when the offense would also be an offense under U.S. law, is *prima facie* proof of "misconduct" and is "substantial evidence" upon which an examiner may base his findings.

V

The question *in* this case is not precisely what the effect of a foreign conviction is in a proceeding under 46 CFR 137 but whether there is substantial evidence that such a conviction occurred. Had the proceeding terminated when the Investigating Officer rested his case, there might have been a question as to whether the vessel's record that Appellant had been detained by local police and Exhibit "C", analyzed above, constituted substantial evidence of the conviction and, hence, of the wrongful possession of marijuana. This question need not be reached.

VI

At this point it may be useful to summarize the chronology of the proceedings in this case.

Appellant was served with the notice of hearing on 28 July 1967. The date of hearing was set, apparently with the consent of Appellant, for 30 August 1967. Appellant stated at the time that he desired professional counsel.

On 31 July 1967, Appellant advised the Investigating Officer that he had signed aboard a ship, bound for India. When the hearing opened on 30 August 1967 the Investigating Officer moved for a proceeding in *absentia*. The Examiner denied this application because:

(1) Appellant had announced that he was leaving the country before the hearing was to begin, and
(2) Appellant had stated that he wanted professional counsel.

Whether the Examiner should have proceeded need not be debated

here; the fact is that he adjourned until Appellant might again be located.

It was not until 21 December 1967 that the hearing was reconvened, this time with Appellant and his counsel present. This session ended, after the Investigating Officer had presented his case and rested, and after Exhibit "C" had been admitted into evidence over Appellant's counsel's objection, subject to the comments as to weight made by the Examiner, with an indefinite,*sine die*, adjournment requested by Appellant's counsel.

Appellant's counsel announced at this time that he might want some depositions taken in Japan. The Examiner permitted this.

When the proceedings reconvened on 7 May 1968, no effort had been made to present interrogatories to or to seek the evidence of any person in Japan. At this time Appellant elected to testify in his own behalf, in the presence of counsel.

VII

Under these conditions it seems unavoidable that Appellant made an informed choice. By a sort of "confession and avoidance" he acknowledged the Japanese conviction and sought to persuade the Examiner that he had been "framed." The Examiner, as trier of facts, rejected Appellant's testimony as to the "frame." The net result of all this was that on the entire record the Examiner had before him not only the disputed case presented by the Investigating Officer but the acknowledgement of Appellant that the conviction which Exhibit "C" tended to prove had occurred.

Appellant had ample time to develop any proof that he needed. The "whole" record shows that he was convicted in a Japanese court of unlawful possession of marijuana in Japan. This is "misconduct" under R.S. 4450.

ORDER

The order of the Examiner dated at Houston, Texas on 27 May 1968, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 9th day of June 1969.

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What constitutes

***** END OF DECISION NO. 1769 *****

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