IN THE MATTER OF LICENSE NO. 310885 MERCHANT MARINER'S DOCUMENT NO. BK-344571 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Walter SCHMEIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1642

Walter SCHMEIS

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 20 September 1966, an Examiner of the United States Coast Guard at New York, N. Y. entered an Admonition in Appellant's record upon finding him guilty of misconduct. The specification found proved alleges that while serving as first assistant engineer on board the United States SS GRINNELL VICTORY under authority of the document and license above described, on or about 30 June 1966, Appellant deserted the vessel at Rotterdam, Holland.

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 an entry in the Official Log Book of GRINNELL VICTORY, after a stipulation that Appellant had been serving as alleged.

In defense, Appellant offered in evidence his own testimony and certain documents relative to medical attention.

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 of admonition against Appellant's record.

The entire decision was served on 21 September 1966. Appeal was timely filed on 23 September 1966.

FINDINGS OF FACT

On all dates in question, Appellant was serving as first assistant engineer on board the United States SS GRINNELL VICTORY and acting under authority of his license and document.

Because of the unusual nature of this case, I quote and adopt the Examiner's thirty-eight Findings of Fact subject to comments which will be made in "Opinion" below.

"1. Walter Schmeis was serving as first assistant engineer on board a merchant vessel of the United States, the SS GRINNELL VICTORY, under authority of his duly issued Merchant Mariner's License No. 310885 and Merchant Mariner's Document BK-344571. The proof adduced by the Government was not sufficient to establish a `prima facie' case with respect to the allegations of the first specification setting out `wrongful absence from duty and vessel on 27, 28 and 29 June 1966 at Rotterdam, Holland.'

"2. The person charged, while serving as above on 30 June 1966, wrongfully did desert his vessel at Rotterdam, Holland.

"3. The third specification alleging that the person charged on 30 June 1966 did `wrongfully fail to join said vessel at Rotterdam, Holland' is deem merged with the second specification.

> "In addition to the above findings with respect to ultimate facts, I make the following findings with respect to specific facts:

"4. The person charged signed articles on 3 February 1966 on the SS GRINNELL VICTORY for its first voyage since being taken out of the reserve fleet of merchant vessels.

"5. The person charged was not suffering from the condition he subsequently complained of while the vessel was in the Far East and Rotterdam, until just before arrival for the first time at Bangkok. (See Finding of Fact No. 10 below.)

"6. The food on this vessel for the entire trip was spicy.

"7. The person charged got along well during the entire voyage with the master and the chief engineer.

"8. The vessel sailed from Baltimore, Maryland to Charleston, North Carolina, thence to Suda, Spanish Morocco.

"9. While the vessel was in Saigon, two of the six engineers on the vessel were wounded ashore and not replaced. Thereafter the person charged, who was the day-working first assistant engineer became a watch-standing first assistant engineer.

"10. While the vessel was at sea on its way to Bangkok, the person charged noticed that he was coughing frequently and spitting up blood. He had no pain. He reported this to the third officer, who was the ship's medical officer. The third officer did not know what to do and the person charged did not ask to be relieved of duty.

"11. In Bangkok, the person charged went to a doctor. His lungs were x-rayed. He was told there were spots on his lungs but to return the next day to the doctor's office since the doctor wanted the radiologist to take a look at the x-rays. He was given a slip by the doctor which he handed to the master. The person charged returned as instructed to the doctor. The doctor told him that the radiologist said that he was fit for duty. The person charged returned to the vessel and to his work.

"12. The vessel went to Naha, Okinawa. There he saw the

doctor and was given salve for his backside, but he did not learn whether he was fit for duty or not; nor does the record disclose why he had been given this particular medication.

"13. From Naha, the vessel went to Buckner Bay, then back to Bangkok. During this time, the person charged was coughing and spitting blood. This matter was reported by the person charged to the third officer. The third officer stated he did not know what to do but suggested the person charged take an aspirin. The person charged never asked to be relieved of duty nor was it suggested to him that he relieved.

"14. The vessel then sailed to Subic Bay, Philippines. In Subic Bay, the person charged went to the U. S. Navy Hospital. Here he was x-rayed and given various tests. He was told to return the next day and did so. Upon his return he was told by the Navy Corpsman to come back on Monday when the doctor would be available to see him.

"15. The person charged upon returning to the vessel informed the master that he was to return to the hospital on Monday. However, the vessel sailed on Sunday night and the person charged was unable to return for his scheduled Monday visit. (Apparently some arrangement was made to have the medical record of Mr. Schmeis sent from Subic Bay to Bangkok. See next finding.)

"16. The vessel's next port of call was Bangkok. Upon arrival at Bangkok, inquiry was made of the MSTS Office concerning the arrival of any medical records of t he person charged from Subic Bay. They had not arrived. Pending the arrival of these records, the person charged did not see any doctor. The day before sailing from Bangkok, the MSTS Office informed the master and the person charged that the medical records had arrived and that the person charged was fit for duty.

"17. The vessel then sailed for Aden. At see underway to Aden, the person charged developed pains in his abdomen just below his navel. The vessel arrived at Aden where it remained for twelve hours. The person charged was working while the vessel was in port and did not see any doctor in this port.

"18. The vessel transitted the Suez Canal and during

this passage the person charged still had pains his stomach and was spitting up blood. The third officer remarked to the person charged that there was a good hospital at Rotterdam, their next port of call.

"19. The vessel arrived in Rotterdam at 2000 hours on 23 June 1966.

"20. The person charged returned to the hospital on 25 June 1966. He was told definitely that he had no tuberculosis but had a nervous stomach. The hospital doctor told the person charged to go back to the company doctor. The person charged did so. The company doctor prescribed tranquilizers for his condition. He was told he was fit for duty but if be had any further trouble, he was to see the doctor in the next port of call.

"21. The person charged returned to the vessel. He told the master that he felt he was mentally and phy*sic*ally unfit for duty to remain on the vessel. He requested a mutual release. The master denied this request apparently because the doctor said he was fit for duty. The person charged followed the doctor's direction with respect to the use of tranquilizers. While on watch after lunch, he vomitted. When he finished the watch, he told the chief engineer he had vomitted and that he was going to go ashore to eat and stay at a hotel.

"22. He told the master, `Captain, the doctor says I'm fit for duty; I still got stomach pains, I'm mentally and physically unfit for duty to stay on the vessel.' He told the master he was leaving the vessel.

"23. At the hotel in Rotterdam, he took his tranquilizers as prescribed, ate dinner and later vomitted. He stayed at the hotel that night.

"24. He awakened with a headache and abdominal pains and then called up the KLM Air Lines to find out if there was a flight to New York at 11 a.m. on 26 June 1966, which would arrive in Kennedy Airport about 4 p.m. that afternoon. The person charged purchased a ticket for that flight.

"25. The person charged left all of his clothing and

gear, as well as his license, on board the vessel in Rotterdam.

"26. He arrived at Kennedy Airport on the afternoon or early evening of 26 June. He went immediately to his home, which is in close proximity to Kennedy Airport. At home he called the Lahey Clinic in Boston, since he had heard on the vessel that this was a good hospital.

"27. The next day, 27 June 1966, the person charged went to Boston to the Lahey Clinic.

"28. He attempted to stay at the clinic as an in-patient, but learned that there were no in-patients in Laney Clinic. He was further told that his examination and text would begin the next, the 28th of June.

"29. The person charged had no money for a hotel room so he spent his time in an all-night movie. However, he did telephone his mother and ask her to come up to Boston and to bring some money.

"30. He was undergoing examination at the Lahey Clinic from 28 June to 1 July 1966. He was classified unfit for sea duty, 26 June to 1 July 1966 by the Lahey Clinic. (See Exhibit 2, which is dated 10 August 1966. It is signed by a Dr. Nugent. It is additionally noted that Exhibit 3, dated 8 August 1966 states Mr. Schmeis was under Dr. Nugent's care from 24 June to 5 July, during which time he was unable to fulfill his duties.)

"31. He returned to New York and became an out-patient at the U. S. Public Health Service Hospital, Staten Island, on 5 July 1966. On this date, he was declared `unfit for duty'. `GI tract' - (See medical report of duty status, containing a further notation to return to clinical medical 8/2/66.) Neither the Lahey Clinic nor the U. S. Public Health Service Hospital, Staten Island, New York ordered the man hospitalized.

"32. The U. S. P. H. S. `Medical Report of Duty Status' dated 2 August 1966 indicated that the person charged was fit for duty with the additional notation, `to return to clinic as needed.'

"33. The person charged on 28 April 1966 at Bangkok had received a cablegram from his mother stating that she was to

undergo a serious operation and it was urgent for him to return home. This cablegram was received about one hour before sailing time. The person charged spoke the matter over with the master and asked the master for his suggestion. The master, on his own initiative, sent a telegram presumably requesting a relief for the person charged. No reply was received.

"34. When the vessel was in Cam Rahn Bay, Viet Nam, (next after Bangkok) the person charged with the permission of the master, sent a follow-up telegram seeking a reply to the master's telegram. No reply was received to this telegram either.

"35. Thereafter when the vessel was at Okinawa and later still at Subic Bay, Republic of the Philippines, the person charged learned by long distance telephone that his mother was all right.

"36. When the person charged went to Lahey Clinic, he complained of a nervous stomach, stiffening of the legs, abdominal pain, and the coughing of blood. The person charged was given among other things a general physical examination, a urine analysis, blood count and various blood tests, including a test of thyroid function, x-ray of the chest, x-ray of the gall bladder, upper G-I series, barium enema and proctoscopic examination.

"37. The diagnosis is best set out in the last paragraph of Exhibit 1, `My final diagnosis aside from the problem of your chest was of a spastic intestive [sic] and I advised you regarding treatment of this.' The letter is signed by the signature of F. Warren Nugent, M. D. This exhibit is dated 8 July 1966.

"38. The person charged was not denied medical attention whenever he requested it."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged contended that appellant's departure from the vessel was justified. Specific arguments as to justification are discussed below in "Opinion".

APPEARANCE: Pressman & Scribner, New York, N. Y., by Ned R. Phillips, Esq.

OPINION

I

Certain extraneous matters discussed in the record, in the Examiner's "Opinion," and in the appellant brief may be disposed of first.

It must be understood that appellant's position at the hearing was that his physical condition justified his departure from the vessel in circumstances which would otherwise have amounted to desertion.

Efforts by the master of GRINNELL VICTORY to secure a replacement for appellant (See Examiner's findings 33, 34, and 35) had no bearing upon this case at all. They were not, as appellant would argue, supportive of a belief that the master recognized that appellant's physical condition called for his replacement. They were made because appellant wished to get to his mother before she had to undergo an operation. When appellant learned that his mother's condition had charged, his efforts to leave the vessel, for that purpose, ceased. In the same vein, however, there is no implication in the evidence that appellant's mother's condition influenced his decision to leave the ship when he did.

II

Extraneous also is the belated claim, that appellant had been required to work more than eight hours an day in violation of 46 U. S. C. 673, a copy of which Counsel has kindly provided. Appellant, as the record shows conclusively, never missed pay-timed during the voyage, never missed bonus-time, never failed to stand a watch, until he decided to leave the ship.

I do not think that any reading of 46 U.S.C. 673 provides to a seaman any remedy other than entitlement to discharge upon illegal requirement of extra-work. If the extra-work has been acquiesced in by the seaman for a period of weeks or months (in

order to obtain I know not what extra pay) he cannot, particularly for the first time on appeal in a case like this, claim that he was entitled to have demanded his discharge earlier to justify his departure, for other reasons, later.

III

There is also much discussion in the record on the question of certain presumptions that have been said to arise in desertion cases.It IS true, as appellant argues, that in determining "intent" a court may look to such matters as removal of personal effects from the ship or leaving them behind, taking or leaving a license, or taking maximum draws available.

These considerations become irrelevant when there is direct evidence as to intent. No inference may be drawn from otherwise silent facts when there is speaking evidence of intent.

Here there is evidence that appellant told the master he was leaving the ship at Rotterdam. Also, appellant admitted that he so told the master. Resort to inferences as to intent from the nature of other acts need not be had when there is direct evidence of intent as there is here.

On novel element is introduced into this case however. It is not specifically raised on the appeal as a grounds for rejecting the Examiner's findings, but it is referred to, as if of significance, in appellant's recital of the facts of the case in his brief on appeal.

The brief says:

"He awoke the following morning . . . Having in his possession enough money for a round trip ticket he flew to the

U.S.A."

The brief refers to R. 35 to support this statement of fact. Under direct examination of counsel appellant testified, at that point, thus:

"Q. What did you do?

A. After I woke up I said to myself, how much money did I have in my pocket. Maybe I better get examined. I went to a KLM officer. I had money for a flight the next day. I had enough money and I bought a ticket.

Q. And you came home. Did you have enough money for a round trip?

A. Yes.

Q. Was it your intention to return to the vessel?

A. Yes."

The brief further asserts this as a fact:

"After his return to the United States the person charged continued to inquire as to the vessel's location and intended to return to her if he were deemed fit for duty before the end of the voyage."

The brief here cites R. 63 in support of this statement. I will return later to consideration of appellant's testimony in this respect, when I have to deal with his credibility.

For the moment, I consider only the naked proposition implied, that if a seaman leaves a ship at any time and intends to return to that ship at any other time prior to the termination of the voyage for which he has signed articles, he cannot he held to have deserted.

This proposition is rejected.

It is true that desertion is established once there is shown a wrongful absence from the vessel with intent never to return. I think that desertion also occurs when there is a wrongful absence at a given port coupled with an intent not to be aboard the vessel on its departure from that port.

In practice, a seaman who fails to join in a certain place is often received back aboard by the master at another place. Indeed, it often happens that an agent will supply the transportation to move the seaman to the next port, with costs assessed against his pay. Conceivably, in a given case, such a practice might be evidence of condonation if desertion were later charged.

I hold here, on this narrow point above and not as dispositive of the entire case, that an unauthorized departure of a seaman from his vessel with an intent to return to it only upon the occurrence of some uncertain future event, is, as a matter of law, desertion.

I mention again that appellant's testimony on this matter is far from persuasive, and I will return to it later. Here, all I do is reject the fundamental principle he asserts.

I am well aware that with respect to the military seaman Congress has recognized three different offenses as possible when the seaman's ship sails during his wrongful absence.

(1) missing movement through neglect;

(2) missing movement through design;

(3) desertion.

These distinctions are not apposite to the situation of the merchant seaman. A missing movement through neglect by a military seaman is equatable to wrongful failure to join by a merchant seaman. But the military seaman who designs to miss the movement of his ship is not necessarily a deserter from his "service" . A merchant seaman who designs to miss the sailing to his ship is in a different position. The merchant seaman is bound only to his

ship, not to a "service," and once he intentionally abandons that ship he is a deserter.

Unless justification can be found, appellant's action in this case must be held to be desertion.

IV

Excess verbiage apart, then, the issue is really resolved to what appellant's counsel declared at hearing to be the issue: ". . .The defense has indicated that the person charged did leave the vessel on June 26, 1966 without the consent of the Master and did not return thereto. However, . . . The leaving of the vessel by Mr. Schmeis was justified." The elements of desertion are admitted, departure without authority, and intent not to return. The only question is whether the action was justified by some other circumstances, despite the concurrence of all the necessary elements of desertion.

Cases cited by appellant and reviewed by the Examiner are not in context here. There is not a case in which a seaman was denied medical attention and was thereby justified in taking extraordinary means to obtain it. Appellant was given medical attention at every place he sought it. He was given medical attention at Rotterdam, both by the company doctor and a hospital. In every case he was found fit for duty.

The critical facts here cannot be overlooked. Appellant was in a city in which he had received medical attention. There is an American consul in that city. (Appellant twice stated--R. 67, 68--that there is no American consul in Rotterdam. There is. See *Congressional Directory*, 89th Congress, 1966, p. 742; 90th Congress, 1967, p. 773.) Appellant had sought a mutual release and been denied it. The vessel remained in that city for four more days after appellant gad left for New York. All means were available for appellant to have regularized or to have had authorized the departure from the ship.

If appellant's case had provided a position that he suddenly, on a Sunday morning, having taken refuge in a hotel for his health's sake, found himself in an emergency situation with respect to his health, without easy access to the consul, the master, the doctor, or the agent, and had panicked in to taking the first

flight available to New York, there might be some weight assignable to his purported justification for the otherwise admitted desertion.

Appellant has closed that door on himself.

He admitted that when he left the ship on Saturday, 25 June 1966, he did not intend to return before the vessel left Rotterdam, and that he left Rotterdam on 26 June 1966.

In this connection there is a curious slip in appellant's testimony. The point need not be belabored here because the question of Appellant's credibility is made clear elsewhere in this opinion. But in his testimony on direct examination, already cited from R. 35, he said that he went to a KLM office. "I had money for a flight the next day. I had enough money and I bought a ticket." If it were necessary, to resolve this case, it could be concluded from this that appellant bought his ticket on Saturday "for a flight the next day," and that his later testimony as to his phone call on Sunday morning to inquire about a flight was fiction.

V

The one point remaining to consider is that appellant submitted evidence that shortly after his departure form the ship he was found not fit for duty. It must be understood that this is not a case of medical treatment refused. It is a case of medical examination granted every time appellant asked for it, medical treatment prescribed on each occasion, and a finding of "fit for duty" made on each occasion prior to appellant's leaving the ship. Thus, the cases that deal with medical treatment refused and emergency action by the seaman to obtain treatment have no bearing.

The argument here is that despite all findings of medical examiners at Rotterdam and earlier ports that appellant was fit for duty, findings of the Lahey Clinic at Boston and the U. S. P. H. S. Hospital at New York after appellant had returned to the United States require that the Examiner has found that appellant's departure from the ship was justified.

Before I try to evaluate the significance of the documents provided by appellant at hearing to support this contention I must

first consider the testimony of appellant at the hearing because his testimony may have much to do with the weight to have been accorded these documents by the Examiner.

VI

While the Examiner's "findings" on matters under controversy in the evidence indicate that the Examiner found against appellant, the Examiner made no comment as to his reasoning. The Examiner never specifically rejected appellant's testimony as to anything. He could have. He chose, however, to accept appellant's testimony on many matters and to resolve the case in a manner most favorable to appellant as far as fact-finding was concerned.

Since appellant's brief has urged certain facts as established on the record, I cannot be as polite as the Examiner and leave unmentioned what may be called "oddities" in appellant's testimony. Nor can I ignore discrepancies between the record and the brief on appeal.

On direct examination by his counsel appellant testified (R. 36):

"Q. When you returned to the United States, what date did you get into the United States?

A. Sunday, 4 o'clock in the afternoon.

Q. What date was that?

A. 26th.

Q. And did you immediately seek medical attention?

A. Yes, sir.

Q. Where did you go for medical attention?

A. I made a phone call to Boston, Massachusetts to the Lahey Clinic, and took a plane there.

Q. Where did you plane from?

A. Idlewild Airport.

Q. Why didn't you go for treatment at the Marine Hospital?

A. It was Sunday and I had no discharge or document to show that I was on a vessel."

This is clear and unequivocal. Appellant asserts that he flew from New York to Boston on Sunday, 26 June 1966, sometime after his arrival from Rotterdam at 4:00 a.m. that day.

His testimony under direct examination relates no details as to when he first reported to the clinic or where he stayed or how long he remained. On cross-examination appellant testified (R. 59):

"Q. What time did the plane arrive in the United States?

A. I would say about 4 p.m. in the evening, same date.

Q. When did you go - where did it arrive in the United States?

A. Kennedy International Airport.

Q. Where did you go from there?

A. To my home.

Q. Where is your home?

A. Seven blocks away.

Q. How long did you stay at your home?

A. Until the following morning, I Called up Boston Lahey Clinic.

Q. How did you get to Boston?

A. Trailway Bus.

Q. When did you arrive at Lahey Clinic?

A. Monday night."

This is also clear and unequivocal. Appellant asserts that he remained at his home on the night of Sunday, 26 June, phoned the Lahey Clinic on Monday, 27 June, and took a Trailways bus which deposited him in Boston Monday night.

Rarely does one see such unreliability of testimony so starkly outlined.

At this point I refer back to the testimony of appellant cited by him on appeal as to his having funds for a round-trip ticket when he left Rotterdam (see "opinion IV" above).

While direct examination elicited the testimony that appellant had founds for a found-trip and that appellant intended to return to the vessel, cross-examination elicited this, and this is testimony to which appellant has specifically referred me (R. 63):

"Q. When you arrived in the United States, was it your intention to fly back to Rotterdam?

A. Yes.

Q. When?

A. As soon as I found out what the physical was.

Q. Would you have flown back to Rotterdam if the GRINNELL VICTORY wasn't there?

A. Yes.

MR. PHILLIPS [Counsel]: May I have that last question and answer read back? I don't think the witness fully understood it.

LT. ALCANTARA [Investigating Officer]: I'll ask the question again.

Q. You say, Mr. Schmeis, that when you arrived in the United States you intended to return to Rotterdam?

A. Yes.

Q. The question the government then asked: Would you have flown back to Rotterdam if you had known that the GRINNELL VICTORY, your vessel, was no longer there?

A. Yes. Because I didn't know what other ports she was going to, and from there the agent would have notified me."

The first thing to be discussed here is whether appellant in fact had sufficient funds for a round-trip ticket. Appellant's testimony on this matter on direct examination has been cited before. Here is his testimony on cross-examination (R. 58):

"A. Yeah, I woke up with pains in my stomach, after midnight, and I called up KLM, I asked them if they had a plane out to the United States, and he said, `The only one was at 11 o'clock in the afternoon'. I asked him much it was, he gave me the price, I asked him to wait a minute, I counted up my money, I just had enough, I had seven dollars left over."

This statement of appellant negatives his earlier claim. That the latter statement is probably the truth is supported by his testimony (R. 60) that his first night in Boston he had to stay in an all-night movie and was without funds until his mother came to

Boston the next day with money.

The not result of this is that I cannot accept as facts what appellant asserts in his brief that he had round-trip money and that he intended to fly back to Rotterdam, especially since the Examiner did not so find.

One last comment may be in order on this aspect of the case. The brief asserts that appellant followed the movements of the ship from New York so that he could return to it. This claim on appeal is belied by his testimony that he would have flown back to Rotterdam even if the vessel had departed that port. Further, the only evidence in the record about any knowledge he obtained as to the vessel's movement was that he received a letter from the man who had been flown out to replace him. (R. 63, 64).

VII

Turning now to the documents furnished by appellant, we see that they are five in number:

(1) a letter from a doctor at the Lahey Clinic addressed to appellant personally, dated 8 July 1966;

(2) a "To Whom it May Concern" statement from the same doctor, dated 10 August 1966;

(3) another such statement dated 8 August 1966;

(4) a PHS from 1731 dated 5 July 1966; and

(5) a PHS from 1731 dated 2 August 1966.

Considering the unreliability of appellant's own testimony, the issue is now narrowly resolved to whether these documents, in and of themselves, are of such weight and significance that they require one to set aside the Examiner's finding that appellant's action were not justified.

The first "Lahey" letter entered into evidence, that of 8 July 1966, after a statement of appellant's normality in most respects, indicates that a doctor of the "chest service" felt that further

studies should be carried out "and he reviewed this with you and made arrangements for these studies to be done." The letter ends, "My final diagnosis aside from the problem of your chest was of a spastic intestine and I advised you regarding the treatment of this."

There is no evidence in the record that anything ever came of the arrangements that had been made for studies to be done. The advice given to appellant with respect to treatment of his spastic condition is not spelled out, but appellant did testify that the only medication he received as a result of four xxxxxxxxxxxxxxxxxxxxxx take a small quantity before each meal and before bedtime. (R. 62). While the nature of the liquid is not known the medication does not sound remarkably different from that prescribed at Rotterdam where appellant was found "fit for duty." Rather significantly this first letter does not contain any statement as to "fitness" nor is there any indication of awareness on the part of Clinic personnel as to what standards would apply to a merchant seaman. In other words, it could well be, on this record, that the Lahey Clinic might declare, in agreement with the Rotterdam doctors, that appellant's condition was such that with the prescribed medication he could have continued on board the vessel.

Incidentally, appellant testified that this letter contained a recommendation that he take a month's vacation. (R. 64, 65). It does not.

The second and third "Lahey" letters, dated 10 and 8 August 1966, respectively, as they were placed in evidence, declare that (1) from 26 June 1966 to 1 July 1966 appellant was "unfit for sea duty" and (2) from 24 June 1966 to 5 July 1966, appellant was "under my care" and "was unable to fulfill his duties." From the errors in date and from their "ex post facto" nature, it cannot be said that the Examiner erred in according little or no weight to them.

The first U. S. P. H. S. document declares appellant not fit for duty as of 5 July 1966 -- "G.I. tract" -- and calls for him to return on 2 August 1966. There is not a shred of evidence as to what this finding was based upon. Appellant was in Boston undergoing examinations for four days, out of which emanated the

inconclusive letter of 8 July 1966. He made one visit to U. S. P. H. S. Hospital, Staten Island, on 5 July 1966. Obviously, the examinations and tests made there must have been cursory compared to the examination he underwent in Boston. There is no evidence of any treatment or medication coming from Staten Island.

Unfortunately for appellant, his own vagaries of testimony further obstruct the searcher for truth. He testified that he finally that to Public Health Hospital because (R. 40, 41):

(1) the Lahey letter recommended a month's vacation, and

(2) a company official said that a Public Health certificate would be better than a private hospital's certificate. As mentioned before, the Lahey letter did not recommend a month's vacation, and the Lahey letter was not even in existence at the time appellant went to Public Health on 5 July 1966. It further appears (R. 41) that the company official made the 5 July appointment at Public Health for appellant. It need not be concluded that the "unfit for duty" slip issued only on appellant's representations of illness and of a false claim to a recommendation for a month's vacation, to find that the Examiner did not act arbitrarily or capriciously in assigning no significant weight to the document in question.

The last medical document submitted by appellant, the PHS 1731 of 2 August 1966, helps his cause not at all. With no evidence of treatment in the interval from 5 July to 2 August, he is found "fit--GI" but with a provision that he should "return to clinic -- as needed." It is obvious that whatever his condition was, and whatever medication was needed (indicating return to the hospital "as needed.") there was nothing disabling from duty.

VIII

Finally, I may say that while I personally might, if I were making the initial decision, reject appellant's testimony completely as being the most self-impeached that I have seen on a record, and might accord no weight whatsoever to the documents he produced, I can abide with this result: Assuming that a fact issue had been raised by the medical evidence, the Examiner was within his province when he accorded the greater weight to the evidence

assembled before appellant's departure from the ship than to the evidence assembled after appellant returned to New York.

The Examiner has declared that ". . . the instant case is both close and unique." I cannot agree with him, on this record, that it is close. I can agree that it is unique, but not for the reasons the Examiner ascribes. I find it unique in the bold self-contradictions by the appellant both at the hearing and on appeal.

CONCLUSION

Appellant here chose to bypass all provisions of United States law for the protection of American Seamen abroad. Once he walked off GRINNELL VICTORY at Rotterdam on 25 June 1966 he was a deserter from the ship.

Appellant's desertion did not take place the day the ship sailed from Rotterdam. If the intent to desert were to be found only by inference from other circumstances, the sailing date might be the correct date. In this case, the latest correct date could be the date on which appellant left Rotterdam by air, 26 June 1966, several days before the ship left port. But, it is also apparent that the date of desertion was the date on which appellant left the ship with the intent of not being aboard when it sailed.

The findings of the Examiner could be modified in that the desertion of appellant took place on 25 June 1966.

Modification is not considered necessary in this case, however, as long as the fact have been clearly detailed. "On or about 30 June 1966," in the specification found proved is close enough to cover "25 June 1966."

ORDER

The order of the Examiner dated at New York, N. Y. on 20 September 1966, is AFFIRMED.

W. J. SMITH

Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 5th day of July 196.

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Credibility of defense witnesses rejected
Credibility of, judged by Examiner

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