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Case of the Warren Ship

**{{DATELINE}}** May 2, 1831

We have been requested to state for the use of the examining counsel our views of the points proper to be inquired into on the part of the defendant in the proceedings before the Commissioner in the case of the Warren.

It may be proper to premise that the amount due out of the fund in question to each and every one of the officers and crew of the ship must be ascertained before a report can be made by the Commissioner.

The mandate of the Supreme Court directs him to ascertain and report the amount due to each of the libellants “so that a separate decree may be entered therefor to each libellant respectively” — It is supposed by the Council for the mariners that the fund will not be sufficient to pay the whole amount due to the claimants and if that should be the case, each claim must abate *pro rata* in the distribution of the fund and consequently a decree cannot be entered for one, until the amount due to every one entitled to a portion of the fund shall be first ascertained. — The investigation therefore necessarily embraces the case of every officer and seaman who is entitled to a portion of the fund in the hands of the assignees of the original owners and we suggest that the examination be conducted as follows. —

1st The testimony taken before the Commissioner should be reduced to writing, because his ascertainment and report is subject to the review and correction of the court.

2. The claimant should be required to prove the time of his return — in what regard he came — who commanded it and at what port he arrived — in order to give the defendants an opportunity of contradicting the testimony of the claimant, if they believe the time of his return to be different than that which he alledges.

3. When the time proved by the claimant is longer than an ordinary voyage would make it, he should be required to show that he was prevented from returning sooner by circumstances beyond his control. The mandate certainly does not mean to allow wages while the party was voluntarily absent, but for the time that he was unavoidably absent.

4. The mandate directs an average when the exact time of the return cannot be ascertained — in order therefore to enable a party to rely on an average, he must show by proof that the exact time {{PB}} cannot be ascertained — for it is only in that contingency that the average is to be substituted for testimony. — Consequently if an average should be claimed by any one, it will be incumbent on him to shew why the exact time cannot be ascertained and the particular circumstances which render it impossible for him to prove it. —

5. In cases when the administrator claimed and the Intestate is said to have returned, it will be equally necessary for the claimant to shew the precise time of the intestates return and the proof in that subject should be as precise as that in the [2 & 3?] points.

6. In cases when the administrator claimed, and the intestate [is said?] not to have returned, proof should be required of the time and place of his death; and of the circumstances which prevented his return and where he was and how employed between the time of the seizure of the ship and his death. —

The interrogatories to be first to the witnesses for the claimants and then cross examination must necessarily depend on the nature of the testimony given by them respectively in their examinations in chief and it would be [ ] for us to suggest any thing [ ] — The examining counsel will be better able to decide — But we think that justice to our clients requires that the examination should be carefully made on the principles above stated and therefore respectfully advise it. When we see the evidence which the claimants offer and the testimony given by their witnesses we will be better able to judge, what proof it may be adviseable to bring forward on the part of the defendants either by continuing the cross examination of the witnesses, or by original proof — and the witnesses should be detained to afford this opportunity and the examination left open —

When the party was at liberty to return and did not do so to make that examination as to the reasons — because if he was profitably employed, such profits are to be deducted from the wages — It is said that some of these mariners shipped in one or more British vessels — this fact should be proved — it will throw a new feature into the case — and may account for the new appearance and new claim of those for whom proceedings have been carried on and we learn are about to be reserved for others *without authority* — when a mariner cannot {{PB}} prove by a disinterested witness the exact time of his return and is about to claim an *average* to the prejudice of the respondents, the party himself might be examined on *specific interrogatories* as to the vessel he came in, the commander, the port and the time. his answer to *such interrogatories* would be evidence in his [favour?] but would not make him a *general witness* in his own behalf and the facts alledged by him in answer might be disproved by the [ ] Books — a roll of crews and passengers. — hearsay evidence should be strictly excluded, or when improperly admitted by the commissioner he should be required to note the objection in his report. — all objections to testimony should be entered in like manner so as to bar the inference of its having been admitted by consent. — the gentlemen who superintind the examination would do well to examine the rules laid down by the Supreme Court for regulating the practices in equity which apply to some extent to admiralty proceedings — when administrators appear to ascertain to what state the decd. belonged and what relatives he left — that those entitled, and no others may receive the money.

**{{SIGNED}}** R.B. Taney

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May 2. 1831

**{{SOURCE}} Legal Notes**

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(MMC 2191, Folder 13)