to be commenced even by the service of the process. According to Dr. Brown (2 Brown, Civil & Adm. Law, 367) it would seem that in strictness the suit is not deemed to be commenced until the issues are made up, and the case ready for transmission from the *prætor* to the *judices* for trial. See, also, *The Martha*, Blatchf. & H. 151.

But, in the absence of aid from the advocate upon this point, I forego the inquiry alluded to, and limit my action on the present occasion to overruling the exceptions upon the ground that it does not appear upon the face of the supplemental libel that any of the facts there stated occurred subsequent to the commencement of the suit.

THE SULTAN *v.* THREE THOUSAND EMPTY OIL BARRELS.*

(*District Court, E. D. Pennsylvania.* January 30, 1883.)

LIBEL FOR FREIGHT—BILL OF LADING—CONSTRUCTION OF—CUSTOM OF PORT—BURDEN OF PROOF.

The burden of proof rests upon a respondent setting up a custom to return and deliver at Chester oil barrels, which, under a bill of lading, stipulating to deliver the same at the port of Philadelphia, had been carried beyond Chester to the city of Philadelphia, and such custom has not been shown to have existed at the date of this contract.

Whether such custom now exists, not decided

Admiralty. Libel, answer, and proofs.

On August 20, 1881, 7,061 empty petroleum barrels were shipped on the Sultan, the bill of lading stipulating that the same should be delivered at the port of Philadelphia, at a wharf to be selected by the consignees. The Chester Oil Company was established in March, 1881, and a large proportion of the barrels afterwards consigned to the port of Philadelphia were discharged at Chester. The Sultan arrived at the city of Philadelphia on the twentieth of September, 1881, and was requested by Witthof, Marsily & Co. to go back and discharge at Chester. This the master refused, and thereupon discharged at Cathrall's wharf, Philadelphia, and filed this libel for $818.76 freight, attaching 3,000 barrels. The respondent claimed that one-third of the oil business of the port was done at Chester, and it was a custom of the port to discharge at that place. The libelant contended that a custom of five months was not sufficient to affect this contract; that up to January, 1883, 176 vessels had discharged at Chester, and of

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

these the respondent had produced only 22 bills of lading not containing a "Chester clause;" only three vessels had returned to Chester after arriving at the city of Philadelphia, and to these towage expenses had been paid, while no instance was shown where a vessel had returned without towage expenses, which the libelant had offered to receive.

Charles Gibbons, Jr., for libelant.

J. W. Coulston and *Alfred Driver*, for respondent.

BUTLER, J. The defense is not sustained. Upon arrival of the cargo at Philadelphia, where the charter required it brought, the respondent ordered it back to Chester, several miles below, claiming a right to do so under the contract. Conceding Chester to be without the limits of Philadelphia, the respondent sets up a custom, which he says requires it to be treated as within, where the particular commerce to which this contract relates is involved. Without entering upon a discussion of the subject it is sufficient to say that no such custom existed at the date of this contract,—whether one exists now need not be considered. What is necessary to the establishment of such a custom is well understood; the burden of proof is on the party setting it up. In the case under consideration the proof is insufficient. That many outward-bound vessels, under contract to carry oil from Philadelphia, had, within two or three months preceding the date of this charter, loaded at Chester, and inward-bound vessels loaded with oil, or oil casks, had unloaded there, is unimportant. In each instance Chester was directly on the way, and a request so to load or unload tended to the carrier's relief, and would, therefore, be favorably received. No instance is shown of a vessel carrying her cargo back to Chester, under such a contract. The opinions of witnesses cited are of no value.

The libel is sustained, and a decree will be entered accordingly.

THE ALERT.*

(District Court, E. D. New York. February 10, 1883.)

COSTS—DOCKET FEE—"FINAL HEARING" UNDER REV. ST. § 824.

Where a vessel was in custody of the court under process issued against her, and the case was entered in the admiralty docket, a consent was given that the case be discontinued on payment of the amount claimed and libelant's costs. *Held*, that the granting of a motion for an order discharging the vessel from custody and canceling stipulations, was a final hearing under Rev. St. § 824, and the libelant was entitled to a docket fee of $20.

In Admiralty.

Goodrich, Deady & Platt, for libelant.

L. B. Bunnell, for claimant.

BENEDICT, J. This was a proceeding *in rem*. The libel was filed, process issued, the vessel taken into custody, and the case entered in the admiralty docket. Subsequently, an order dismissing the case and discharging the vessel from custody on payment of costs, founded upon a consent of the libelant that the cause be discontinued on payment of the amount claimed and the libelant's costs, was applied for and obtained.

The costs are presented for taxation, and the question is raised whether the libelant can tax a docket fee of $20. The fee-bill allows on a final hearing in admiralty a docket fee of $20, where the amount recovered is over $50. Rev. St. § 824. A distinction is drawn by the statute between admiralty causes and cases at law. In the latter case a docket fee of five dollars only is allowed where the case is discontinued. A docket fee of $20 is allowed in all admiralty cases where there is a final hearing. In *Hayford* v. *Griffith*, 3 Blatchf. 79, it was held by the circuit court that a dismissal of a cause upon the calendar, upon a motion before hearing, for an omission to file security for costs, was a final hearing within the meaning of the statute. The ground of this decision would seem to be that granting an order which disposed of the cause was a final hearing.

In accordance with this decision, the practice of this district has been to allow a docket fee in admiralty causes *in rem*, like the present. In this case the court has possession of the vessel. An order of court is necessary to obtain her release and to effect the cancellation of the libelant's stipulations. A discharge of the vessel does not follow of course. It may be that the pendency of other proceedings

*Reported by R. D. & Wyllys Benedict.

against the same vessel will prevent a release of the vessel upon such a motion. Such a motion, when granted, terminates the cause, so far as the vessel is concerned, and the hearing thereon is deemed a final hearing within the principle of the case of *Hayford* v. *Griffith*, above referred to.

The clerk's taxation of a docket fee of $20 is affirmed.

See *Coy* v. *Perkins*, 13 FED. REP. 111, and note; also *Yale Lock Manuf'g Co.* v. *Colvin*, 14 FED. REP. 269.

THE SAMUEL OBER.

(*District Court, D. Massachusetts.* February 23, 1883.)

1. SEAMEN'S WAGES.
   A vessel under charter is liable for the wages of seamen hired by the charterers, although the owner may not personally be liable therefor.
2. SHIPPING CONTRACTS.
   A seaman is not bound by a clause in his shipping contract unfavorable to his interest if it was concealed from him, or its meaning misrepresented; and if, from any cause, he is unable to read the contract, he may show that it differs from his oral engagement, upon clear proof that the written contract was not read or explained to him.

In Admiralty.

F. Cunningham, for libelants.

H. P. Harriman, for claimant.

NELSON, J. The claimant, Edward E. Small, of Provincetown, chartered the schooner Samuel Ober for a cod-fishing voyage of seven months from May 1, 1882, on the coast of Maine. The libelants, Manuel Francisco, John Francisco, and Manuel Caton, are Portuguese fishermen, living in Provincetown, unable to read or write. They allege that they shipped as fishing hands on the schooner for this voyage, under an oral agreement by which they were to serve for five months from May 1st, and were to receive as wages for such service, respectively, $250, $240, and $210. They left the vessel October 2d, at South-west Harbor, Mount Desert, after having served five months, and now sue for their wages according to the verbal contract. The shipping articles fix their wages at the sums stated, and contain this clause written in below the printed part, above the signatures of the men: