A G E N D A

Meeting

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, November 1, 1980

Harris Hall - Main Meeting Room, 125 East 8th Street (entrance on corner of 8th and Oak)

Eugene, Oregon

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1. Approval of minutes of meeting held 10/18/80

2. Public testimony relating to proposed Oregon Rules of Civil Procedure and Amendments - Tentative Draft dated September 6, 1980

# # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held November 1, 1980

Harris Hall (Main Meeting Room), 125 East 8th Street

Eugene, Oregon

Present:	Carl Burnham, Jr.	Donald W. McEwen
	Anthony L. Casciato	Robert W. Redding
	Wendell E. Gronso	Val D. Sloper
	William L. Jackson	Wendell H. Tompkins
	Laird C. Kirkpatrick	Lyle C. Velure
	Harriet R. Krauss	William W. Wells
	Berkeley Lent	
Absent:	Darst B. Atherly	Garr M. King
	John Buttler	Charles P.A. Paulson
	John M. Copenhaver	Frank H. Pozzi
	Austin W. Crowe, Jr.	James C. Tait
	William M. Dale, Jr.	David R. Vandenberg, Jr.

The meeting was called to order at 9:35 a.m. by Chairman Don McEwen.

Judge Winfrid K. Liepe, of the Lane County District Court, recommended that the first sentence of Rule 70 A. be changed by deletion of the language shown in brackets: "Every judgment shall be in writing plainly labelled as a judgment [and set forth in a separate document, except judgments need not be set forth in a separate document if the local rules of a court so provide]." He said that in many cases it was useful to have some other procedural step combined with a judgment in the same document. He stated this would save paper and storage space. He said the rule should be uniform for all courts of the state.

Judge Liepe said there appeared to be an inconsistency between subsections C.(1) and C.(2) of Rule 67. He said it was not clear whether the limitation of a judgment to the amount demanded as damages applied to default judgments under 67 C.(1). He also said that it was not clear what must be included in the reasonable notice referred to under 67 C.(1).

Judge Liepe said that Rule 68 C. should be clarified to indicate whether the uniform attorney fee procedure applied to a claim for attorney fees where the right to such fees arose from a contractual provision.

Judge Liepe suggested that the Council consider whether any rule should allow a clerk to enter a default judgment without court order. He suggested that the rule should at least allow a court not to authorize its clerk to enter such default judgments.

Judge Liepe finally asked whether it was good policy to require service again upon the Department of Motor Vehicles as set up in the amendment to ORCP 7 C.(4)(a). It was suggested that this was done to provide a record of service that could be consulted. Judge Liepe suggested the Council consider whether it wanted the DMV to send the notice of service to insurance carriers.

Sgt. Stanley D. Young, in charge of the Civil Division, Jackson County Sheriff's Office, Medford, addressed the Council regarding Rule 84 on attachments. He asked the Council to be sure to preserve an emergency procedure for issuance of provisional process without hearing when there is danger of loss of the property to be attached.

Mr. John M. Reed, Springfield, addressed the Council. He asked the Council to be sure the procedural system operated in an inexpensive manner that did not result in excessive fees being paid to attorneys. He suggested that the present system of pleading and practice forms was too complicated and should be rewritten in plain English found in Webster's dictionary. Mr. Reed continued to make general remarks relating to the legal system and legal profession. He was asked to confine his statements to comments or suggestions relating to the rules of civil procedure. He did not do so and was asked to finish his statement to allow other speakers to address the rules. Mr. Reed suggested that he would submit written comments and would like an opportunity to address further general remarks to any Council members who cared to stay on after other witnesses had testified.

Mr. John P. Graff, Eugene, testified. He raised a question whether the method of service for a show cause order was specified under Rule 83 G.(1). He suggested the rule should allow for service by some method other than personal service.

He stated that he was concerned about the preference for corporate surety bonds in Rule 82 A.(5). He stated that many people could not get a corporate surety bond. He also asked that Rule 82 A.(6) make clear that no notice or hearing be required before the judge is authorized to order that a non-corporate bond be used. He said this could be done by amending 82 A.(6) to read: "upon an ex parte showing of good cause."

Mr. Graff also pointed out that the last sentence of 69 B.(1) seems inconsistent with Rule 68 C.(4)(a)(i). Rule 69 authorizes the clerk to enter judgment for disbursements and attorney fees on default, but 68 C.(4)(a)(i) only allows entry of attorney fees and disbursements after service of a statement of such fees and costs upon parties not in default for failure to appear.

Diana Godwin, Eugene, spoke on behalf of the Oregon Savings and Loan League. She stated that written comments relating to proposed changes to Rule 32 had previously been submitted to the Council. She stated that the Savings and Loan League particularly objected to the following changes:

(1) Elimination of prelitigation notice 30 days before commencement.

(2) Elimination of the requirement of individual notice to class members who can be identified but who have claims less than $100. She doubted the constitutionality of the provision and said it would leave a defendant who won with a judgment of questionable effect against class members who did not get notice and a defendant who lost with a danger of double recovery if fluid damages were allowed. She also suggested the $100 figure was arbitrary and asked who decided if claims exceeded $100.

(3) The inclusion of a provision which allowed the court to require the defendant to pay notice costs or send notices to the class. She said the standard for allowing this was too vague and the procedure was unconstitutional. She said it would require an elaborate double trial. She stated it was doubtful whether an interlocutory appeal could be had from the order directing defendant to pay notice costs. If defendant won, the defendant probably could never get the notice costs back.

(4) Elimination of the requirement that defendants with damage claims opt-in as a condition to inclusion in a judgment. She said this was a substantive change that resulted in authorization for fluid class recovery and that a fluid class recovery would be a new remedy.

Upon motion of Lyle Velure, seconded by Judge Tompkins, the minutes of the meeting held October 18, 1980, were approved as submitted.

The meeting adjourned at 11:30 a.m.

(After the meeting, Mr. John Reed again addressed some members of the Council who remained to listen.)

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

Law Offices

Ringo, Walton, Eves and Gardner, P.C.

Robert G. Ringo
James W. Walton
S. David Eves
Robert S. Gardner
J. Britton Conroy

October 21, 1980

Mr. Fredric R. Merrill
Council on Court Procedures
University of Oregon Law School
Eugene, OR 97401

RE: Medical Examinations

Dear Mr. Merrill:

One thing that is very bothersome is the defense getting to choose their physician without the plaintiff having the opportunity to object. Recent suits have been filed against a Dr. Clinton McGill for his conduct in medical examinations. It would only seem fair that this should be somewhat under the control of the court. The plaintiff should be allowed upon a sufficient showing to object to a physician.

I would appreciate your bringing this topic before the Council on Court Procedures. This is something that should be solved by the council and should not have to reach legislation. I will be glad to answer any questions that you might have.

Best regards,

Robert G. Ringo

vp
cc: Mr. Frank Pozzi

Distribute at Council meeting 11/1/80

605 S.W. Jefferson Avenue • P.O. Box 1067 • Corvallis, Oregon 97330 • (503) 757-1213

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JOAN O'NEILL
TIMOTHY E. BROPHY
ROBERT D. NEWELL
EDWARD SEAN DONAHUE
EDWARD CRAIG TONKIN

October 27, 1980

TELEPHONE
(503) 221-0550

SUBJECT: Ida O. Hurst v. Tri-Met
Our File No.: 91-21-129

Patient: Ida O. Hurst

Kaiser Permanente
10180 S.E. Sunnyside Rd.
Clackamas, Oregon

Attention: Peggy Smith
Medical Records

Dear Ms. Smith:

We represent Tri-Met in a claim brought against it by Ida Hurst. We forwarded our routine letter for records of her medical treatment and hospitalization. You called to tell us that as she was treated as an out-patient with clinic records only, you were not required under 44E to release them. On one other occasion, Kaiser Permanente has taken the same position that emergency treatment and anything that is not overnight treatment does not have to be produced. When I asked the person who called me the reason for this, as Kaiser Permanente is the only hospital that takes this stand, to my knowledge, the person advised me that she knew you were the only hospital taking this position, but that your attorneys had advised you to do so.

After the refusal of the Hurst records, I wrote to the Executive Director of the Council on Court Procedures, Fredric R. Merrill, to ask the Council on Court Procedures to include very clear language so there is no question that all medical records, whether they are emergency treatment, clinical treatment or whatever, can be produced in the routine course of discovery. Enclosed please find Mr. Merrill's letter. He informs us that in 1979 the Oregon Statutes, specifically ORCP 44E. was revised to add the language "or provision of medical treatment by the hospital of the injured person" to solve the very problem that we are facing with Kaiser Permanente. The Legislature was under the impression that

it had added language which would provide access to hospital records. Please advise us within 10 days of the date of this letter whether Kaiser Permanente still takes the position that emergency records, clinic records and any records that do not involve overnight treatments, do not have to be produced under ORCP 44E. If I have not heard from you by that date, I will assume that your silence means you have not changed your position. As you can see from Mr. Merrill's letter, the matter will then be presented to the Council on Court Procedures.

I do not know what prompts Kaiser Permanente to take this position. In the instant case they have taken it even though they have given notice of a lien for all the treatment, the records of which they decline to provide. I would appreciate a direct call from your attorney who has advised you to take this position.

Thank you for your attention to this request.

Very truly yours,

BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS

Joan O'Neill

JO;cls
encl.

cc: Fredric R. Merrill, Executive Director
Council on Court Procedure

Law Offices

Ringo, Walton, Eves and Gardner, P.C.

Robert G. Ringo
James W. Walton
S. David Eves
Robert S. Gardner
J. Britton Conroy

October 28, 1980

Mr. Frederic Merrill
Council on Court Procedures
University of Oregon Law School
Eugene, OR 97401

RE: Council on Court Procedures -- Bar resolutions

Dear Mr. Merrill:

I appreciated receiving your telephone call and discussing the Bar resolutions with the questions of allowing the jury to separate. The reasoning was that in many rural counties people have a long way to travel and it is extremely difficult for them to stay late at night. In addition, we find over and over again that there are two job families involved and one of the spouses is required to be at the residence while the other is working swing shift or something similar to that situation. Some of the judges believe that they have the authority and others do not. All in all, it seems that allowing them to separate, under suitable instructions, during deliberations is just as valid as allowing them to separate under suitable instructions during the trial.

As this is a Bar resolution, the State Bar will be introducing a bill. There certainly should not be any cross effort between the Bar and the Commission on Court Procedure. So I would hope that this could merely be accomplished through the Commission. I will be glad to help in any way that I can.

The other question is in regard to the Bar resolution for removing the 180 day notice to municipal bodies. Likewise, I feel that this is merely a procedural matter and not a statute of limitations matter; and this is something that the Commission should take up.

605 S.W. Jefferson Avenue • P.O. Box 1067 • Corvallis, Oregon 97330 • (503) 757-1213

Thank you for the opportunity to review these matters with you.

Very truly yours,

Robert G. Ringo

vp

cc: Mr. Frank H. Pozzi
Mr. Clayton Patrick

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WENDELL GRAY
OF COUNSEL

October 28, 1980

Fred Merrill, Esq.
University of Oregon
School of Law
Eugene, Oregon 97403

Re: ORCP 7 Suggested Changes

Dear Professor Merrill:

Please bring to the Council's attention my concern over the suggested amendment to ORCP 7 D.(3)(e) providing for service on an agent of foreign steamship owners and operators authorized to solicit cargo, etc.

My concern is twofold:

1. Even though the proposal may benefit our firm's practice, I seriously doubt that the Council should establish the precedent of incorporating proposed special interest rules without previously consulting with the affected Bar committees.

2. In addition, I have some doubts that the proposed rule change is constitutional. Unfortunately, I have not had the opportunity to consider all the implications of the proposal or research the issue. I point out that if the rule is adopted counsel may be misled into the trap of invalid service and the statute of limitations having run. As an example of this nightmare I enclose a copy of Judge MacMahon's decision in Italia Assicurazioni S.P.A. v. SS ST. OLGA, 1974 AMC 2209 and 1975 AMC 2004 (USDC, SDNY, 1975).

Very truly yours,

Lloyd W. Weisensee

LWW/bsw
Enclosure

cc: Frank Pozzi, Esq.
Clarence R. Wicks, Esq., Chairman, Federal Practice & Procedure
James L. Knoll, Esq., Chairman, Practice & Procedure
John Brooke, Esq., Admiralty Section
Austin W. Crowe, Esq., President OADC

ITALIA ASSICURAZIONI S. P. A. AND NORTHEAST PETROLEUM CORP., *Plaintiffs*,

v.

S S *ST. OLGA*, ST. OLGA MARITIME CO., LTD., *Defendants*.

United States District Court, Southern District of New York, May 8, 1975.

74 Civ. 712-LFM.

PRACTICE—137. "Doing Business."

Where defendant foreign shipowner terminated its relationship with N. Y. steamship agency a year before plaintiff's cargo damage complaint was filed, defendant cannot be held to be "doing business" in N. Y.

PRACTICE—1922. Long Arm Statutes.

Fact that foreign shipowner's N. Y. agent collected charter hire payments in N. Y. does not constitute a transaction of business by shipowner within the state, especially since plaintiff's cargo damage action does not arise out of the payment arrangement.

YORKSTON W. GRIST (HAROLD M. KINGSLEY), *for Plaintiffs*.
HILL, BETTS & NASH (ROBERT W. MCLEAN), *for Defendants*.

LLOYD F. MACMAHON, D. J.:

Defendant, St. Olga Maritime Co., Ltd., moves under Rule 12(b)(2), Fed.R.Civ.P., to dismiss the complaint for lack of jurisdiction *in personam*. This action under the Carriage of Goods by Sea Act, 46 U. S. Code, sec. 1300 *et seq.*, seeks damages for cargo shortage and delay.

Plaintiff predicates personal jurisdiction on New York's long-arm statute. CPLR secs. 301 and 302(a)(1) (McKinney 1972). Jurisdiction over defendant under sec. 301 requires a showing that defendant or its agent is "doing business" in New York.

Plaintiff contends that defendant is "doing business" through its agent, Karavias (U. S. A.) Inc. ("Karavias"), which operates in New York. The chartering manager of Karavias avers that Karavias' agency relationship with defendant terminated on February 15, 1973, approximately a year before the complaint in this action was filed. That averment is uncontradicted.

We conclude, therefore, that defendant does not have an agency relationship with Karavias and cannot be held to be "doing business" in New York.

Plaintiff also attempts to establish *in personam* jurisdiction under sec. 302(a)(1), which requires a showing that defendant transacted business in New York and that the cause of action arose out of such transaction of business.

It is undisputed that the present action is for shortage and delay in the shipment of 207,049 barrels of fuel oil from Italy to Massachusetts. Plaintiff concedes that the only contact defendant had with New York is that the 1971 charter agreement provided for payment to defendant through Karavias, defendant's agent at that time. This payment arrangement is insufficient to constitute a transaction of business by defendant in New York through its agent. *Del Bello v. Japanese Steak House, Inc.*, 43 App. Div.2d 455 (4th Dep't), 352 N. Y. S.2d 537 (1974). In any event, the claim for shortage and delay does not arise out of the payment arrangement. Plaintiff, therefore, fails to show jurisdiction over defendant under sec. 302(a)(1).

Accordingly, defendant's motion to dismiss the complaint for lack of jurisdiction *in personam* is granted.

So ORDERED.

NORTH EAST SHIPPING CORPORATION, *Plaintiff*,

v.

GOVERNMENT OF PAKISTAN, *Defendant*.

United States District Court, Southern District of New York, April 23, 1975.

73 Civ. 4750.

JURISDICTION—135. Sovereign Immunity.

State Department's refusal to suggest immunity for Pakistan Government is binding upon court, which can therefore decide whether that Government is a proper party defendant to a claim arising out of commercial litigation.

Previous proceedings reported at 1973 AMC 940 (Arb.), 1973 AMC 1612 (SDNY, 1973), 1974 AMC 900 (SDNY, 1974).

BURLINGHAM UNDERWOOD & LORD (MICHAEL MARKS COHEN), *for Plaintiff*.
DUNN & ZUCKERMAN (MORTON & ZUCKERMAN), *for Defendant*.

CHARLES M. METZNER, D. J.:

The Government of Pakistan has moved to dismiss the complaint in this action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it has sovereign immunity in this case. Defendant also requests such other and further relief as may be just and proper.

opining against and even criticizing the President for placing the armed forces in a state of alert, but the experts are to a certain extent irresponsible advisers and the "buck" stops in the hands of the Executive. Most certainly in this limited case, the "buck" stops in the hands of the Owners, where it is placed by the Charter Party.

It can be argued that Clause 50 prescribes remedies in the case the Owners withhold their consent or that it pertains to voyage charters. This clause defines also the rights of each party which appear to be clear. The Owners can withhold their consent in case of *any war* and the Charterers have the right to nominate substitute ports which the Owners, as signers of the Bills of Lading or although having received orders to proceed to a port which they have the right to reject, must accept, receiving the prescribed compensation.

It is well known in the trade that time charterers in most, if not in all cases, even when they are at the same time shippers, draw a voyage charter to cover each carriage. In my opinion Clause 50 is tailored to cover all such eventualities, voyage and time charters.

A comparison of this present "Standtime" type Charter Party with "Esso Time 1966" and "Esso Time 1969" shows that the War Clause is identical in all three. However the War Risks Clause of the "STB Time" drawn more recently is different. It reads:

> ". . . Vessel shall not, however, be required, without the consent of Owners, *which shall not be unreasonably withheld*, to enter any port or *zone which is involved in a state of war* . . ." [emphases mine]

It is interesting that the term "any war zone" of the "Standtime" Charter Party is changed to "zone which is involved in a state of war" and the "deemed" of the "Standtime" is changed to "consent . . . which shall not be unreasonably withheld".

To rule that the Charterers in this present case did not breach the Charter Party in ordering the vessel to enter the Persian Gulf while the Gulf States were at war, without the consent of the Owners, is equivalent to substituting the "Standtime" Charter Party by the "STB time" and to ignoring Clause 50. This, I believe, is not within the powers of the arbitrators.

Otherwise I am in agreement with the Majority opinion.

ITALIA ASSICURAZIONI S.P.A. and NORTHEAST PETROLEUM CORP., *Plaintiffs*,

v.

S/S ST. OLGA, ST. OLGA MARITIME CO., LTD., *Defendants*.

United States District Court, Southern District of New York, July 8 and September 13, 1974
74 Civ. 712-LFM

ARBITRATION—111. Agreement to Arbitrate Future Disputes
CHARTER—24. Actions and Arbitrations

Charter arbitration clause does not bind cargo plaintiffs who are not parties to the agreement to arbitrate.

AGENTS AND BROKERS—112. Scope of Agency
JURISDICTION—137. Doing Business
PRACTICE—191. Process, in General

Absent any showing that alleged N. Y. agent had expressed or implied authority to accept process for defendant Liberian shipowner, service on the agent was not effective to give SDNY personal jurisdiction over defendant.

BILLS OF LADING—1953. Time to Sue

Cargo damage plaintiffs, who failed to sue within the one-year COGSA period, must demonstrate that the time limitation was either waived or tolled. *Held:* Letters from carrier's P & I Club, extending suit time in favor of cargo underwriters, do not apply to persons not specifically referred to therein.

YORKSTON W. GRIST, *for plaintiff*.
HILL, BETTS & NASH (ROBERT W. MULLEN), *for defendants*.

LLOYD F. MACMAHON, D.J.:

This is a motion to dismiss, pursuant to Rule 12(b), Fed. R.Civ.P. The brief and rather cryptic complaint states that "[t]his claim relates to shortage, damage and consequential damages for delay in respect to a shipment of 207,049 barrels of fuel oil in bulk moving aboard the *S/S St. Olga* to Salem, Massachusetts, arriving on or about December 10, 1971." We assume that this is a claim for shortage and delay arising under the Carriage of Goods by Sea Act, 46 U. S. Code §1300 *et seq.*

Defendant moves to dismiss on the following grounds: (1) that the action is barred by the statute of limitations; (2) that there is no personal jurisdiction over defendant; and (3) that court lacks jurisdiction over the subject matter of the controversy.

1974 A. M. C.

We treat first defendant's contention that we have no subject matter jurisdiction. Defendant claims that the arbitration clause in the charter party ousts this court of jurisdiction since plaintiffs are bound to arbitrate this dispute in London, in accordance with the terms of the charter party. We disagree.

While it is true that the charter party contains an arbitration clause, it can by no stretch of the imagination be said to bind plaintiffs. The charter party is between defendant St. Olga Maritime Co., Ltd. and Montecatini Edison S.P.A. Neither plaintiff is a party to the agreement to arbitrate, and, so, the charter party does not oust us of subject matter jurisdiction.

Defendant's contention that this action should be dismissed for lack of personal jurisdiction has more merit. Defendant claims to be a corporation organized under the laws of Liberia and, so, not subject to service of process in New York.

Plaintiffs claim jurisdiction over defendant by service of process on the secretary of Karavias, Inc., an alleged agent of defendant. To prove this agency relationship, plaintiffs rely on the Greek Shipping Directory. It lists Karavias, Inc. as defendant's New York office but gives no further information about the alleged agency relationship.

Defendant argues that Karavias' relationship with defendant terminated on February 15, 1973, more than a year before process was served. In support of this contention, defendant relies upon an affidavit of the chartering manager of Karavias, Inc. Defendant also notes that the marshal's return of service indicates that service was accepted under the protest of Karavias' secretary, who claimed that Karavias no longer represented defendant.

It appears that we need not reach the issue of whether the alleged agency relationship was terminated prior to service, for plaintiffs have failed to demonstrate that the nature of the alleged relationship would permit defendant to be served through Karavias. It is clear that "the mere appointment of an agent, even with broad authority, is not enough; it must be shown that the agent had specific authority, express or implied, for the receipt of service of process." 2 J. MOORE, *Federal Practice* ¶4.22[1] (2d ed. 1974); *Schultz v. Schultz*, 436 F.2d 635 (7 Cir. 1971); *Nelson v. Swift*, 271 F.2d 504 (D.C. Cir. 1959).

Accepting, *arguendo*, plaintiffs' position that the agency relationship had not lapsed before service was effected, all that is shown is that Karavias was defendant's agent for an unspecified purpose. P[illegible] make no showing that Karavias had express authority to accept process for defendant and set forth no facts from which such

2209.

authority may be implied. Absent such a showing, we must conclude Karavias had no authority to accept process for defendant. Plaintiffs have not shown that defendant was served with process, and we must, therefore, dismiss the complaint.

Furthermore, as to plaintiff Northeast Petroleum Corp., defendant also prevails on its statute of limitations argument. The Carriage of Goods by Sea Act provides a one year statute of limitations for cargo damage actions. 46 U. S. Code §1303(6). The operative one-year period commences at the time the goods were, or should have been, delivered.

Here, the goods were delivered on December 10, 1971 and the action was not commenced until February 13, 1974, more than a year after the time for commencing suit expired. See *United States v. South Star* 1954 AMC 418, 210 F.2d 44 (2 Cir. 1954); *Monarch Indus. Corp. v. American Motorists Ins. Co.*, 1967 AMC 2488, 276 F. Supp. 972 (S.D.N.Y. 1967). Plaintiffs must demonstrate that the period of limitations was either waived or tolled, or they are barred from prosecuting this action. *United Fruit Co. v. J. A. Folger & Co.*, 1959 AMC 2224, 270 F.2d 666 (5 Cir. 1959), *cert. denied*, 362 U. S. 911, 1960 AMC 1717 (1960); *Noel v. Baskin*, 131 F.2d 231 (D. C. Cir. 1942); *Monarch Indus. Corp. v. American Motorists Ins. Co., supra.*

Plaintiffs claim that the statute of limitations was tolled on consent of the defendant. They rely on five letters, translated from Italian, in support of this contention. The date on the first of these letters is October 30, 1972, and it purports to be a confirmation of an "extension of three months . . . for the claim of" the alleged shortage and damage. The four subsequent letters are similar in nature and purport to continue these extensions up until February 15, 1974. Plaintiffs contend that this action is timely since defendant waived or tolled the statute of limitations until February 15, 1974 by granting these extensions.

These letters were written by defendant's Italian Protection and Indemnity Club representatives on behalf of the shipowners. They confirm time extensions to plaintiff Italia Assicurazioni S.P.A., but none of the letters so much as mentions plaintiff Northeast Petroleum Corp.

We find, therefore, that as to plaintiff Italia Assicurazioni S.P.A., the statute of limitations was tolled by these letters until February 15, 1974 and, so, its action was timely filed. See *United Fruit Co. v. J. A. Folger & Co., supra; Monarch Indus. Corp. v. [illegible]erican Motorists Ins. Co., supra.* Plaintiff Northeast Petroleu[illegible]orp., however,

never received a time extension from defendant, and it cannot claim the benefit of the extension granted to its co-plaintiff. *Monarch Indus. Corp. v. American Motorists Ins. Co., supra.* Its action is, therefore, barred by the statute of limitations since it was filed more than a year after the statute expired.

Accordingly, defendant's motion to dismiss the complaint is granted.

ON MOTION FOR REARGUMENT,

September 13, 1974

The within motion for reargument is granted.

Upon reargument, we modify our order of July 8, 1974 to the extent that plaintiff Italia Assicurazioni's service upon the defendant is quashed in lieu of dismissal of its complaint. In all other respects, we adhere to our opinion and decision of July 8, 1974.

Plaintiff is directed to effect service upon defendant on or before October 15, 1974.

EMPIRE ALUMINUM CORPORATION, *Plaintiff*

v.

SS KORENDIJK, HOLLAND-AMERIKA LIJN etc., *Defendants*

EMPIRE ALUMINUM CORPORATION, *Plaintiff*

v.

OLD DOMINION FREIGHT LINE, *Defendant*

United States District Court for the Southern District of Georgia, Savannah Division, Sept. 5, 1973

Civil Action No. 2939
Civil Action No. 2984

BILLS OF LADING 143. Exceptions—1966. Damage by Rain—1713. Damage Before and After Discharge.

EVIDENCE—115. Presumptions-CARGO DAMAGE-Aluminum Sheets AFFREIGHTMENT—18. Connecting Carrier.

In a consolidated case of damage to aluminum sheets, evidence was both vague and inconclusive as to where the damage was caused. The court, therefore, relying largely upon presumptions and circumstantial evidence, found that the sheets were damaged by rain while on an inland motor carrier's trucks after discharge from the ocean carrier.

An inland motor carrier under the law of Georgia is bound as at common law to use extraordinary care in protecting goods in its custody.

BILLS OF LADING—191. Concealed Damage—142. Apparent Good Order —143. Exceptions, Clean B/L—121. U. S. Cogsa.

Notation in a bill of lading of receipt in apparent good order and condition and the absence of exceptions at out-turn, refer only to the external, not the internal, condition of the goods. Such notations constitute *prima facie* evidence of good condition, and the carrier has the burden of rebutting this evidence and proving that the goods were not damaged while in his possession.

BILLS OF LADING—1952. Notice of Claim—143 Exceptions—Clean Bill of Lading

Unless written notice of concealed damage is given within three days after delivery and removal of goods at the port of discharge, such delivery and removal constitute *prima facie* evidence of delivery as described in the bill of lading.

SPENCER CONNERAT, JR. (CONNERAT, DUNN, HUNTER, HOULIHAN, MACLEAN & EXLEY), *for Empire Aluminum Corp.*

GUSTAVE R. DUBUS, III (LAWTON, SIPPLE & CHAMLEE), *for S. S. KORENDIJK et al.*

MARSHALL R. WOOD (FALLIGANT, DOREMUS, KARSMAN, KENT & TOPOREK), *for Old Dominion Freight Line.*

ALEXANDER A. LAWRENCE, Ch.J.,

JOINT COMMITTEE ON THE JUDICIARY
347 STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8833

October 29, 1980

Professor Fred Merrill
University of Oregon School of Law
Eugene, OR 97403

Dear Fred:

This is to inform you that the Judiciary Committee is proposing an amendment to ORCP 59C. I am enclosing a copy of the amendment.

The reason for the proposed amendment is that the Evidence Code does not allow a sitting juror to be called as a witness.

Sincerely yours,

Joan

Joan Robinson
Legal Counsel

JR/c
Encl.

(c) May require the production of records, books, papers, contracts and other documents.

(2) Each witness who appears before the supervisor under a subpena shall receive the fees and mileage provided for witnesses in civil cases in the circuit court.

(3) If a person fails to comply with a subpena so issued or a party or witness refuses to testify on any matters, the judge of the circuit court for any county, on the application of the supervisor, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpena issued from such court or a refusal to testify in such court.

Section 97a. ORCP 59C is amended to read:

C. Deliberation.

C.(1) Exhibits. Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions.

C.(2) Written statement of issues. Pleadings shall not go to the jury room. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

C.(3) Copies of documents. Copies may be substituted for any parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

C.(4) Notes. Jurors may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.

C.(5) Custody of and communications with jury. After hearing the charge, the jury shall retire for deliberation. When they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon their verdict or are

discharged by the court. Unless by order of the court, the officer must not suffer any communication to be made to them, or make any personally, except to ask them if they are agreed upon a verdict, and the officer must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. Before any officer takes charge of a jury, this subsection shall be read to the officer who shall be then sworn to follow its provisions to the utmost of such officer's ability.

C.(6) Juror's use of private knowledge or information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to other jurors[, except when called as a witness,] nor shall the juror be governed by the same in giving his or her verdict.

SECTION 98. ORS 41.020, 41.030, 41.040, 41.050, 41.060, 41.070, 41.080, 41.090, 41.100, 41.120, 41.130, 41.140, 41.150, 41.210, 41.220, 41.230, 41.240, 41.250, 41.260, 41.280, 41.310, 41.320, 41.330, 41.340, 41.350, 41.360, 41.410, 41.420, 41.430, 41.440, 41.450, 41.460, 41.470, 41.480, 41.610, 41.640, 41.650, 41.670, 41.680, 41.690, 41.700, 41.710, 41.720, 41.730, 41.810, 41.820, 41.830, 41.840, 41.850, 41.860, 41.870, 41.890, 41.900, 44.020, 44.030, 44.040, 44.050, 44.060, 44.070, 44.095, 44.310, 44.330, 44.340, 44.350, 44.360, 45.510, 45.520, 45.530, 45.540, 45.550, 45.560, 45.570, 45.580, 45.590, 45.600 and 45.630 are repealed.

SECTION 99. This Act amends statute sections repealed by chapter 842, Oregon Laws 1977. Any statute section amended by this Act that is repealed by chapter 842, Oregon Laws 1977, remains subject to the operative date of the repeal in chapter 842, Oregon Laws 1977, if the repeal becomes operative, and to applicable provisions of