In the

# Supreme Court of the United States

COOPER STEVEDORING COMPANY,

Petitioner,

vs.

FRITZ KOPKE, et al.,

Respondents

Docket No. 73-726

Pages 1 thru 47

Washington, D. C.

April 15 & 16, 1974







HOOVER REPORTING COMPANY, INC.
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IN THE SUPREME COURT OF THE UNITED STATES

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| COOPER STEVEDORING COMPANY, Petitioner | : | No. 73-726 |
| v. | : | |
| FRITZ KOPKE, ET AL, Respondents | : | |

Washington, D. C.

Monday, April 15, 1974

The above-entitled matter came on for argument at 2:53 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH D. CHEAVENS, ESQ., Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002, for the Petitioner.

BRUCE DIXIE SMITH, ESQ., 800 Bank of the Southwest Bldg, Houston, Texas 77002, for the Respondents.

# I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-726, Cooper Stevedoring against Kopke.

Mr. Cheavens, you may proceed.

ORAL ARGUMENT OF JOSEPH D. CHEAVENS

ON BEHALF OF THE PETITIONER

MR. CHEAVENS: Mr. Chief Justice, and may it please the Court: This case is an admiralty case brought beofre the Court on grant of certiorari to the United States Court of Appeals for the Fifth Circuit.

The broad issued posed by the case concerned the write of contribution in admiralty between joint tortfeasors. Before we reach and discuss that broad issue, I think it behooves us first to examine in some detail the particular factual and procedural context in which this case is presented to the Court.

The story of the case, as it were, begins in Mobile, Alabama, where my client, Cooper Stevedoring Company, loaded a cargo of palletized crated fabric aboard the vessel. The evidence shows that that loading was done under the supervision of the chief officer of the vessel and the super cargo, an employee of the time charter.

Upon completion of the discharge, the stowage performed by my client was inspected and approved by the vessel.

The cargo, the evidence showed, was not secured at

Mobile in any way to prevent it from shifting at sea, nor was it covered with dunnage.

The ship sailed and went to Houston. There the plaintiff, Mr. Troy Sessions, who was one of the first longshoremen to work on top of the Mobile-stowed cargo -- he was carrying a sack of cargo, and he stepped on a piece of paper which obscured a crack between the crates which had been loaded in Mobile. His foot went in the crack and he sustained a back injury.

As a result he, first, of course, drew compensation benefits under the United States Longshoremen and Cargo Workers Compensation Act. In connection therewith he also brought an action against the vessel owner. The vessel then filed a rather standard Ryan indemnity action against both Mr. Sessions' employer, Mid-Gulf Stevedoring in Houston, and against my client, Cooper Stevedoring, in Mobile.

It is important to notice two things at this point. First, that Mr. Sessions did not sue my client Cooper directly, although there was no statutory bar for his having done so.

Secondly, the indemnity action asserted by the ship against both Mid-Gulf and Cooper was an action purely for breach of warranty. It was not an action seeking contribution.

QUESTION: This was before the recent amendments to the --

MR. CHEAVENS: That is correct, your Honor.

QUESTION: -- Longshoremen and Harbor Workers Act? Today could there have been an indemnity action against, whatever it is called, Mid-Gulf?

MR. CHEAVENS: Not against Mid-Gulf. Such an action was expressly prohibited by the '72 amendments. But the Ryan action against my client would still have survived.

QUESTION: It was not affected by that, yes.

MR. CHEAVENS: Those amendments would merely have said that Mr. Sessions no longer has a right to recover against the vessel for unseaworthiness. He must prove negligence.

QUESTION: Uh-hmm.

MR. CHEAVENS: But having proved negligence, the vessel would still be free to prosecute either in that action on in a separate case, an action for indemnity against Cooper.

QUESTION: Against you, but not against Mid-Gulf.

MR. CHEAVENS: That's correct.

QUESTION: Under the amendment law.

QUESTION: So now Sessions has to go under the Jones Act basically?

MR. CHEAVENS: No. The Jones Act gives a right of recovery for employees --

QUESTION: Seamen.

MR. CHEAVENS: Yes, seamen. This man is not a seaman; he is a so-called Sieracki seaman. Employees are seamen, which until the '72 amendment, he had the benefit of

the warranty of unseaworthiness which has always been applied to seamen.

QUESTION: Under Sieracki.

MR. CHEAVENS: Under Sieracki.

QUESTION: Holcyon v. Haenn.

QUESTION: So now he no longer has a Sieracki claim.

MR. CHEAVENS: That's correct.

QUESTION: But only an action for negligence against --

MR. CHEAVENS: Only an action for negligence against -- that's his sole action -- against the vessel.

QUESTION: Against the ship. But that's not a Jones Act because he's not a seaman.

MR. CHEAVENS: No, because he is not a member of the crew of the vessel.

Shortly before the trial of the case, Mid-Gulf, the Houston stevedore, took over the defense of the vessel and in so doing it agreed to indemnify the vessel fully.

Now, this point has been challenged in Respondents' brief. They have asserted that no place does this appear of record. I would cite the Court to page 118 of the Appendix where Mr. Smith testified concerning this. The District Court made a specific fact-finding on page 164. If there is any question about it, on the final page of the brief filed in the Fifth Circuit on behalf of the vessel--the Fifth Circuit has a local Rule 13-A which requires a refusal statement in

order for the court to evaluate possible disqualification. The circuit requires each counsel to state who the real party in interest in the case is. That refusal statement says: Texas Employers Insurance Association, which the record shows is Mid-Gulf's insurer -- "Texas Employers Insurance Association is obligated by a contract of indemnity to pay any final judgment which may be rendered against the Appellees and cross Appellants in this case." The Appellees and cross Appellants in the Fifth Circuit, of course, being the vessel. Upon conclusion of the trial of the case, the District Court made these findings: The vessel was found unseaworthy and the vessel owner negligent in three respects; first, in the failure to secure the crates in Mobile; secondly, in failure to dunnage off the cargo; and thirdly, because of the presence of this piece of paper which obscured the dangerous condition.

The District Court also found that Cooper was negligent with respect to the failure to dunnage off and the failure to secure.

Now, I think it's important at this point to carefully examine the precise legal significance of those findings.

MR. CHIEF JUSTICE BURGER: The Court will resume at 10 o'clock in the morning.

[Whereupon, at 3 o'clock p.m., the oral argument in the above-entitled matter was recessed, to recommence on Tuesday, April 16, 1974.]