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In the

Supreme Court of the United States

BRUNETTE MACHINE WORKS LTD.,

Petitioner,

vs.

KOCKUM INDUSTRIES, INC.,

Respondent.

No. 70-314

Washington, D. C.
March 23, 1972

Pages 1 thru 28

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KOCKUM INDUSTRIES, INC.,

Respondent.

Washington, D. C.,

Thursday, March 23, 1972.

The above-entitled matter came on for argument at 10:42 o'clock, a.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:

J. PIERRE KOLISCH, ESQ., Kolisch, Hartwell & Dickinson, 1004 Standard Plaza, Portland, Oregon 97204; for the Petitioner.

HARRY M. CROSS, JR., ESQ., Seed, Berry, Dowrey & Cross, 1502 Norton Building, Seattle, Washington 98104; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'il hear arguments next in No. 70-314, Brunette Machine Works against Kockum Industries.

Mr. Kolisch, you may proceed whenever you're ready.

ORAL ARGUMENT OF J. PIERRE KOLISCH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KOLISCH: Mr. Chief Justice, and may it please the Court:

The question presented for review is which of two federal venue statutes control in a patent infringement suit.

One of them, 1391(d) is the venue statute which controls venue generally. And this states that an alien may be sued in any district.

The other statute, 1400(b), specifically covers the situation in patent infringement action, and it provides that such an action may be brought in the district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Q Now, with reference to that last phrase of the statute, both factors must be present, is that correct?

MR. KOLISCH: Yes, it is "and a regular and established place of business."

However, in the particular case which the Court now

has before it, that is not important. The thing that is significant here is: what was the history of the special venue statute? Now, this Court has passed on this special venue statute, which is now known as 1400(b), three times. There have been three different occasions in which the Court was asked to expand venue in patent cases.

Q Well, would you explain for me why it isn't important? The last part of it.

MR. KOLISCH: It is not important in this case because there isn't any question that under the special venue statute the defendant here is clear. In other words, if the special venue statute controls, there is no venue; if the general venue statute controls, there is venue.

So it's just a question of may an alien -- you see, we represent a Canadian defendant, and it's a question of whether an alien may be sued any place under the general venue statute, or may the defendant claim the special venue statute.

Now, there is no argument that we do not, that the defendant does not qualify under the special venue statute. So we have a situation here: which controls, general venue or special venue?

Q What's the consequence on venue if your position is correct?

MR. KOLISCH: If my position is correct, we are not

subject to suit.

Q Anywhere in the United States?

MR. KOLISCH: Correct.

Q Therefore it seems to me to cut the other way, that it is very important in your case.

MR. KOLISCH: I thought you asked me, Mr. Justice Blackmun, whether or not, if we had a regular and established place of business and whether or not we had committed acts of infringement here, were important. For the purposes of this case, we have agreed that we do not have a regular and established place of business, and we have not committed acts of infringement.

In other words, if special venue controls, we're not covered. We're out. If general venue controls, we are; because we are an alien.

Q But the consequence of your position is that an American party in claiming infringement would be without any remedy, is that not correct?

MR. KOLISCH: It is possible that in certain limited situations, and we're willing to assume it for the purposes of this case, there may be a certain class of defendants in infringement cases who are not subject to an infringement suit in the United States. You've stated it completely correctly, Mr. Chief Justice.

But we have to go back and take a look at the history

of the special venue statute, which was first passed in 1897, and see what happened and what this Court did with respect to this statute.

Now, the Court held, in the three prior cases, that the special venue statute controlled as to all defendants; and I emphasize the word "all" because it was emphasized by the Court. It made no --

Q In each of those cases, Mr. Kolisch, there was a district in the United States where they could have been sued, was there not?

MR. KOLISCH: Correct. This is the factual difference between the present case and all the other cases which the Court has considered; namely, the Court was dealing with domestic defendants.

Now, the principle which we say governs those cases is still the same. In other words, it is our position that the Act of 1897, which is the predecessor of 1400(b), and this is the particular statute you have before you. In that Act the Congress very clearly, unequivocally, as this Court has stated, said that special venue is going to control with respect to all defendants, irregardless of whether or not they are domestic or alien.

Now, the basic fact in the present case is that the defendant Brunette is a Canadian corporation. It was sued in the United States District Court for the District of Oregon

for infringement of two patents. Brunette is not a resident of Oregon, and it doesn't have a regular and established place of business there.

The Brunette motion --

Q How was jurisdiction obtained?

MR. KOLISCH: Jurisdiction obtained under a -- there's a long line of statutes; so that there isn't any quarrel about jurisdiction.

The motion to dismiss was granted. The Ninth Circuit reversed, based on a decision which had previously been handed down in the Southern District of New York, which is known as the Pfizer case. The Ninth Circuit expressly declined to follow a prior decision by the Seventh Circuit in the Coulter case, in which basically the same factual situation had been presented; namely, an alien defendant claiming improper venue. The Seventh Circuit had examined the prior decisions of this Court and came to the conclusion that venue was improper.

Q And Judge Mansfield, in the Pfizer case, refused to follow that of the Seventh Circuit, too?

MR. KOLISCH: Yes. Yes. And Judge Mansfield refused to follow, and expressly mentioned it.

Our position is now that the problem with the whole line of cases, and there have been district court cases which have followed Pfizer. But they're based on an erroneous line

of district court cases; and it is our position that these cases fail to appreciate what happened in 1897 when Congress passed the first special venue statute.

Now, at that time the court, this Court had already decided two cases involving alien defendants. The first case was the Hohorst case in 1893, and that case involved a German alien in a patent infringement case, and the Court said: alien is subject to suit any place.

Subsequently, in 1895, Keasbey & Mattison came along, decided by this Court, and Keasbey & Mattison confirmed Hohorst. An alien as well as a domestic -- Keasbey & Mattison was not an alien case. But both these cases stood for the proposition that a defendant in a patent infringement case, you can sue him any place you can get service on him.

So, the Act of 1897 was then passed. It is our position that it overruled those cases, because Congress, when it passed the 1897 Act, was well aware of the decisions of this Court in Hohorst and Keasbey & Mattison for that which they stood.

Now, mind you, Hohorst did stand for the proposition that an alien could be sued any place.

Q Mr. Kolisch, I could find in your brief and in your opponent's brief and in the amicus briefs no indication of any legislative history, since I thought the briefs would have that; but there really isn't any legislative history on

the subject.

MR. KOLISCH: Mr. Justice Rehnquist, if you are referring to the legislative history with respect to the '48 or the 1897 Act?

Q The 1897.

MR. KOLISCH: The 1897 Act. There is legislative history, and it's set forth rather fully in this Court's opinion in Stonite, which is the first case. This was decided in 1942. There's a footnote in Stonite, and they go into it rather fully, what was going on at the time that the 1897 Act was passed, and it is the consensus that the 1897 Act was passed to take care of abuses which had grown in patent infringement cases.

Q But did that history have any significant references to either Hohorst or Keasbey?

MR. KOLISCH: The history does not indicate any specific reference to Hohorst or Keasbey, but in the Stonite case the Court does discuss Hohorst and Keasbey, recognizing the situation with respect to Hohorst and Keasbey, and then goes on to say that: We decide that the special venue statute is the only statute controlling, and it excluded everything before it.

Now, I admit Stonite was still a domestic defendant, there was not an alien defendant in Hohorst. However, in the Stonite decision, which goes into the history rather fully,

Hohorst, Keasbey, and all the other cases, and the lower court cases, and the confusion that existed among the lower courts with respect to this question of venue in patent infringement is examined, and the Court says: Congress passed the 1897 Act to set the record straight, and make it clear that special venue controlled in all infringement cases.

Now, the next time that the Court had the question before it was in the Fourco case in 1957; the specific question presented to the Court in Fourco was whether 1391(c), which provided that a corporation can be sued in any judicial district in which it is doing business, was supplementary to 1400(b).

Now, at the time that the Court decided Fourco, 1957, the 1948 revision to the Judicial Code had taken place, and it was at that time that the subsections which we are considering, and specifically 1391(d), were added to the law.

The approach which the Court took in Fourco was: the holding in Stonite that the special venue statute controls and is exclusive is still good law unless there was some change in the 1948 revision to the Judicial Code.

Again I say that's when section (c) and (d) were added. The Court was specifically considering (c) in Stonite.

The Court came to the conclusion, and it again reviewed the history of the 1948 revision and what had happened before, that there had been no intended change in the law, and

that therefore 1400(b) remained controlling as to all defendants in patent infringement cases, and that 1391(c) should not be read as supplementary to 1400(b).

The last time that this Court had the question before it was in 1961, and that was in the Schnell case. Again the Court briefly reviewed the history, came to the conclusion, as it had in the other two cases, it reaffirmed its decisions in Stonite and Fourco, namely, that 1400(b) is the exclusive provision controlling venue in patent infringements.

And the Court specifically said in Schnell that the attempts to broaden patent venue were contrary to the congressional intent and, as far as the Court was concerned, would involve judicial legislation.

Now, this point was well understood --

Q The Stonite footnote certainly doesn't deal with the particular issue in this case, does it? The legislative history as to the Act of 1897 in terms.

MR. KOLISCH: In terms of alien, it does not. It quotes from what Mr. Mitchell had to say; however, you will note, Mr. Justice Rehnquist, that Hohorst is discussed in the footnote of Stonite. Stonite, of course, dealt with a domestic; but Hohorst was recognized at the time that the Court was rendering its opinion, as it was in 1897 when the Act was passed.

Q But Mr. Mitchell's remarks don't deal with Hohorst at all.

MR. KOLISCH: No. Mr. Mitchell did not talk about Hohorst. However, the Court, when it wrote Stonite, had Hohorst in mind.

Now, it's our position that an alien, just like a domestic defendant, who is involved in a patent case, that this doesn't justify a change in the interpretation below, which this Court has had for the last 75 years.

Now, the principal argument which is urged on this Court, and which apparently carried the day before Judge Mansfield, was that ' revisor's note to 1391(d), and they emphasized that in the Fourco case 1400(b) had not -- that this had not been fully appreciated by this Court when it wrote Fourco, as by the Coulter case.

Now, this note says that the new subsection gives "statutory recognition to the weight of authority concerning ... which there has been a sharp conflict", and then cites two district court cases. These were both out of the Ohio District Court, which Judge Westenhaver had decided in 1917 and 1918.

Now, this, we submit, is not an indication of a change in the law, because in 1948, when the Judicial Code was revised, 1391(d) being added, it was merely a codification of the law that generally, and this was the law generally recognized, that an alien could be sued in any district where

service could be effected. And that's what 1391(d) stood for.

That didn't change or modify 1400(b), which had been in existence in a prior form since 1897, which still controlled in patent cases.

Now, if it had been the congressional intent in 1948, when 1391(d) was to change this well-established law, our submission is that there would have been an appropriate revision, obviously, in the patent statute. Something would have been said to the effect, "except as aliens" or in some situations such as that.

Now, the Court's decision in Stonite that special venue is the sole provision governing in patent cases, we say supports the position we have taken. The Court has repeatedly had this before it and has said: Well, Congress simply said that as far as all defendants in patent cases are concerned, they are a special class. It's our position that if there's going to be a change in the law in 1948 -- and, by the way, the revisers to the code say there wasn't any change in the 1948 revision, that this was a revision, this was the codification of the law as it stood -- there certainly would have been a more positive, a stronger statement than this rather ambiguous note which was appended to 1391(d).

Q Mr. Kolisch, what would be the -- help me out on this -- what would be the policy behind your analysis of the congressional approach? Why should patent defendants be

treated differently than other interests?

MR. KOLISCH: This went back to the 1897 Act, and at that time it was felt that defendants in patent cases should not be subject to suit any place, that there should be a relationship either where they were inhabitants or where they had committed acts of infringement, and had a regular, established place of business. A practice had grown up after the Hohorst, Keasbey & Mattison cases, in which they were being sued all over the place. And therefore Congress's reaction to that was the special venue statute, and I think that's brought out in the footnote that Mr. Mitchell had in the Stonite case.

This has been the law, and this was the justification for it.

Q Of course, coupled with that, then, is complete exemption from suit for a client such as yours?

What I want to get at is the policy behind that.

MR. KOLISCH: Yes. I am not urging on the Court that the Congress intended deliberately to exempt any particular type of defendant, let's say, such as an alien.

I will assume that under 1400(b) and that under certain circumstances aliens, and a certain type of alien, and for the purpose of this argument, my client might not be subject to suit in any district, because it doesn't quality under 1400(b). Because the strongest argument that plaintiff

of course can make is that: Was it the congressional intent that your client not be subject to suit any place? No, I don't think that was the congressional intent. I think there may have been a gap. I think that possibly Congress had not considered the matter, and the fact, of course, is that the thing that moved Judge Mansfield and certain other of the courts was to say, well now, here are a group of defendants who can with impugnity infringe patents and send infringing articles into the United States.

Well, of course, that simply isn't the case. As a practical matter, a patent owner can bring suit against persons who makes, uses, or sells. So if he can't get the maker, he can get the user and seller, all of whom are in this country.

Furthermore, of course, under the Tariff Act, and one of the decisions we cite points out that Congress was well aware of the situation and it decided it was going to take care of the thing through the Tariff Act. Section 337 of the Tariff Act says that if there is an infringement of a United States patent, you go through the Treasury Department and you can stop it at every port of entry.

Q That doesn't give them any damages, though, does it?

MR. KOLISCH: No. But it does give him the opportunity to stop any importation, and it has the additional

protection that he never has to subject his patent to a question of validity, because during the Tariff proceedings, unless the patent has been declared invalid, it is presumptively valid. So this defense can't be raised in the Tariff proceedings.

So it is our position that this concern of the certain lower court cases with respect to what will happen is more imaginary than real.

Q Mr. Kolisch, am I right in thinking that in order for you to prevail here, we must be satisfied that the Act of 1897 overruled Kohorst, and that the 1948 revision did not change it back again?

MR. KOLISCH: Precisely.

And I would submit to the Court that there may be a gap, as Mr. Justice Rehnquist, I think, suggested. Certainly there wasn't congressional intent to excuse, but once you analyze what went on, you will see that the court repeatedly, and Congress, even when it had the matter brought to its attention, never did anything about it.

Now, it may --

Q Well, have there been judicial decisions under 1400 -- no, under the predecessor to 1400, Section 48, that an alien could be sued anywhere?

MR. KOLISCH: Yes. And those are the line of decisions which came out of the district court of the District of Ohio.

Q Well, all right. There had been some holdings to that effect and there had been some holdings to the contrary effect; right?

MR. KOLISCH: Yes.

Q And then came the revision of '48?

MR. KOLISCH: Yes.

Q 1400(b).

MR. KOLISCH: Correct.

Q And you say that 1400(b), which didn't say anything different than Section 48, settled that conflict one way or the other?

MR. KOLISCH: Actually the conflict had been settled earlier. Mr. Justice Rehnquist mentioned that the earlier cases, they are all based on Hohorst. The 1893 and 1895 decisions of this Court were overruled by the 1897 Act. And the 1897 Act, of which 1400(b) is a descendant, simply held that in all patent infringement cases special venue rather than general venue controlled.

I'd like to reserve a few minutes, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cross.

ORAL ARGUMENT OF HARRY M. CROSS, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CROSS: Mr. Chief Justice, and if the Court please:

I wonder if Congress could not intend the result that the petitioner is suggesting, whether any venue statute at all is required to effect the judicial power of the United States as promulgated in a federal statute?

What the petitioner is urging is a frustration of the federal judicial power. Venue, as I understand it, in a federal cause of action is intended to direct the geographical area where federal judicial power is to be applied. Not if it's going to be applied, but where.

The petitioner is urging the Court to apply very broad language from the Fourco case, out of context, and without regard to the legislative and judicial histories upon which both the Fourco and the Stonite cases were based.

In so far as alien venue is concerned, I would like to suggest that the patent venue statute as originally promulgated in 1897 was not a restrictive statute. Beginning with the review presented in the Stonite decision, and specifically with two cases cited in the Stonite decision, at 315 U.S. 567, these cases being the Bauers (?) case, 104 Fed. 887, and the Cheatem Electric case, 191 Fed. 727, at which a detailed history ofthe 1897 Act is presented.

Prior to the first patent venue statute of 1897, there initially was a general venue statute of 1875, that provided that a defendant in any case could be sued wherever he was found. In the general venue statute of 1887 and 1888,

that was modified in cases where federal courts had concurrent jurisdiction, to providing venue for defendants in the district in which they were inhabitants.

Now, that's a substantial limitation over where they may be found, but it's important to note that that general venue statute was strictly limited to cases of concurrent jurisdiction.

When this Court reached the subject of alien venue in a patent case in 1891, in the Hohorst decision, they had first of all said: there is no expression in the statutes of 1887 and 1888 that venue -- that that venue statute applies to an alien, since there's nothing to indicate that it was congressional intent that that statute so applied to an alien; they concluded that it did not, and that an alien could be sued anywhere.

The second holding in that case, which is most important, is that a federal patent action, based on a federal statute, the federal courts have exclusive jurisdiction since the statute of 1887 and 1888 was directed to causes where the federal courts had concurrent jurisdiction, it simply did not apply in a federal patent action. Therefore, for the second reason that statute didn't apply.

In the Keasbey & Mattison Supreme Court decision, they reaffirmed both those points. It was at that time that the lower circuit courts generally permitted suits against

patent infringers without regard to whether they were aliens or domestics.

The passage of the first patent venue statute of 1897 was directed toward the second point in Hohorst. It was intended, according to the Bauers case, to place patent venue on a par with general venue. It first of all provided that in patent infringement cases, venue was to be had where the defendant was an inhabitant. That is exactly the same as was in the 1887 and 1888 general venue statutes.

In addition, Congress provided that an alien -- excuse me, that an infringer could be sued at the place he infxringed and where he had a regular and established place of business.

That adds another district. So, to that extent, it is broader than the general venue statutes of 1887 and 1888.

Q Mr. Cross, you say that the Bauers case supports your construction of the Act of 1897; does the Bauers case rely on legislative history, or is it just a statement in the case that that was the purpose?

MR. CROSS: It's a statement of the case. A statement of the histozy.

Continuing from the point of 1897, the cases immediately following that are substantially contemporaneous with the Act adopted this point of view, in that the first point on which the Hohorst decision was based was not modified,

that it was simply to bring the patent venue on a par with general venue.

The first decision, of the United Shoe Machinery case, that's cited in our brief, and subsequent to that is the Sandusky case that is cited by the reviser in his note to 1391(d).

Regarding for a moment the Sandusky case: contrary to the inference to be drawn from the petitioner's reply brief, the Sandusky case has two decisions, it's a two-point decision, and the first one definitely holds that an alien in a patent infringement action is suable wherever he can be found. It's not indicative, it's a positive holding.

At the time of this Court's decision in Stonite, the general rule, as applied to venue over aliens, was a judicial rule, it was not statutory. These prior lower court decisions continuing to reapply the Hohorst decision as to the patent alien venue are not inconsistent with Stonite's holding. Stonite, even the language of Stonite, clearly says that the then patent venue statute, Section 48 of the 1911 Judicial Code, that statutory provision is not modified by other provisions of venue. They're talking about other statutory provisions. No consideration was given to the judicial rule of venue, whatsoever.

The difficulty it has created in this case is by the fact that in Fourco this Court stated that the issue before

Fourco was legally indistinguishable from the issue before Stonite. Between Stonite and Fourco, however, 1391(b) codified the judicial law on alien venue.

Q That was the first time that it had been dealt with by statute?

MR. CROSS: That's right.

Therefore, by repeating generally the phraseology of Stonite in Fourco, I think inadvertently the language became too broad. Because then when you talk in terms of statutory provisions not being supplementable, that does not comply with the previous judicial rule that was codified in 1391(d).

The effect of the request by petitioner is going to become significantly more important, I think, in the future. The number of recent cases concerned with this problem reflects an economic change in this country, more and more new technologies, in whatever form, are going to be imported into this country rather than vice versa.

That certainly is nothing -- there's nothing objectionable in that. But it's certainly true that it's done for a profit motive, and if aliens can see a profit in importing their technologies into this country, and by so doing violate a federal statute, and do it in such a manner that they subject themselves to the in personem jurisdiction of the federal courts, it seems to me incongruous that venue would be so restrictively interpreted as to oust the subject matter of

jurisdiction in the federal courts.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cross.

You have a few minutes left, Mr. Kolisch, if you have anything more.

REBUTTAL ARGUMENT OF J. PIERRE KOLISCH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KOLISCH: The statement by this Court in Stonite I think is quite illuminating. It said that "The Act of 1897 was adopted to define the exact jurisdiction of the Federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887 as amended to sugh litigation. That purpose indicates that Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings."

Now, the Court, in Stonite, was well aware of the situation in Hohorst, because it had just gotten through quoting a long footnote, and Hohorst was the case which had discussed venue with respect to aliens. And there is no argument that prior to 1897 an alien could be sued any place, and if Hohorst, as far as its holding, is still good law, this alien can be sued.

But it is our position that Congress, when it enacted the Act of 1897, repealed Hohorst to that extent, as

far as Hohorst had two holdings, it was talking about aliens and then it was talking also generally about venue. But as far as aliens being subject to suit any place, that was repealed by the Act of 1897, and the Court considered it and said: there wasn't any intention to have any dovetailing.

So, to me, this indicates that when the Court wrote the Stonite opinion, it knew that there was a conflict in certain cases, namely patent cases, between general venue and special venue, and with respect to all defendants, not just domestic defendants.

Q If the Court knew it at the time, there was no occasion for the Court to pass on it, because that wasn't the fact before.

MR. KOLISCH: No. There was not an alien involved in it. I say, it is significant in view of the sweeping language which was used in Stonite, and then used again in Fourco, and of course which is the language which gives the respondent here the most trouble. Because the Court did say this covers all defendants, not just certain kinds of defendants, not blue-eyed or gray-eyed defendants, it's all defendants. And of course all defendants includes aliens as well as domestic.

So the Court had very definitely taken a very strong position.

Now, it could be that -- and there are, I admit that there are a group of defendants, a certain selected few, who

may not qualify and may not be sued any place. If there is, then there's been some kind of an oversight or a gap, as far as the Acts of Congress are concerned, because the 1897 Act spoke very clearly. If there has been a gap here, then there's going to be, or there will be some appropriate change in the law, and that will be for Congress.

Q Has there been any bill to clarify that situation that you know of?

MR. KOLISCH: No. There haven't been any bills, and my submission is, of course, this is not a significant problem, because the domestic patent owners are adequately and well-protected; because of the fact that they can sue anybody who uses or sells in this country, even if they can't get the maker, plus the fact that they have all this protection under the Tariff Act.

So that this is not a significant problem. If it becomes a significant problem, I'm certain that Congress will take care of it.

Q So there are no proposals, up to now, that you are aware of?

MR. KOLISCH: I know of none, Mr. Justice Stewart.

Q When Congress passed 1391(d), the reviser's notes did cite some cases?

MR. KOLISCH: Yes, Mr. Justice White.

Q And including alien patent cases?

MR. KOLISCH: It cited the Sandusky case, which was a case involving an alien.

Q And holding that you could sue an alien anywhere?

MR. KOLISCH: Yes.

Q In a patent case.

MR. KOLISCH: Yes.

Q And it says that 1391(d) was intended to codify this rule?

MR. KOLISCH: It says that 1391(d) was intended to codify the rule, and to resolve the conflict between the lower district courts. Now, the problem with the Sandusky case --

Q Well, it resolved the conflict all right, they then resolved it in favor of letting the alien be sued anywhere?

MR. KOLISCH: No. I submit, Mr. Justice White, that that is not what it resolved. You see, Sandusky was based --

Q Well, what did it resolve?

MR. KOLISCH: It simply codified the general venue statute, which is -- you see, there hadn't been -- with respect to aliens. There hadn't been any statute with respect to them. It had been recognized judicially that an alien could be sued every place.

Q And they codified the judicial rule.

MR. KOLISCH: The judicial rule that an alien generally could be sued any place.

Q Yes. Exactly. But when they codified it, they cited a patent case against an alien.

MR. KOLISCH: That patent case talks about general venue as well as alien, and the other case is limited to general. So that the codification, our position is, is merely the general situation, not patent defendants.

Q But Judge Mansfield did rather heavily rely on the argumentative line suggested by my brother White's question, did he not?

MR. KOLISCH: Yes. He relied on them. And our position is that that decision, that old Sandusky decision, never sought to appreciate the point which Mr. Justice Rehnquist brought up, that the Act of 1897 changed the Hohorst. They all base on Hohorst, which was the 1893 case.

Q Well, maybe Sandusky was wrong, but how about Congress?

MR. KOLISCH: Congress never --

Q How about Congress, in putting 1391(d) on the books -- I doubt, if you'd been the reviser, if you hadn't intended to codify the results of Sandusky, you certainly wouldn't have cited Sandusky even on the general proposition, would you?

MR. KOLISCH: The way, obviously, in which this would have been done was an amendment to 1400(b). "Defendants except aliens". Now, this would have been a major change,

and there is where the change would have been made, instead of this rather ambiguous note, which is mentioned, as a matter of fact, in Fourco, in the dissenting opinion by Mr. Justice Harlan.

Q Right.

MR. KOLISCH: He says: this note is rather ambiguous.

I don't agree with this, though. So I think that obviously that's the cite that would have been made.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kolisch.

Thank you, Mr. Cross.

The case is submitted.

[Whereupon, at 11:20 o'clock, a.m., the case was submitted.]

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