

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 KARL J. KIRCHBERG, :

Appellant, :

4 v. :

No. 79-1388

5 JOAN PAILLOT FEENSTRA, ET AL., :

6 Appellee. :
7 - - - - - :
8

Washington, D. C.

9 Wednesday, December 10, 1980
10

11 The above-entitled matter came on for oral ar-
12 gument before the Supreme Court of the United States
13 at 11:06 o'clock a.m.

14 APPEARANCES:

15 ALAN F. SCHOENBERGER, ESQ., 13344 Chef Menteur Highway,
16 New Orleans, Louisiana 70129; on behalf of the
Appellant Pro Hoc Vice.

17 MS. BARBARA HAUSMAN-SMITH, ESQ., RFD Dothan Street,
18 White River Junction, Vermont 05001; on behalf
of the Appellee.
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C O N T E N T S

ORAL ARGUMENT OF

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1 of Orleans.

2 QUESTION: This is the equivalent of a foreclosure,
3 in any other state, isn't it?

4 MR. SCHOENBERGER: Yes, sir. Mrs. Feenstra's counsel
5 filed for a temporary restraining order, what we call a TRO,
6 and finally a permanent injunction. And they claim, of course,
7 that Mr. Kirchberg was engaging himself as a creditor and
8 money lender under the Truth in Lending Act. Mr. Kirchberg
9 thereafter filed in United States District Court for the
10 Eastern District of Louisiana, and the case was allotted to
11 the Hon. Judge Morey Sear, and at that time he prayed for a de-
12 claratory judgment that he had not violated the truth in lending
13 Act, and that issue was later settled and compromised agree-
14 able to all parties.

15 But Mrs. Feenstra, lo and behold, counterclaims.
16 In her counterclaim, she argues, or she claimed, that Article
17 2404, Louisiana head and master provision, is unconstitutional,
18 is violative of the Fourteenth Amendment to the United States
19 Constitution. Now it is important to note that initially
20 there was some discrepancy. It would appear from the record
21 that the original counterclaim was to Article 2334, was the
22 article which was unconstitutional. However, Judge Morey Sear
23 evidently felt that the gravamen of the complaint was Article
24 2404, the head and master article.

25 Thereafter, in the United States District Court for

1 the Eastern District, Mr. Kirchberg filed a motion for summary
2 judgment, saying that there are no material issues of fact,
3 that indeed he should be able to proceed via executiva, and he
4 won by way of motion for summary judgment, and Honorable Judge
5 Sear, looking at Louisiana law and looking toward this honorable
6 Court's guidance in Labine v. Vincent held that the motion for
7 summary judgment would be granted.

8 Thereafter, Joan Feenstra appealed to the Fifth
9 Circuit Court of Appeals and in that decision the holding was
10 that Article 2404 was unconstitutional, and the decision was
11 reversed, but applied prospectively.

12 QUESTION: To whom? Do you think it applied to the
13 parties, or not?

14 MR. SCHOENBERGER: We do not believe that it does,
15 Your Honor, and this is part and parcel of the problem. Having
16 laid down this basic structure of where we are moving, let
17 me --

18 QUESTION: Well, if you didn't think it applied to
19 you, why did you appeal? Why did you come here at all if you
20 didn't think that --

21 MR. SCHOENBERGER: Your Honor, we are saying that if
22 the decision applies it is purely prospectively. Only under
23 Linkletter does --

24 QUESTION: Well, does it apply to your client or
25 doesn't it?

1 MR. SCHOENBERGER: Your Honor, it says, reversed,
2 applied prospectively, on the motion for summary judgment.

3 QUESTION: You just told me you didn't think it
4 applied to your client.

5 MR. SCHOENBERGER: Your Honor, this is part of the
6 problem. The mortgage, the underlying mortgage was executed
7 and filed on October 22, 1974. The 5th Circuit never said
8 that the underlying mortgage is invalid. It only said that
9 Article 2404 is unconstitutional.

10 QUESTION: Well, what is -- so, you want to come up
11 here to have us declare your mortgage invalid?

12 MR. SCHOENBERGER: No, no, Your Honor. We are arguing
13 that if this is applied purely prospectively, and looks to the
14 future, then it cannot look to the past, and it cannot look
15 to 1974, when Karl Jean Kirchberg relied upon the civil law
16 as it existed at that time.

17 QUESTION: But then there's no case or controversy,
18 no live case or controversy, it's just purely a decision of
19 an abstract proposition which doesn't have any effect on
20 concrete rights of the parties.

21 MR. SCHOENBERGER: I -- this --

22 QUESTION: Why did you come here at all, if you
23 didn't --

24 MR. SCHOENBERGER: Well, Your Honor, this was one
25 possibility, and I had to juggle with this problem --

1 QUESTION: I suppose one of your questions, if you
2 want to ask back, is why did we ever grant it?

3 MR. SCHOENBERGER: Well, Your Honor, it's -- and the
4 other way in which I have viewed this particular decision is
5 that maybe it does apply to the parties on the motion for
6 summary judgment, but since it looks prospectively, it does
7 not apply to the mortgage as recorded in 1974, because -- and
8 this is the important point to note, we look at the 5th Circuit
9 language, the very end of the opinion. It says: "We reverse.
10 We apply prospectively, because not to do so would create
11 substantial hardship within the State of Louisiana."

12 QUESTION: But to say that it applies to the parties
13 but not to the mortgage is really kind of a conundrum because
14 the only controversy between the parties is with respect to
15 the mortgage, isn't it?

16 MR. SCHOENBERGER: It is with respect to the mort-
17 gage, Your Honor, but the situation of the case is such that
18 it moved up on a motion for summary judgment. And indeed, if
19 the 5th Circuit is making any sense -- and indeed, Corpus
20 Christi, also another opinion of the Supreme Court of the
21 State of Louisiana, mentioned the substantial hardship.
22 It must mean that Mr. Kirchberg's mortgage is valid as of the
23 date of October, 1974, because if it is not then we do have
24 that substantial hardship, because the new law did not come
25 into effect till January 1, 1980.

1 QUESTION: What relief do you want here?

2 MR. SCHOENBERG: We have six years.

3 QUESTION: What relief do you want here?

4 MR. SCHOENBERG: The relief that we would have this
5 Court grant is that Article 2404 would be declared constitu-
6 tional, and that Mr. Karl Jean Kirchberg could proceed via
7 executiva to have the Feenstra home seized and sold. This
8 would be the relief that we would ask.

9 QUESTION: You'd be just as happy, I suppose, if you
10 had a ruling that whatever the Court of Appeals said didn't
11 invalidate your mortgage?

12 MR. SCHOENBERG: Yes, yes, Your Honor. That would be
13 the other way of proceeding through this. Having --

14 QUESTION: And if we read the Court of Appeals'
15 decision as not invalidating your mortgage, you'd be very
16 happy.

17 MR. SCHOENBERG: Yes, sir.

18 QUESTION: But then, what controversy would the
19 Court of Appeals have adjudicated within the --

20 QUESTION: We would then dismiss the appeal, I
21 suppose, as for want of jurisdiction.

22 MR. SCHOENBERG: Well, the case or controversy would
23 involve the motion for summary judgment between Mr. Kirchberg
24 and Joan Paillot Feenstra. as to the constitutionality of
25 Article 2404. I realize the difficulties, Your Honors, and

1 I've thought about this in depth, and it is a problem, it is
2 a problem, it's a serious problem. And that is why we are
3 here, and that is why I'm addressing the three issues before
4 the Court. Maybe what I would like to do is to proceed first
5 with the issue of Article 2404 as it is.

6 And of course, beginning -- of course we begin with
7 the private law of Louisiana contained therein in the Civil
8 Code of our state, in which Article 1 states clearly, "Law is
9 a solemn expression of legislative will." Of course, the
10 law of stare decisis does not technically apply in Louisiana.
11 We look to our Legislature in determining in true civilian
12 fashion as is done in Quebec and is applied in France as to
13 what the law is. We come to Article 17 which states clearly,
14 "All laws are to be read in pari materia."

15 When one particular provision of the Civil Code of
16 Louisiana does not clearly enunciate the law or if it enunciates
17 the law in a fashion which can be viewed as only leading to one
18 principle, we look to the other Code articles which emanate
19 from that particular system. Article 2404. Article 17 is the
20 article applying to the in pari materia rule which is used by
21 civilians in interpreting a law in our jurisdiction.

22 QUESTION: Do you want us to apply that rule to our
23 Constitution?

24 MR. SCHOENBERG: Well, Your Honor, all I can say is
25 the law would be what this honorable Court would say the law is.

1 QUESTION: What the Constitution says it is.

2 MR. SCHOENBERG: What the Constitution is and how
3 this honorable Court would interpret the Constitution.

4 If we turn to Article 2404, we read that the husband
5 is the head and master of the community. He manages the com-
6 munity, he disposes of its assets. We read this in pari
7 materia with Article 2334 which as originally enacted in 1962
8 -- and this is the provision that we are looking at -- stated
9 that the husband could not alienate the community immovable
10 property where the woman, the wife, had filed a declaration of
11 homestead in the mortgage and conveyance office where the
12 parish, where the property was situated.

13 2334 was then later amended in 1977 to state that
14 community immovable property could not be alienated unless
15 the wife filed a declaration stating to the effect that her
16 consent was not required. So we're looking at earlier
17 article 2334, valid as of 1962, valid until January 1, 1977,
18 and we're looking at Article 2404, and we are looking at this
19 law and we're looking at October, 1977, when these events
20 occurred. And this is the system of law which is applied
21 at this time.

22 In my brief, Your Honors, we have attempted to
23 point out the unique circumstances of Louisiana law. We have
24 pointed to the fact that Joan Paillot Feenstra had a remedy
25 which was a very, very easy and a very simple remedy,

1 filing the declaration of homestead.

2 The 5th Circuit Court of Appeals ignored that issue
3 and immediately jumped to the fact that an antenuptial agree-
4 ment could have been entered into between the parties before
5 the marriage in which the parties would be separate in proper-
6 ty or they would not have community property, or that the
7 husband alone could not mortgage the household.

8 And they go into the point of transactional cause
9 and the great expense of retaining an attorney before entering
10 into marriage in Louisiana. But the fact is that no attorney
11 was ever needed. The fact is that no antenuptial agreement
12 was ever needed to remedy the situation. We're not looking
13 at \$300, \$400, \$500, although I do not ask this Court to take
14 judicial notice of the amount of attorney's fees. All we are
15 looking at is a simple declaration, a simple, simple, very
16 inexpensive declaration in the notarial archives of Orleans
17 Parish and the Custodian of the Records stating to the effect
18 that this community house cannot be alienated or mortgaged by
19 my husband without my consent. So we feel --

20 QUESTION: Isn't your relief really one directed to
21 the Court of Appeals for clarification of its judgment
22 rather than here?

23 MR. SCHOENBERGER: Well, Your Honor, we of course
24 first address the issue of Article 2404, and that the third
25 point I did ask, does the decision apply to my client and

1 to Joan Paillot Feenstra in such a way as to allow my client
2 to have the house seized and sold, or does it not mean that?
3 And my feeling was that that issue was subsumed within the
4 issues that this Court would tell us what prospectivity means
5 in this particular circumstance.

6 QUESTION: Did you ask the 5th Circuit for clarifi-
7 cation of its judgment?

8 MR. SCHOENBERGER: We did not, Your Honor. We did
9 not.

10 QUESTION: So both of you come up here not knowing
11 what the judgment means. And this is the gist of the State of
12 Louisiana's motion to dismiss, as I read it.

13 MR. SCHOENBERGER: That there is no case or contro-
14 versy, Your Honor. But clearly, there is a case or controversy
15 because the mortgage stands in Orleans Parish and
16 Mr. Kirchberg, due to the injunctions, cannot seize the house,
17 and the house is encumbered. So we stand in this dilemma of
18 a house that's encumbered with a mortgage, without an order
19 saying to the seneschal of the Parish Orleans, you are noti-
20 fied to seize this particular property, advertise it for sale,
21 and to sell the property. And we stand in this dilemma.
22 It's a dilemma that both parties face.

23 QUESTION: Well, if you got together, you could
24 sell it.

25 MR. SCHOENBERGER: Maybe so, Your Honor.

1 QUESTION: Couldn't the Supreme Court of Louisiana
2 solve all of that dilemma?

3 MR. SCHOENBERGER: The Supreme Court, Your Honor?

4 QUESTION: Yes; of Louisiana, solve all of your
5 dilemma?

6 MR. SCHOENBERGER: I don't --

7 QUESTION: Don't you have any title-clearing cases
8 down there? Can't you clear title down there? Clear the
9 title?

10 MR. SCHOENBERGER: Well, Your Honor, not in a situa-
11 tion such as this. They would probably be looking to this
12 Court's guidance, in terms of resolving the conflict.

13 QUESTION: We would give them guidance in how to
14 enforce their own statutes?

15 MR. SCHOENBERGER: Well, Your Honor --

16 QUESTION: We would give them guidance in how to
17 clear up a case?

18 MR. SCHOENBERGER: Well, Your Honor, if an order
19 would proceed from this Court that Article 2404 is constitu-
20 tional, then clearly the house can be seized and sold, if an
21 order would proceed.

22 QUESTION: That's what you want us to say?

23 MR. SCHOENBERGER: Yes, Your Honor, that article --

24 QUESTION: I just wondered what you wanted us to do.

25 MR. SCHOENBERGER: Well, that is the first issue

1 in our statement of jurisdiction: is Article 2404 unconsti-
2 tutional? And we believe that it is not.

3 If we were looking at a formal antenuptial agree-
4 ment, we could agree that the situation would be quite burden-
5 some. But considering the small amount of fees, of filing
6 fees --

7 QUESTION: Couldn't you -- I'll put it this way,
8 could you have just simply commenced your proceeding on the
9 assumption that the 5th Circuit meant what it seemed to have
10 said, that this was prospective only, and then let the state
11 courts of Louisiana wrestle with that problem?

12 MR. SCHOENBERGER: Yes, Your Honor, except that --

13 QUESTION: What was there to prevent you from doing
14 that after the 5th Circuit came down?

15 MR. SCHOENBERGER: Well, I felt that since this case
16 was in the federal system that it should move up appropriately
17 through the federal system, Your Honor.

18 QUESTION: You're asking us to clarify something that
19 doesn't seem to be clear to you and that's what it amounts to,
20 isn't it?

21 MR. SCHOENBERGER: Well, Your Honor, what we are
22 saying --

23 QUESTION: You come to us without knowing whether,
24 what the Louisiana courts would have done or whether you
25 could have proceeded with this foreclosure.

1 MR. SCHOENBERGER: Well, with the injunction, Your
2 Honor, no; that is part of the problem. And we do not feel
3 that the 5th Circuit opinion is clear, and that is why we
4 appealed the case.

5 QUESTION: Well, I would have thought the 5th Circuit
6 had said that at least as between you and your opponent, the
7 mortgage was invalid.

8 MR. SCHOENBERGER: But it did not say that.

9 QUESTION: They decided the case. And a federal,
10 any federal court, including the Court of Appeals in this
11 case, has to decide cases before it, one way or the other.
12 And it can't give advisory opinions, and it's the very fact
13 it decided the case leads to the inference, I suppose, I would
14 suppose, that my brother Rehnquist has suggested, doesn't it?

15 MR. SCHOENBERGER: Except, Your Honor, that accord-
16 ing to Linkletter the federal courts can apply cases prospec-
17 tively only, future prospectivity there is nothing --

18 QUESTION: Even if we can do it prospectively only, Link-
19 letter didn't say that. But I think I know what you mean.
20 But in any event, a court always decides the case before it
21 in favor of one party or the other, and there's no indication
22 here that the court decided this case in your favor, is there?

23 MR. SCHOENBERGER: There is no direct statement to
24 the effect that the case was decided in our favor, and there
25 is no statement to the effect that it was decided exactly in

1 favor of Mrs. Feenstra. There was no statement to the effect
2 that the mortgage was invalid or that the mortgage --

3 QUESTION: Well, it was either decided against you
4 or it wasn't decided at all, wasn't it, in your case?

5 MR. SCHOENBERGER: Unless, Your Honor, as I feel,
6 that it was decided in our favor and looked toward the future
7 from the date of December 12, 1979, on, and that the prior
8 mortgage was valid, because if it were not valid then we would
9 be in substantial chaos in Louisiana, because the law of the
10 case could not apply to Mr. Kirchberg alone --

11 QUESTION: Why not?

12 MR. SCHOENBERGER: -- because that would be unfair.

13 QUESTION: Why?

14 MR. SCHOENBERGER: Because if it applies to
15 Mr. Kirchberg under McDuffy v. Weil, all mortgages in Louisiana
16 are only valid from the date of recordation and filing, and
17 therefore, if the law of the 5th Circuit is that Article --
18 well, obviously, the 2404 is unconstitutional. And if it
19 applies to Mr. Kirchberg, it applies from 1974 on.

20 QUESTION: Well, counsel, at least, however, you pre-
21 vailed in the district court before Judge Sear?

22 MR. SCHOENBERGER: We did, Your Honor.

23 QUESTION: And that was reversed?

24 MR. SCHOENBERGER: That was reversed.

25 QUESTION: Does it follow that that's a decision

1 against your client?

2 MR. SCHOENBERGER: It would follow, Your Honor, that
3 it was a reversal of a motion for summary judgment. And --
4 but in terms of application of that judgment, that is another
5 problem. And from what date, and in what circumstances would
6 that apply, is again unknown.

7 If the 5th Circuit Court of Appeals had not said to
8 apply this case would cause substantial hardship, if applied
9 retrospectively, citing Cipriano v. City of Houma, the case in-
10 volving the property bond voting restrictions to people who
11 did not own property, then it would be much more clear. Your
12 Honor, we would --

13 QUESTION: But the judge did cite that case.

14 MR. SCHOENBERGER: He did cite the case. He did
15 cite the case, Your Honor, but then he said he would --

16 QUESTION: She did, isn't it a she?

17 MR. SCHOENBERGER: She; yes. Your Honor, we will
18 reserve the rest of the time for rebuttal.

19 QUESTION: Before you sit down, counsel, the state-
20 ment of jurisdiction which was prepared by your client has what
21 looks to me like a duplication of the 5th Circuit's opinion.

22 MR. SCHOENBERGER: Yes, sir.

23 QUESTION: Is that a correct duplication or does one
24 take precedence over the other?

25 MR. SCHOENBERGER: Your Honor, we received the

1 original opinion and we duplicated that opinion, the slip
2 decision, and then we proceeded to copy the further West
3 opinion also. So that there would be all decisions before
4 the Court, because we want the Court to have all the relevant
5 cases.

6 QUESTION: Well, is there a distinction between the
7 two opinions?

8 MR. SCHOENBERGER: There isn't, Your Honor, but we
9 just felt that we should follow --

10 QUESTION: Why did you include the memorandum?

11 MR. SCHOENBERGER: Well, we --

12 QUESTION: But the judgment of the Court of Appeals
13 was a remand, wasn't it?

14 MR. SCHOENBERGER: It just said --

15 QUESTION: Reversed the proceedings.

16 MR. SCHOENBERGER: Reversed, Your Honor.

17 QUESTION: No, it said -- it says, "And we reverse
18 and remand for further proceedings consistent with this
19 opinion."

20 MR. SCHOENBERGER: Okay.

21 QUESTION: So on the remand, what would have hap-
22 pened? If you hadn't have come here?

23 MR. SCHOENBERGER: We would probably have --

24 QUESTION: Had trouble enforcing your mortgage,
25 wouldn't you?

1 MR. SCHOENBERGER: Well, no, Your Honor, but there
2 would have been a controversy as to the enforcement of the
3 mortgage, and I imagine we would have had to appeal through
4 the federal system again, another time. Okay.

5 MR. CHIEF JUSTICE BURGER: Ms. Hausman-Smith.

6 ORAL ARGUMENT OF MS. BARBARA HAUSMAN-SMITH, ESQ.,

7 ON BEHALF OF THE APPELLEE

8 MS. HAUSMAN-SMITH: Mr. Chief Justice, and may it
9 please the Court:

10 Appellant Kirchberg in this case has apparently
11 confused what is a very simple case before this Court, and that
12 is whether Article 2404 is a denial of equal protection and
13 whether the 5th Circuit lower court opinion should be applied
14 to the parties litigant.

15 It was not until the appeal to this Court that the
16 issue of whether Ms. Feenstra should be included in the hold-
17 ing of -- an unconstitutional holding of the Article 24 has
18 been raised, and it was raised by Mr. Kirchberg as an 11th
19 hour attempt to save his mortgage.

20 At the court below, at the district court, the
21 State of Louisiana and the Governor of Louisiana was included
22 as a defendant in Ms. Feenstra's counterclaim. They prepared
23 a brief to the 5th Circuit on appeal which stated, if the 5th
24 Circuit holds Article 2404 unconstitutional and if it applies
25 its decision prospectively only, then Mrs. Feenstra would be the

1 only person who would benefit from the holding of unconstitu-
2 tionality. Therefore, the State of Louisiana and Ms. Feenstra
3 were in agreement at that point that a prospective-only ruling
4 should include the parties before the Court. Mr. Kirchberg --

5 QUESTION: What do you mean, include them?

6 What would include them?

7 MS. HAUSMAN-SMITH: An unconstitutional holding
8 that Article 2404 would apply to the parties litigant.

9 QUESTION: But not to other --

10 MS. HAUSMAN-SMITH: Exactly.

11 QUESTION: Other people who had made mortgages
12 before?

13 MS. HAUSMAN-SMITH: Exactly. And at no time --

14 QUESTION: Ms. Hausman-Smith, hasn't there always been
15 kind of an uneasiness with the case in controversy requirement
16 about this Court's retroactivity holdings, and prospective-
17 only holdings? You have to have a concrete case or contro-
18 versy and yet you want to avoid undue hardship to people who
19 have relied on preexisting law.

20 MS. HAUSMAN-SMITH: Absolutely, Your Honor. That is
21 correct. And the 5th Circuit went to a great effort. Half of
22 its opinion was based on the fact that there was a case or
23 controversy before them, and then to hold that the decision
24 should not be applied to Ms. Feenstra would be absolute,
25 an advisory opinion. This is especially so since Article 2404

1 has been repealed and after January 1, 1980, does not, there
2 is no longer head and master in Louisiana and no such mort-
3 gages with just the husband's signature can be allowed to
4 stand. Therefore, any --

5 QUESTION: Any of them, or those executed after
6 1980?

7 MS. HAUSMAN-SMITH: That is correct, Your Honor,
8 those executed after 1980. But in practicality, Ms. Feenstra
9 is the only person with a home that stands to lose at this
10 point. Since 1977, January 1, 1977, the Louisiana Legisla-
11 ture amended Article 2334, under which a husband would be no
12 longer able to mortgage without his wife's consent. And
13 therefore any mortgages signed after 1977 on property held in
14 names of both spouses could not be mortgaged or alienated
15 merely by the husband's signature only.

16 So, in practicality, this is not a problem. There is
17 no economic chaos in the State of Louisiana at this time be-
18 cause of an unconstitutional holding.

19 QUESTION: But Louisiana is not the only state that
20 operates under a community property system. The other states
21 that have community property systems are in other federal cir-
22 cuits, so that there -- it's by no means a symmetrical result
23 as if the 5th Circuit were the only court that were ever to
24 pass on the constitutionality of this type of statute and
25 declare it unconstitutional but prospective only.

1 MS. HAUSMAN-SMITH: Your Honor, I agree with that,
2 but there is in no sense a holding, or as Ms. Feenstra is
3 seeking to have held, that the community property system is
4 unconstitutional. She is merely speaking about the head and
5 master managerial powers over the community property, the
6 real community property of parties. And Louisiana is the only
7 community property state that has such a provision in its
8 legislation.

9 QUESTION: Well, the law may have changed since I
10 practised in Arizona but Arizona had a community property
11 statute where the husband could alienate property on his own
12 signature unless it was in fraud of the rights of the wife.

13 MS. HAUSMAN-SMITH: My understanding is that
14 Louisiana is at this point, was -- in 1976 -- when this
15 lawsuit was brought, was the only state with that kind of
16 provision, but I certainly may be incorrect, Your Honor.

17 QUESTION: Well, you may --

18 MS. HAUSMAN-SMITH: I would like to point out that
19 a holding, prospective-only holding in this case would also
20 go against the holdings in prospective cases of the Louisiana
21 Supreme Court. The Louisiana Supreme Court in Corpus Christi
22 Parish Credit Union v. Martin did not reach the constitutional
23 issue but in a three-justice dissent they clearly said that
24 Article 2404 had to be found constitutional, that it should be
25 applied prospective only, because of the subsequent inequity

1 that could result from a retroactive holding, but that of
2 course the parties before them should be included in that.

3 QUESTION: Did you say that was a dissenting opinion?

4 MS. HAUSMAN-SMITH: That was the three-justice dis-
5 sent in *Corpus Christi*, Your Honor, and it is the only case law
6 where the Louisiana Supreme Court has grappled with an uncon-
7 stitutional holding of Article 2404 and come up with a solu-
8 tion as far as application to the parties, or retroactive
9 application.

10 QUESTION: So it's not a ruling of the Louisiana
11 Supreme Court?

12 MS. HAUSMAN-SMITH: That is correct. But in *Lake*,
13 *Inc., v. Louisiana Power & Light*, 330 So.2d 914, the Louisiana
14 Supreme Court did hold, make a prospective-only decision and
15 specifically included the parties before the case. So they
16 have spoken on prospective-only and have shown their intention
17 to keep the parties before them.

18 QUESTION: Of course they may not have the same case
19 or controversy requirements that the federal judicial system
20 has.

21 MS. HAUSMAN-SMITH: Absolutely, and a case in contro-
22 versy is at the basis of the appellee's claim that she has in-
23 cluded in the 5th Circuit.

24 I would like to point out that in appellee's motion
25 for affirmance before this Court, in the appeal before this

1 Court, appellee pointed out that the 5th Circuit was empowered
2 to decide whether its holding prospective-only applied to the
3 parties litigant, and that it was not necessary for the appeal
4 to come before this Court on that issue.

5 I'd also like to speak to a point made by Mr. Kirch-
6 berg's attorney that he relied on Article 2404 to his detri-
7 ment. There's nothing in the record to give evidence of his
8 reliance. He received a note signed by Mr. Feenstra in
9 October, 1974, on a debt of \$3,000, and five days later he re-
10 turned to prison where Mr. Feenstra was and got him to sign
11 the mortgage. I'm sure Mr. Kirchberg was aware at this time
12 there would be no way in which Mrs. Feenstra would agree to
13 such a mortgage and therefore he was merely trying to cover
14 his options. There is no evidence that he was relying on it.

15 He also was an attorney and practicing for several
16 years in domestic relations work, and he was in process of
17 this kind of work at the time that Labine and Frontiero were
18 decided, so he should have been aware of those holdings.

19 Furthermore, in practice, there are no other cases of
20 this type pending, and no other mortgages known to be fore-
21 closed in Louisiana. The State of --

22 QUESTION: How about the other community property
23 states though that are in the 9th Circuit?

24 MS. HAUSMAN-SMITH: Well, as I stated before, I'm
25 not aware of any, and I doubt that any could be, because I

1 did not believe that they were able to have the husband
2 alienating community property without the wife's consent, as
3 Louisiana did. Further, there's -- the State of Louisiana was
4 my opposing counsel below at the 5th Circuit; however, they
5 chose not to appeal this decision. And their conspicuous
6 absence in this appeal would point to the fact that there is
7 no reason to suspect that an unconstitutional holding,
8 in particular to Mrs. Feenstra and the mortgage on her home,
9 would cause chaos in the commercial transactions of Louisiana.

10 Obviously, the State of Louisiana has deemed its
11 citizens secure and the Code secure, and has failed to join
12 Mr. Kirchberg in his appeal. In fact they had moved to dis-
13 miss on those grounds and they moved as appellees. So they
14 are, at this stage of the appeal, joint appellees.

15 QUESTION: Actually, the State of Louisiana has moved
16 to dismiss as moot, hasn't it?

17 MS. HAUSMAN-SMITH: Yes, which was -- well, they'd
18 moved to dismiss as moot, but they also made much of -- their
19 motion was based on the fact that there wasn't a case or con-
20 troversy below, and now they find that the repeal of the head
21 and master statutes, Article 2404, in their opinion that was
22 moot. But, it was incorrectly so because any mortgage signed
23 after January 1, 1980, would be affected, but not Mrs. Feen-
24 stra's mortgage, so there's definitely a live controversy, case
25 in controversy before this Court.

1 But in their motion to dismiss they made a point
2 that the 5th Circuit could reopen its mandate and determine
3 what they meant by a prospective-only holding. This Court has
4 continually in Article III cases recognized the power of find-
5 ing, making a decision prospective only, but in all times where
6 an Article III case in controversy was presented the decision
7 applied to the parties litigant, and I think this is agreed
8 upon by the State of Louisiana.

9 As to Appellant Kirchberg's contention that there is
10 no need to reach the issue of unconstitutionality because of
11 Mrs. Feenstra's ability to file a declaration of homestead,
12 this was a very serious burden imposed upon married women in
13 Louisiana, and under the statute this declaration was only
14 allowed to be made six months after the property was purchased
15 by the wife. The statute provided --

16 QUESTION: Within the first six months or after the
17 first six months?

18 MS. HAUSMAN-SMITH: After the first six months.
19 The first six months after the property was purchased the
20 State of Louisiana left those six months for the husband to
21 file a declaration of family homestead, but if he neglected to
22 within those six months then they empowered the wife, so
23 potentially a husband can mortgage the property without his
24 wife's consent and the declaration would be useless to her if
25 it was done within the first six months after purchase.

1 QUESTION: How about an antenuptial agreement?

2 MS. HAUSMAN-SMITH: An antenuptial agreement was
3 possible under Louisiana law, but Appellee Feenstra would
4 maintain that at all points that that was not, did not cure
5 the burdens on her; that an antenuptial contract would have to
6 be signed by both the parties, and a husband therefore would
7 have to give up, be required to give up the power that
8 Louisiana had given him under the head and master principle.
9 And this is -- the wife would be seeking an antenuptial agree-
10 ment under -- it's definitely an unequal bargaining position.

11 QUESTION: Well, if it's an antenuptial agreement,
12 she can refuse to marry him, I suppose.

13 MS. HAUSMAN-SMITH: I suppose; yes. -- But this
14 declaration merely enhances and buttresses the fact that
15 Mrs. Feenstra has been discriminated against and her rights of
16 equal protection have been violated. Under Louisiana law as
17 it applied to her, the burdens were all on her to cure a ba-
18 sically unequal law, and in no sense, no matter what she did,
19 would she ever be able to proceed in the power that her husband
20 had under head and master, and that would be having total
21 authority and managerial authority over the community proper-
22 ty; no matter what she did would she be able to be in that --
23 stand in that position.

24 Appellee seems to have not created her own predica-
25 ment; the State of Louisiana has by choosing for her a system

1 under which she has no managerial rights over her own property.
2 Article 2404 would force her to relinquish all of her contri-
3 bution. The basis of community property is that a husband and
4 wife contribute equally to the marriage and therefore own
5 jointly all the assets of that community. Yet Article 2404
6 only gives the wife an imperfect ownership right in her own
7 property and gives the husband a perfect right over the entire,
8 her half and his half. And it is not until the marriage is
9 dissolved or his death that she would be able to sue for fraud
10 or to gain her ownership rights if no fraud was committed or
11 if the assets were not structured.

12 By the Louisiana system of choosing management by
13 the husband alone, it is definitely calling for a different
14 treatment of otherwise similarly situated married persons, and
15 this different treatment is based on sex. It is impossible to
16 view the article in any other terms but a denial of her equal
17 protection. The opt-out provisions, the antenuptial con-
18 tract, the declarations that were made, are all forms in which
19 she the wife must, has the burden of correcting a definitely
20 inequitable situation, yet the husband never has that burden.

21 The ability of Mrs. Feenstra to declare a family home
22 was not made light by the 5th Circuit. They merely pointed
23 out that she would have an additional economic and legal burden
24 and the transactional costs added to the wife and not being
25 added to the husband was a denial of equal protection.

1 There is no declaration or contract under this
2 Louisiana head-and-master system which could ever give the
3 wife a favorable position of managerial control.

4 I would like to add that the power of the wife to
5 renounce the community under Article 2410 which was presented
6 as a balance to the head and master system is not a balance,
7 that the Code was not balanced equally and it is balanced
8 inequitably against the wife. The wife had all the disadvan-
9 tages and none of the advantages over her property.

10 Under Article 2410 the wife has the right to renounce
11 at the dissolution of a marriage if her husband has run up
12 debts that exceed the assets of the community. Now, how such
13 a article can be conceived to balance the head and master
14 system against her is unbelievable to me. Fortunately, this
15 is also repealed and now, in Louisiana, there is a strong
16 community property system, a healthy, live community property
17 system, but without the discriminatory provisions.

18 The Louisiana Legislature in its wisdom has adopted a gender-
19 neutral system where both husbands and wives manage equally
20 their property and have avoided, and have chosen the least
21 discriminatory manner possible of regulating marital property
22 to the satisfaction of all parties. And therefore there is
23 really no reason to believe that a situation of havoc or that
24 the Code has been harmed or is unhealthy situation at this point.

25 QUESTION: What was your claim against the State of

1 Louisiana?

2 MS. HAUSMAN-SMITH: The State of Louisiana was
3 enforcing by the mortgage an unconstitutional --

4 QUESTION: So you asked that there be, that the
5 provision be declared unconstitutional and the State be
6 enjoined from enforcing it?

7 MS. HAUSMAN-SMITH: Yes. And that the marriage
8 be declared null and void.

9 QUESTION: And what do you think is left of -- you
10 won your case, didn't you?

11 MS. HAUSMAN-SMITH: Below in the 5th Circuit;
12 yes.

13 QUESTION: And what do you think -- what relief
14 against the State is left after its prospective ruling?

15 MS. HAUSMAN-SMITH: There is really none at this
16 time. The State is in agreement, apparently by their failure
17 to appeal the unconstitutional holding below that the State --

18 QUESTION: I would say that, isn't your position
19 that the State is enjoined from enforcing the provision with
20 respect to your mortgage?

21 MS. HAUSMAN-SMITH: Absolutely.

22 QUESTION: But it is not enjoined from
23 enforcing the provision with respect to any other mortgage?

24 MS. HAUSMAN-SMITH: Yes, with respect to any other
25 mortgage signed --

1 QUESTION: But these are just counterclaims you've
2 filed. The original action was by the appellant.

3 MS. HAUSMAN-SMITH: That is correct, Your Honor.

4 QUESTION: Counsel, how about the second paragraph
5 of what used to be Article 2404 where it describes the role of
6 the husband in marriage, and where it says he can make no
7 conveyance inter vivos by a gratuitous title of the immovables
8 of the community? That would sound to me not to fall within
9 the proscription of the 5th Circuit's reasoning.

10 MS. HAUSMAN-SMITH: Well, it might not, but for-
11 tunately that has all been solved by the repeal of that act
12 as of January 1, 1980.

13 QUESTION: But we still have the problem of the
14 time between the handing down of the 5th Circuit's decision
15 and the adoption of the new system on January 1.

16 MS. HAUSMAN-SMITH: Yes, Your Honor.

17 QUESTION: It's on page A42 of the statement of
18 jurisdiction.

19 MS. HAUSMAN-SMITH: That also includes movables too,
20 and that is something that is totally out of the realm of what
21 the 5th Circuit decision on articles -- what they declared as
22 unconstitutional. So I suppose they declared the entire
23 article unconstitutional.

24 QUESTION: But actually, as to the immovables, the
25 statute already proscribed them.

1 MS. HAUSMAN-SMITH: That's true; so --

2 QUESTION: And since January 1, 1980, under the
3 then and now-existing statutes of Louisiana, a mortgage such
4 as that involved in this case would have had to have been
5 signed by a husband and wife, is that it?

6 MS. HAUSMAN-SMITH: Yes; a mortgage on property held
7 in both their names, community property, or of property held
8 in the name of one spouse would have to be signed by both
9 parties. In effect that --

10 QUESTION: If the property had been acquired during
11 the marriage?

12 MS. HAUSMAN-SMITH: Yes. Community property; that
13 only refers to community property.

14 I would like to point out one question that Justice
15 Blackmun asked of my opposing counsel, and that was, why the
16 5th Circuit made two separate decisions that look exactly the
17 same? There is one footnote in the second decision that was
18 added. Their opinion was originally amended and that footnote
19 concerned the decision of the Louisiana Supreme Court in
20 Corpus Christi, and that's why it was the necessity of includ-
21 ing both decisions in there. They are not exactly the same.

22 I would like to conclude just on the idea that under-
23 standing the facts in this case are really understanding how
24 the law discriminates against women in Louisiana. And Mrs.
25 Feenstra filed criminal charges against her husband to avoid

1 his further molestation of her child. She was merely protect-
2 ing her family and her own daughter from her husband.

3 QUESTION: What does that have to do with the issues
4 here now?

5 MS. HAUSMAN-SMITH: It has to do with it in the fact
6 that it enhances the actual discrimination against her, because
7 Mr. Kirchberg is asking that Louisiana enforce the mortgage
8 under which she would lose her home for no other reason than
9 her opposition to the party that's seeking the mortgage. Those
10 are legal fees performed by Mr. Kirchberg, that is the separa-
11 tion and the so-called representation in the criminal charges
12 were in direct opposition to her interests, and yet she is the
13 one that stands to lose from this. Thank you.

14 MR. CHIEF JUSTICE BURGER: Do you have anything fur-
15 ther, Mr. Schoenberger? You have a couple of minutes left.

16 MR. SCHOENBERGER: A few brief comments.

17 ORAL ARGUMENT OF ALAN F. SCHOENBERGER, ESQ.,

18 ON BEHALF OF THE APPELLANT -- REBUTTAL

19 MR. SCHOENBERGER: I would first like to say that
20 in terms of my client's reliance upon the law, we would point
21 out that Article 2404 was valid in 1974 and we would say there
22 was no other law to rely upon, and he relied upon the law at
23 that time, when these acts were executed.

24 We would also say that in terms of --

25 QUESTION: Well, the 5th Circuit acknowledged that,

1 did they not?

2 MR. SCHOENBERGER: Right, right. But -- yes. And,
3 Your Honor, we would also say that this decision would have
4 effects potentially damaging. A wife, under Kirchberg v.
5 Feenstra, the 5th Circuit holding, could renounce pay-
6 ment on mortgages executed by the husband alone, so creditors
7 under this holding would be prejudiced by the holding. So we
8 do have problems, and we do have the problem that the mortgage
9 was executed in 1974 and if an order should proceed from this
10 Court cancelling the inscription of the mortgage, the mortgage
11 would have to be cancelled as it would relate back to the
12 date of October, 1974, and therefore all the other mortgages
13 similarly situated after October, 1974, would be affected by
14 this holding.

15 QUESTION: So, counsel, even in community property
16 states which allow the husband to alienate on his own signa-
17 ture community property so long as it is not in fraud of the
18 rights of the wife, this mortgage would fail, would it not?
19 I mean, certainly this is in fraud of the interests of the
20 wife.

21 MR. SCHOENBERGER: Well, Your Honor, we did not feel
22 that it was in fraud of the interest of the wife.

23 MR. CHIEF JUSTICE BURGER: Thank you, counsel. The
24 case is submitted.

25 (Whereupon, at 12:01 o'clock p.m., the case in the
above-described matter was submitted.)

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1388

KARL J. KIRCHBERG

V.

JOAN PAILLOT FEENSTRA

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. White

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