Appellate Review of Facts in Louisiana Civil Cases

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COMMENTS

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I. THE LOUISIANA RULES ON SCOPE OF REVIEW

A. Introduction — The Manifest Error Rule

The jurisprudence of Louisiana appears settled beyond doubt that findings of fact made by a trial court will not be upset on appeal unless deemed “manifestly erroneous” by the appellate court. The manifest error rule is often stated to be so well set-

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1. The vast majority of cases involving factual problems on appeal contain statements attesting to the universal applicability of the manifest error rule. The Louisiana Digest lists upwards of 1000 manifest error cases. In Succession of Fields, 222 La. 310, 319, 62 So.2d 495, 498 (1952), the court stated: “Counsel for defendant makes reference to 500 cases or more to the effect that a judgment of the trial court on questions of fact will not be disturbed on appeal unless manifestly erroneous.” In The Work of the Louisiana Supreme Court for the 1946-1947 Term — Civil Procedure, 8 Louisiana Law Review 261, 268 (1948),
tled as to warrant no citations of support,² and is articulated in most of the cases involving factual questions on appeal. At the outset, it should be noted that this doctrine receives a variety of types of application in the cases. In some, it appears fairly clear that the appellate court was in full accord with the factual conclusions drawn by the trial court, and invoked the manifest error rule merely as additional support for an already well-supported affirmation.³ In other cases, it appears that the doctrine is invoked in order to allow the appellate court to avoid stating which way it would have decided the case at the trial level, or to avoid reproducing or analyzing a lengthy or detailed trial court opinion.⁴ The applications of the manifest error rule to which this Comment is primarily directed might be termed the decisive uses of the doctrine. I.e., in a minor number of cases, the appellate court will state that the trial court's conclusions were manifestly erroneous and therefore must be overturned.⁵ In other cases, the appellate court may express disagreement with the conclusions reached by the trial court, but state that the court below was not so clearly incorrect as to be manifestly in error. In both of these latter types of cases, it may be said that the outcome of the appeal turned on the extent of applicability and meaning of the manifest error doctrine.

² See Schlesinger v. Fontenot, 235 La. 47, 59, 102 So.2d 488, 493 (1958); State v. Ragusa, 234 La. 51, 59, 99 So.2d 20, 23 (1958); Jones v. Jones, 232 La. 102, 105, 93 So.2d 917, 918 (1957); Kruse v. Kruse, 175 La. 206, 207, 143 So. 50 (1932). In Rosenthal v. Gauthier, 224 La. 341, 346, 69 So.2d 367, 368 (1953), the court speaks of "the long line of precedent as to not overruling the trial judge's factual findings unless manifestly erroneous and the uniformity of a constant repetition of this rule."


Although the origins of the manifest error doctrine are obscure, it seems safe to assume, in the light of the constitutional provision charging Louisiana's appellate courts with reconsideration of the facts in civil cases, that in its inception the rule

6. Apparently the earliest reported cases in Louisiana contain statements of the rule differing in no appreciable respect from the language of the latest cases. See Klein v. Dinkgrave, 4 La. Ann. 540, 541 (1849) ("It is not our province to disturb the opinion of a district judge or the verdict of a jury with regard to questions of fact, unless where such opinion or verdict appears to us manifestly erroneous."); Henderson v. Beale's Curator, 4 Mart. (N.S.) 228, 229 (La. 1826) ("The case turns entirely on a question of fact. The judge has concluded from the testimony before him that the deceased . . . fully paid what he owed to the transferor; we cannot say he erred in doing so, and in a case like this the opinion of the judge below has great weight in this court."); Pascal v. Caldwell, 3 Mart. (N.S.) 175, 176 (La. 1824) ("the first judgment prevails with us, unless manifestly wrong"); Boissier's Syndics v. Belair, 3 Mart. (N.S.) 29, 30 (La. 1824) ("The decision of the suit now depends solely on matters of fact; and in similar cases we have long been in the habit of yielding much to the conclusions of the courts of the first instance: whether evidence may have been weighed by a judge or by a jury"); Walton v. Grant, 2 Mart. (N.S.) 494 (La. 1824) ("The question presented is one of fact alone, and the rule established in this court is, that the decision in the inferior tribunal always governs here, unless it clearly appears to be erroneous."); Boismarre v. Jourdan, 1 Mart. (N.S.) 304, 306 (La. 1823) ("we adopt the conclusion of the court of the first instance, as we always do on questions of fact, unless the decision is clearly erroneous"); Soubie's Executor v. Beale, 1 Mart. (N.S.) 95, 96 (La. 1823) ("there is not such evident error in the judgment of the court below."); Moore v. Angiolette, 12 Mart. (O.S.) 532, 533 (La. 1823) ("We agree in the conclusions of the district judge, whose decision, on questions of fact, always prevails in this court, unless manifestly erroneous."). It will be noted that the Moore decision was rendered in 1823, and gives no citations in support of the proposition quoted.).

7. LA. CONST. art. VII, § 10(6) : "In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.">

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The consequences of the inclusion of appellate fact review in a judicial system are far-reaching. A major effect has been the relative scarcity of civil jury trials. This scarcity is usually ascribed to a feeling that appellate scrutiny of the facts of a case negatives any advantages of sympathy or pooled intuition which might be had in a jury trial. It should be noted that the scope of appellate review appears the same whether the trier of fact be judge or jury; the manifest error rule applies with equal force in either case. Gilliland v. Feibleman's, Inc., 161 La. 24, 28, 108 So. 112, 113 (1926) : "The jurisprudence of this state does not attach greater importance to the verdict of a jury than to judgments of a trial court upon questions of fact. Where the proof is doubtful, or a fair preponderance of the proof is not clearly ascertainable from the record, weight is given to the verdict of the jury or the judgment appealed from, and neither will be disturbed, but otherwise this court will render such judgment as, in its opinion, should have been rendered in the court below. That is all that the frequently but loosely used expression 'great weight is given to the verdict of a jury' means." See Burt v. Burt, 160 La. 387, 107 So. 234 (1926); Moret v. New Orleans Rys., 112 La. 863, 36 So. 759 (1904); Klein v. Dinkgrave, 4 La. Ann. 540 (1849); Boissier's Syndics v. Belair, 3 Mart. (N.S.) 29 (La. 1824); Roux v. Attardo, 93 So.2d 332 (La. App. 1957). Perhaps contra is McGinn v. New Orleans Ry. & Light Co., 118 La. 811, 43 So. 450 (1907). There a jury verdict in favor of plaintiff who had fallen while riding on a street car and broken her leg was overturned. The court stated: "Were the facts such as plaintiff's counsel claim them to have been, the jury should have accorded a larger amount than it did. The verdict was evidently a sympathetic one. Juries cannot be sustained in indulging in
was intended to operate as a limitation upon the freedom with which the appellate court would overturn the trial court's factual conclusions. The jurisprudence would seem to bear out this assumption. While it seems impossible to determine the precise extent to which the doctrine has limited the scope of appellate review of findings of fact, it is a virtual certainty that appellate courts have to some undefined extent felt themselves limited by the rule. Equally well settled, at least in theory, is the scope of appellate review on questions of law. Here, the appellate court is subject to no doctrinal restrictions in its reconsideration of the

sympathy on insufficient evidence at the expense of other persons." Id. at 822, 43 So. at 454.

Appellate fact review, and the infrequency of civil jury trials, having affected substantive law to a very great extent. For discussion of the comparative consequences of jury and non-jury trials in tort cases, see Malone, Damage Suits and the Contagious Principle of Workmen's Compensation, 12 LOUISIANA LAW REVIEW 231, 237 (1952). For discussion of some mechanical differences between judge-tried and jury-tried cases, which differences have substantive bearing, see Sunderland, Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived, 4 U. CHI. L. REV. 218 (1936).

The effects of appellate fact review upon rules of evidence have often been cited. In Employers' Liability Assurance Corp. v. Madden, 219 F.2d 205 (5th Cir. 1955), the court of appeals affirmed a trial court denial of defendant's motion for a directed verdict. Defendant's motion was grounded upon the contention that plaintiff had not introduced enough evidence to take the case before the jury. The court noted that the fact that Louisiana appellate courts review facts as well as law makes it impossible to determine the state substantive law relative to sufficiency of evidence. See Comment, 30 TUL. L. REV. 462, 473 (1956).

In criminal cases, appeal lies only as to questions of law. LA. CONST. art. VII, § 10(7).

For discussion of the system of appellate review in Louisiana as applied to juvenile courts, see The Work of the Louisiana Supreme Court for the 1947-1948 Term—Criminal Procedure, 9 LOUISIANA LAW REVIEW 252, 276 (1949); Comment, 8 LOUISIANA LAW REVIEW 415 (1948).

8. A good example of a reluctant affirmance brought about by the manifest error limitation is Nissen v. Farquhar, 123 La. 192, 48 So. 885 (1909), where a trial court grant of a separation from bed and board was affirmed. "The whole case depends upon which set of witnesses are [sic] to be believed. The trial judge believed those of plaintiff. . . . The parties have been living apart since March, 1906, and are unlikely to live again together, even though a legal separation were refused them. We cannot be positive that the trial judge, who saw and heard the witnesses, had erred; hence we find ourselves compelled to affirm his judgment — somewhat reluctantly, we admit." (Emphasis supplied.) Id. at 193, 48 So. at 889. Another example of the limiting effect of the manifest error doctrine is the recent court of appeal case of Knighten v. American Automobile Insurance Co., 121 So.2d 344 (La. App. 1960). There, an automobile driven by defendant's insured collided with a pick-up truck in which plaintiff was a guest passenger. In a prior action by the driver of the automobile against the driver of the truck, the court of appeal had held that a jury finding on reconventional demand that the automobile driver (defendant's insured) had been guilty of negligence was not manifestly erroneous. In the instant action plaintiff contended that this prior holding meant that here the automobile driver must be counted as negligent. The court rejected this contention, and held that the jury finding in the instant case that the driver of the automobile had been guilty of no negligence was not manifestly erroneous. Thus, on the same issue of fact, the same court of appeal examined two diametrically opposed jury findings, and held neither of them to be manifestly erroneous.
case, and will substitute its own judgment for that of the trial court with relative freedom. Substitution of judgment means that the reviewing court in theory attaches no special weight to the conclusions of the lower court, and, for purposes of discussion at least, may be counted as the broadest possible rule of scope of review. At the other extreme, absolute inviolability of the trial court’s conclusions would be the narrowest possible scope of review. The manifest error rule lies at some undefined point between these two extremes. The appellate tribunal, in reviewing a finding of fact made by a trial court, will inquire into the facts of the case with a view to determining whether the trial court has been manifestly wrong. Reversal will not follow from mere disagreement on the part of the appellate court, but must be predicated upon something more. This “something more” is visualized as the focal point of this Comment.

B. Elasticity of the Rules

At the outset, the impossibility of imprisoning in words the precise extent to which appellate courts will interfere with the findings of fact of trial courts should be firmly in mind. Such formulae as the manifest error rule are inevitably elusive and variant, since the deference to be paid the findings of the trial court will to some extent always be an individual matter, dependent upon such factors as the propensity of the appellate court to exercise sweeping or limited review, the nature of the subject matter at hand, and whether the appellate court feels as a matter of policy that it is desirable to affirm or to reverse. This is not to say that attempts at definition and clarification of principles governing scope of review should be abandoned. However, it does illustrate that these principles should be viewed as flexible, elastic concepts, rather than as iron-clad doctrines. The

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9. A Louisiana appellate court, on finding a trial court’s conclusion of fact to be in error, ordinarily will not, as is the practice in most jurisdictions, remand the case for further consideration on the facts, but will simply make its own determinations of fact. See Richard v. Cain, 168 La. 608, 122 So. 866 (1929). There the appellate court considered evidence which had been excluded in the trial court. Sometimes, however, a case will be remanded, particularly where a remand on the facts is tantamount to a reversal. See White v. White, 161 La. 718, 109 So. 399 (1926), where, in an adultery case, the trial court gave judgment for plaintiff-husband, refusing to hear any more evidence after deciding not to believe the wife. The Supreme Court remanded, the tenor of the opinion clearly indicating that the outcome of the case should be denial of the divorce. Of course, if it is necessary to hear further testimony or acquire other evidence not already of record in order to reach a finding, of necessity the appellate court will remand the case, having no machinery for hearing witnesses or examining other evidence. See Dunn v. Springfield Fire & Marine Ins. Co., 109 La. 520, 33 So. 585 (1902).
extent of review will ordinarily depend more upon the individual circumstances of a case than upon the wording of the applicable rule of scope of review.

Definitions of the manifest error rule. With this elasticity in mind, some apparently contradictory Louisiana jurisprudence is more easily understood. Many apparent discrepancies may be seen in the cases, both in attempted definitions of the manifest error rule, and in its application. Definitions of manifest error have ranged from statements such as "when such error is manifest, it should be easy to point it out"10 (the court apparently seeing the manifest error doctrine as somehow equated with the appellant's burden of establishing error11) to the more eloquent

11. There appear to be great possibilities for confusion in attempting to interrelate the manifest error concept, the plaintiff's burden of proof at the trial level, and the appellant's burden of establishing error. In Succession of Fields, 222 La. 310, 320-21, 62 So.2d 495, 498 (1952), it was stated: "The question as presented before us is one of the sufficiency or the preponderance of the testimony, rather than of the credibility of the witnesses. In a situation such as this, it has been held that the trial court has no advantage over the appellate court in weighing the testimony and giving it proper effect." This court is apparently saying that the manifest error rule has no application where there is no question of which witnesses are to be believed, but only whether or not all the testimony, once believed, would be sufficient to make out a case. In other cases, the phrase "preponderance of the evidence" has been used to mean about the same thing as the manifest error rule. See Von Eye v. Byrnes, 124 La. 769, 773, 50 So. 708, 709 (1909), where the court stated that the trial court's judgment was against the preponderance of the evidence and would have to be reversed. Likewise, a presumption that the trial court was correct in its conclusions—which would seem to be synonymous with the preponderance of the evidence idea—has been used in lieu of the manifest error rule in order to affirm a trial court judgment. Ansley v. Stuart, 123 La. 330, 48 So. 953 (1909). In Kendrick v. Kendrick, 232 La. 1104, 96 So.2d 12 (1957), the preponderance of the evidence notion was substituted for the manifest error rule in an affirmation. In some of the early cases, language may be found indicating that the appellate court will be more reluctant to reverse when the judgment below was for the defendant than when the plaintiff has been successful. Nahu v. Soubereau's Heir, 4 Mart. (N.S.) 493, 494 (La. 1826); Walton v. Grant, 2 Mart. (N.S.) 494, 494-95 (La. 1824); Rachel v. St. Amand, 8 Mart. (O.S.) 363, 364 (La. 1820).

About the only thing which can be said about these cases is that notions of the appellant's burden of establishing error and the plaintiff's burden of proof have become inextricably entangled, this resultant tangle sometimes working in accord with the manifest error rule, sometimes contradicting it. Further confusion is added by the fact that some of the more modern cases have stated that it is incumbent on the appellant to show manifest error in the judgment below before a reversal may be secured. Smith v. Westchester Fire Ins. Co., 227 La. 812, 80 So.2d 418 (1955); Pearson v. Taylor, 116 So.2d 835 (La. App. 1959); Dane v. Canal Ins. Co., 116 So.2d 359 (La. App. 1959). Apparently this is what the language from Sunseri v. Westbank Motors, 228 La. 370, 82 So.2d 43 (1955), quoted in the text, means.

It is believed that the following analysis comes as close as any to presenting a logical picture of the above-described situation. At the trial level, plaintiff has the burden of making out his case by a preponderance of the evidence. The trial court determines that plaintiff has not made his case. On appeal, plaintiff must show error in the judgment below, i.e., he has the burden of establishing error. See Pisciotta v. Indemnity Co. of America, 164 La. 260, 113 So. 840.
proposition that the manifest error rule is "but a splendid affirmation in determining evidence taken by another court" (this court seemingly visualizing the manifest error doctrine as something of an inter-judicial rule of comity). Definitory statements of the manifest error rule will frequently appear diametrically opposed. Thus, in one case, the statement was made that the trial court will be reversed whenever there is "reasonable certainty of error"; in another, it was stated that the lower court will be reversed only if there is no "evidence of record which . . . supports" the finding. These latter two statements appear especially illustrative of the wide discrepancy as to the meaning of manifest error which may regularly be observed in the cases. The statement that the trial court will be reversed provided there is reasonable certainty of error may be interpreted as meaning that very little weight will be given the conclusions of the trial judge, the appellate court merely making reasonably certain that the trial court is wrong before reversing. On the other hand, the statement that the trial court's findings will be affirmed if there is evidence of record which supports them carries with it the idea that any shred of evidence will be seized upon in order to uphold the trial court's conclusion. These two statements, both taken from Louisiana Supreme Court cases

(1927). But this burden is the same, whether or not the appellant was plaintiff or defendant below, whether or not the trial court determined that plaintiff made out his case or did not make out his case. The burden of proof which plaintiff bore in the trial court enters the manifest error scene only as an index of what facts it was necessary for the trial court to find in order to reach its decision. Whether appellant be defendant or plaintiff, his burden of establishing error should be exactly the same.

Furthermore, it does not seem that either appellant should have the burden of establishing manifest error in the judgment below. The manifest error rule is a guide by which the appellate court measures the extent to which a presumption in favor of the trial court's correctness will be exercised, but it seemingly should have no application to the burden of establishing error.

15. Other definitory statements of a broad manifest error rule include: "not prone to disturb the findings" (Gravity Drainage District v. Key, 234 La. 201, 211, 99 So.2d 82, 87 (1958)); "conclude with reasonable certainty that the . . . trial judge correctly resolved the facts" (Psayla v. Thomas, 177 La. 1019, 1022, 150 So. 5, 6 (1938)); "presumption that the conclusions reached by the trial court were correct" (Ansley v. Stuart, 123 La. 330, 341, 48 So. 653, 657 (1908)). Some narrower definitions: "not proper to reverse . . . unless . . . clearly unsupported by evidence" (Carlisle v. Steamer Eudora, 5 La. Ann. 15, 16 (1850)); "the conclusion . . . does not appear to us to be so violently opposed to the entire evidence of the case as to require the interference of this court" (Jordan v. White, 4 Mart.(N.S.) 626, 628 (La. 1826)); "no such evident error . . . as to require . . . reversal" (Soubie's Executor v. Beale, 1 Mart.(N.S.) 95, 96 (La. 1823)).
involving review of findings of fact made by a trial judge in a civil proceeding, seem to represent two extremes of scope of review. It would thus seem that the elasticity of the manifest error doctrine is difficult to overestimate.  

Applicability of the manifest error rule. Some areas of divergence among the cases are not so readily explained in terms of the flexibility of the manifest error doctrine. Thus, there appear to be two lines of cases on the question of whether the limitation applies only as to findings of fact based upon the trial court's evaluation of the credibility of witnesses, or rather as to any finding of fact made at the trial level. The cases stating

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16. Not only may divergence in views as to the extent of proper application of the manifest error rule be found among different cases, but there are instances of apparent discrepancy within the same case. The manifest error rule has been cited for the purpose of upholding the lower court's finding as to liability, but seemingly ignored in the same case for the purpose of reducing the quantum awarded below. Dozier v. Fire Ass'n of Philadelphia, 116 So.2d 185 (La. App. 1959). In Norman v. State, 69 So.2d 120, 131 (La. App. 1953), the court of appeal affirmed the judgment of the lower court in a jury case with the following statement: "As a practical proposition the reasons for this restriction are obvious. Unquestionably it is intended for the purpose of lending weight and persuasive influence to the effect of the actions of a trial court upon the considerations of an appellate tribunal. It emphasizes the distinction between a court of first instance . . . and an appellate tribunal." In spite of this relatively cogent statement of the rule, however, the Supreme Court in the same case reviewed the conflicting testimony of witnesses, weighed their credibility, and reversed the judgments of the court of appeal and the trial court without mentioning the manifest error rule. Norman v. State, 227 La. 904, 90 So.2d 658 (1955).

17. Probably the strongest authority discovered for the proposition that the manifest error rule is applicable regardless of the nature of the factual conclusions being reviewed is Schlesinger v. Pontenot, 235 La. 47, 61, 102 So.2d 485, 498 (1958), where the statement was made: "[W]here the issue involved is one purely of fact a fair and sound analytical disposition thereof by the trial judge warrants an affirmance." Almost equally strong authority is State v. Ragusa, 234 La. 51, 99 So.2d 20 (1958), an expropriation case where the issue for review was whether the trial judge arrived at a proper method of evaluating expropriated property. Cases which state the manifest error rule without limiting it to credibility questions include Jones v. Jones, 232 La. 102, 93 So.2d 917 (1957); Huber v. Ed Taussig, Inc., 228 La. 1018, 84 So.2d 806 (1956); Kruse v. Kruse, 175 La. 206, 143 So. 50 (1932); Burt v. Burt, 160 La. 387, 107 So. 234 (1926).

Cases indicating that the manifest error rule applies, but with somewhat less effect, when the question is one other than credibility include Kendrick v. Duconce, 236 La. 34, 106 So.2d 707 (1958); Orlando v. Polito, 228 La. 846, 84 So.2d 433 (1955); Adeock v. Palmer, 179 La. 131, 153 So. 538 (1934); Psayla v. Thomas, 177 La. 1019, 150 So. 5 (1933); Yarbrough v. Marks, 168 La. 57, 121 So. 300 (1929); Shaw v. Carter, 8 Mart.(N.S.) 659 (La. 1899). See also Fed. R. Civ. P. 52(a), which sets forth the federal "clearly erroneous" rule, and contains the phrase: "and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Square statements to the effect that the manifest error rule applies only where the factual questions for review turn upon an analysis of the credibility of witnesses who testified in open court may be found in Succession of Fields, 222 La. 309, 319-20, 62 So.2d 495, 498 (1952) and in Jordan v. Jordan, 175 La. 468, 474-75, 143 So. 377, 378 (1932). It is interesting to note that in both these cases, following fairly lengthy explanations of reasons why the manifest error rule had absolutely no application, the court states that the trial court judgment in
that the doctrine limits review only where the trial court's factual conclusions are based upon an evaluation of demeanor evidence, leaving the appellate court free to substitute judgment as to other findings, proceed upon the theory that the only reason for limiting the appellate court in its re-examination of the facts is that the trial court, having seen the witnesses and heard them testify, is in a better position to decide whether and to what extent to believe them than is the appellate court, confronted with only a cold record. On the other hand, cases stating that the case was manifestly erroneous. Further support for the position that the manifest error rule applies only when credibility is at issue may be gleaned from the fact that there is some indication among the early cases that at its inception the rule applied only as to credibility matters. Carlisle v. Steamer Eudora, 5 La. Ann. 15 (1850); Jordan v. White, 4 Mart.(N.S.) 626 (La. 1826); Henderson v. Beulé's Curator, 4 Mart.(N.S.) 228, 229 (La. 1826); Boissier's Syndics v. Belair, 3 Mart.(N.S.) 29 (La. 1824). Perhaps contra earlier cases are Shaw v. Carter, 8 Mart.(N.S.) 680 (La. 1830); Walton v. Grant, 2 Mart.(N.S.) 494 (La. 1824); Boismarre v. Jourdan, 1 Mart.(N.S.) 504 (1823).

Cases lending support to the proposition that the manifest error rule is applicable only in credibility matters (through stating the reason for the rule as being that the trial judge sees and hears the witnesses and thus is in a better position to determine credibility questions) include Diez v. Diez, 219 La. 575, 53 So.2d 677 (1951); Trascher v. Ducote, 178 La. 925, 152 So. 567 (1934); Guillory v. Fontenot, 170 La. 345, 127 So. 746 (1930); Gore & Lambert v. Vidal, 15 La. 479 (1840).

18. E.g., Jordan v. Jordan, 175 La. 468, 474-75, 143 So. 377, 378-79 (1932): "Counsel for defendant has referred us to many cases in which it was said by this court that judgments of trial courts based purely upon questions of fact are entitled to great weight and will not be set aside unless manifestly erroneous. We need not cite them here—they are numerous, and we here take occasion to say again that it is with reluctance that we disturb such judgments. The reason is that the trial judge sees and hears the witnesses—we do not. This is a great advantage, because by seeing and hearing, the trial judge is enabled to form some estimate of their intelligence and veracity. By observing their manner of testifying, their attitude toward the court and the case, he is enabled to form some idea as to whether they are influenced by bias or prejudice. Having this advantage, which is not afforded the members of the appellate court, he is in better position than they are to say what weight should be given their testimony. In cases where the testimony is conflicting, it is often necessary, in order to properly determine the issues presented, to sift the wheat from the chaff, to separate the sound from the unsound, the gold from the dross. He who sees the witnesses, who hears what they say, is in better position to do the sifting, the separating, than he who reads what they say.

"So we defer to the judgment of trial judges as to the intelligence and veracity of witnesses, and the weight which should be given their testimony. But further than this, the rule invoked has no application. In the absence of any intimation from the trial judge that he had reasons to discredit the testimony of a witness or group of witnesses, we must assume that they are all of equal credibility, unless the contrary appears from the written record, which is not often the case.

"In the absence of any intimation or suggestion from the trial judge to the contrary, we must assume that his judgment was based upon what he considered a preponderance of the testimony. Either that, or he was not satisfied that the testimony adduced, if believed, was sufficient to sustain the action. As to matters of this kind, trial courts have no advantage over appellate courts." It is interesting to note that at the close of this statement, the court enigmatically states: "The trial judge manifestly erred in his judgment."

It would seem to be a fairly logical proposition that the trial court is in a better position to decide questions of credibility. However, there is language in
manifest error rule operates as a limitation upon scope of review no matter what the nature of the findings of fact at issue seldom give reasons for their view, simply resting on the statement that the jurisprudence is well settled that findings of fact are not to be disturbed unless manifestly erroneous.

_Substitution of judgment._ While it is fairly easy to see that formulae like the manifest error rule are quite flexible, there is greater temptation to think of the concept of substitution of judgment as something of an absolute. However, this is not believed to be the case. Just as the manifest error doctrine is capable of great fluctuation, representing a sliding scale of

the cases casting doubt upon the acceptability of even that proposition. In Von Eye v. Byrnes, 124 La. 769, 50 So. 708 (1909), the Supreme Court reversed a trial court determination that plaintiff had not been defamed by defendant during an altercation concerning a boundary fence. The solution of the case depended directly upon which set of witnesses was to be believed, a matter seemingly squarely within the area of clear trial court advantage. The court, however, stated that "appellate jurisdiction over the facts of the case compels us to reverse verdicts and judgments when they are clearly against the preponderance of the evidence. The same jurisdiction and the mandate of the Code of Practice compel us to render such judgment as should have been rendered below." Id. at 773-74, 50 So. at 709. In Fridge v. Talbert, 180 La. 937, 947, 158 So. 209, 212 (1934), the Supreme Court stated: "The consideration of written testimony by an appellate court has some advantage over the hearing of oral testimony by the trial court. A written record furnishes the opportunity for a more mature consideration of the stories told by the witnesses, for detecting the inconsistencies in the statements of individual witnesses, and for sifting the conflicting statements of opposing witnesses." In Owens v. Felder, 35 So.2d 671, 672 (La. App. 1948), the statement is made: "We are reluctant to reverse the finding of a trial court based primarily on questions of fact, but in a case such as we are presently analyzing, it is a self-evident principle that it is occasionally easier to perceive fallacies and inconsistencies in the record by a comparison of the various portions of the transcribed record with other pertinent portions than it is to accurately observe and catalogue them while listening to the oral evidence of the various witnesses who testified during the course of trial."

Despite any plausibility which may be seen in statements like the above, it would appear that if there is any area where the trial courts should be considered paramount, it is the area of determining just what basic facts have emerged from the testimony of the witnesses in a case. A cogent argument that the trial judge enjoys a superiority of position in matters of credibility and weight of testimony, and should therefore be accorded a great deal of respect on appeal in regard to such matters was made by Mr. Justice Moise in Gilbert v. Heintz, 231 La. 535, 538-39, 91 So.2d 784, 786 (1956): "[E]vidence adjusts itself in various ways. To the judge some things will be self-evident; others will be proven by senses; and, there are other subjects which address themselves to no palpable standard of truth, but to human experience of human motives. The trial judge looks at the influences which surround our fellows, and then sounds their hearts by the plummets which he applies to his own. He is not under the same handicap as this Court, who reads a bare transcription of testimony." This same Justice also made a strong statement of the necessity of the trial judge enjoying a great deal of preponderance in these matters in Rosenthal v. Gauthier, 224 La. 341, 346-47, 69 So.2d 367, 368-69 (1953): "[T]he long line of precedent as to not overruling the trial judge's factual findings unless manifestly erroneous and the uniformity of a constant repetition of this rule cannot ... be wholly relaxed or entirely left behind, else there would hardly be any judicial ordering or navigable lines for the development of our judicial system."
scope of review manipulable at the desire of the individual appellate court, so the substitution of judgment rule is to a great extent flexible. In order for substitution of judgment to amount to an absolute standard of review, it would be necessary that the appellate court consider the case de novo, giving no effect whatever to the conclusions of the trial court. While as to questions of law this is no doubt sometimes done, the appellate tribunal will probably more often feel constrained to give some weight to the determination of the trial judge. In this factor — the extent to which the appellate judge will lean in favor of his brother below — lies the flexibility of the substitution of judgment rule. This discussion is believed relevant as an illustration of what might be termed the futility of attempting to formulate more rigid standards for appellate review which would allow the advocate or the student to predict the outcome of an appellate litigation. As stated by the United States Supreme Court in discussing an analogous scope of review problem: "Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry."

The law-fact distinction. Another facet of the law having a direct bearing upon the flexibility of scope of review is the much-discussed distinction between questions of law and questions of fact. Here again much judicial discretion is evident. It is not an inordinately difficult task to unearth cases on either side of the question of whether a given proposition is one of law or one of fact. The tendency of the courts to go in either direction on

20. See 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01—30.08 (1958); 5 MOORE, FEDERAL PRACTICE ¶ 52.03 (2d ed. 1951); Phelps, What Is a "Question of Law?", 18 U. CIN. L. REV. 259 (1949); Sunderland, Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived, 4 U. CHI. L. REV. 218 (1936).

The importance of the law-fact distinction for present purposes is that there is no limitation on the power of the appellate court to review the trial court's conclusions of law, the appellate court more or less freely substituting its own judgment in such matters. Therefore, in order to determine whether the manifest error limitation is applicable, it is necessary to determine whether the matter for review constitutes a question of fact or a question of law. An illustration of the importance of the distinction may be seen in the case of Fouquier v. Fouquier, 231 La. 430, 91 So.2d 591 (1956), where on original hearing the Supreme Court affirmed a trial court's award of a separation from bed and board to the wife, on grounds that the trial court had not manifestly erred. However, on rehearing, the court reversed its original position, stating that although the trial court's finding of fact as to mutual fault was not in manifest error, his award of the separation to the wife was in legal error, since neither party is entitled to an award of separation when both are at fault.

21. In The Work of the Louisiana Supreme Court for the 1951-1952 Term—
such questions in borderline situations is not unique to Louisiana, and has been explained in terms of a "practical" approach to the law-fact distinction, as opposed to an analytical approach. 22 This practical approach simply means that in areas where the logical distinction between questions of fact and questions of law has become blurred, the courts may be influenced in deciding whether a given question is one of law or one of fact by their inclination that the question being considered is deserving of review, or, on the other hand, that the finding below on the point should be left undisturbed. Thus, in a case where a statutory term requires refinement before it can feasibly be applied to a factual setting, the refining process is not purely a matter of fact, since more is involved than determining whether something did or did not happen in a physical world. Neither is it a pure question of law, since the point at issue is not the formulation of a legal norm or standard. The relative impossibility of adhering to the analytical approach in certain cases is believed illustrated in the following situation. Article 2277 of the Louisiana Civil Code 24 requires "one credible witness, and

Civil Procedure, 13 Louisiana Law Review 306 (1953), it is stated that questions such as "holder in due course," "purchaser in good faith," "possessor in good faith," "converted," all have received diametrically opposing interpretations in the cases.

See Talton v. Todd, 233 La. 146, 96 So. 2d 327 (1957), where a nuncupative will under public act was held by the trial court to be void, on the basis of a finding of fact that two of the attesting witnesses had not been present when the will was dictated by the testator, and that the notary did not read back the will in the presence of the attesting witnesses. The trial court's written reasons dealt almost entirely with problems as to which of the various witnesses at the trial were to be believed, i.e., with questions of credibility. The Supreme Court, however, reversed the trial court, stating the following to be a rule of law: "Testimony of subscribing witnesses which is adduced on the contest of the will and which, in effect, impeaches the solemn statements contained in the instrument which by their signatures they have attested as correct, is not in itself sufficient to overcome the presumption of validity." Id. at 151, 96 So. 2d at 329.

22. 4 Davis, Administrative Law Treatise §§ 30.1-30.08 (1958); Davis, Administrative Law Text 541 (2d ed. 1959).

23. There are some Louisiana cases which give the impression that the analytical approach to the law-fact distinction will be adhered to irregardless. In Lazarus v. Friedrichs, 117 La. 711, 42 So. 230 (1906), the Supreme Court went through a great deal of travail in reversing a trial court determination on a question of whether plaintiff's services had been performed as an attorney or as a promoter. The court throughout treated the question as one of fact, and consequently had greater difficulty in concluding to reverse than if the question had been treated as one of law. In Brewster v. Emlet, 168 La. 326, 122 So. 524 (1929), the court treated the question of domicile as a question of fact, reviewed the trial court's determination under the manifest error limitation, and concluded that the trial judge had manifestly erred. It would seem that in both these cases, had the court chosen to apply the practical approach and count these questions as questions of law, a great deal of difficulty would have been avoided.

24. La. Civil Code art. 2277 (1870): "All agreements relative to movable property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing may be proved
other corroborative circumstances" to prove an agreement relative to money or movable property above $500 in value. Since the question of whether the requirements of the article have been complied with involves the application of a statutory standard to a set of facts, the analytical approach settles only that the question is one of the type traditionally termed "mixed" questions of law and fact. The complicating element is that the particular statutory standard set forth in Article 2277 is partially concerned with credibility, a matter generally treated as a pure question of fact. In Cormier v. Douet, the Louisiana Supreme Court treated the question of whether the requirements of Article 2277 had been met as a question of fact, reviewable only to the extent permitted by the manifest error limitation. The trial court's judgment was affirmed. Had the Supreme Court determined that justice or other considerations demanded reversal, it is arguable that the question would have been treated as a matter of law, reviewable free from the manifest error restriction.

C. Conclusion

It can be concluded that the Louisiana jurisprudence is none too revealing as to the exact scope of appellate fact review. Statements propounded as definitions of the manifest error rule appear to range over the entire scale of possible formulae for scope of review, stopping short only of absolute inviolability for trial court conclusions at the one extreme, and of completely free substitution of judgment at the other. The cases are divided on the question of whether the rule applies in cases dealing with findings of fact which are not based upon the trial court's evaluation of credibility. There is much room for flexibility and discretion in the application of even so relatively stable a concept as substitution of judgment. Whether a particular question is one of fact — and thus reviewable subject to the manifest error rule — or one of law — thus leaving the appellate court free to substitute judgment — depends to a very great extent upon whether the appellate court's appreciation of the legal and policy factors involved in the case dictates affirmance or reversal. To these difficulties may be added the fact that in cases where the

by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved at least by one credible witness, and other corroborating circumstances."

25. 219 La. 915, 54 So.2d 177 (1951).
26. A related difficulty in analyzing manifest error jurisprudence is that some-
trial court's findings of fact are reversed, it is indeed rare to find mention of the manifest error rule, save in discussions stating why the rule is inapplicable in the particular case. In other words, where the appellate court feels that policy or other considerations dictate that the trial court's findings of fact be overturned, often the court will find that the manifest error rule is inapplicable, and that the trial court was simply in error, rather than stating that this trial court's conclusions of fact are manifestly erroneous. Very rarely will a statement be found to this effect: "We think the trial court's factual determinations on this point were manifestly erroneous." Furthermore, even in the rare case where such a statement is made, almost never have the courts proceeded to state how, why, and in what respect the error committed was manifest.

II. OTHER RULES OF SCOPE OF REVIEW

Having come to the conclusion that under the Louisiana cases the scope of appellate review depends to a large extent upon ju-

27. One notable technique of avoiding the limitation of the manifest error rule is to ignore it. In Meyer v. Hackler, 219 La. 750, 54 So.2d 7 (1951), the appellate court avoided the manifest error rule by stating: "Any attempt to go into the credibility of the witnesses would be a vain and useless thing, because the issue here is the sufficiency of the evidence." Id. at 755, 54 So.2d at 9. Another case where the rule was seemingly ignored was Norman v. State, 227 La. 904, 80 So.2d 858 (1955), where the Supreme Court reviewed the conflicting testimony of witnesses, weighed their credibility, and reversed the judgments of the court of appeal and the trial court without mention of the rule.

28. Cases where express findings of manifest error have been made include Huber v. Ed Tauussig, Inc., 228 La. 1018, 64 So.2d 806 (1956); Moore v. Lelong, 226 La. 962, 77 So.2d 729 (1955); Fridge v. Talbert, 180 La. 937, 158 So. 209 (1934); Brewster v. Emlet, 168 La. 326, 122 So. 54 (1929). In Succession of Fields, 222 La. 310, 62 So.2d 495 (1952), and Jordan v. Jordan, 175 La. 407, 143 So. 377 (1932), statements that the trial court had manifestly erred were made, but in each instance only after lengthy discussion of reasons why the manifest error rule had no application.
dicial discretion, with the manifest error rule serving to limit review to some undefined extent in an uncertain number of cases, a brief glance at two other scope of review rules might prove useful for comparative purposes.29

A. The Federal Substantial Evidence Rule30

It has come to be settled law that a finding of fact arrived at by an administrative agency will be upheld when reviewed by a federal court provided there is substantial evidence in the record to support the finding.31 "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."32 It is generally stated that the rule means that the agency will be upheld if there is a rational basis of record for so doing. This rule developed in the case law, having its beginnings in the rule that the reviewing court must determine whether the administrative agency abused its power. From this developed the idea that a finding of fact not supported by substantial evidence is beyond the power of the agency. The substantial evidence rule subsequently was incorporated into the majority of statutes governing administrative agencies.

In one of the early cases, substantial evidence was equated with the amount of evidence necessary in order for a trial judge to send the case to the jury, rather than directing a verdict.33 From this statement, there developed the doctrine that the substantial evidence rule applies also to an appellate court's review of findings of fact arrived at by a jury.

It seems fairly clear that the substantial evidence rule allows only a quite narrow review; the reviewing tribunal is precluded

29. Also useful for comparison might prove the following discussions of related scope of review problems: Annot., 33 A.L.R. 745 (1924) (master in chancery); 49 C.J.S. Judgments § 59 (1947) (common law judgments n.o.v.); Comment, 34 N.Y.U. L. Rev. 1118 (1959) (United States Supreme Court review of state courts); Note, 43 Marq. L. Rev. 376 (1960) (appellate review where district court's findings conflict with findings of master or referee in bankruptcy).


32. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

from overturning a factual determination made by an administrative agency or a jury if there is anything properly in the record upon which a reasonable or rational man could base such a finding. As a matter of fact, it has often been stated that review under the substantial evidence rule represents the narrowest extent practicable. By this is meant simply that a reviewing court will ordinarily not accept bases for the trial court's findings which are less than rational.

It is interesting to speculate as to the reasons for limiting review to the narrow extent permitted under the substantial evidence rule. As to administrative agencies the most obvious reason would be that the agency's expertise in certain matters renders it better qualified to make findings of fact than the reviewing court. Closely connected with this notion is the further reason that the intent of Congress in setting up the agency ordinarily may be presumed to have been to allow the agency to handle these specialized matters, rather than leaving them to the courts. A third reason might be that before an agency, basic rights of an individual will ordinarily not be at issue to the same extent as in court, thus mitigating the compelling reasons for having a more or less complete judicial double check of the proceeding.

A basic reason for limiting appellate review of the facts in jury proceedings to a determination of whether substantial evidence of record may be found to support the finding lies in the traditional rationale for the jury trial — the desirability of having a panel of laymen pool their intuitive judgment, embodying therein the underlying sense of justice and fairness of the community. The desirability of incorporating into a judgment this sense of fairness might logically dictate that the jury also decide questions of law. However, the interest of the law in maintaining some consistency, coupled with the relative inability of the layman to handle legal questions, requires that questions of law be decided by the trial judge. An even more compelling reason

34. Strong argument against the desirability of jury fact-finding may be found in Henry, Procedure in Civil Law Jurisdictions — A Comparative Study, 2 LOUISIANA LAW REVIEW 401, 421 et seq. (1940). See also Jacobs v. Solomon, 219 La. 237, 244, 52 So.2d 763, 765 (1951): "The judgment here is one by jury and not by judge. Laws are pumped into them which they cannot comprehend, and there is a giving of testimony they are unable to analyze or remember. They often chafe under restraint and are in no condition of mind to analyze the masses of evidence where a proper computation must be made by experts and instead of being the ancillary of justice, very often become the medium of confusion."

35. Of course, there is substantial ground for arguing that, in many cases,
for the substantial evidence limitation is the seventh amendment to the United States Constitution, which prohibits appellate review of facts which have been found by a jury.\textsuperscript{36}

It would seem that the cases applying the substantial evidence rule have defined it with somewhat more precision than has been observed in the manifest error jurisprudence in Louisiana. While there is admittedly a great deal of flexibility within the substantial evidence concept, it seems clear that the reviewing court is precluded from disturbing findings of fact in a much greater number of cases than under the broader formulations of the manifest error rule. On the other hand, statements of the manifest error doctrine were discovered which seems to approximate the substantial evidence rule.

One area where the reviewing court subject to the substantial rule enjoys an equal amount of discretion as under the manifest error doctrine is that of the law-fact distinction.\textsuperscript{37} As in Louisiana, the reviewing tribunal will sometimes resort to the practical approach to the distinction in borderline situations. Moreover, it would appear that a question which analytically is clearly factual may be treated as a question of law if the appellate court's clear appreciation of the law and policy of the case dictates reversal.\textsuperscript{38} Especially in review of administrative agency findings is this technique of transmuting a clear question of fact into one of law often seen.\textsuperscript{39} Thus, the question of whether certain houses were held by a taxpayer for sale to customers in the

\textsuperscript{36} Through the employment of a legal fiction, review under the substantial evidence rule is counted as review of a question of law. A sufficiency of evidence to justify the trial judge in submitting the case to the jury is counted as also being sufficient to sustain the judgment at the appellate level. Thus, the reviewing court inquires into the facts with a view to determining if enough evidence was properly in the record below to justify the trial judge in sending the case to the jury. Since a trial judge's error in submitting to the jury a case supported by inadequate evidence is counted as an error of law, the review is not of the facts, but rather of a question of law. Thus, the seventh amendment poses no problem. See Wright, The Doubtful Ominiscience of Appellate Courts, 41 MINN. L. REV. 761, 757 et seq. (1957). The seventh amendment poses no problems in the case of review of findings of fact of administrative agencies, since an agency proceeding is not deemed a "suit at common law" within the intention of the amendment.

\textsuperscript{37} DAVIS, ADMINISTRATIVE LAW TEXT 539-62 (2d ed. 1959).

\textsuperscript{38} \textit{Id.} at 520.

\textsuperscript{39} For a discussion of this transmutation technique in appellate courts generally, see Wright, The Doubtful Ominiscience of Appellate Courts, 41 MINN. L. REV. 751 (1957).
ordinary course of business seems to be a question of fact. However, it has been held that this is "a conclusion of ultimate fact, which is but a legal inference from the facts," and thus subject to review as a question of law.40 By the same token, before there was any law on the subject, the question of whether a woman is capable of bearing children was clearly a question of fact. However, the courts have established a presumption that a woman is capable of bearing children until her death.41

B. The Federal Clearly Erroneous Doctrine42

The rule as to scope of review of findings of fact made by a federal trial judge sitting without a jury developed entirely independent of the substantial evidence rule of jury law or of administrative law. Traditionally, the equity trial judge considered evidence taken by interrogatories out of court and by depositions, and heard no witnesses in open court. This being true, the appellate court reviewed the entire case de novo, without regard to the conclusions reached by the trial judge. However, when equity began hearing witnesses in open court, this de novo rule was abandoned, and the rule developed that in cases where the trial judge heard witnesses and based his factual determinations upon their testimony, he would be reversed on appeal only if these findings were clearly erroneous. This former equity rule was incorporated in the Federal Rules of Civil Procedure.43 Although the equity "clearly erroneous" rule apparently applied only to findings based upon demeanor testimony, the Federal Rule was more broadly drawn, applying to all findings of fact with special emphasis upon credibility questions. The jurisprudence under this rule seems fairly uniform, save as to the proper scope of review of a trial judge's decision upon a "mixed" question of law and fact involving the application of a statutory defi-

41. 31 C.J.S. Evidence § 121 (1942).
42. Authority for the discussion of the clearly erroneous doctrine were the following: 2 BARRON & HOLTFORD, FEDERAL PRACTICE AND PROCEDURE §§ 1121-1134 (1950); 5 MOORE, FEDERAL PRACTICE ¶¶ 52.02-52.05 (2d ed. 1951); Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 HARV. L. REV. 70 (1944).
43. For interesting discussion of the scope of appellate review of decisions of the Tax Court, now subject to the clearly erroneous doctrine, see Dobson v. Commissioner, 320 U.S. 489 (1943); Altman, The Dobson Rule, 21 TUL. L. REV. 527 (1947); Note, 17 LOUISIANA LAW REVIEW 833 (1957).
nition to a particular set of facts. Here, the decisions are divided as to whether the question should be treated as a question of law or of fact. Probably the weight of authority is that the question is one of law and thus completely reviewable. This would seem to be historically sound, in the light of the fact that the equity practice from which the "clearly erroneous" rule developed was apparently concerned only with matters of credibility.

The most widely-quoted definition of clear error is that it is such error as will leave the reviewing court "with the definite and firm conviction that a mistake has been committed." If "clear error" means this, and if substantial evidence means evidence which a reasonable person could consider adequate, it appears quite clear that review under the clearly erroneous rule is somewhat broader. It would seem that an appellate court might be left with the definite and firm conviction that a mistake had been committed, while still quite unprepared to say that there is no evidence of record on which a reasonable man could base the conclusion reached. That review of a trial judge's findings of fact should be broader than that of an administrative agency or a jury may be seen by a comparison of the function of the appellate court in the three types of cases. The reasons for limiting fact review to the narrow scope of the substantial evidence rule in administrative and jury cases have already been mentioned. On the other hand, the reasons for limiting review of the trial judge's findings of fact appear less compelling. One reason, of course, would be that the trial judge sees and hears the witnesses, and is therefore in a better position to determine questions of credibility. Other reasons which might be proposed for according deference to the trial judge's conclusions of fact include the theory that the trial court may have more time, and thus be able to give greater consideration to the case, together with considerations of discouraging frivolous appeals and of avoiding overburdening the appellate tribunals. It would seem that none of these reasons is of the same weight as the historical and constitutional reasons dictating that scope of


45. In this situation, the appellate court would presumably reverse a trial judge, but affirm an administrative agency or a jury, on the same finding of fact.
appellate review of jury findings of fact be narrowly limited, nor are they worthy of the same consideration as the expertise idea supporting the substantial evidence rule in administrative cases.

C. Conclusion

Scope of review under the substantial evidence and clearly erroneous rules of federal law is quite flexible. The tests themselves are subject to a great deal of manipulation, and reviewing courts subject to either of these rules are equally as adept as Louisiana courts in using the distinction between questions of law and questions of fact as a device to achieve more flexibility of scope of review. However, it does not seem that either the substantial evidence or the clearly erroneous rule is quite as elastic as the manifest error rule. Apparently, review under the manifest error doctrine may range from the narrowest conceivable under the substantial evidence rule to the broadest possible under the clearly erroneous doctrine.

III. POSSIBILITY OF FORMULATING A MORE EXACT RULE

Having concluded that the manifest error rule is so broad and flexible as to defy definition, it becomes pertinent to inquire

46. It is interesting to note that the requirement of Fed. R. Civ. P. 52(a) that findings of fact and conclusions of law be separately set forth has occasioned criticism as overly restrictive. Hanson, Findings of Fact and Conclusions of Law—An Outmoded Relic of the Stage Coach Days, 32 A.B.A.J. 52 (1946).

47. Two Louisiana authorities have expressed the opinion that review under the clearly erroneous rule is "similar" to review under the manifest error doctrine. Flory & McMahon, The New Federal Rules and Louisiana Practice, 1 Louisiana Law Review 45, 72 (1938). This view may perhaps be tempered by the fact that there is strong indication that the clearly erroneous rule operates to extend the scope of review, whereas, as pointed out hereinabove (see note 4 supra and text) it seems fairly clear that the manifest error rule limits scope of review.

48. Having established at this point that review under the substantial evidence rule is to some undefined extent narrower than under the clearly erroneous rule, the next logical step in this inquiry might be an attempt to place the manifest error test somewhere in relation to these other two. As pointed out hereinabove, the state of the manifest error jurisprudence in Louisiana is such as to defy analysis, so that no meaningful statement of what the law of scope of review actually is can be made. It is not the purpose of this Comment to take a position on this question. However, if taking a position were absolutely essential, it might be possible to venture the extremely timorous hypothesis that as a general proposition, in matters of credibility the Louisiana trier-of-fact's conclusions are accorded approximately the same weight as the findings of a jury or of an administrative agency under the substantial evidence rule. In cases involving non-demeanor evidence, or questions of inference from established facts, the scope of review in Louisiana is perhaps somewhat broader than under the clearly erroneous test. The sliding scale of scope of appellate review represented in the phrase "manifestly erroneous" appears to range all the way from the narrowest review possible under the substantial evidence rule to some point beyond the broadest possible under the clearly erroneous rule, depending upon the nature of the factual conclusions under consideration.
into the possibility of formulating a rule which would specify the extent to which findings of fact are reviewable. This might be done by borrowing one of the tests discussed above, or by formulating a new doctrine.

A. Adoption of the Substantial Evidence or Clearly Erroneous Rule

At the outset, it would seem that the substantial evidence rule should be rejected for Louisiana purposes. As pointed out above, one of the primary reasons for the limitation is the seventh amendment prohibition against appellate review of jury-found facts. Since the Louisiana Constitution provides for appellate review of facts in a civil case, whether found by a judge or a jury, the constitutional reason for the substantial evidence rule seems clearly inappropriate for consideration in Louisiana. By the same token, since the appellate court is charged with reconsideration of the facts, it seems obvious that the theory of the jury as a pooling of lay intuitive judgment which should be accorded a great deal of deference has been considered inapplicable in Louisiana.

The clearly erroneous rule, on the other hand, would be conceptually quite acceptable in Louisiana. However, it is not believed that its adoption would serve any particular purpose of clarification or firming of our law, since the rule is subject to much of the same vagueness and flexibility as is the manifest error rule.

B. Formulation of a New Test

The remaining possibility would seem to be the formulation of a new test, lying somewhere within or beyond those thus far discussed. The first step in such a task should probably be an examination into the nature of the fact-finding process.49

Nature of the fact-finding process. The raw material of a trial is evidence. This may be of a variety of kinds, of greater or lesser probative weight. All of it which is admitted at the trial becomes the material from which conclusions of fact will ultimately be produced. Once all the evidence is in, the trial court arranges it into relevant groups, pertinent to a variety of

49. For comprehensive treatment of this subject, see FORKOSCH, ADMINISTRATIVE LAW §§ 245-247 (1950). See also 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 16.06 (1958) ; WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF (2d ed. 1931).
different propositions of fact. Some of it will inevitably pertain to factual propositions not material to the instant inquiry, and will not merit further consideration. Such evidence as is deemed relevant to material propositions of fact will be weighed and sifted until a primary fact emerges. This fact is arrived at by inference, involving weighing and sifting the evidentiary facts and deciding what they mean. The inference by which a primary fact is arrived at may be termed the primary inference. A succession of sifting and weighing processes, of primary inferences involving the mass of evidence relevant to each proposition, will result in the production of other primary facts. From these primary facts, secondary inferences will then be drawn. The product of this second inference-drawing process will be the ultimate facts, or findings of facts.

This fact-finding process may perhaps be made clearer by means of illustration. \( A \) sues \( B \) for damages sustained in an automobile accident involving the two parties. \( A \) is relying solely on a statute making it unlawful to drive over thirty miles per hour on a wet highway. In order for \( B \) to be found liable, it is necessary that he have violated the statute. The issues of ultimate fact, then, are road conditions and the speed of \( B \)’s automobile. It is stipulated that \( B \) is a young man with flaming red hair, and that he drives a yellow Bentley automobile. At the trial, various types of evidence are introduced. From this mass of evidence, the trier of fact, through primary inferences, determines that it had rained approximately one-half hour before the accident, and that witness \( X \) was driving at approximately twenty-five miles per hour and was overtaken and passed by a red-haired man in a yellow Bentley about one-tenth of a mile from the scene of the accident. These findings would be primary facts. From these facts, the secondary inference-drawing process leads the trier of fact to the conclusion that the road was wet at the time of the accident, and that \( B \) was traveling faster than thirty miles per hour. These would be the findings of ultimate facts.

This illustration suggests several possibilities for formulating a more precise rule prescribing scope of appellate review of facts. One possibility would be completely unrestricted review. Under such a scheme, the appellate court might examine all the evidence in the record, and, taking into consideration \( X \)’s testimony that his color vision is somewhat defective, and that he is
unfamiliar with British automobiles, decide that X had not in fact seen a red-haired man in a yellow Bentley. The appellate court would here be substituting judgment on a question of credibility, by making its own primary inference as to whether and to what extent witness X is to be believed.

A second possible rule for scope of review would be to give a great degree of deference to the trial court’s conclusions on matters of credibility, but otherwise to exercise completely untrammelled review. Thus, the trial court’s conclusion that X had in fact been overtaken and passed by a red-haired man in a yellow Bentley would be accepted by the appellate court. However, the reviewing court might decide on the basis of other evidence in the record that B had arrived at the scene of the accident via another route than the one on which X had been proceeding, and thus that the phenomenon observed by X could not have been B. Here, the reviewing court would be re-examining the trial court’s secondary inference, and substituting its own judgment for that of the trial court.

A closely related scheme would be to accord great weight to the conclusions of the trier of fact as to any inference of fact, either primary or secondary, based upon demeanor testimony, but to exercise free review as to primary and secondary inferences based upon any other type of evidence. Thus, X’s statement that he had seen a red-haired man driving a Bentley, and the trial court’s conclusion that the man X saw was B, speeding toward the accident, would be accepted undisturbed. However, the appellate court might conclude on the basis of documentary evidence from the weather bureau that the accident occurred at the height of a ten-week drought, and thus that the statute had not been violated.

It will be observed that the above suggestions are subject to almost infinite modification and variation depending upon the greater or lesser degree of deference to be paid to the trial court’s fact-finding at whatever level of the process is under scrutiny. This question of deference seems to represent an irreducible area of flexibility, of judicial discretion, in the scope of fact review. Perhaps it can be said that the analysis of the fact-finding process has therefore left the problem of scope of review no clearer than before, since questions such as how much evidence is substantial, or how much error is manifest, will still
be presented and will still inevitably be left to judicial discretion at some level. However, it is believed that separating the fact-finding process into components may have served some purposes of clarification, at least to the extent that the nature of the questions inherent in the broad problem of scope of review have been pointed up. Further, it is arguable that perhaps the problem of scope of review could be made less complex and the rules less elastic by eliminating the element of flexibility or discretion at certain levels of the process. This, of course, would be done by making the trial court's conclusions inviolable at these levels.

Considerations involved in adopting a rule of appellate fact review.\(^5^0\) Having examined to some limited extent the nature of the fact-finding process, with a view to exploring various possibilities for formulating a more definite test for scope of fact review, consideration will now be given to some factors believed pertinent to the decision of whether a broad, narrow, or intermediate rule should be adopted.

(a) factors weighing toward narrow review

Two types of factors are here involved. Considerations going to the possibility that in some areas the trial court may be better equipped to make factual determinations than the appellate court will be discussed separately from broader policy considerations, going to the philosophy of appellate fact review.\(^5^1\)

The most frequently stated reason for the manifest error rule is that the trial court sees and hears the witnesses, and is therefore in a better position to determine questions of credibility than is the appellate court, confronted with only a cold record. This reason is based on the theory that certain aspects of the trial, primarily demeanor of the witnesses, upon which a decision as to credibility will be predicated are incapable of being incorporated into a written record, and thus may be considered only by the trial judge. It should be noted that the question of credibility embraces much more than simply whether a witness has intentionally falsified, including matters relative to accuracy of perception, memory, and the ability to observe and to communicate. In the words of Justice Moise: "The judge

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50. For one approach to some of the broad jurisprudential problems involved in such an analysis, see Frank, Courts on Trial (1949).

51. A thoughtful argument for narrow review which relies to some extent upon both these types of factors is Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957).
sees and hears the witnesses, and sounds their hearts by the plummets he applies to his own." While it is doubtless true that the physical aspect of a witness will often be highly relevant to a determination of his veracity and intelligence, there is another side to the story. For example, it has been stated by some courts that the appellate court will often be in a better position to decide questions of credibility, since on appeal the entire record may be examined at more leisure, and inconsistencies within the testimony of a single witness and among the statements of various witnesses may be observed. Further, it is possible to argue that the appellate court may be able to give more objective consideration to the testimony, having in a sense been more remote from the case. Despite these arguments, however, it is believed that the proposition that the trial court is better equipped to determine questions of credibility is well taken in the vast majority of cases where such questions arise.

Closely related to the question of credibility, but, it is submitted, a separate question, is that of the interpretation to be placed upon the testimony of a witness. The courts have apparently not viewed this as separate from the question of credibility. However, it is believed that there is a clear difference between the two questions, as illustrated by the hypothesis set out above involving the red-haired tortfeasor. In that illustration, the question of whether witness X's testimony to the effect that he was overtaken and passed by a red-haired man driving a yellow Bentley is to be believed is a question of credibility only, and under the approach taken by the Louisiana courts, clearly one for the trial court alone, unless the appellate court can discover manifest error in the trial court's conclusion. However, the inference to be drawn from this piece of testimony, once accepted, to the fact that the driver observed by X was in fact B, is an entirely different matter. This inference would be part of the secondary inference process, and it is difficult to see why the trial court has any particular advantage in drawing it. It is the view of this writer that this question should be considered as entirely separate from the question of credibility, and that the factors indicating that the trial court has an advantage in answering credibility questions have no application here.

A third factor which might give the trial court some ad-

vantage in fact-finding matters is again dependent upon the fact that the trial court has the opportunity to observe flesh-and-blood witnesses. If evidence is taken which is confused or uncertain, the trial court has the advantage of being able to ask questions of the witnesses in order to clear up any haziness which may exist in the facts. However, it should be kept in mind that once the trial court has questioned a witness, any material thereby elicited will be part of the record, and at the disposal of the reviewing court.

Since the trial judge is a member of the same community as the litigants and attorneys with whom he will ordinarily be confronted, the question arises as to whether his knowledge of the individual propensities of attorneys, or of other habituées of the court, such as frequent medical experts or extremely litigious citizens, should be taken into consideration in deciding how much weight to give his conclusions. The law appears fairly well settled that the individual propensities of a witness or a litigant are not proper subject for judicial notice. This rule would appear to preclude arguing for greater deference to the trial court on the basis of such knowledge. The same principles appear applicable to any special knowledge the judge may have of attorneys. If the knowledge is a proper subject for judicial notice, the fact of notice should be noted and made part of the record of the case. If not a proper subject for judicial notice, certainly the matter should not be given any consideration. The fact that such matters may in many cases receive consideration does not appear to justify a theoretical argument for greater deference to the trial court.

53. See, e.g., Miranne v. State Farm Mutual Auto Ins. Co., 54 So.2d 538, 540 (La. App. 1951), wherein it was stated: “Judicial knowledge is limited to what a judge properly may know in his judicial capacity, and he is not authorized to make his individual knowledge of a fact, not generally known, the basis of his action. Courts may properly take judicial notice of the facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.” Cf. Coltharp v. Hearin Tank Lines, Inc., 239 La. 445, 451, 118 So.2d 881, 883 (1960), wherein the following statement of the district judge was quoted with approval: “It probably should be said now that the Court in arriving at the conclusion it has reached . . . has given great weight to Trooper Chance’s testimony. Mr. Chance has been a State trooper for more than five years and of course during that experience has investigated many traffic accidents. As a matter of fact, he has been a witness in this Court on a number of occasions. His testimony is always straightforward, clear and concise, and has always impressed the Court as being wholly trustworthy.”

54. In Martel v. Jennings-Heywood Oil Syndicate, 118 La. 391, 394, 42 So. 975, 976 (1907), the court stated: “The [trial] judge has special opportunity to judge of the value of the services of the sheriff from personal observation. This court has not that opportunity on appeal.” (Emphasis supplied.)
As stated above, the major reason for according great deference to the findings of fact of administrative agencies is that these agencies are considered to be expert in certain matters, and thus better able to make factual determinations than the reviewing courts. Consideration of this expertise idea gives rise to the question whether there might be situations where trial judges develop some type of expertise regarding frequently litigated matters. For example, in a district where oil and gas litigation frequently arises, might not the judge have become something of a special expert in these matters? That this is a definite possibility seems beyond argument. However, there appears to have been no consideration of this factor in the cases. Whether or not it should be given consideration in determining the extent to which the appellate court should review the facts of the case is open to question. One factor which would have to be taken into account in making such a decision would be whether it would be desirable to have different rules of review for different trial courts. There are strong arguments against this, based upon the desire of the law for uniformity and consistency. It is believed that different scope of review rules for different trial courts might also give rise to serious questions as to the rights of individual litigants in the one court or the other.

Inquiry into the amount of time available to the trial court for reaching a decision, as compared to the appellate court, appears relevant in deciding whether the trial court is superior to the appellate court in fact-finding matters. Closely related to this matter is the question of whether any difference in rules of review should be made when the trial judge decides the case at the hearing, as opposed to when he takes the case under advisement. These are questions which have apparently not received any degree of treatment in the jurisprudence, and to which this writer is unable to suggest any definitive answers. However, it may be timorously advanced that nothing appears in any of the cases to negative the presumption that the appellate court is usually going to be at least equally competent with the trial judge in finding facts.

Thus, there appear no compelling arguments that the trial court enjoys any advantage over the appellate court in any area except the relatively narrow one of credibility.55 This being

55. Other, relatively unimportant, areas where it might be said that the trial
true, it follows that in matters of secondary inference, and of primary inference from any kind of evidence other than de- meanor testimony, the appellate court is in as good a position as is the trial judge to reach conclusions of fact. Whether, aside from this area, this means that the appellate court should review the facts free of any restraint will be discussed hereinafter. 56

Foremost among what might be termed policy factors indicating that a great deal of weight should be given the conclusions of the trial court is the idea that the proper place of the appellate court in the judicial scheme is the function of insuring that the jurisprudence maintains a certain minimum standard of consistency, rather than working justice on behalf of the individual litigant. When the relative numbers of trial and appellate tribunals are considered, it becomes apparent that some function other than re-examination of each case must have been envisioned for the appellate courts. The theory runs that, consistency and uniformity being the function of the appellate court, no reason can be advanced for any extended inquiry into the facts of the individual case at the appellate level, beyond seeing that the findings of fact do not depart from some hypothetical norm or standard of consistency.

This function of the appellate courts is perhaps most clearly seen with regard to the question of quantum. It can be argued that the appellate courts should examine quantum with a view to keeping the award of damages somewhat consistent. The courts have not distinguished quantum from the usual factual questions, however, simply stating that the question of quantum is reviewable subject to the limitation of the manifest error rule. 57

It would seem that a valid distinction could be made as to the extent of review in quantum cases, since the policy of the

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56. In reality, this raises the issue of the proper function of the appellate court. If the appellate court be taken to be for the purpose of maintaining a uniform jurisprudence, with the burden of working justice in the individual case left to the trial court, then presumably the appellate court would defer to the trial court on many matters of fact-finding, despite its equality of competence. Supporters of this position would point out that there is no real reason to suspect trial courts of any inferiority to appellate courts, and that the relative numbers of trial and appellate tribunals indicate that full review of all trial court fact-finding process was probably never envisaged.

law here toward consistency could be said to outweigh whatever reasons might be vouchsafed for narrow review.\textsuperscript{58}

Since the trial judge is a member of the community from which the litigants facing him will ordinarily be drawn, it is plausible to argue that his feeling for the prevailing sense of fairness and justice in the community is important to the proper disposition of cases, and should entitle his conclusions to a great degree of weight on appeal. Since Louisiana judges are elected officials, this position is not without logical merit. Also in line with this consideration of the trial judge as an elected official is the problem of possible deleterious effects of reversal upon the popular respect in which he is held. Admittedly, these are not the kinds of factors which ordinarily receive consideration, but doubtless there is some thread of theory in the idea of elected judges which is relevant for present purposes.

Another factor which is closely related to the idea that the trial judge's appreciation of the sense of fairness and justice in the community is important in deciding how much weight to give his decisions is the notion that the faith of the public in the stability of their law and justice should be preserved in as healthy a condition as possible. This idea weighs rather heavily toward avoiding reversal whenever possible, as does the related administrative consideration of discouraging multiplicity of appeals.

(b) factors weighing toward broad review

Probably the foremost factor weighing toward broad powers of appellate review of facts is that the individual litigant will doubtless stand a better chance of being justly dealt with if he is assured of a complete double check of any litigation in which he may be involved.\textsuperscript{59} This idea is, of course, the basis for ac-

\textsuperscript{58} For discussion of quantum review in federal courts, with some mention of state law, see Note, 20 Tul. L. Rev. 275 (1945).

\textsuperscript{59} For an interesting argument for broad appellate review, see Bullis, Louisiana and Federal Appellate Court Practice, 19 Tul. L. Rev. 236 (1944). The author states, \textit{id.} at 243-44: "It may be objected that this is the 'adding machine' theory of justice, and that justice is never so simple as two plus two equals four; that the nearest approach to perfect justice is for the judges to do as one prominent appellate court judge said: 'I listen to the arguments of both sides, decide which side ought to win, then find facts and law to sustain a decision for that side.'"

"This would be true if judges were supermen. But only God Almighty knows infallibly what is justice in every case. It would seem that every litigant is entitled to have a disinterested appellate judge weigh all of the facts in the record
cording parties the right of appeal and of petition for writs of review. It would seem that argument could be made for giving complete treatment to a case, to both the facts and the law, once it is up on appeal or writs, on the theory that the additional time and expense involved would be more than offset by the added guarantee of justice to the individual litigant.

There may be a theory that appellate judges are possessed of greater juristic abilities than are trial judges. Manifestation of this theory may be seen in the fact that the qualifications for holding an appellate judgeship are more stringent. This being true, additional support may be found for allowing the appellate judge to review the entire case, without restriction. Closely allied with this argument for full appellate review is the fact that there are several appellate judges involved with each case, whereas trial judges hear and decide cases alone.

The potential effect of the possibility of more complete review upon trial judges and upon lawyers should be noted. It is at least arguable that if judges and attorneys are aware that cases may be reviewed in their entirety, with no special deference being paid the conclusions of the trial court, they may exercise their roles with greater care.

(c) factors weighing toward a rule of discretion

Although it may not be readily apparent, there is a great deal of difference between a broad rule of review and the type of discretionary rule envisioned here. Under a rule of broad appellate review, the reviewing court would be free to reverse the trial court's findings in any instance of disagreement. Under a rule of discretion, however, the degree of deference to be paid to the trial court's factual findings would vary, depending upon the nature of the case.

It should be noted that the discretionary rule which is being discussed here is not the status quo. It is true that scope of review is highly discretionary under the present state of the law, but this discretion stems from the flexibility inherent in

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"Instead of the holding that the decision of the lower court should be accepted as correct, unless clearly erroneous, efficiency should cause the recognition of the fact that the district judge is so close to the litigants that his human prejudices and passions might be aroused by his relations with them. This fact entitles the appellant to an entirely independent review by disinterested judges."
the manifest error rule and in the distinction between law and fact, rather than from a clearly announced rule of discretion. The discussion here envisions a stated rule which might well prove more binding upon the judges than the present scheme, since there would at least be fairly clearly defined limits.

A discretionary rule of appellate review might have the advantage of allowing the appellate court to ground the extent of review upon the importance of the questions involved. The determination of the importance of the questions involved might be based upon considerations pertinent to only the individual case, or might involve a much broader problem, such as the value or necessity of establishing a precedent in the area of law under consideration.

Some consideration should perhaps be given to the extent to which appellate judges are aware of individual propensities—short-comings and abilities—of trial judges, and the extent to which consideration of such factors by the appellate court is proper. The possibility that certain trial judges may acquire expertise in some types of litigation has already been mentioned. Under a discretionary rule of review, the appellate court would be free to take such factors into account. The desirability of so doing is, of course, an entirely different question.

IV. CONCLUSION

A variety of answers could be given to the question of what should be the rule in Louisiana for scope of appellate review of facts. The weight to be given to the various factors and considerations discussed will to a large extent depend upon the individual doing the weighing. It is hoped that this discussion of some of the problems involved, and factors to be considered, may provoke thought and possibly action on this troublesome subject.

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