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RIGHT TO APPELLATE REARGUMENT

In language applicable to courts of appeal, article V, § 8(B) of the Louisiana Constitution of 1974 provides that "when a judgment of a district court is to be modified or reversed and one judge dissents, the case shall be reargued before a panel of at least five judges prior to rendition of judgment, and a majority must concur to render judgment." Despite the broad and apparently mandatory language of this section, the Fourth Circuit Court of Appeal has chosen not to apply it when the dissenting judge disagrees with the majority over issues other than those upon which the reversal or modification is based.¹ Additionally, the Louisiana Supreme Court has mandated application of this provision even when the cause of action and filing of the suit that is the subject of the appeal occurred prior to the effective date of the new constitution.² Whether the courts' application of article V, § 8(B), satisfies constitutional requisites while affording maximum judicial efficiency is a question that bears examination.

Federal and common law appellate courts ordinarily may review only questions of law,³ or mixed questions of law and fact.⁴ Federal appellate courts generally may not disturb findings of fact by the jury or trial judge unless clearly erroneous,⁵ or if reasonable men could not arrive at a contrary verdict.⁶ Common law appellate courts generally may not dis-

1. *Murray v. Travelers Ins. Co.*, 316 So. 2d 199, 201 n.5 (La. App. 4th Cir. 1975); *Brown v. Employers Commercial Union Ins. Co.*, 316 So. 2d 194, 198 n.4 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 204 (La. 1975).

2. *Traigle v. P.P.G. Industries, Inc.*, 315 So. 2d 859, 863 (La. App. 3d Cir.), *cert. granted*, 317 So. 2d 625 (La. 1975) (court of appeal's denial of rehearing vacated; remanded for reargument in compliance with LA. CONST. art. V, § 8(B)); *Traigle v. P.P.G. Industries, Inc.*, 321 So. 2d 541 (La. App. 3d Cir. 1975) (decision after reargument).

3. *See, e.g.*, *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 620-21 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 911 (1971); *Randolph Constr. Co. v. Kings East Corp.*, 334 A.2d 464, 466 (Conn. 1973). *See also* N.Y. CONST. art. VI, § 3a, for a state constitutional provision typical in its general limitation of appellate review to questions of law.

4. *See, e.g.*, *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961); *Stambaugh v. Stambaugh*, 329 A.2d 483, 485-86 (Pa. 1974).

5. *See, e.g.*, *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 274-75 (1949), *aff'd on rehearing*, 339 U.S. 605, 610 (1950); *Professional Golfers Ass'n of America v. Bankers Life & Cas. Co.*, 514 F.2d 665, 672 (5th Cir. 1975); *FED. R. CIV. P.* 52(a).

6. *See, e.g.*, *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (test for granting motions for directed verdict).

turb findings of fact by the jury or trial judge if supported by the evidence,⁷ or by substantial evidence,⁸ or unless clearly erroneous.⁹ The general federal and common law policy of limited review of jury or lower court findings of fact mirrors a determination that witness credibility and the weight of the evidence are matters best decided by the trier of fact.¹⁰

By contrast, the Louisiana constitution empowers appellate courts to review questions of both law and fact in civil cases,¹¹ with the result that civil jury trials in Louisiana are relatively rare.¹² The Louisiana Constitutional Convention of 1973¹³ considered inclusion of appellate review of fact and ultimately retained the power for various reasons, including its strong civilian heritage,¹⁴ prevention of injustice that could result in the absence of judicial fact review,¹⁵ and avoidance of the judicial backlog that could occur from increased demands for civil jury trials¹⁶ and from lawyers feel-

7. See, e.g., *Chapman v. Allstate Ins. Co.*, 211 S.E.2d 876, 877 (S.C. 1975); *Home State Bank v. Cavett*, 518 S.W.2d 584, 586 (Tex. Civ. App. 1975).

8. See, e.g., *Slater v. Alpha Beta Acme Markets, Inc.*, 44 Cal. App. 3d 274, 118 Cal. Rptr. 561, 563 (1975); *Parsons Mobile Prod., Inc. v. Remmert*, 216 Kan. 256, 531 P.2d 428, 432 (1975).

9. See, e.g., *Strouth v. Williams*, 224 N.W.2d 511, 513 (Minn. 1974); *Wolf v. Wolf*, 333 A.2d 138, 139 (R.I. 1975).

10. See, e.g., *McCrary v. Runyon*, 515 F.2d 1082, 1086 (4th Cir. 1975); *Paradise Ventures, Inc. v. Rossman*, 534 P.2d 978, 979 (Ore. 1975).

11. LA. CONST. art. V, §§ 5(C), 10(B). Cf. La. Const. art. VII, §§ 10(6), 29 (1921).

12. See Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78, 83-84 (1968).

13. STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS, Aug. 5, 1973 at 61-74 [hereinafter cited as PROCEEDINGS].

14. *Id.* at 51, where Delegate Dennis introduced the appellate re-argument provision as a "continuation of our present law which is based on the French civilian tradition of appellate review of the facts." He later remarked: "It would seem strange to me that here in 1973, right after the advent of 'cajun power' in its full blossom, that we should discard this French Civilian tradition which has stood us in great stead and made our courts, I think, the envy of the country." *Id.* at 72. See also Hubert, *Trial by Jury Under the New Code of Civil Procedure*, 35 TUL. L. REV. 520 (1961).

15. PROCEEDINGS, Aug. 5 at 65, 67.

16. *Id.* at 65-67. Delegate Burson expressed concern that abolition of appellate fact review would increase judicial backlog: "I would agree, definitely . . . that taking away the power of appellate courts to review facts will increase your backlog many fold. You have only to look at the examples of the States of Illinois, New York, California and so on where they do not have appellate review of facts, and they have backlogs of four or five years

ing compelled to "create" technical errors in order to preserve some "legal" ground for appeal.¹⁷ As an apparent limitation upon the capricious exercise of sui generis appellate fact review, the Louisiana jurisprudence has developed the well-established rule that a trial court's findings of fact will not be overturned on appeal unless they are deemed "manifestly erroneous" by the appellate court.¹⁸ The "manifest error" rule appears both a safeguard against subversion of the trial court's first-hand evaluation of witness demeanor and credibility¹⁹ and an acknowledgement that a major function of an appellate court is to maintain minimum standards of uniformity in the jurisprudence.²⁰

The constitutional history of the appellate reargument provision demonstrates an intent to check unbridled judicial discretion in the exercise of appellate review of fact²¹ com-

because everybody wants a jury trial." *Id.* at 65. Delegate Justice Tate agreed: "[T]he Institute of Judicial Administration which collects statistics on delay in Metropolitan and other areas doesn't even list our state because as bad as we think the delays are, they are nominal compared to other states. Chicago five years to wait for a trial in an automobile accident case. New York the same and so on." *Id.* at 67.

17. *Id.* at 67, where Delegate Justice Tate observed: "Now, when your review is limited to questions of law, what does a trial lawyer do? Naturally, he tries to raise, and I don't blame him, just as many technical traps as he can for the trial court. Why? In order to . . . in case he loses, preserve some ground to have another shot at the apple on a retrial. So what happens? Instead of a case being tried in one day, it'll be three days. And instead of being finally over . . . if there are some technical errors there, it's sent back and it occupies the trial judge again three days."

18. See, e.g., *Spreen v. Gibbs*, 305 So. 2d 494, 497 (La. 1974); *Carter v. New Orleans Public Service, Inc.*, 305 So. 2d 481, 485 (La. 1974). For an exhaustive treatment of the "manifest error" rule, see Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LA. L. REV. 402, 402-15 (1961) [hereinafter cited as *Appellate Review*]. Louisiana jurisprudence requires for modification of the amount of damages awarded that an appeals court find that the trial court abused the "much discretion" allowed the trier of fact under LA. CIV. CODE art. 1934. See *Mayeux v. Mock*, 278 So. 2d 591, 592 (La. App. 3d Cir. 1973); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Torts*, 36 LA. L. REV. 400, 406-08 (1976).

19. For cases suggesting the superior position of the trial judge in observing witness credibility and in determining the weight to be accorded particular testimony, see *Heintz v. Heintz*, 231 La. 535, 538-39, 91 So. 2d 784, 786 (1956); *Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 308 So. 2d 489, 492 (La. App. 1st Cir. 1975). See also Tate, "Manifest Error"—Further Observations on Appellate Review of Facts in Louisiana Civil Cases, 22 LA. L. REV. 605, 613-14 (1962) [hereinafter cited as Tate].

20. See Tate at 607; *Appellate Review* at 428-30.

21. PROCEEDINGS, Aug. 16 at 56-69.

parable to the judiciary's self-imposed restraint on its power through the "manifest error" rule. The Constitution of 1921 placed the determination of whether to sit en banc solely in the discretion of the courts of appeal.²² Although the Constitution of 1974 authorizes a court of appeal to sit in panels of more than three judges,²³ § 8(B) forecloses discretion when the appeals court reverses or modifies a lower court decision and one judge dissents from the reversal or modification. Proponents of § 8(B) viewed a compulsory five-judge appellate panel as a safeguard against overturning of the trial court's findings of fact by only two of three court of appeal judges relying exclusively on their reading of a "cold" trial transcript.²⁴ When an appeals court judge dissents from reversal or modification of a lower court decision, the judges having heard the case are evenly divided—two favor reversal or modification, and two, one of whom observed the witnesses' demeanor and perceptual capabilities, favor the decree as rendered.²⁵ Reargument of these cases before a larger panel of judges was deemed desirable as a matter of policy, especially since the supreme court generally does not grant writs to review findings of fact in civil cases unless a case concurrently presents a question of law or manifest error.²⁶ Moreover, proponents urged that the reargument provision would have the effect of remedying the anomalous situation in which varying results are reached by the same court of appeal in nearly identical factual situations, owing to the appellate court system of rotating the judges in panels of three.²⁷ Appellate reargument thus appears an explicit curb on unregulated review of fact by courts of appeal.

22. La. Const. art. VII, § 23 (1921).

23. LA. CONST. art. V, § 8(A). On first hearing, panels of more than three judges have been utilized in the discretion of the courts of appeal in several instances. *E.g.*, *Rubenstein Bros. v. LaForte*, 320 So. 2d 303 (La. App. 4th Cir. 1975); *Charbonnet v. Hayes*, 318 So. 2d 917 (La. App. 4th Cir. 1975).

24. PROCEEDINGS, Aug. 16 at 58, where Delegate Roy, the amendment's principal proponent, remarked: "All I am saying today is that no two judges on an appellate court who read a cold record should be able to take what a district judge has done after hearing a case for three days and subvert it by simply outvoting another judge."

25. *Id.* at 56-59. *But see id.* at 60, where Delegate Tate, arguing against the provision, noted: "Let's say they split three and two the next time. It is still three and three. Somewhere there has to be an end to the system."

26. *Id.* at 60, Delegate Justice Tate remarked: "[T]he policy of the [supreme] court has been on a question of fact not to accept it . . . in absence of a question of law, or manifest injustice."

27. *Id.* at 57-58.

Although the broad phraseology of article V, § 8(B) draws no distinction between issues of fact and issues of law²⁸ for the purpose of appellate reargument, compulsory reargument when the appeals court, despite a dissenting opinion, reverses or modifies the lower court's findings of law appears incongruous with constitutional history, which uniformly views the provision as one designed to vouchsafe the trial court's determinations of fact.²⁹ Furthermore, reading the provision literally to require appellate reargument when an appeals court judge dissents from the majority's reversal or modification of a lower court's findings of law would have the effect of providing a procedural right beyond that secured by either federal or common law,³⁰ and of usurping the function of the appeals court, which is to guarantee that the jurisprudence does not depart from established legal norms.³¹

The Fourth Circuit Court of Appeal decided not to utilize appellate reargument in *Brown v. Employers Commercial Union Ins. Co.*³² because the dissent was directed to the issue of liability, while the majority's modification of the lower court's decree involved a reduction of damages. Since, according to constitutional history, § 8(B) provides for appellate re-examination only when a court of appeal splits two-to-one over reversal or modification of a lower court's findings of fact, the court in *Brown* appears to have interpreted the section correctly; the lower court's determination of liability was neither reversed nor modified, and all appellate judges acquiesced in the reduction of quantum.³³ To require compliance with the literal terms of the provision whenever one

28. For a discussion of problems encountered in distinguishing issues of law from issues of fact in Louisiana jurisprudence, see *Appellate Review* at 412-14.

29. See text beginning at note 21, *supra*.

30. See text at note 3, *supra*.

31. See references in note 20, *supra*.

32. 316 So. 2d 194 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 204 (La. 1975). "[T]he panel is of the unanimous opinion . . . [that § 8(B)] is inapplicable because in the instant case the dissenting opinion addresses itself to the issue of liability; whereas, the modification of the trial court's judgment by the majority involves a reduction in quantum." *Id.* at 198 n.4. See *Murray v. Travelers Ins. Co.*, 316 So. 2d 199, 201 n.5 (La. App. 4th Cir. 1975) (companion case; same footnote).

33. Since the dissenting judge would not have held defendant liable at all, he must have agreed with the majority's reduction of plaintiff's damage award. 316 So. 2d at 198 (Redmann, J., dissenting).

judge dissents from reversal or modification on a collateral matter that is not the basis for the majority's reversal or modification would be to disregard the constitutional history of § 8(B), and to ignore the need for swift judicial administration.

The Third Circuit Court of Appeal determined in *Traigle v. P.P.G. Industries, Inc.*³⁴ that article V, § 8(B) was inapplicable when the cause of action and the filing of the suit that was the subject of appeal antedated the January 1, 1975, operative date³⁵ of the Constitution of 1974.³⁶ The court of appeal cited article XIV, § 23 of the new constitution which provides that "all . . . suits, . . . appeals, rights or causes of action, . . . existing on the effective date of this constitution shall continue unaffected," and article XIV, § 26 which provides that "this constitution shall not be retroactive and shall not create any right or liability which did not exist under the Constitution of 1921 based upon actions or matters occurring prior to the effective date of this constitution." Implicit in the third circuit's reading of these provisions are the notions that both substantive and procedural rights bestowed by the new constitution are non-retroactive and that a litigant's substantive and procedural rights on appeal are those vesting at the time his cause of action arose. In remanding *Traigle* on writs for reargument before a five-judge appellate panel,³⁷ the supreme court, without articulating its reasons, rejected the third circuit's interpretation. The supreme court apparently interprets article V, § 8(B) as having created a new procedural right, unaffected by the general non-retroactivity rule of arti-

34. 315 So. 2d 859, 863 (La. App. 3d Cir.), *cert. granted*, 317 So. 2d 625 (La. 1975), 321 So. 2d 541 (La. App. 3d Cir. 1975) (decision after reargument). See *Fleming v. Maturin*, 314 So. 2d 356, 361 (La. App. 3d Cir. 1975) (LA. CONST. art. V, § 8(B) held inapplicable when cause of action, filing of suit and trial antedated the effective date of the new constitution).

35. LA. CONST. art. XIV, § 35.

36. The Third Circuit Court of Appeal has in several other cases declined to apply LA. CONST. art. V, § 8(B) although the lower court judgment was reversed or modified and there was a dissent from such alteration, apparently on the same rationale as in *Traigle*. *E.g.*, *Southern Natural Gas Co. v. Gulf Oil Corp.*, 320 So. 2d 917 (La. App. 3d Cir. 1975); *Benoit v. Acadia Fuel & Distrib., Inc.*, 315 So. 2d 842 (La. App. 3d Cir.), *cert. denied*, 320 So. 2d 550 (La. 1975); *Placid Oil Co. v. Taylor*, 313 So. 2d 626 (La. App. 3d Cir.), *cert. granted*, 318 So. 2d 40 (La. 1975) (remanded for reargument in compliance with LA. CONST. art. V, § 8(B)).

37. 317 So. 2d 625 (La. 1975).

cle XIV, §§ 23 and 26. Since mandatory appellate reargument does not have application until an appeals court reverses or modifies a lower court ruling with one judge dissenting from that reversal or modification, its existence as a procedural device is wholly contingent on the appellate life of the claim. Thus, when the appellate life of the claim post-dates the effective date of the constitution, appellate reargument can be properly viewed as a procedural right to be applied prospectively. The Second and Fourth Circuit Courts of Appeal evidently have chosen this interpretation of the interrelationship between article V, § 8(B) and article XIV, §§ 23 and 26³⁸—with the apparent sanction of the supreme court.

The rule is settled in Louisiana that legislation, while it cannot operate retroactively to divest substantive rights,³⁹ may apply retrospectively to alter or remedy purely procedural rights.⁴⁰ Notwithstanding the non-retroactivity principle of article XIV, §§ 23 and 26, reference during the constitutional convention proceedings to § 23 as "standard transitional material,"⁴¹ and to § 26 as "absolutely standard language,"⁴² coupled with the absence of any discussion regarding their alteration of the customary retroactivity of laws affecting procedural rights, suggest these provisions were not intended as departures from the established substantive-procedural retroactivity dichotomy. Therefore in situations like that in *Traigle*, although substantive rights have vested

38. See, e.g., *Magness v. Caddo Parish Police Jury*, 318 So. 2d 117 (La. App. 2d Cir. 1975); *Rubenstein Bros. v. LaForte*, 320 So. 2d 303 (La. App. 4th Cir. 1975).

39. See, e.g., *Long v. Northeast Soil Conservation Dist.*, 226 La. 824, 833, 77 So. 2d 408, 411 (1954) (by implication); *Fithian v. Centanni*, 159 La. 831, 838, 106 So. 321, 323 (1925); *Town of Eunice v. Childs*, 205 So. 2d 897, 900 (La. App. 3d Cir. 1967), *cert. denied*, 251 La. 937, 207 So. 2d 540 (1968).

40. See, e.g., *Fithian v. Centanni*, 159 La. 831, 838, 106 So. 321, 323 (1925); *Fullilove v. United States Cas. Co.*, 129 So. 2d 816 (La. App. 2d Cir. 1961); *Davis v. United Fruit Co.*, 120 So. 2d 273, 276 (La. App. 4th Cir. 1960). See also La. Acts 1960, No. 15 § 4(A), enacting statute, which provides that the act regulated, with some exceptions, procedure in civil actions pending on the effective date of the act.

41. PROCEEDINGS, Jan. 18 at 51. Delegate Duval noted: "Anyone having rights which the courts would declare to be vested rights, under the '21 Constitution, their rights would not be taken away—if these rights vest prior to the adoption of this constitution—is all it's saying." *Id.* at 54.

42. *Id.* at 68. Discussion of LA. CONST. art. XIV, § 26 prior to its passage at the constitutional convention occupies merely three pages of the transcripts. *Id.* at 68-70.

prior to the operative date of the new constitution, the former procedural right to appeal without reargument seems superseded by the article V, § 8(B) appellate reargument provision. To maintain, in light of the nature and purpose of appellate reargument, that appellate procedural rights vest at the time a cause of action arises or at the filing of suit produces anomalous results.⁴³

The language and history of Louisiana's unique⁴⁴ constitutional provision indicate that appellate reargument before a five-judge panel should be automatic in its operation; rehearing should ensue without any requirement that the litigant petition for it. After a three-judge appellate panel considers the merits of a case at its appeals court conference, a split decision favoring reversal or modification of a lower court's findings of fact should ipso facto require reargument before a five-judge panel prior to rendition of written judgment.⁴⁵

Appellate reargument likely will be utilized infrequently since only a small proportion of cases decided by the Louisiana courts of appeal involve reversal or modification of a lower court's findings of fact and a dissent from the reversal or modification,⁴⁶ perhaps in part because of the

43. For instance, in a suit for breach of contract in which the cause of action arose December 31, 1974, an appeals court would not apply the appellate reargument provision, though the action might not be brought for several years because of the ten year prescriptive period for causes of action in contract (LA. CIV. CODE art. 3544); however, that same court would be required to apply appellate reargument on appeal of the same suit if the cause of action arose January 1, 1975, merely one day later.

44. Research has revealed no other state constitutional provision requiring appellate reargument; this is not surprising since no other state provides for appellate review of fact. See text at note 6, *supra*. But cf. N.Y. CONST. art. VI, § 3b(1), which provides in civil cases an appeal of right to the Court of Appeals from judgments entered upon the decision of an appellate division of the supreme court when at least one of the justices dissents from the decision, or when the judgment reverses or modifies the trial court's judgment.

45. For proper application of appellate reargument—automatically and prior to rendition of written judgment, *see, e.g.*, Succession of Hausser, 320 So. 2d 614 (La. App. 4th Cir. 1975); Board of Comm'rs v. Elmer, 318 So. 2d 914 (La. App. 4th Cir. 1975); Townsend v. Cleve Heyl Chevrolet-Buick, Inc., 318 So. 2d 618 (La. App. 2d Cir. 1975).

46. The writer's research of the Southern Reporters from Volume 306 (the first volume recording Louisiana court of appeal decisions rendered after January 1, 1975), through the recent Volume 320 revealed that in only about 3.7% of all cases decided by the Louisiana courts of appeal during this

thoroughness of appeals court conferences.⁴⁷ Nonetheless, when article V, § 8(B) is applicable, the favored position accorded lower court findings of fact by the Constitution of 1974 should guide the courts of appeal in their review of trial court determinations. Ideally, increased judicial sensitivity to the need for delicately balancing first-hand trial court findings of fact with the economics and equity of appellate review of fact will be the product of mandatory appellate reargument.

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DUE PROCESS FOR DRIVERS UNDER THE LOUISIANA REVOCATION STATUTES

With the recent demise of the right-privilege distinction in procedural due process analysis,¹ the United States Supreme Court is declaring state statutory schemes invalid under the fourteenth amendment with increasing frequency.² The parameters of liberty and property interests and the procedures required of the state to protect them are expanding to match increasing governmental power. The purpose of this note is to determine whether the Louisiana scheme for revocation and suspension of drivers' licenses has kept apace with these constitutional developments.³

interval (in about 30 of approximately 800 cases) was there a reversal or modification of a lower court's findings coupled with a dissent from the reversal or modification.

47. This rationale was suggested by Judge Landry in a conversation the writer had with the senior judge of the First Circuit Court of Appeal on December 18, 1975.

1. *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971). Formerly, many states labeled statutorily permitted activities as "privileges" on the theory that what the state gives it may take away without due process.

2. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (Ohio high school student suspension statute).

3. Only LA. R.S. 32:414 (1950), as amended by La. Acts 1974, No. 508 § 1, and LA. R.S. 32:661-69 (Supp. 1972), as amended [hereinafter cited as the Implied Consent Law], will be considered in this note. Other statutes providing for revocation or suspension, such as LA. R.S. 32:415 (1950) (commission of an offense in another jurisdiction which would be grounds for revocation or