Case Western Reserve Law Review

Volume 18 | Issue 2 Article 12

1967

Appellate Review of Jury Instructions in Ohio--The Dilemma over the Two-Issue Rule

Richard Bronner

Appellate Review of Jury Instructions in Ohio —The Dilemma Over the Two-Issue Rule

> The jury should be distinctly instructed by the court . . . and without this it cannot be expected that a jury trial will result in an intelligent verdict.[1]

THE JUDGE'S INSTRUCTIONS to the jury are the culmination of trial procedure in Ohio — the final step before the jury retires to deliberate and render a verdict.[2] In establishing guidelines for the ultimate resolution of the issues, the trial court exerts great influence upon the minds of the jurors. The judge, with the help of both counsel,[3] frames the relevant issues, states the applicable and correct principles of law, educates the jury as to its duty, and selects the form of the verdict. Therefore, an error committed in the instruction may, at least in theory, mislead the jury.[4]

When the jury receives an erroneous instruction, most jurisdictions require that an appellate court review the entire set of jury instructions to ascertain whether the error was prejudicial to either party. Ohio, however, subscribes to a minority theory known as the two-issue rule, according to which error in the court's charge on one issue is disregarded if two or more issues are involved.[5] Since the jury's verdict may hinge on the court's instructions, it is essential that procedural rules in Ohio insure the discovery and elimination of prejudicial error. The purpose of this Note is to examine the historical development of the two-issue rule, the rationale which Ohio courts have employed in adopting the minority position, and the practical effects of its application. A critical evaluation of the rule and a comparative analysis of the appellate practices of other jurisdictions will provide the basis for a discussion of pertinent revisions of appellate review in Ohio.

---

[1] Baltimore & O.R.R. v. Lockwood, 72 Ohio St. 586, 590, 74 N.E. 1071, 1072 (1905).

[2] OHIO REV. CODE § 2315.01(G).

[3] Counsel for either side has the right to present written instructions to the court on matters of law and to request that they be given to the jury. OHIO REV. CODE § 2315-.01(E). See Kish v. City of Cleveland, 102 Ohio App. 453, 459, 131 N.E.2d 260, 264 (1956), which held that a party is entitled to have the jury instructed upon his theory of the case, provided there is evidence to support it.

[4] Hannah, *Jury Instructions: An Appraisal by a Trial Judge*, 1963 U. ILL. L.F. 627, 633, 638.

[5] For an extensive but not exclusive listing of those states which provide for unrestricted appellate review when any error is committed at trial, see notes 91-103 *infra*.

I. History of the Two-Issue Rule

A. *Statement of the Rule*

The two-issue rule is a procedural device utilized by appellate courts to review jury instructions given on two separate issues of law. It is a means of determining whether an alleged error committed on one issue prejudicially affected a general verdict subsequently rendered. The Ohio Supreme Court, in *Bush v. Harvey Transfer Co.*,[6] restated the definition of the rule which has been decisive of every case concerning this principle since 1873:

> This rule as generally applied is that, where there are two causes of action, or two defenses, thereby raising separate and distinct issues, and a general verdict has been returned, and the mental processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, it will be presumed that all issues were so determined; and that, where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded.[7]

B. *Development of the Rule*

The two-issue rule originated in the landmark case of *Sites v. Haverstick*[8] which held in a one-page opinion that a general verdict carries the implication that *all* issues were resolved by the jury in favor of the victorious party.[9] The plaintiff-appellant sought to recover possession of real estate, claiming title by descent through marriage and that the deed of release in the defendant's possession was obtained through fraud. The sole allegation of defendant-appellee was that plaintiff's marriage was not valid and therefore the title was defective. Although error occurred in the instruction on the issue of the marriage's validity, the general verdict was affirmed by the appellate court which inferred that the jury had found all issues in favor of the appellee.[10] The court reasoned that the

---

[6] 146 Ohio St. 657, 67 N.E.2d 851 (1946).

[7] *Id.* at 666-67, 67 N.E.2d at 856. The rule has been stated in several general forms although each has identical substantive import. For some variations see Centrello v. Basky, 164 Ohio St. 41, 49, 128 N.E.2d 80, 86 (1955); Bush v. Harvey Transfer Co., 146 Ohio St. 657, 666-67, 67 N.E.2d 851, 856-57 (1946); Sites v. Haverstick, 23 Ohio St. 626, 627 (1873).

[8] 23 Ohio St. 626 (1873).

[9] The language of the opinion ("found the *issues* joined in the cause," *id.* at 627) gives rise to the court's implication. The rule applies to sustain a verdict for defendant when there are two defenses asserted, either of which, if established, is sufficient in itself to defeat plaintiff's cause of action.

[10] *Ibid.*

issue of marriage was immaterial because the issue of fraud alone was sufficient to defeat appellant's claim and that the error was not prejudicial in the absence of an affirmative demonstration by the appellant of such prejudice.[11]

The principle established in the *Sites* decision has since been followed in over one hundred cases[12] and has become firmly entrenched in Ohio law. *State ex rel. Lattanner v. Hills*[13] exemplifies the perpetuation of the rule. A defendant-promisor of a note pleaded six defenses to a collection action and received a favorable general verdict. Although the court erred in its instruction on one of the defenses, the judgment could not be reversed because the appellate court had no means of determining which issue was the basis for the verdict.[14] The court therefore assumed that *every* issue was decided in favor of the defendant and that the error occurred in an issue which was immaterial in the minds of the jury.[15] The court justified this assumption by stating that a finding upon the one issue submitted free from error must justify the general verdict.[16] It was further assumed that because of the weight of the evidence the outcome of this one issue would be consistent with the general verdict[17] — an apparent effort to demonstrate that the jury did rely solely upon this one issue. Thus without a policy statement or judicial explanation, the supreme court formulated a doctrine which has become the minority view in the United States.[18] Application without interpretation in these decisions left the courts with no alternative but to follow the precedent established even if it was not clear why the rule was adopted.

Jones v. Erie R.R.[19] was decided on the basis of the not yet

---

[11] *Ibid.* See also Burke v. Cremeens, 114 Ohio App. 313, 182 N.E.2d 324 (1961). A discussion of this theory may be found in 1 FESS, OHIO INSTRUCTIONS TO JURIES § 7.11, at 44-45 (1952).

[12] For a complete listing of every case in Ohio dealing with the two-issue rule, see 4 OHIO JUR. 2D *Appellate Review* § 831, at 26-29 n.19 (1953).

[13] 94 Ohio St. 171, 113 N.E. 1045 (1916).

[14] *Id.* at 182, 113 N.E. at 1048.

[15] *Ibid.*

[16] *Ibid.* This is the standard stipulation which courts place upon the rule's application to substantiate affirmation of the verdict. The phrase is usually added at the end of the opinion as a justification of the court's decision which, although supported by the evidence, could as easily have been for the other party. See also Niemes v. Niemes, 97 Ohio St. 145, 119 N.E. 503 (1917).

[17] *Ibid.*

[18] A discussion of the various jurisdictions is found in notes 91-110 *infra* and accompanying text.

[19] 106 Ohio St. 408, 140 N.E. 366 (1922).

interpreted two-issue rule. Because the court was concerned with the dichotomy between federal and state jurisdiction, it failed to ascertain whether the facts of the case justified application of the rule.[20] Once the court found that it had jurisdiction in the case, it affirmed the general verdict despite evidence of erroneous jury instructions, stating: "[U]nless this court is prepared to overthrow this well-established doctrine . . . the same views must be approved."[21] Dictum in the case admonished lawyers that in the future "it [would be] . . . the duty of counsel . . . to submit special interrogatories in order that it might be definitely ascertained whether the verdict of the jury rested upon that defense in which error intervened . . . ."[22]

An insight into the rationale underlying the application of the rule was finally gained through this statement. When counsel fails to take this precaution and a reviewing court is unable to determine what was in the minds of the jury, a presumption will arise in favor of the party who received the general verdict and all error will be disregarded, provided that the evidence supports the general verdict.[23] The justification for the two-issue rule finally became evident thirty-nine years after its advent, but by that time it had become entrenched in Ohio appellate procedure.

The logic of the doctrine was further demonstrated in *Ochsner v. Cincinnati Traction Co.*,[24] a negligence action. The general verdict for the defendant provided no insight into the manner in which the issue of negligence was resolved because the jury might have found the defendant either negligent with no damage to the plaintiff or not negligent at all. Because the error involved the question of damages, the court held that it was not justified in speculating upon what ground the jury based its verdict and that "the verdict being a general one in favor of the defendant, we have just as much right to

---

[20] *Id.* at 411-12, 140 N.E. at 367. The issue of whether an Ohio court should follow state or federal law in the trial of a case in which liability depends upon a federal statute was resolved in favor of state law because, procedurally, Ohio must follow its own legislative rules.

[21] *Id.* at 411, 140 N.E. at 367. The court rejected this assertion: "It is claimed . . . that inasmuch as this particular controversy is based upon a liability created by a federal statute, this court should look to the rules [declared] . . . by the federal courts" which have different rules than Ohio. *Ibid.* State jurisdiction was based upon the principle that "the federal courts in all cases involving the construction of state statutes have uniformly followed the rule that the construction given to such statutes in the state of their enactment shall control." *Id.* at 412, 140 N.E. at 367.

[22] *Id.* at 414, 140 N.E. at 368.

[23] This presumption is accepted in OHIO REV. CODE § 2315.01, Case Notes 662-63 (Page ed.).

[24] 107 Ohio St. 33, 140 N.E. 644 (1923).

assume that the jury found in favor of the defendant upon the issue of negligence as we have to assume that they found for the plaintiff upon . . . [the other] issue."[25] A presumption was said to arise that the defendant was not negligent which, being unrebutted, dictated that the judgment be affirmed. Accordingly, the error involving the measure of damages was harmless, and the verdict, impliedly reached upon the issue of negligence, was affirmed.

In *Knisely v. Community Traction Co.*,[26] the Ohio Supreme Court finally announced the precise policy reasons for the two-issue rule. In a suit wherein the defendant's negligence and the plaintiff's contributory negligence were alleged — the classic situation in which the rule is applied[27] — the defendant's general verdict was upheld. The court stated that the rule, while not applicable in federal courts, is one of policy and expediency found not only in Ohio but in other states as well.[28] The language of the opinion is unmistakably clear:

> The soundness or unsoundness of the rule cannot be argued upon principle, because no principle is involved. It is purely and solely a question as to whether the trial court will be held to a strict accountability to submit each and every issue in a case free from error . . . .[29]

Continuing, the court emphasized the basis of the rule:

> The rule was designed to simplify the work of trial courts and to limit the range of error proceedings. It being merely a question of policy . . . it is within the power of this court . . . to either limit or further extend the rule or abolish it altogether.[30]

The justification for the two-issue rule was thus predicated upon a practical desire to "simplify the work of trial courts" rather than upon a duty — statutory as well as moral — to render justice to

---

[25] *Id.* at 38, 140 N.E. at 646. To resolve this dilemma, the court specifically suggested that special interrogatories should have been filed, an answer to which would have indicated whether the defendant was negligent and whether damages were actually found. *Ibid.* In the absence of such special findings, there is no rule of law which allows a reviewing court to assume that a defendant was negligent or what the jury's mental attitude was.

[26] 125 Ohio St. 131, 180 N.E. 654 (1932).

[27] Although the original cases decided upon the two-issue rule involved other issues, the vast majority of cases since 1932 are predicated upon negligence and contributory negligence.

[28] Although this assertion was made, *id.* at 133, 180 N.E. at 654, in actuality only a small minority of states follow the two-issue rule. Four of these states, Connecticut, North Carolina, Michigan, and Tennessee, are discussed in notes 104-09 *infra* and accompanying text.

[29] 125 Ohio St. at 133, 180 N.E. at 654.

[30] *Ibid.*

individual litigants.[31] With this reasoning in mind, little doubt exists as to the course of action an appellate court will follow in reviewing verdicts tainted with possible prejudice because of erroneous instructions. As long as at least one issue is submitted free from error, the court will disregard all error in other issues and affirm a general verdict on the ground that such issues were irrelevant to the jury's decision.[32]

C. *Limitations and Present Scope of the Rule*

The applicability of the two-issue rule remained unchallenged in Ohio courts for many years. Once an initial exception to absolute application was announced, however, the courts became hesitant to extend the doctrine without at least a preliminary analysis of the logic of its application. As the courts implemented this process, numerous exceptions to the rule arose. A chronological delineation of the various exceptions will permit both a precise definition of the doctrine and, more importantly, an analysis of the present scope of its application.

(1) Separate Issues.—In *H. E. Culbertson Co. v. Warden*,[33] the supreme court limited the purview of the two-issue rule by stipulating that the two or more required issues must be completely separate. In reversing the general verdict for plaintiff, the court held that the five specifications of defendant's negligence constituted only one cause of action; thus there was only one real issue in the case and the rule could not be invoked to affirm the verdict.[34] The court stated: "This rule has prevailed for approximately sixty years . . . and, while it has not met with universal favor, it has neverthe-

---

[31] *Ibid.* The court apparently believed that the smooth flow of the trial court docket was more important than granting the appellant fair and satisfactory relief. Language of this opinion indicates that Ohio wished to reduce appellate review, but no further explanation ensued. See 4 OHIO JUR. 2D *Appellate Review* § 831 (1953) for evidence of this void.

[32] The rationale in all five cases discussed thus far is that, when two or more issues are before the jury, any one of them provides sufficient ground to support a verdict; therefore, the other issues and their erroneous instructions are to be disregarded because the case could have been decided upon the one issue which was presented free from error and which was both supported by the evidence and in turn supported the verdict. The presumption is that this issue was decisive and that all other issues are immaterial. For a general criticism of this proposition, see text accompanying notes 124-41 *infra*.

[33] 123 Ohio St. 297, 302-03, 175 N.E. 205, 206-07 (1931).

[34] *Id.* at 303-04, 175 N.E. at 207.

less been a settled rule . . . . It is not deemed expedient to further extend the operation of the rule . . . ."[35]

(2) Prejudice to All Issues.—Similarly, an erroneous instruction on an issue which is decisive of the entire case or which prejudices *all* the issues will bar the rule's application, as was set forth in *Acrey v. Bauman.*[36] Although testimony relevant to only one issue was erroneously admitted, it tended to provoke racial prejudice against the appellant on every issue; therefore, the court presumed that such error influenced the general verdict.[37]

(3) Conflicting Instructions.—This reasoning also precluded application of the rule in *Bosjnak v. Superior Sheet Steel Co.*,[38] in which it was established that when two conflicting instructions of law are given by the court on the same issue, no presumption exists that the jury followed the correct charge and disregarded the erroneous one.[39] Rather, it is presumed that the error substantially affected the determination of the verdict and reversal will be granted.[40]

(4) Libel Actions.—In actions for libel per se, the rule has not found application. This exception merits mention because the majority opinion in *Westropp v. E. W. Scripps Co.*[41] failed to distinguish the two-issue rule, although one of the two issues was erroneously submitted to the jury. The court held, however, that error on one issue in this area was prejudicial to the entire case.[42] A

---

[35] *Id.* at 303, 175 N.E. at 207. See also Readnour v. Cincinnati St. Ry., 154 Ohio St. 69, 93 N.E.2d 587 (1950). In Stemper v. Campbell, 155 Ohio St. 1, 97 N.E.2d 25 (1951), the court rejected different items of damage as a proper case for application of the two-issue rule.

[36] 134 Ohio St. 449, 17 N.E.2d 755 (1938). See Cleveland Ry. v. Masterson, 126 Ohio St. 42, 53, 183 N.E. 873, 877 (1932) which announced in dictum this very principle.

[37] 134 Ohio St. at 455, 17 N.E.2d at 757.

[38] 145 Ohio St. 538, 62 N.E.2d 305 (1945).

[39] *Id.* at 550-51, 62 N.E.2d at 311. The action involved a claim of personal injury allegedly sustained by an employee of an independent contractor while working on defendant's premises. The court at various points in the general charge correctly stated the applicable rules of law on the issue of defendant's conduct in maintaining a safe place of employment. However, at one specific point the judge, subsequent to reciting the appropriate statutes concerning rules of conduct, failed to enumerate the limitations of these provisions. Because a proper understanding of the statutes was impossible without consideration of the limitations, the omission was deemed prejudicial error. *Id.* at 550, 62 N.E.2d at 310.

[40] *Id.* at 551, 62 N.E.2d at 311.

[41] 148 Ohio St. 365, 74 N.E.2d 340 (1947).

[42] *Id.* at 378, 74 N.E.2d at 347.

leading advocate of the rule, the late Chief Justice Weygandt,[43] concurred in a dissent which also neglected to mention the rule.[44] An apparent breach in the doctrine appeared with this line of decisions because the court was no longer looking quantitatively at the number of issues but sought to ascertain qualitatively the effect of the error regardless of the number of issues.

(5) Primary and Secondary Issues.—Perhaps the greatest restriction on the rule was adopted in the case of *Bush v. Harvey Transfer Co.*,[45] which distinguished factual situations that do not meet the standard tests set forth in its definition. The issues must be independent and separate, neither being an element of nor dependent upon each other, and if two issues can be considered as primary and secondary, the rule may be applied only if the primary issue is submitted free from error.[46] If only the secondary issue is correctly submitted, application of the rule is precluded.[47] Negligence as the primary issue and contributory negligence as the secondary issue illustrate this dichotomy because the latter "presupposes or implies" the former and cannot exist without it.[48] When error occurs regarding the issue of negligence, the general verdict cannot logically be upheld by the theory that it was based upon contributory negligence, for a finding on the former issue is a prerequisite to a finding on the latter one.[49] The verdict in *Bush* was summarily reversed as a result of the prejudicial error in the primary issue.[50]

(6) Unwarranted Instructions.—The two-issue rule underwent its last major restriction in two relatively recent cases. *Ricks v.*

---

[43] The former Chief Justice's logic in the two-issue rule cases never waivered, as evidenced by his dissent in Bush v. Harvey Transfer Co., 146 Ohio St. 657, 675, 67 N.E.2d 851, 860 (1946):

> [T]here is nothing in the record to indicate that the jury's verdict for defendants was not the result of finding the defendants and the plaintiff's decedent all guilty of negligence. If the jury did so find, wherein could the plaintiff be prejudiced by error in the charge on the separate issue of the defendant's negligence?

[44] 148 Ohio St. at 379, 74 N.E.2d at 347. The dissent of Judge Hart was the only opinion to even mention the two-issue rule. *Id.* at 386, 74 N.E.2d at 350.

[45] 146 Ohio St. 657, 67 N.E.2d 851 (1946).

[46] *Id.* at 667, 67 N.E.2d at 856-57.

[47] *Id.* at 667, 67 N.E.2d at 857.

[48] *Ibid.* For an authoritative explanation of this principle, see PROSSER, TORTS 426-34 (3d ed. 1964). Ohio courts have generally accepted the rule. See, *e.g.*, Payne v. Vance, 103 Ohio St. 59, 133 N.E. 85 (1921); Cincinnati Traction Co. v. Stephens, 75 Ohio St. 171, 79 N.E. 235 (1906).

[49] 146 Ohio St. at 668, 67 N.E.2d at 857. The logic of this statement is based upon the principle set forth in text accompanying note 48 *supra.*

[50] *Id.* at 672, 67 N.E.2d at 859.

Jackson[51] held that "the two-issue rule does not apply where there is a charge on an issue upon which there should have been no charge."[52] Further, in a persuasive opinion based primarily upon general objections to faulty instructions,[53] *Schumacher v. Iron Firemen Mfg. Co.*[54] held prejudicial a charge that did not clearly state the issues as set forth in the pleadings, was inaccurate as a result of a failure to include all relevant factors, or included some element or issue which was not properly within the case.

Recent applications of the two-issue rule have attempted to incorporate all of the numerous limitations imposed in the last thirty years.[55] Conflicts have arisen, however, in light of the fact that its sometimes ambiguous limitations are individually interpreted by the courts. Often, several exceptions are cited together to avoid application of the rule, thus creating new exceptions.

(7) Merger of Limitations.—Schreckengost v. Montgomery[56] adopted the limitation concerning separate specifications of negligence,[57] yet the rationale of the lower court's opinion was based upon a second and totally unrelated principle: that the submission to the jury of an unwarranted issue is prejudicial.[58] The supreme court reached its conclusion by impliedly relying upon one principle — inappropriate in this instance — while at the same time superficially reaffirming another.[59]

(8) Inconsistent Application.—A federal court, in *McCrate v.*

---

[51] 169 Ohio St. 254, 159 N.E.2d 225 (1959).

[52] *Id.* at 257, 159 N.E.2d at 227. See also Kehrer v. McKittrick, 176 Ohio St. 192, 198 N.E.2d 669 (1964). In Gottesman v. City of Cleveland, 142 Ohio St. 410, 415, 52 N.E.2d 644, 647 (1944), the issue of sole negligence of the plaintiff was a legal question as it involved a statutory requirement of a certain age for legal responsibility. The five-year-old plaintiff did not have the capacity to be negligent; thus, the submission of this issue was prejudicial. See Cincinnati Traction Co. v. Forrest, 73 Ohio St. 1, 75 N.E. 818 (1905) for the case which originally announced this basic principle.

[53] For a discussion of how influential the court's instructions are in the minds of the jurors, see generally notes 112-20 *infra* and accompanying text.

[54] 102 Ohio App. 347, 360, 133 N.E.2d 801, 809 (1956).

[55] OHIO REV. CODE § 2315.01, Case Note 662 (Page ed.) sets forth a concise synopsis of the various exceptions. A detailed discussion of the rationale of these exceptions is found in notes 33-54 *supra* and accompanying text.

[56] 176 Ohio St. 165, 198 N.E.2d 460 (1964).

[57] *Id.* at 166, 198 N.E.2d at 461. The limitation was established in H. E. Culbertson Co. v. Warden, 123 Ohio St. 297, 175 N.E. 205 (1931).

[58] 176 Ohio St. at 166, 198 N.E.2d at 461. See Ricks v. Jackson, 169 Ohio St. 254, 159 N.E.2d 225 (1959).

[59] 176 Ohio St. at 166, 198 N.E.2d at 461.

Morgan Packing Co.,[60] held that an Ohio court of appeals decision was controlling in the absence of a state supreme court ruling and that the two-issue rule had no application when two issues were submitted to the jury, one of which was unsubstantiated by the evidence adduced at trial. Subsequently, *Sickler v. Neil House Hotel*[61] decided this precise point but reached an opposite conclusion. In *Ricks v. Jackson*,[62] the Ohio Supreme Court expediently resolved the conflict between the two district courts of appeals, but the fact that comparable courts employed identical principles to arrive at totally different results casts doubt on the credibility and function of the two-issue rule.

(9) Non-Jury Findings.—Although the rule is normally invoked only when a jury verdict is involved, it has also been applied in the appellate review of a referee's finding. In *Edwards v. Edwards*,[63] the court interpreted the rule as not to have a "tortured" construction when applied to an accounting proceeding, provided that two separate methods of calculating a final figure were present.[64] In adapting the theory of the rule to non-jury hearings, its original rationale was totally obscured. Whereas a jury may decide upon any and all issues in any possible combination in rendering a general verdict, a referee has the duty to select and utilize only the correct method of calculation. By applying the two-issue rule, the court acquiesces in the potential selection of an incorrect computation.

(10) Plaintiffs' Verdicts.—The theory of the rule obviates its application to a case in which a general verdict has been rendered for the plaintiff.[65] The judicial explanation is that it then would

---

[60] 117 F.2d 702, 704 (6th Cir. 1941). The court of appeals decision was Kolp v. Stevens, 45 Ohio App. 147, 186 N.E. 821 (1933). Prior to Ricks v. Jackson, 169 Ohio St. 254, 159 N.E.2d 225 (1959), this decision was the implied law in Ohio.

[61] 156 N.E.2d 162 (Ohio Ct. App. 1958). Compare the express rationale of the court with that in Kolp v. Stevens, *supra* note 60. Although it was probable that one issue had been improperly submitted in the case, the court affirmed the verdict, ruling that the submission of such issue was harmless. 156 N.E.2d at 164.

[62] 169 Ohio St. 254, 159 N.E.2d 225 (1959).

[63] 107 Ohio App. 169, 157 N.E.2d 454 (1958).

[64] *Id.* at 171-72, 157 N.E.2d at 457. The referee used the cost figures introduced at the hearing to evaluate improvements of the land. He also evaluated the enhancement of the farm using the present value of improvements, but employed the wrong yearly base. The court held that the present value after depreciation was the same value as the original cost (this is the figure the referee found). The court was then unable to determine how the referee arrived at his final figure, so it applied the two-issue rule.

[65] Cincinnati St. Ry. v. Keehan, 45 Ohio App. 75, 186 N.E. 812 (1932).

have been necessary for the jury to have found in favor of the plaintiff on *all* the issues.[66]

The admitted error would be potentially prejudicial because it was essential that all the issues, including the one to which the error related, be considered if the plaintiff were to prevail.[67] Conversely, when the verdict is for the defendant, only one of the issues must have been decided in his favor; any error is presumed to have occurred in an immaterial issue.

(11) Criminal Prosecutions.—Although most definitions of the rule provide solely for civil application,[68] the doctrine has been utilized in criminal prosecutions. The court, in *State v. Figuli*,[69] when confronted with the impossible task of determining what the jury had intended, turned to the two-issue rule to justify its indulgence in every presumption to sustain the verdict.[70]

II. THE RULE IN OTHER JURISDICTIONS

A. Federal Jurisdiction

Although the two-issue rule has been well-established as substantive law in Ohio for over sixty years, the Sixth Circuit Court of Appeals has emphatically rejected the doctrine. *Williams v. Powers*[71] decided that Ohio's rule requiring affirmance of a general jury verdict notwithstanding the erroneous presentation of one of the two issues involved "impinges on the federal rule relating to special verdicts and interrogatories and hence does not apply in federal court."[72] The general verdict rendered was reversed by the court, which held that it was reasonable to assume that the jury *might* have based its finding upon the issue which had been erroneously submitted.[73]

The *Williams* court expressly rejected the rule even though fed-

[66] *Id.* at 78, 186 N.E. at 813.

[67] *Ibid.*

[68] For an announcement of the civil case limitation, see Bush v. Harvey Transfer Co., 146 Ohio St. 657, 567 N.E.2d 851 (1946). The limitation is also expressly set forth in 1 FESS, OHIO INSTRUCTIONS TO JURIES § 711, at 44 (1952).

[69] 36 N.E.2d 19 (Ohio Ct. App. 1938).

[70] *Id.* at 25. The rule was employed to resolve the question of whether the jury intended to return a general verdict of guilty to both counts or only to one. Because the rule is founded upon the principle that prejudicial error must affirmatively appear and that the losing party must preserve the record to show such manifest error, these presumptions have been created.

[71] 135 F.2d 153 (6th Cir. 1943).

[72] *Id.* at 153 (syllabus 5).

[73] *Id.* at 158.

eral courts are bound to apply the substantive law of the state in which they are located.[74] The Sixth Circuit impliedly interpreted the rule to be strictly procedural and therefore not binding because it pertains to the submission of or the failure to submit special interrogatories with a general verdict.[75] Since local law regarding the submission of general verdicts does not control the federal courts with respect to the mode in which causes are required to be submitted to the jury, the federal courts are not bound by the state rules for interpreting such verdicts.[76] The Second[77] and Eighth[78] Circuits share this view.

The most persuasive federal interpretation of the rule was handed down by the Supreme Court in *Bollenback v. United States*.[79] Upon the submission of two separate issues[80] to the jury, a general verdict without special interrogatories was returned for the government. The defendant appealed on the ground that the court's erroneous instructions on one issue misled the jury. The Supreme Court agreed and reversed the verdict, although the government contended that the error was "technical" and to be disregarded.[81] In

---

74 Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See generally WRIGHT, FEDERAL COURTS §§ 55-60 (1963).

75 135 F.2d at 156. Congress may delegate authority to the United States Supreme Court and the inferior federal courts to formulate rules governing the practice and procedure of the federal courts. Hanna v. Plumer, 380 U.S. 460 (1965); Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Herron v. Southern Pac. Co., 283 U.S. 91 (1931).

76 The practice in the federal courts to resolve a conflict between federal and state appellate procedure, relied on by the instant court, is based upon Spokane & I.E.R.R. v. Campbell, 217 Fed. 518 (9th Cir. 1914) which established:

> It has been distinctly held that the local law with respect to submitting special findings along with a general verdict does not control the federal courts. . . . This being so, it is a logical consequence that the federal courts will not be bound by the rules obtaining in local courts for interpreting such verdicts. The general rule . . . is that the court . . . will not look to the evidence . . . . *Id.* at 523.

For the difference between state and federal requirements, *compare* OHIO REV. CODE §§ 2315.16-.17 *with* FED. R. CIV. P. 49(b).

77 Foster v. Moore-McCormack Lines, Inc., 131 F.2d 907 (2d Cir. 1942), *cert. denied*, 318 U.S. 762 (1943). The opinion held that a reviewing court could not determine whether the jury carefully weighed the testimony in light of the judge's erroneous instructions when a general verdict was returned and special interrogatories were not requested. *Id.* at 908.

78 Roth v. Swanson, 145 F.2d 262 (8th Cir. 1944).

79 326 U.S. 607 (1946).

80 *Id.* at 608. The two issues were defendant's alleged transportation of stolen securities in interstate commerce and the conspiracy to commit that offense. Often, Ohio has held that two issues so commonly related as these are in fact only one issue, thus barring the application of the two-issue rule. These cases have been presented in notes 33 and 45-49 *supra* and accompanying text.

81 *Id.* at 614-15.

declining to treat the manifest misdirection of the trial court as a technical error, the Court held that the jury might have been influenced and that therefore such error was prejudicial.[82] A further suggestion by the government that the jury would "know enough to disregard the judge's bad law if in fact he misguides them"[83] was rejected by the Court as a judicial invasion of the province of the jury.[84]

Federal court holdings clearly conflict with the theory of the two-issue rule in Ohio. Whereas Ohio courts presume that the jury disregarded the erroneous instruction and affirm the verdict, the federal courts favor reversal, recognizing the possibility that the instruction might have been relied upon. The federal decisions can be explained by Rule 49(b) of the Federal Rules of Civil Procedure,[85] which provides for the submission of special interrogatories when a general verdict is requested. An interpretation of Rule 49(b) was afforded by the court's decision in *Pacific Greyhound Lines v. Zane*,[86] an action in which error occurred in the charge on one of two issues. Although the rule could have been applied to affirm the general verdict, the court was compelled to remand for a new trial because of the possibility that the erroneous instruction influenced the jury.[87] The court justified its decision by stating that "we are unable to determine and . . . cannot say that it *affirmatively* appears from the whole record that giving these . . . instructions was harmless error."[88] Thus, under this interpretation, the appellant does not have the burden of affirmatively demonstrating that the error was prejudicial; it is assumed, rather, in the absence of affirmative proof to the contrary, that the error was *not* harmless. The *Zane* court further established that "the presence of these . . . in-

---

[82] *Id.* at 614.

[83] *Id.* at 613-14. The implication was that although it was the special duty of the court to properly guide the jury through the "maze of facts" with legal terminology, the laymen of the jury could recognize and disregard an erroneous instruction.

[84] *Id.* at 614. The Court held that the government's suggestion would "transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence." *Ibid.*

[85] See the Notes of Decisions to FED. R. CIV. P. 49(b), in 28 U.S.C.A. (Supp. 1965) for a detailed interpretation and application of this rule.

[86] 160 F.2d 731 (9th Cir. 1947). An ancillary statute on harmless error, 28 U.S.C. § 2111 (1964), has been interpreted in Niemes v. Niemes, 9 Ohio St. 145, 119 N.E. 503 (1917) and Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628 (1855). For further interpretations of this rule, see, *e.g.*, Bollenbach v. United States, 326 U.S. 607 (1946).

[87] 160 F.2d at 737.

[88] *Ibid.* (Emphasis added.)

structions provides no assurance that the error did not materially affect the jury's verdict."[89]

B. *The Rule in Various States*

The vast majority of states adhere to a doctrine which requires reversal when one of two issues is submitted erroneously to the jury and a general verdict is returned. In many states, this principle is applied as a matter of course and without expressly rejecting the two-issue rule.

(1) Possibility of Prejudicial Error.—California is representative of the majority position which recognizes the possibility that the erroneous charge might have misled the jury.[90] When an appellate court in that state cannot determine upon which of two issues the jury based its verdict, an error in the instruction on either is considered substantial and requires a reversal.[91] Perhaps the most logical and compelling language is found in the opinions of several Illinois courts of appeals. Concerning errors committed at trial, they have broadly asserted that "unless the reviewing court can say that on retrial the result could not be otherwise, the cause must be remanded toward the end that the party bringing error may secure substantial justice."[92]

Minnesota also has a more equitable appellate procedure than does Ohio.[93] When several issues of fact are tried and any one of them is erroneously submitted with the return of a general verdict, the appellant is entitled to a new trial because of the possibility that the jury was misled by the erroneous instruction.[94] Ohio courts, conversely, will sustain a verdict on the basis that a finding on the

---

[89] *Id.* at 737. Ohio's two-issue rule is based on the harmless error doctrine, a theory which the court in *Greyhound v. Zane* thought to be "eminently sensible" and intended to be freely applied. *Id.* at 739 n.6. But, whereas Ohio applies the harmless error doctrine to general verdicts, the federal courts bar its use in connection with jury trials when general verdicts are returned without special interrogatories so as to avoid the creation of "troublesome problems." *Ibid.*

[90] McCandless v. United States, 298 U.S. 342 (1936), exemplifies the majority rule which provides that an erroneous instruction is presumed to be prejudicial unless the appellee can affirmatively demonstrate the contrary. One branch of this rule is found in those jurisdictions cited in notes 91-94 *infra* which adhere to the theory that the jury might have relied upon the erroneous charge. However, the results under both theories are identical in that the verdict is reversed and the case remanded.

[91] Plotts v. Albert, 120 Cal. App. 2d 105, 260 P.2d 621 (Dist. Ct. App. 1953).

[92] Sims v. Chicago Transit Authority, 7 Ill. App. 2d 21, 29, 129 N.E.2d 23, 26 (1955), cited in McKee v. Yellow Cab Co., 36 Ill. App. 2d 415, 422, 184 N.E.2d 743, 746 (1962).

[93] Funk v. St. P. City Ry., 61 Minn. 435, 441, 63 N.W. 1099, 1102 (1895).

[94] *Ibid.*

issue free from error will merely *support* the verdict — a far less reasonable test.[95]

(2) Presumption of Prejudicial Error.—Many jurisdictions, in presuming that the error is prejudicial and that the burden of proving the contrary is upon the appellee, have followed a principle which not only directly conflicts with Ohio's but also extends the rule of numerous states which recognizes the mere possibility of such error. For example, Georgia decisions have established that if the propositions of law framed by the trial court are erroneous, the error is presumed prejudicial and the entire record must be reviewed.[96] In Missouri, it is presumed that the jury strictly follows the court's instructions;[97] an inference may be drawn, therefore, that any error on an issue will materially affect its general verdict. Similarly, North Dakota holds that an error in the instruction as to one theory is not harmless if a general verdict is returned.[98] The jury may have founded the verdict upon the issue to which the erroneous charge was related and the instruction may have been controlling in the jury's determination of the issues.

By placing the burden of proof upon the appellee, as is done in

---

[95] The directed verdict procedure employed in every jurisdiction compels the judge to weigh the evidence and to determine whether more than one result was possible. However, the determination is made before the issues are submitted to the jury. Ohio's two-issue rule authorizes the appellate court to again weigh the evidence, which need only "support" the verdict; a directed verdict, conversely, demands at a minimum that reasonable men could not have found any other way — a more stringent test. Ohio's judiciary has been allowed too much discretion in weighing the evidence. See WRIGHT, *op. cit. supra* note 74, § 94, at 361-62.

[96] Norris v. Sikes, 102 Ga. App. 609, 610, 117 S.E.2d 214, 216 (1960).

[97] Kirst v. Clarkson Constr. Co., 395 S.W.2d 487, 499 (Mo. App. 1965).

[98] Barta v. Hondl, 118 N.W.2d 732, 736 (N.D. 1962). A proviso was added by the court that the rule would apply when "one theory was not supported by the evidence." *Ibid.* The following states also adhere to this principle: Southern Cas. Co. v. Hughes, 33 Ariz. 206, 218-19, 263 Pac. 584, 588 (1928); Conway v. Coursey, 110 Ark. 557, 562, 161 S.W. 1030, 1032 (1913); Great W. Sugar Co. v. Parker, 22 Colo. App. 18, 46, 123 Pac. 670, 679 (1912); Henning v. Thompson, 45 So. 2d 755, 756 (Fla. 1950); American Employers' Ins. Co. v. Cornell, 225 Ind. 559, 569, 76 N.E.2d 562, 566 (1948); Stanley v. Taylor, 160 Iowa 427, 431, 142 N.W. 81, 82 (1913); Union Pac. Ry. v. Mills, 5 Kan. App. 478, 47 Pac. 623 (1897); Trevillian v. Boswell, 241 Ky. 237, 244, 43 S.W.2d 715, 718-19 (1931); Stewart v. Graham, 93 Miss. 251, 46 So. 245 (1908); Heinen v. Heinen, 64 Nev. 527, 186 P.2d 770, 777 (1947); Stewart v. Newbury, 220 N.Y. 379, 385, 115 N.E. 984, 985 (1917); Laffoon v. Kantor, 373 P.2d 252, 253 (Okla. 1962) (the court will consider whether the issues were fairly submitted by the instructions in their entirety); Tisdale v. Panhandle & S.F. Ry., 228 S.W. 133, 137 (Tex. Comm. App. 1921); Harris v. Harris, 14 Utah 2d 96, 377 P.2d 1007 (1963); Buffington v. Lyons, 71 W. Va. 114, 119, 76 S.E. 129, 130-31 (1912); Sharp v. Milwaukee & Suburban Transp. Corp., 18 Wis. 2d 467, 118 N.W.2d 905 (1963) (verdict affirmed because the erroneously submitted issue was supported by *undisputed* evidence for appellee).

the federal system,[99] Indiana courts reach a result contrary to that which is usually produced by the two-issue rule.[100] However, a compromise between placing the burden upon either the appellant or the appellee has been achieved by the courts of New Jersey.[101] Through an analysis of the various state interpretations of the two-issue rule, it was deduced that the minority rule followed in Ohio was less equitable; the court implied that the majority rule as interpreted in both state and federal courts placed too heavy a burden upon the appellee in light of the manifest desire to construe all inferences in favor of the lower court's verdict.[102] A middle ground was thereby established by which the appellant has the burden of showing that the verdict " 'appears' to give rise to a substantial injustice."[103]

(3) Adoption of the Two-Issue Rule.—The few states which adhere to the minority position employ basically the same rationale that has been adopted in Ohio. Tennessee is an example.[104] North Carolina[105] and Michigan[106] also utilize the rule, but in these states a distinguishing factor justifies formulation and negates its true existence. Connecticut [107] applies the rule not only when error oc-

---

[99] The federal rule and its underlying rationale is found in notes 85-89 *supra* and accompanying text.

[100] Drolet v. Pennsylvania R.R. 130 Ind. App. 549, 555, 164 N.E.2d 555, 558 (1960). The court, quoting from an earlier Indiana case, stated that "the giving of erroneous instructions is presumed prejudicial, and the burden is on appellee to show by the record that the appellant was not harmed thereby." See also MacDonald v. Firth, 202 Va. 900, 904, 121 S.E.2d 369, 372 (1961), in which the Virginia Supreme Court announced a general principle which exemplifies both the federal rule and the rule of most states: "[A]s all error is presumed to be prejudicial we cannot say that the errors complained of were harmless and did not influence the jurors in arriving at their verdict."

[101] Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (Super. Ct. 1956). New Jersey bases their middle position on N.J. RULES 1:5-3(b), which is patterned after FED. R. CIV. P. 61. The old New Jersey law of Ruckman v. Bergholz, 37 N.J.L. 437 (1874) demanded conclusive proof that the appellant was not prejudiced by the error before the verdict could be affirmed.

[102] 39 N.J. Super. at 11, 120 A.2d at 269.

[103] *Ibid.*

[104] Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), defining Tennessee law as established in Tennessee Cent. R.R. v. Ulmenstetter, 155 Tenn. 235, 291 S.W. 452 (1927).

[105] Redd v. Mecklenburg Nurseries, Inc., 241 N.C. 385, 85 S.E.2d 311 (1955). A stipulation between the parties rendered the second issue, upon which the erroneous charge was given, immaterial to the jury's verdict. The second issue could therefore be considered nonexistent.

[106] Termaat v. Bohn Aluminum & Brass Co., 362 Mich. 598, 107 N.W.2d 783 (1961). The record in fact disclosed that the jury based the verdict upon the negligence issue and never considered the incorrectly submitted issue of contributory negligence.

[107] Hardy v. Weitzman, 162 A.2d 507 (Conn. 1960).

curs in the charge on contributory negligence, as does Ohio, but also when the charge on negligence is erroneous. Thus, that state has an even more rigid system of appellate review than does Ohio.[108]

This analysis demonstrates that Ohio's adoption of the two-issue rule places it in the vast minority of states. The soundness of the majority rationale is substantiated by the most eminent legal authorities.[109] While it is true that the latter view — by granting new trials instead of sustaining potentially tainted verdicts — imposes a burden upon already backlogged trial dockets, it is more likely to insure justice for every litigant.

III. PRACTICAL RESULTS OF THE RULE

The theory of the two-issue rule is that the jury disregards an erroneous instruction in deciding an issue or disregards the entire issue to which the instruction related.[110] Such error is, by necessity, presumed to be harmless. This presumption conflicts with both the weight of authority and sound reasoning, for it is generally accepted that faulty instructions are the greatest single source of reversible error.[111]

A. The Effect of Jury Instructions

(1) Province of Judge and Jury.—Since, in the furtherance of justice, the trial court is vested with the authority to supervise the intelligent submission of a cause of action to a jury, it is the province of the court to instruct the jury on the principles of law applicable to the case.[112] The jury, by design, is composed of laymen who are totally unfamiliar with these principles as well as with the procedure

---

108 Ohio specifically rejects the two-issue rule in a situation involving an erroneous charge on the primary issue of negligence. Case authority and rationale on this exception to application of the rule have been explained in notes 45-49 *supra* and accompanying text. Connecticut, in recognizing no difference between errors in the primary and secondary issues, unequivocally applies the rule.

109 *Cf.* 7 MOORE, FEDERAL PRACTICE §§ 61.02-.03, .10 (2d ed. 1954); 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940).

110 1 FESS, *op. cit. supra* note 68, § 7.11, at 44.

111 Trusty, *The Value of Clear Instructions*, 15 KAN. CITY L. REV. 9 (1947); Wright, *Adequacy of Instructions to the Jury*, 53 MICH. L. REV. 505, 509 (1955).

112 See FED. R. CIV. P. 51 which provides:

> At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed . . . .

OHIO REV. CODE § 2315.01(G) provides: "The court, after argument is concluded, before proceeding with other business, shall charge the jury." Juries were originally wit-

to be followed in reaching a verdict.[113] Thus, the manifest purpose of the court's instructions is to guide the jury by providing both a fair understanding of the issues involved and a basis for reasonable comprehension of the applicable rules of law.

In Ohio, the trial judge is required to state the controverted issues separately and definitely in his general instructions in addition to any specific instructions necessary to each such issue.[114] The judge must fully understand the issues involved "for nothing is more vital to the securing of a fair trial than the instructions of the court to the jury as to the law of the case."[115] The difficulty which even learned judges often encountered in defining the issues[116] is indicative of the dilemma surrounding appellate review of general verdicts. Great credence is added to the charges in light of the fact that juries must be advised that all instructions emanate from the bench; thus the bench gains a position of prominence in the eyes

---

nesses, not triers of fact; this created an image which dominated for several hundred years. At the same time, the control of juries was arbitrary and, at best, limited. FORSYTH, HISTORY OF TRIAL BY JURY 206-07 (1852). In 1670, *Bushel's* Case was handed down with an examination in Judge Vaughan's opinion of the theory that questions of law are for the court and questions of fact are for the jury. The enunciation of this concept as the "neat term" it is today was originally in Lord Coke's report of Heydon's Case, 2 Co. Rep. (pt. 4) 41a-42b (K.B. 1585); both cases are cited in Farley, *Instructions to Juries — Their Role in the Judicial Process*, 42 YALE L.J. 194, 198 (1933).

At the end of modern trials, the court is aware of the controverted legal issues, and the jury is fully aware of the relevant facts. The court then advises the jury of the law, and the jury applies it to reach a verdict. *Id.* at 205-06.

[113] The purpose of jury instructions in any case is and should be to advise the jurors of the principles of law applicable to the particular facts of the case as simply and succinctly as possible. Too many attorneys and judges fail to do this effectively because they forget that jurors are not lawyers or versed in legal terminology, and that they become confused by complicated and voluminous instructions. Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378, 379 (1961). (Footnote omitted.)

[114] OHIO REV. CODE § 2315.01. For the text of this statute, see note 112 *supra*. See, *e.g.*, Simko v. Miller, 133 Ohio St. 345, 13 N.E.2d 914 (1938); King v. Ohio Nat'l Bank, 62 Ohio App. 266, 23 N.E.2d 847 (1939). The court is further required to state to the jury all issues in a clear, concise, and accurate manner, doing so fully and fairly. Beck v. Beagle, 28 Ohio App. 508, 162 N.E. 810 (1927).

[115] American Steel Packing Co. v. Conkle, 86 Ohio St. 117, 123, 99 N.E. 89, 90 (1912). One major criticism of the jury system is predicated upon the failure of the trial judge to explain clearly to the jurors in simple language the rules of law which are to be utilized. Hannah, *Jury Instructions: An Appraisal by a Trial Judge*, 1963 U. ILL. L.F. 627, 630.

Since it is not sufficient to permit jurors to determine the issues from listening solely to the pleadings, the court has the obligation to supply the jury with every tool necessary to render a just verdict. "[I]n almost every case, there are intricacies which the jury, from lack of legal knowledge and experience, cannot unravel without the assistance of the court. The jury should be distinctly instructed by the court . . . ." Baltimore & O.R.R. v. Lockwood, 72 Ohio St. 586, 590, 74 N.E. 1071, 1072 (1905).

[116] *Ibid.*

of the jurors.[117] The typical juror invariably gives at least as much consideration to the instruction of the court as to the arguments of counsel.[118] The United States Supreme Court has stated that "it is obvious that under any system of jury trial the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." [119] The trial judge must thus frame the instructions for a general verdict[120] with extreme caution to avoid influencing the jury to render a verdict that normally would not have been reached.

(2) Appellate Review.—Appellate courts are vested with authority to reverse a verdict which is contrary to the weight of the evidence or is the product of a jury that either misunderstood the law or was misled by the judge's instructions.[121] The court must necessarily assume that the verdict is free from prejudice, thereby placing the burden upon the appellant to demonstrate precisely in what manner the jury was misled, misinformed, or confused.[122] Furthermore, although error is admitted in the trial court, the appellant not only has the difficult task of relating the error to the verdict but also must show a reasonable likelihood that the jury relied upon that error.[123] The appellate court does not review the verdict but hypothesizes on whether the jury *might* have been misled by the erroneous instruction.[124]

---

117 Corboy, *Pattern Jury Instructions — Their Function and Effectiveness*, 32 INS. COUNSEL J. 57 (1965). "The jurors regard the instructions as originating with the judge and presumably consider his remarks with greater care." ALEXANDER, JURY INSTRUCTIONS ON MEDICAL ISSUES 8 (1966).

118 *Id.* at 9.

119 Starr v. United States, 153 U.S. 614, 626 (1894). For further statements of this idea, see, *e.g.*, Bollenbach v. United States, 326 U.S. 607, 612 (1946).

120 Ohio provides three forms of jury verdicts: general verdict, OHIO REV. CODE § 2315.13; special verdict, OHIO REV. CODE §§ 2315.14-.15; and general verdicts coupled with special findings or interrogatories, OHIO REV. CODE §§ 2315.16-.17. This discussion assumes that a general verdict has been requested and rendered. The problems arising under this form of verdict are the subject of this Note. Special verdicts and special findings determine by the specific detailed answer whether the erroneous instruction was prejudicial.

The general verdict, on the other hand, merely requires a decision for or against one party with no insight into how the jury arrived at that conclusion. It therefore is impossible to determine whether the error misled the jury or prejudiced the verdict. Solutions to this dilemma are enunciated in notes 142-45 *infra* and accompanying text.

121 Farley, *supra* note 112, at 211. For an Ohio holding, see Pendleton St. R.R. v. Stallman, 22 Ohio St. 1 (1871).

122 1 FESS, OHIO INSTRUCTIONS TO JURIES § 7.11, at 45 (1952).

123 *E.g.*, Eaton v. Askins, 95 Ohio App. 131, 118 N.E.2d 203 (1953); Harris v. Harris, 14 Utah 2d 96, 377 P.2d 1007 (1963).

124 Farley, *supra* note 112, at 211. See also Sunderland, *Verdicts, General and Spe-*

On the other hand, studies have demonstrated that forty percent of all reversals arise from faulty instructions;[125] therefore, the appellate court should make every effort to assure itself that the erroneous instruction played no part in the jury's verdict. In Ohio, the application of the two-issue rule limits the effectiveness of appellate review because the courts rely upon the unwarranted assumption that error in only one of two issues is immaterial.

B. Theoretical Application

In light of the influential function of jury instructions in trial procedure, it is questionable whether a jury would realize that an instruction was erroneous and disregard it, as the first tenet of the two-issue rule presumes. The second assumption of the two-issue rule, that one issue submitted free from error will support a general verdict for the defendant notwithstanding the erroneous submission of a second issue, would be valid if appellate courts were authorized to weigh the evidence. Otherwise, it constitutes an invasion of the province of the jury in that the court places itself in the minds of the jurors so as to determine how the issue was decided.[126] There exists no method other than the submission of special interrogatories to determine the outcome of one issue in a general verdict.

A hypothetical situation will illustrate the illogical application of the rule. Plaintiff sues defendant in negligence. Defendant alleges contributory negligence, the issue on which error is committed when the court instructs the jury. A general verdict for defendant ensues, meaning either: (1) that the defendant was not negligent; or (2) that the defendant was negligent but the plaintiff was contributorily negligent. Assume that the weight of evidence supports the first solution — that defendant was not negligent. If the second solution were actually used, however, the error substantially affected the verdict because in its absence the jury might not have found that the plaintiff was contributorily negligent. Thus the practical application of the rule, despite (and perhaps in light of) the stated judicial public policy, leaves doubt as to the existence of a theoretical

---

cial, 29 YALE L.J. 253, 258-61 (1920). A noted authority has also stated:

> And while it has been said that "twelve men can easily understand more law in a minute than the judge can explain in an hour," we believe this is not because of the incompetency or lack of integrity of the jurors. Rather, it is due to the judge's lack of clarity in instructing them. Hannah, *supra* note 115, at 629. (Footnote omitted.)

[125] Trusty, *supra* note 111.

[126] "[I]f one cannot say, with fair assurance, . . . that the judgment was not substan-

approach at all. "To simplify the trial work and to limit the range of error proceedings"[127] is the only justification for its application. Unfortunately, its *sole* practical effect is a reduction in remanded trials and overcrowded dockets.[128] It thus appears that Ohio courts have adopted a rule which sacrifices justice for expediency.[129]

The New Jersey courts have adopted the most practicable approach to the problem of appellate review of instructions.[130] Instead of either party being compelled to disprove prejudice, the appellant must show only that the verdict "appears" to give rise to substantial injustice, because it is difficult and sometimes impossible to show conclusively that a general verdict resulted from prejudice. The majority rule compensates for the inequity imposed upon the appellant by assuming that all error is prejudicial unless proven

---

tially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result.*" Kotteakos v. United States, 328 U.S. 750, 765 (1946). (Emphasis added.) The court, in speaking of § 269 of the Judicial Code, 28 U.S.C. § 391 (1964), went on to discount the theory of presumptions which has sprung up around appellate review.

It was further stated in Spokane & I.E.R.R. v. Campbell, 217 Fed. 518, 523 (9th Cir. 1914) that "the general rule with respect to this subject [interpreting verdicts] is that the court . . . will not look to the evidence . . . ." Of course, the court can weigh the evidence at several different points in the proceeding and render a directed verdict, but this can only occur *before* the case is given over for jury deliberation and then only upon issues as to which reasonable men could not agree. Once the case is deemed triable by the jury, the court has relinquished its authority to weigh the evidence. Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628, 645-46 (1855), overruled on other grounds by Hamden Lodge, I.C.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934), is one of the early cases which established this procedure by judicial decision; no statute confers such power upon the court. 52 OHIO JUR. 2D *Trial* § 115 (1962). In Bollenbach v. United States, 326 U.S. 607 (1946), the Court stated:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. *Id.* at 615.

The implication stemming from this statement is that the jury is charged with one specific function — to weigh the evidence and achieve a just verdict — and that the judge may not supplant the jury in this function, either at the trial or appellate level.

[127] Knisely v. Community Traction Co., 125 Ohio St. 131, 133, 180 N.E. 654 (1932).

[128] In the face of sound logic by the majority rule, the theory of the two-issue rule becomes instead a mere practical procedure to alleviate overcrowded dockets. *Id.* at 133, 180 N.E. at 655.

[129] *Ibid.* The opinion, although its writer did not concur in the acceptance of the rule, stated by majority vote that "the rule becomes binding upon the bench and bar . . . and should cheerfully be accepted." *Id.* at 134, 180 N.E. at 654. A rule or principle which is sound in logic and theory need not beg for a "cheerful" acceptance, because rational minds are receptive to rational ideas; "cheerful" acceptance connotes something less than rational.

[130] Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (Super. Ct. 1956). See notes 101-03 *supra* and accompanying text for a more detailed analysis of this case and New Jersey's method of resolving this difficult area.

otherwise.[131] Ohio, however, in its desire to implement the public policy behind the rule — the simplification of appellate review — assumes the opposite and demands the impossible. Thus, New Jersey's "middle-of-the-road" approach is the most equitable to both parties.

C. *Inconsistent Interpretation and Application*

Another criticism of the two-issue rule lies in the inconsistency with which it is interpreted and applied. Exceptions to the general rule are predicated upon factual situations which appear in theory to be no different from those situations in which the rule still applies. One reason advanced for this caprice is that the court has the discretion to bar application if the error affects all of the issues or if the error is prejudicial to the entire proceeding.[132] No general rule may be formulated when courts have such discretion because different factual situations are involved. Further explanation of the inconsistency focuses upon the discretion that the court has in determining the number of issues to be determined.[133] One judge may hold that two allegations in a cause of action are, in fact, one issue, thus barring the rule's application. Another judge, however, will find the same allegations to be definite and separate.

The major area of the rule's application is in cases involving negligence and contributory negligence. The rule is not applied when the error occurs in the issue of negligence, but an error which affects the issue of contributory negligence does not bar application. The courts have explained that negligence is the primary issue and that, before the plaintiff's contributory negligence may be considered, the jury must find the defendant negligent.[134] If there is such an error as prevents the jury from finding upon the negligence issue, the secondary issue of contributory negligence will never be determined. Thus, whether or not the jury finds that the defendant was negligent is essential to disposition of the case.

The rationale behind applying the two-issue rule to errors upon the issue of contributory negligence and not upon the issue of negli-

---

131 The majority rule is fully traced in notes 62-94 *supra* and accompanying text. A concise definition is found in the text accompanying note 92 *supra.*

132 Acrey v. Bauman, 134 Ohio St. 449, 17 N.E.2d 755 (1938).

133 H. E. Culbertson Co. v. Warden, 123 Ohio St. 297, 175 N.E. 205 (1931). For different factual situations in which this principle has been applied, see, *e.g.*, the cases cited in note 35 *supra.*

134 This "requisite" theory of the courts is discussed in notes 45-49 *supra* and accompanying text.

gence is not clear. A New Jersey court considered and rejected this double standard of application by holding that when a general verdict is returned it is entirely possible that the jury arrived at its decision by erroneously finding the plaintiff contributorily negligent.[135] Thus, the submission of this issue with an erroneous instruction was prejudicial error.[136]

In distinguishing between the two issues of negligence, the Ohio courts have not deemed contributory negligence worthy of jury determination because it has been said that error in a charge on this issue is to be disregarded.[137] Yet contributory negligence is often decisive of a case.[138]

Perhaps the most inconsistent area of interpretation of the two-issue rule involves the direct conflict between the federal and Ohio rules.[139] The outcome of a suit brought in an Ohio state court may ultimately depend on the application of the two-issue rule, but an action initiated in an Ohio federal court can never be similarly affected. Thus, two citizens of the same state can have identical lawsuits decided differently, depending upon the court in which suit was filed.

---

[135] La Morgese v. Kern-O-Mix, Inc., 82 N.J. Super. 581, 586, 198 A.2d 779, 782 (Super. Ct. 1964).

[136] *Ibid.*

[137] For various cases which established this point, see notes 45-49 *supra.*

[138] The courts have uniformly held that this issue is almost always for the jury's determination and is not merely a matter of law. See, *e.g.*, Glass v. William Heffron Co., 86 Ohio St. 70, 98 N.E. 923 (1912). An eminent authority has stated that "the marked tendency has been to let the issue [of contributory negligence] go to the jury . . . where enough uncertainty can be conjured up . . . ." PROSSER, TORTS 430 (3d ed. 1964). The hypothetical illustration posed in the text following note 126 *supra* amply demonstrates the illogic of the two-issue rule in differentiating between the two types of negligence.

In Gottesman v. City of Cleveland, 142 Ohio St. 410, 416, 52 N.E.2d 644, 647 (1944), the court, in rejecting the two-issue rule, held that the issues of the plaintiff's negligence and the defendant's nuisance were in fact only one because the former at best could tend to negate the allegation that defendant's nuisance was the proximate cause of the death. Yet the issues of negligence and contributory negligence are considered separate issues, calling for the application of the rule, although they, too, are so inextricably bound together that contributory negligence cannot be found unless negligence is first adjudicated. The difference between *Gottesman* and any negligence-contributory negligence case is difficult to grasp.

If the rule is applied in the contributory negligence cases, as it invariably is, then it should have similarly been applied in *Gottesman*, a case in which substantially the same issues and interrelations between issues were involved. This example of inequitable application leads directly back to the original rationale behind the rule — expediency rather than logic — and demonstrates that a procedure founded upon practicality instead of rational theory will result in inconsistent interpretation.

[139] For the federal law in the Sixth Circuit Court of Appeals, see Williams v. Powers, 135 F.2d 153 (6th Cir. 1943), which is analyzed in the text accompanying notes 71-76 *supra.*

The courts have uniformly stated that "we are not authorized to enter a field of speculation. Not being aided by interrogatories . . . it must follow that the [verdict] . . . below be affirmed."[140] Yet in presuming that the correctly submitted issue was determinative of the case, the courts have indulged in the very speculation they adamantly condemn. In essence, the appellate court makes an educated guess based upon the weight of the evidence, which in reality is a violation of its own statement that courts are "not justified in *guessing* upon which ground the jury saw fit to rest their verdict."[141]

IV. RECOMMENDATIONS AND CONCLUSIONS

It appears that the two-issue rule is a minority doctrine which has been emphatically rejected in the federal courts and by the overwhelming majority of the states. The rule, which conflicts with generally accepted appellate practice, is not justified by Ohio's rationale because, in satisfying the stated public policy of "limiting appellate review,"[142] manifest injustice is potentially committed. If the policy supporting the rule is as compelling as the courts believe, then a more sensible and just method is readily available in the Ohio Revised Code.[143] Mandatory rather than permissive use of special interrogatories whenever a general verdict is requested would significantly reduce appellate review, thus accomplishing the stated public policy, and would simultaneously provide a basis for remanding only those cases in which error was prejudicial, thereby insuring a fair review for the individual litigant. The implementation of this procedure would satisfy both needs without resorting to presumptions and would resolve the unfortunate conflict between justice and expediency which now exists.

The major objection to the theory of the two-issue rule is that an appellate court must speculate as to how the individual issues had been determined, a matter which has been obscured by the general verdict. Issue is not taken with the argument that an efficient appellate procedure is necessary; nevertheless, if justice for the individual is sacrificed in order to attain such a procedure, the system is intolerable.[144] The submission of special interrogatories would

140 Ochsner v. Cincinnati Traction Co., 107 Ohio St. 33, 39, 140 N.E. 644, 646 (1923).

141 *Ibid.*

142 The public policy rationalization behind the two-issue rule has been presented in notes 26-30 *supra* and accompanying text.

143 OHIO REV. CODE §§ 2315.16-.17.

144 In Ochsner v. Cincinnati Traction Co., 107 Ohio St. 33, 38, 140 N.E. 644, 646

alleviate the necessity of both unwarranted judicial speculation and potentially remanded trials without depriving the litigant of the benefit of the general verdict. Unfortunately, as pointed out by the United States Supreme Court,[145] many lawyers hesitate to submit special interrogatories for fear of requiring too specific an answer from the jury.

An evaluation of the relative merits of general and special verdicts is not within the scope of this Note, but it cannot be ignored that Ohio provides for the submission of special interrogatories or findings when a general verdict is requested. The mandatory use of these provisions would completely eliminate the need for the judicially created two-issue rule. In the alternative, it is suggested that Ohio adopt a legislative ruling similar to that in effect in New Jersey, according to which the burden of affirmatively proving or dispelling the existence of prejudicial error is replaced by a lesser burden upon the appellant of merely demonstrating that the verdict "appears" to give rise to substantial injustice. This theory of review permits the discovery and correction of most prejudicial error committed at trial without placing an insurmountable burden upon either litigant.

Although firmly entrenched in Ohio law, the two-issue rule fails to provide a logical or equitable system of appellate review. More suitable methods are available and should be adopted.

RICHARD BRONNER

(1923), the court presented this weak argument: "[W]e have as much right to assume that the jury found in favor of the defendant upon the issue of negligence as we have to assume that they found for the plaintiff . . . ." No justification other than expediency has been offered, and the presumption should be abolished, especially in light of the potential detriment suffered by the appellant.

[145] In Foster v. Moore-McCormick Lines, Inc., 131 F.2d 907, 908 (2d Cir. 1942), *cert. denied*, 318 U.S. 762 (1943), the court lamented: "But that wise rule [Rule 49 of FED. R. CIV. P. relating to special interrogatories] . . . is, for some dark reason, seldom used."