

appear that the trial court should have instructed for defendant as to plaintiff's action or for plaintiff as to defendant's defence, or pro tanto considering the error complained of. Refusal of a new trial, because prejudice from error is overcome, does not take into account, or at least need not take into account, any views about presumption of prejudice from error and whether the burden is on appellant to shew prejudice. It cuts from under all claim of prejudice the possibility of harm by saying there is nothing for prejudice to affect.

The cases, therefore, which hold that the losing party should not have had any contention by way of action or defence decided in his favour need not be adverted to, for, according to Alabama practice there should have been an affirmative charge in favour of the party not complaining, applying such rule to an entire action or defence as to what the error, *e.g.*, a claim of set-off, affects. And so those cases or the particular issues therein as to which a favourable verdict in favour of a complaining party would not be allowed to stand. Much authority could be cited to these propositions, but merely a few illustrative cases are referred to.

*Cases in which verdict for either party would be sustained.*—It may, in view of what has gone before, be said, that it is only where a losing party could claim that a verdict in his favour would stand, that any error against him in the course of a trial may be complained of at all. Not even, then, may he successfully complain, unless the error interfered with a full and fair consideration of his action or defence and that interference was not nullified or negated in the course of the trial. It is in these cases only in which error may be properly said to be harmless or prejudicial. In all others there being nothing upon which prejudice can operate, its presence or absence is a mere figment of the mind.

*Presumption of prejudice from error.*—There are cases which announce as a principle of law, that error is presumed to be prejudicial to the interests of him against whom it is committed. As strong an expression of that principle as we have