

seen given is by the federal Supreme Court, which said: "While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt, that the error complained of did not and could not have prejudiced the rights of the party duly objecting." A California court has said in effect, error would not be deemed harmless unless it appears that no harm could have been or was done thereby and it does not suffice to shew that probably no harm was done.

It has also been stated, that the admission of illegal evidence requires a reversal, if it cannot be said what effect it may have had on the minds of the jury. So as to the exclusion of competent evidence there is presumption of prejudice unless it clearly appears it was not of importance to the party offering it, where the exclusion was erroneous.

On the other hand expression of the rule has been stated with much more mildness. Where the error referred to procedure, such as giving the wrong party the right to open and close, prejudice will not be presumed, but must be shewn, but as against this the Supreme Court of Missouri appears opposed, in holding that the wrongful over-ruling of a challenge for cause will be deemed prejudicial, whether or not the challenger has exhausted his challenges. And it has been said as to immaterial and irrelevant evidence, that on its face it must appear to be calculated to have an improper influence.

In regard to instructions erroneously given or refused, we find similar opposition in expression about presumption of prejudice. In Arkansas it is stated, with regard to refusing a proper requested instruction and the giving of an erroneous instruction, that prejudice is presumed. Also, the federal courts say it must be said that there is prejudicial error, though there be two theories, upon either of which the verdict could stand, if there was an erroneous instruction regarding one of them, if there was no way of telling which theory the jury adopted. The same result ensues from conflicting instructions, as it cannot be said which the jury followed. And even misleading instruction presumes prejudice, it only being necessary to see that it could, not did, mislead.