NEW TRIALS FOR IMPROPER RECEPTION OR REJECTION OF EVIDENCE.

It is necessary that evidence be pertinent to the issue or issues being tried; and, where the tribunal for the trial of the issue or issues is a jury, great care is required as to the evidence which ought to be submitted for their consideration.

It is of course the duty of the presiding judge in the first instance to decide all questions as to the admissibility of testimony. If he be wrong, either in the reception or rejection of testimony, the ordinary remedy is an application to the Court in which the cause is pending for a new trial.

But new trials are not ordered in every case of testimony wrongfully received or rejected. The practice on this head is now well understood; and it will be our object in what follows to expound as concisely and clearly as possible the practice as we understand it.

The granting of a new trial is a matter of discretion in the Court, a discretion indeed not to be exercised capriciously; but, in the absence of legislation, according to the rules and practice of the Court, gathered from decisions of the Courts. The decisions deal with the improper reception of evidence and the improper rejection of evidence as grounds for new trials, as governed in some degree by similar principles.

In *Horford* v. *Wilson*, 1 Taunt. 12, 14, Mansfield, C. J., said: "Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury."

In *Doe d. Teynham* v. *Tyler*, 6 Bing. 561, 563, Tindal, C. J., said: "It has been contended, that we are to analyse the evidence by a difficult process and to discriminate the precise effect produced on the mind of the jury on each portion of the proof; but we have a much plainer course, and that is, to hear the report of the trial and to sustain the verdict, if we are satisfied that there is enough to warrant the finding of the jury independently of the evidence objected to."

But in *Baron de Rutzen* v. *Farr*, 4 A. & E. 53, the Court laid down the rule that where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party, unless they see clearly that the improper evidence could not have weighed with the jury or that the verdict if given the other way would have been set aside as against evidence.

In *Wright* v. *Doe d. Tatham*, 7 A. & E. 313, 330, Denman, C. J., referring to the foregoing case said: "We need not repeat our reasons for holding that, wherever evidence formally objected to at Nisi Prius is received by the judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial."

Hence where improper evidence has been received, a new trial will be ordered although the jury accompanied their verdict with a distinct and positive statement that they have reached a conclusion without reference to the obnoxious evidence: *Bailey* v. *Haines*, 19 L. J. Q. B. 73, 78.

The latest decision on the subject, notwithstanding some differences of opinion among the judges, is in accordance with the more recent exposition of the practice above mentioned, see *Hodson* v. *The Midland Great Western Railway Co.*, L. R., 11 Ir. C. L. R. 109.

Two exceptions appear to be established. These are: