

made before a jury," and it is said that if the Judge has that opinion then we cannot say that it appears he has not that opinion, and therefore from the nature of the thing there is no appeal. I cannot give that force to the phrase I have just referred to. The words "in the opinion of the Court or a Judge" seem to me to be equivalent to "according to the judgment of the Court or a Judge," and inasmuch as there cannot be any positive rule of law applicable to the particular case, for that reason it is that this opinion is an opinion of discretion as distinguished from an absolute rule of law.

HOLKER, L. J.—After a reference to the sections of the Judicature Act and to the orders, I have now come to the conclusion that it was the intention of the legislature to give, and that the legislature has given, an appeal from the exercise of the discretion of a learned Judge who either makes or refuses an order for an alteration in the mode of trial. By giving an appeal I do not mean that the legislature has enacted that there should be an appeal in the strict sense of the word, but where a learned Judge has, in making such an order, not exercised his discretion properly, that there the Court of Appeal should exercise its discretion in lieu of the discretion of the learned Judge.

LORD COLERIDGE, C. J.—Although I certainly should not have made the order myself, I must decline to interfere with it when made, on two grounds: First—I think Mr. Baron Pollock had jurisdiction to make the order, and that we ought not to interfere with his discretion. Secondly—I am by no means satisfied that we have jurisdiction to review this particular kind of order, and if it were necessary, and I think it is not, to decide the case on this ground, I am prepared, as at present advised, to hold that we have not.

BRETT, L. J.—The only power given to the Court or a Judge under this section is to order that the issues of fact shall be referred. There is no power to refer issues of law; and I am very much inclined to think that the prolonged examination of documents, which is intended in this section, is a prolonged examination of such documents as it is necessary to enquire into in order to enable the Judge to leave the questions of fact, and where the examination is not so required, but only to enable the Judge to determine a question of legal right, I doubt very

much whether it is an examination within this section.

[NOTE.—*The Imp. and Ont. sections appear to be virtually identical. The general subject of appeal from the discretion of a Judge is discussed in the judgments, which are of considerable length.*]

ONTARIO.

ELECTION CASE.

IN THE MATTER OF RECOUNT—ELECTORAL DISTRICT OF MUSKOKA AND PARRY SOUND ELECTION (DOMINION).

Recount by County Judge—Dominion Elections Acts of 1874 and 1878 (consolidated), ss. 55, 67—Effect of irregular acts or omissions by D. R. O.—Written ballots.

Held, that irregular acts or omissions by a deputy returning officer in dealing with a ballot before or after it has been cast by a voter do not warrant its disallowance for the candidate indicated by the voter.

Where there appeared, along with the ordinary printed forms of ballots, certain written ballots, giving little more than the names of the candidates, but apparently supplied by the D. R. O.'s and counted by them; *held*, that, on a recount, the County Judge was not justified in rejecting the written ballots.

[July 24, GOWAN, Co. J.]

We give below the interesting judgment delivered by Judge Gowan in connection with the recount of votes in the recent Muskoka election, the result of which left Mr. O'Brien still in a majority of three over his opponent, Mr. Miller. The facts of the case sufficiently appear from the judgment.

Pepler, for Mr. O'Brien.

Lash, Q.C., for Mr. Miller.

GOWAN, Co. J.—In the course of this recount a large number of ballots cast were objected to by counsel for the candidates respectively, because Deputy Returning Officers in dealing with these ballots did something not in accordance with the direction of the Election Act, or omitted doing something directed by that Act, as an inspection of the ballots cast, it is contended, shows. It is urged that these ballots should now be disallowed, though counted and allowed for the candidates for whom they were given. In the view I take I need not enter on the details of these objections. But there is one class