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By our Special Correspondent.

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Parliament has met, but it remains uncertain if the Government is prepared to move the requisite addresses for filling the vacancies in the King's Bench Division caused by the death of Mr. Justice Fraser and the elevation of Mr. Justice Greer. Until the number of Judges of that Division falls below sixteen, vacancies cannot be filled without the voting of such an address by both houses. Although it seems to the average taxpayer that public money is voted with extreme lightheartedness for other less necessary and more costly objects, Parliament always appears to begrudge the cost of the adequate manning of the judicature. No doubt the business of the Courts is at the moment lighter than it has been, but every practising lawyer knows that if the vacancies remain unfilled "arrears" will begin to mount up, and, when their magnitude constitutes a public scandal and a denial of justice, the vacancies will be filled. Why it should be necessary to wait on each occasion until a situation thoroughly discreditable to our judicial system is created no man can say. The administration of any of the other "social services" on similar lines would long since have provoked an outcry against which no Government could have stood. The last legislative regulation of this matter did indeed provide that an address, once voted, should remain in force for a year. But this concession has proved of no value in the present instance, as Mr. Justice Fraser's death occurred much more than a year after Mr. Justice Wright's appointment. In fact no appointment to the King's Bench Division has been made since May, 1925.

The decision of the House of Lords in *Donald Campbell and Co.* v. *Pollak,* now reported in the November number of the Law Reports,[1] is something of a landmark in our legal history since it closes a curious chapter therein. But on this occasion the effect of the decision is not the sanctioning or restatement of rules laboriously worked out in the lower Courts, but the annihilation of such rules.

The story is an odd one. Under the Judicature Acts and

[1] [1927] A.C. 732.

Rules the costs of an action or issue tried by a jury follow the event unless the trial Judge shall "for good cause, otherwise order." But where trial is by a Judge alone costs are in the discretion of the Judge, and his decision upon costs is declared to be unappealable save with his leave.

In the eighties a battle-royal took place between the Court of Appeal and some of the Judges, particularly Lord Coleridge, C.J., as to whether in a jury action the existence or not of "good cause" could be reviewed on appeal. Lord Coleridge maintained the negative, and his decisions on this point being in divers cases reversed, he finally refused to exercise his discretion at all on the ground that the decisions of the Court of Appeal were beyond his understanding. The curious will find matter in his judgment in *Huxley* v. *West London Extension Railway Co.*[2] not easily paralleled in any other reported judgment. The Chief Justice himself thought it requisite to disclaim "intentional offence" to the Court of Appeal! But, his vigorous language notwithstanding, his view in this matter did not triumph, and it has long been settled that the existence of "good cause" for a special order as to costs in a jury action may be considered on appeal.

It might well be thought however that the provisions as to costs in non-jury causes were such as wholly to prevent a review of the Judge's decision upon appeal, or, at the least, that this was impossible without his leave. But it was not so. In *Civil Service Co-operative Society* v. *General Steam Navigation Co.*[3] Lord Halsbury, sitting in the Court of Appeal, adumbrated the doctrine that, while the exercise by a Judge of his discretion "upon certain materials which are before him" may be unreviewable, "the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied" and can be reviewed. Upon this foundation an imposing structure of judicial decisions has been erected by the Court of Appeal, in which the exercise of discretion was reviewed, albeit the Judge had given no leave to appeal. The effect of these decisions has been, in Lord Carson's words, so to circumscribe "the discretion as to costs given to a Judge in cases tried by him alone without a jury as to render such discretion almost nugatory." In particular, the circumstances in which a successful defendant can be deprived of costs have been laid down in terms which could hardly have been more precise had they been those of statutory rules. It may be added that Lord Coleridge did not live to wit-

[2] (1886) 17 Q.B.D. 373.
[3] [1903] 2 K.B. 756.

ness this development. Imagination fails before the task of suggesting in what language he would have thought fit to characterise it.

In *Donald Campbell* v. *Pollak* (*supra*) protracted and expensive litigation was finally concluded upon a trial before Branson, J., without a jury. The action in question had already been tried once, together with another action with which it had been consolidated. The House of Lords had affirmed the decision reached upon the trial in this latter action but had ordered a new trial of the former action. Upon such new trial Branson, J., gave judgment for the defendant, but deprived him of costs mainly on the ground of his misconduct in the other action. These costs amounted to a very large sum. The defendant appealed as to costs only, without leave of the Judge. The Court of Appeal, applying the doctrines already indicated, allowed the appeal and gave the defendant his costs. The plaintiffs appealed to the House of Lords.

Here, however, they were met with a preliminary objection, that the House will not hear an appeal as to costs only. Had this objection succeeded, an extraordinary situation must have resulted. The Court of Appeal had entertained an appeal as to costs only, without the leave of the trial Judge, and had reviewed his discretion upon the authority of a series of cases, never before considered in the House of Lords and whose consonance with the Judicature Acts and Rules was on the face of it doubtful. Manifest injustice must have been involved in a refusal to hear the appeal in such circumstances, and the House, though not without powerful dissent, refused to apply the rule as to appeals as to costs only in such a case.

Having obtained seisin of the case, the House made short work of the more recent cases in the Court of Appeal which may be regarded as forming the superstructure of the building erected on Lord Halsbury's foundation. They were over-ruled, and the discretion of the Judge was declared to be unreviewable, unless perhaps when manifestly exercised on grounds wholly unconnected with the cause of action. The decision of Branson, J., was restored.

Thus the law is finally vindicated in the sense which beyond doubt the framers of the Judicature Acts and Rules intended, and, as I have already said, a curious chapter of legal history is closed. Few will regret the result in reference to High Court actions. In the County Courts it may, perhaps, be otherwise. Costs in County Courts depend upon other Statutes and Rules, but the over-ruled decisions have in the past powerfully operated to prevent "freak" orders as to costs for which some Judges have an incurable affection. This restraint is now removed, and in certain County Courts this

will, I fear, be painfully obvious. And experience teaches, in this country at any rate and probably in Canada also, that special and unexpected orders as to costs, unless obviously and overwhelmingly justified, are a great source of irritation to litigants and powerfully militate against litigation.

Sir John Simon's Retirement.—The retirement of the Right Honourable Sir John Simon from the practice of his profession at the early age of fifty-five need occasion no surprise when it is recalled that for twenty years and more he has held a first-rate but exacting position at the English Bar and has enjoyed a very large income. In addition to his laborious work in the Courts, Sir John has been a busy Member of Parliament for a long period, during which he respectively held the offices of Solicitor-General, Attorney-General, and Secretary of State for Home Affairs. Although he resigned the latter office in 1915 by way of protest against the conscription policy of the Asquith Government in the Great War, he afterwards served in France as a Major in the Royal Air Force for about a year. It is also known that he declined Mr. Asquith's offer to him of the Lord Chancellorship. It was a great compliment to his character and capacity that he should be chosen as chairman of the present Government's Committee for enquiring into the possibilities of setting up constitutional autonomy in India.

Sir John Simon has made no contributions to literature so far as we are aware; in that respect he differs greatly from his contemporary, Lord Birkenhead, who, like Sir John, is a graduate of Wadham College, Oxford.