

## FAIR COMMENT IN JOURNALISM.

*Some Wise Comments on the State of  
the Libel Law.*

From The Chatham Ont. Planet.

IN an article from THE PRINTER AND PUBLISHER, which appears elsewhere, The Monetary Times is properly congratulated upon winning, in the courts, a triple victory for "honest trade and honest journalism." The narrative of its "experience" is of special interest to The Planet, which, as the man in the street would say, has "been there." Our contemporary condemns the present system of awarding costs and taxing them, and has evidently a poor opinion of what is called "judicial discretion." This is described as one of those profound phrases of the courts which the most skilled practitioner has never yet fathomed, and probably never will.

"The 'discretion' of the taxing officer," we are told, "is too often his caprice; it is a first-class professional trap, from which there is little or no chance of escape." The mild censures of The Monetary Times are fully borne out by The Planet's experience as a litigant.

In a certain libel action which was brought against this journal by a public official, whose conduct was open to criticism, the jury gave us a verdict, and the action was dismissed with costs. The judge's charge was very favorable to the plaintiff, and was not objected to by his counsel, but a majority of the Divisional Court in their "discretion" granted a new trial, costs to be "costs in the cause to the party ultimately successful." The new trial having been granted for a statement by the judge to the jury, which, it was alleged, "might" have misled them, we are assured that, under a well-understood rule of procedure, no objection having been made to that statement by his counsel, the plaintiff should not have been allowed a new trial except upon payment of the defendant's costs of the previous trial, and of the Divisional Court appeal. We think we had good reason to complain at the "discretion" of the court not having been exercised in that way. Mr. Justice McMahon, one of the three judges who heard the motion for a new trial, dissented, and thought the plaintiff's appeal should have been dismissed with costs.

The "discretion" thus exercised by the Divisional Court was in regard to the judge's charge on the question of fair comment, which was one of The Planet's defences. The trial judge, Chief Justice Armour, an able jurist, defined fair comment to the jury, and told them that, if they thought The Planet's comment on the plaintiff's conduct was fair, they should find for the defendant, which they did. In the reported judgments of the court, Mr. Justice McMahon agrees with the chief Justice's charge as to fair comment. He also shows, beyond question, that a jury are the sole judges of the law and the facts in an action for libel, and that once the case is fairly laid before a jury, and the verdict is found one way or the other, it should not be disturbed by the courts unless it is such a verdict as reasonable men could not possibly have found. The verdict for The Planet was not a verdict of that kind,

because we gave evidence, which the jury believed, of the truth of the statements complained of; and the truth is always a good defence. Mr. Justice McMahon's judgment is, as he points out, strongly supported by the highest judicial authority, and we have yet to find a lawyer, who has given any attention to the subject, who disagrees with his conclusions. The judge's charge is also on record, and it would be interesting to discover any intelligent person who could possibly be misled by it. We have no hesitation in saying that the so-called "discretion" of the court was wrongly exercised in that case, and that an injustice was done The Planet in granting a new trial. More than that, a serious blow was dealt at the liberty of the press with respect to public officials, who should be open, at times, to severe criticism.

The "discretion" exercised by the court of appeal, to which The Planet appealed against a new trial, was just as objectionable. The Chief Justice of that court, in a brief judgment in which no attempt was made to review the law on the subject, said he did not think the court should interfere with the "discretion" of the two Divisional Court judges, and dismissed our appeal with costs. One would have supposed that where there were two judges against two, because that was really the position, there would have been an endeavor by the appellate tribunal to analyze the conflicting opinions, and to declare what the law really is upon a question of such consequence as fair comment in journalism. But this was not done. The appeal was determined on the narrow, incomprehensible point of "judicial discretion," instead of being an instructive exposition of an important legal question. In this and other respects the result was extremely unsatisfactory.

The new trial was equally unsatisfactory. It resulted in a verdict for the plaintiff for one dollar as to one of the alleged libels, but with a recommendation by the jury that there should be "no costs" against the defendant. The verdict as to the other alleged libel was in The Planet's favor, and nothing was said about the costs. Juries, it seems, have no legal right to decide the question of costs. These are in the "discretion" of the judge, who, in our case, happened to be one of the two judges who granted the new trial. The jury estimated the damage to the plaintiff's reputation at one dollar, but only as to part of The Planet's article. The rest of the article they regarded as harmless, and they certainly intended that The Planet should not be inflicted with costs. But, just at that point, the judge's "discretion" came in, and the defendant was condemned to pay some two-thirds of the whole of the costs taxed in the action, which included the costs of the two trials, and of the appeal to the Divisional Court. And this in a case in which the costs were to be "costs in the cause to the party ultimately successful," each party, as a matter of fact, having been equally successful. Doubtless the judge did what he thought was right, but his decision was none the less a hardship on the defendant. The first trial was a victory for the newspaper; the second trial was a drawn battle; the Divisional Court was divided; and the publisher might, under the circumstances, have been justly spared the penalty of costs. It was a penalty that did not fit the crime, in the jury's opinion, at all events. And public