



ONLY ELEVEN SHILLINGS

ABUSING PUBLIC JUSTICE IN ENGLAND IN THE LATE EIGHTEENTH CENTURY (PART 1 OF 2)

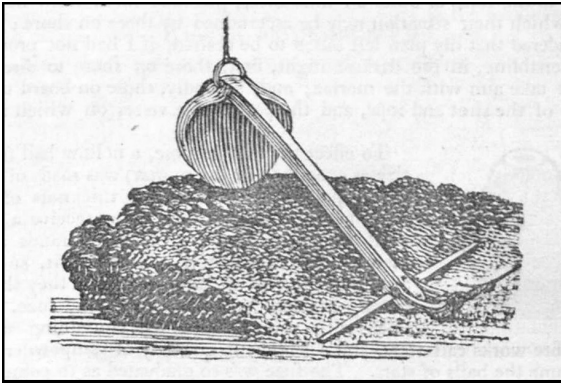
James Oldham

IN THE SPRING OF 2010, a message arrived in my email from John Gordan III, then a Morgan Lewis partner in New York, since retired. John thought I might be interested in a book, or rather pamphlet, in his library, a free-standing, 85-page printed report of an unusually curious case. For many reasons indeed I was interested, not the least that the case includes proceedings from the Court of Common Pleas in 1786-87, a period for which there are no standard printed reports of Common Pleas cases – none whatever.¹ John kindly arranged for a photocopy to be made for me, and I am in his debt.

Hurry v. Watson was a pitched battle in the English common law courts from 1785 to 1788 between two residents of Great Yarmouth, William Hurry and John Watson. The contest went through eight stages, all absent from the standard printed reports. The most significant parts were, however, captured by the shorthand notes of a young law student, Robert Alderson, a great nephew of William

James Oldham is the St. Thomas More Professor of Law and Legal History at the Georgetown University Law Center.

¹ See J. Oldham, “Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century,” in Hendrick Hartog, William E. Nelson, and Barbara Wilcie Kern, eds., *Law as Culture and Culture as Law* (Madison 2000), 119, 122.



An anchor with cable attached.

Hurry, and in later years, the father of Baron Alderson of the Court of Exchequer.²

It all started when a ship called the *Alex and Margaret* lost two anchors and cables while lying in Yarmouth Roads in Great Yarmouth in July 1785. The anchors and cables were located by men called “salvors” and were taken to Castle Yard, a venue under the care of the Admiralty. Captain Shipley of the *Alex and Margaret* learned of the recovery of the anchors and cables and notified the ship owner, who hired Samuel and William Hurry, brothers in trade in Yarmouth, to reclaim the property by paying the necessary salvage fees.

The Register of the Admiralty in Yarmouth at the time was John Watson, an attorney who was also Mayor-Elect. Samuel Hurry called upon Watson and paid the salvage, after which the anchors and cables were returned. Samuel’s brother, William, however, on seeing the salvage bill thought the cartage fee was eleven shillings too high. He sent Samuel back to Watson, but Watson said the charge was correct. Samuel told Watson that unless he refunded the eleven shillings, he would be summoned to the Court of Requests.

² According to Foss’s biography of Edward Alderson, a nineteenth century Baron on the Court of Exchequer, Baron Alderson’s father was Robert Alderson, who became an eminent barrister and recorder of Norwich, Ipswich, and Yarmouth. Robert’s grandfather was Samuel Hurry, William Hurry’s brother. See E. Foss, *The Judges of England*, 9 vols. (London 1848-54) VIII: 130.

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Watson responded, “Go and consult your great lawyer Bell,” adding that he, Watson, “shall have no justice there, there are so many of your own family.”³

In July 1785, John Watson was indeed summoned by William Hurry to the Yarmouth Court of Requests.⁴ Watson did not appear; nevertheless, as prosecutor, William Hurry took an oath that Watson owed eleven shillings. This set in motion a concatenation of legal proceedings lasting two-and-a-half years and generating staggering expense, fueled by political animosities, spite, and fulminating anger.

Shortly, I will describe the eight stages of this contest, but first a word about what we can hope to learn from this convoluted drama. We will see displayed in sharp relief the extraordinarily incestuous nature of legal proceedings in provincial England in the late eighteenth century. Going to law was a form of combat, and in these proceedings, at astonishing cost. We are led to wonder how it was that Hurry and Watson were prepared to take the apparent risk of

³ All quotations, unless otherwise indicated, are taken from the Alderson transcript. Since the Alderson transcript is at present inaccessible, pinpoint cites are not given. For those who may be interested, the full Alderson transcript will become available in 2012 as an Appendix to the Selden Society volume for 2011, J. Oldham, ed., *Case-Notes of Sir Soulden Lawrence, 1787-1800*. Regarding the Hurry family at the Court of Requests, see text at n. 5, below.

⁴ As is generally known, courts of requests were small claims courts with jurisdiction over disputes involving less than 40 shillings. The best-known work on these courts is W. Hutton, *Courts of Requests: Their Nature, Utility, and Powers Described* (Birmingham, 1787). Hutton describes the customs and procedures of these local courts, supplying almost one hundred case summaries infused with melancholy commentary on the foibles of human nature. Hutton had presided for fifteen years over the Birmingham Court of Requests. He was assisted by commissioners, all non-professionals from the local population. Hutton reported that in Birmingham at the time, there were seventy-two commissioners, but “there are not more than half a dozen accustomed to attend, and it is often difficult even to collect half these.” *Id.* at 74. He explained that six commissioners “are summoned alternately, by the beadle, to attend the bench each month,” that “attendance is wholly optional,” that “any three form a quorum,” and that “decision is solely in them.” *Id.* at 73. Procedures on the Court of Requests were informal, and it was unusual for a case to occupy as long as a half-hour.

being bankrupted by the business. In the latter part of the drama, Watson's own counsel observed that, "though I do not pretend to describe Mr. Watson as a man of brilliant parts, he is not an idiot." Yet in the end, Watson was saddled with a £3,000 jury verdict for malicious prosecution, plus costs of £800. Not only that, this protracted litigation culminated in the trial of an information filed against Watson and others by the Attorney General for a libel on the public justice of the country.

Two substantive issues emerged before it was all over: first, whether, or under what circumstances, a jury award of damages would be overturned because it was deemed excessive; second, whether a jury verdict could be overturned by means of post-trial affidavits about allegedly improper procedures in the jury room.

The eight stages of this contest were as follows:

First, *Hurry v. Watson*, Yarmouth Court of Requests, July 1785 (dismissed).

Second, *R. v. Hurry*, perjury indictment tried at the Thetford Assizes before Justice Nares and a special jury, March 18, 1786 (not guilty).

Third, *Hurry v. Watson* for malicious prosecution, Norfolk Summer Assizes 1786 before Lord Chief Baron Skynner and a special jury (nonsuit).

Fourth, *Hurry v. Watson*, motion to set aside nonsuit, Court of Common Pleas, Michaelmas 1786 (granted).

Fifth, *Hurry v. Watson* for malicious prosecution, tried at the Thetford Assizes before Justice Ashhurst and a special jury, March 24, 1787 (£3,000 verdict for plaintiff, plus costs).

Sixth, *Hurry v. Watson*, motion for new trial, Court of Common Pleas, Easter Term 1787, continued on June 13, 1787 (settled).

Seventh, *R. v. Watson*, show cause order for an information for a libel on public justice, King's Bench, January 25, 1788 (granted).

Eighth, *R. v. Watson*, information for a libel on public justice, King's Bench, tried at Thetford Winter Assizes 1788 before Justice Grose and a special jury (not guilty).

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It will not be possible for me to explore fully all eight stages, but let us return to the first stage, the Court of Requests where William Hurry swore that John Watson had overcharged for cartage by eleven shillings. During the second stage (the perjury trial at the Thetford assizes in March 1786), the clerk of the Court of Requests, Mr. Spurgeon, was called as a witness and testified that at the Court of Requests Hurry was asked under oath: "Is Mr. John Watson indebted to you, Mr. Hurry, in the sum of eleven shillings?" Hurry an-

swered, “He is.” The courtroom was noisy, and the jury was having trouble hearing, so the question was repeated. Before Hurry answered, one of the commissioners of the Yarmouth Court of Requests who was attending the perjury trial at the Thetford assizes leaned forward and said, “Brother William, explain yourself.” The commissioner was George Hurry, another of William Hurry’s brothers.⁵ On being prompted, William added that the eleven shillings were owed him “only as agent for Mr. Shipley [the Captain].”

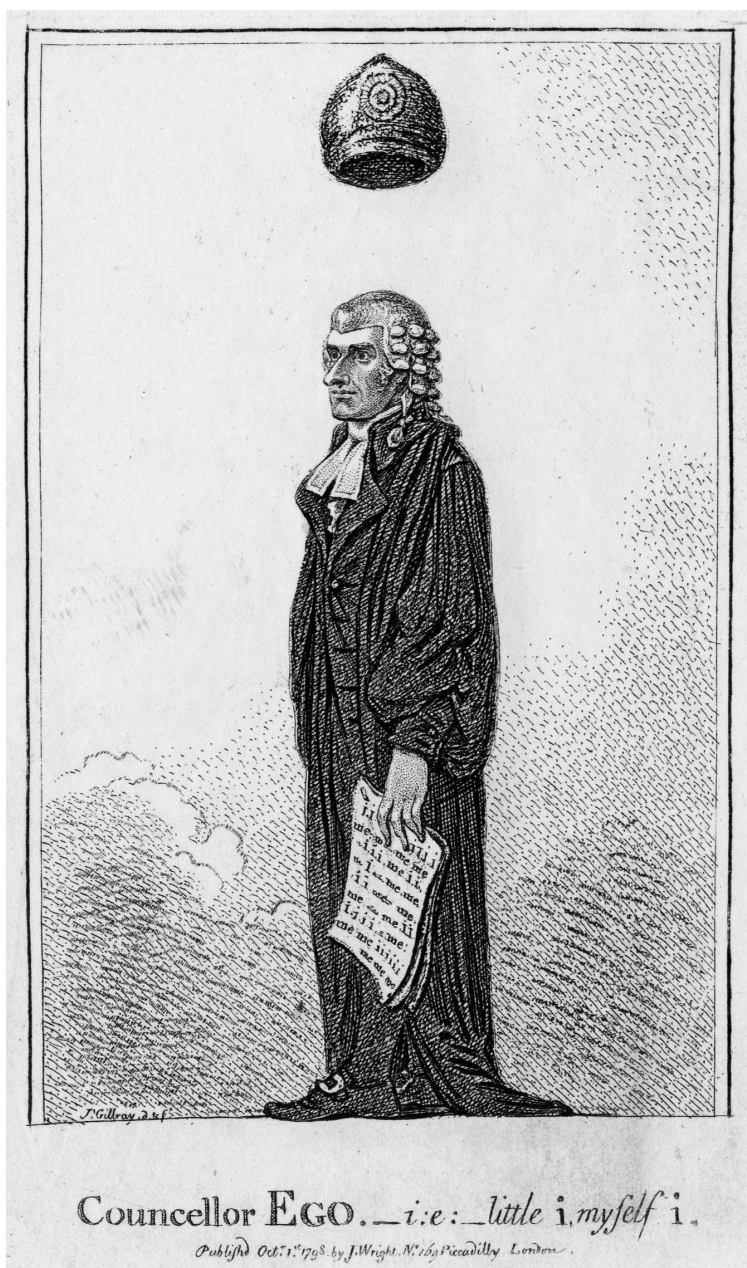
The President judge of the Court of Requests in July 1785 was Mr. John Reynolds, then the Mayor of Great Yarmouth. Reynolds also happened to be the defendant’s law partner. According to testimony brought out in later proceedings, immediately after William Hurry took the oath about the eleven shillings, Reynolds pulled from his pocket a copy of a statute that showed, he claimed, that the dispute between Hurry and Watson was outside the jurisdiction of the Court of Requests, belonging exclusively to the Court of Admiralty. Reynolds, therefore, dismissed the case.

Not long afterward, Watson initiated the perjury prosecution against Hurry for having falsely sworn that Watson was indebted to Hurry for eleven shillings. During a later stage, Hurry’s counsel, Thomas Erskine, wondered how one could be convicted of perjury for having sworn a false oath before a court that had no jurisdiction over the case. Nevertheless, an indictment was returned a true bill by the local grand jury. That grand jury was subsequently shown to have included one man married to Watson’s wife’s sister, another whose wife and Watson’s wife were cousins, two more who were married to nieces of the wife of President Judge Reynolds, and one who did business in shipping with Reynolds. It was also shown that several men who customarily served on the grand jury were not called. And who “delivered out” the grand jury list? The Mayor did, that is, the defendant’s law partner, President Judge John Reynolds.⁶

⁵ There was no evidence that George Hurry had been sitting as a commissioner when Hurry’s case against Watson in the Court of Requests was heard.

⁶ John Watson, the Mayor-Elect, took office a few weeks later.

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Thomas Erskine, counsel to William Hurry. © Trustees of the British Museum.

The perjury trial came on at the Thetford Assizes before Justice Nares and a special jury on March 18, 1786, three months before Nares died of, according to Foss, “a gradual decay.”⁷ When Mr. Justice Nares learned that the indictment had omitted the fact that the eleven shilling debt had been owing to Hurry only in his capacity as agent for Captain Shipley, Nares was indignant. He stood up and sarcastically said, “it is wonderful” – “here is evidently an indictment founded on but *part* of an oath, when that which is most essential to its meaning is left out.” Counsel Erskine warmly interjected: “Wonderful, indeed, my Lord” – “I do not believe that, in all the annals of human infamy, a parallel case can be found.” According to a report of the case in *The Times*, “the Judge, Jury, and every candid person in the Court, instantly discovered the prosecution to be founded in falsehood, and carried on for the worst of purposes.”⁸ Justice Nares instructed the jury to return a verdict of not guilty, with which the jury promptly complied.

Within days afterward, John Watson concocted an advertisement which he placed in four local papers stating: “The Perjury cause which came on to be tried at Thetford, which was supposed to have taken up a long time, took up but a short one, it going off on a defect in the indictment, notwithstanding which, a fresh indictment will be preferred by the prosecutor.” This was, of course, untrue, and the advertisement contributed to the finding of malice in the malicious prosecution case that followed. At that trial, on March 24, 1787 before Mr. Justice Ashhurst and a special jury, Erskine was at his flamboyant forensic best. Erskine granted that “eloquence, when proof is absent, is but a beating of the air,” but with proof in hand, Erskine’s eloquence had its effect. The jury returned a verdict of £3,000 against John Watson. In a later challenge to the award as excessive, Serjeant Bolton said that the effect of Erskine’s oratory was “to make the Court and Jury madder than a fever.” Bolton admitted that “Mr. Erskine earned his fee [£300], for, upon this occasion, he out-Heroded Herod.” Bolton said that he understood that

⁷ *Foss’s Judges of England*, VIII: 349.

⁸ *The Times*, March 22, 1786, p. 3.

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“Mr. Hurry came to Thetford, more like a conqueror than anything else; he had all the ladies with him, and all the gentlemen of his acquaintance and neighbourhood: the day of the trial was *a perfect jubilee of the Hurrys*.” He said that Erskine “talked of good name in man and woman, with so sweet an accent and in such moving phrases, that all the men were in tears, and all the women absolutely blubbered.”

In truth, the florid phrases flew on both sides before the jury at the Thetford assizes in March 1787. Watson’s counsel, Mr. Hardinge, asserted that Hurry’s oath at the Court of Requests was “flagrant and malignant,” and that the bill of indictment of Hurry for perjury was justified – “let any man living say, whether there was not a design on the part of Mr. Hurry to injure Mr. Watson” – Hurry was, said Mr. Hardinge, “the original Shylock.”

At this stage, a year and three-quarters after the inconspicuous beginning in the Court of Requests in July 1785, with expensive counsel hurling verbal assaults at each other trying to sway the jury, one wonders what the parties thought about the gamble they were taking. In the motion for new trial in Common Pleas in June 1787, Serjeant Adair said that the damages that had been awarded by the jury “stare one in the face” – the sum “cannot be paid: the defendant has made an affidavit, that it is much more than he is worth in the world.” Serjeant Rooke went further, saying that it was up to the court to decide whether to ruin Watson, for “should the judgment be entered up, my client must be imprisoned for life.”

Perhaps Watson never in his wildest supposed that the end game of this dog-fight would be an adverse jury verdict of £3,000, and so never soberly reflected on the specter of debtors’ prison. But I do not think so. Shortly after the Court of Requests hearing, Watson had become Mayor, head of the twenty-member board of the Corporation of Yarmouth, and he may have been confident all along that the town would cover any liability that he might incur. This, in fact, is what happened, as we shall see. First, however, let us turn to the two substantive issues addressed in stage six, the motion for a new trial.

EXCESSIVE DAMAGES⁹

A few days prior to the hearing in *Hurry v. Watson* by the Court of Common Pleas in Trinity Term 1787, the case of *Monroe v. Elliot* came before the same court.¹⁰ In *Monroe*, the court considered whether a £200 jury verdict on a writ of inquiry was excessive against the defendant, “a constable, who during his attending one Edward Aylett, an attorney, while in the pillory for perjury, had given the Plaintiff a violent blow on the head with his mace.”¹¹ Aylett had been convicted of perjury by a jury in King’s Bench for having falsely sworn that when he was arrested that he was privileged from arrest because he was traveling from his home to court on legal business.¹² According to a report in the *Gentleman’s Magazine*, “had he [Aylett] been exposed unprotected, he would have been torn to pieces by the populace, but the sheriffs did their duty.”¹³ Apparently constable Elliott’s zeal in protecting Aylett was excessive, but so were the jury’s damages. The court set aside the verdict, and a new trial produced a second verdict of £150.

When *Hurry v. Watson* came before the court in Trinity Term 1787, the *Monroe* case was fresh in the court’s memory. Chief Justice Loughborough said that he had “no doubt that the Court has a power to grant a new trial, in the instance of excessive damages,” adding, “We did it the other day on a writ of enquiry” (referring to *Monroe*). He said that, “In that case, it was pretty obvious what the idea of the Court was – that they considered the damages assessed as too much, so as to desire that the matter might be reheard; what the

⁹ See generally, J. Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (NYU Press, 2006), 64-73.

¹⁰ The case was unreported, but notes of the case were taken by Justice Lawrence (to be published in the forthcoming Selden Society volume, *Case-Notes of Sir Soulden Lawrence, 1787-1800*, 5:160).

¹¹ *Ibid.*

¹² See *R. v. Aylett*, 1 T.R. 63 (1785). For a caricature of Aylett in the pillory, see J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill, 1992) II:1067.

¹³ *Gentleman’s Magazine* (London, 1786) 992.

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Court has done in one instance, it may in another.” In truth, the *Monroe* case was not as strong a precedent as Loughborough suggested. According to Justice Lawrence’s notes of *Hurry v. Watson*, Chief Justice Loughborough “had no doubt but that the court might set aside a verdict in cases of torts for excessive damages” – “they had done so in the case of inquiry where they thought the sum given exceeded the amount of the inquiry.”¹⁴ The jury verdict in the writ of inquiry in *Monroe* would almost certainly have been a jury inquiry conducted by the sheriff after a default judgment, and it would have been improper for such a jury to return a verdict that exceeded the sum demanded in the plaintiff’s declaration.¹⁵

The common law courts were quite prepared to vacate a jury verdict if the dispute involved a question susceptible of “hard calculation” and the verdict was substantially out of line. Courts would, for example, overturn verdicts in cases involving fixed obligations such as contracts or promissory notes, since in such cases the courts could clearly see whether the jury verdict was mistaken. But in tort cases, where the disputes centered on harm to reputation or feelings, intangibles not easily quantified in money terms, jury verdicts were rarely overturned. As Chief Justice Wilmot of the Court of Common Pleas stated in *Beardmore v. Carrington*,¹⁶

we desire to be understood that this Court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush.

In *Gilbert v. Burtenshaw*,¹⁷ a jury gave £400 for a malicious perjury indictment. In upholding the verdict, Lord Mansfield declined to say “that in cases of personal torts, no new trial should ever be granted for damages which manifestly shew the jury to have been actuated

¹⁴ *Case-Notes of Sir Soulden Lawrence 1787-1800*, forthcoming, 5: 167.

¹⁵ See *Trial by Jury* at 49-56.

¹⁶ 2 Wils. 244, 250 (1764).

¹⁷ 1 Cowp. 230 (1774).

by passion, partiality, or prejudice,” but “it is not to be done without very strong grounds indeed” – “unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the Court to draw the line.”¹⁸ An example where the court did draw the line is *Goldsmith v. Lord Sefton*.¹⁹ There, the plaintiff, a sheriff’s officer, had arrested a man who escaped into the defendant’s house, where the plaintiff pursued him, yet the fugitive escaped again. Later, the defendant found the plaintiff and demanded to see his warrant for having entered his house; an argument ensued, the defendant threatened the plaintiff with his horse whip, the plaintiff raised his officer’s stick, and the defendant took the stick out of the plaintiff’s hand and threw it away. For having done so, plaintiff brought an action of assault, and a writ of inquiry jury gave a verdict of £200 damages. The judges of the Court of Exchequer stated that jury verdicts in tort cases should never be overturned for excessive damages except where the awards were outrageous (citing, among other cases, *Huckle v. Money* and *Gilbert v. Burtenshaw*). They viewed the facts before them as such a case and ordered a new trial, Chief Baron MacDonald declaring that “we are bound to protect a party where, by the improper warmth or worst passions of a jury, damages glaringly and outrageously great have been given against him.”²⁰

One type of case with typically large damage awards was the civil action for adultery – for criminal conversation, as it was called, or for short, crim. con. Jury discretion in determining criminal conversation damages was almost unlimited. In *Duberley v. Gunning*,²¹ the Court of King’s Bench upheld a crim. con. verdict for the plaintiff for £5,000 despite evidence that the plaintiff had been grossly inattentive or negligent about his wife’s conduct with the defendant. Lord Kenyon acknowledged that the damages were larger than ought to have been given but “my difficulty arises from being unable to fix any standard by which I can ascertain the excess which, ac-

¹⁸ *Ibid.* at 231.

¹⁹ 3 Anst. 808 (Ex. 1796).

²⁰ *Ibid.* at 810, 1046.

²¹ 4 T.R. 651 (1792).

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cording to my view of the case, I think the jury have run into. . . . [W]here there is no such standard, how are the errors of the jury to be rectified? What measure can we point out to them, by which they ought to be guided?”²²

The wide discretion extended to juries in criminal conversation cases was reflected not only in the prevalence of verdicts awarding plaintiffs large sums in round numbers, but also in the swiftness of jury decision-making. Reports of crim. con. cases in *The Times* show jury verdicts for thousands of pounds being issued almost immediately after the judges’ instructions concluded, or after only a few minutes’ consultation. Clearly no evidentiary calculations were required.

Lord Kenyon’s reflections in the *Duberley* case were unusual – ordinarily he urged the juries to pile on damages for this most abhorrent behavior, thinking that large damage awards might have a deterrent effect in society at large. His frame of mind was evident immediately after he became Chief Justice. In *Sheridan v. Newman*, Lord Kenyon was “extremely sorry to say,”

that although this is only the third day I have unworthily filled this place, this is the second cause of this kind that has come before me. – To you, juries, the guardianship and protection of families is committed; – it is your duty to teach men who thus transgress the laws of God and of society, that it is in their interest, to restrain their passions, and to regulate them according to rules of morality and decency.²³

In *Parslow v. Sykes*,²⁴ Lord Kenyon told the special jury not to “run wild in assessing the damages,” but, “Large, very large and exemplary damages were proper in this case, and the jury would fall short of that justice which they owed to the country if large damages were not given.” The jury got the message, returning a verdict for the plaintiff of £10,000, the sum demanded in the declaration.

²² *Id.* at 655.

²³ *The Times*, June 28, 1788, reporting the trial held in Westminster Hall on June 14, 1788.

²⁴ *The Times*, Dec. 10, 1789, p. 3.

These large crim. con. verdicts, however, provided little precedential guidance for the courts in assessing damage awards in other types of tort cases. This was because, in addition to Lord Kenyon's notion of deterrence, the large crim. con. verdicts were often collusive, with no expectation of actual payment; rather, the verdicts were reached as necessary prerequisites to actions for divorce in the Ecclesiastical Courts.²⁵

In *Hurry v. Watson*, the trial jury's award of £3,000 damages for malicious prosecution for perjury was challenged as excessive. Borrowing Justice Wilmot's words (above), was this sum "monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush"? Or, using Lord Mansfield's test (above), was this a case of damages that were "flagrantly outrageous and extravagant," apparently "actuated by passion, partiality, or prejudice"?

On June 13, 1787, the motion to set aside the verdict and grant a new trial was heard. . . .

TO BE CONTINUED IN OUR NEXT ISSUE



²⁵ See, e.g., J. Oldham, *The Mansfield Manuscripts*, supra n. 11, at II: 1263-64.