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Only Eleven Shillings: Abusing Public Justice in England in the Late Eighteenth Century

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


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
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. 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.”

In July 1785, John Watson was indeed summoned by William Hurry to the Yarmouth Court of Requests. Watson did not appear; nevertheless, as prosecutor, William Hurry took an

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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
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 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:

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


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


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).


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 answered, “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. 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

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.
grand jury list? The Mayor did, that is, the defendant’s law partner, President Judge John Reynolds.⁶

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 general 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

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⁶ John Watson, the Mayor-Elect, took office a few weeks later.
⁸ The Times, March 22, 1786, p. 3.
“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 “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 Damages

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. 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.” 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. 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

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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.
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 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 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

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14 Case-Notes of Sir Soulden Lawrence 1787-1800, forthcoming, 5: 167.
15 See Trial by Jury at 49-56.
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*,

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*, 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 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.”

An example where the court did draw the line is *Goldsmith v. Lord Sefton*. 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*).

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16 2 Wils. 244, 250 (1764).
17 1 Cowp. 230 (1774).
18 Ibid. at 231.
19 3 Anst. 808 (Ex. 1796).
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.”

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*, 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,
according 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?”

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.

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20 Ibid. at 810, 1046.
21 4 T.R. 651 (1792).
22 *Id.* at 655.
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.”

In Parslow v. Sykes, 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.

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.

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

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.
25 See, e.g., J. Oldham, The Mansfield Manuscripts, supra n. 11, at II: 1263-64.
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. Serjeants Bolton and Rooke appeared for the defendant; Serjeants Adair, Bond and Lawrence were for the plaintiff. Serjeant Adair noted the “extreme reluctance which the Court always feel when a verdict is given by a respectable Special Jury.” After commenting on the perverseness of Watson’s malicious prosecution, Adair argued that the case before the court was “a matter which was peculiarly the province of a Jury to decide upon; of a Jury of the County, where the conduct of both the parties were under their considerations; of a Jury, composed of Gentlemen, who were acquainted with both the parties, who knew the character and the circumstances of both the parties.”

Counsel for the plaintiff, however, faced some resistance from Lord Loughborough on the question of damages. Loughborough noted the evidence of very heavy expenses for the prosecution, saying, “I dislike that very much” — “It is probable that the Jury in estimating their damages, started from the £600 which was proved upon the trial to have been laid out by the present plaintiff.” Serjeant Bond responded by claiming that, “When I go to a Jury, I have a right to state to that Jury what damages I find sustained in procuring counsel to protect me,” and he

26 In the case of McCarthy v. Leeson in January 1791, Serjeant Bond sought to overturn a jury verdict of 1,000£ for false imprisonment on the ground of excessive damages, and after Justice Gould observed that the case had been tried by a special jury, Serjeant Bond said, “a Special Jury was not infallible.” Lord Loughborough then said, “it certainly was not.” See The Times, 28 January 1791, reporting on King’s Bench sittings at Westminster Hall, 27 January 1791.
argued that, in any case, if counsel for the defendant thought “that the expence of £800 for fees ought not to have brought in evidence, they ought at the trial to have stated their objections.”

Serjeant Lawrence gave the most extensive argument on Hurry’s behalf for upholding the jury verdict. He cited all the relevant cases in which damages that were said to be excessive were upheld. One seventeenth-century case, *Lord Townsend v. Hughes*,

upheld a jury verdict for £4,000 in a case for words, but Chief Justice Loughborough put little stock in that case, observing that it was decided in a time “of high political ferment.” For the defendant, as shown earlier, Serjeant Bolton attributed the jury’s award “more to the speech of Mr. Erskine than to anything that Mr. Hurry actually suffered.”

Lord Loughborough gave his opinion that the plaintiff was entitled to “substantial and very considerable damages,” but if excessive, “the enquiry is open to another Jury; because from the circumstances of the excess, it is to be inferred, that the verdict was given in the hurry of *Nisi Prius*; the Court does not arrogate hereby to itself the right of assessing damages, nor does it affect the credit of a Jury. The Court does nothing more, than direct a cooler enquiry should be made.”

In these reflections, Lord Loughborough seems to have been of the same mind as Chief Justice Raymond of the Court of King’s Bench in *Chambers v. Robinson*, a case that also involved an action for malicious prosecution of an indictment for perjury. The jury had awarded

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27 The £600 figure mentioned in early proceedings had subsequently grown.
28 2 Mod. 150 (C.P. 1677).
29 The Chief Justice’s opinion was not altogether logical. Why would not another jury trial be conducted “in the hurry of *Nisi Prius*”? Why would another jury be expected to conduct a cooler inquiry? Perhaps Loughborough surmised that no client could afford Erskine twice, in which case the atmosphere might indeed be cooler.
30 2 Str. 691 (1726)
damages of £1,000, but the court ordered a new trial, saying that “it was but reasonable he [the
Plaintiff] should try another Jury, before he was finally charged with 1,000l.” Later, however,
Chief Justice Pratt of the Court of Common Pleas in *Beardmore v. Carrington*,\(^{31}\) disapproved the
*Chambers* case, calling the reason given by Chief Justice Raymond (“to give the defendant a
chance of another jury”) “a very bad reason; for if it was not, it would be a reason for a third and
fourth trial, and would be digging up the constitution by the roots; and therefore we are free to
say this case is not law.”\(^{32}\)

Nevertheless, given the gaping disparity between the original eleven shillings claimed by
Hurry and the £3,000 verdict, intervention by the court was unsurprising. Yet even though
Chief Justice Loughborough thought the verdict may have been excessive, he was clearly
outraged by John Watson’s behavior, since he volunteered his opinion that £1,000 would not be
too much. He also made the following observations:

> Where the injury is of a personal nature; where the comfort and happiness of a man are
> concerned, you have no measure by which to form your judgment. You cannot ascertain
> a matter of this kind, by pounds, shillings, and pence; nor are the abilities of the
> defendant to regulate the verdict: for if the plaintiff should be intitled to a particular
> verdict, the incapacity of the defendant to fulfill it, ought not to be considered as a reason,
> why it should not be given. But in a case, where the defendant is subjected to no
> particular injury, in that case, perhaps, some consideration may be thereto
> had. . . .Whether the verdict for three thousand pounds be one of those palpably excessive
cases, which would warrant interference of the Court, I wish for some days to consider.

\(^{31}\) 2 Wils. 244, 249 (1764)  
\(^{32}\) 2 Str. at 692. Chief Justice Pratt, who later became Lord Camden, failed to mention the fact
that in *Chambers*, a second trial was held in which the verdict was the same as in the first trial,
and the defendant’s request for a third jury was rejected—the court said “it was not in their
power to grant a third trial.” See generally Trial by Jury, pp. 65-66.
Juror Affidavits

The fourth reason given by Serjeant Le Blanc in *Hurry v. Watson* for setting aside the verdict and ordering a new trial was that the special jury had used an improper method of arriving at damages. Le Blanc said that when the jurors had differed in their opinions, they adopted the foreman’s suggestion that each juryman should put down a sum, all the sums would be added together, and the median figure should be their verdict. Lord Loughborough’s first reaction was that, “If that was the mode of estimating the damages, the verdict ought not to stand.”

The problem, however, was how to prove what the jury had done. Counsel for the defendant offered an affidavit of one of the jurors, supported by affidavits from two other persons who allegedly heard the jurymen describe this mode of having reached the verdict. When this offer of proof was first made by Serjeant Le Blanc, Judge Wilson asked, “Do you know, Brother Le Blanc, any case where the affidavit of a Juryman has been received in evidence?” Le Blanc responded, “I know it was refused lately in the Court of King’s Bench,” adding, “I think I recollect in the books more cases than one, where a rule was granted to show cause, when it appeared from the affidavit of a Juryman, that the Jury had taken improper methods to form their verdict; that they had tossed up, &c.”

On further argument, Serjeant Adair asked opposing counsel, Serjeant Bolton, exactly what the juror’s affidavit said. Serjeant Bolton “then read the affidavit of one Zachariah Death,

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33 The court said that the question was whether the juror’s affidavit could be received; if it were inadmissible, so also were the affidavits of the other two persons.
34 Le Blanc was referring to the case of *Vaise v. Delaval*, 1 T.R. 11 (1785), in which an affidavit that the jury had “tossed up” in order to reach a verdict was rejected.
of Diss, the purport of which was, that the jury did all agree to put each their separate sums, and having done so, and something being mentioned respecting Mr. Watson’s circumstances, they fixed upon £3,000.” Chief Justice Loughborough then said that the mode used by the jury was admittedly “idle,” but “the £3,000 does appear to have been agreed to then by them all.” Thus, even if allowed, the affidavit would have been to no purpose. Justice Heath closed the issue by stating: “I am glad, in the present case, the affidavits are not admissible, on account of the precedent.”

The rule against admitting jury affidavits had been firmly established in the Court of King’s Bench early during Lord Mansfield’s term as Chief Justice. In *Rex v. Thirkell*, eight of the jurors signed a paper disapproving of the verdict that they just given, and Lord Mansfield “expressed great dislike of such representations made by jurymen, after the time of delivering their verdict.” It invited a “very bad consequence, to listen to such subsequent representations contrary to what they had before found upon their oaths; and which might be obtained by improper applications subsequently made to them.” Justice Wilmot agreed, declaring that representations made by jurymen after their departure from the bar “ought to be totally disregarded.” This view was reaffirmed in 1772 in an unreported decision of King’s Bench.

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35 Diss was a small town in Norfolk.
36 What “Mr. Watson’s circumstances” were is unclear, but perhaps these special jurors, gentlemen from Great Yarmouth, realized that Mayor Watson would be protected.
37 3 Burr. 1696 (1765).
38 In Priest v. Pidgeon, 17 June 1772, a bankruptcy case, the jury found for the plaintiff apparently on the theory that the plaintiff, a victualler, had nevertheless become a trader in wine and brandy and thus had been properly declared bankrupt. Afterwards, some of the jury filed an affidavit that they did not mean to find that the defendant was a bankrupt, but according to a note by Edward East, “the court would not hear it read, it being an established practice never to receive such affidavits.” Manuscript Notes by Buller J & Sir E.H. East 1754-92, Inner Temple Library, Misc. MS 96, London I: 109.
and again in 1788 in *Jackson v. Williamson* \(^{39}\) while Lord Mansfield was yet Chief Justice, although inactive. But the decision that came to stand for the rule against admitting juror affidavits was *Vaise v. Delaval*, \(^{40}\) a case that continues to be cited in the twenty-first century. In a six-line opinion, Lord Mansfield said that such affidavits were not admissible, “but in every such case the Court must derive their knowledge on some other source such as from some person having seen the transaction through a window, or by some such other means.” \(^{41}\)

Lord Mansfield was willing to receive an affidavit from jurors who realized that they had simply made a mistake that they wished to correct. In *Bevan v. Slade*, the plaintiff sued for damages and expenses caused by a lethal infection transmitted to the plaintiff’s wife by the defendant’s wife. The jury gave a verdict for the plaintiff for £10 *and all the expenses*, which the trial judge interpreted to include the £40 that, according to one witness, had been spent by the plaintiff trying to cure his wife. Thus a verdict of £50 was announced in the courtroom and entered on the record. Subsequently, eight of the jurors submitted an affidavit saying that they meant only the plaintiff’s costs, thinking the proof of the £40 insufficient. Lord Mansfield was reported to have said: “The word ‘Expences,’ was ambiguous. The Jury themselves, who are the properest persons, now inform the court what they meant by it, and the verdict must be altered accordingly.” \(^{42}\)

Similarly, in *Cogan v. Ebden*, \(^{43}\) the Court of King’s Bench accepted an affidavit from eight of the jurors that the foreman had reported their verdict incorrectly as for the defendant on

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\(^{39}\) 2 T.R. 281 (1788).

\(^{40}\) 1 T.R. 11 (1785).

\(^{41}\) Lord Mansfield’s example seems far-fetched – that an observer might happen to see through a window that the jurors were flipping a coin to reach their verdict.

\(^{42}\) *The Times*, January 13, 1786, p. 3.

\(^{43}\) 1 Burr. 383 (1757).
both issues presented, whereas the verdict should have been for the plaintiff on one of the issues. The foreman declined making any affidavit “because, he said, he should make himself appear a fool, to the Court of King’s Bench.” The court said that the mistake should be rectified.

In an earlier King’s Bench case, however, the judges were cautious. In Palmer v. Crowle, two jurors signed an affidavit that the jury “intended to give but 7s. besides the money brought into Court, instead of the sum for which the verdict was declared and entered up.” Counsel for the defendant argued that it would be unjust to found a judgment on an untruth. But the court, per curiam, said “it would be of very dangerous example to suffer jurors to come in and suggest a mistake in order to invalidate their acts upon oath, especially where their verdict is not contrary to evidence, as this case is.” The motion to correct the verdict was, therefore, denied.

In the Court of Common Pleas, the issue about the admissibility of juror affidavits remained uncertain until 1805, when the case of Owen v. Warburton was decided. There, an affidavit of a juryman was offered to show that the verdict had been decided by lot. After argument centering upon the case of Vaise v. Delaval and other precedents, Chief Justice James Mansfield seemed to have been of two minds about how the issue should be decided, but took the case under advisement since the authorities were contradictory. Later, he delivered the following opinion of the court:

We have conversed with the other Judges upon this subject, and we are all of opinion that the affidavit of a juryman cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such

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44 Andrews 382 (1739)
45 1 Bos.&P. (NR) 326 (1805).
46 No relation to Lord Mansfield, Chief Justice of the Court of King’s Bench, 1756-88.
evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him.  

The Outcome in *Hurry v. Watson*

On June 27, 1787, as reflected in a consent order in the Common Pleas, the parties settled the case of *Hurry v. Watson* for £1,500. The consent order is unclear whether the £1,500 was inclusive of Watson’s costs, but according to a later report in *The Times*, Watson was responsible for £800 costs in addition to the £1,500.

At the initial hearing of the case in Easter Term, Serjeant Le Blanc had asserted that the jury’s assessed damages, independent of all the costs, were “more than he [Watson] is worth in the world.” As speculated earlier, if Serjeant Le Blanc’s statement were true, it would seem that the settlement of £1,500, plus £800 costs would surely send Watson to the King’s Bench Prison, where he would join other incarcerated debtors indefinitely.

In fact, however, Watson had to pay nothing at all. Less than ten weeks after the date of the consent order, 20 members of the Corporation of Yarmouth, including Mr. Watson, voted, on motion of Mr. Watson, to reimburse Mr. Watson the sum of £2,300 “for the expences incurred by him in preferring a bill of indictment for perjury against Mr. Hurry, and in defending an

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47 *Ibid.*, 329-30. (NB: The headnote in the printed report is incorrect. It states that the court will set aside a verdict on an affidavit by a juror that it was decided by lot. As the quotation above shows, the court’s ruling was the opposite.) By “the other judges” Chief Justice Mansfield referred to the judges of the Court of King’s Bench and the Court of Exchequer. On this informal practice of consultation, see J. Oldham “Informal Law-Making in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries,” *Law and History Review*, 29: 181 (2011).

48 *The Times*, March 28, 1789, p. 4.
action brought by the said William Hurry against the said John Watson in consequence thereof." According to The Times, the resolution of the Corporation stated, in effect,

That Mr. Watson was the Register of the Admiralty-Court, and the late Mayor of Yarmouth, and that in consequence of such offices, he had been involved in divers suits and controversies with Mr. Hurry, and had incurred thereby considerable expences; and that the assembly were sensible that Mr. Watson was influenced in his conduct by motives of public regard for the interests of the Corporation, and the dignity of the Chief Magistrate of Yarmouth, and that he bore no ill-will to Mr. Hurry.

John Watson was not, however, completely out of the woods. On January 25, 1788, a show cause order was heard by the Court of King’s Bench on why an information should not be exhibited against Watson and nineteen other members of the Corporation of Yarmouth for having committed a libel on public justice by the action of the defendants in reimbursing Watson. After argument of counsel, Justice Ashhurst said that the reimbursement resolution did indeed import a libel on the public justice of the country. He said that, “he happened to be the Judge who tried this cause; and in the course of his recollection he did not remember a grosser or stronger case of malice.” He pointed out that, “The moment Mr. Hurry was acquitted on the charge in that indictment, Mr. Watson puts in a paragraph in the papers, that the cause only went off on account of a flaw in the indictment, and that a new indictment would soon be preferred.” Further, “this certainly reflects on the Jury that found that verdict, and on the Judge who suffered that verdict to be found.” Justice Buller concurred, as did Justice Grose. The show cause order was therefore made absolute.

The information against Watson and nineteen other members of the Yarmouth Corporation was tried during the Winter Assizes at Thetford before Justice Grose and a special

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49 Ibid.
50 Ibid.
51 The Times, January 26, 1788, p. 3.
jury. After two witnesses had been examined by counsel for the prosecution (Thomas Erskine), and the Assembly-Book of the Corporation containing the reimbursement order had been examined, Justice Grose determined that there was a material variance between the order entered in the Assembly-Book and the libel as laid in the information; thus, “after several ingenious arguments by the Counsel on each side, the Jury found a verdict of Not Guilty, for all the defendants.”

Thus this eleven-shilling contest ended, with the imposing sum of £2,300 unwittingly bankrolled by the good citizens of Great Yarmouth. William Hurry emerged triumphant, and John Watson managed to escape financial ruin, apparently (if the behavior of the other nineteen members of the Corporation of Great Yarmouth is a reliable indicator) with his reputation intact. The judicial system was the stage on which this dysfunctional drama was acted out.

Could the case have been cut short and the waste of municipal funds prevented? It is difficult to see how. The perjury action was thrown out by Justice Nares, and the first malicious prosecution action was thrown out by Chief Baron Skynner. The Court of Common Pleas could have stopped the proceedings by denying the motion to set aside Skynner’s nonsuit, but Chief Justice Loughborough used the occasion to try to loosen the strictures of special pleading. After a full discussion of somewhat inconsistent precedents, Loughborough concluded that the variance in the pleadings considered by Skynner to be fatal was immaterial. This decision generated the second malicious prosecution action and the entry on stage of Thomas Erskine, evidently an oratorical force of nature, at least in the eyes and hearts of the special jurors.

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52 *The Times*, March 28, 1789, p. 4.
Had there been no jury, of course, the excessive damages undoubtedly would not have been given. The view has been advanced that the public veneration of the civil jury in eighteenth-century England and the counterproductive effects that the system produced were unfortunate. That, however, is another story.