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BROWN V. COMMONWEALTH: THE COURT BALKS ON QUOTIENT VERDICTS

A fundamental principle underlying the system of trial by jury is the premise that the verdict returned by the jury should be the result of a process of careful examination, reflection, and deliberation.¹ The fact that this process is considered essential to the attainment of justice, however, makes it no less frustrating or time-consuming for the members of the jury. Consequently, over the years juries have resorted to a number of methods for shortening the deliberative process.² Not surprisingly, most of these methods are far better suited to the attainment of an expeditious verdict than a sound one, and they are, therefore, widely condemned. One such method is the *quotient verdict*. Like the courts of many jurisdictions,³ the Kentucky Court of Appeals has had to deal with the problems presented by quotient verdicts on numerous occasions in both civil and criminal cases. Unfortunately, the Kentucky Court has demonstrated a less enlightened approach to these verdicts than have the courts of other states.⁴ In *Brown v. Commonwealth*,⁵ the Court recently reasserted its traditional position on quotient verdicts,⁶ a position which clearly separates this state from the more progressive jurisdictions, and which, in view of recent legislation, need no longer persist.

An understanding of quotient verdicts is best achieved by considering three areas of analysis: (1) the nature and validity of quotient verdicts; (2) the rationale for and against the use of quotient verdicts; and (3) the relationship of quotient verdicts to verdicts by lot, with

¹ See *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137 (Ky. 1942); Comment, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 ILL. L.F. 388, 392.

² See Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958).

³ In addition to Kentucky; Alabama, Arkansas, and Texas have particularly extensive histories of dealing with quotient verdicts. See *Security Mutual Fin. Corp. v. Harris*, 261 So.2d 43 (Ala. 1972); *Copeland v. State*, 41 So.2d 390 (Ala. 1949); *Harris v. State*, 2 So. 2d 431 (Ala. 1941); *Stone v. State*, 135 So.2d 646 (Ala. 1931); *Ledbetter v. State*, 85 So. 581 (Ala. App. 1920); *National Credit Corp. v. Ritchey*, 477 S.W.2d 488 (Ark. 1972); *Connelly v. State*, 350 S.W.2d 298 (Ark. 1961); *Arnold v. State*, 238 S.W. 818 (Ark. 1921); *Speer v. State*, 193 S.W. 113 (Ark. 1917); *Brown v. State*, 475 S.W.2d 938 (Tex. Crim. App. 1971); *Phillips v. State*, 216 S.W.2d 211 (Tex. Crim. App. 1949); *Central Motor Co. v. Gallo*, 94 S.W.2d 821 (Tex. Civ. App. 1936); *Galveston, H. & S.A. Ry. v. Brassell*, 173 S.W. 522 (Tex. Civ. App. 1915).

⁴ Florida, as will be seen, appears to be the most progressive of the jurisdictions and Arkansas the least progressive. Kentucky decisions correspond more closely to the Arkansas position than to that of Florida.

⁵ 490 S.W.2d 731 (Ky. 1973).

⁶ The Kentucky Court's stance is that the quotient method of arriving at a verdict may be used as long as the verdict reached by use of the quotient is subsequently and independently adopted by all the members of the jury. *Brown v. Commonwealth*, 490 S.W.2d 731 (Ky. 1973); *Stone v. Commonwealth*, 418 S.W.2d 646 (Ky. 1967); *Graham v. Commonwealth*, 221 S.W.2d 677 (Ky. 1949).

emphasis on the manner in which Kentucky has historically confronted this question.

I.

A quotient verdict is one wherein the members of the jury, having already determined the guilt or innocence of the defendant or the liability of the parties,⁷ agree to arrive at the sentence, fine, or award by the use of a simple mathematical operation. Each juror writes down or orally submits what he believes to be the proper amount of damages or number of years of confinement, the individual figures are added up, the sum is divided by the number of jurors, and the resulting quotient is returned by the jury as its verdict.⁸ The invalidity of quotient verdicts, in almost every jurisdiction, derives from the agreement by the jurors *in advance* of the calculation to be bound by its results.⁹ There are, however, two notable exceptions to this general rule. The first exception is peculiar to the state of Arkansas, where the validity of quotient verdicts is determined by the presence or absence of a requisite degree of *chance*.¹⁰ The second exception arises from the recent Florida case of *Malone v. Marks Brothers Paving Co.*¹¹ wherein the court, perhaps marking the way for a

⁷ Quotient verdicts appear with almost equal regularity in civil and criminal cases, and, historically, the same rules have been applied to both situations. For example, although *Louisville & N. R.R. v. Marshall*, 158 S.W.2d 137 (Ky. 1942), is a civil case, the statute construed therein was section 271 of the Kentucky *Criminal Code* and many of the decisions relied upon by the Court were criminal cases. The practical difference, of course, is that in civil cases quotient verdicts are employed to determine the amount of damages to be awarded, whereas in criminal cases they are used as a means of fixing the length of the defendant's sentence or the amount of his fine.

If a differential application of quotient verdict standards is to be made, a strong case can probably be construed in favor of requiring closer scrutiny and stricter rules in criminal cases than in civil cases. In the latter, the risks involved can be calculated in dollars and cents; in the former they are most often measured in years of confinement in a penal institution. There is no reason why this distinction, the importance of which is manifested in other areas of criminal and civil procedure, should not be recognized in this context as well. Still, as is illustrated hereinafter, there is little justification for permitting quotient verdicts or other averaging techniques in either type of case, and the application of different standards thereto would at best represent only a partial solution to the problem.

⁸ Comment, *Trial Practice—Juries—Quotient Verdicts*, 9 ARK. L. REV. 77 (1955).

⁹ *Wheat v. State*, 202 So.2d 65 (Ala. App. 1967); *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137 (Ky. 1942); *Haarberg v. Schneider*, 117 N.W.2d 796 (Neb. 1962); *Thompson v. State*, 270 S.W.2d 379 (Tenn. 1954); *Brown v. State*, 475 S.W.2d 938 (Tex. Crim. App. 1971).

¹⁰ See *National Credit Corp. v. Ritchey*, 477 S.W.2d 488 (Ark. 1972); *Speer v. State*, 198 S.W. 113 (Ark. 1917).

¹¹ 168 So.2d 753 (Fla. App. 1964). In this case the jurors all stated that they had employed the averaging device to arrive at a figure but that there was no agreement beforehand to abide by the results. The jury did, however, submit

(Continued on next page)

future trend in this area, ruled that the use of *any* averaging technique in moving the jury toward a verdict would serve to vitiate that verdict despite the *absence* of an advance agreement by the jurors to be bound by the result.

A further refinement of the general rule involves the degree of participation in the advance agreement necessary to render the verdict invalid. In most cases involving invalid quotient verdicts *all* the jurors have entered into the advance agreement, but such complete participation is not always required. Quotient verdicts have been set aside where only a majority of the jurors agreed in advance to be bound;¹² where two or more jurors were so bound;¹³ and even where it was shown that only one juror felt bound by the prior agreement.¹⁴

Neither must the advance agreement always be *expressed* in order to vitiate a verdict resulting from the use of the quotient method. If it is shown that there was an implied agreement¹⁵ or a tacit understanding¹⁶ among the jurors prior to the calculation that they would be bound by the results, this will serve to void the subsequent verdict. It has been suggested that the *Malone* case¹⁷ in Florida can be explained in terms of the "implied agreement" concept.¹⁸ It should be noted, however, that, unlike other "implied agreement" cases, *Malone* turns not upon whether the calculation was preceded by an agreement among the jurors but rather upon whether such a calculation was employed at all. It is, therefore, misleading to consider *Malone* any more representative of "implied agreement" quotient verdict cases than it is of the "express agreement" cases.

It is evident from the foregoing discussion that, under certain circumstances, the quotient method may be employed without producing

(Footnote continued from preceding page)

the quotient thus derived as its verdict. In declaring the verdict invalid, the Court reasoned that:

not only is the so-called technical quotient verdict condemned, but any such irregular methods of arriving at a verdict as aggregating or averaging for the reason that such verdicts do not represent the independent opinion of each juror and this undermines and circumvents the deliberative process underlying the jury system. *Id.* at 756.

¹² *Harris v. State*, 2 So.2d 431 (Ala. 1941); *Sylvester v. Casey*, 81 N.W. 455 (Iowa 1900).

¹³ *Benjamin v. Helena Light & Ry.*, 255 P. 20 (Mont. 1927).

¹⁴ *Gordon v. Trevarthan*, 34 P. 185 (Mont. 1893); *Wright v. Union Pac. R.R.*, 62 P. 317 (Utah 1900); *Galveston, H. & S.A. Ry. v. Brassell*, 153 S.W. 522 (Tex. Civ. App. 1915).

¹⁵ *Thompson v. State*, 270 S.W.2d 379 (Tenn. 1954).

¹⁶ *Ledbetter v. State*, 85 So. 531 (Ala. App. 1920); *Sylvester v. Casey*, 81 N.W. 455 (Iowa 1900); *Becker v. Mollenaur*, 234 S.W.2d 690 (Tex. Civ. App. 1950).

¹⁷ 168 So.2d 753 (Fla. App. 1964).

¹⁸ Annot., 8 A.L.R.3d 335, 351 (1966).

an invalid verdict. In fact, in the great majority of instances where the quotient method has been used by a jury the eventual verdict has been declared valid.¹⁹ This may occur, notwithstanding *Malone*, whenever there is

no previous agreement that the average estimate to be arrived at shall be binding and this plan of deliberating is adopted merely for the purpose of achieving a working basis, which the jurors are free to accept or reject as they see fit²⁰

In such cases the final verdict is not technically a quotient verdict, and it is valid "whether it be for a sum which is the average of the amounts fixed or for some other amount."²¹

A second situation in which the use of the quotient method does not usually result in an invalid verdict occurs when the jury agrees in advance to be bound by the quotient but decides, after the quotient has been calculated, to abandon it, and subsequently arrives at a different verdict.²² This does not mean that an otherwise invalid quotient verdict can be "cured" by simply rounding off or otherwise insignificantly changing the quotient.²³ On the contrary, in most cases "[t]he fact that the jury agreed to a slightly different verdict than the quotient arrived at cannot cure the evil effects of such a verdict, if it appears that the agreement made in advance entered into or induced the result."²⁴ When the jury clearly refuses to abide by the advance agreement, however, and adopts a final verdict sufficiently different from the quotient, such a verdict has been held valid.²⁵

In Kentucky, a third rationale for allowing the use of what otherwise would be invalid quotient verdicts is recognized. Since a true quotient verdict technically should remove the necessity of any deliberation or acceptance after the quotient has been reached, the

¹⁹ Do not confuse the quotient method with the quotient verdict. As will be seen, the quotient method (*i.e.* the actual mathematical calculation) is used under many circumstances without resulting in a quotient verdict.

²⁰ *Copeland v. State*, 41 So.2d 390, 392 (Ala. 1949); *accord*, *Lazarte v. City of Mountain Brook*, 248 So.2d 153 (Ala. 1971); *Clark v. Commonwealth*, 257 S.W. 1035 (Ky. 1924); *Haarberg v. Schneider*, 117 N.W.2d 796 (Neb. 1962); *Thompson v. State*, 270 S.W.2d 379 (Tenn. 1954).

²¹ *Copeland v. State*, 41 So.2d 390, 392 (Ala. 1949).

²² *Wheat v. State*, 202 So.2d 65 (Ala. App. 1967); *Cox v. Commonwealth*, 74 S.W.2d 346 (Ky. 1934); *Davis v. State*, 419 S.W.2d 648 (Tex. Crim. App. 1967) (by implication).

²³ *Security Mut. Fin. Corp. v. Harris*, 261 So.2d 43 (Ala. 1972); *Stone v. State*, 135 So. 646 (Ala. 1931); *Ledbetter v. State*, 85 So. 581 (Ala. App. 1920); *Benjamin v. Helena Light & Ry.*, 255 P. 20 (Mont. 1927).

²⁴ *Stone v. State*, 135 So. 646, 647 (Ala. 1931).

²⁵ See *Wheat v. State*, 202 So.2d 65 (Ala. App. 1967); *Cox v. Commonwealth*, 74 S.W.2d 346 (Ky. 1934).

Kentucky Court of Appeals has ruled that if, after deriving the quotient, the jury "considers the sum thus obtained, and agrees that the sum shall be the verdict of the whole jury, it is then a valid verdict and not a quotient verdict."²⁶ This argument was pursued to the extreme in *Bennett v. Commonwealth*²⁷ in which the Court noted that after the calculation "the result reached by the method employed was as fully assented to and agreed upon by each juror as if the method had not been employed"²⁸ and incredibly concluded that "[t]he verdict is *the same* as would have been reached by the jury without the method."²⁹ Although the Kentucky Court of Appeals has not adopted such reasoning in recent cases, it continues to maintain that a quotient verdict which is "subsequently and independently adopted by all members of the jury . . ." ³⁰ will not be set aside.

It must be remembered, however, that this method of removing the illegality from quotient verdicts is not widely accepted outside Kentucky.³¹ In the majority of jurisdictions it is rejected as a "mere ratification of a verdict arrived at in an improper manner."³² Rather than being viewed as a redeeming act of deliberation on the part of the jury, this procedure has been chastised as merely evidencing "a continued willingness to adopt an improper method for determining the extent of liability."³³

II.

The predominant argument raised in objection to quotient verdicts is that they offend a basic principle of our legal system.³⁴ The quotient verdict

is condemned by the rules of the common law on the ground that it is reached in a manner not contemplated when provision was made for the trial of cases by a jury. On the contrary, it was then intended that the conclusion of the body should be reached after a thorough consideration of the law and testimony heard at the

²⁶ *Commonwealth v. Anderson*, 14 S.W.2d 392, 395 (Ky. 1929).

²⁷ 194 S.W. 797 (Ky. 1917).

²⁸ *Id.* at 800.

²⁹ *Id.* (Emphasis added).

³⁰ *Brown v. Commonwealth*, 490 S.W.2d 731, 733 (Ky. 1973); *accord*, *Stone v. Commonwealth*, 418 S.W.2d 646 (Ky. 1967); *Graham v. Commonwealth*, 221 S.W.2d 677 (Ky. 1949); *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137, 142 (Ky. 1942).

³¹ *See Sylvester v. Casey*, 81 N.W. 455 (Iowa 1900); *Central Motor Co. v. Gallo*, 94 S.W.2d 821 (Tex. Civ. App. 1936); *United Iron Works v. Wagner*, 167 P. 1107 (Wash. 1917).

³² Note, *Quotient Verdicts in Florida*, 7 FLA. L. REV. 206, 207 (1954).

³³ *Central Motor Co. v. Gallo*, 94 S.W.2d 821, 823 (Tex. Civ. App. 1936).

³⁴ *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137 (Ky. 1942); Comment, *Impeachment of Jury Verdicts by Jurors*, *supra* note 1.

trial, and in the exercise of an honest judgment of each juror as to what verdict should be reached in justice to the rights of all parties connected with the litigation.³⁵

Quotient verdicts, it is argued, have the effect of foreclosing the exchange of views and criticism among the members of the jury, thereby circumventing the deliberative process.³⁶ As a result,

[t]he sentence which is ultimately imposed does not reflect the single view of twelve men, but is simply the average of twelve different views which may be widely divergent and which have not been subjected to criticism and analysis.³⁷

A more concrete, if less persuasive, argument against the quotient verdict is that it enables one or two jurors, by submitting unreasonably large or small numbers, "to exert inordinate and unfair influence upon the amount of the quotient and thus bring about a verdict which may be substantially out of line with the judgment of most of the other jurors . . ."³⁸ For example, if ten of the jurors feel that the sentence in a particular case should be five years and the other two jurors for some reason believe that 20 years is the appropriate term, the resulting quotient will be seven and one-half years, a figure 50 percent greater than the one preferred by all but two of the jurors. Two factors, however, militate against the persuasiveness of this argument. First, in the absence of strong prejudices on the part of any of the jurors, it seems unlikely that such great differences of opinion as to the length of the sentence will often exist. Second, if such differences do exist it is reasonable to assume that either the jury will become deadlocked, in which case there must be a new trial anyway, or the jurors will agree upon a compromise figure not unlike that which the quotient method would have produced.

The latter of these two factors is one of the few arguments pressed *in favor of* quotient verdicts. It is contended that

[t]he taking of a quotient is a rough approximation of the deliberative process since discussion itself tends to neutralize extreme views and produce an average of the jurors' initial opinions.³⁹

Still, as seen above, the strongest argument against quotient verdicts is based on legal principles rather than practical effects. The fact that in a given situation the quotient verdict may closely approximate

³⁵ *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137, 143 (Ky. 1942).

³⁶ *Id.*; Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 985 (1967).

³⁷ Note, *Jury Sentencing in Virginia*, *supra* note 36, at 985.

³⁸ Annot., *supra* note 18, at 348; *accord*, *Security Mut. Fin. Corp. v. Harris*, 261 So.2d 43 (Ala. 1972); *Killion v. Dinklage*, 236 N.W. 757 (Neb. 1931).

³⁹ Comment, *Impeachment of Jury Verdicts*, *supra* note 2.

the verdict produced by careful deliberation makes it no less odious when measured against those principles.

The only other noteworthy justification for the use of quotient verdicts is founded on the assertion that "quotients are often used not as a complete substitute for deliberation, but as a last resort after protracted deliberation has failed to produce agreement."⁴⁰ Even granting the veracity of this statement,⁴¹ it still does not change the fact that a true quotient verdict does not "reflect the single view of twelve men"⁴² Nor does it necessarily reflect the exact view of any one of the twelve jurors. Furthermore, the inability of twelve supposedly reasonable jurors to agree on a sentence after lengthy deliberation is very likely a strong indication of the real necessity for a new trial. To permit a quotient verdict in such instances merely for the sake of judicial economy or the jurors' peace of mind would be to work a paramount injustice.

III.

The determination of the validity of quotient verdicts in a number of states has historically involved the issue of whether or not a quotient verdict is a *verdict by lot*. This is largely due to the existence of statutes in these states in which one of the specifically designated grounds for granting a new trial is that the verdict has been decided by lot.⁴³ In general, "lot" is defined as "a contrivance to determine a question by chance or without the action of a man's choice or will."⁴⁴ Whatever else may be involved, a verdict by lot has one essential characteristic—the element of chance.⁴⁵

The most clear-cut example of a verdict by lot is found in the 1833 New York case of *Mitchell v. Ehle*.⁴⁶ In that case, after initial deliberations had failed to produce an acceptable verdict, the jurors placed ballots, some marked "prize" and some left blank, in a hat. It

⁴⁰ *Id.*

⁴¹ See *Thompson v. State*, 270 S.W.2d 379 (Tenn. 1954).

⁴² Note, *Jury Sentencing in Virginia*, *supra* note 36, at 985.

⁴³ Eleven states currently have statutes specifically referring to verdicts by lot in criminal cases: ARIZ. R. CRIM. P. 310 (1956); ARK. STAT. ANN. § 43-2203 (1968); CAL. PENAL CODE § 1181 (West Supp. 1972); FLA. R. CRIM. P. 1.600 (1968); IDAHO CODE § 19-2406 (1948); IOWA CODE ANN. § 787.3 (1950); N.D. CENT. CODE § 29-24-02 (1960); OKLA. STAT. ANN. tit. 22, § 952 (1958); S.D. COMPILED LAWS ANN. § 23-50-2 (1967); TEX. CODE CRIM. PRO. ANN. art. 40.03 (1966); UTAH CODE ANN. § 77-38-3 (1953). In addition, since 1953, four such statutes have been repealed and replaced with more general provisions which do not specifically mention verdicts by lot. The repealed laws are: KY. CR. CODE § 271 (1953); MONT. REV. CODES ANN. § 94-7603 (1949); NEV. REV. STAT. § 175.535 (1957); N.Y. CODE CRIM. P. § 465 (McKinney 1945).

⁴⁴ *Arnold v. State*, 233 S.W. 818, 820 (Ark. 1921).

⁴⁵ *Blaylack v. State*, 233 S.W.2d 615 (Ark. 1963).

⁴⁶ 10 Wend. (N.Y.) 595 (Sup. Ct. 1833).

was agreed that if more "prizes" were drawn the plaintiff should win and that if more blanks were drawn the defendant should prevail. As a result of the drawing, the jury decided in favor of the defendant, but the verdict was subsequently set aside as being the product of a lottery. In this particular case the presence of the essential element of chance is obvious.

In contrast, the presence or absence of the element of chance in quotient verdicts is considerably more difficult to discern and has therefore been a point of sharp disagreement between states in which verdicts by lot are or were prohibited by statute. On the one hand, the Supreme Court of Arkansas established the rule for that jurisdiction when it held that:

[t]he quotient verdict is not the result of a lottery. It is a certain result, ascertained by adding 12 separate amounts together and dividing the total sum by 12. Only one result can be reached. It would be a lottery, if 12 separate amounts were placed on separate slips of paper and one slip then drawn out, which by agreement should become the verdict.⁴⁷

The *Speer* holding has been scrupulously followed in later Arkansas cases⁴⁸ and, in one instance, has been adopted by the highest court of Montana.⁴⁹ In the recent case of *National Credit Corp. v. Ritchey*,⁵⁰ however, the Arkansas Supreme Court indicated that it is now willing to compromise its former position with regard to quotient verdicts. While paying homage to *Speer*, the court distinguished between: (1) those instances where the jurors agree to be bound by a quotient before they *determine* and *reveal* their individual figures and, (2) those instances where they agree to be bound only after arriving at their individual figures and making them known to the other jurors. (Note that in either situation the agreement to be bound by the quotient precedes the actual calculation of the quotient.) The court then concluded that, while the second of these situations creates a mere quotient verdict, the first instance amounts to a verdict by lot wherein "each juror is in a position to control the odds."⁵¹ Semantical differences aside, this decision is significant in that it represents a recognition by the Arkansas Court that at least one type of quotient verdict is a verdict by lot.

⁴⁷ *Speer v. State*, 198 S.W. 113 (Ark. 1917).

⁴⁸ *Blaylack v. State*, 370 S.W.2d 615 (Ark. 1963); *Connelly v. State*, 350 S.W.2d 298 (Ark. 1961).

⁴⁹ *State v. Moorman*, 321 P.2d 236 (Mont. 1957).

⁵⁰ 477 S.W.2d 488 (Ark. 1972).

⁵¹ *Id.* at 496.

On the other hand, some jurisdictions with "verdict by lot"⁵² statutes have long maintained that the true quotient verdict is a verdict by lot. Devoid of the element of deliberate judgment by the jurors, the quotient verdict is viewed by these states as no more than "the result of chance and self-imposed coercion"⁵³ The history of Kentucky's treatment of the problem of quotient verdicts is particularly noteworthy in this regard because it illustrates the modern trend in legislation on verdicts by lot, if not the modern trend in case law. Prior to 1962, the Kentucky statute pertaining to verdicts by lot was section 271 of the Criminal Code of Practice. It stated that:

[t]he court in which a trial is had upon an issue of fact may grant a new trial, if a verdict be rendered against the defendant, by which his substantial rights have been prejudiced, upon his motion in the following cases: . . .

[3] If the verdict has been decided by lot, or in any other manner than a fair expression of opinion by the jurors⁵⁴

Due largely to Kentucky's liberal provisions for "curing" quotient verdicts, the Court of Appeals has seldom declared a verdict involving the use of the quotient method to be a verdict by lot under this statute. Typical of these pre-1962 cases is *Graham v. Commonwealth*⁵⁵ wherein the Court noted that the use of the quotient method in arriving at verdicts "has been repeatedly condemned by us,"⁵⁶ but concluded that:

where it appears, as in the instant case, that the jury unanimously agreed upon the guilt of the accused and then arrived at a quotient verdict which was subsequently and independently adopted by all the members of the jury, . . . the verdict is not one by lot within the meaning of § 271(3) of the Criminal Code of Practice⁵⁷

When faced with a true quotient verdict by Kentucky standards (*i.e.* one in which the quotient was returned by the jury as its verdict without a post-calculation ratification of the advance agreement), however, the Court has declared it to be a verdict by lot.⁵⁸

In 1962, the Kentucky Criminal Code of Practice was replaced by the Kentucky Rules of Criminal Procedure, and section 271 of the

⁵² See *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137, 143 (Ky. 1942); *West v. State*, 443 P.2d 131 (Okla. Crim. App. 1968); *Phillips v. State*, 216 S.W.2d 211 (Tex. Crim. App. 1949).

⁵³ *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137, 143 (Ky. 1942).

⁵⁴ KY. REV. STAT. CRIM. CODE [1960] § 27 (repealed 1962).

⁵⁵ 221 S.W.2d 677 (Ky. 1949).

⁵⁶ *Id.* at 678.

⁵⁷ *Id.*

⁵⁸ *Louisville & N.R.R. v. Marshall*, 158 S.W.2d 137 (Ky. 1942).

old code was succeeded by rule 10.02. The new rule, which is far more general than the old one, simply states that "the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice."⁵⁹ Under this new rule the Court is free to resolve the issue of justice or injustice without being bound to the old mechanical test of whether or not a quotient verdict has been sufficiently cured to escape classification as a verdict by lot. However, in *Stone v. Commonwealth*⁶⁰ and *Brown v. Commonwealth*,⁶¹ both decided since the adoption of the new rules of criminal procedure, the Court failed to note the statutory change. Citing *Graham*⁶² and *Stone* as authority, the Court in *Brown* reasserted that:

[w]here it appears that the jury unanimously agreed upon the guilt of the accused and then arrived at a quotient verdict which was subsequently and independently adopted by all members of the jury, the verdict was not "made by lot" and cannot be set aside on that basis.⁶³

In all fairness it must be noted that the Court reached this conclusion in response to the defendant's specific contention that the verdict was, in fact, made by lot. Notwithstanding that contention, it is submitted that the Court could easily have taken judicial notice of the new law and apprised the defendant that the existence of a technical verdict by lot is not an express prerequisite for granting a new trial under Kentucky Rule of Criminal Procedure 10.02.

In maintaining its traditional stance in *Brown v. Commonwealth*, the Kentucky Court of Appeals has given rule 10.02 a very narrow reading, at least with regard to quotient verdicts. In effect, it has said that in most instances the use of the quotient method does not prevent the defendant from having a fair trial and that the interest of justice requires only that quotient verdicts be set aside when they are not cured by subsequent agreement. The Court has therefore refused to follow the lead of the more progressive jurisdictions and, in so doing, has again failed to rid this state of an obscure but significant burden upon the rights of the accused. Hopefully, the Court of Appeals will not long continue to maintain its present position. The Court should recognize that the use of the quotient method for any reason, at any

⁵⁹ Ky. R. CRIM. P. 10.02(1) (1962).

⁶⁰ 418 S.W.2d 646 (Ky. 1967).

⁶¹ 490 S.W.2d 731, 733 (Ky. 1973).

⁶² *Graham v. Commonwealth*, 221 S.W.2d 677 (Ky. 1949).

⁶³ *Brown v. Commonwealth*, 490 S.W.2d 731, 733 (Ky. 1973).

stage of the jury's deliberation, is a poor substitute for the careful consideration of evidence and ideas. Having done so, the Court should thereafter proceed at the first opportunity to render the use of the quotient method obsolete in the state of Kentucky.

William M. Lear, Jr.