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context, the need to protect his right to rely on the statute of frauds as a defense is eliminated, because neither the defendant nor the court can be defrauded by the plaintiff. Moreover, a judicial admission does not bar the defendant from contesting the validity or terms of the contract on other grounds. It is submitted that the purposes of the statute would be better served, and judicial efficiency more effectively promoted, by giving full effect to the judicial admissions exception to the statute of frauds.

Colleen M. McIntosh

CPLR 4111: Special verdict answers do not require concurrence by the same five jurors

Since 1937, New York has permitted verdicts in civil trials to be rendered by five-sixths of the jury. The authorizing statute

gill Inc., Commodity Mktg. Div. v. Hale, 537 S.W.2d 667, 669 (Mo. Ct. App. 1976). Defendants should not be allowed to avoid admitted obligations in the name of preventing plaintiffs from perpetrating non-existent frauds. See Stevens, supra note 18, at 378.

See supra note 24 and accompanying text. "Undeniably, the purpose of the statute was to give assured protection against the risk . . . of convincing proof through perjured testimony of an agreement that had never actually been entered into." Stevens, supra note 18, at 360. A defendant will not admit the existence of a contract that he did not make, and, therefore, it is suggested, once the contract is admitted the defendant should not be protected by the statute.


The history of the statute of frauds clearly indicates that its purpose was to prevent the enforcement of fraudulent claims. See Stevens, supra note 18, at 355-71. It is suggested that because a party does not ordinarily admit a contractual obligation to which he was not a party, it is reasonable to hold the party bound, to the extent that he admits the obligation. "Since the statute of frauds was intended to provide justice by reducing frauds, doing away with the judicial admission exception to discourage perjury achieves justice in the same way as legalizing criminal activities in order to reduce crime." Shedd, supra note 24, at 28 n.144.

1 See CPLR 4113(a) (1963). The statute provides: "A verdict may be rendered by not
does not distinguish between special verdicts and general verdicts. Neither the New York Court of Appeals nor the legislature


2 See CPLR 4111(a) (1963). A special verdict is defined as “one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon.” Id. This definition was substantially the same at common law. See Carr v. Carr, 52 N.Y. 251, 255 (1873); Anderson v. Anderson, 103 Misc. 427, 428, 170 N.Y.S. 612, 613 (Sup. Ct. N.Y. County 1918).

Special verdicts were originally created to allow the jury to leave all determinations of law to the court, and thus avoid “the danger of punishment arising from [juror] mistakes in dealing with [the] law.” See Note, Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure, 74 Yale L.J. 483, 485 (1964). The special verdict has been retained in modern procedures in order to give the court more control over the application of legal principles. Id. at 486. Special verdicts are particularly useful in cases in which the jury fails to consider a material issue of fact. See 8 CARMODY-WALL, NEW YORK PRACTICE, § 58:11 (2d ed. 1966). CPLR 4111(b) allows the court to resolve omitted issues of fact in accordance with the jury’s answers. See CPLR 4111(b) (1963); Siegel § 399, at 522-23 (1978). The court should phrase legal questions underlying special verdicts narrowly to reduce the risk that jurors will fail to understand the issues. Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 259 (1920) (juror “who has never studied . . . [the law] cannot understand or appreciate its intricacies”).

3 See CPLR 4111(a) (1963). The trial court may request a special or general verdict from the jury. See id.; Johnson v. Art Kraft Strauss Sign Corp., 45 App. Div. 2d 482, 483, 359 N.Y.S.2d 773, 774 (1st Dep’t 1974). A general verdict is defined as “one in which the jury finds in favor of one or more parties.” CPLR 4111(a) (1963). It becomes a conclusory finding by the jury in favor of a party, see Siegel § 399, at 522, and is not subject to division or examination of its component parts, see Murphy v. Roger Sherman Transfer Co., 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep’t 1970); Sunderland, supra note 2, at 258; Comment, supra note 1, at 363-64.

To reach a general verdict, the jury must apply the law to the facts. See 4 WK&M ¶ 4111.02. To make such an application, the jury receives detailed instructions on the law. See id. The underlying assumption that the jury comprehends the law and is capable of applying it correctly is the subject of much criticism. See Finz, Does the Trend in Our Substan-
has yet addressed the question of whether a special verdict containing more than one answer requires the concurrence of the same five jurors upon each answer.⁴ Recently, in *Schabe v. Hampton Bays Union Free School District*,⁵ the Appellate Division, Second Department, addressed this issue, holding that the concurrence of any five jurors is sufficient to answer special verdict questions.⁶

In *Schabe*, a junior high school student was injured on school property when she was struck by a school bus.⁷ The student com-
menced a negligence action against the school district, the high school, the bus company, and the bus driver. At the close of trial, the jury was given seven written questions and directed to find a special verdict. The trial judge instructed the jury that each question of the special verdict required the vote of a five-sixths majority, but that this majority could be comprised of any five jurors. Inter alia, the jury found the school district negligent and the plaintiff contributorily negligent, and apportioned fault between them. Subsequent polling of the jury revealed that one juror who had dissented on an issue of liability had nevertheless concurred in the apportionment of fault. On appeal, the school district challenged the trial court's "any five" instructions.

In a unanimous decision, the Second Department upheld the "any five" rule. Writing for the court, Presiding Justice Lazer examined the legislative reasons behind the abolishment of the unanimous jury requirement, and concluded that the adoption of the
any five” rule furthers the legislative intent. The court emphasized the different roles played by general and special verdicts in jury trials, explaining that unlike general verdicts, in which the focus rests on the outcome of the case, special verdicts focus only on the resolution of specific questions. Therefore, the court held that although the requisite number of jurors must agree with the entire result of a general verdict, nothing mandates that jurors agree upon all of the separate and distinct issues presented in a special verdict. The court noted that although the “validity of a special verdict may depend on the jury’s answers being consistent enough for the entry of judgment . . . it does not depend upon the consistency of individual juror voting patterns.” Finding nothing in the law mandating such consistent voting on all issues, the court concluded that in the interest of “public policy and fairness,” such a requirement should not be imposed.

The Schabe decision represents the most comprehensive evaluation by a New York court of the “any five” issue. It is submitted that by ascertaining the legislative reasons behind abolishing the

(1935).

16 See Schabe, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334.
17 See id. at 425-26, 480 N.Y.S.2d at 334.
18 Id. at 425, 480 N.Y.S.2d at 334; accord Murphy v. Roger Sherman Transfer Co., 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep't 1970). In Murphy, the then requisite number of 10 of 12 jurors had agreed upon a general verdict. 62 Misc. 2d at 961, 310 N.Y.S.2d at 892. Because the same 10 jurors had not agreed on the issues of liability and damages, see id., the trial judge invalidated the verdict, id. The Murphy case can be distinguished from Schabe in that Murphy involved a general, rather than a special, verdict. See id. See generally supra notes 2-3 (noting differences between general and special verdicts).
19 Schabe, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334. The Schabe court stressed the limited function of the special verdict, reasoning that “a special verdict [is] not merely a reflection of a general verdict split into parts, but [is] a device for returning the facts only.” Id.; see supra note 2.
20 Schabe, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334; see supra note 3.
21 Schabe, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334. The court found no support in either the legislative history of CPLR 4111 or the statute itself compelling adherence to the “identical five” rule. Id. at 425-26, 480 N.Y.S.2d at 334.
22 Id. at 426, 480 N.Y.S.2d at 334. The court reasoned that if the votes of each individual juror were scrutinized, the function of the special verdict would be frustrated, since the number of mistrials and retrials would increase. Id.
23 Id.
24 Id. at 427, 480 N.Y.S.2d at 335. The Schabe court rejected the argument that the “any five” rule permits inconsistent voting. Id. at 426, 480 N.Y.S.2d at 334. As long as any five jurors agreed on each issue, there was no reason to seek “some greater symmetry on the individual juror voting patterns.” Id., 480 N.Y.S.2d at 335.
unanimous jury requirement and applying them to the "any five" rule, the court effected the true goal of the New York Legislature.

The abandonment of the unanimous-jury requirement manifested the desire of the legislature to reduce court congestion and produce fairer verdicts. After research and deliberation, the legislature decided that the concurrence of five out of six jurors would serve these policy objectives without sacrificing fairness. It is submitted that this degree of jury concurrence is achieved whenever "any five" jurors agree upon an answer to a question within a special verdict.

It is submitted that the "any five" rule is consistent with the present bifurcated trial procedures. In bifurcated trials, the liability and damages issues are often decided by different jurors. Accordingly, the votes needed to sustain each verdict need not be

\[\text{See id. at 423, 480 N.Y.S.2d at 332-33; infra notes 27-29 and accompanying text. A statute should be interpreted in accordance with the intentions of the legislature and applied in accordance with its general purpose. See Petterson v. Daystrom Corp., 17 N.Y.2d 32, 38, 215 N.E.2d 329, 331, 268 N.Y.S.2d 1, 4 (1966). Such intent and purpose may be ascertained from the legislative history of the statute. See Kruger v. Page Management Co., 105 Misc. 2d 14, 24, 432 N.Y.S.2d 295, 303 (Sup. Ct. N.Y. County 1980).}\]

\[\text{See Schabe, 103 App. Div. 2d at 424-26, 480 N.Y.S.2d at 333-35; infra notes 27-29 and accompanying text.}\]


The Council agrees with the argument that this proposed law, if enacted, will have two beneficial effects: (1) it will lessen the economic loss of jury disagreements; (2) it will result in a fairer expression of the jury's belief than under the unanimous verdict requirement.\]

\[\text{Id. Once the amendment was adopted, see N.Y. Const. art. I, § 2, the Judicial Council supported legislation to effect this change, see Third Ann. Rep. N.Y. Jud. Council 34-35 (1937), again, for the "economic saving to the State," id. at 35. The practical considerations of reducing delays and mistrials are just as important today. See Aiello v. Wenke, 118 Misc. 2d 1068, 1076, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983) (adoption of practical rule necessary to alleviate congested calendars); Desmond, Juries in Civil Cases—Yes or No?, in The Jury, Selected Readings 17 (G. Winters ed. 1971) (problem with current court congestion is "urgent").}\]


\[\text{See id. Before choosing the exact number of jurors necessary to reach a verdict, the legislature examined constitutional, statistical, and theoretical issues. See id.}\]

\[\text{See CPLR 603 (1976) (allowing "bifurcation," or separate trials, of individual claims or issues at court's discretion). Bifurcation saves time and money. See Siegel § 130, at 514-15. Typically, courts bifurcate the liability and damages issues in personal injury cases. Id.}\]

\[\text{See Mercado v. City of New York, 25 App. Div. 2d 75, 76, 265 N.Y.S.2d 834, 836-37 (1st Dep't 1966) ("[t]he liability issue and the damage issue in an action, grounded in negligence . . . represent distinct and severable issues which may be tried and determined separately").}\]
rendered by the same five jurors. Therefore, the “any five” rule ensures that the same degree of jury concurrence required in bifurcated trials will be attained in special verdict answers.

A frequent argument against the “any five” rule is that it allows individual jurors to cast irreconcilable votes. However, if the same five jurors are required to agree on special verdict answers, the dissent of a juror in one question requires the remaining five jurors to agree unanimously on all other issues. Thus, many of the problems with the unanimous jury requirement would be reintroduced, thereby frustrating the purpose of the less-than-unanimous verdict statute.

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32 See Murphy v. Roger Sherman Transfer Co., 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep't 1970). In Murphy, the court noted:

if the issues of liability and damages had been . . . tried separately (see CPLR 603) . . . any 10 jurors making for a valid verdict need not be the same with respect to each of their votes on the separated issues of liability and damages.

Id. At the trial level, however, the issues were tried together, and because the court found that the same jurors had not agreed on the issues of liability and damages, a new trial was ordered. Id. This distinction has often been criticized as overtechnical. See Tillman v. Thomas, 99 Idaho 569, 572, 585 P.2d 1280, 1283 (1978); Reed v. Cook, 103 N.Y.S.2d 539, 541 (Sup. Ct. Onondaga County 1951); CPLR 4113, commentary at 131 (McKinney Supp. 1984-1985)


34 See, e.g., Cohen v. Levin, 110 Misc. 2d 464, 469, 442 N.Y.S.2d 851, 854 (Sup. Ct. Queens County 1981). In Cohen, a medical malpractice suit was brought against two defendants. Id. at 464-465, 442 N.Y.S.2d at 851. When the jury was polled, it was found that one juror who had dissented from a finding of liability as to one defendant had agreed to an apportionment of damages which included that defendant. Id. at 464-65, 442 N.Y.S.2d at 851-52. The court reasoned that “[t]hese votes cannot be reconciled, and the court cannot choose between them and sustain one of them. In the court's view, they must both be eliminated from consideration.” Id. at 469, 442 N.Y.S.2d at 854.


36 See Naumberg v. Wagner, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. Ct. App. 1970). In Naumberg, the court criticized the “same five” rule because it reinstates a characteristic of a unanimous verdict by requiring the same jurors to agree to each issue, id., and because
The failure of New York courts to consider the legislative history of the "any five" issue in prior decisions had resulted in inconsistent holdings. The Schabe court properly resolved the issue by focusing on the legislative intent surrounding the creation of section 4113, and, therefore, to avoid future inconsistencies, its decision should be adopted by either the New York Court of Appeals or the legislature.

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it attempts "to maintain the semblance of unanimity after the requirement of unanimity ceases to exist," id. Similarly, New York courts have adopted the "any five" rule because it supports the five-sixths jury rule. See, e.g., Aiello v. Wenke, 118 Misc. 2d 1068, 1076, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983) (determining inconsistencies in votes of individual jurors would undermine five-sixths rule); see also supra notes 26-28 and accompanying text (discussion of legislative intent behind abandonment of unanimous-jury rule).