

July 2015

Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds

Morris G. Shanker

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Contracts Commons](#), [Jurisprudence Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Shanker, Morris G. (1990) "Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds," *Akron Law Review*: Vol. 23 : Iss. 1 , Article 1.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol23/iss1/1>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@Uakron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@Uakron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

JUDICIAL MISUSES OF THE WORD FRAUD TO DEFEAT THE PAROL EVIDENCE RULE AND THE STATUTE OF FRAUDS

(With Some Cheers and Jeers for the Ohio Supreme Court)

by

MORRIS G. SHANKER*

PROLOGUE	2
I. The Parol Evidence Rule	2
A. <i>The Fraud Exception</i>	3
B. <i>The Inappropriate Use of the Word Fraud</i>	4
C. <i>The Duty to Read and Understand</i>	5
D. <i>Proper Fraudulent Inducement Claims</i>	7
1. Fiduciary Relationships	8
2. Fraud in the Factum	9
3. Meaning of Words Known Only by One Party	9
4. Extrinsic Fraud	9
E. <i>Summary and Cheers for the Ohio Supreme Court</i>	10
II. THE STATUTE OF FRAUDS	10
A. <i>A Confused Ohio Supreme Court</i>	11
1. Misleading from the Lawyers	11
2. Precise Meaning of the Word Fraud Depends on Context	13
3. Perpetuating Past Error Which Improperly Used the Word Fraud	15
4. The Distinction Between Wrongs and Frauds	17
B. <i>Summary and Jeers for the Ohio Supreme Court</i>	18

* John Homer Kapp Professor of Law, Case Western Reserve University Law School; B.S., Purdue University (1948); M.B.A., J.D., University of Michigan (1952).

PROLOGUE

If we were more careful about what we say, and how, we might be more critical and less gullible. Those for whom words have lost their value are likely to find that ideas have also lost their value.

— Edwin Newman¹

I. THE PAROL EVIDENCE RULE

The Parol Evidence Rule was developed centuries ago to protect the integrity of written contracts. Essentially, it does so by prohibiting a party from contradicting its written terms by evidence either of alleged or actual prior agreements.² Nevertheless, lawyers have become frustrated attempting to draft written contracts whose language, will be upheld in court. Undoubtedly, many would agree with Justice Mosk's statement that:

Members of the Bar . . . are commissioned by clients to prepare a written instrument able to withstand future assaults . . . [but], it has become virtually impossible under recently evolving [parol evidence] rules to draft a written contract that will produce predictable results in court. The written word, heretofore demand immutable, is now at all times subject to alteration by self-serving recitals based on antecedent events.³

The courts, of course, continue to recognize that the Parol Evidence Rule exists and to pay lip service to it. However, they have developed

¹ E. NEWMAN, *STRICTLY SPEAKING* 17 (1974).

² Current formulations of the Parol Evidence Rule are found in Restatement of the Law of Contracts (2d) § 213 and following; and also at U.C.C. 2-202. While U.C.C. 2-202 applies directly only to written sale of goods contracts, the courts, nevertheless, have often turned to it as an appropriate and succinct statement of the Parol Evidence Rule for non-sales contracts.

³ *Delta Dynamics, Inc. v. Arioto*, 69 Cal. 2d 525, 532, 446 P.2d 785, 789, 72 Cal. Rptr. 785, 789 (Mosk, J., dissenting).

a series of so called “exceptions” to its application, and lawyers for litigants have learned these “exception” lessons well. Thus, whenever a client becomes unhappy with one or of more of the terms of a written contract which he signed, his lawyer likely will fish out one of these “exceptions” in an effort to excuse his client from it.

There are many of these so called “exceptions” to the application of the Parol Evidence Rule. Indeed, it is sometimes said that the “exceptions” to the Parol Evidence Rule have actually overwhelmed the rule itself. This obviously encourages litigation as to the “meaning” of the written words – so much so that Judge Kozinski of the Ninth Circuit recently wrote:

In many states, for example, it is no longer possible to enforce a contract drafted by sophisticated, knowledgeable parties without a trial to decide what the parties really meant when they agreed to language that seems perfectly clear to the average Joe.⁴

Even if the one who alleged an “exception” lost in court, the other party, nonetheless, had been put to the considerable expense, delay, and effort of a trial; hardly an appealing exercise for those who thought that putting the contract in writing was for the very purpose of finalizing its terms and ending disputes about them. Undoubtedly, if that Charles Dickens character, Mr. Bumble, had been subjected to this situation, he surely would have protested that if the law works this way, then “the law is a ass - a idiot.”⁵

A. The Fraud Exception

Among the so-called “exceptions” to the Parol Evidence rule is fraud. Putting it another way, it is well accepted that contracts may be rescinded if they had been induced by fraud. It is not surprising, therefore, that allegations of fraudulent inducement are often heard in our judicial halls when a written contract is presented there for enforcement.

It is this fraud “exception” to the Parol Evidence Rule which I will discuss in this paper. Before I do so, let me digress to criticize this “exception” terminology regarding the Parol Evidence Rule. Indeed, stating

⁴ Kozinski, *Hunt for Law's "True" Meaning Subverts Justice*, Wall St. J., Jan. 31, 1989, at A18, col. 3.

⁵ C. DICKENS, *OLIVER TWIST*, 489 (1970) (First published serially 1837-1839).

that there are “exceptions” to the Parol Evidence Rule is, I submit, an illustration of the superficial thinking and imprecise language use which I criticize in this paper. The Parol Evidence Rule does not have “exceptions” to it. When evidence extrinsic to a written contract is proffered, the precise question before the court is whether the Parol Evidence Rule is or is not applicable. (Of course, that is the same question presented when one is dealing with the application of any other legal rule. And determining whether a legal rule does or does not apply always requires clear and precise thinking.) Putting it otherwise, when the Parol Evidence Rule is applicable, then it is fully applicable without “exception.” When the Parol Evidence Rule is not applicable, one simply does not apply it because it is inappropriate to do so; it is not because the Parol Evidence Rule has an exception to it.

B. The Inappropriate Use of the Word Fraud

Be that it may, I do not question the notion that the Parol Evidence Rule does not and should not prevent introduction of evidence seeking to show fraudulent inducement of the written contract. The problem, however, is that too many judges in the name of fraud have allowed extrinsic evidence which directly contradicted the written terms of a contract when, in fact, no case of legal fraud had been or could be made out.

There are many examples of this judicial knee jerking. Putting it another way, judges, rather than carefully analyzing the proffered evidence to see if it can support a fraudulent inducement claim, have allowed it just because it is proffered under a fraud label. That, I submit, is superficial rather than careful judicial thinking.

A particularly good example of this came from the Virginia Supreme Court. A buyer who had signed a written contract for the purchase of an airplane decided that he did not like being bound by its written terms. In particular, the buyer was unhappy because the written contract stated that he had purchased and accepted the airplane “as is, where is” and with a “waiver of all warranties.” Accordingly, the buyer alleged that the seller during the negotiations had stated otherwise; indeed, had “fraudulently represented” that the airplane was in perfect condition and capable of transporting a cargo of 40,000 pounds a distance of 2,700 miles. This, of course, was a direct contradiction of the written terms which had disclaimed all warranties, and, as such, never would have been permitted under the Parol Evidence Rule. But, according to the Virginia Supreme Court, the evidence was to be received. And why? Apparently, just because the buyer “alleged that [seller] made fraudulent representations of material facts and that the sale contract was induced by defendant’s

fraud.”⁶ And, “[w]hen fraud in the procurement of the written contract is [merely] pleaded, parol evidence tending to prove the fraud is admissible.”⁷ Thus, the written warranty disclaimers “stands no higher than the contract which is vitiated by the fraud.”⁸ Amazingly, the court reached this conclusion even though the written contract had been written by the lawyer for the same party who later attacked its terms.

This view is probably shared by most judges.⁹ Among them is Justice Kerns of the Ohio Supreme Court. In the just decided *Marion Production Credit Association*¹⁰ decision he, too, expressed concern that our legal rules governing written contracts might be used “as a vehicle to silence claims of fraud . . . [or] fraudulent inducement.”¹¹ Note well: The mere allegation that there has been fraud is all that Justice Kerns and the Virginia Supreme Court require; and this is so even though the actual evidence of the fraud does nothing more than contradict the clear and unambiguous terms of the writing.

Fortunately for Ohio lawyers who are trying to draft writings that will stand up in court, Justice Kerns was dissenting. The majority of the Ohio Supreme court took quite a different view. Speaking through Justice Holmes, it made clear that Ohio courts will not permit a “fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.”¹²

C. The Duty to Read and Understand

I suspect that Justice Holmes no more condones fraud than does Justice Kerns. What Justice Holmes was telling Justice Kerns (and the many judges who agree with him) is that his thinking about the word “fraud” was not very disciplined. Talk is cheap. Thus, one party merely

⁶ *George Robberecht Seafood, Inc. v. Maitland Bros., Inc.*, 220 Va. 109, 113, 255 S.E.2d 682, 684 (1979) (emphasis added).

⁷ *Id.* at 112, 255 S.E.2d at 683 (quoting *Stevens v. Clintwood Drug Co.*, 155 Va. 353, 359, 154 S.E. 515, 518 (1930)).

⁸ *Id.* (quoting *Packard Norfolk v. Miller*, 198 Va. 557, 565, 95 S.E.2d 207, 213 (1956)).

⁹ Annotation, *Parol Evidence Rule; Right to Show Fraud In Inducement or Execution of Written Contract*, 56 A.L.R. 13, 41 (1927). The many cases discussed in this annotation have been augmented by many more since it was published. See Supplement to Volumes 1- 175 of A.L.R. See also Annotation, *Application of Parol Evidence Rule of U.C.C. 2-202 Where Fraud or Misrepresentation is Claimed in Sale of Goods*, 71 A.L.R.3d 1059 (1976).

¹⁰ *Marion Prod. Credit Ass'n v. Cochran*, 40 Ohio St. 3d 265, 533 N.E.2d 325 (1988).

¹¹ *Id.* at 277, 533 N.E.2d at 335. (Kerns, J., concurring in part and dissenting in part).

¹² *Id.* at 274, 533 N.E.2d at 326.

saying that the other party committed fraud is not enough. To the contrary, the words "fraudulent inducement" have a precise meaning in our law. Like all other legally recognized claims, fraudulent inducement claims require the establishment of certain minimum elements. Thus, a party cannot merely say or allege that there has been fraudulent inducement; his proffered evidence must show that he can, in fact, meet the established legal standards for fraudulent inducement before his claim judicially should be allowed.

To elaborate, the elements for fraudulent inducement claims require more than proof that the other party made a false statement of a material fact. The complaining party must also show that his justifiable ignorance of that false statement induced him to enter into the transaction.¹³ But, how can one be ignorant or unaware of a term contained in a writing which was always available for inspection: indeed, a writing which the complaining party should have read before signing it. This is the point which Justice Holmes was making. But, he was not the first Ohio Supreme Court Justice to do so. Indeed, nearly 40 years ago, the late Chief Justice Taft of the Ohio Supreme Court put it particularly well when he wrote:

A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking at what he signed. If this were permitted, contracts would not be worth the paper on which they are written. If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs.¹⁴

More recent decisions also recognize this seeming self evident reality. See, for example, *Bunge Corp. v. Williams*,¹⁵ where an Illinois court in 1977 stated: "[i]t is a well settled rule of law that when a party to a contract is able to read and has the opportunity to do so, he cannot thereafter be heard to say he was ignorant of its terms and conditions." Comparably, in *Smith v. Price Creameries*, the New Mexico Supreme Court in 1982 stated: "even assuming the truth of this assertion, in face of the clear

¹³ The eight separate elements required to prove fraudulent inducement are succinctly set out in *Computerized Radiological Serv. v. Syntex Corp.*, 786 F.2d 72 (2d Cir. 1986). While the decision was based on New York law, that law is in accord with the generally accepted common law rule.

¹⁴ *Dice v. Akron, Canton and Youngstown R.R. Co.*, 155 Ohio St. 185, 191, 98 N.E.2d 301, 304 (1951), *rev'd* (for failure to apply appropriate federal standards in a Federal Employees Liability Act case), 342 U.S. 359 (1952). Other Ohio authorities accepting Justice Taft's thinking have been collected in *Campco Dist., Inc. v. Fries*, 42 Ohio App. 3d 200, 203, 537 N.E.2d 661, 664 (1987).

¹⁵ 45 Ill. App. 3d 359, 365, 359 N.E.2d 844, 847-48 (7th Cir. 1948) (quoting *Vargas v. Esquire*, 166 F.2d 651, 655 (7th Cir. 1948).

wording of the rights of the parties under the [written] termination clause, the oral statement . . . made prior to execution of the agreement, cannot be deemed to constitute fraud or misrepresentation."¹⁶

To sum up: The Parol Evidence Rule will not exclude evidence of fraud which induced the written contract. But, a fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit.

Just why so many of our judges, like Justice Kerns, fail to accept this reality is puzzling. Maybe it is because it is so difficult to break out of long held taboos. To explain, from the time lawyers and judges were students in law school, they have been taught to view the word fraud with alarm. To the legal psyche, it carries with it the notion that the fraud doer is a deceitful and despicable character. He is one who has committed an act close to if not equal to a criminal act; an act which the law must redress. Thus, if a lawyer introduces any evidence under the banner of fraud, the presiding judge's likely mind set is to receive it with open arms. But, in so doing, the judges are reacting; not thinking clearly or precisely about what fraud in our legal system is all about. And, by such unthinking reactions, our judges are undercutting the whole purpose for the Parol Evidence Rule and, more importantly, the societal need to uphold the integrity and certainty of written contracts.

D. Proper Fraudulent Inducement Claims

Well, then, what are the misrepresentations amounting to fraudulent inducement to enter into a written contract which may be received in evidence despite the Parol Evidence Rule? Actually, there are several such categories. To understand them, one must remember the basic premises on which the Parol Evidence Rule is grounded.

That basic premise is that one is supposed to read and understand a writing before he signs it. While this was implicit in what Justice

¹⁶ 98 N.M. 541, 544, 650 P.2d 825, 828 (1982). The New York Court of Appeals recently reviewed the New York authorities and also concluded that a signer is conclusively bound by his writings "irrespective of [signer's] testimony that he did not read it and was unaware of its terms see, Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416, 125 N.E. 814; 9 Wigmore, Evidence Sec. 2415 [Chadbourne rev. 1981]. Indeed, it has been held that the failure of a signer to read an instrument in circumstances analogous to those here amounts to gross negligence [New York cases cited]." Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 11, 534 N.E.2d 824, 829, 537 N.Y.S.2d 787, 792 (1988).

Holmes and the late Chief Justice Taft stated,¹⁷ the point was particularly well expressed in the Illinois decision, *Bunge Corp. v. Williams*:

it the duty of every contracting party to learn and know its contents before he signs [a writing] . . . But the contract cannot be avoided by proof that one of the parties, if he was sound in mind and able to read, did not know the terms of the agreement. One must observe what he has reasonable opportunity for knowing; the law requires men, in their dealings with each other, to exercise proper vigilance and give their attention to those particulars which may be supposed to be within reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them. A person is presumed to know those things which reasonable diligence on his part would bring to his attention.¹⁸

1. Fiduciary Relationships

As a careful reading of the above statement indicates, there are occasional situations where one is excused from the usual duty of reading and/or understanding a writing. One such situation is where the writing was prepared by the other party who is in a fiduciary relationship to the signer; e.g., an attorney, a close family member, etc. Where a fiduciary prepares a writing for his beneficiary's signature, then the beneficiary is entitled, by reason of this special relationship, to rely upon the fiduciary's statements of what the writing contains. Thus, evidence that the fiduciary gained an advantage by misrepresenting to his beneficiary the terms of the writing is admissible notwithstanding the Parol Evidence Rule. But, it must be emphasized that these fiduciary situations are rare. In the typical business situation, each party is expected to take care of himself, i.e., to read and understand the writing before he signs it.¹⁹

¹⁷ See text accompanying notes 12 and 14 *supra*.

¹⁸ 145 Ill. App. 3d at 364-65, 359 N.E.2d at 847 (quoting *Vargas v. Esquire*, 166 F.2d at 654-55.)

¹⁹ These points are well illustrated by a set of recent English decisions. The Court of Appeal had ruled that a banker held a fiduciary relationship with respect to his customer; but only because of the unusual and special facts of the case which showed that the customer was treating the banker as a confidant and relying on his advice. As such, the bank fiduciary was under duty not to misrepresent the contents of the [mortgage] document, and, indeed, to give the beneficiary proper "guidance and advice whether or not she should sign the [mortgage] document," or, at least to advise her to seek independent advice. Since this was not done, the Court of Appeals ruled that the customer's signature on the mortgage document was not binding and the mortgage must be set aside. *National Westminster Bank v. Morgan*, [1983] 3 All E.R. 85, 91 (C.A.). The House of Lords, however, reversed, noting that the Court of Appeals "were led into a misinterpretation of the facts by their use, as is all too frequent in this branch of the law, of words and phrases such as 'confidence,' 'confidentiality,' 'fiduciary duty.'" No such fiduciary relationship had been established. Instead, the relationship was an ordinary one between a banker and its customer, and, therefore, no special duties, other than honesty by the banker, was owed to the customer. *National Westminster Bank v. Morgan*, [1985] 1 App. Cas. 686, [1985] 1 All E.R. 821, 826 (H.L.).

2. Fraud in the Factum

Another class of cases where persons are excused from reading and understanding a writing involve those who are unable to do so, and, therefore, must rely upon the other party's representations of what the writing contains — the so-called fraud in the factum cases. These include situations involving blind persons, illiterate persons, foreign speaking persons, etc. Where there exists this total incapacity to read and understand a writing, then the normal duty to do so is excused and a fraud case is made out by showing that the other party misrepresented the contents of the writing.

3. Meaning of Words Known Only By One Party

There is a third situation which is somewhat comparable in principle to the fraud in the factum case. This group of cases arises where the meaning and understanding of particular words contained in the writing are solely within the knowledge of one party. Thus, the other party necessarily must rely upon that party's statement of what those written words mean.

A good example of this situation can be found in the Third Circuit decision of *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*²⁰ The parties actually had agreed that the buyer's price for the seller's goods was to be the seller's cost plus 10%. The seller then advised that his computerized accounting system was set up by his list prices rather than his cost prices. He then falsely stated that his list price less 11% was the same as the agreed upon cost price plus 10%. Based on this false representation, the buyer went along with the list price less 11% term. That false statement was quite properly allowed to prove that the buyer had been fraudulently induced to go along with the list price less 11% term. But, as stated, I believe this was because the meaning of the term, seller's list price less 11%, was known only to the one party, the seller, and that knowledge was not readily determinable by the other party, the buyer.²¹

4. Extrinsic Fraud

Finally, there are other misrepresentations which induce a written contract, but which do not contradict the terms contained in the

²⁰ *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966).

²¹ *See also Gerill Corp. v. Jack L. Hargrove Builders*, 128 Ill. 2d 179, 538 N.E.2d 530 (1989), where the court stated: "the rule [is] that one is justified in relying upon the representations of another, without independent investigation, where the person to whom the representations are made does not have the same ability to discover the truth as the person making the representations [authorities]."

written contract. Or, as Justice Holmes in the *Marion Production Credit Association* decision put it, where the misrepresentations are “premised upon matters which are wholly extrinsic to the writing.”²²

An example of this kind of fraud would be a seller who falsely represents to a property owner that he is a heating engineer and then offers to check out the efficiency of the owner’s furnace. Having done so, the Seller then falsely states the furnace is not working well and needs replacement. Thereupon, he offers to sell a new furnace to replace the old one. The property owner agrees and a written sales contract for a new furnace is executed. When the owner, the buyer, discovers the falsity of the seller’s representations, then he has a proper case for fraudulent inducement of the written sales contract, evidence of which may be introduced despite the Parol Evidence Rule. But, note, the buyer in this example is *not* attacking or contradicting the terms of the written sales contract for the new furnace itself — something which he cannot do under the Parol Evidence Rule. Instead, the buyer is showing false representations *extrinsic* to the writing that induced him to enter into the written sales contract. The Parol Evidence Rule will not bar evidence of this kind.

E. Summary and Cheers for the Ohio Supreme Court

Too many judges are willing to ignore the Parol Evidence Rule just because one side, although perfectly capable of reading and understanding the writing, alleges that he was induced to sign the writing because of the other side’s fraudulent misrepresentations as to what is contained in the writing or what the words in the writing mean. This is unfortunate. It permits such parties to avoid the written terms of the contract to which they have agreed, even though the “fraud” is nothing more than a direct contradiction of the writing itself. That, of course, is the very thing which the Parol Evidence Rule was designed to avoid. The better, although probably minority judicial thinking, recognizes that such allegations of fraud simply do not establish legal fraud. The Ohio Supreme Court deserves cheers for supporting this seemingly self-evident reality in its recent *Marion Production Credit Association* decision.

II. THE STATUTE OF FRAUDS

Humpty Dumpty: When I use a word, it means just what I choose it to mean.

In this case, the . . . matters [were] almost exclusively within the knowledge of Hargrove and it would have been difficult, if not impossible, for Rosch to discover them.” *Id.* at _____, 538 N.E.2d at 537.

²² 40 Ohio St. 3d at 274, 533 N.E.2d at 334.

*Alice: But the question is whether you can make words mean
so many different things.*

—Lewis Carroll²³

A. A Confused Ohio Supreme Court

Unfortunately, many Ohio lawyers will not realize that their Supreme Court in its *Marion Production Credit Association* decision has made this significant contribution to the legal authorities dealing with the fraud exception to the Parol Evidence Rule. Indeed, the court itself apparently did not realize it. Quite to the contrary, Justice Holmes, writing for the court, thought he was analyzing a problem involving the Statute of Frauds!²⁴ But, as will be pointed out below, this was an error. Instead, as already discussed in Part I of this paper, the problem before the court involved the Parol Evidence Rule.²⁵

Apparently, there were two reasons for this judicial goof. One reason was because the court was led astray by the lawyers. The other was that the court used the word “fraud” imprecisely. These are worth discussing because the same two reasons often lead our courts into error.

1. Misleading from the Lawyers

A judicial opinion rarely is the original product of the judges who wrote it. More typically, it represents the judges’ response to the lawyers’ presentations. And, if the lawyers’ approach is off base, the response — the judicial opinion — equally is likely to be misleading. That seems to be what happened in the *Marion Production Credit Association* decision. The lawyers thought they were dealing with a Statute of Frauds problem, and earnestly argued the point to the court. The court’s opinion responded in like kind.

This all came about because the plaintiff decided four years after the original pleadings had been finalized (which included the plaintiff’s Complaint and the defendant’s Answer and Counter Claim) that he also

²³ L. CARROLL, THROUGH THE LOOKING GLASS 205. (Charles L. Dodgson, 1934).

²⁴ See, e.g., official headnotes 2, 3, and 4, of *Marion Prod. Credit Ass’n.* decision, 40 Ohio St. 3d at 265, 533 N.E.2d at 326-27, all of which indicate that the decision is being made under the Statute of Frauds. The text of the opinion follows suit.

²⁵ See also headnotes 3 and 4 of the *Marion Prod. Credit Ass’n.* decision, *id.* These headnotes essentially track the language found in current formulations of the Parol Evidence Rule. For example, U.C.C. 2-202 prohibits finalized writings from being “contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.” Headnote 3 states that “an oral agreement cannot be enforced in preference to a signed writing which . . . has different terms.” Comparably, headnote 4 states that a defense will not be permitted where it is nothing more than a claim “that a different set of terms [was] orally agreed to at [the time of signing the writing].” Yet, despite the fact that both headnotes articulate the substance and language of the Parol Evidence Rule, both state that they are dealing with Statute of Frauds’ matters!

should have filed a Reply which affirmatively pleaded the Statute of Frauds. This was an error, in that there simply was no Statute of Frauds issue. To explain, the party to be charged — the defendant — admitted having signed a real estate mortgage and surety agreement.²⁶ While both of these contracts are covered by the Statute of Frauds,²⁷ that admitted signed writing clearly satisfied it; and why plaintiff's lawyer felt otherwise is puzzling.

Possibly, the plaintiff's lawyers acted from an excess of caution; to make sure they had raised all possible defenses to defendant's arguments. Recall, defendant had argued that a previous oral agreement should control over his later signed writing. Hearing this, the lawyers erroneously concluded that defendant was trying to enforce that oral agreement without complying with the State of Frauds.

It also is possible that the lawyers got tangled up by the word fraud, and I will discuss later how slippery that word can be. If this is what happened, it is, perhaps, understandable. Oral agreements can play a role both in Parol Evidence and Statute of Frauds cases. As already discussed, the Parol Evidence Rule will not permit prior or contemporaneous oral agreements to contradict a later writing. On the other hand, the Statute of Frauds prohibits the enforcement of oral agreements which are not evidenced by a writing. As the facts of *Marion Production Credit Association* make clear, it was the parol evidence problem that actually was the issue; an attempt by defendant to contradict a written agreement with evidence of an alleged prior oral agreement.²⁸

Nevertheless, the lawyer proceeded under the erroneous assumption that the Statute of Frauds was the key issue in the case. Therefore, the plaintiff requested permission to affirmatively plead the Statute of Frauds by way of Reply. Despite the protests of the defendant, permission to do so at that late date (4 years after the original pleadings had been filed) was granted by the trial court. Thus, the Supreme Court felt that it had to decide whether the trial court had acted correctly. The Supreme Court ruled that the trial court had not abused its discretion

²⁶ *Marion Product Credit Ass'n.*, 40 Ohio St. 3d at 268, 533 N.E.2d at 328. Defendant's counsel is quoted as stating to the trial judge that "we are not going to deny that these documents were signed. We are not going to deny that. Those things will probably all be stipulated to." See also headnote 4, *id.* at 265, 533 N.E.2d at 327, recognizing that the defendant had "voluntarily placed his signature" upon the relevant writings.

²⁷ The Statute of Frauds is found in footnote 1 of *Marion Prod. Credit Ass'n.*, at 268, 533 N.E.2d at 329, and corresponds to OHIO REV. CODE ANN. § 1335.05.

²⁸ See note 25 and accompanying text; see also discussion in Part I of this paper.

in allowing this 4-year late pleading.²⁹ Indeed, the *Marion Credit Production Credit Association* case likely will become one of the leading judicial pronouncements on the issue of when late pleadings may be allowed.³⁰

However, the trap was now set. The lawyers' mindset was that they had a Statute of Frauds issue and the judges of the Supreme Court responded in like kind. The lawyers had set the judicial agenda as a Statute of Frauds problem which it was not. The judges in this judicial battle, unfortunately, went along with this mislabeling of what really was before them.

2. Precise Meaning of the Word Fraud Depends on Context

The second reason why the Supreme Court fell into error was its failure to appreciate what it (and all lawyers) certainly ought to know; namely, that language can be slippery. More particularly, a single word, particularly a word like fraud, can convey quite different ideas depending upon the context in which it is used.³¹ Thus, lawyers and judges constantly must be alert that they use a common word precisely and accurately.

To elaborate: The word "fraud" appears in the title to the Statute of Frauds. However, the "fraud" which concerns that statute has little to do with the problem of fraud that arises when one misrepresents what are the terms contained in a written contract which is the concern of the Parol Evidence Rule.

The evil which the Statute of Frauds seeks to control is quite different from the evil sought to be controlled by the Parol Evidence Rule. The Parole Evidence Rule is concerned with protecting the integrity of

²⁹ See item II, pages 270 to 272 of the *Marion Prod. Credit Ass'n.* decision, 40 Ohio St. 3d at 270-72, 533 N.E.2d at 331-32.

³⁰ The court also ruled that the sale under a mortgage foreclosure proceeding should be delayed until the merits of all counterclaims have been decided. See headnote 1 of the *Marion Prod. Credit Ass'n.* decision. *Id.* at 265, 533 N.E.2d at 326. This holding also is of interest to Ohio lawyers.

³¹ The late Justice Harland, discussing the word "property," aptly made this point when he stated: "it is impossible to get any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others." *Fisher v. Cushman*, 103 F. 860, 864 (1st Cir. 1900). And further, "[w]hether an item is classed as 'property' by the Fifth Amendment's [j]ust-[c]ompensation [c]lause or for the purposes of a state taxing statute cannot decide [the meaning of the word 'property'] under the Bankruptcy Act, whose own purposes must ultimately govern." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

signed writings, while the Statute of Frauds is concerned with controlling the use of perjury in our courts. Thus, the Statute of Frauds requires that certain "important" contracts (which are itemized in the Statute) be proven by more than the plaintiff's oral testimony³² — testimony which possibly may be perjured. Indeed, the original title of the Statute was "An Act for the Prevention of Frauds *and Perjuries*." Thus, before these important contracts are enforceable in court, the Statute of Frauds requires some objective corroborating evidence of their existence other than the oral testimony of the plaintiff.

The usual way, but not the only way, to supply that corroborating evidence is by a memorandum of the agreement signed by the party to be charged. But, that writing need not be the finalization of all (or any) of the terms of the contract agreed to by both parties. Quite to the contrary, the writing need only contain "bare bones" language; that is, just enough language to establish that plaintiff's testimony about defendant's having agreed to the oral contract was not conjured up out of this air. Further, the writing can be on any scrap of paper and need be signed *only* by the party to be charged. Indeed, it is not necessary that the other party even know that the paper exists or be seen by him - at least, until it is produced at the trial or during discovery proceedings prior to the trial.³³

Obviously such "scrap of paper" writings are not those which both parties intend to finalize the terms of an agreement. As such, that writing, signed by only one party, get no protection from the Parol Evidence Rule which protects only finalized written agreements. Nothing, therefore, prevents the non-signing party from demonstrating that whatever language or contractual terms happen to be set out on that signed writing are not accurate. Indeed, the modern authority suggests that even the signing party is not bound its specific terms. Thus, even he is not prevented from trying to show, if he can, that they were misstated.³⁴

³² See *supra* note 27. For a discussion of the Statute of Frauds, see RESTATEMENT OF THE LAW OF CONTRACTS 2d, Chapter 5, §§110 and following.

³³ See, e.g., U.C.C. 2-201 (1) [dealing with Statute of Frauds for sale of goods] and official comments 1 and 6. See also *Bazak Int'l Corp. v. Mast Indus., Inc.*, 73 N.Y.2d 113, 120-21, 535 N.E.2d 633, 636, 538 N.Y.S.2d 503, 506 (1989), where the New York Court of Appeals stated: "The official comment describes UCC 2-201(1) [the Sales Article Statute of Frauds] as simply requiring 'that the writing afford a basis for believing that the offered oral evidence rests on a real transaction.' As Karl Llewellyn, a principle drafter of UCC 2-201, explained to the New York Law Revision Commission: '[w]hat the section does *** is to require some objective guaranty, other than word of mouth, that there really has been some deal.' (1954 report of N.Y. Law Rev. Commn., at 119.) . . . [T]his conclusion accords with the majority of courts and commentators that have considered the issue [many cases and commentators cited]." See also comment (d) of Restatement of the Law of Contracts 2d, § 131.

³⁴ U.C.C. 2-201 (1) states that the signed writing is sufficient even if it "incorrectly states a term agreed upon." Official comment 1 states: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated."

To sum up, the “fraud” which concerns the Statute of Frauds is the unfairness which might be perpetrated upon the nonsigner and, indeed, upon the legal system itself if it permitted enforcement of “important” contracts which could be proven only by the perjured evidence of the plaintiff. The required writing, however, serves only a limited purpose; namely, providing objective collaborating evidence that the signer had orally agreed to a contract, not necessarily what are its specific terms. These can be proven by extrinsic oral evidence, even though it contradicts what is found on this “bare bones” writing.

Of course, the writing requirement of the Statute of Frauds could be satisfied by a writing which incorporated the agreed upon terms and was signed by *both* parties. In such cases, the Statute of Frauds obviously is satisfied by the two signatures, and it no longer is an issue in the case. That writing could, however, raise problems under the Parol Evidence Rule, if one of the signatories seeks to introduce evidence or prior representations or oral agreements which contradicts the terms of the writing. And, that, as already discussed, is what was going on in the *Marion Production Credit Association* case. Regrettably, while the court dealt nicely with that parol evidence problem, it did so under the false banner of the Statute of Frauds.

3. Perpetuating Past Error Which Improperly Used the Word Fraud

The Supreme Court’s error was compounded when it turned to previous Ohio Statute of Frauds decisions to deal with the problem before it. But, the Court failed to perceive that those decisions were readily distinguishable and really had nothing to do with the problem before the court. To explain, each of the three previous decisions cited by the court posed a proper Statute of Frauds question; namely, whether an oral agreement not evidenced by any written memo should be enforced.³⁵ None of the decisions involved a writing signed by both parties, where one of the signatories was seeking to contradict that writing which, as several times stated, was the problem before the Court in its *Marion Production Credit Association* case and which is resolved by the Parol Evidence Rule.

Nevertheless, these prior Statute of Frauds decisions had also loosely used the word “fraud” in their discussions. Unfortunately, the *Marion Production Credit Association* court relied upon that language and thereby perpetuated its misuse.

³⁵ *Watson v. Erb*, 33 Ohio St. 35 (1877); *Newman v. Newman*, 103 Ohio St. 230, 133 N.E. 70 (1921) (verbal agreement for the conveyance of real estate), and *Tier v. Singrey*, 154 Ohio St. 521, 97 N.E.2d 20 (1951) (oral contract for the sale of land).

To explain, there has been an on-going debate among the courts whether a purely oral contract covered by the Statute of Frauds might be enforceable under equitable principles of promissory estoppel even though there is no signed memorandum or other compliance with the Statute of Frauds.³⁶ In my judgment, the better reasoning is with those courts which do not allow this, since it ignores the language and, indeed, undermines the purpose of the Statute of Frauds itself.³⁷ On the other hand, some courts under very limited circumstances do enforce certain oral agreements within the Statute of Frauds on a promissory estoppel theory.³⁸ Ohio, in its previous decisions, has apparently joined this camp.³⁹

It must be emphasized that these courts in enforcing these oral contracts despite the Statute of Frauds are not doing so because of principles normally associated with fraudulent conduct. Indeed, they generally recognize that the mere refusal to be bound by an oral contract within the Statute of Frauds usually *cannot* be considered a wrongful or fraudulent act.⁴⁰ What these courts are doing is turning to a quite separate body of law, namely the equitable principles of promissory estoppel which arises when a party has relied to its detriment upon the oral promise of another, which the court then concludes should be enforced to prevent injustice.

Regrettably, when courts take this tack in Statute of Frauds cases, they again misuse the word "fraud." It becomes vogueish for these courts to justify their actions by sloganeering that the Statute of Frauds was never intended to permit the perpetration of a fraud.⁴¹ [I say sloganeering,

³⁶ See Annotation, *Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037 (1974), and supplements thereto.

³⁷ *Id.* at 1052.

³⁸ The courts that take this position are not, however, in agreement as to what are the limited circumstances that permit the application of the promissory estoppel theory to defeat the Statute of Frauds. In my class lectures, I have often argued that the supposed distinctions between those cases where the court refuses to enforce oral agreement by reason of the Statute of Frauds and those which are enforced under promissory estoppel principles are illusory. In other words, no persuasive reasons for distinguishing between the two sets of cases can be mustered.

³⁹ See *Marion Prod. Credit Ass'n. v. Cochran*, 40 Ohio St. 3d at 273, 533 N.E.2d at 333.

⁴⁰ *Id.* at 274, 533 N.E.2d at 333. See also *Decatur Coop. Ass'n. v. Urban*, 219 Kan. 171, 179, 547 P.2d 323, 330 (1976), where the court states: "the conduct of the promisor must be something more than a mere refusal to perform the oral contract, since any party to an oral contract unenforceable under the Statute of Frauds has that right, and the exercise of their right of nonperformance is no more a fraud than a breach of any other contract (37 C.J.S. Frauds, Statute of, § 247, page 755)."

⁴¹ See, e.g., *Marion Prod. Credit Ass'n.*, at 273, 533 N.E.2d at 333: "[t]he law, through application of principles of equity, has refused to allow the Statute of Frauds to be interposed in furtherance of fraud." *Decatur Coop. Ass'n. v. Urban*, 219 Kan. at 179, 547 P.2d at 330, where court states "the Statute of Frauds was enacted to prevent fraud and injustice, not to foster or encourage it."

because isn't this true of all statutes? Were any enacted for the purpose of permitting the perpetration of fraud?] Having employed this facile phrase, the courts then jump to the questionable conclusion that failure to carry out the oral contract under the circumstances presented would, therefore, somehow amount to a "fraud" on the other party.

4. The Distinction Between Wrongs and Frauds

But, I submit that the courts in enforcing these oral contracts are not trying to prevent fraud within the precise legal meaning of that word. Nor, are they trying to prevent the kinds of "fraud" on the legal system which would result if only oral testimony about the existence of a contract — oral testimony which may well be perjured — were sufficient, and that, of course, is the prime concern of the Statute of Frauds.

Quite to the contrary, one's failure to carry out duties imposed by the equitable principles of promissory estoppel would seem no more "fraudulent" than his failure to perform any legally imposed duty. Legal thinking, for example, does not label as "fraudulent" the failure to perform the duties imposed by principles of tort law, or the duties imposed by some other statute? Failure to perform these duties, undoubtedly, are legally "wrongful" acts for which there is a remedy, but that hardly makes these acts "fraudulent" ones. One's failure to carry out duties imposed by promissory estoppel principles should be labeled no differently.

Comparably, few would say that one is guilty of a fraud because he refused to abide by the terms of a written contract. Why, then, should the fraud label be affixed on that same person because he refuses to carry out the terms of an oral contract? Indeed, it should be recalled that, in the view of many courts, the party who refuses to carry out the terms of an oral agreement within the Statute of Frauds, is doing a rightful act; one which the law allows.⁴² Thus, for other judges to call that same party a "fraud" is a bit much.

Using the fraud label may give comfort to those judges in their questionable effort to get around the Statute of Frauds that requires a writing. But, it is an imprecise use of language and even though the "words make one feel all warm inside, the result of seduously preventing thought about them is likely to lead to more trouble than the draftsmen's cozy glow is worth."⁴³ Humpty Dumpty insisted that he could assign whatever meaning to a word that he chose, since he, not the word, was the master.⁴⁴

⁴² See *supra* note 40 and accompanying text.

⁴³ Leff, *Unconscionability and the Code - the Emperor's New Clause*, 115 U. PA. L. REV. 485, 559 (1967).

⁴⁴ See CARROLL, *supra* note 23, where Humpty Dumpty, in replying to Alice's question of how he could "make words mean so many different things," rebutted that: "the question is, which is to be master — that's all."

But, the courts ought not follow his bad example.

If the courts wish to enforce oral contracts within the Statute of Frauds under promissory estoppel principles, they obviously have the power to do so. But they should realize what they are doing and be honest about it. For, as has been stated: “[c]overt tools are never reliable [ones],”⁴⁵ and, “[s]ubsuming problems is not as good as solving them, and may in fact retard solutions instead.”⁴⁶ The courts are not penalizing the non-signer for fraud. What they are doing is declaring that the nonsigner is bound under the very unique circumstances of this particular case by the equitable principles of promissory estoppel. But, that judicially determined “wrong” surely is no more of a “wrong,” nor is it any more fraudulent than the “wrong” committed by other parties who do not comply with some other legal rule which the courts have imposed upon them.

B. Summary and Jeers for the Ohio Supreme Court

The Ohio Supreme Court, in the *Marion Production Credit Association* case, wrote a misleading essay. Apparently confused by the pleading tactics of the litigants and erroneously assuming that the word “fraud” meant the same thing in all circumstances, the court erroneously wrote its opinion on the theory that it was dealing with the problem of the Statute of Frauds. But, a careful consideration of the facts of the case show that the Statute of Frauds was never a serious issue, since all agreed that the party to be charged had signed the writing containing the terms of the suretyship and mortgage agreement. The same careful analysis shows that the question actually presented was whether that written agreement could be contradicted under the plaintiff’s theory of fraudulent inducement. This is a question to be determined by the Parol Evidence Rule; and, on this score, the Ohio Supreme Court, without realizing it, wrote a significant and useful essay. For having done so, the court is to be cheered. For having confused the problem and for having perpetuated the imprecise use of the word fraud, the court should be jeered.

Let us hope that the cheers will live on long after the jeers are forgotten.

⁴⁵ K.N. LLEWELLYN, *THE COMMON LAW TRADITION* 365 (1960) (quoting Lleywlynn, *Book Review*, 52 *HARV. L. REV.* 700, 703 (1939)).

⁴⁶ Leff, *supra* note 43, at 559.