C. INTERPRETATION OF THE TERMS OF AN AGREEMENT

We now turn from the problem of identifying the terms of an agreement to the problem of interpretation. It is clear that the common law and Code parol evidence rules identify the terms of an agreement by determining whether an agreement is integrated, and that all of the common law and Code tests for integration require courts first to engage in some interpretation.[34] We set out the problem of interpretation separately, however, because it is conceptually distinct from the problem of identifying the terms of the agreement. In this section, we explore the debate between the plain meaning rule and the more liberal contextualism embraced by the Second Restatement. We then examine how this same debate has resurfaced in the cases applying UCC § 2-202. Section 1 begins by presenting three cases applying and debating the common law's interpretive regimes.

The facts of *In re Soper's Estate* present one of the strongest tests of the fundamental assumption underlying a plain meaning regime — that terms can have an objective meaning divorced from context.[35] The debate continues in a more contemporary context in Justice Traynor's defense of liberal contextualism in *Pacific Gas & Electric Co.* Judge Kozinski responds forcefully in favor of the plain meaning rule in *Trident Center.* As you read these cases, ask yourself whether a plain meaning regime protects or undermines the parties' contractual intent. Should the judge try to vindicate the parties' actual intent, or are there other values that should guide the process of judicial interpretation?

Section 2 concludes the chapter by examining the fundamental tension in the Code's interpretive regime. The court in *Columbia Nitrogen Corp.* takes the Code's admonition to include extrinsic evidence in the meaning of written terms to its limit. The court in *Southern Concrete* flatly rejects this approach, insisting that even the Code must presuppose that terms do ultimately admit of a relatively objective, if not plain, meaning.

1. Objectivism and Contextualism in Common Law Interpretation

Assume that some terms do in fact have a plain meaning. The plain meaning regime still faces the problem of interpreting terms that have more than one

[34] For example, before a court can determine whether an agreement is integrated, under the "natural omission" test, it must interpret the terms of the writing and the proffered terms to assess whether the parties would have included the proffered terms in the writing. Likewise, it must interpret the terms of the express terms of a writing to determine whether the writing contains an express merger clause.

[35] Pardon the pun. (You'll get it when you read the case.)

plain meaning. How should courts choose among the alternative meanings of an ambiguous term? The "Peerless" case, *Raffles v. Wichelhaus,* 2 H & C 906, 159 Eng. Rep. 375 (1864), is perhaps the most well-known example of the problem of ambiguity. In that case, the defendant agreed to buy from plaintiff 125 bales of cotton which would arrive from Bombay on a ship named "Peerless." Unfortunately, there were two different ships named "Peerless" that left Bombay carrying cotton. Defendants claimed that the parties had different ships in mind when they entered into the contract. The court agreed, and held that because there was no meeting of the minds, no contract had been formed.

The resolution in *Raffles* is consistent with both a contextualist and an objectivist approach to interpretation. The contextualist approach takes as its starting point the assumption that the purpose of interpretation is to determine what the parties subjectively intended at the time of the contract. Once the court finds that the parties lacked the same subjective intent about the meaning of a term in their agreement, there is no agreement for the court to enforce. An objectivist approach analysis begins with the rule that terms will be given their plain meaning. But here, the term "Peerless" refers to two different ships. The objectivist's method of assigning terms their plain meaning provides no guidance for deciding the ship to which the term refers. Even under the plain meaning rule, then, if a court finds a term of an agreement is ambiguous, it is permitted to admit contextual evidence to resolve the ambiguity. In *Raffles,* the contextual evidence revealed that each party understood the term to refer to a different ship. Hence, in cases of ambiguity, there is often little or no difference in interpretive result under both interpretive regimes.

What should a plain meaning court do if it must interpret a term that has an unambiguous plain meaning but which the court believes is at variance with the meaning the actual parties clearly intended the term to have? Such a case might test the convictions of even the most hard-boiled, dyed-in-the-wool objectivists. As you read *In re Soper's Estate,* ask yourself if this case is a rare exception to the plain meaning regime that proves the rule, or instead exposes a fundamental flaw in the plain meaning regime.

IN RE SOPER'S ESTATE

Supreme Court of Minnesota
196 Minn. 60, 264 N.W. 427 (1935)

[Ira Soper married Adeline Westphal in 1911 and lived with her in Louisville, Ky. until August 1921 when he disappeared. His wife never heard from him again during his remaining years. Although Soper "was inclined to go on periodic [drinking] sprees" during which he often disappeared, this disappearance was ruled out as such a spree. Rather, it was studiously designed to appear as a suicide.

Ira Soper moved to Minneapolis and assumed the name John W. Young, which he kept until his actual death by suicide in 1932. While in Minneapolis he married twice. His first Minneapolis wife died in 1925. He lived with the second, Gertrude Whitby, until his death.

During his Minneapolis years, Young and one Karstens formed the Young Fuel Company. This business invested in a stock and life insurance plan which provided that upon the death of either partner, the Minneapolis Trust Company was to deliver the deceased's stock certificates to the other partner and was to pay the proceeds of the life insurance policy to the deceased's wife.

Upon Young's (Soper's) death the Trust Company paid the proceeds to Gertrude Whitby Young as Young's "wife." It was later established that no one but Young knew anything about Mrs. Soper. Several months after the matter had presumably been closed, Mrs. Soper appeared. She and the appointed administrator of Soper's estate sued to recover the insurance money on the theory that it had been erroneously paid out by the trustee.]

OLSON, J.

Plaintiffs have assigned 40 errors and devote pages 18 to 50, inclusive, in their printed brief thereto. These are summarized, however, into more compact form thus: "The essential issue, as it really presented itself at the trial, was this: granting that Mrs. Whitby was not the deceased's wife, could not be his wife, was not his heir, did not have and could not have any rights of inheritance, statutory or otherwise, did Soper, by some valid, clear, effective supervening instrument, valid as a will or as a present deed or conveyance inter vivos, shut off and determine, in her or in someone else's favor, the clear rights which his wife and heir would otherwise plainly have had? And further, if it first be found that he actually did execute a valid instrument which clearly and unmistakably has that effect, to deprive his wife of her rights, did he have the power to do that, without his wife's consent, under our law?"

It must be conceded that defendant Gertrude never was the legal wife of decedent. Although her innocence of wrongdoing is clearly established and her good faith in entering into her marriage relation with Young is amply sustained, the fact remains that she can take nothing under the laws of descent. . . .

We conclude that Gertrude neither did nor could take anything as the "wife" of Young. As a matter of law, she never became such. But this conclusion does not solve our problem because she does not lay claim to the insurance merely as his lawful wife, but as the person intended to be the beneficiary under the escrow agreement as fully as if her name had been written into that contract instead of the word "wife." So the real question presented is whether under the escrow agreement designating the "wife" of depositor Young as the beneficiary parol proof is admissible that Gertrude was so intended and not Mrs. Soper, the true wife. Plaintiffs claim that the written instrument is free from ambiguity, latent or otherwise, and that as such it was improper for the trial court to permit oral evidence to show who was intended thereby to be such beneficiary. They strenuously assert that the agreement is not subject to construction, that it is perfectly plain in its language, and that the only thing for the court to determine is whether Mrs. Soper was the lawful wife of the deceased husband, or if Gertrude was such.

From the facts and circumstances hereinbefore related, the conclusion seems inescapable that Gertrude was intended. She was the only one known or considered by the contracting parties. True, Young knew otherwise, but that

he did not intend his real wife to take anything as beneficiary seems obvious. From the time he left Louisville and came to Minneapolis, and until some time after his death, no one amongst his business or social acquaintances knew anything of or concerning his true wife. Gertrude alone answered the descriptive designation of "wife." Public records disclosed her and her alone to be such. There was no one else.

The question of who is one's wife is at times, under circumstances similar to what we are here considering, a matter of grave concern and genuine dispute. There may be involved the question of divorce, whether the court had jurisdiction of the status or of the parties, and many other difficulties. In many cases fact questions arise ordinarily capable of proof only by means of the aid of oral testimony. The question of identification of the individual intended by the written instrument very often involves and requires oral proof. That is the situation here. The right to the money here involved is claimed by both Adeline Soper and Gertrude Young. In what manner may either establish relationship to the decedent as his "wife" except by means of oral testimony? Ira Collins Soper and John W. Young, in the absence of proof contra, would likely lead an inquirer to the view that two different men were involved. Adeline, to establish her relationship, was necessarily required to and did furnish proof, principally oral, that her husband, Ira Collins Soper, was in fact the same individual as John W. Young. Gertrude by similar means sought to establish her claim. Of course the proof was such as to require a finding sustaining Adeline's claim. No one questions that result. But until such proof was adduced, it is equally clear, both from public records in Hennepin county and general repute, that Gertrude had been duly married to John W. Young. All friends and acquaintances knew and recognized her as his wife. There was nothing in Minneapolis or in this state indicating otherwise. Were we to award the insurance fund to plaintiff Adeline, it is obvious that we would thereby be doing violence to the contract entered into by the decedent Young with his associate Mr. Karstens. That agreement points to no one else than Gertrude as Young's "wife." To hold otherwise is to give the word "wife" "a fixed symbol," as "something inherent and objective, not subjective and personal." Dean Wigmore, in his excellent work on Evidence, 5 Wigmore, *Evidence* (2d Ed.) § 2462, p. 378, has this to say:

> The ordinary standard, or "plain meaning," is simply the meaning of the people who did not write the document. The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth, there can be only some person's meaning; and that person, whose meaning the law is seeking, is the writer of the document.

And, further, page 379:

> The truth is that whatever virtue and strength lies in the argument for the antique rule leads not to a fixed rule of law, but only to a general maxim of prudent discretion. In the felicitous alliteration of that great judge, Lord Justice Bowen, it is "not so much a canon of construction as a counsel of caution."

. . . In Anderson v. Brower, 148 Minn. 44, the facts were that testator had by will made specific provision for his wife. He had also made provision for

his son wherein, upon certain conditions arising, the son should not take and the property was to go to testator's "legal heirs." The son did not take because of the proviso, and the issue arose as to who were the legal heirs within the meaning of the will. The court said, 148 Minn. 44, 48:

> It is sometimes said that the intent of the testator is to be derived by a "four-cornered" view of the will. Words used may or may not be given their technical meaning. They are to be given such meaning as gives effect to the real intent of the testator. Such words as heirs, or legal heirs, though their technical significance is not to be overlooked, may, to give effect to the testator's intent, be held to refer to others than those who are technically heirs and may exclude those who are technically heirs. (Citing many cases.)

In Wilmot v. Minneapolis Auto. Trade Ass'n, 169 Minn. 140, 142, this court said:

> The duty of courts is to apply contracts to their subject-matter and so effect the purpose of the parties. Their interpretation is incidental. To accomplish the main object, resort may and frequently must be had to the circumstances under which the contract was made, and, if there be need for resort to extraneous aids to construction, it is immaterial whether such need arises from an uncertainty in the instrument itself, or that being clear, standing alone, it ceases to be so, and ambiguity arises when the contract is applied to its subject-matter. In either case construction must follow, and resort must be had to the aids furnished by extrinsic circumstances. The prohibition of the law is not against their being used for interpretation, but against making them the instruments of contradiction of an expressed contractual intent. The old distinction between patent and latent ambiguities, never more than "an unprofitable subtlety" (Thayer, *Preliminary Treatise on Evidence,* 434), "so far as contracts are concerned, . . . may be wholly disregarded." 2 *Williston on Contracts,* § 627. To hold as plaintiffs would have us do, 169 Minn. 140, 143 "would thwart the one purpose of construction, which is to ascertain the intention of the parties themselves. It would sacrifice rationalism to that "primitive formalism which views the document as a self-contained and self-operative formula," rather than an instrument the whole of which is in relation to extrinsic matter, and concerning which very frequently there can be no adequate understanding of purpose, without first an understanding of the extrinsic facts and things upon which the writing must have its only operation.

After all, as we said in City of Marshall v. Gregoire, 193 Minn. 188, 198, 199:

> A written contract is little more than a scrap of writing save as it operates with legal effect on matters extraneous to itself. Construction deals with the dynamic rather than the static phase of the instrument. The question is not just what words mean literally, but how they are intended to operate practically on the subject-matter. Thus, seemingly plain language becomes susceptible of construction, and frequently

requires it, if ambiguity appears when attempt is made to operate the contract.

That is the situation here. The trust agreement has become "susceptible of construction" because "ambiguity appears when attempt is made to operate the contract." The order is affirmed.

OLSEN, J. (dissenting).

I am unable to agree that this court should make a new contract for the parties and so change either the policy or the trust agreement as to substitute a new beneficiary. A man can have only one wife. If, while married, a man fraudulently and in violation of law, goes through a marriage ceremony with another woman, she does not become his wife, however innocent such woman may be of any wrongdoing. She cannot inherit from the man who has wronged her or claim any benefits as his wife. Much is said in the opinion as to the wrong done to the innocent woman whom he purported to marry. Nothing is said about the wrong done to the lawful wife. To have her husband abandon her and then purport to marry another, and live in co-habitation with such other, was about as great a wrong as any man could inflict upon his wife. While there are some intimations that there may have been some unpleasant incidents in the Soper family life because of the husband's habits in using liquor to excess, there is nothing to show that the wife was in any way to blame.

The contract in this case designates the "wife" as the one to whom the money was to be paid. I am unable to construe this word to mean any one else than the only wife of Soper then living.

Soper's suicide is readily explainable. He had committed two felonies in this state. One was bigamy and, assuming that the clerk of court did his duty, perjury was committed in obtaining a marriage license here. About two years before Soper's suicide, his brother had discovered that he was alive and in Minneapolis. There was constant danger of his situation becoming known and being investigated. He was an educated man, had been a teacher in a commercial school, and was a good businessman. He was fully aware of what he had been doing.

As to the trust company's liability, there are other questions in the case which I do not discuss.

NOTES

1. *Questions on* In re Soper's Estate. Justice Olsen writes in dissent: "The contract in this case designates the 'wife' as the one to whom the money was to be paid. I am unable to construe this word to mean any one else than the only wife of Soper then living." On the one hand, Justice Olsen presents a powerful plain meaning critique of the majority's contextualist approach. After all, the term "wife" seems to have about as clear and unambiguous a plain meaning as any term. Among professional philosophers of language, the paradigm example of a term with a clear and unambiguous plain meaning is "bachelor." No one, it is routinely asserted, can deny that "bachelor" means an unmarried man. If it is possible, the meaning of "wife" seems even less

assailable than the meaning of "bachelor." The term "wife" is defined by the laws of marriage and is therefore immune from confusion or informal change. Like the term "bachelor," its meaning can be discovered easily by examining any English dictionary. Moreover, the term "wife" is defined as a legal matter by marriage statutes that set out the requirements for attaining the legal status of a wife. Unsurprisingly, Justice Olsen is unable to construe the term "wife" to refer to anyone other than the woman to whom a man is legally married.

On the other hand, the majority's opinion presents perhaps the most powerful challenge to a plain meaning regime. Although the plain meaning of the term "wife" is clear and unambiguous, it is equally clear that Mr. Soper and Mr. Karstens actually intended the term "wife" in their escrow agreement to refer to Gertrude Young, not Mr. Soper's wife, Adeline. Indeed, Mr. Karstens believed at the time that Gertrude Young *was* legally married to Mr. Soper. Mr. Soper therefore knew that Mr. Karstens took the term "wife" to be referring to Gertrude and by his silence acquiesced in Mr. Karsten's understanding. As the majority argues, if the goal of contractual interpretation is "to ascertain the intention of the parties themselves," then indeed, "[it] would sacrifice rationalism to that 'primitive formalism which views the document as a self-contained and self-operative formula,' rather than an instrument the whole of which is in relation to extrinsic matter." *In re Soper's Estate* (quoting *Wilmot v. Minneapolis Auto. Trade Ass'n,* 169 Minn. 140, 142). For the majority, the *parties'* meaning, not plain meaning, is talismanic.

Suppose, as the dissent argues, that a plain meaning regime embraces a "primitive formalism which views the document as a self-contained and self-operative formula." Does it follow, as the dissent maintains, that such formalism sacrifices rationalism? Is there a coherent rationale for ignoring the parties' clear intent when they use terms with a meaning at variance with their unambiguous plain meaning? Could you argue that by vindicating the actual intent of the parties, the majority diminishes the autonomy of all contractors who subsequently use the term "wife" to refer to the woman to whom they are legally married?

2. *Historical Origins of the Objective and Subjective Approaches to Contract Interpretation.* A number of scholars have argued that the common law of contract historically embraced a subjective theory of intent until Holmes created the objective theory virtually out of whole cloth. In *The Origins of the Objective Theory of Contract Formation and Interpretation,* 69 Fordham L. Rev. 427 (2000), Professor Joseph Perillo argues that the origins of the objective theory in the common law of contracts can be traced from ancient times through the twentieth century. Ancient law justified the objective theory on the ground that the words of an agreement were sacred and therefore constituted an unchallengeable "sovereign talisman." Rather than inventing the objective theory, Holmes justified the objective theory on the ground that the parties' words constituted the parties' "manifest intention" and therefore provided the best indication of their subjective intent. *Id.* at 434. By resuscitating the intellectual credentials of the objective theory, Holmes secured a foothold for the objective theory that still characterizes many areas of the common law of contracts, notwithstanding the contexualist approach

adopted by the Restatement (Second). The subjective theory, however, still controls the contract doctrines on insanity, intoxication, duress, undue influence and misrepresentation, as discussed in Chapter 5.

3. *Public Policy and Interpretation.* In light of the strong public policy arguments for strengthening the institution of marriage, and against adultery and spousal abandonment, could you argue that the court should have given the term "wife" its plain meaning? Wouldn't such a ruling simultaneously protect Adeline Soper's financial interests and thwart Ira Soper's efforts to preserve his fraudulent marriage to Gertrude? Or should the principles of contractual interpretation be insulated from the objectives of other substantive public policies?