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Possibility of Plain Meaning: Wittgenstein and the Contract Precedents

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THE POSSIBILITY OF PLAIN MEANING: WITTGENSTEIN AND THE CONTRACT PRECEDENTS

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The fashion in American law schools is to teach that contractual language cannot have a plain meaning. Some of this teaching may be inadvertent. Most of it occurs when students study the "plain meaning rule." This rule allows a judge, after finding unambiguous language (plain meaning) in a written contract, to refuse to look at other evidence of that language's meaning.

The rule is heavily criticized, but claims against it have been exaggerated. One of these exaggerated claims is that plain meaning is impossible. This claim is found in the caselaw opinions that students are made to read. It appears most clearly in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*[1] ("*PG&E*"), decided in 1968 by Justice Roger Traynor of the California Supreme Court. Traynor's opinion appears in nearly every Contracts casebook.[2] Because *PG&E*'s facts actually do not put the plain meaning rule in issue, that case is often supplemented by another case more on point, such as *In re Soper's Estate*.[3] I describe both of these opinions in Part I.

Both opinions claim that plain meaning is impossible. There are two premises to this claim. First, the judges assert that plain meaning could only be found by reading a document if words had inherent meaning, or absolute and constant referents. But they do not, the argument goes. Second, the opinions claim that the meaning of words is actually the thoughts and intentions of the speaker, or perhaps the speaker and hearer. No written contract could ever adequately reveal these. Plain meaning is therefore impossible. This claim is left irrefuted in the casebooks and contract law literature, Part I notes, and in most teaching of contract law. The consequence is that students are taught that plain meaning is impossible. A startling implication of this conclusion, as Part I explains, is that the majority of U.S. courts, which hold to the plain meaning rule, are relying on a fiction.

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[1]Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643-45 (Cal. 1968).

[2]*PG&E* appears as a principal case in the following casebooks: RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 474 (3d ed. 2003); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 386 (3d ed. 2006); JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS 339 (4th ed. 2004); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 452 (4th ed. 2004); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 504 (8th ed. 2003); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 592 (6th ed. 2001); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 262 (2005); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 615 (8th ed. 2006); JAMES F. HOGG ET AL., CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION 373 (2008); JAMES F. HOGG & CARTER G. BISHOP, CONTRACTS: CASES, PROBLEMS AND MATERIALS 377 (1997); AMY HILSMAN KASTELY ET AL., CONTRACTING LAW 729 (2d ed. 2000); GEORGE W. KUNY & ROBERT M. LLOYD, CONTRACTS: TRANSACTIONS AND LITIGATION 390 (2006); EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 638 (6th ed. 2003); ARTHUR ROSETT & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION 553 (6th ed. 1999); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 656 (3d ed. 2002); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 684 (4th ed. 2001).

[3]*In re* Soper's Estate, 264 N.W. 427 (Minn. 1935).

But the claim that plain meaning is impossible is false, as are its premises. Part II explains why. Drawing on the philosophy of Ludwig Wittgenstein, Part II.A shows why the meaning of words cannot be the thoughts and intentions of the speaker, hearer, or anyone else. Part II.B demonstrates that plain meaning does not require that words have "inherent meaning" or "absolute and constant referents." Plain meaning is possible and occurs quite apart from reference or another theory of inherent meaning. Plain meaning rests instead on our unreflective, public, conventional practice of language use. Most meaning is plain.

Part III explains that, though plain meaning is immune from attack on grounds of impossibility, whether the plain meaning rule is the best legal rule is another matter. Actually, all of the legal rules currently available for determining the meaning of contractual language are possible. Which rule one chooses is not a matter of possibility at all, or of language philosophy, but of legal reasoning and social policy.

I. THE ATTACK ON THE PLAIN MEANING RULE

A. Justice Traynor's Armchair Language Philosophy

In 1968, California's Justice Traynor expounded language and meaning as follows. His argument is the most well-known attack on the plain meaning rule of contract law (footnotes within the quoted text are from Traynor's opinion):

> When a court interprets a contract on th[e] basis [of plain meaning] . . . [t]he exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency* and inherent meaning of words . . . .**
>
> A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained. . . .
>
> Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations.*** Under this view, contractual

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*E.g., The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the "Precieuses"; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough.

**"Rerum enim vocabula immutabilia sunt, homines mutabilia," (Words are unchangeable, men changeable) from Dig. XXXIII, 10, 7, s 2, de sup. leg.

***A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.

> obligations flow, not from the intention of the parties but from the fact that they used certain magic words. . . .
>
> If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning. Accordingly, the meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.[4]

Each year, my students and I read this passage from Justice Traynor's opinion in *PG&E*,[5] and I lament that so few of my students question its assertions. The passage maligns the plain meaning rule.[6] Traynor claims in it that the plain meaning rule requires that words have "inherent meaning," "absolute and constant referents," or "one true meaning." But they do not have any of these, he says. How do words have meaning, then? For Traynor, a "word is a symbol of thought." On this theory, meaning "can only be found" in the intention of the writer, in "the sense in which *the writer* used the words." This theory more or less demands that the judge find out as much about the parties as possible. "A word has no meaning apart from these factors; much less does it have an objective meaning," Traynor claims. So merely

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[4] *PG&E*, 442 P.2d at 643-45 (internal quotations and citations omitted).

[5] *Id.*

[6] The plain meaning rule has been recited thus:

> where a court finds that the terms of a contract are clear and unambiguous, the task of judicial construction is at an end and the contract terms must then be applied as written and the parties bound by them. . . . [When] the contract is unambiguous, th[e] Court will neither inquire into the intent of the parties nor extrinsic evidence. A court may look to surrounding circumstances of contract formation to determine [the] parties' intended meaning of [their] words of contract only when such words are ambiguous and open to more than one interpretation; when the contract is unambiguous, however, [the] intent of the parties becomes irrelevant.

Delaney v. Kusminski, No. C.A. 02-7096, 2005 WL 1109625, at *4 (R.I. Super. May 4, 2005) (internal citations omitted); *see also* Arrow Elects., Inc. v. Hecmma, Inc., 500 F. Supp. 2d 648, 651-52 (W.D. Tex. 2005). There are many iterations of the plain meaning rule, some more strict than others. This one is of the more strict variety, and it is this more strict variety that I mean to defend as factually (and philosophically) unproblematic. The plain meaning rule also may or may not involve canons of interpretation. The canons are irrelevant to this discussion, as they have little if anything to do with Justice Traynor's criticisms and nothing to do with plain meaning. If meaning were plain, why would a judge need a canon? I am also not concerned with anyone's (in particular, say Williston's) articulation of the rule. Traynor attacked the possibility of plain meaning at all, in any articulation. That possibility is my focus.

studying the document could never reveal the meaning of the words,[7] the meaning of contractual language.

Our Contracts casebooks, most of which include this language from *PG&E*[8] with nothing to refute it,[9] suffer the same flaw. They may give alternate jurisprudential or economic grounds for the plain meaning rule,[10] but its linguistic status remains under

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[7]In this writing, I routinely discuss the "meaning of words" without differentiating between kinds of words or combinations of them. Certainly a sentence is used differently than a noun or an interjection, and an appositive than an active verb, or a name for a natural category as opposed to a non-natural. Actual philosophers of language may draw fine distinctions here. *See, e.g.*, H.P. Grice, *Meaning*, 66 PHIL. REV. 377-88 (1957). But the theory of language employed here applies equally to all as a refutation of the notion that words mean the thoughts and intentions of the language users. So I continue to use the phrase "meaning of words" as I do even though it may appear indiscriminate to those drawing finer distinctions in other, more philosophical contexts.

[8]*See supra* text accompanying note 4.

[9]At most, the casebooks give economic or other jurisprudential grounds for the rule. *See* sources cited *infra* note 10. Knapp, Crystal, and Prince claim that "contract theorists have been practically unanimous in their rejection of the plain meaning rule," and treat it in a note. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 365 (5th ed. 2003). The reason they, like Traynor, give for this rejection is that no one believes that "words can have only one precise meaning." *Id.* In another place, one author, Harry G. Prince, refers to *PG&E*'s discussion of language and meaning as "solid reasoning and clear lessons." Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result,"* 31 LOY. L.A. L. REV. 557, 575-81 (1998). Frier and White title the note following *PG&E* "Is Meaning Ever Plain?," but then respond only with jurisprudential arguments for and against the rule. FRIER & WHITE, *supra* note 2, at 256-67. But they introduce the section of the casebook by asserting "the inherent haziness of language itself," so they make their sympathies apparent. *Id.* at 256. Presumably, they exclude their own language, or perhaps neither they nor I have any concrete idea what they are saying. Others let *PG&E* stand without any criticism. *See* DAWSON ET AL., *supra* note 2, at 504-11; HOGG ET AL., *supra* note 2, at 377-80. Hogg, Bishop, and Barnhizer ask of Traynor's philosophizing, "What is the intent of his language . . . ?" HOGG ET AL., *supra* note 2, at 377. This question suggests agreement with Traynor's theory, as if the only way to figure out what it means is to get into his mind. A further note of Hogg's is entitled "Old Rules Die Hard," as if the plain meaning rule is surely on its way out, presumably for the unrefuted reasons expressed in *PG&E*, to which the note is attached. *Id.* at 378.

[10]For example, Farnsworth quotes Judge Posner, who noted that the rule cuts down on litigation and therefore may be what both parties might choose ex ante. FARNSWORTH ET AL, *supra* note 2, at 595 (quoting FDIC v. W.R. Grace & Co., 877 F.2d 614, 621 (7th Cir. 1989)). Farnsworth also quotes Judge Kozinski's opinion in *Trident Center*, which states that the rule's opposite results in needless litigation and requires a judge to "divine[]" the intent of the parties from their own "self-serving testimony." *Id.* at 596 (quoting Trident Center v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 568-69 (9th Cir. 1988)). Scott and Kraus also include the *Trident Center* case, in which Kozinski questions whether the rule of law and the value of contract as an institution requires that some words have plain meaning, but Kozinski offers no more than questions. SCOTT & KRAUS, *supra* note 2, at 663 (quoting *Trident Center*, 847 F.2d at 568-70). Scott and Kraus also discuss whether rejecting the plain meaning rules gives judges too much discretion and whether the rule is efficient. *Id.* at 665-70. Murphy, Speidel and Ayres give jurisprudential grounds for both *PG&E* and the plain meaning rule in notes following the case. MURPHY ET AL., *supra* note 2, at 644-46. Some casebooks merely include Kozinski's policy analysis, without other commentary on *PG&E*. *See, e.g.*, BARNETT, *supra*

attack. Consider Learned Hand's famous objective theory of contract: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."[11] Even this theory, often recited to students, is but the expression of legal policy: "The rights and obligations depend upon the law alone," Hand says.[12] He is explaining contract and law, not language and meaning.

The courts continue to hold to the plain meaning rule,[13] but also without any explanation or refutation of the philosophical attack.[14] Yet were Traynor's

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note 2, at 474-82; CALAMARI ET AL., *supra* note 2, at 339-353 (also including an excerpt from Beanstalk Group, Inc. v. Am Gen. Corp., 283 F.3d 856 (7th Cir. 2002), which may or may not add to *Trident*'s response); KASTELY ET AL., *supra* note 2, at 728-37; KUNEY & LLOYD, *supra* note 2, at 390-98; SUMMERS & HILLMAN, *supra* note 2, at 684-89. Frier and White, *supra* note 2, at 256-67, follow suit, citing jurisprudential concerns (and Kozinski) in notes following *PG&E*. Melvin Eisenberg includes *Steuart v. McChesney*, 444 A.2d 659 (Pa. 1982), as a principal case, which itself contains a long policy analysis, and also Kozinski's *Trident Center*. FULLER & EISENBERG, *supra* note 2, at 608-26. Crandall and Whaley, *supra* note 2, at 451-56, quote a dissent of Justice Mosk (in *Delta Dynamics, Inc. v. Arioto*, 446 P.2d 785 (Cal. 1968)) pointing out some jurisprudential concerns. Macauley, Kidwell, and Whitford include a long excerpt from Edwin Patterson's *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964). STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (THE CONCISE COURSE) 748 (2d ed. 2003). But Patterson held with plain meaning only because it was legally useful, even while he conceded a subjective view of meaning:

> To say that all determinations by a judge of the meaning of a contract are *merely* his legal evaluations is at least a gross exaggeration. The judge (or judges) must start with the symbols (and other manifestations of intention) expressed by the parties in order to arrive at a proper judicial determination. If every "contract" were "interpreted" as if it were a (signed) blank sheet of paper, the usefulness of contract would vanish.

Id. at 750 (quoting Patterson, 64 COLUM. L. REV. 833). Steven Burton tries himself to explain *PG&E*'s confusing theory. BURTON, *supra* note 2, at 383-85. "What is meaning?," he asks, then, asserting that he is eschewing academic theories, both claims adherence to a reference theory of meaning but also to such fluttering statements as "all language . . . is indeterminate" and "each meaningful term refers to at least one *class* of things in the world, not to one and only one particular thing." *Id.* at 383-84. He never explains how, if meaning is reference, "we may use language that has a meaning different from what we meant." *Id.* at 385. Rosett and Bussel include a plain meaning case, *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968), which includes a jurisprudential ground for the plain meaning rule, namely, the avoidance of fraud. ROSETT & BUSSEL, *supra* note 2, at 553-63.

[11]Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

[12]*Id.* at 294.

[13]"The majority [of] jurisdictions in the United States retain some version of the Plain Meaning rule in their common law." CISG Advisory Council Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 17 PACE INT'L L. REV. 61, 73 (2005); *see also* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.10 (5th ed. 2003); E. ALLAN FARNSWORTH, CONTRACTS § 7.12 (4th ed. 2004) ("[T]he overwhelming majority of courts retains some kind of plain meaning rule.").

arguments sound and all that could be said for the plain meaning rule's treatment of language were that some social policy supports it—i.e., that the rule is efficient—then the plain meaning rule would be no more than a convenient legal fiction.[15] It would only assume plain meaning, for the sake of efficiency or some other policy, when none could exist (this may have been Corbin's view[16]). We would expect the results of such an impossible rule to be perverse. Each application of the rule would be a smokescreen for either the application of another, separate rule that is not

[14]*See, e.g.*, Mintun v. Blades, No. CV-06-139-S-BLW, 2008 WL 711636 (D. Idaho Mar. 14, 2008); Seger v. Hartford Ins. Co. of Midwest, No. 274572, 2008 WL 508062 (Mich. App. Feb. 26, 2008); Cont'l Ins. Co. v. Adams, 438 F.3d 538 (6th Cir. 2006).

[15]This is more or less the conclusion of Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 800 n.13, 838 (2002) ("One day someone used the term 'plain meaning' and I said that there was no such thing. When my comment was greeted with incredulity I offered to show my colleagues articles by Corbin and Farnsworth."). *See also* Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643, 643 (1995) ("[W]hen courts refuse to admit evidence of context, they seek only virtual reality and ignore the real meanings of contract terms."); Andrea W. Cornelison, *Dead Men Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 812-13 (2000), (stating, after expressing agreement with language similar to Traynor's, that the plain meaning approach is dishonest).

[16]Arthur Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965) ("[N]o man can determine the meaning of written words by merely gluing his eyes within the four corners of a square paper . . . ."). On the other hand, if this was Corbin's view, he immediately denied it: "the extrinsic evidence of the judge's own education and experience (of which he necessarily takes judicial notice) may well be decisive." *Id.* at 164. While Corbin insisted that everything a judge does with contractual language be called "interpretation," he also wrote:

> In many cases, the process may not be at all difficult. Viewed as a whole and in the particular and undisputed context, the language may at first sight convey only one meaning and intention, either to the judge, the jury, or any other reader. When such is the case, the words will be described as plain and clear and unambiguous. We must, indeed, be wary of this first impression, since language conceals many a pitfall. But an interpretation is not to be scorned merely because it seems obvious; words are, indeed, not to be condemned because they seem plain and clear and unambiguous. Clarity of expression is a merit—a somewhat unusual one. There are cases in which the words of the writing are ambiguous to nobody . . . . In other cases, [the parties] may violently assert different interpretations; and their attorneys may argue with eloquent and wearisome repetition for an interpretation favorable to their clients, without producing any relevant or credible evidence in support, intrinsic or extrinsic, either within the four corners of the writing or in the word usages of the time and place . . . . In cases like these, the words of the contract stand as written and will be enforced as interpreted . . . .

Id. at 172. I find it somewhat odd that, given this admission, Corbin still insists in the pointless exercise of hearing the irrelevant and incredible evidence. If the proffered evidence is irrelevant and incredible, as he hypothesizes, there is no point in hearing it, so why does he continue to insist? At any rate, because Corbin clearly holds that sometimes the judge's reading will be sufficient, I do not read Corbin to say that plain meaning is impossible. (Others have read him this way.) *See, e.g.*, Linzer, *supra* note 15, at 800 n.13; PERILLO, *supra* note 13 (citing Corbin for the proposition, "[m]eaning may not be ascertained simply by reading the document").

revealed to the parties or, if not that, then the imposition of the judge's random will. This unfortunate consequence follows from Traynor's argument if he is correct.

The other unfortunate aspect of Traynor's opinion is, however, that its attack on plain meaning was unnecessary. In *PG&E*, a rigging company promised to remove and replace the upper metal cover of PG&E's steam turbine.[17] The rigging company promised to "indemnify" PG&E "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract."[18] In addition, the rigging company promised to buy $50,000 in property damage insurance containing "a cross-liability clause extending coverage" to PG&E's property.[19] PG&E was also named an additional insured. During the actual work, the turbine cover fell on the turbine rotor, which PG&E owned, and PG&E sued the rigging company for the damage.

Because "indemnify" means "to save harmless,"[20] the rigging company's promise to indemnify seemed to cover losses to third parties for which PG&E might be liable. But "indemnify" also means "to compensate,"[21] and damage to PG&E's turbine rotor and cover called out for compensation. Because "indemnify" meant either or both, the word was not plain but was, in the court's language, "reasonably susceptible" of either meaning.[22] The court held that the trial court should have examined evidence extrinsic to the contract *before* deciding whether the word was ambiguous. But the word was ambiguous even without resort to extrinsic evidence. So the plain meaning rule did not apply. The plain meaning rule's common corollary—that ambiguity *requires* resort to extrinsic evidence[23]—should have resolved the case. *PG&E* is not even a good test case for the plain meaning rule. For that reason, casebooks often include other, better test cases, such as the following.

B. A Better Test Case: In Re Soper's Estate[24]

Perhaps, of all the cases currently employed in legal education,[25] the best test case for the plain meaning rule is *In re Soper's Estate*.[26] This case presents a true

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[17]Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643 (Cal. 1968).

[18]*Id.*

[19]*Id.*

[20]*E.g.*, BLACK'S LAW DICTIONARY 910 (rev. 4th ed. 1968); BLACK'S LAW DICTIONARY 910 (4th ed. 1957); BLACK'S LAW DICTIONARY 772 (7th ed.1999); Ark. Motor Club, Inc. v. Ark. Employment Sec. Div., 373 S.W.2d 404, 425 (Ark. 1963); Tex. Ass'n of Qualified Drivers, Inc. v. State, 361 S.W.2d 580, 582 (Tex. Civ. App. 1962).

[21]*E.g.*, BLACK'S LAW DICTIONARY 910 (rev. 4th ed. 1968); BLACK'S LAW DICTIONARY 910 (4th ed. 1957); BLACK'S LAW DICTIONARY 772 (7th ed.1999); Breshears v. Ind. Lumbermens Mut. Ins. Co. of Indianapolis, 63 Cal. Rptr. 879, 883 (Cal. Ct. App. 1967); Hall v. Elliott, 202 A.2d 726, 731 (Md. 1964).

[22]*PG&E*, 442 P.2d at 646.

[23]Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co., 297 P.2d 428, 430-31 (Cal. 1956); Walsh v. Walsh, 116 P.2d 62, 65 (Cal. 1941); Barlow v. Frink, 152 P. 290, 292 (Cal. 1915); Sheldon Builders, Inc. v. Trojan Towers, 63 Cal.Rptr. 425, 428 (Cal. Ct. App. 1967).

[24]In re Soper's Estate, 264 N.W. 427 (Minn. 1935).

conflict between seemingly clear contractual language and the parties' intentions. The case's opinion reports[27] the following tragic facts (the photos are from the record):

1. Facts

The namesake of *Soper's Estate* is Ira Collins Soper, the man in the photos (Soper was one or two inches over six feet tall, and around 250 lbs.[28]).

Ira Soper married widow Adeline Westphal in October, 1911, in Louisville, Kentucky.[29] Mrs. Soper had three daughters from her prior marriage. In the years following the wedding, Soper would occasionally go on drinking "sprees" or binges. Twice he left on a trip immediately after binging, once to Memphis, once to St. Louis. Soper went on another drinking binge in August of 1921. At the time, his sister was visiting the Sopers and upbraided him, charging him with bringing dishonor to the family name. A wife of Soper's drinking buddy also chastised Soper.

The next day, Soper disappeared. He wrote suicide notes to his wife (photocopied below), one of which said, "If there is any hereafter may meet you again." He left the notes in his car, which was found parked by a canal. His hat and some articles of clothing were left with the car. A note pinned to a business card in the car read, "This belongs to Mrs. Soper."

Plfs. Ex. E

Plfs. Ex. D

[25]*Soper's Estate* is a principal case in SCOTT & KRAUS, *supra* note 2, at 651. It is a note case in FARNSWORTH, YOUNG & SANGER, *supra* note 2, at 581, MURRAY, SPEIDEL & AYRES, *supra* note 2, at 637; and JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS 493 (5th ed. 2001).

[26]In support of *Soper's Estate* as near paradigmatic, see Linzer, *supra* note 15, at 803, and SCOTT & KRAUS, *supra* note 2, at 655 ("[T]he majority's opinion presents perhaps the most powerful challenge to a plain meaning regime."). Kniffin also employs *Soper's Estate* as an example of a case in conflict with the plain meaning rule. Kniffin, *supra* note 15, at 647-48.

[27]*In re Soper's Estate*, 264 N.W. at 427-32.

[28]Roy Soper Deposition, *Soper's Estate* Record 188 (copy on file with author).

[29]*In re Soper's Estate*, 264 N.W. at 428.

Plaintiff's Exhibit C

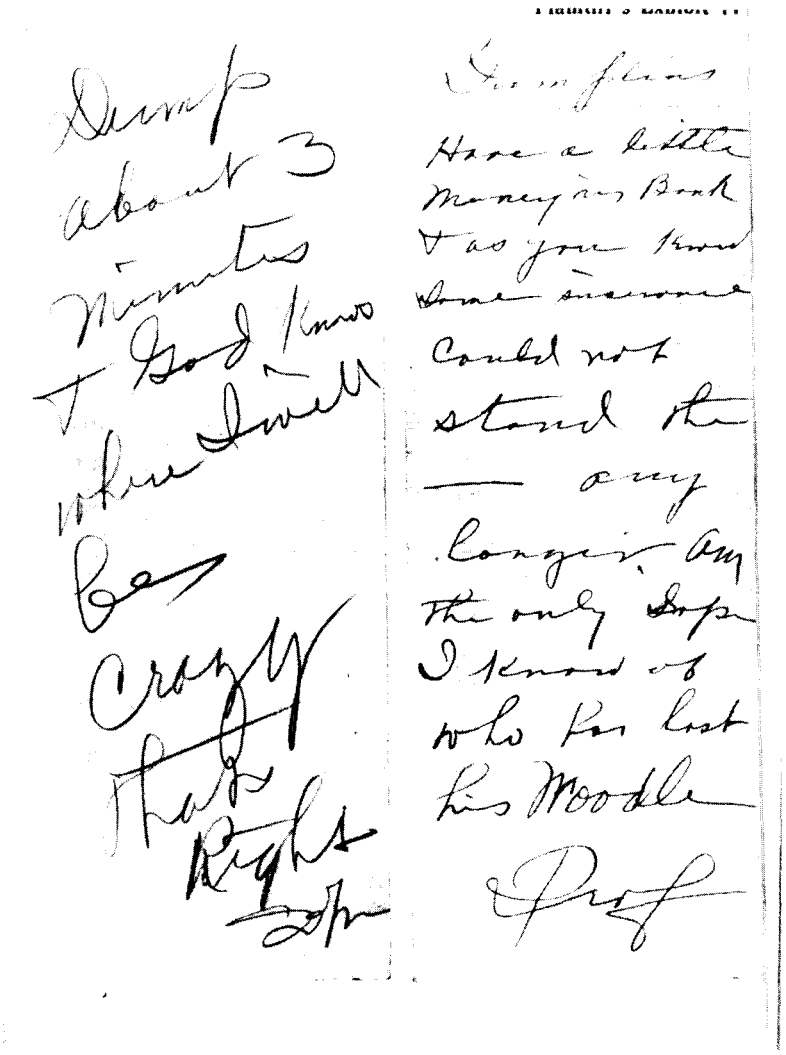
PLAINTIFF'S EXHIBIT D

Sweetheart

For God's Sake
I hate to say
it but
Good bye
Oh I wish I
could have
been what
would have
desired
but it's the
Best for you
Sof—

Sweetheart
Darling.

May the Lord
be good to
you as I
have tried
to be. If
There is any
here after
May we meet
again.
Ever—



Soper managed to get away.[30] He went to Canada, then soon after to Minneapolis, where he lived under the name of John Young. No one there knew his real name. In 1922, he married a widow, Mary Christopher. Well, actually it was not a marriage; because Soper was already married, no other valid marriage was possible. Nonetheless, Soper and Mary Christopher lived together as husband and wife until she died in 1925. In 1927, Soper married, or attempted to marry, Gertrude Whitby, a third widow.

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[30]The record reveals that Adeline, suspecting and later knowing that Soper had not committed suicide, searched for him. *E.g.*, Testimony of Adeline Westphal Soper, *Soper's Estate* Record, *supra* note 28. One sees doubt about Soper's death even in the notice of his death published in the newspaper. *See* Appendix I. Adeline later asked that Soper's picture and a request for assistance finding him be placed in the *Masonic Home Journal*. *See* Appendix II.

Some time before 1927, Soper went into business with Ferdinand Karstens. Soper and Karstens later formed a corporation, the Young Fuel Company. Soper and Ms. Whitby owned half the shares of the corporation, and Karstens and his wife owned the other half, but the two men were the principal shareholders.[31] Not long after Soper married Whitby, Soper (as Young) and Karstens agreed that the Young Fuel Company would insure the lives of both Soper and Karstens for $5,000. If either died, the insurance money would be paid to the "wife" of the deceased.[32] That's the word they used: "wife." The insurance company's trust officer was informed that Soper and Whitby were married,[33] as were Karstens and his wife. No one but Soper knew any differently. The shares of the fuel company were placed in escrow with the insurance company, and the premiums paid. If proceeds were paid to a "wife," then the insurance company was to convey all the shares of the company to the surviving principal shareholder, whether Soper (Young) or Karstens.[34]

But this was not the only insurance. In 1925, Soper bought two other policies from the same insurance company.[35] In 1927, Soper changed the beneficiary on these policies. In place of whoever was there before, he named the person he wanted to benefit: "Gertrude Young, wife."[36] These policies were not included in the escrow agreement,[37] however, but were separate contracts.

Soper committed suicide in 1932.[38] The insurance company paid the $5,000 to Gertrude Whitby and transferred Soper's (Young's) and Whitby's shares to Karstens. All this was done in good faith. Only several months later did anyone in Minneapolis learn for the first time about Adeline Westphal Soper.[39] She had heard of the late Soper's death. She traveled to Minneapolis and objected to this handling of Soper's estate. She and a newly appointed administrator for Soper's estate, a Mr. Cochran, then sued Whitby and the insurance company.[40] Mrs. Soper wanted the $5,000.

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[31]Copies of the stock certificates representing two hundred shares issued to Young (195 shares) and Whitby (five shares) are attached to this article as Appendix III.

[32]*In re Soper's Estate*, 264 N.W. at 429.

[33]*Id.* The court put this finding in passive voice. It is unclear in the decision who first said that Whitby was Soper's wife. The testimony of the trust officer, Oliver Aas, indicates that he asked Soper "who Gertrude Whitby was," and Soper answered, "That is Mrs. Young, my wife." Oliver Aas Testimony, *Soper's Estate* Record, *supra* note 28, at 197, *and see generally id.* at 195-97, 199.

[34]*In re Soper's Estate*, 264 N.W. at 428-29.

[35]*Id.* at 431.

[36]*Id.* at 432.

[37]Copies of these policies are attached to the Article as Appendix IV.

[38]*In re Soper's Estate*, 264 N.W. at 428.

[39]*Id.* at 429.

[40]*Id.*

2. The Litigation

The issue, as Mrs. Soper and the administrator saw it, was whether Mrs. Soper was Soper's "wife."[41] Well, she clearly was. The word was not ambiguous. There could only be one wife, and Adeline was it. The word "wife" required that some extrinsic evidence identify the proper woman, but the word was not reasonably susceptible of including Whitby. The court conceded that Whitby was not Soper's "legal wife."[42] On plain meaning, Mrs. Soper should win.[43]

But the court saw matters another way. It thought the issue was whether Whitby was "the person intended to be the beneficiary under the escrow agreement."[44] That was the court's focus when it asked whether extrinsic evidence was admissible to show that Gertrude Whitby was intended, and not Mrs. Soper.[45] Plenty of extrinsic evidence showed that Whitby was intended:

> She was the only one known or considered by the contracting parties. . . . From the time [Young] 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. . . . Public records [in Minnesota] [and "general repute"] disclosed her and her alone to be such. There was no one else.[46]

Besides, there were the two other insurance policies that Soper changed so that "Gertrude Whitby, wife" was beneficiary.[47] On all of this extrinsic evidence, the Minnesota Supreme Court waxed philosophical and (long before Traynor) held that Whitby must win because, the court claimed:

> To hold otherwise is to give the word "wife" "a fixed symbol," as "something inherent and objective, not subjective and personal" . . . . 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,

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 431. In some states, Ms. Whitby would be a "putative wife," meaning that the marriage between Soper and Whitby was entered into in good faith by one party (Whitby) and would be deemed a legal marriage for some purposes. In fact, in a case with facts similar to *Soper's Estate*, the Texas Supreme Court held that the estate of the husband should be split between the wife and the putative wife. Davis v. Davis, 521 S.W.2d 603, 606-07 (Tex. 1975) (awarding the putative wife one-half the deceased man's wages and one-half of a life insurance policy that named the man's estate as beneficiary). *See also* Davis v. Davis, 507 S.W.2d 841, 842 (Tex. App. 1974). Such a result would probably not have been possible in *Soper's Estate*, however, because the insurance policy named "wife," a single individual, as sole beneficiary.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 431-32.

> there can be only some person's meaning; and that person, whose meaning the law is seeking, is the writer of the document. . . .[48]

Rejecting the plain meaning standard, the court considered the extrinsic evidence, and Mrs. Soper lost. One Justice, Olsen, dissented.[49]

3. Unreported Support from the Record

Unreported facts in the appellate court record confirm the court's view of the parties' intent. The court failed to mention several uncontested facts that also show that the parties to the insurance contract intended Whitby to be the beneficiary.

First and foremost, in order for the share ownership issue to be settled after the death of one of the principal shareholders of the Young Fuel Co., all the shares on one principal's side had to be transferred to the other side when the one principal died. Mrs. Karstens and Ms. Whitby both owned shares.[50] In order for the transaction to work, they, as well as the men, had to endorse the shares in blank so that the trust company could transfer the shares at the death of one of the two male principals.[51] Both women endorsed their shares. Gertrude Whitby would not likely have joined in the transaction in this manner unless she believed herself to be the beneficiary of the escrow agreement. If the money could go to another, she would have been giving her shares away. (Her endorsing the shares was most likely consideration for being named beneficiary, or it was detriment suffered in reliance on that fact.) Because the only other participant in the transaction to discuss it with her was Soper himself,[52] most likely she understood from him that she was the beneficiary. Thus, her participation is evidence of Soper's intent to benefit her.

Second, the principal promoters and drafters of the deal believed Whitby was married to Soper. Elmo Smith from the insurance company, Karstens, and Oliver Aas from the trust company pushed the transaction forward and arranged its terms, not Soper.[53] Smith proposed it to Karstens.[54] Karstens wanted it to happen.[55] Smith and Karstens together convinced Soper to go along.[56] Smith in fact urged protection

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[48]*Id.* at 431 (internal citations omitted).

[49]*Id.* at 433.

[50]Of the 400 shares outstanding, Mrs. Karstens owned twenty-five and Gertrude Whitby five. *Id.* at 428.

[51]Peter Karstens Testimony, *Soper's Estate* Record, *supra* note 28, at 161-64.

[52]*Id.* at 157-64.

[53]*Id.* at 149-54, 157-59.

[54]*Id.* at 149-52.

[55]*Id.* at 152.

[56]*Id.* Karstens is quoted as follows:

> I was anxious to have the agreement and approached Mr. Smith about it, or rather, he spoke to me and I was in favor of it, and then we approached Mr. Young, and he seemed to want to let it go and stand as it was; and I urged Mr. Smith to go and see him again, and I think finally it was through Mr. Smith that he finally convinced Mr. Young . . . .

Id.

of Gertrude Whitby as one of the primary considerations for the escrow agreement. Smith asked Soper "in the event of his death if he preferred to have Mrs. Young have the cash the same as the stock was worth or she have the stock," and Soper replied, "I think it would be better a whole lot for her" to have the cash, referring to Gertrude Whitby.[57]

When Karstens and Soper agreed to do the deal, Smith chose the trust company.[58] Oliver Aas examined the company's shares; explained the agreement as including money paid to the women, referring to them as the wives of the men; and drafted the agreement itself,[59] which was the "usual and customary" language used in such forms.[60] Soper had nothing to do with the drafting.[61] The word "wife," in other words, was Oliver Aas's idea, not Soper's or even Karstens'. Aas never met Whitby, but once Aas asked the men who Gertrude Whitby was, and Soper responded, "That is Mrs. Young, my wife."[62] That answer grounded Aas' usage of "wife." Soper did not object to the usage,[63] though he examined the agreement for two or three weeks.[64] From the perspective of Smith, Karstens, and Aas, the promoters and drafters of the agreement, there was no other woman than Whitby. In the view of these, the principle organizers of the transaction and those generating and most in control of its terms, "wife" meant Whitby.

Finally, if no consideration existed for naming Whitby as beneficiary and no other vesting of rights occurred, the name of the beneficiary was at Soper's will, and he did not change it. Evidence of his intent up until his death indicates that he intended Whitby as the beneficiary. For instance, he told his brother Roy Soper in 1930 that Whitby

> was such an ideal woman and that her mother was greater than his own mother to him and that he had taken out some insurance for her and that if he could only keep that up; that if the business went to pieces he was in hopes to keep that up. He also spoke about having a policy with his partner—that each one had a policy so if one died—the company kept the premium—and it seemed that that policy was worrying him considerable because he was afraid if he had to give up the company that he would lose this, but I afterwards found out that he and his partner did get together and

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[57]Smith Testimony, *Soper's Estate* Record, *supra* note 28, at 250-53 (original spelling and punctuation retained).

[58]Karstens Testimony, *Soper's Estate* Record, *supra* note 28, at 153; Smith Testimony, *Soper's Estate* Record, *supra* note 28, at 246-49.

[59]Karstens Testimony, *Soper's Estate* Record, *supra* note 28, at 157-64; Aas Testimony, *Soper's Estate* Record, *supra* note 28, at 193-201.

[60]Aas Testimony, *Soper's Estate* Record, *supra* note 28, at 193-201.

[61]Smith Testimony, *Soper's Estate* Record, *supra* note 28, at 250-53.

[62]Karstens Testimony, *Soper's Estate* Record, *supra* note 28, at 159-64; Aas Testimony, *Soper's Estate* Record, *supra* note 28, at 193-201; Smith Testimony, *Soper's Estate* Record, *supra* note 28, at 246-49.

[63]*E.g.*, Karstens Testimony, *Soper's Estate* Record, *supra* note 28, at 159.

[64]Aas Testimony, *Soper's Estate* Record, *supra* note 28, at 193-201.

> cut the policy loose from the company but they [Soper and Karstens] were taking care of the premiums.[65]

Soper saw Smith in April or May 1932, about one month before Soper's death. Soper stopped Smith in the street and said, "I was talking with Mrs. Young last night. I told her that if anything happened to me I wanted her to get in touch with you before she got in touch with anybody else."[66] Soper did not say in relation to what, but the only business connection that Soper and Smith had was the stock escrow agreement and the two policies of insurance that identified "Gertrude Whitby, wife" as beneficiary.[67]

Soper saw his friends the Nelsons on a Sunday afternoon about thirty days before his death. He told them he was very discouraged about his business. Mrs. Nelson testified that Soper said

> things were terrible, collections were hard, and he said, "I do not know what I am going to do if things do not pick up," and he said, "I have a little insurance and before I have seen Mrs. Young or that dear little mother of hers suffer in need I would end it all." He said, "So if you ever hear about anything has happened to me you will know the reason why I did it."[68]

In fact, the morning Soper committed suicide he mentioned the stock to Whitby and "impressed it upon [her] mind that if there was anything [she] wished to know, to call Mr. Smith."[69] The testimony at trial clearly shows that Soper wanted to leave insurance benefits to Whitby.

Interestingly, Soper's faking his own suicide in 1921 may also have been intended to benefit Adeline Soper. One of his suicide notes to her stated, "Have a little money in Bank and as you know some insurance."[70] In fact, he did have life insurance in 1921. Adeline received the proceeds from it in 1929,[71] in the amount of $940.[72] She never felt he was dead, she explained regarding the eight-year delay, but the insurance company had contacted her and wished to pay the policy and be done with the matter.[73] Soper later asked his brother Roy, "[D]id you hear that Addie had collected [my] insurance?" Roy said no, he hadn't heard. Soper replied, "That's the only thing that keeps me from going back to Louisville."[74] "And he was under the

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[65]Roy Soper Deposition, *Soper's Estate* Record, *supra* note 28, at 182-84 (original spelling and punctuation retained).

[66]Smith Testimony, *Soper's Estate* Record, *supra* note 28, at 256-58.

[67]*Id.*

[68]Nelson Testimony, *Soper's Estate* Record, *supra* note 28, at 229 (original spelling and punctuation retained).

[69]Whitby Testimony, *Soper's Estate* Record, *supra* note 28, at 214.

[70]Suicide Note, *Soper's Estate* Record, *supra* note 28.

[71]Adeline Soper Testimony, *Soper's Estate* Record, *supra* note 28, at 83.

[72]*Id.* at 93.

[73]*Id.* at 83-86.

[74]Roy Soper Deposition, *Soper's Estate* Record, *supra* note 28, at 190.

impression that she had collected his insurance."[75] Insuring himself for the benefit of the woman he loved before committing suicide appears to have been Soper's modus operandi.

Soper's Estate is such a challenge to the plain meaning rule because Gertrude Whitby was obviously the intended beneficiary, notwithstanding that "wife" did not include Whitby. In this, of all cases, plain meaning seems contrary to the contracting party's intent. If plain meaning were the rule, Mrs. Soper would have won. As Justice Olsen, who dissented, wrote cogently, "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 the woman may be of any wrongdoing."[76] The court seems to admit as much. "The question is not just what words mean literally,"[77] the court rationalized, because the literal meaning of "wife" meant Adeline Soper. But by that time the court had already poured scorn on what it assumed were the linguistic underpinnings of "what words mean literally," so it was no longer concerned much with the words themselves.

C. A Summary of the Attack

PG&E and *Soper's Estate* claim that the plain meaning rule is impossible. Summarized, the two assert that the meaning of the word is given in the thoughts and intents of its user, either the speaker or writer or the hearer or reader. As a symbol of thought, a word has only a "subjective and personal" meaning, not an objective or true meaning. "Accordingly, the meaning of a writing can only be found by interpretation in light of all the circumstances that reveal the sense in which the writer used the words."[78] (Corbin can also be read to say this.[79]) Nothing in a contract could be plain, on this view. For the judge to employ the judge's understanding of the word is to supplant the party's subjective meaning with the judge's. The courts therefore look on plain meaning as fictional. Moreover, plain meaning is based, the courts claim, on the view that words have absolute and constant referents as would a "fixed symbol," or that words have some other inherent or absolute meaning. Because they do not, plain meaning is also fictional, and impossible. (The passages from the cases are repeated here in the margin, so that the accuracy of this summary can be checked.[80])

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[75] *Id.*

[76] *In re Soper's Estate*, 264 N.W. 427, 433 (Minn. 1935).

[77] *Id.*

[78] Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968).

[79] Corbin expounded:

> The interpretation of a written contract is the process of determining the thoughts that the users of the words therein intended to convey to each other. . . . Extrinsic evidence is admissible . . . to determine the meaning of language that the parties actually gave to it . . . . It is the meaning that the parties intended to convey by these specific words that is to be determined.

Corbin, *supra* note 16, at 170-71.

[80] From *PG&E*:

II. REFUTING THE ATTACK

The arguments employed by *PG&E* and *Soper's Estate* are for the most part false. The arguments misunderstand both language and meaning and also the plain meaning rule. The thoughts and intents of the speaker and writer, hearer and listener, are irrelevant to the meaning of language. Meaning is not subjective and personal. Instead, the meaning of language is necessarily public and objective. The meaning lies in the consistent, conventional patterns of our usage. Though language can never be understood apart from the context in which it is used, that context only matters to the extent that it, too, is objective and public. Moreover, though meaning is usage, no person has control of language's meaning—even in a contract—because no person has control of the public conventions of language.

> When a court interprets a contract on th[e] basis [of plain meaning], it determines the meaning of the instrument in accordance with the "* * * extrinsic evidence of the judge's own linguistic education and experience." The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words.
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> . . . .
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> A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained. Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.
>
> . . . .
>
> If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning. Accordingly, the meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.

PG&E, 442 P.2d at 643-45 (internal citations omitted, internal quotation marks omitted); *see supra* text accompanying note 4.

> From Soper's Estate:
> To hold otherwise is to give the word "wife" "a fixed symbol," as "something inherent and objective, not subjective and personal". . . . "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."

In re Soper's Estate, 264 N.W. at 431 (internal citations omitted).

Because I find Ludwig Wittgenstein's account of language and meaning[81] most plausible, I employ the terminology of his view in this refutation of the attack on plain meaning. Fortuitously (or not), Wittgenstein himself debunked the very view of language that *PG&E* and *Soper* adopt—the idea that the meaning of language is the thought or intent of its speaker or writer, hearer or reader, or is dependent on such thought or intent. That is the key premise of *PG&E* and *Soper*'s comments on language and meaning. But this premise is wrong for several reasons. Refuting this erroneous view of meaning comprises Part II.A.

Part II.B replaces this theory of meaning with another theory that explains why plain meaning is not only possible but is the norm in language use. In this far more precise and well-considered theory, plain meaning occurs even though words have neither absolute and constant referents nor inherent meaning.

A. Thoughts and Intent Are Not Meaning

1. Thought and Intent Are Private, but Meaning Is Necessarily Public

A primary objection to looking to thoughts or intentions for meaning is that these are private. Wittgenstein famously demonstrated that the source of meaning must be public. His method of proof was to postulate a hypothetical language in which the source of, or criterion for, meaning was private. In this language, "individual words . . . refer to what can only be known to the person speaking; to his immediate private sensations."[82]

The difficulty with such a language is that no "criterion for correctness" for the use of it exists.[83] Language, to have meaning, must be used consistently. (Wittgenstein's way to express this consistency was to say that language is used "according to rule" (the sum of an expression's rules he called its "grammar").) Moreover, some way to check the consistency must exist so that users of the language know whether language is being used meaningfully or not. But no method exists to keep a wholly private language consistent, or to check it for consistency.

Consistency requires an appeal "to something independent."[84] A mere private belief that a "connection" between private sensation and sign exists over time is not enough.[85] It is unreliable. Also, it does not allow other users of the language to determine whether a word was used meaningfully. Bolstering the private belief by an appeal to private memory is no better. No way exists to ensure that the memory of the "connection" between the word and the sensation, or even the memory of the sensation, remains the same over time.[86] So a word with only a private "meaning" could mean anything, and the "meaning" could change randomly with each use. Such language is meaningless. As Wittgenstein said more specifically, "Hence it is

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[81]LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscome, trans., 3d ed. 1958) [hereinafter PI] (primary citation).

[82]*Id.* ¶ 243.

[83]*Id.* ¶ 258.

[84]*Id.* ¶ 265.

[85]*Id.* ¶¶ 258, 260.

[86]*Id.* ¶ 265.

not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it."[87] Only by random chance would the private sensations of speaker and hearer align, and no way exists to determine whether that actually occurred. Understanding would be impossible under such circumstances—one could never know whether one understood or not. Thus, the source of, and criteria for, meaning cannot be private.

Wittgenstein illustrated this argument in a lengthy passage on pain and pain language.[88] His conclusions are summarized in the well-known "beetle in the box" metaphor:

> Now someone tells me that *he* knows what pain is only from his own case!—Suppose everyone had a box with something in it: we call it a "beetle". No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle.—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word "beetle" had a use in these people's language? —If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty.—No, one can 'divide through' by the thing in the box; it cancels out, whatever it is.
>
> That is to say: if we construe the grammar of the expression of sensation on the model of 'object and designation' the object drops out of consideration as irrelevant.[89]

Wittgenstein's point is not to deny the reality of private sensations such as pain but to show that the sensation itself plays no role in the meaning of such a word as *pain*. The word has the meaning—its use in our language—that it has quite apart from anyone's sensation of pain. And if *pain*, a word we use more or less only to talk about an obviously private experience, has no private meaning, then no word does.

Wittgenstein further illustrated the irrelevance of thoughts to meaning by pointing out that language users understand various comments about supposedly private mental states—these comments have meaning—even though no one else can experience those states. Ordinarily, users of a language take their lack of access to the thoughts for granted. The inability to perceive the so-called referenced object does not stop us in the least from communicating. For instance, the question "Is this foot *my* foot?" seems odd. Who could answer it? Only the person who owns the foot can tell if the experience is happening to the foot, it seems. But language users say things like this ordinarily, and that philosophical difficulty never arises. Suppose a person's foot is anaesthetized, then tapped with a hammer. The person says, jokingly, "Is this foot *my* foot?" to say that the anesthesia has taken effect.[90] The use

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[87] *Id.* ¶ 202. Similarly, "Orders are sometimes not obeyed. But what would it be like if no orders were *ever* obeyed? The concept 'order' would have lost its purpose." *Id.* ¶ 345.

[88] *Id.* ¶¶ 271-303, 310-15.

[89] *Id.* ¶ 293.

[90] PI, *supra* note 81, ¶ 411.

of the phrase in ordinary discourse does not require the reference at all, because we know that the anesthesia has had effect even without access to the sensation (or lack of expected sensation).[91]

Consider another example: A person claims, "I have consciousness." This seems to be a clear reference to a thought or, more specifically, an entirely internal sensory perception. Yet when a doctor after an accident questions whether the patient has regained consciousness, and the patient answers, "I have consciousness," the philosophical problem does not arise.[92] The purpose of the language is served entirely without any reference being necessary, because the test for consciousness (and the meaningfulness of the word *consciousness*) does not require access by outsiders to the person's experience of consciousness, only that the person be verbally responsive. Wittgenstein wrote, "*Certainly* all these things happen in you.—And now all I ask is to understand the expression we use."[93] When these things happen in you, they do not need to happen in me for me to understand the expression. Only a "god, who . . . sees into human consciousness," could understand in that fashion.[94] Yet language users do understand, and this understanding demonstrates that the meaning of the words does not depend on a private sensation or a thought of one.

In summary, if our thoughts were the rule governing the use of the word, then everything could be made to accord with the rule,[95] because our thoughts could be anything, or more than one thing over time (or nothing, as the beetle illustration shows). Any word could have any meaning in any use. (In fact, if meaning were private because it referred to thoughts, it would not be our words that have meaning, but our thoughts. Knowing our own words would only be knowing our own thoughts. But someone else could never understand our words.[96]) (For the same reason, "[i]ntuition" is not [meaning]—'how do I know *how* I am to obey it? And

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[91]Only a philosopher would ask whether the person claiming that the anesthesia was working in the foot was lying. Lying might serve the cause of masochism. Surely that has happened, but no one attending the patient would know (or care) unless the patient showed signs of pain or expressed a desire for more anesthesia, in which case it would be given if medically advisable even without reference to the private sensation of pain or its lack.

[92]PI, *supra* note 81, ¶¶ 416-19.

[93]*Id.* ¶ 423.

[94]*Id.* ¶ 426.

[95]*Id.* ¶ 201. What Zapf and Moglen and others quite rightly explain as the "problem of induction," namely, that "[p]ast observed regularities can never, as a matter of logic, determine future occurrences," Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: The Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 493 (1996), forms one antecedent for Wittgenstein's resolution: "there is a way of grasping a rule which is *not an interpretation*." *Id.* ¶ 201; *see also* Scott Hershovitz, *Wittgenstein on Rules: The Phantom Menace*, 22 OXFORD J. LEGAL STUD. 619, 619-30 (2002). The possibility of matching any private thought to any private use was another antecedent, which is why Wittgenstein immediately followed with, "And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying." PI, *supra* note 81, ¶ 202.

[96]PI, *supra* note 81, ¶ 347.

how do I know it doesn't mislead me?' For if it can guide me right, it can also guide me wrong,"[97] just as our thoughts or memory could.)

But words do have meaning. To those who see words as symbols of thoughts, this presents a paradox. Wittgenstein concludes, "The paradox disappears only if we make a radical break with the idea that language always functions in one way, always serves the same purpose: to convey thoughts—which may be about houses, pains, good and evil, or anything else as you please."[98] The criterion for meaning, in other words, cannot be our thoughts.[99] The source of, and criteria for, meaning must be public.

Now that is not to deny that sometimes we have thoughts or intentions that we try to describe in words, as if we translate our thoughts or paint them in language as we would a picture.[100] That undoubtedly is what Traynor was thinking of. But these thoughts do not play any role in the meaning of the words. Consider all the things that might be going on in the mind,[101] any one of which is consistent with the words used but all of which are quite different from each other: A picture occurs, and one tries to describe it; or an image which is not a picture flashes before one's mind, and one tries to find an expression for it; or a solution occurs to a problem, which one then tries to express in words (one might question what the thought consisted in before the expression); or a precedent is recalled, and words thought generally to describe it are written; and so on. These mental activities, like the beetle in the box, play no role in the actual meaning of the words used. Meaningful use of words occurs whichever process occurs, and even if none occurs. Often, words have meaning even when they occur without thought (more on this in Part II.A.3).[102]

Ironically enough, even *PG&E* in the end implicitly rejects the assertion that thoughts give words meaning—the very theory both the *PG&E* and *Soper's Estate* courts expressly espouse. The *PG&E* opinion limited possible meanings to those to which a word is "reasonably susceptible"[103] (so do Corbin[104] and Farnsworth[105]). That is an odd move, considering the courts' language theory. This obviously objective limitation has little, if anything, to do with anyone's thoughts or intent. It

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[97] *Id.* ¶ 213.

[98] *Id.* ¶ 304.

[99] *See also id.* ¶ 377 ("What is the criterion for the sameness of two [mental] images? What is the criterion for the redness of an image? For me, when it is someone else's image: what he says and does. For myself, when it is my image: nothing. And what goes for 'red' also goes for 'same.'").

[100] *Id.* ¶ 335 ("This phrase compares the process to one of translating or describing: the thoughts are already there (perhaps were there in advance) and we merely look for their expression. This picture is more or less appropriate in different cases.").

[101] *Id.*

[102] *Id.* ¶ 341.

[103] Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644, 646 (Cal. 1968).

[104] *See* sources cited *supra* note 16.

[105] Farnsworth, *supra* note 13, § 7.10 ("[T]he language itself imposes a limit on how far the court will go in that process.").

is an objective standard and as such must depend not on thoughts or intent but on something public. How could a word have a "reasonable susceptibility" limit on its meaning if the court is seeking only the intent of the parties, which may well be unreasonable? The court gives no theoretical reason for limiting the meaning of words in this manner, and this limit is contrary to all of the language theory the court mentions.[106]

The *PG&E* court also claimed that it would discern the intention of both parties "as expressed in the contract," for that "is the source of contractual rights and duties,"[107] but there is next to no possibility that the thoughts of both parties matched at all on any single issue beyond the language itself at the time the contract was signed. Agreeing to the language is all the parties mustered. Who can say what their thoughts were? In this move, also, the court concedes that the theory it used to attack the plain meaning rule is inadequate.

I am also almost certain that if we asked the parties under oath "the meaning the parties gave to the word" (quoting *PG&E* at one of its more subjective moments), the parties would give exactly opposite testimony. That, of course, is why they are in court. Such testimony was not even possible in *Soper's Estate*, because Soper was dead. So in the end the courts drew meaning not from any proposed subjective intention, but from the use of the word in context, the quite objective circumstances in which the words *indemnify* and *wife* occurred. In fact, courts must, notwithstanding pretensions to omniscience, admit they have no concrete idea what the parties thought, what they intended. Courts must admit that they are being guided by the language itself as used in the circumstances, and drawing upon their own expertise as users of that language. In short, the *PG&E* and *Soper* courts in the end made no use of thoughts and intentions in deciding what *indemnity* and *wife* meant, and admitted as much. They were right to abandon their armchair philosophy. Under it, words would be meaningless. The philosophy was false.

2. Reference Does Not Explain Meaning

a. Reference Itself Is a Mystery

Even if somehow our thoughts and intentions were public and so could play a role in the meaning of words, they could not unless language and thoughts were connected in some manner. The nature of this connection is mysterious, but under the theory promulgated by *PG&E* and *Soper*, meaning depends on such a

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[106]For instance, one might hypothetically ask Traynor the following questions, drawn from his own criticisms of plain meaning: Does not the reasonably susceptible limit come from the judge's own linguistic education and experience? Does it not reflect the possibility of (reasonably) perfect verbal expression? Does it not reflect a primitive faith in the inherent potency and meaning of words? Does this not assume that words have (relatively) absolute and constant referents? How could a symbol of thought be limited in this manner, when thoughts are not so limited? If a word has no meaning apart from "the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers," then how could a judge limit meaning in this manner? *PG&E*, 442 P.2d at 644; *see supra* text accompanying note 4. Of course, I ask the questions only to point out the incoherence of Traynor's opinion, not because his criticisms have any validity.

[107]*PG&E*, 442 P.2d at 644.

connection. The language has meaning only insofar as we can discover the thought that "gives it" meaning. These two, language and thought, have reference to each other, the theory claims. Justice Traynor meant to name this connection when he wrote that a "word is *a symbol of* thought."[108] Without the thought, the word would have no meaning. The word must have a connection to it, then. The theory named in the cases is a reference theory of meaning.

What could this connection be? It consists of neither language nor thought. These are the two things that need connecting. Neither of the two can bridge the gap between itself and the other. The connection also cannot be a physical connection, because no physical event or object between speaker and listener conveys anything more than the language itself. (Nor can it be some innate language into which all of our words are translated. Then the meaning of that innate language would require an explanation. Using yet another innate language to explain leads to an infinite regression. At some point, translation must stop.)

b. Reference Provides at Most Only an "Is," Not an "Ought"

The reference theory has a second difficulty besides inexplicability. Reference simply cannot account for what happens when we use language.[109] Wittgenstein gives the following example of a simple case of reference:

> A is building with building-stones: there are blocks, pillars, slabs and beams. B has to pass the stones, and that in the order in which A needs them. For this purpose they use a language consisting of the words "block," "pillar," "slab," and "beam." A calls them out;—B brings the stone which he has learnt to bring at such-and-such a call.[110]

This is perhaps the simplest case in which a word might refer to an object. Assume that there is some connection between the two. Even if there is, neither that connection nor the object itself tells B what to do when A calls out.[111] "It is easy to imagine a language consisting of only orders," but that alone is not our language.[112] A mere connection between word and object does not account for B's response.[113] B might just as logically grab the stone and run away (our practice might assume that B desires A's deprivation), or hit A over the head with it (our practice might assume that B desires to destroy A), or hammer it (our practice might assume that B wants to destroy everything A wants). Many different practices could be conceived as a proper response to A's object of reference. The stone itself does not tell B what to do. The difficulty with explaining meaning as reference is akin to that encountered when trying to draw an "ought" from an "is." A's language, if B understands it, limits the responses from B that will be correct, something the object itself cannot do. So the meaning of the word is more than a connection to an object.

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[108] *Id.*

[109] PI, *supra* note 81, ¶ 1.

[110] *Id.* ¶ 2.

[111] *Id.* ¶¶ 1 ("But how does he know where and how he is to look up the word 'red' and what he is to do with the word 'five'?"), 4.

[112] *Id.* ¶ 19.

[113] *Id.* ¶¶ 1 ("Explanations come to an end somewhere."), 26-35.

PG&E and *Soper* did not refer to objects, of course, but to thoughts. One could claim instead that A's word refers to A's thought. That is a particularly tempting version of the reference theory of meaning, as Wittgenstein recognized: "[B]ecause we cannot specify any *one* bodily action which we call [our meaning], we say that a *spiritual* [mental, intellectual] activity corresponds to these words."[114] Assuming that the private nature of A's thought is no objection, we might conceive of the meaning of A's word "slab" as a picture in A's mind of the stone itself that A wants B to bring. But the picture cannot be the connection between word and meaning. It can give no more than the stone itself could. The hearer might see the right picture and bring the wrong stone, and then we would say B misunderstood A's language, but we could not say that B misunderstood the picture.[115] Or the hearer might see the right picture and pound the stone with a hammer, breaking it, and that would also be to misunderstand the language, even though the picture was correct.[116] The mental picture as the meaning of the word allows these misunderstandings.[117]

The intention could be combined with the picture. A's statement, "Slab!" could refer to A's desire that B bring the slab to A, for instance. Or A could even feel when he says, "Slab!" a sort of indignation, a feeling that B should be compelled to bring the slab. Yet we have the same difficulty here. Nothing that could be called a connection between the word and the thought tells B the proper response. Playing along and bringing the slab is quite a different thing than responding to what another desires. B might throw the slab at A as a response to A's desire, or hire a courier to take it (delaying the building), or giftwrap it first. B might turn and leave at A's indignation, and take the slab with him. In either case B might properly respond to the thought but in a way that may indicate that B did not understand the word. Said more generally, the thought does not contain the meaning.

Conversely, the meaning does not require the thought (a point also made in Part II.A.1). Those who already speak a language understand that the activity outlined by Wittgenstein in the hypothetical works whether A has a thought or not. In the context of the activity, B need not know any of A's thoughts in order to bring the slab. If B brings the correct stone then both A and B, on the one hand, and any observer, on the other, would say the word was meaningful even without a thought or intention in A's mind.[118] A's mere use of the word tells B enough in the hypothetical.

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[114]*Id.* ¶ 36.

[115]*Id.* ¶ 6.

[116]*Id.*

[117]One could multiply examples. The music teacher says, "I want you to sing it vivaciously." As the teacher says this, she has first a sensation of her own boredom with the song, which the student is singing without enough energy; and second, as she says her words, she has an inner feeling of a dancing motion. It is a quick motion, like a hopping from side to side. Suppose the student has access to these thoughts, so that the student can connect them to the language used. What is the student to do? If she begins hopping from side to side, and bobbing her head back and forth as she sings in the same boring way, wouldn't we say that she misunderstood? But she has connected the thought and the language.

[118]PI, *supra* note 81, ¶ 20.

Consider another example: A speaker wants water and says, "Bring me water." This may have been accompanied in her mind by a conscious desire for water. Suppose she is thirsty and actually wants a glass of water. But the hearer will react differently depending on whether the speaker is dying in a desert, preparing to undergo an operation in a hospital, buying water rights, sitting as a celebrity in a dunking booth and taunting the crowd, or painting a watercolor. The function of the statement—what it does, its meaning—depends on its use in context, not on the thought of the speaker.

This problem is not solved, only delayed, by putting the thoughts into words. Suppose the thought accompanying the statement, "Slab!" was the much more detailed, "You, B, go and pick up the slab and bring it to me now!" Or suppose the speaker wanting water thought, while speaking the command for water: "I must obtain water rights for my New Mexico farm so that I can raise this crop of peppers, recoup my investment, avoid bankruptcy, and eventually send my son to college; and besides, I'm giving you a great deal on this water, so you should sign here." This clarification does not help. If the listener knows these thoughts, then the example has merely replaced one expression with another. That does not explain how anyone understands words, either, for how will the listener understand this new expression? By reference to more thoughts? Then we have an infinite regression.[119] By reference to non-linguistic thoughts? Then we have the same problems as before—how do we understand a proper response to an object?

c. To What Do Non-Nouns Refer?

The genesis of the reference theory may well have been some contemplation about the meaning of proper nouns.[120] While the theory carries an intuitive appeal when proper nouns are at issue (though the same problems arise), this view of meaning is much harder to justify when some other kind of word is used. Consider the word "this." What is its referent? That to which I am nodding? (This way.) That to which I am pointing? (This rock.) That on which I am sitting? (This chair.) That in which we are speaking? (This place.) That of which I am thinking? (This idea.) Very little is the same in those five usages. But do thoughts lie behind these usages? Must a speaker think in order to shift the meaning of *this* between these usages? And what is like these and also like the use of *this* in this sentence?[121] One could say they all "call attention to something," perhaps. But is there some sort of mental pointing occurring each time one says *this*? Even if there is, and the hearer could know it was occurring, the mental pointing alone would not be enough to suggest the meaning in each of these uses. None of the instances could be understood without a knowledge of activities quite different than pointing (such as going, finding, sitting, being in a location, and thinking and recalling), and if this knowledge exists, and one understands the language, the word is meaningful whether mental pointing occurs or not.

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[119] *Id.* ¶¶ 85-86.

[120] *Id.* ¶ 1.

[121] *Id.* ¶¶ 10-12, 16.

Or how about the word *the*? Or the number *seven*?[122] The referents here are impossible to find or, once one has found a plausible candidate, it is impossible to say that everyone who understands and uses these words correctly, meaningfully, has this referent—the same referent thought or intention. Exclamations are another difficult use. Wittgenstein named several to point out their varieties of meaning: "Water! Away! Ow! Help! Fine! No!"[123] These words are obviously doing more work here than referring to objects or thoughts or intentions, and each exclamation is doing something quite different than the others.

In short, in order for some thing—an object or thought—to give meaning to a word, there must be some connection between the object or thought and the word. But the nature of this connection is inexplicable (perhaps because it does not exist). Even if we imagine a connection, hypothetically, no connection between the two explains meaning—the way language actually works, language's actual use. Neither does the object or thought itself. Reference therefore offers no explanation for the meaning of language.

3. Thinking and Talking Are Independent Activities

Finally, thinking and talking occur independently of each other. Words with, at best, obscure possible referents, such as *this*, *the*, numbers, and exclamations demonstrate that point. These are also examples of words that typically are not thought at all. When did you last think a *the* while you spoke it? Or exclamations—Wittgenstein's list[124] illustrates our ability to speak beyond what we can or do think. Wittgenstein adds several other examples. For instance, we speak of the color green as a general idea, but our thoughts of this color are always particular. "Ask yourself: what *shape* must the sample of the colour green be? Should it be rectangular? Or would it then be the sample of a green rectangle?"[125] Introspection reveals that one cannot think of the color green without also thinking of a surface with a texture. Yet, notwithstanding, we speak of green and all colors as disembodied abstractions (a fact that also shows the weakness of the reference theory).

Wittgenstein's example of a game is similar. English speakers know what a game is but can give no essential characteristic common to all games; they can list traits, but no two lists are alike and some do not overlap at all with some others.[126] There is a "family resemblance" of sorts in all games—each one looks sort of like another, so that they can plausibly be grouped in a family,[127] but one can use the word *game* without ever recognizing this fact—without the thought of it.[128] The word *good* is another example.[129]

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[122] *Id.* ¶¶ 28-29.

[123] *Id.* ¶ 27.

[124] *See supra* text accompanying note 123.

[125] PI, *supra* note 81, ¶ 73.

[126] *Id.* ¶ 66.

[127] *Id.* ¶ 67.

[128] *Id.* ¶ 75.

[129] *Id.* ¶ 77.

Conversely, various thoughts may accompany identical language. The water example in Part II.A.2 illustrates this point. In another example, Wittgenstein famously imagined a student learning a series of numbers. After watching the teacher for a bit, the student says, "Now I can go on!" The student may have grasped an algebraic formula describing the series, or seen the regularly increasing differences between the numbers in the series, or grasped the series intuitively, or had the sensation of "that's easy" and then continued forward.[130] "Now I can go on" meant which of these thoughts? Given interchangeability of the thoughts, probably the words "meant" none of them. Perhaps the speaker felt only a feeling of relief. That hardly qualifies as a thought corresponding to the words.[131]

Moreover, sometimes thoughts turn out to be wrong. Suppose the student who said, "Now I can go on!" tries to, but then hesitates and cannot.[132] Her words remain meaningful, even though her thought was mistaken. Or consider the application of old words to new experience:

> I say "There is a chair." What if I go up to it, meaning to fetch it, and it suddenly disappears from sight? . . . But in a few moments we see it again and are able to touch it and so on. . . . But suppose that after a time it disappears again—or seems to disappear.[133]

This use of *chair* remains correct, though perhaps novel. Such uses of words occur in science fiction. Those who know the language understand them, and they would not say the use of such words was incorrect, though the supposedly referenced object no longer corresponds to anyone's original thoughts, and even though they would distinguish between a normal chair and the disappearing chair when the distinction was important.

Sometimes language users think one thing and say another. Thoughtless words mean *something*, even if not what is intended. Hearers may misunderstand the speaker but not the words that the speaker used. Sometimes language users divorce their language and thoughts intentionally. The actor may be thinking of dinner after the play, or his facial expressions as he says the lines. The lines have meaning, just no meaning corresponding to any thought harbored by their speaker. Or one may read aloud thoughtlessly,[134] or repeat lines from memory without thought. Or a computer might generate words that make sense to an actual person.[135] The case of

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[130] *Id.* ¶ 151.

[131] *Id.* ¶ 180.

[132] *Id.* ¶ 181.

[133] *Id.* ¶ 80.

[134] *See id.* ¶¶ 156-71.

[135] The ELIZA program, for instance, was intended to simulate a psychoanalyst, and rumor has it that some people engaged by the program thought for a while that they were communicating with a real person. *See* ELIZA—Wikipedia, http://en.wikipedia.org/wiki/ELIZA (last visited Oct. 4, 2008). To try it out, see Eliza, http://www-ai.ijs.si/eliza-cgi-bin/eliza_script (last visited Oct. 4, 2008). But whether you think you are speaking with a real person or not, ELIZA is often responsive in a seemingly conscious way and certainly produces questions that can be answered. The words are not all meaningless (though they eventually become so as one realizes there is no one there). Another example is the toy 20Q, a small ball

intentional deception is another example. In that case, the speaker may think one thing but say the opposite. The intention to deceive is not the meaning of the deceptive words. There are no thoughts corresponding to the words. The words are not symbols of any thoughts (or objects) in existence, but they have meaning.

Further, language users may think a thing as they say something and then afterwards forget what they thought, or not think of it again.[136] But their words continue with roughly the same meaning. Perhaps the language users could remember the thought if they tried, but perhaps their memory has changed.[137] When they have forgotten the thought that produced the words, the words still have meaning.[138] (Again, memory is unreliable as a criterion for meaning.) Or, language users die. The thoughts corresponding to words spoken by the dead have long since passed from our world, but their words continue with meaning—Genesis, Shakespeare, the Constitution.

In summary, thoughts and intentions are private and therefore unavailable to anyone else hearing the speaker and unreliable as a check on meaning. Thoughts and intentions also fail either to contain or to generate the meaning of the words we ordinarily use. And thinking, on the one hand, and speaking, writing, hearing, and reading, on the other, occur independently. For all of these reasons, the thoughts and intentions, whether of the speaker, writer, hearer, or reader, are not the meaning of the language they use and understand.

B. A Truer View: The Objective Meaning of Words, and How Perfect Verbal Expression Is Possible Without Reference or Voodoo

I find a much truer account of language and meaning in Wittgenstein. Wittgenstein's picture of the way language works describes more closely our experience as language users. His view also makes more sense theoretically, assumes less, and is more elegant.

Both the *PG&E* and *Soper* courts claimed that words do not have objective meaning: "A word . . . does [not] have an objective meaning, one true meaning. Accordingly, the meaning of a writing can only be found by interpretation."[139] "[T]o hold otherwise is to [treat] the word 'wife' . . . as 'something . . . objective, not subjective and personal.'"[140] This lack of objectivity necessarily follows from the

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with "yes" and "no" buttons and a screen. Words on the screen ask the toy's user to think of an object and then ask the user twenty questions about the object in conversational format. If the user plays the game, answering each question, the toy very often announces at the end the very item of which the user is thinking. *See* http://www.thinkgeek.com/interests/giftsunder20/6e15/ (last accessed Nov. 11, 2008).

[136]PI, *supra* note 81 ¶ 148.

[137]*Id.* ¶ 56.

[138]*Id.*

[139]Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968).

[140]*In re* Soper's Estate, 264 N.W. 427, 431 (Minn. 1935).

premise that words express thoughts. Only subjective meaning is possible on that premise (a depressing thought[141]). That view is wrong, as Part II showed.

The truth is less obvious (but more hopeful). Meaning is public, shared, and objective. Part II.A teaches us that meaning is not objective because language refers to the world, either the world itself or the world in our thoughts. Meaning is not reference at all, either to matter or mind. But words do have objective meaning,[142] or, put better, meaning is necessarily objective. Some people find objective meaning extremely difficult to understand in the absence of reference. They seem to want meaning to be forced on humanity by the world. Having become so used to imagining that the things they think they "are talking about" give their words meaning, the rejection of that standard throws them into a tailspin of doubt. They fear that nihilism is overtaking them. Others seem to want the meanings of words to be imposed on us a priori, or logically. All of these are disappointed.

But meaning is objective, nonetheless. Wittgenstein wrote, "the meaning of a word is its use in the language."[143] By this he meant consistent use; moreover, the consistency must be discernable. As I said before, Wittgenstein's method of discussing consistency was to talk of rules for use, or "grammatical rules." Meaning requires use according to rule.[144]

A few key texts on rule-following from the *Philosophical Investigations* were badly misconstrued early on for lawyers[145] but were later straightened out.[146] The rule concept is not that difficult. Unless there is discernable consistency in people's use of a word, no one could possibly know what a person using the word was doing. Hearers and readers would say, "I have no idea what he means," or "he's talking gibberish." This discernable consistency in practice is more or less what Wittgenstein meant by rule. He explains:

> It is not possible that there should have been only one occasion on which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so on.—To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).[147]

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[141]This view is not only wrong but also depressing. If no objectivity exists in the meaning of a word, then we do not understand one another. Language on that view is an extension of solipsism—a solipsism you could never really tell anyone existed. If that were true I would be writing only to find out what I thought, and you would be reading only to find out what you thought. We would speak at others but only to ourselves. What my law students say about me would be true: "He talks only to hear his own voice." Unfortunately, they would be speaking only to themselves.

[142]Oh, the irony of putting such a sentence in print.

[143]PI, *supra* note 81, ¶ 43.

[144]*Id.* ¶¶ 68, 84.

[145]The story of this misunderstanding is set down in Zapf & Moglen, *supra* note 95, at 485-98.

[146]*E.g.*, BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (Clarendon Press 1993); Hershovitz, *supra* note 95, at 619-30; Zapf & Moglin, *supra* note 95.

[147]PI, *supra* note 81, ¶ 199.

Wittgenstein also put this another way, noting that rules are not always followed: "Orders are sometimes not obeyed. But what would it be like if no orders were *ever* obeyed? The concept 'order' would have lost its purpose."[148] In other places he calls it a "regular" use.[149] There must be this discernable consistency, or we could not understand each other.[150]

We go about using language consistently without thinking about it, unreflectively. That point is worth repeating: We use language consistently without thinking about it. "When I obey a rule, I do not choose. I obey the rule *blindly*."[151] That is necessarily so. After all, if thought were required, as is often the case when lawyers do what lawyers call "applying a rule,"[152] or what scientists do when formulating one,[153] then the meaning of a word would not be its use but rather its rule, or the thoughts about the rule required in order to apply it. The rule we are talking about is merely consistency in use, not a guide to meaning or a justification for such use. It is not like a sign-post. It cannot be, because then we would need to know the meaning of the sign-post; we would require a separate, discernable consistency in the use of sign-posts. If the rule for using words or sign-posts

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[148] *Id.* ¶ 345.

[149] *Id.*; *see also id.* ¶¶ 206-08.

[150] For this reason also, "[t]he use of the word 'rule' and the use of the word 'same' are interwoven." *Id.* ¶ 225. Relatedly, Wittgenstein notes, "Would it make sense to say 'If he did something *different* every day we should not say he was obeying a rule?' That makes *no* sense." *Id.* ¶ 227.

[151] *Id.* ¶ 219.

[152] Lawyers and law-trained judges deliberate about a rule and its meaning when applying it. *See, e.g.*, Hershovitz, *supra* note 95, at 630-40; Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PENN. L. REV. 371, 396-412 (1992). In legal discourse, it is usually appropriate to give reasons, and failing to give them subjects one to criticism. *See, e.g.*, Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 KAN. L. REV. 325, 368-69 (2004) ("Usage simply is, without needing reasons. . . . Leaving the conclusion to faith, however, breaches the rule of law, which requires that judges give reasons for their decisions."). This deliberative activity probably falls outside of the scope of Wittgenstein's discussion, as others have noted. BIX, *supra* note 146, at 45-54; Dennis Patterson, *Wittgenstein on Understanding and Interpretation (Comments on the Work of Thomas Morawetz)*, 29 PHIL. INVESTIGATIONS 2 (2006) *available at* http://ssrn.com/abstract=877284; Hershovitz, *supra* note 95, at 633, 636-40; *see, e.g.*, Philip Bobbitt, *What It Means to Follow a Rule of Law*, RULES AND REASONING: ESSAYS IN HONOR OF FRED SCHAUER, 55, 55-60 (1999), *reprinted in* WITTGENSTEIN AND LAW, 1, 1-6 (Dennis Patterson, ed. 2004). On the other hand, reasons are not necessary for every legal decision. Insofar as no dichotomy between legal and everyday language is necessary to serve the law's purposes, the meaning of legal texts such as statutes and constitutions and quasi-legal texts such as wills and contracts also does not need to be supported with arguments. Moreover, lawyers themselves share a form of life that is more than every single proposition of law or application of law they might state. *See, e.g.*, Val D. Ricks, *Contract Law and Christian Conscience*, 2003 B.Y.U. L. REV. 993, 1026-30 (2003). So no attempt is (nor need be) made to justify every move in every legal discourse. Finally, lawyers can disagree as to when reasons are needed, as occurs in plain meaning cases.

[153] *See* Zapf & Moglen, *supra* note 95, at 503-05.

required another rule or sign-post, that would continue ad infinitum, and understanding would be impossible—postponed while we pursued an endless regression.[154] At some point, the guides, explanations, and signposts must stop.

For the same reason, a rule is not an interpretation. Like a sign-post, "any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning."[155] For we need a further rule to give us the meaning of the interpretation. Would this rule be still another interpretation? At some point, interpretation must stop.[156] But to follow a rule is not to make an interpretation. Instead, "there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying a rule' and 'going against it' in actual cases."[157] "And to *think* one is obeying a rule is not to obey a rule."[158] "The rule can only seem to me to produce all its consequences in advance if I draw them as a *matter of course*."[159]

Within these parameters, a rule is the consistency in our use of language, in our public practice of using a word in a certain way. "And hence also 'obeying a rule' is a practice," Wittgenstein writes.[160] "To understand a language means to be master of a technique."[161]

That is the explanation of meaning's objectivity. Why does it work? Why does it lead to words having meaning and to our understanding one another? The answer is that we users of language all use it roughly the same way. This is collective rule following. Another word for such collective rule following would be "agreement." As Wittgenstein wrote, "The word 'agreement' and the word 'rule' are *related* to one another, they are cousins. If I teach anyone the use of the one word, he learns the use of the other with it."[162] This is because a rule requires not just consistency in use over time but also consistency in use among those who know the language. "[L]anguage . . . is founded on convention."[163] The agreement in usage is what makes the rule a rule rather than a private, unchecked, dependent, movable thing. "Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it."[164]

Now please do not misunderstand. By saying that agreement makes a rule *a rule* I am not suggesting that anyone has control over this, or that it is done intentionally, or by any sort of conscious consensus whatever, or that a "community" is required.

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[154]PI, *supra* note 81, ¶ 87.

[155]*Id.* ¶ 198.

[156]*Id.*

[157]*Id.* ¶ 201.

[158]*Id.* ¶ 202.

[159]*Id.* ¶ 238.

[160]*Id.* ¶ 202.

[161]*Id.* ¶ 199.

[162]*Id.* ¶ 224.

[163]*Id.* ¶ 355.

[164]*Id.* ¶ 202.

It is done only collectively and publicly, but also almost entirely unconsciously, and importantly so, because it is not, and cannot be, dependent on anyone's (individual or collective) thoughts.[165] Again, the grammatical rules of our language are not interpretation, or a method of interpretation—only public consistency in practice. So long as agreement in behavior exists, no thought is necessary and no thought occurs. Wittgenstein was not talking about agreement in thought, opinion, or interpretation; again, meaning is independent of these. Rather, "[i]f language is to be a means of communication there must be agreement"[166] with respect to the language people use;[167] there must be agreement in their linguistic and related practices, in their "form of life."[168]

One could object that humans do not agree in their "form of life." After all, we disagree in our worldview, our religion, our politics, our tastes and thought processes, and so on. But this objection partially misunderstands the point of Wittgenstein's inclusion of the word *form* in "form of life." It is our language and language-related activities that matter. To the extent our *practices* related to our use of language truly differ, we may not understand each other when we use the language thus affected.[169] No one suggests that we understand one another's language omnisciently. But to the extent we understand one another at all, it is because some agreement in practice of language use and related action exists. It is agreement in our language and language-related practices that allows understanding. It is in those common behaviors that language has meaning. Wittgenstein illustrated this with an important thought experiment:

> Suppose you came as an explorer into an unknown country with a language quite strange to you. In what circumstances would you say that the people there gave orders, understood them, obeyed them, rebelled against them, and so on?
>
> *The common behavior of mankind is the system of reference by means of which we interpret an unknown language.*

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[165]So, as Bix notes, "[w]e do not determine whether [to say] a flower is red by first asking everyone around what they think the flower's colour is." BIX, *supra* note 146, at 41. And, as Zapf and Moglen assert, "it is unreflective and automatic." Zapf & Moglen, *supra* note 95, at 503.

[166]PI, *supra* note 81, ¶ 242.

[167]*Id.* ¶ 241 ("So you are saying that human agreement decides what is true and what is false?—It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.").

[168]*Id.* ¶ 23, 241. Various writers expand on "form of life." For example, Bix suggests "commonalities in our training and in our nature." BIX, *supra* note 146, at 44. He also adds "social contexts, cultures, [and] practices." *Id.* at 55. Wittgenstein did not elaborate much, though he did emphasize training. PI, *supra* note 81, ¶¶ 5, 6, 190; *see also* BIX, *supra* note 146, at 44.

[169]For instance, individuals within a trade may employ certain language quite differently than those outside the trade. As a result, "[t]he 'plain meaning' of a particular phrase might be quite different in a particular industry sub-community than it is in normal everyday speech." BIX, *supra* note 146, at 75.

> Let us imagine that the people in that country carried on the usual human activities and in the course of them employed, apparently, an articulate language. If we watch their behaviour we find it intelligible, it seems 'logical'. But when we try to learn their language we find it impossible to do so. For there is no regular connexion between what they say, the sounds they make, and their actions; but still these sounds are not superfluous, for if we gag one of the people, it has the same consequences as with us; without the sounds their actions fall into confusion—as I feel like putting it.
>
> Are we to say that these people have a language: orders, reports, and the rest?
>
> There is not enough regularity for us to call it "language."[170]

Here "regularity" means only commonality in our own behavior related to language use—the sounds we make, and our actions, and the connections our practice of language makes between them.

This is a fuzzy standard, perhaps. It is hard to say anything concrete about it. But that does not mean it does not work,[171] and its operation can be seen in detailed examples of everyday language use. We understand one another's words about as much as we have agreement in form of life. (It follows that as our form of life or our level of agreement in our form of life changes, the meaning of our words will change.) But "fuzzy" is perhaps not the right word. The standard is not quantitative, nor is it mechanistic. The meaningful use of language—resting as it does on our unspoken and largely unspeakable agreement in our technique for living, in our form of life inasmuch as it affects our language use—is "artifice" in the older sense of the word as craft or skill. One speaks something like a master musician plays.[172]

III. IMPLICATIONS FOR FINDING MEANING IN A CONTRACT

What ramifications does Wittgenstein's view of meaning have for *PG&E* and *Soper's Estate*? Summarily, on Wittgenstein's view, plain meaning is possible. This philosophy of language is consistent with the plain meaning rule. It is also consistent with the results in *PG&E* and *Soper*. In Wittgenstein's view of meaning, there is no

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[170]PI, *supra* note 81, ¶¶ 206-07 (emphasis added).

[171]*Id.* ¶ 88.

[172]Wittgenstein hints at this in PI, *supra* note 81, ¶¶ 341, 527, 529. Pianist Gabriela Montero talks of improvising as a native speaker might reflect on talking:

> Harmonies are like food . . . I can gobble them up. They speak to me in such a strong way. That's what I like about improvising most. I get such pleasure from them. Yet, I couldn't name any of the chords I've played. I have no knowledge of theory. This was partly on purpose. Analyzing doesn't really interest me, because theoretical knowledge is only a means to an end. The point is to make music. And I want to make music from an instinctive point of view. When I improvise, it's like what people call "taking dictation." It has to do with an opening that allows a creative element to come out. If I were to start thinking, it would obstruct the process.

Stuart Isacoff, *A Pianist Who Plays Around With the Classics*, WALL ST. J., June 7, 2006, at D10.

conflict between these two rules. The theory reconciles seemingly contrary authorities.

A. Impact on the Attack on the Plain Meaning Rule

The plain meaning rule requires that the judge look at the written contract itself. If the expression at issue in the contract is unambiguous, then the court looks nowhere else, the plain meaning rule provides. The rule presents no theoretical difficulties. Applying the plain meaning rule is clearly possible and not philosophically problematic. Because the grammar of an expression—the rules of its use that determine meaning—is public, is not dependent on reference, and has no connection to the thoughts of the parties to the contract, those thoughts need not be consulted. The judge can know how a word is used without consulting the parties. There *is* a context, of course. There always is a context in every use of language. There is nothing "acontextual" here. (Scholars, courts, and lawyers who claim the plain meaning rule finds "acontextual" meaning (such as Corbin?[173] and Farnsworth[174]) are employing a red herring; what they really want is a different context, one more consistent with their political preferences.[175]) The context of the

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[173]Corbin wrote:

> [A] long experience in the use of words . . . [has] demonstrated that the thoughts that they express or convey are variables, depending on verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.

Corbin, *supra* note 16, at 187. Traynor quoted this language in *PG&E*, 442 P.2d at 641-45. *See supra* text accompanying note 4. Corbin included this language in a long argument suggesting that judges should always hear extrinsic evidence of ambiguity. But no one suggests that any word has "one true meaning." That is the red herring. Corbin is also wrong about the thought-word connection—there is none related to the meaning of words. Corbin is also wrong about a word lacking an objective meaning. In the context of their common use, words do have objective meanings. This common use can occur even in a contract, as even Corbin elsewhere appears to admit. *See* Corbin, *supra* note 16. Incidentally, in the very case Corbin was examining when he wrote this language, he admitted that no ambiguity in the language existed, even after extrinsic evidence was cited. *Id.* at 187-88.

[174]Farnsworth wrote, in relation to the plain meaning rule and as an argument for taking extrinsic evidence, "[i]ndeed, it is questionable whether a word has a meaning at all when divorced from the circumstances in which it is used." FARNSWORTH, *supra* note 13, § 7.10. Farnsworth mistakenly thinks that the judge's use of the contractual language is not a use, as if the judge stood apart from the parties and looked down on them, as if omnisciently, from outside the universe, and only discerned the parties' use without making one of her own. But the adjudication is the use of the contractual language that is at issue for the plain meaning rule. That use also has circumstances, a context, so it is incorrect to claim that it does not. Furthermore, from the assertion that it does not, it is also incorrect to claim that the word can have no meaning in that very contextual activity.

[175]Nor is the plain meaning rule "abstract conceptualism," as some have said. It is not any kind of conceptualism. The use of language in plain meaning language practice is no more or less conceptual than any other language use. The judge is merely following the grammar of the contractual expression in the context of the adjudication. The rule-following may be more abstract because it involves consideration of fewer particulars, but it is no more "conceptual" than any other language use. "Conceptualism" appears to be primarily an epithet scholars use

plain meaning rule includes the contract itself,[176] whatever of the commercial context that can be discerned from the contract, the learning and background of the judge,[177] and the arguments that litigants offer regarding whether the language is clear. These are all part of the setting for the plain meaning language game. In this game, the parties (and their lawyers, if any, whether in drafting the contract or in arguing it) speak to the judge, and the judge replies in a ruling. Nothing in Wittgenstein's philosophy or in common sense forbids plain meaning here. The grammatical rules by which language has meaning, even plain meaning, can function in this setting, in this context. No extrinsic evidence is necessary for meaning to occur (and the judge's language skills and background are not extrinsic evidence, despite Corbin[178]).

In this practice, the language's plain meaning is not a subjective event. The meaning of the language is based on objective rules—conventional, unreflectively-practiced rules regarding the use of language—the same objective kinds of rules on which the meaning of nearly all language is based. These are the same kinds of rules that operate in whatever context language occurs, whether the more narrow context

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to scorn writers with whom they disagree; "you are not considering what I think you should," the person using the term seems to say, "and so your thinking is dry and arid and inconsiderate of the concerns of real people." *See* Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COM. L.J. 17, 21 (2006).

[176]On the contract as context, see Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 571 (1998):

> In legal disputes, the context is determined by the rules of evidence. The judge and jury look at all evidence relevant to the facts in dispute. Contractual disputes are unique because the parties can, in advance, specify the relevant context. This is important, because the parties know in advance that judges err, and can evaluate this risk in light of their contractual objectives and structure the contract in a way that minimizes this risk. The parol evidence rule can thus be understood as a device for allowing parties to choose the appropriate context.

[177]This setting includes the judges' legal learning and political predilections. *See also id.* at 572:

> But because the principles governing the implication of terms and the general interpretive principles are invariant with respect to the facts of contractual negotiation, parties should be able to take account of these principles when negotiating their contract and predicting judicial enforcement under [the plain meaning rule]. Because judges are appointed or elected from a homogenous group of people, and because their interpretive prejudices are revealed in their decisions and opinions, these prejudices should be relatively predictable at the time of contracting.

[178]Corbin's assertion that the judge's "linguistic experience and education" are extrinsic evidence is a mere shibboleth, an equivocating password which by using we indicate our discipleship to him. Corbin, *supra* note 16, at 189. The assertion improves nothing in the law. Extrinsic evidence is always necessary, Corbin says. Then he insists that the judge's experience and education are extrinsic evidence. Then he admits that the judges' knowledge may alone be sufficient to rule appropriately on the meaning of contractual language. *See supra* note 16. Thus, Corbin re-phrased the plain meaning rule so that he can say that extrinsic evidence is always necessary. But it is still the plain meaning rule. In fact, the judge's technique with language is not evidence because no one submits it. The point of the plain meaning rule, legally, is to avoid submissions of evidence. The rule succeeds precisely because the judge's facility with language is not submitted.

of the plain meaning rule or the broader context of the *PG&E/Soper* rule. There is no qualitative difference in the practice employed under either rule, from the standpoint of language theory. The judge has no control over these rules, nor do the parties. Here, Judge Hand's sentence is closer to the truth than Traynor's, if we are talking about language: The meaning of a "contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties."[179] Wittgenstein's language theory rests the plain meaning rule on firm philosophical ground. Plain meaning is possible. The plain meaning rule is not a legal fiction.

Some will continue to object that it is the parties, not the judge, who matter here. Surely the judge is trying to discern what the parties said. True enough, but the implication that, in order to see plain meaning, the judge must concern herself with the parties' subjective intention is false. Wittgenstein addressed this: "In a law-court, for instance, the question might be raised how someone meant a word. And this can be inferred from certain facts."[180] That is how the *Soper* court learned how Ira Soper, the deceased, meant "wife"—from the public facts.[181] A contract contains what parties plan for the future. Any talk about its meaning involves, explicitly or implicitly, a reconstruction of the parties' purposes. That is part of the judge's use of the language in the plain meaning game, and it occurs by means of the same public use and observable rules of grammar by which all meaningful use of language occurs. But still it is the judge's use of the contractual language that is relevant in the activity, under the plain meaning rule or any other rule. It is the judge's use that *PG&E* and *Soper* claimed was philosophically impossible. The judge's use of the language at issue will be meaningful or not. Whether the judge's use is meaningful depends on whether the judge follows the grammar of the expression, its rules for use in the context in which the use occurs, not on which context the judge chooses to use.

It is true that there is less context in the plain meaning setting than if the judge considered extrinsic evidence, but that is beside the point. More or different context might always change the meaning of words by altering the circumstances of the words' use. Under Wittgenstein's theory, the meaning of contractual language might be clear within the four corners of the document but ambiguous or different outside of that context or when more context is added. In different circumstances, different rules for the use of the word would then apply, and the meaning would change. But the possibility of altering the meaning or rendering it ambiguous by adding more facts—in effect, changing the context—does not mean that the words are not plain and clear in their present context. Nor does anything in this language theory require that, for meaning to be plain or to exist at all, one must seek as much context as possible, or seek one context as opposed to another.[182] So while, at the same time,

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[179]Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (D.C. N.Y. 1911).

[180]PI, *supra* note 81, ¶ 214.

[181]*See supra* Part II.A.1.

[182]A number of commentators cite Wittgenstein to support the notion that more context is always a good thing, or that one context is better than another. Usually this takes the form of recommending that a certain group be entrusted to define a legal word, or suggesting that certain usages be looked to as a method of generating the legal meaning of a word. *See generally* David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 S.M.U. L. REV. 617, 634-43 (2001) (defending reliance on custom

the addition of more or other facts may change the otherwise plain meaning of a contract, the judge can, so far as theory is concerned, discern the plain, objective meaning of a contractual term within the limited context of the four corners of a contract.[183] Again, plain meaning is possible. The plain meaning rule is not a fiction.

(Warning: If you read the following two paragraphs, you will read an argument that favors retaining the plain meaning rule. Up to now I have been talking only facts, but there is a (slight) political commitment in these paragraphs.)

I suspect that most critics of the plain meaning rule, if forced publicly to answer the question about actual language in contracts, would have to admit the plain meaning rule might sometimes actually be appropriate, because *sometimes some* meaning in a contract will be plain. One has to stop taking evidence at some point, and sometimes the right time to stop taking evidence is before one begins. The only way to disprove this point is to show that every language use in every contract is always debated. But, of course, it is not. Does anyone debate the meaning of every word in a contract—every *the*? Every *and* and *but*? Every party's name? Every

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and conduct as part of a contract); Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1 (2000) (recommending that the artisans' context as opposed to the judges' be privileged); Craig Allen Nard, *Legitimacy and the Useful Arts*, 10 HARV. J.L. & TECH. 515 (1997) (recommending that judges defer to industry practice in interpreting claim language); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989) (suggesting that merchants rather than judges or juries should best decide the meaning of good faith in then UCC § 1-208); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984) (constructing a definitional mechanism that extrapolates new usages by taking into account all usages and privileging some of these).

I do not suggest that any of these proposals would make bad law. But they are mistaken readings of Wittgenstein. Nothing in Wittgenstein's philosophy specifies a normative method of developing new uses, or changing established uses, or privileging established uses. Wittgenstein only explained why words have meaning. He said nothing regarding whether one meaning was superior to another, normatively or otherwise: "Philosophy may in no way interfere with the actual use of language; it can in the end only describe it." PI, *supra* note 81, ¶ 124. On this point, the thrust is correct of Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801 (2005). *See, e.g.*, *id.* at n.174 ("'[T]he task of philosophy is not to create a new, ideal language, but to clarify the use of our language, the existing language. Its aim is to remove particular misunderstandings; not to produce a real understanding for the first time.'") (quoting WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 115 (Rush Rhees ed., Anthony Kenny trans. 1974)). In other words, despite Professor Snyder's modest disclaimer that "I seek to tap his work, but only to the extent it might help a lawyer, a judge, or 'a reasonable law professor,'" Snyder, *supra*, at 637 n.138, Wittgenstein offers not much help to the lawyer, the judge, or the law professor, and no help at all in developing, changing, or privileging ways of determining the meaning of words.

[183]Of course, in any given case, the term may not be clear. Dan L. Burk & Mark A. Lemley, *Quantum Patent Mechanics*, 9 LEWIS & CLARK L. REV. 29, 30 (2005), argue that patent claims are never clear (and hence, "there may simply be no such thing" as plain meaning). The absolutism of their claim smacks of hyperbole. I thank them for saying "may . . . be." But surely sometimes some parts of a claim are clear. Not everything is litigated, and surely some parts are litigated frivolously. On the other hand, patent claims are written about novel developments, and the degree of uncertainty is surely greater in such documents than in those reflecting more established practices.

"hereinafter"? Every dollar amount? Every product designation? I am not asserting (as only a fool would) that any of these words (or any words in a contract) are always plain. They are not. But (again) to prove that the plain meaning rule serves no valid purpose one would have to prove that no words in any contract ever have a plain meaning. Perhaps in some philosopher's fantasy world one could imagine such a thing. But in our world, including our legal world, that is silly and, besides (and because), if it were true I could not even understand the proposition asserting it. Contract language is not non-language. One can always start with some givens from some language in a contract because some language is clear. There is no need to argue over every meaning of every word in a contract, nor do plausible arguments exist to dispute every meaning in a contract. Perhaps the plain meaning rule is necessary only to justify disposing of idiotic arguments, but those do arise. Lawyers often decide not to make them because they violate plain meaning. And sometimes no relevant extrinsic evidence exists. Forbidding reliance on existing plain meaning in such a case would make the judge unable to decide the case on its true merits. If we did not have an articulated plain meaning rule, we would need one.

Moreover, whether the parties and their lawyers like it or not, the judge is one audience of a written contract. That is an inevitable consequence of putting a contract in writing. For most written contracts, especially if they are not form contracts but often even if they are, the judge is the proper audience. Most contracts are written by legal professionals for legal professionals, and the plain meaning rule has such contracts in mind. Such contracts are written for the judge, or for other lawyers when contemplating what a judge would do. Putting a deal in writing is wise to avoid disputes, but only if it has that effect. It will have that effect only if the judge can say what the writing means.[184] Thus, ex ante, lawyers should write to current usage. Writing against current usage is betting that the fact finder will believe the improbable. That is always a dumb idea, one the plain meaning rule properly discourages. Courts, who generally do not live in a fantasy world, know this, and that is why they retain the plain meaning rule in some form whether they use it often or not.

B. Impact on the PG&E *and* Soper *Rules*

If the plain meaning rule is well-grounded in a sound theory of language and meaning, what about *PG&E* and *Soper*'s legal rule, copied from Corbin, requiring a judge to look at extrinsic evidence first, if it is offered, before deciding whether the meaning of language in a contract is plain? Substantial legal authority exists for the *PG&E* rule, especially on facts such as *Soper*'s.

Some change in the grounding of the *PG&E* rule is necessary. In fact, the *PG&E* rule is theoretically illegitimate as *PG&E* and *Soper* justify it. No language *always requires* interpretation. Yet this is more or less what Traynor concludes: "[T]he

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[184] *See, e.g.*, NOLO, http://www.nolo.com/article.cfm/ObjectID/57831C55-CB6C-4B3A-8840EB2FB8FC911E/catID/0D973BC0-3287-4CA1-4DC75DE82DC59F/111/159/106/ART/ (last visited Oct. 15, 2008) (justifying a written agreement as a way to avoid a "he said v. she said" dispute in court); Contract Basics, http://www.lectlaw.com/files/bul03.htm (last visited Oct. 15, 2008); Importance of Written Business Contracts: Laws and Negotiations, http://www.morebusiness.com/the-importance-of-written-business-contracts (last visited Oct. 15, 2008) ("Written contracts are also much easier to enforce should you end up in court.").

meaning of a writing . . . can only be found by interpretation."[185] This is wrong, as a general statement. In order for language to function at all, there must be a way of grasping its meaning which is not interpretation. Traynor also reasoned that an inquiry into the thoughts of the speaker or writer was necessary because a word meant those thoughts. But a word does not mean a thought, as Part II showed and as Traynor in the end admitted.[186] So the *PG&E/Soper* rule will need a new ground. At the least, it cannot be supported by Justice Traynor's armchair language philosophy.

But Wittgenstein's view of meaning allows a role for the *PG&E* rule. A look at extrinsic evidence or some interpretation is not required in every case by language or by any sound theory of meaning. But even in ordinary usage, the meaning of a word is always open to challenge. Language use is craft or skill, a practice or regular activity, and meaning arises through and because of our conventional, consistent uses of words. Disagreements about the meaning of a word are not resolved simply because someone sees the meaning as plain, even when the meaning really is plain. Nothing in Wittgenstein's theory directs a judge *not* to consider an argument that the meaning is not plain. And evidence submitted under *PG&E* may well suffice as an alternative explanation of some different, non-obvious meaning of the contractual language at issue. In short, Wittgenstein's theory of meaning is consistent with allowing the parties to make arguments that the meaning is not plain, even though the evidence they might submit is not required for the words to have meaning, and even though the meaning might be plain without the extrinsic evidence. The theory is agnostic as to whether the *PG&E* or plain meaning rule is adopted.

C. Away from Philosophy, Back to Law

As long as making *PG&E* evidentiary arguments is consistent with the theory of language that supports both *PG&E*'s evidentiary rule and also the plain meaning rule, courts can choose the appropriate rule based on the legal reasoning and on political policies they prefer. As Zapf and Moglen write, "legal rules, unlike linguistic ones, cannot be 'blindly obeyed.'"[187] Some courts may see the plain meaning rule as supporting consistency in business practices, efficacious in giving parties an incentive to memorialize their agreements in a form that is meaningful in a legal forum, and that lowers potential litigation costs.[188] I am sympathetic to this policy. The plain meaning rule is useful in reminding parties that a contract is written, primarily and most importantly, to the decision-maker. The written contract's purpose is to avoid disputes later on. That will only occur if the contract actually does resolve disputes, and that beneficial result is only possible if the judge can understand the contract without taking evidence on everything the parties did not bother to write. The parties, after all, create the contract, which is the closest context of the contractual language at issue. Had they wished a different context, or different language, they could have written either.

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[185]Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1968).

[186]*See supra* Part II.A.1.

[187]Zapf & Moglen, *supra* note 95, at 519.

[188]Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568-84 (2003).

Some other courts might see the plain meaning rule resulting from "(1) the fear of perjured testimony and faded memories; (2) distrust of juries, who, it is feared, will be improperly swayed by unreliable parol evidence in contradiction to the agreed upon text; and (3) the need to insulate writings protected by the statute of frauds from oral testimony, which is not so protected."[189] Such policies would also support the plain meaning rule.

On the other hand, courts might theorize that contract is about autonomy, and one way of promoting autonomy is to spend more time and money trying to discern the intention of the parties. A focus solely on the intention of the parties (this is subjective intention that matters; autonomy is concerned with what the parties actually want) would as a matter of legal reasoning and public policy—though *not* of language or language philosophy!—lead one to the *PG&E-Soper* rule, or at least to less concern for the document the parties' produced. If that is the law's focus, then the law should look at the plain meaning rule as a cramped and truncated process, needing enlargement if possible (that was probably Corbin's view[190]). But the law (and its commentators) should be perfectly clear on this point: If the law is seeking the intentions of the parties, it has departed from, and is no longer concerned with, the meaning of words in the contract. It is not seeking meaning of words at all, which is objective and public and not controlled by what the parties intended. Instead, the law is seeking subjective intention, and this may or may not be revealed in the contractual language. In fact, the written word may have no relation to it.[191] So if the law is focused on the intention of the parties, the law has no need to claim that plain meaning is impossible. That claim is irrelevant. Moreover, it is wrong. Continued insistence on that claim only makes the law look "sophomoric."[192]

A focus solely on economic (as opposed to judicial) efficiency might lead one to prefer the intention of the parties as well, though whether the goal of efficiency leads toward or away from plain meaning is debatable.[193] Whether the potential gain from identifying the intention of the parties through the cumbersome process of producing

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[189] Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 223 (1998).

[190] Corbin wrote, "[t]he cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties. The criticized [plain meaning] rule, if actually applied, excludes proof of their actual intention." Corbin, *supra* note 16, at 162. But, of course, if Corbin was merely focusing on the intention of the parties as a matter of legal policy, then he had nothing to say about the possibility of plain meaning as a factual or philosophical matter. Other commentators than Corbin actually seem to believe Traynor's hypothesizing. *E.g.*, Kniffin, *supra* note 15, at 651-53. In fairness, Kniffin also admits that the objective limitation of "reasonable susceptibility" should stop the judge from trying to see into the parties' minds, but on her own reasoning this limitation reflects only "virtual reality." *Id.*

[191] Contractual interpretation may raise so many legal difficulties because the meaning of the words in the contract is not the thoughts or intents of the parties, but enacting the parties' subjective intent is what the law of contract seeks.

[192] David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1566 (1997) ("But of course it is also sophomoric to maintain that there is never any such thing as a plain meaning accessible to speakers of the language.").

[193] *See, e.g.*, Schwartz & Scott, *supra* note 188.

and examining *PG&E/Soper*-style evidence outweighs the heavy costs of the judicial proceedings over time is an interesting question,[194] especially considering the near certainty that the judicial process in the end will not choose anything much like the initial intention of the parties at the time they entered the contract. Unlike many who champion the *PG&E* rule, or even broader approaches, I have no fantasy that judges have, on *any* evidence, the kind of omniscience necessary actually to discern the parties' subjective intentions formed at best months, and usually years, ago in circumstances that can not possibly be recreated or even imagined with any degree of accuracy.[195]

A court might also decide that, regardless of intent, the court will impose a just result.[196] That may take into account plain meaning, but it may not. In any event, it seems fair to let the party challenging the otherwise plain meaning of the contractual language proffer evidence, a proffer that often takes place in briefs submitted against the application of the plain meaning rule itself. Extending fairness to require the judge to hear the evidence is not a much greater stretch (philosophically, though it will involve a great deal more judicial resources). I am less concerned with the policies supporting the *PG&E/Soper* rule than in showing that its application, like the plain meaning rule's, is not a legal fiction. Philosophically, either rule is possible. Which one chooses is a political and legal choice, not a philosophical mandate.

Thus, *Soper*, too, is supported by Wittgenstein. In *Soper's Estate*, policies supporting the court's decision do not offend language theory, nor does the court's result. The contract was drafted by Oliver Aas for Karstens, Soper, and the trust company. Three of those four parties correctly employed the rules for a non-spouse's use of *wife* to treat Whitby as Soper's wife under the contract. These were the parties who drafted and executed the contract. Soper played a minimal role in the use of the word *wife* except to deceive the other parties as to Whitby's status and to fail to object to the final language, thus perpetuating the deceit. Plainly, *wife* by deceit meant Whitby. That was its plain meaning in context to three of the four parties. To them, there was no ambiguity. As for Soper, who knew the truth, the meaning of *wife* was incorrect, yet it was clearly what he intended. There is no harm to language done by this case, rationalized in this fashion. It is merely a case of meaning established by the practice of deceit, which justifies an extra look outside

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[194]*See, e.g.*, Posner, *supra* note 176.

[195]On this issue, I am in substantial agreement with Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99 (2005). When Linzer calls plain meaning a "fantasy of certainty," his hyperbole only demonstrates the absurdity of his claim that judges rejecting plain meaning instead inhabit a "world of reality." Linzer, *supra* note 15, at 839. Linzer's fantasy—that he's really getting at the truth now—is simply easier to defend as a method of promoting party autonomy, at least without taking into account the potential that parties might actually want their contract to cut down on litigation (the parties did, after all, mean something by writing it down, or by paying lawyers to write it down).

[196]*See, e.g.*, Prince, *supra* note 9, at 557; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997); Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991).

the contract if a court believes that is the right approach as a matter of legal or social policy.

But the extra look is not *required* to find the meaning of *wife*. Nothing in language theory or in a proper understanding of language and meaning requires the look outside the contract. *Wife* has a plain meaning even if only extrinsic evidence shows that Mrs. Soper is Soper's wife. Justice Olsen, in dissent, was also correct in terms of the language at issue. "A man can have only one wife."[197] That is what I want my students to see. The plain meaning may stand all by itself within the context of the four corners of the contract. As a matter of language and philosophy, neither legal rule is favored. Both are correct. So the cases should be resolved not on language theory but on legal or political policy.[198]

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[197] *In re* Soper's Estate, 264 N.W. 427, 433 (Minn. 1935) (Olsen, J., dissenting).

[198] Judges should refrain from arm-chair philosophizing about language and stick to arm-chair philosophizing about public policy. They are almost certainly wrong in the former, and cannot be proved wrong in the latter. Or, as Bix puts it, "language has, for the most part, been a false focus of legal theory. Language and theories of language have been used as an excuse for decisions that are more properly attributable to political—or at least policy—decisions about how we want the various institutions in our legal system to interact." BIX, *supra* note 146, at 178.

APPENDIX I

Plaintiff's Exhibit F

DOUBT COAL MAN, MISSING, CARRIED OUT DEATH NOTE

Family and Employer of Ira C. Soper Know of No Suicide Reason.

The accounts of Ira C. Soper, 39 years old, who left a note in an automobile parked at Thirteenth Street and the canal Monday night intimating suicide with the Black Diamond Coal Mining Company of Drakesboro, Ky., which he represented here as resident manager of the Southwestern Fuel Company, 412 Starks Building, were in perfect order and the Black Diamond company knows of nothing

IRA C. SOPER.

that might have caused Mr. Soper to desire his own death, W. W. Bridges, president of the company, declared this morning.

Mr. Soper and Mr. Bridges were in conference together at Dawson Springs last Friday, Mr. Bridges said, and at that time the local manager seemed in excellent spirits. The Black Diamond company received

(Concluded On Fifth Page.)

DOUBT COAL MAN, MISSING, CARRIED OUT DEATH NOTE

(Continued From First Page.)

three letters from him on Saturday, and in none of them was there anything that indicated Mr. Soper was contemplating suicide.

Mr. Bridges planned to leave Drakesboro this morning for Louisville and to arrive here at 6 o'clock tonight.

The automobile in which the note intimating suicide was left was found by Frank Hatfield, 339 Fourteenth Street. It was attached to Soper's business card and read: "This belongs to Mrs. Soper."

Had Been Drinking.

Mrs Soper, who lived with her husband at 820 South Fourth Street, is confined to her bed today. Her husband mailed her a note from the Pennsylvania railroad station last night which read: "Dumplins—Hate to do it, but noodle is wrong. Be good. God knows I love you. Sope." With the note was mailed a photograph.

Mrs. Soper went to her husband's office last night to accompany him home. She had felt uneasy about him all day, she told police. "Whenever he left suddenly on a business trip he always notified me," she said. "He had been drinking heavily and I had been worried about him. Eighteen months ago he left hurriedly and went to St. Louis without saying anything, but he left no note like this anywhere."

Captain Ford and Lieutenant Cundiff of the police, who are investigating the case, decided this morning not to drag the river. They are of the opinion that it would be useless, as they do not know where Soper jumped in, if he jumped at all, and think that if he really drowned himself the only chance of his body being recovered is if it washes up. They believe that the car was left by the river after nightfall last night.

Mr. Soper has three stepdaughters, Mrs. Catherine Callahan, 1128 South Third Street; Mrs. Almetia Litsey, 623 South Fourth Street, and Mrs. Mary Bergen, 708 East Broadway.

Mr. Bridges of the Black Diamond Company said that he did not believe Soper was a drinking man—"that is, beyond the point of taking a drink occasionally."

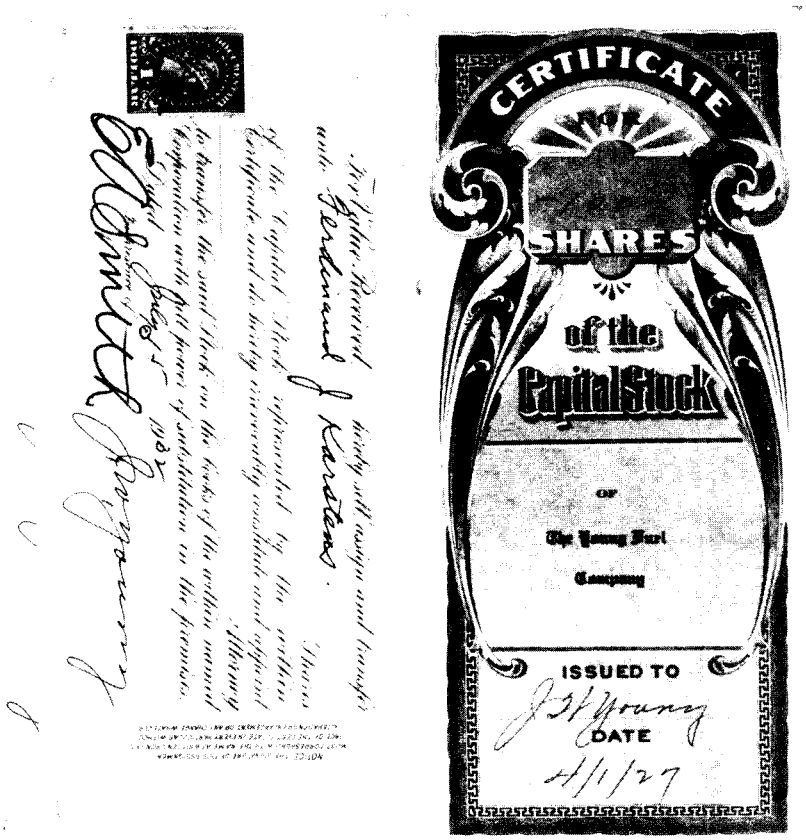
FROM:-
THE LOUISVILLE TIMES
LOUISVILLE, KY.
AUGUST 23rd, 1921.

APPENDIX II

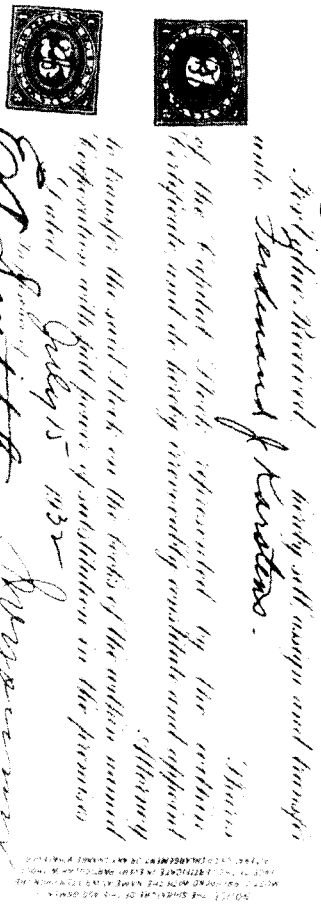
HAVE YOU SEEN HIM?

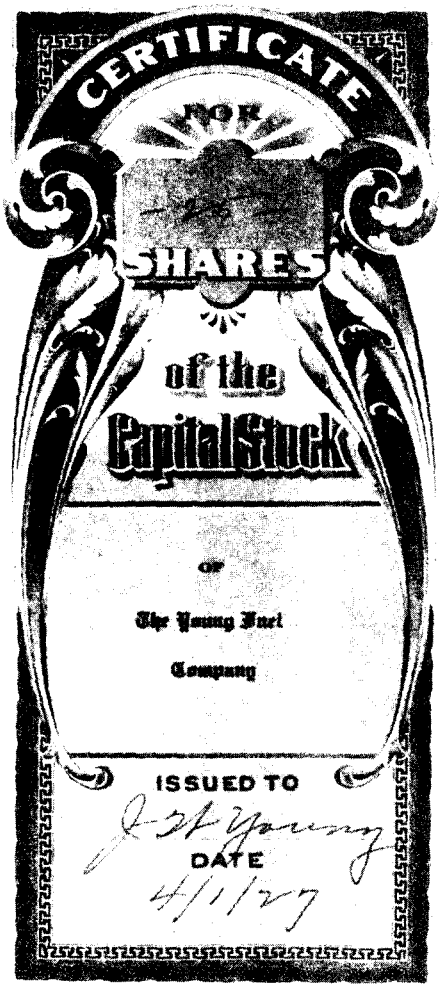
Jno Soner, aged forty years, left home August 22, 1921, and has not been heard from since. He is a member of Little Rock Lodge No. 246, of Little Rock, Ky. At the time of his disappearance, he wore a blue suit made by Yates & Langley, Starks Bldg, Louisville, straw hat, had solid gold watch with Hinks' ingraved [sic] on it, had a crossed head-glass on left eye, wore tortoise shell glasses with gold and shell ear pieces; has dark brown wavy hair; very dark complexioned with beautiful soft hands; had celluloid fob with "S" brilliant stone on it, attached to piece of plain leather; wore light blue shirt and black string tie; had gold cuff buttons with "S" engraved on them, and small diamond stud; tan oxfords with rubber heels. If found, notify Mrs. J. C. Soner, 708 W. Broadway. Home Phone City 1653 J, at my expense.

APPENDIX III

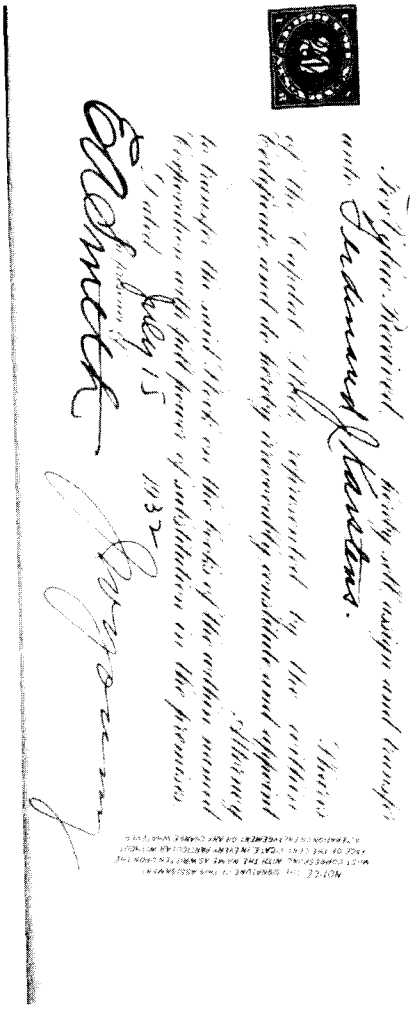


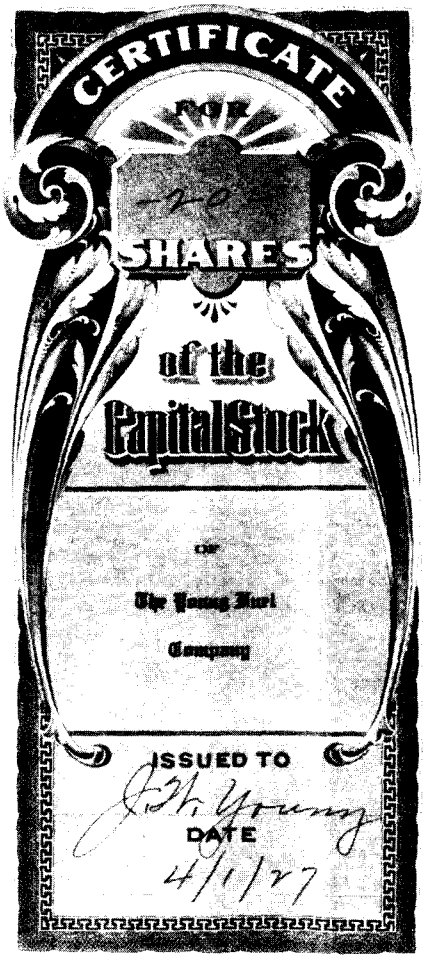

Defendant's Exhibit 3
NO.
Shares
THE YOUNG FUEL COMPANY
THIS CERTIFIES THAT
is the owner of
Shares of the Capital Stock of
The Young Fuel Company, of the par value of Twenty-five Dollars ($25) each,
transferable only on the books of this Corporation in person or by Attorney
upon surrender of this Certificate properly endorsed.
IN WITNESS WHEREOF the said Corporation has caused this Certificate to be signed
by its duly authorized officers and its Corporate Seal to be hereunto affixed
at Minneapolis, Minn. this day of A.D. 192
CHARTER 1925

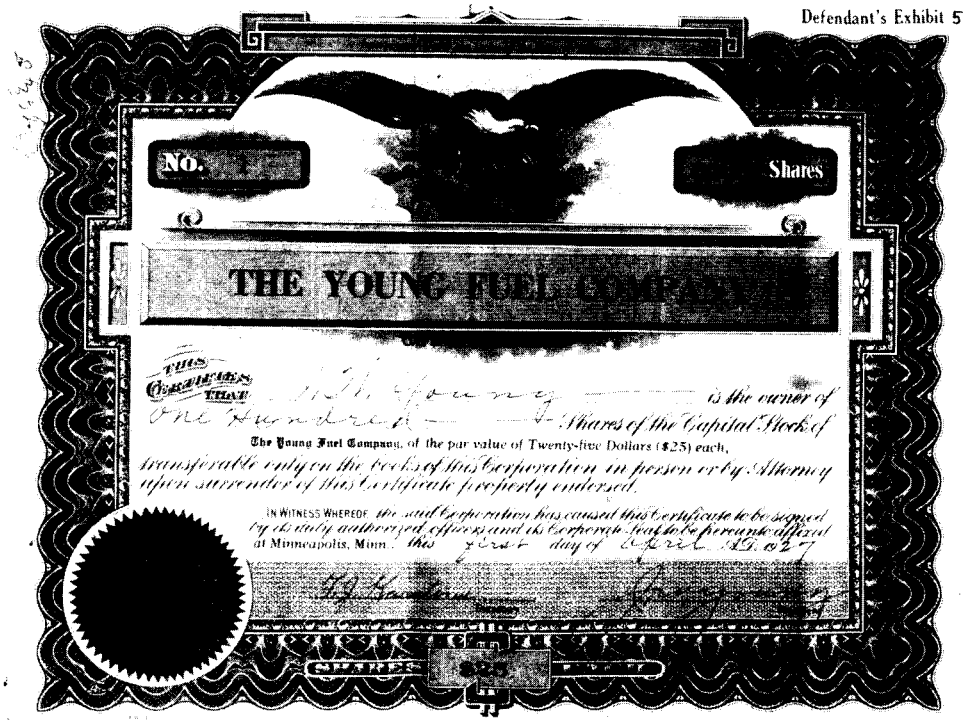



CERTIFICATE
FOR
SHARES
of the
Capital Stock
OF
The Young Fuel
Company
ISSUED TO
DATE
4/1/27

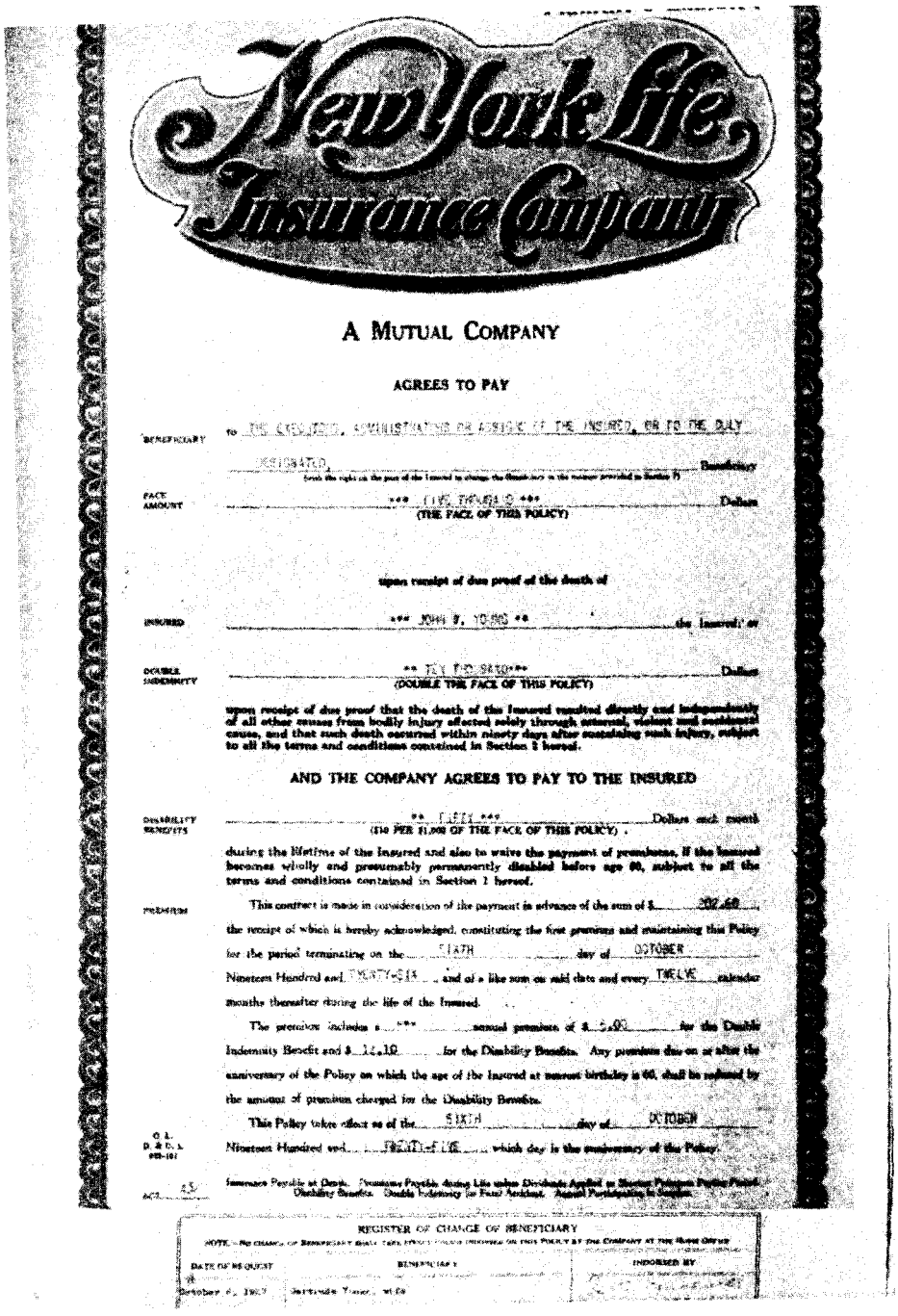

Defendant's Exhibit 4
NO.
Shares
THE YOUNG FUEL COMPANY
This Certifies That
is the owner of
Shares of the Capital Stock of
The Young Fuel Company, of the par value of Twenty-five Dollars ($25) each,
transferable only on the books of this Corporation in person or by Attorney
upon surrender of this Certificate properly endorsed.
IN WITNESS WHEREOF the said Corporation has caused this Certificate to be signed
by its duly authorized officers and its Corporate Seal to be hereunto affixed
at Minneapolis, Minn. this
day of
A. D. 19
$25




CERTIFICATE
FOR
SHARES
of the
Capital Stock
OF
The Young Rivet
Company
ISSUED TO
J. H. Young
DATE
4/1/27


Defendant's Exhibit 5
NO.
Shares
THE YOUNG FUEL COMPANY
THIS CERTIFIES THAT
is the owner of
Shares of the Capital Stock of
The Young Fuel Company, of the par value of Twenty-five Dollars ($25) each,
transferable only on the books of this corporation in person or by Attorney
upon surrender of this Certificate properly endorsed.
IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed
by its duly authorized officers and its corporate seal to be hereunto affixed
at Minneapolis, Minn. this day of A.D. 1927

APPENDIX IV



New York Life Insurance Company

A MUTUAL COMPANY

AGREES TO PAY

BENEFICIARY to THE EXECUTOR, ADMINISTRATOR OR ASSIGNS OF THE INSURED, OR TO THE DULY
ASSIGNATED
(Subject to the right on the part of the Insured to change the Beneficiary in the manner provided in Section 3) Beneficiary

FACE AMOUNT *** FIVE THOUSAND *** Dollars
(THE FACE OF THIS POLICY)

upon receipt of due proof of the death of

INSURED *** JOHN F. DOE *** the Insured; or

DOUBLE INDEMNITY ** TEN THOUSAND ** Dollars
(DOUBLE THE FACE OF THIS POLICY)

upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and that such death occurred within ninety days after sustaining such injury, subject to all the terms and conditions contained in Section 2 hereof.

AND THE COMPANY AGREES TO PAY TO THE INSURED

DISABILITY BENEFITS ** FIFTY *** Dollars each month
($10 PER $1,000 OF THE FACE OF THIS POLICY),

during the lifetime of the Insured and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 2 hereof.

PREMIUMS This contract is made in consideration of the payment in advance of the sum of $ 202.60, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the SIXTH day of OCTOBER Nineteen Hundred and TWENTY-SIX, and of a like sum on said date and every TWELVE calendar months thereafter during the life of the Insured.

The premium includes a *** annual premium of $ 5.00 for the Double Indemnity Benefit and $ 14.10 for the Disability Benefits. Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is 60, shall be reduced by the amount of premium charged for the Disability Benefits.

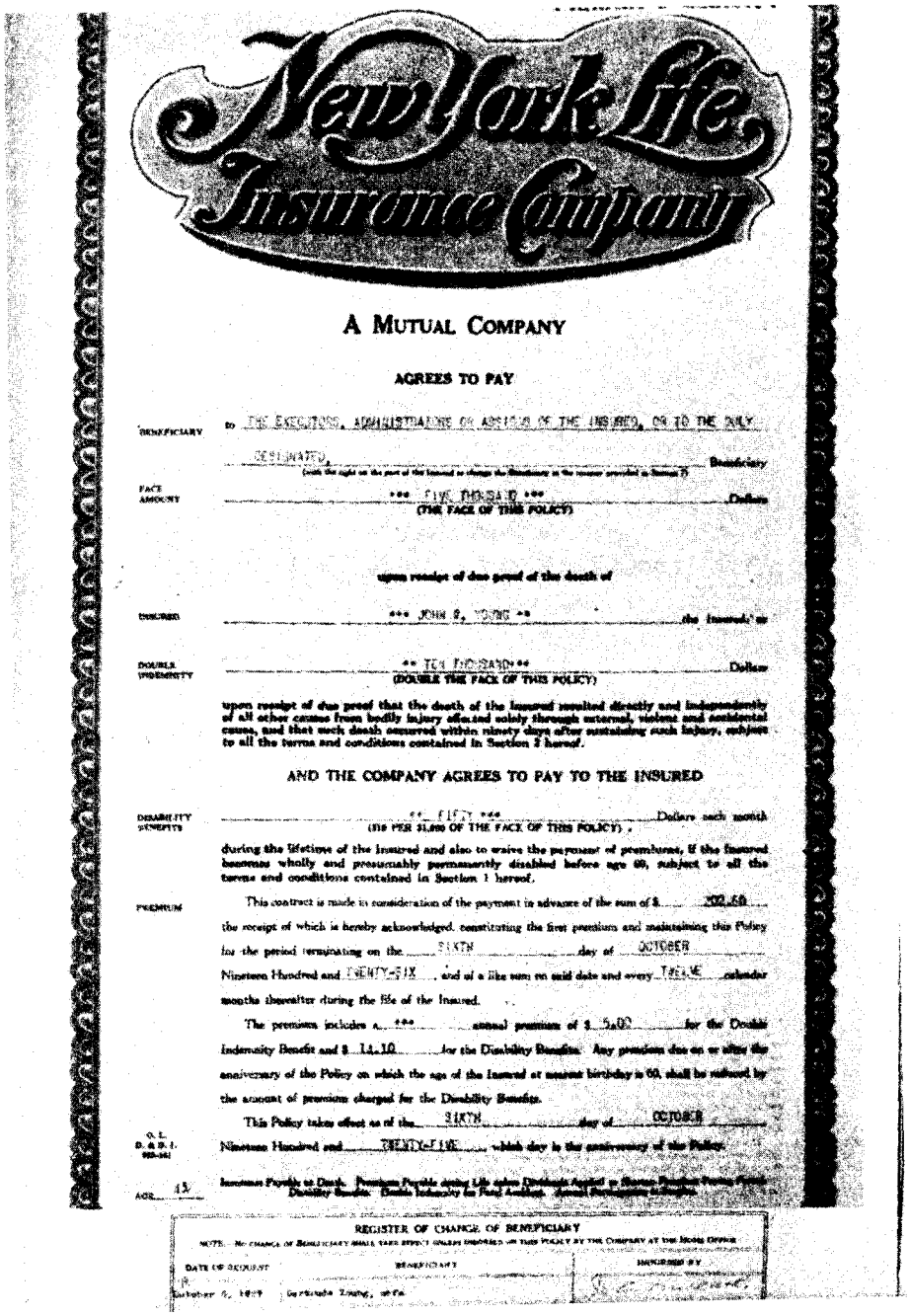
This Policy takes effect as of the SIXTH day of OCTOBER
G.L. D. & D.L. 9B-101 Nineteen Hundred and TWENTY-FIVE, which day is the anniversary of the Policy.

ACC. 45 Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

REGISTER OF CHANGE OF BENEFICIARY

NOTE—No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office.

DATE OF REQUEST	BENEFICIARY	INDORSED BY
October 6, 1925	Gertrude Doe, wife	



New York Life Insurance Company

A MUTUAL COMPANY

AGREES TO PAY

BENEFICIARY — TO THE EXECUTORS, ADMINISTRATORS OR ASSIGNS OF THE INSURED, OR TO THE ONLY BENEFICIARY DESIGNATED, Beneficiary
(Subject to the right on the part of the Insured to change the Beneficiary as the manner provided in Section 7)

FACE AMOUNT — *** FIVE THOUSAND *** Dollars
(THE FACE OF THIS POLICY)

upon receipt of due proof of the death of

INSURED — *** JOHN E. YOUNG *** the Insured, as

DOUBLE INDEMNITY — ** TEN THOUSAND ** Dollars
(DOUBLE THE FACE OF THIS POLICY)

upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and that such death occurred within ninety days after sustaining such injury, subject to all the terms and conditions contained in Section 3 hereof.

AND THE COMPANY AGREES TO PAY TO THE INSURED

DISABILITY BENEFITS — ** FIFTY *** Dollars each month
(1% PER $1,000 OF THE FACE OF THIS POLICY),

during the lifetime of the Insured and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.

PREMIUM — This contract is made in consideration of the payment in advance of the sum of $ 202.50 the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the SIXTH day of OCTOBER Nineteen Hundred and TWENTY-SIX, and of a like sum on said date and every TWELVE calendar months thereafter during the life of the Insured.

The premium includes a *** annual premium of $ 5a00 for the Double Indemnity Benefit and $ 14.10 for the Disability Benefits. Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is 60, shall be reduced by the amount of premium charged for the Disability Benefits.

This Policy takes effect as of the SIXTH day of OCTOBER Nineteen Hundred and TWENTY-FIVE, which day is the anniversary of the Policy.

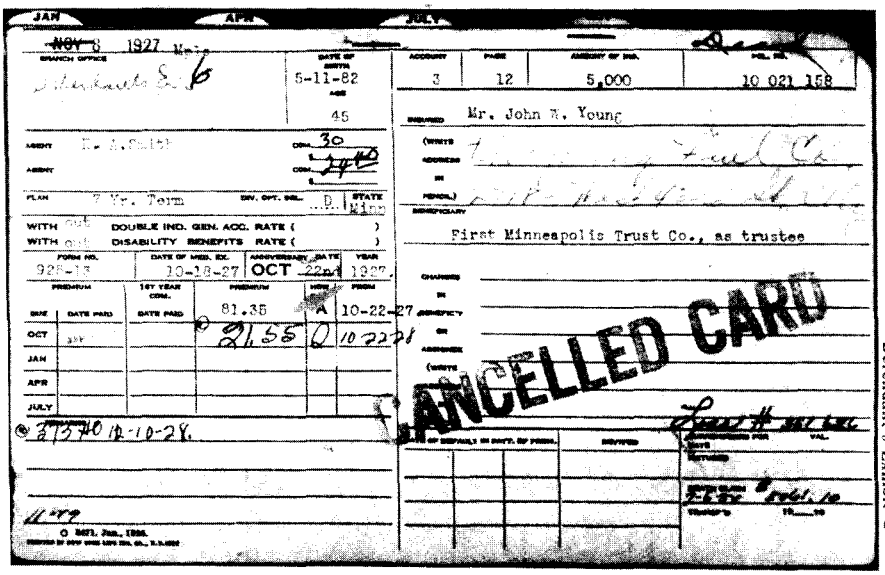
O. L. D. & D. I. 000-041

AGE 43 Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Dividends Participating.

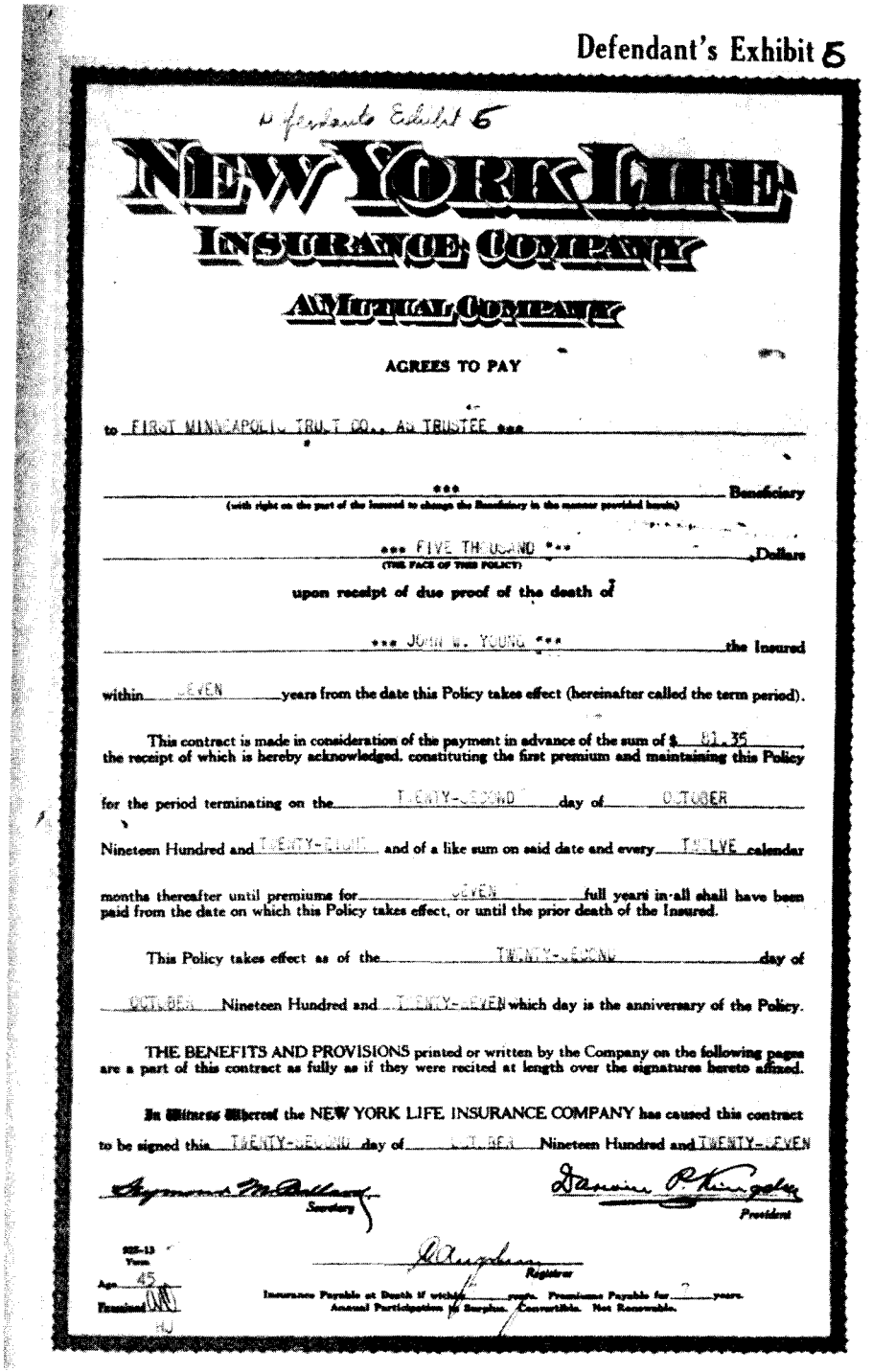
REGISTER OF CHANGE OF BENEFICIARY

NOTE.—No change of Beneficiary shall take effect unless recorded on this Policy by the Company at the Home Office.

DATE OF REQUEST	BENEFICIARY	INSURED BY
October 6, 1927	Gertrude Young, wife	



Defendant's Exhibit 5



Defendant's Exhibit 5

Defendants Exhibit 5

NEW YORK LIFE
INSURANCE COMPANY
A MUTUAL COMPANY

AGREES TO PAY

to FIRST MINNEAPOLIS TRUST CO., AS TRUSTEE ***

*** Beneficiary
(with right on the part of the Insured to change the Beneficiary in the manner provided herein)

*** FIVE THOUSAND *** Dollars
(THE FACE OF THIS POLICY)

upon receipt of due proof of the death of

*** JOHN W. YOUNG *** the Insured

within SEVEN years from the date this Policy takes effect (hereinafter called the term period).

This contract is made in consideration of the payment in advance of the sum of $ 61.35 the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy

for the period terminating on the TWENTY-SECOND day of OCTOBER

Nineteen Hundred and TWENTY-EIGHT and of a like sum on said date and every TWELVE calendar

months thereafter until premiums for SEVEN full years in all shall have been paid from the date on which this Policy takes effect, or until the prior death of the Insured.

This Policy takes effect as of the TWENTY-SECOND day of

OCTOBER Nineteen Hundred and TWENTY-SEVEN which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this TWENTY-SECOND day of OCTOBER Nineteen Hundred and TWENTY-SEVEN

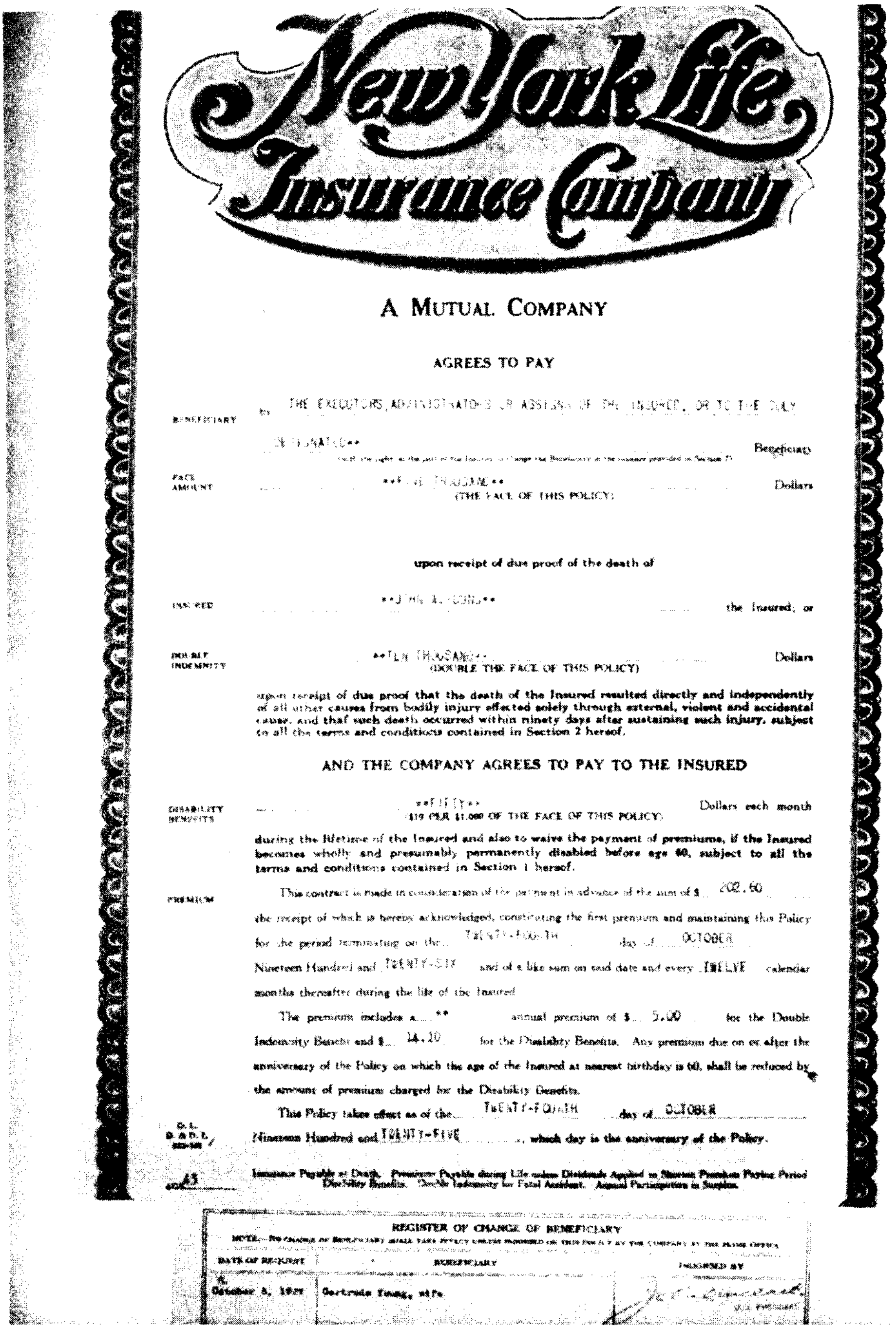
Seymour McAllaster
Secretary

Darwin P. Kingsley
President

Registrar

825-13
Term
Age 45
Premium 61.35

Insurance Payable at Death if within ___ years. Premiums Payable for ___ years.
Annual Participation in Surplus. Convertible. Not Renewable.



A MUTUAL COMPANY

AGREES TO PAY

BENEFICIARY to THE EXECUTORS, ADMINISTRATORS OR ASSIGNS OF THE INSURED, OR TO THE DULY DESIGNATED** Beneficiary

FACE AMOUNT **FIVE THOUSAND** Dollars (THE FACE OF THIS POLICY)

upon receipt of due proof of the death of

INSURED **[illegible]** the Insured, or

DOUBLE INDEMNITY **TEN THOUSAND** Dollars (DOUBLE THE FACE OF THIS POLICY)

upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within ninety days after sustaining such injury, subject to all the terms and conditions contained in Section 2 hereof.

AND THE COMPANY AGREES TO PAY TO THE INSURED

DISABILITY BENEFITS **FIFTY** Dollars each month ($10 PER $1,000 OF THE FACE OF THIS POLICY)

during the lifetime of the Insured and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.

PREMIUM This contract is made in consideration of the payment in advance of the sum of $ 202.60 the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the TWENTY-FOURTH day of OCTOBER Nineteen Hundred and TWENTY-SIX and of a like sum on said date and every TWELVE calendar months thereafter during the life of the Insured.

The premium includes a ** annual premium of $ 5.00 for the Double Indemnity Benefit and $ 14.10 for the Disability Benefits. Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is 60, shall be reduced by the amount of premium charged for the Disability Benefits.

This Policy takes effect as of the TWENTY-FOURTH day of OCTOBER Nineteen Hundred and TWENTY-FIVE, which day is the anniversary of the Policy.

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

REGISTER OF CHANGE OF BENEFICIARY

DATE OF REQUEST	BENEFICIARY	INDORSED BY
October 5, 19[illegible]	Gertrude Young, wife	[illegible]