**Nature of Assent**

1. **Beginning Questions**
   1. **Whether and when a party has:**
      1. Agreed or
      2. Promised or
      3. Assented or
      4. Committed to do something
   2. **Who Decides the question?**
      1. Judge or jury?
   3. **What test(s) are used?**
      1. If there is a signed agreement, there is usually offer and acceptance
   4. **Role of Lawyer**
      1. Lawyer must plan for legal enforceability of the agreement
         1. To do this, must understand legal requirements of a valid agreement
      2. Even if a party’s K claim fails because of absence of a valid agreement, another theory of obligation may still apply
   5. ***Embry v. Hargadine***- Reasonable Person’s understanding of circumstances- offer
      1. Dispute over whether Embry was an at will employee or contract employee.
      2. **Embry Test:** If what McKittrick said would have been taken by a ***reasonable man*** to be an employment and Embry so understood it, it constituted a valid k of employment for the ensuing year
         1. ***Intent*** is ***persuasive***, but ***not controlling***
         2. Manifestations to other party and whether the other party reasonably believes “this was the meaning of the communication”
         3. ***Reasonable Person***: Not purely objective or subjective. Look at what it means to someone actually in the position knowing what Embry knows
   6. ***Lucy v. Zehmer***- Reasonable person standard of acceptance
      1. From Lucy’s perspective, could he reasonably believe what was written out on the restaurant check to be a k to sell the Zehmer farm for 50k
         1. K was written, satisfies SoFs. Reasonable person in ***position*** of Lucy, knowing what Lucy knew. Perhaps Lucy should have read the k different than your or I would have read it
      2. **Test-** If words/acts, judged by reasonable person in the position standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his (Zehmer) mind
   7. ***Morrow v. Morrow*-** Family Agreements
      1. Oral agreement between siblings. Family agreement, burden is on the party ***asserting*** the k to prove that there was a K
      2. Obstacle that agreements of this type between family members ***generally do not*** impute a legal obligation on parties
      3. **Takeaway-** Party asserting K has burden of setting aside belief that most arrangements like this are ***not contractual***. Family agreements/promises are generally seen as gratuitous
   8. ***Tilbert v. Eagle Lock*-** In Form K. Court will not favor provision excluding remedy
      1. Tilbert’s husband died the day Eagle Lock canceled their benefit program, however, husband died ***before*** the cancelation notice was distributed. Cancelation came too late. The policy was cancelable at will but relied on by employees.
      2. **Takeaway-** When subject matter of an agreement is of a kind that is usually dealt with in enforceable K’s and parties have ***acted under this assumption***, the court is not likely to favor a provision that seems to exclude all sanction & remedy
   9. **Basic Test of *Embry* and *Lucy*:** If a reasonable person in the position of the recipient of a communication would understand it in a certain way and the actual recipient understood it in that way- that is what it means ***regardless*** of hidden intentions of the communication
2. **Offer**
   1. ***An offer*** ***creates a power of acceptance in the offeree*** and corresponding liability on the part of the offeror. For a communication to be an offer, it must create a ***reasonable expectation*** in the offeree that the offeror is willing to enter into a k on the basis of the offered terms. In deciding whether a communication creates this reasonable expectation, you should ask the following 3 questions:
      1. Was there an expression of a ***promise, undertaking, or commitment*** to enter into a K?
      2. Were there ***certainty and definiteness*** in the essential terms?
      3. Was there ***communication*** of the above to the offeree?
      4. **Note:** If a reasonable person in the position of the recipient of a communication would understand it in a certain way and the recipient actually understood it that way- that is what it means regardless of hidden intentions of the communication
   2. **R.2d Sec. 24: Offer Defined:** “An offer is the manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it”
      1. Manifesting a willingness and made in a way that justifies the recipient of the communication saying, “I agree” that will conclude the deal
      2. An offer creates a power of acceptance in the offeree
         1. At the point where the offeree can bind the deal (I Accept)
         2. Doesn’t take anything more from the offeror, if it does, **IT IS NOT AN OFFER**
   3. **Factors Used by Courts to Distinguish Offers from Preliminary Negotiations**
      1. Was the language used language of offer or promise of commitment?
         1. Offer: Will sell, “promise vs. “quote,” “asking,” “interested”
            1. Wishy washy language- less likely it was an offer
      2. Was the proposal to one person or a group?
         1. One person- more likely
      3. Was proposal clear and definite on terms?
         1. What is being offered, time, price
      4. Was proposal in response to a request for an offer?
      5. Do the circumstances (stage of negotiations, prior dealings, trade usage, etc.) indicate that language has particular meaning?
   4. **Promise, Undertaking, or Commitment:** For communication to be offer, it must contain a promise, undertaking, or commitment to enter into a k, rather than a ***mere invitation*** to begin preliminary negotiations: i.e., there must be an ***intent*** to enter into a k. Criteria:
      1. **Language:** Technical language (I offer) is useful to show offer was made but not necessary. Other language is generally construed as merely contemplation
      2. **Surrounding Circumstances:** Should be considered. For example, where statement is made in jest, anger, or way of bragging, and the statement is reasonably understood in this context, it will have no legal effect. If statement is made in jest but reasonably understood by the hearer to be seriously, statement is an offer **(*Lucy*)**
      3. **Prior Practice and Relationship of the Parties:** Court will consider this
      4. **Method of Communication:**
         1. **Use of Broad Communications Media:** (e.g. publications). More likely it is that courts will view the communication as merely the ***solicitation of an offer***
         2. **Advertisements, etc.:** Usually construed as mere ***invitations for offers***
            1. In certain situations, courts have treated advertisements as offers ***if the language*** of the advertisement can be construed as containing a promise, the terms are certain and definite, and the offeree(s) is clearly identified. Price quotations also may be considered if given in response to an inquiry. ***(Lefkowitz)***
      5. **Industry Custom:** Considered in determining whether proposal qualifies as offer
   5. **Definite and Certain Terms:** Basic inquiry is whether enough of the essential terms have been provided so that a k including them would be ***capable of being enforced***. The principal is that the parties make their own k; courts do not make it for them. Following factors are important:
      1. The ***identity of the offeree;*** (ii) the ***subject matter***; and (iii) the ***price*** to be paid
      2. **UCC 2-204 (3):** Even though one or more terms are left open a K for sale does not fail for indefiniteness ***if the parties have intended*** to make a K and there is reasonably certain basis for giving an appropriate remedy
      3. **UCC 2-311 (1):** An agreement for sale which is otherwise sufficiently definite to be a K is not made invalid by the fact that is leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.
   6. ***Lefkowitz v. Great Minneapolis Surplus Store*-** Definiteness of Offer
      1. Deal 1: Ad for 3 coats worth to 100 bucks each, first 3 people get them for 1$. Lefkowitz gets to store first, Store refuses deal on the grounds of a house rule to only sell to women.
         1. Court says ad was too indefinite “to 100”
      2. Deal 2: Black Stole, worth 139.50 for 1$. Lefkowitz shows up, store refuses to sell
         1. Court finds this was an offer and Lefkowitz accepted, therefore entitled to performance or price of 139.50-1. Ad said first come first serve.
   7. ***Courteen Seed*-** Definite language of offer
      1. D sends telegram to P saying, “I am asking 23 cents per pound” and states they have an offer for 22 ¾. P believes this is an offer to buy seed for 23 cents.
      2. Court disagrees- believes “I am asking” is indefinite”
      3. Issue- Plaintiff originally sent telegram saying the offer was too high and to wire a ***firm*** offer. Defendant then replied, “I am asking 23.” Seems a lot like an offer
3. **Acceptance**
   1. An acceptance is a manifestation of assent to the terms of an offer. Through this manifestation of assent, the offeree exercises the power given her by the offeror to create the K.
      1. If you don’t have an offer you can’t have acceptance. Offeree now has power of acceptance and needs to do ***something*** (promise, performance, etc.) to show they have accepted the offer
      2. **Offeror is master of his offer:**
         1. The offeror ***can*** specify how the offer is to be accepted. Control it, can say “you can only accept by taking two laps around the track at the college”
            1. Ex. Someone in position of offeror may want to know, and know by a particular time. “In order to accept you must deliver this to my office by 5PM Friday.” -Certainty.
      3. **Modern View: UCC 2-206 (1) (a):** Unless otherwise unambiguously indicated by the language or circumstances
         1. An offer to make a K shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances
      4. **Mirror Image Rule:** Acceptance must be definite and unequivocal. Nothing left to be done. I accept
      5. Ordinarily some communication or ***notice is required*** and ***silence will not suffice***
         1. Can’t have the idea of silence as acceptance
      6. **Acceptance of Offer for Unilateral Contract:** If an offer provides that it may be accepted ***only by performance***, note the following particular rules:
         1. **Completion of Performance:** Offer for unilateral k is not accepted until performance is completed. The beginning of performance may create an option so that the offer is irrevocable. However, the offeree is not obligated to complete performance merely because he has begun performance, as only complete performance constitutes acceptance of the offer.
         2. **Notice:** ***Generally, not required*** to give the offeror notice that he has begun requested performance, but is required to notify the offeror within a reasonable time after performance has been completed. However, no notice is required if:
            1. The offeror ***waived notice***; or
            2. The offeree’s ***performance would normally come to the offeror’s attention*** within a reasonable time
      7. **Acceptance of Offeror for Bilateral K:** Unless an offer specifically provides that it may be accepted only through performance, it will be construed as an offer to enter into a bilateral k and may be accepted by either a promise to perform or by the ***beginning of performance***
         1. **Generally, Acceptance Must be Communicated:** Acceptance of an offer to enter into a bilateral k must be communicated to the offeror
            1. Exception- Waiver in Offer: If an offer provides that acceptance need not be communicated, not needed.
            2. Silence as Acceptance: Although the offeree cannot be forced to speak under penalty of having her silence treated as acceptance, if the offeree silently takes offered benefits, courts will often find acceptance. Especially true if propr dealings between parties, or trade practices know to both, create a commercially reasonable expectation by the offeror that silence represents acceptance. In this case, Offeree is under a duty to notify offeror if she does not intend to accept (R2d. of K’s-69).
      8. ***Ardente v. Horan***-Acceptance v. Counter-offer
         1. P put in bid for 250k which was accepted. Drafted a purchase agreement and included a letter which was a request to confirm certain pieces of furniture and property would be included as a sale. D refused to accept due to the included letter.
            1. Court held that the included letter was a counter-offer. Seller offered property for 250k. Buyer counter offered for 250k for property + stipulated furniture and property
            2. **Here,** the signed purchase agreement would have been an offer for purchase. However, + the letter transformed this into a counter-offer
         2. **Takeaway-** The more wishy-washy the request for stuff is, the more likely the request will be seen as an acceptance and desire for a gift. The more concrete and demand for the stuff is, the more likely a court will construe the letter to be a counter offer.
      9. ***Bergey v. HSBC Bank­-***Addenda attached to valid purchase agreement does not constitute a counter-offer
         1. HSBC originally accepted Bergey’s offer, sent a k with addenda. Then said they “jumped the gun” and sold the house to a higher bidder. Bergey sues for specific performance and breach of K.
            1. Hold: There was a written k. Informed through email that bank would accept offer. Damages are clear, Bergey had to buy the property from the other buyer for a higher price than his original bid to HSBC.
         2. **Takeaway-**If bidding process for a property is traditional, the bid is probably on a standard sheet and signed. Therefore, acceptance of the bid via K with addenda is valid. If there is a valid offer, acceptance with attached administrative details does not constitute a counter-offer
      10. ***White v. Corlis***- Acceptance must be definite
          1. P was a builder, K’d to build with D. P made an estimate, D changed the estimate, P agreed to the amended estimate. D’s book keeper sent another note saying P could start ***upon acceptance***. P went out and bought materials without hearing a firm acceptance from D. D repudiated and P sued.
             1. Right then and there, sending the revised estimate may constitute an offer and the P’s acceptance = acceptance.
             2. Court: P should not have been relying without a deal. Had not indicated acceptance. Can use materials purchased for another job. Get over it.
4. **Duration of Offers**
   1. **Terminating the Power of Acceptance** 
      1. Race with attempt to exercise the power
      2. **Ways to terminate (R. 2d §36)**
         1. **Offeree Rejects**
            1. Rejection by the offeree terminates the power of acceptance
            2. Rationale is that the OR may rely on the rejection, by action or inaction, or by merely failing to revoke the offer
            3. Possibility of reliance is enough, no actual reliance required
         2. **OE Counteroffers w/o indicating that offer is still being considered**
            1. A counter offer is an offer made by the ***offeree*** to the offeror that contains the same subject matter as the original offer but differs in its terms. Serves as a rejection of original offer ***as well as a new offer***
         3. **Lapse of time specified in offer** 
            1. Must Accept within Specified or Reasonable Time: OE must accept the offer within the time period specified or, if no time period is specified, within a reasonable time. If she does not do so, then she will have allowed the offer to terminate
            2. Look to When Offer is Received by Offeree: If offer provides that it will expire within a particular time period, ***that period commences*** when the offer is ***received by the offeree***. If the offer is delayed in transmission and this fact ***is or should have been apparent to the offeree***, the offer terminates at the time it would have expired had there been no delay. All relevant facts must be considered in determining whether knowledge is present. Look to: Date of letter, postmark, and any subsequent statements made by the offeror
            3. ***Caldwell-*** Offer starts when letter received; must come to one’s knowledge before it has legal existence. Offeror is the only one who knows when letter has been sent and how long it’ll take.
            4. ***Vaskie***- Insurance companies could be more specific about time limit. Question of fact if the time allotted was reasonable: Factors to Consider:

Nature of K, Relationship of parties and course of dealing, usages of particular business

* + - 1. **Offeror Revokes- Directly or Indirectly**
         1. **Methods of Communication**

Revocation by Direct Communication: Revocation directly communicated to the OE by the OR terminates the offer.

Revocation by Publication: Offers made by publication may be terminated by publication of revocation ***through comparable means***

Revocation by Indirect Communication: If offeree ***indirectly*** receives (i) correct information, (ii) from a reliable source, (iii) of acts of the offeror that would indicate to a reasonable person that the offeror no longer wishes to make the offer

* + - * 1. **Option Contracts**

**R.2d §87**

An offer is binding as an option K if it:

Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

Is made irrevocable by statute

An offer which the OR should reasonably expect to ***induce action or forbearance*** of a substantial character on the part of the OE before acceptance and which ***does*** induce such action or forbearance is binding as an option K to the extent necessary to avoid injustice

***Marsh***- Money binds seller for the time specified and is irrevocable since OR chooses price of binding K; doesn’t have to be adequate

**R. 2d S45- Option K Created by Part Performance or Tender:**

Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, ***an option k is created*** when the ***offeree tenders or begins*** the invited performance or tenders a beginning of it

**UCC §2-205:** If the term assuring that the offer will be held open is on a form supplied by the offeree, it must be separately signed by the offeror.

**R. 2d §42:**

An OE’s power of acceptance is terminated when the OE ***receives*** from the OR a ***misrepresentation of an intention*** not to enter into the proposed K

Offer will remain open as a bare promise, unsupported by consideration, and therefore unenforceable

As a general rule, revocation must be received before OE’s power of acceptance is terminated

**Either OR or OE dies or is incapacitated**

***In addition,*** an offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer

1. **Offer and Acceptance**
   1. **Offer:** Need to have an offer in order to provide for an acceptance
      1. **Test:** Did the offer create a power of acceptance? Did it get to the point where the offeree can close the deal? If you need more from the OR, you don’t have an offer/deal yet
         1. Deals with problems of hidden intentions
         2. Shifts to judge decisions where judge may take over the interpretation of language and say, “any reasonable person would read this language in a particular way”
         3. ***Context Matters***. A response saying 7k after 5 back and forths and are down to what the price will be. If you got 7k out of the blue you would be confused.
   2. **Acceptance:** Has it been accepted?
      1. Usually takes some sort of promise or act. Silence usually is not acceptance.
      2. The offeror is master of the offer, can specify how it is to be accepted. The law has moved in the direction that ***if you want to control acceptance*** you ***really need to be clear***.
         1. Usually now, unless clearly specified, ***any manner reasonable*** in the circumstances ***is ok for acceptance***
      3. Must be definite and unequivocal
      4. Without exception (2-207) you have an acceptance that matches the offer ***(Mirror Image Rule).*** Can’t come back with something different than offer
         1. ***Ardente v. Duran-*** Came back with talk of other furniture, ruled that was not acceptance
      5. Voluntary act, definite and unequivocal, don’t change stuff, only have to worry about what offeror says unless there are specifics
   3. **Termination of Offer**
      1. **Time:** Specification of time, master of offer controls. Specify clearly (clear starting date, time, etc.)
         1. No specified time leads to ***reasonable time***
            1. Some situations where it is established as a matter of law what a reasonable time is. Classic Examples:

Commodities, futures. Offered, you take it now, don’t come back when the market has changed. Offer dies almost immediately.

***Basky:*** Becomes a matter of fact and circumstance. What is reasonable under the circumstance.

* + 1. **Rejection:** Raised as a major reason in ***Akers***. Essentially walking away, once rejected, that’s the end.
    2. **Counter-offers:** Has the effect of rejection unless reserving that you are considering the original offer.
    3. **Revocation:** Offeror does this. Can say directly: “I revoke”
       1. **Indirect:** Offeree gets reasonable info that OR no longer wants to make a deal
       2. **Where you can’t do it:**
          1. When someone paid for specific time where it can’t be revoked (30-60 days, etc.), OR may have part performance which may act as a way to prevent the revocation
          2. Reliance issues: (2-205- certain offers by Merchant are irrevocable)
          3. Death or incapacity of offeror and offeree
  1. **Unilateral and Bilateral K’s**
     1. **Unilateral K:** Promise in exchange for an action. ***Only promising party is bound***.
        1. Traditional unilateral k is one in which the offeror requests performance rather than a promise. Here, the offeror-promisor promises to pay upon the ***completion of the requested act*** by the promisee. Once the act is completed, a K is formed.
     2. **Bilateral Contracts:** Exchange of mutual promises (promise for a promise)
        1. The traditional bilateral K is one consisting of the exchange of mutual promises, in which each party is both a promisor and promisee.
     3. **Modern View:** Most Contracts are Bilateral
        1. **Acceptance by Promise or Start of Performance:** Under Article 2 and the R. 2d. of Contracts, unless clearly indicated otherwise by the language or circumstances, ***all*** offers are “indifferent” offers, which means that they may be accepted by promising or beginning performance
        2. **Unilateral Contracts Limited to 2 Circumstances:** A traditional unilateral K (i.e. a K that can be formed only by full performance) occurs only in two situations: (1) where the offeror clearly (unambiguously) indicates that ***completion of performance is the only manner of acceptance-*** the offeror is master of the offer and may create the offer in this fashion; and (ii) where there is an ***offer to the public*** such as a reward offer, which so clearly contemplates acceptance by performance rather than a promise that only the performance requested in the offer will manifest acceptance.
  2. ***Davis v. Jacoby*-** Unilateral v. Bilateral K
     1. There was an offer for the Davis’s to come down to CA and take care of the Whiteheads. In return the Davis’s were to inherit the Whitehead’s estate. The problem is that Mr. Whitehead commits suicide and in the will, the nephew inherits everything.
        1. Death will terminate an ***offer*** but ***not a contract***. The issue is whether there was an offer or a K. If a K, if unilateral- not binding until performance. If bilateral- promise for a promise, makes K binding
        2. Court: Bilateral K, promise seems more likely than a demand for performance.
     2. **Takeaway-** Most K’s are bilateral. For a unilateral K, must be very clear and definite in the way acceptance is conditioned. The presumption is toward bilateral K’s so both parties are bound ***as quickly as possible***.
  3. ***Brackenbury v. Hodgkin*-** Unilateral K accepted by beginning of performance
     1. Hodkin is a dick, she solicits her daughter to come up to the farm and take care of her and in return, daughter and husband get the house when Hodkin dies. Hodkin then gets in many fights with Mr. Brackenbury and tries to evict them by passing title to her son who proceeds to try and remove the Brackenburys.
        1. Was this an offer and acceptance?
        2. Court: Determines the K was unilateral (promise for performance). Performance was to take care of Hodkin for life. Until she is gone, there is no K. Court determines there was a K but performance was only rendered for a few weeks before things went south. ***Starting performance is acceptance, not completion***.
     2. **Takeaway-** Unilateral K’s generally may only be accepted by complete performance, however, in certain situations the beginning of performance may create an option so that the offer is irrevocable
  4. ***Petterson v. Pattberg*-** Exception to the “offer creates power of acceptance in the offeree” rule
     1. **Takeaway-** Revocation will terminate an offer unless irrevocable. An offer is a request for something, creating power of acceptance in the offeree. In this case, there is no power of acceptance in Petterson. There is not a K until Pattberg accepts the money. This effectively turns Petterson into the ***offeror*** and Pattberg becomes the ***offeree*** because he needs to accept the payment in the end.
        1. **Here,** Pattberg revoked the offer before performance. Majority demands a tender to be made. What they want is him actually paying early. Unilateral K. Tender is needed (when Pattberg opens the door, shove in money and say I tender the money)
           1. This would be enough to constitute a K
        2. Person being paid must assent/accept the money. Only thing that would have done the trick would be for Pattberg to accept the payment
  5. ***Garber v. Harris Trust***
     1. Credit Card K. Defendant changed terms midterm and the plaintiffs are claiming they had a concrete K and are now seeking injunctive relief.
        1. Bank Theory: Every use of the card is a separate K and constitutes acceptance. Issuance of card constitutes an offer, whenever used constitutes accepting terms.
        2. Plaintiffs: Adds and such are invitations for an offer, card add is an offer, acceptance of the offer occurs by providing issuer with requested credit info and allowing issuer to commence a credit check prior to issuance of the card
        3. Court: Accepts Bank theory. Can change terms mid K.
     2. **Takeaway-** Unilateral K with no consideration. No duty to continue the K.
  6. **R.2d Contracts §87(2):** An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option K to the extent necessary to avoid injustice
     1. ***Drenan v. Star Paving Co*.-** Option K
        1. P was a general contractor preparing a bid on a School job. Taking bids from subcontractors. Estimator from Star Paving called and gave the lowest bid for paving. P stopped at D’s office on his way to LA where he was informed by D’s construction engineer that Star couldn’t do the job for their bid, they had made a mistake. P told D he expected them to carry out the job under original bid because he had relied on it to make his bid for the job. D said they couldn’t do it for less than 15k so P engaged L&H paving to do the work for 11k.
           1. Court: Substantial evidence D made definite offer to do the job. P relied on D’s bid for his own bid, is entitled to the difference in Star’s bid price and price to hire L&H
        2. **Takeaway-** Option K, needs to be enforced in order to prevent injustice to **Drenan**. D cannot revoke P’s power of acceptance
  7. **Modern Unilateral K’s**
     1. Good for one-way obligations of employers, governments, and schools
     2. With employees and employers
        1. Typical cases involve claims by employees against present or former employees for employment benefits

1. **Bargaining at a Distance and UCC §2-207**
   1. **Mailbox Problem**
      1. Acceptance by mail or similar means creates a K at the ***moment of dispatch***, provided that the mail is properly addressed and stamped, ***unless*:**
         1. The ***offer stipulates*** that acceptance is not effective until received; or
         2. An ***option contract*** is involved (an acceptance under an option contract is effective only upon ***receipt*** (R. 2d. §63)
      2. **Note:** OR is still master of his offer and as long as he is clear about it, OR may specify what must be done to accept.
         1. **Also:** Because a revocation is effective only upon receipt, under the mailbox rule if the OE dispatches an acceptance ***before he receives a revocation*** sent by the OR, a K is formed. This is true even though the acceptance is dispatched after the revocation is dispatched and received after the revocation is received
      3. **Overview:** Acceptance effective on dispatch. Everything else effective on ***receipt.***
   2. **UCC §2-207- Additional terms in Acceptance or Confirmation:** Created to cure the common law problem of welching and last shot’s
      1. Intended to deal with two typical situations
         1. Written confirmation
         2. Offer and acceptance
      2. **Last Shot Rule:** Last K agreed upon is the dominating one
      3. **UCC 2-207: Additional Terms in Acceptance or Confirmation**
         1. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms
            1. (1) Consists of that part of subsection 1 up to the comma, recognizing a k via "a written confirmation" of terms "agreed upon."
         2. The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
            1. The offer expressly limits acceptance to the terms of the offer;
            2. They materially alter it; or
            3. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
         3. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.
      4. **Comment on 2-207**
         1. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to
         2. Where clauses on confirming forms sent by both parties *conflict* each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself
         3. As a result the requirement that there be notice of objection (2) is satisfied and the conflicting terms do not become part of the k
            1. Contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by 2-207, including subsection (2)
            2. Written confirmation is also subject to 2-201

Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement

* + 1. **Basic Routes to K formation under Section 2-207**
       1. Consists of that part of subsection 1 up to the comma, closing a contract via a "definite and seasonable expression of acceptance."
          1. (1) Consists of that part of subsection 1 up to the comma, recognizing a k via "a written confirmation" of terms "agreed upon."
       2. Consists of that part of subsection 1 after the comma
       3. Consists of subsection 3.
    2. **Basic Routes to Contract Formation**
       1. **Route A (primary):** “Definite and seasonable expression of acceptance” … even though it states terms additional to or different from those offered
          1. ***This is not a counter offer***. In the fine print, stuff doesn’t match up, but the stuff in the blanks (price, quantity, etc.) agrees

If you don’t have that, it should begin to die

* + - * 1. ***However***, a change in price, quality, description, or quantity would not be a definite and seasonable expression of acceptance. Counter-offer.
        2. Assuming if it is just the fine print that is off, the section says you have a deal and have dealt with the “welcher problem” as neither party is free to go off and deal with someone else without the consequences
      1. **Route B:** “Acceptance is ***expressly made conditional*** on assent to the ***additional or different terms”***
         1. Most of these cases, buyer will send purchase order (offer) and seller will send a responsive document (acceptance)
         2. When OE is the seller most often
         3. Route B says offeree can, if offeree wants, to preserve mirror image rule but has to do it by saying more clearly (the better) that our assent is expressly made conditional on assent to additional or different terms

Court says you have to make it very clear that you are only accepting if you get what you want (additional or different terms)

If a form has this language in it, all we have are forms that don’t create a K

Re-instates welcher problem: Two different forms, don’t have a deal yet. If nothing happens after this, either side can walk away without liability.

* + - * 1. Common Law: If buyer accepts goods, common law rule says that the express terms were a counter offer which was accepted by taking goods

Most courts looking at 2-207 says no, occasion goes to Route C. No longer a last shot doctrine. If it is conduct that recognizes existence of K and the writings don’t for a deal than you end up in C. Get what the forms agree upon.

* + - * 1. **Note:** If you want ***Route B*** you ***really*** want to make sure to ***use the statutory language***.
      1. **Route C:** “Conduct by both parties which recognizes the existence of a K… although the writings of the parties do not otherwise establish a contract”
         1. Where writings fail. Ex. A route B that is not responded to. Don’t ship goods without verbal assent
         2. Last shot no longer applies. If you have contract it takes you to what the code would provide. Not a last shot anymore.
      2. **Route A Prime:** “Written Confirmation… even though it states terms additional to or different from those agreed upon…”
         1. Problem: Agreed to deal (typically on phone) and then both send paper confirming a deal. The papers says stuff that is not the same
    1. ***Stemcor USA, Inc. v. Trident Steel Corp.*-** Must properly state and act like you want Route B
       1. Uses Route C. P sells tubes to D, they turn out to be faulty. The purchase orders “fine print” says no terms and conditions other than those on the purchase order would be binding on purchaser. P later sends an arbitration clause separately to D. P tries to enforce arbitration clause when tubes are faulty and D gets sued.
       2. Stemcor did not use the express language necessary for a Route B k. In addition, they shipped goods before receiving assent from Trident Steel (even if language was correct, may not have been a valid arbitration clause). Court wants to put a stop to the last shot rule.
       3. **Note:** If you’re going Route B you need to ***use the right language (statutory*) and** you need to stop the merry go round. Must act like you mean Route B
    2. ***Gottleib v. Alps*-** When is a clause a ***material alteration*** under 2-207?
       1. Gottleib is making liners for Alps and the fabric starts to suck, Alps doesn’t pay Gottleib. Gottleib sues, Alps counterclaims for consequential damages as a result of the shitty fabric for 600k. Gootleib asserts the defense they have a limited liability clause in their K.
          1. Court: Trial Court said the Limitation of liability clause was a ***material alteration***. ***Appeals reverses*** because Alps never informed Gottleib of specific purpose for liners (prosthetic limbs), Gottleib was not aware their actions would result in massive consequential damages
          2. **2-207** says if a clause is a material alteration between merchants it does not get in. ***Material Alteration*** if the clause resulted in ***surprise or hardship***

Buyer wants to prove this. Comment 4 provides you can limit the remedy in a ***reasonable manner***. One of the issues is surprise. It might be more surprising if there ***wasn’t*** a limitation of liability clause

* + - 1. **Takeaway-** If the clause is reasonable and common, did not result in surprise, it is not a material alteration (2-207 Comment 4).
    1. ***Hill v. Gateway 2000*-** Additional terms are construed as proposals for additions to K.
       1. Hill’s buy a computer over the phone which arrives in a box with an arbitration clause inside.
          1. Court: Hills and Gateway have a K once the customer opens the box and does not return it in 30 days. Additional terms become part of the K even if the buyer doesn’t know they’re there and the buyer’s acceptance of the terms is simply ***not returning the product***.
       2. **Takeaway-** Oral agreement early on, anything that comes after would fall into the proposals in addition to the K that would have to go through 2-207(2). ***If you don’t want to accept the additions you must do something***
          1. **Here,** the Hills ***really*** should have returned the damn computer.
    2. ***Step-Saver Data Sys. Inc. v. Wyse Tech.***- Box top license- material alteration
       1. Step Saver bought computer software from The Software Link (TSL) and brought an action for breach of warranty when the software developed problems. P would call TSL and place an order, TSL would accept order and promise while on phone to ship the goods. P would then send a purchase order. TSL would ship order promptly with invoice for essentially the same terms (price, quantity, shipping and payment forms). No reference was ever made to disclaimer of warranties
       2. Issue: Are disclaimers of warranties and limitation of remedies ***printed on*** ***the package containing the software*** terms of the parties agreement?
       3. Court: K was sufficiently definite without terms provided by box-top license, opening did not constitute conditional acceptance because clause did not “clearly express TSL’s unwillingness to proceed unless additional terms were incorporated into agreement”
          1. ***Box top was a material alteration and not part of original agreement***
       4. **Takeaway-** If your K is sufficiently definite and the substance of a box top license are never discussed, nor do either party act in anyway like they recognize or are considering it, it is a ***material alteration*** to the K agreed upon
       5. **Note:** Route A Prime. Agreements occurring over the phone, paper (here the box top license) says something other or alters the agreement made over the phone. Usually become part of K unless it ***materially alters*** the K. Here, the license materially altered the contract.

1. **Statute of Frauds (SoF)**
   1. **Basics**
      1. What is the statute: Some kind of written memorandum is required for ***some K’s***
      2. Why do we Have it?
         1. No body actually knows. Writing is chill AF.
      3. **Key Terminology:**
         1. “Within the statute”
         2. “Requirements of the statute are satisfied”
         3. “Taken out of the statute”
      4. **Note:** Statute is generally disfavored and narrowly construed by courts.
   2. **Contracts within the Statute** 
      1. **Suretyship:** A promise made to guarantee the debt, default or miscarriage of another
         1. Includes the promise of an executor to pay obligations of the estate out of the executor’s own pocket
         2. Standing behind, guaranteeing the principal debtor
            1. Promise that the surety will step up if the principal debtor fails to pay their obligations
            2. Would not be enforceable without evidence by writing
         3. **Elements:** 
            1. **Must be a collateral promise:** (promise to answer for the debt or default of another must be evidenced in writing. Promise may arise out of tort or contract, ***but it must be collateral*** to another person’s promise to pay, ***and not a primary promise to pay***
            2. **Main Purpose/Leading Object Rule**

Court looks to see if your main purpose or leading object is your ***own benefit*** or primarily for the principal debtor

* + 1. **Agreement upon Consideration of Marriage** 
       1. Was about in the classic sense- castles in Spain, etc.
    2. **K’s involving the creation or transfer of interests in land**
    3. **Agreement not to be performed within one year from the date of formation**
       1. Applies to contracts in general
       2. Dealing with contracts that are too long a term for an oral agreement
    4. **K for the sale of goods for the price of 500$ or more (UCC 2-201)**
       1. Modernizes the sale of goods
       2. Price of 500$ or more, sale of goods must be within writing to be outside the statute
       3. Put in back in the 40’s- this provision was designed for the sale of ***big ticket items***
       4. **Lesson:** Where you possibly can you don’t want to put fixed dollar amounts, you want to index it, if you put a fixed dollar amount it is likely to fall within the Statute and require writing
          1. ***This provision has greatly increased the amount of K’s within the statute***
    5. **Agreement authorizing or employing real estate agent or broker**
  1. **Miscellaneous**
     1. **How does one satisfy the statute?**
        1. Writing requirement. Can be a receipt, letter, check with details in the memo line, written offer accepted orally, etc.
           1. Electronic records satisfy writing requirement.
        2. Signature requirement. Liberally construed. A signature is any mark or symbol made with intent to authenticate writing as that of signer.
        3. **Note:** Can you piece together a written memo between 3-4 pieces of paper and find a signature ***somewhere*** to meet the statute?
           1. **Potential Exam Question:** Look hard at the documents and what else might be around to tie into a package to meet the Statute

**Note:** At least in some jurisdictions you have the possibility of an estoppel to plead the SoFs

Looks remarkably like Promissory Estoppel

Raise the question of whether you can get around the statute by some kind of estoppel

* + 1. **What is the effect of non-compliance?**
       1. Voidable but not void
          1. You need to bring it. Court will not raise SoFs for you. Grounds for Lawyer malpractice
          2. Lose it if you don’t raise it
       2. Noncompliance with SoF renders the contract unenforceable at the ***option*** of the party to be charged (i.e. the party being charged may raise the lack of a sufficient writing as an affirmative defense). If it is not raised as a defense, it is waived.
    2. **Possibility of restitution**
       1. Even without signed writing, court can still say there is a claim for restitution (***Gay v. Moony***)
    3. **Ways Around the Statute:**
       1. A lifetime K, possible (not probable) that you die before a year runs
       2. On the other hand, a 13-month K you die before a year, still within the statute. Not possible the K could be complete within the year
    4. **Equitable Estoppel:** Sometimes applied in cases where it would be inequitable to allow the SoFs to defeat a meritous claim. When a defendant ***falsely and intentionally*** tells a plaintiff that the contract is not within the Statute or that he will reduce their agreement to a writing, or when his conduct foreseeably induces a plaintiff to change his position in reliance on an oral agreement, courts may use the doctrine to remove the K from the SoFs. ***Injustice must only be avoided by the enforcement of the K***.
  1. ***Howard M. Shoor & Associates v. Holmdel Homes*-** Main purpose/leading object rule
     1. Engineering firm is not getting paid by Holmdel for work, get a guarantee from Mr. Sugarman who owns stock in D company and is their attorney. Sugarman pays shoor & Associates a bit of money, claims the payment is in good faith, requests additional performance by the firm in order to secure financing from investors to pay D company. When Holmdel Homes goes belly up, Sugarman claims he never had a promise to pay P’s and even if he did, it is invalid due to SoFs.
     2. Court: There is a promise, falls within SoFs but Sugarman’s main purpose was his ***own benefit*** due to his financial stake in the company which invalidates the Statute
     3. **Takeaway-** If you’re paying another’s debts hoping to make back the return due to something (here stock options) than SoFs is invalid. It is narrowly construed by courts and generally disfavored.
        1. **Here,** easy for court to find self-interest and client interest because they dislike the statute. Easy to roll with main purpose rule which is enough to take the K “out” of the SoFs.
  2. ***McIntosh v. Murphy*-** Equitable Estoppel to bring a K outside the Statute
     1. P relied on D’s promise of employment, sold his home, moved to HI. D says K is unenforceable b/c it wasn’t written and the SoF makes oral K’s that cannot be completed within a year voidable.
     2. Court: Finds for P due to equitable estoppel, as injustice could only be avoided by enforcing the K
     3. **Takeaway-** If injustice can only be avoided by enforcing a K being hit by the SoFs, court may take it outside the statute through equitable estoppel

**Determining the Terms of the Contract**

1. **Parol Evidence- Supplementing, explaining, or contradicting terms**
   1. Interpreting and enforcing a k, questions often arise as to whether the written instrument is the complete embodiment of the parties’ intention. Where the parties to a k express their agreement in a ***writing*** with the ***intent*** that it embody the final expression of their bargain, the writing is an ***integration***. Any other expressions- written or oral- made ***prior to*** the writing, as well as oral expressions ***contemptuous with*** the writing, are ***inadmissible to vary*** the terms of the writing.
   2. **Purpose:** Part of substantive contract law. Designed to carry out apparent intentions of parties and facilitate judicial interpretation by having a single clean source of proof (the writing) on the terms of the bargain
   3. **Is the writing an integration?**
      1. Two Sub-Questions:
         1. Is the writing intended as a ***final*** expression?
         2. Is the writing a ***complete*** or ***partial*** integration?
      2. **Intended as Final Expression?**
         1. Writings that evidence a purported k are not necessarily the “final” expression of that k. Parties may have only intended a draft. If so, PER will not bar introduction of further evidence. Any evidence is admissible to show the parties did not intend the writing to be final. The ***more complete*** the agreement appears to be on its face, the more likely it was intended as an ***integration***.
      3. **Is the writing a complete or partial integration?** 
         1. After establishing the writing was final, must determine this.
         2. If Complete: Writing may not be contradicted or supplemented
         3. If Partial: Cannot be contradicted, but may be supplemented by proving up consistent additional terms
         4. ***All relevant evidence*** is admissible for the purpose of making the determination, even the evidence whose admissibility is challenged. ***The UCC presumes all writings are partial integrations*** unless there is evidence that the parties intended the writing to be a complete agreement
   4. **Mechanics**
      1. Judge decides whether to admit extrinsic evidence
      2. Short form PER:
         1. If x (the writing) is the k then X is the k and evidence that contradicts or adds to X is irrelevant and inadmissible
      3. **Two Basic Questions**
         1. What test does the judge use?
            1. A bunch (***Masterson***)
         2. What evidence does the judge consider?
            1. See above
      4. **Rule itself is a rule of *integration***
         1. Has a conclusion, freedom of k notion
         2. Says: If the writing is the k than it is the k and evidence that contradicts or adds to it is irrelevant and inadmissible
   5. **Parol Evidence- What is the Contract?**
      1. **Problem:**
         1. Suit on K. There is a writing that purports to be the K admitted to evidence. One of the parties relies on the writing. The other party wishes to present evidence that ***before*** the writing was executed the parties agreed to matter which are not in the writing. The party relying on the writing raises the PER by preliminary motion or objection to testimony.
      2. **Restatement 240:** If it looks complete, the extrinsic evidence should be excluded unless the party pushing the outside stuff can try and convince the judge that the extrinsic evidence would be ***naturally and normally stated separately***
      3. **Restatement 2-202:** Suggests you admit the outside evidence unless the proponent of the writing convinces the court that the extrinsic evidence ***would have been included in writing***
      4. **Corbin:** If there is credible evidence that it actually happened ***and*** that the later writing didn’t mean to erase it, it ought to be admissible
   6. **Policy Battle between Williston (pro-writing) and Corbin (pro-extrinsic)**
      1. **Williston: Pro-Writing**
         1. Parties are responsible to read, draft, and understand
         2. Writings are good things- evidence and efficiency
         3. Virtue of certainty: Deal is known to all and ***not subject to constant disputes***
         4. Juries are unduly emotional and sympathetic to underdogs
      2. **Corbin: Pro-Extrinsic**
         1. Parties are often overwhelmed by unbalanced bargaining power and complexity
         2. Difficult to say everything you want perfectly
         3. Virtue of fluidity- ***deals often come together over time***
         4. Juries are capable of getting to the truth
   7. ***Mitchell v. Lath­-***If you want something you should really put it in written K
      1. Oral promise to remove icehouse prior to written agreement for sale of property. The proponent of the extrinsic evidence (one trying to get the icehouse removed) has a horrible problem. REALLYYY should have put the icehouse agreement in writing. Sellers suck.
         1. Court: Majority agrees with seller, does not admit extrinsic evidence.
      2. **Test:**
         1. The agreement must in form be a collateral one;
         2. It must not contradict express or implied provisions of the written K
         3. It must be one that the parties would not ordinarily be expected to embody in writing (Must not indicate the writing appears “to contain the engagements of the parties, and to define the object and measure the extent of such agreement”)
            1. Must not be so clearly connected with the principal transaction as to be part and parcel of it
      3. **Note:** Mitchil does not satisfy the third part of the test. Really should have included removal of the icehouse in the K.
         1. Buyers are attempting to say in return for what they agreed to pay for the home, they get removal of the icehouse as well
            1. Must decide if it is part of the deal whether it would be in writing
            2. Use a forerunner of the R. 240: Ordinarily in the writing test
   8. ***Masterson v. Sine***
      1. Dallas and wife Rebecca owned a ranch as TiC, transferred to Sine’s with a reserved option to repurchase property for same price. Dallas has been bankrupt since conveyance, Trustee and Rebecca brought action to establish their right to enforce the option. D’s contend that the option provision is too uncertain to be enforced and extrinsic evidence as to its meaning should have been admitted. D’s claim the option was only to be exercised to keep property in family, not to buy back whenever.
         1. Court: Allow extrinsic evidence as to the “keep in family” intent. D’s win. No buyback.
      2. **Takeaway-**
         1. **R.2d 204(1)(b)** permits proof of a collateral agreement if it “is such an agreement as might ***naturally*** be made as a separate agreement by parties situatied as were the parties to the written K
         2. **UCC:** Exclude the evidence “if the additional terms are such that, if agreed upon, they would ***certainly*** have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact”
         3. **Policy-** ***One policy*** is based on the assumption that written evidence is more accurate than human memory. Adequately served by excluding parol evidence of agreements that directly contradict the writing.
            1. ***Another Policy:*** is based on the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts

Recognizes that if this theory were adopted in disregard of all other considerations, it would lead to the exclusion of testimony concerning oral agreements whenever there is a writing and thereby often defeat true intent of parties.

Evidence of oral collateral agreement ***should be excluded*** only when the fact finder is likely to be mislead

The rule must therefore be based on the credibility of the evidence

* 1. **UCC §2-202- Final Written Expression: Parol or Extrinsic Evidence (UCC Parol Evidence Rule)**
     1. Paragraph (a) makes admissible evidence of ***course of dealing, usage of trade, and course of performance,*** to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. ***Such writings are to be read on the assumption that the*** course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased.
     2. **Newell Test:** The extrinsic things ought to get in unless the person relying on the writing can show that the extrinsic things would ***certainly have been in writing***. If we look at it, is this something that certainly would have been in the writing? Largely turns on credibility- if the judge believes testimony.
     3. **Plain Meaning Test (Conservative):** If a writing is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms.
     4. **Ambiguity Exception:** If a writing is ambiguous, courts admit evidence in order to ascertain its meaning.
        1. Some courts allow “some evidence” to determine if there is ***latent ambiguity***
        2. **Latent Ambiguity:** Phrase on face looks clear, ***but there may be some latent ambiguity***
           1. **If yes,** extrinsic evidence is ***admissible***
           2. **If no,** if judge is not convinced there is an ambiguity buried somewhere, ***no extrinsic evidence***
     5. **Corbin:** To hell with ambiguity, ***admit the evidence***
  2. ***Soaper v. State*-** Plain Meaning Rule
     1. 2 women, one real wife, one “wife.” Husband leaves Wife #1 in the middle of night, meets wife #2, dies, leaves a pot of gold for *Wife*.
        1. Plain Meaning Rule: Wife #1 would like this, seeing as she legally is the “wife”
        2. Court: Allows testimony of Wife #2
  3. ***Gold Kist v. Carr­*-** Multiple iterations of K, final one is controlling
     1. D argues that P gave him exclusive hauling rights for peanuts, saying P breached a k giving him that exclusive right. The first draft of k gave him exclusive rights, but final, signed draft specifically said P had no obligation to engage D’s services
        1. Court: Terms are clear and unambiguous, no possible interpretation other than “no exclusive rights,” Evidence does not need to be admitted.
     2. **Takeaway-** Under PER, a writing is ambiguous when its meaning is genuinely uncertain and doubtful or when it is reasonably susceptible to more than one meaning. However, if it is clear, no extrinsic evidence is to be admitted.
     3. **Note-** If a writing is a final expression of a K, can’t reference a previous iteration
  4. ***Greenfield v. Philles Records***- Plain meaning rule applied
     1. P contracts with record company and produces music, gives it the masters under an agreement that they can market them however they see fit. D ends up getting the masters, digitizes them and makes a ton of money. P sues to get the rights back.
        1. Court: Not gonna happen. The original agreement was unambiguous, and allowed reproduction through any means
     2. **Takeaway-** If an agreement on its face is reasonably susceptible to only one meaning, a court is not free to alter the k and reflect its personal notions of fairness and equity
  5. ***Pacific Gas*-** If language of K is susceptible to multiple meanings and evidence offered is relevant to proving one of the meanings, ***let it in***
     1. P&D enter agreement in which D was to do repairs, Pacific Gas (P) claims there was an indemnity clause in the K making D liable for damage (there was damage). D claims that the clause was for third party damages, tries to introduce extrinsic evidence to shed light on the ambiguity of the case
        1. Court: Let the extrinsic evidence in
     2. **Takeaway-** The ***test is not*** whether or not it appears to the court to be plain and unambiguous on its face, but ***whether*** the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.
        1. Intent is the source of contractual rights and duties. Exclusion of extrinsic evidence to explain the plain meaning of a written instrument could only be justified if it were feasible to determine the meaning the parties gave to the words from the instrument alone
        2. Ignoring Parol Evidence just because the words ***seem unambiguous*** can lead to the use of a written instrument for an ***unintended purpose***
        3. If the court decides, after considering the evidence, that the language of a k, in light of all the circumstances, is fairly susceptible to either one of the 2 interpretations contended for… extrinsic evidence relevant to prove either of such meanings is ***admissible***.
  6. ***Eskimo Pie*-** Can introduce expert in industry for objective standard of plain meaning
     1. Written contracts between Eskimo and Whitelawn and SAS. K referred to by parties as the “package deal.” Eskimo granted to Whitelawn the right to manufacture certain ice cream bearing Eskimo wrappers and labels and to SAS the right to purchase Eskimo branded products from Eskimo or Eskimo authorized manufacturers in NY metro area. Eskimo starts selling to other companies, results in purported termination by Whitelawn and SAS and mutual claims of breach (White-SAS refused to accept and pay for certain products).
        1. Issue is the meaning of the word “non-exclusive” used in the Package deal and proposal of Whitelawn-SAS to offer PE with respect to its meaning
        2. Court: The meaning of word non-exclusive is ***not ambiguous*** 
           1. Still allows evidence to be introduced but only objectively. “What an executive in the ice-cream business would reasonably assume non-exclusive to mean”
     2. **Takeaway-** The meaning to be attributed to the language of such an instrument is that which a ***reasonably*** intelligent person acquainted with general usage, custom, and surrounding circumstances would attribute to it
        1. That in the absence of ambiguity, PE will not be admitted to determine the meaning that is to be attributed to such language
        2. **Here,** the drafters are either unavailable or have died, opening the door to fraud if PE is allowed.
     3. **Note:** The package deal was created by parties over a long time with counsel present. For one party to assert a secondary hidden meaning behind a clear and unambiguous term is hard for the court to believe.
  7. ***River Island Cold Storage*-** Fraud Exception
     1. Workmans signed an agreement in which the Credit Association promised it would take no enforcement action on outstanding loan payments if the Workmans made specified payments. Workmans pledged 8 parcels of real property and initialed pages detailing there legal description. Alleged fraud and negligent misrepresentation against the association because they claim the VP met with them 2 weeks before the agreement was signed and told them they would extend the loan for 2 years in exchange for 2 ranches. Instead it was for 3 months’ forbearance and identified 8 properties as collateral. Workmans did ***not*** read the agreement, just signed it.
        1. Court: PE rule should not be used as a shield to prevent the proof of fraud
     2. **Takeaway-** Fraud exception to PER. Intent element of promissory fraud entails more than proof of an un-kept promise or mere failure of performance.
        1. **Requires** a showing of justifiable reliance on defendant’s misrepresentation
  8. **Evidence Outside Scope of Rule:** Because the rule prohibits admissibility of only extrinsic evidence that seeks to vary, contradict, or add to an “integration,” other forms of extrinsic evidence may be admitted where they will not bring about this result, i.e., they will fall outside the scope of parol evidence rule.
     1. **Validity Issues:** A party to a written k can attack the agreement’s validity. The party acknowledges (concedes) that the writing reflects the agreement but asserts, most frequently that an ***agreement never came into being*** because of any of the following:
        1. **Formation Defects:** Fraud, duress, mistake, illegality may be shown by extrinsic evidence
     2. **Collateral Agreements and Naturally Omitted Terms:** PE is often admissible if the alleged parol agreement is collateral to the written obligation (i.e. related to the subject matter but not part of the primary promise) and does not conflict with it. This “collateral agreement” doctrine is hard to apply because it is conclusory. **R. 2d. §216:** Allows evidence of terms that would naturally be omitted from the written agreement. A term would naturally be omitted if:
        1. It ***does not conflict*** with the written integration; and
        2. It concerns a subject that similarly situated parties ***would not ordinarily be expected to include*** in the written instrument
  9. **Difference between PER and Ambiguity Exception**
     1. PE goes to what is ***the contract***
     2. Ambiguity exception goes to “once we know what we are talking about, what does it mean, can we introduce evidence as to meaning if terms”
     3. **Plain Meaning Test:** Idea of judge looking at the writing and whatever terms are at issue and deciding “is there a patent ambiguity (on the face)” and if judge decides no, plain meaning exists, extrinsic evidence is excluded
     4. **Mansfield & Eskimo Pie:** Judge has sympathy for plain meaning rule but will allow parties to try and convince him (fact finder) if there is latent (hidden) ambiguity
        1. **Party can only produce objective** evidence, not self-serving subjective self-testimony
           1. Ex. “Reasonable ice-cream exec” is ok
           2. “Well I thought” is not
     5. **Pacific Gas:** Preliminary battle with judge, can bring in all kinds of evidence (self-serving ok) to try and convince judge that there is a hidden ambiguity
     6. **Corbin:** Doesn’t like ambiguity tests, can produce all evidence as to what terms mean, goes straight to jury

1. **General Principles of Interpretation (R.2d §201)**
   1. **Same Meaning:** When both parties attach the same meaning to a promise, agreement, or term, it is interpreted in accordance with that meaning
      1. ***Berke Moore v. Phoenix Bridge*-** Same meaning Rule
         1. D Phoenix bridge entered into K with New Hampshire to build bridge. Subcontracted with Berke Moore in which they would pay P (Berke) 12$ per square yard of “concrete surface including the bridge deck.” P performed the work and claimed that according to K language it should be paid for the amount of concrete placed on all of deck’s outer surfaces, including the top, bottom, and sides. D said the K only obligated them to pay amount of concrete in upper surface area
            1. Court: Evidence shows both parties knew the job was just for upper surface of bridge, so this is the meaning assigned to K. P gets paid for what K says.
         2. **Takeaway-** The same meaning rule precludes the use of the understanding of one party alone. It is designed to prevent imposition of his private understanding upon the other party to a bilateral transaction.
            1. When the understanding is mutual, it ceases to be “private” understanding of one
         3. **Note:** Tips for avoiding the sort of confusion in ***Phoenix Bridge***
            1. Include estimates for amounts you’re expecting to spend
            2. Use more specific language, they should have defined “bridge deck”
            3. Drawing a diagram always helps
   2. **R. 2d. §201:**
      1. Where the parties have attached the ***same*** meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning
      2. Where the parties have attached ***different*** meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:
         1. That party did not know of any different meaning attached by the other party, and the other knew the meaning attached by the first party; or
         2. That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party
      3. ***Except as stated in this Section***, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent
   3. ***Turner Holdings v. Howard Miller Clock***-Ambiguity
      1. P contracted with D to locate companies for acquisition, D owes P payment if they acquire anything, but also for any company still “under consideration” two years after the termination of the K. Within 2 years, a company P says was “under consideration” is bought by D. D refuses to pay, P says they must. The parties argue about the term “under consideration.”
         1. Court: THI’s efforts on behalf of HMCC were sufficient to trigger HMCC’s obligation under termination clause of k to pay THI’s finders fee
      2. **Takeaway-** Ambiguity does not exist due to “what’s in your head” of one party. When the parties have attached ***different*** meanings to a agreement or term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made the party did not know of any meaning attached by the other party, and the other party knew the meaning attached by the first.
         1. **Here,** Court gives no weight to the supposed elements D claims must be met for a company to be “under consideration” by P. THI had no idea D had these ideas in his head, while D, acting reasonably, would expect THI to view the purchased company as “under consideration”
         2. Where language of k is plain and unambiguous, the terms of the k and the intent of parties will be interpreted as being consistent with that language
         3. Cardinal rule of interpretation is to ascertain intent of parties
   4. **Patent Ambiguity:** Apparent on the face of the instrument arising by reason of inconsistency, obscurity, or an inherent uncertainty of the language adopted, such that the effect of the words in connection used is either to convey no definite meaning or a double one
   5. **Latent Ambiguity:** Where the language employed is clear and intelligible and suggest but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings
      1. Court must ***first examine extrinsic evidence*** to determine in fact such evidence supports contention that the language of the k, under the particular circumstances of its formation, is susceptible to more than 1 interpretation
      2. ***Undisclosed and uncommunicated belief*** about what words mean in the K is ***not sufficient*** ***to establish*** existence of ***latent ambiguity***
   6. **Note:** Court’s start out with ordinary meanings of language and grammar. Misplaced comma’s can be disastrous. Have to be careful
2. **Course of Performance/dealing, usage of trade**
   1. **UCC §1-201 (b)(3):**
      1. “Agreement,” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including ***course of performance, course of dealing, or usage of trade***
   2. **UCC§2-208: Course of Performance or Practical Construction**
      1. Where the K for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement
      2. The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable ***as constant with each other***; but when such construction is ***unreasonable***, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade
      3. Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance
   3. **UCC §1-303(b)-€**
      1. A **“course of dealing”** is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct
      2. A **“usage of trade”** is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. Scope and existence must be proven by facts.
      3. A **course** **of** **performance** or **course** **of** **dealing** between the parties or **usage of trade** in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.
      4. The express terms and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:
         * 1. ***express terms*** prevail ***over course of performance***, course of dealing, and usage of trade;
           2. ***course of performance*** prevails ***over course of dealing*** and usage of trade; and
           3. ***course of dealing*** prevails ***over usage of trade***.
   4. **UCC 2-202 Comment #2 (UCC Parol Evidence Rule)** 
      1. Paragraph (a) makes admissible evidence of ***course of dealing, usage of trade, and course of performance,*** to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. ***Such writings are to be read on the assumption that the*** course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased.
   5. **Usage of dealing, usage of trade, & course of performance**
      1. Ascertain meaning of agreement;
      2. Give particular meaning to specific terms;
      3. Supplement or qualify terms;
      4. Explain the agreement
   6. **UCC 1-303 b-e**
      1. Express terms + Course of performance, dealing and usage of trade should be construed ***wherever reasonable as consistent with each other***. If such construction is unreasonable, there is ambiguity.
      2. **Course of Dealing:** Sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct
   7. **Hierarchy: Statutory Preference (Not Parol Evidence Rule, Always Admissible!)**
      1. Express terms
      2. Course of performance
      3. Course of dealing
      4. Usage of trade
      5. UCC Gap Fillers
   8. ***Nanakuli v. Shell Oil***- Trade usage, course of performance and dealing ***in action*** 
      1. P buys all its asphalt from D, D raises prices twice, but price protects P each time. 3 years later, D raises price again, gives one day of notice to P, then refuses to price protect them.
         1. Court: Jury finds ***course of performance*** (D price protected twice before), ***course of dealing*** (D accepted a lower price twice before or 100% of the other times this happened), and ***usages of trade*** (Oahu practice is to just trust the distributor, Shell deals there frequently, should have know this, were certainly equipped to figure it out, look to previous interactions and customs on the island)
      2. **Trade Usage:** Nanakuli gets the “rock guys” to testify. They don’t ask for price verification or put price protection in K, ***but they always do it***.
         1. **Shell Argument:** If there is a trade, it is just asphalt, and if it is just asphalt, only 2 major suppliers at the time (Chevron and Shell) Shell will say 1 thing, Chevron will say another
         2. Shell tries to argue that the Rock industry is different from Oil (for asphalt). There is an oil embargo, not a rock embargo. Court says the Oahu market is small and Shell was either aware or should have been aware of the ***trade usage*** in such a ***small market***
         3. “A usage need not necessarily be one practiced by members of the party’s own trade or vocation to be binding ***if*** it is so commonly practiced in a ***locality*** that a party should be aware of it
            1. Shell would be bound not only by usages of sellers of asphalt but by more general use ages on Oahu, as long as those usages were so regular in their observance that Shell should have been aware of them
      3. **Course of Performance:** Repeated occasions for performance
         1. 2 previous instances of price protection.
         2. Course of performance is how a party actually performs under the k. Repeated occasions, did they always look at the problem in a particular way. Strong reason to interpret in a certain way.
      4. **Course of Dealing:** The past
         1. If the parties have ***not dealt*** with each other ***before*** there is **NO COURSE OF DEALING**
         2. The parties ***have dealt with each other before***, how did they handle each other before?
            1. Essentially the same argument as course of performance
            2. Had a history of dealing with this in a particular way

***Less strong than performance***

1. **Gap Fillers** 
   1. **Why Gaps:**
      1. **Absence of Expectation**
         1. Did not foresee or at least did not expect
            1. Beyond what they could possibly expect
         2. Stupidity
            1. Miss some stuff
      2. **Understatement of expectation-** Saw the possible problem but chose not to deal with it
         1. Thought unlikely to occur
            1. So unlikely to happen, don’t want to mess with it (time, some issues are nasty- could blow apart the deal)
         2. Thought Really hard to agree and/or draft
            1. Draft: Not that easy, imponderables are large, variations of what could go wrong are significant

Leave some of these alone

* + - 1. Decided to pass the buck
         1. To parties in the future with better information
         2. TO parties in the future who would have to take the heat in dealing with nasty problem
  1. **UCC 2-204 (3):**
     1. “Even though one or more terms are left open, a K for sale does not fail for indefiniteness if the parties have ***intended to make a K*** and there is a ***reasonably certain basis*** for giving an appropriate remedy”
  2. ***Haines v. NYC­-***Court looks to intent of parties to fill gap, considers duration and scope
     1. Agreement states that city will pay for maintenance and operation of a sewage plant, no specificity is given to duration or scope (will they need to expand to accommodate more homes). P wants to build more, D says they can’t because the sewage plant is at capacity. P asserts that D has to expand it due to their agreement.
        1. Court: Intention of NYC was to maintain the facility until it is no longer needed, not continually expand it to accommodate growth of the village.
     2. **Takeaway-** In absence of express term/to fill gaps in K, court looks to parties’ intent.
        1. **Duration:** Whether the parties have not clearly expressed the duration of a k, court will imply they intended performance to continue for a reasonable time
           1. **Here,** Reasonable to infer parties intended city to maintain facility for until such time city neither wanted or desired the water, whose purity was protected by the facility
        2. **Scope:** Again, goes to intent. ***Here***, the city has to maintain the current system (under the K) until village doesn’t want clean water. No duty to expand, however.
  3. ***Haslund v. Simon Property­-***Just because a K is incomplete does not mean it is unenforceable
     1. D’s appeal argues that the provision of the K that it was found to have violated was too indefinite to be enforceable, and no injury proved. P joined a startup subsidiary of D company for an increased salary and 1% equity in the company. Never received her stock, was eventually fired. Startup never turned a profit or had a substantial income.
        1. Court: There was an enforceable k but that the value of equity was nominal (company never turned profit). Held that there was no evidence that there would have been a ***market*** for employee’s shares
     2. **Takeaway-** The fact a K is incomplete, has lots of unanswered questions, etc. does not make it unenforceable for indefiniteness. If contracting parties had to provide for every contingency that might arise, negotiations would be interminable
        1. **A K is Unenforceable for Indefiniteness When it Leaves Out:**
           1. A crucial term that
           2. A court cannot reasonably be asked to supply in the nature of interpretation
           3. Ex. Contract Price
  4. ***Southwest Engineering Co. v. Martin Tractor*-** Failure to agree on terms of payment would not defeat an otherwise valid agreement
     1. P sought to purchase generator equipment from D. Representatives met to discuss terms, at meeting D wrote on a piece of paper the price for the generators, his name, and quantity of generators. Later D refused to sell. P sued for breach of K Payment terms were discussed as an afterthought rather than a material portion of the k. Martin did not mention the disagreement over payment until 4 months after the agreement.
        1. Court: Fact payment was not agreed upon was not fatal to the agreement. KS Statute stated that unless otherwise agreed, payment was due at delivery
     2. **Takeaway-** Failure to agree on terms of payment would not defeat an otherwise valid agreement
        1. Where parties have reached an enforceable agreement for the sale of goods, but omit the terms of payment, the law will imply, as part of the agreement, that payment is to be made at time of delivery.

1. **Good Faith**
   1. **2d §205, Comment (a):** “Faithfulness to an agreed common purpose and consistency with the justified expectations of the other party…”
   2. **Excluder (Summers):** A tool of interpretation that looks not at what a party agreed to do but rather at what the party at least agreed not to do
      1. Looking at what kind of rotten conduct is seen here, whether they at least agreed not to do
      2. Courts are focused on bad behavior
      3. Turn it around- good faith is not doing “that”
   3. **As an interpretive tool, courts often simply implying limitations on what the words, if read literally, would seem to allow**
      1. It says you can do this, but it doesn’t really mean you can do it every time in every condition
      2. Implying some kind of limitations
   4. **No independent obligation to be good. UCC §1-304 Comment #1-** **No separate duty of fairness and reasonableness which can be independently breached** 
      1. Can’t just say “well you were unfair” without referencing what in the K was done or not done
   5. **Catch-all category to deal with an assortment of bad behavior**
      1. Eg. Whistleblowing, harassment, short changing, etc.
   6. **Idea of good faith permeates many situations**
      1. Eg. Wood v. Lady duff-gordon, Hoffman v. Red Owl, Wiener v. McGraw Hill, Watts v. Watts, Drennan v. Star Paving, Nanakuli v. Shell
   7. ***Fortune v. National Cash Register***- Breach of Good faith is not performing under the K in such a way as to not take away what the parties reasonably expected to happen under the K
      1. Fortune was employed by NCR under a written “salesman k” which was terminable at will, without cause, by either party on written notice. First National signed a big order of machines to be delivered over 4 years (5 mil.). Fortune did not participate in negotiation term but did appear on the order in the space entitled “salesman credited” which entitled him to a 92k bonus credit. He was fired, then told to stay on and keep doing what he was doing, started receiving bonus, got 75% and was told to just “forget about the rest,” then was asked to retire, which he refused, at which point he was fired.
      2. **Elements of Bad Faith:**
         1. “Reassigned” to the same job and account
         2. Timing- 1st firing and second firing (terrible timing)
         3. Old, had a kid in college
         4. Unkind management
         5. 25-year employee
         6. 1st National is a long-time client
         7. Prospect of fortune making 95k for doing not very much under current bonus system doesn’t look good in conjunction with his firing
      3. **Takeaway-** Every K has an implied covenant of good faith, if you act in obvious bad faith, it will be considered a breach of K.
   8. ***Tymshare v. Covell*-** Example of bad faith in sales K’s
      1. Management reserved the right to retroactively alter salesman quotas, thereby changing how much commission they could make. P offered no reason why management could do this. D argued that it was a way for the company to arbitrarily deprive employees of the agreed benefits of their labor. Was successful
   9. ***City of Midland v. Obryant***- Not every contractual relationship created a duty of good faith and fair dealing. The court here refused to impose good faith and fair dealing in the employer/employee relationship.
   10. ***Felt v***. ***Henry***
       1. P operated a wholesale bread baking business, parties had a k in which P was to buy bread crumbs from D. D stopped producing without giving the required notice because it was no longer economical to continue the operation. D tells P they can keep operating if P ups the price on the k.
       2. Court: So long as the stoppage was in good faith, there is no obligation to carry out the rest of the term of the K. ***Contracts for production*** mean that the party is obligated to make a good faith effort to provide output.
       3. **Note:** Output K
          1. Quantity is measured by seller’s output, whatever seller’s output is, is the quantity of K
          2. Output K’s only work with seller’s good faith output
             1. Here the output is 0. Could be in good faith if seller was going bankrupt or business was in peril. Here, however, output is 0 because seller didn’t feel like fulfilling the K
          3. Seller did not observe the cancelation provision in the K. Did not provide notice of cancelation to avoid expenses for either party
       4. Flipside- Buyer’s requirement
          1. Measured by what Buyer requires
       5. **Takeaway:** Economic feasibility is not a factor that justifies cancellation of K’s. Good faith required notice of cancellation before cessation of production in an output K

**Conditions**

1. **Express Conditions; Operation, Effect, and Interpretation**
   1. **Defined:** Duty of a party (always identify the duty) is contingent upon the occurrence of an uncertain event so that if the event does ***not*** occur (or is ***not*** excused) the duty is ***not*** activated and thus cannot be breached by non-performance
   2. **Three Kinds of Conditions**
      1. **Express:** Written terms expressly provide that the duty is conditioned
         1. E.g. Buyer’s duty to pay for realty and close the deal is ***expressly*** conditioned on a particular loan being available
      2. **Implied in Fact:** No express provision but facts compel compulsion that duty is conditioned
         1. On the facts, the duty has to be conditional
         2. E.g. Grain sales K with Seller to deliver to port designated by buyer. Seller’s duty to deliver is conditional on B designating the port
      3. **Constructive (Implied-in-Law) Condition:** Justice and good sense say that a duty should be conditioned
         1. E.g. Roofing K, roofer must substantially perform job before the owner’s duty to pay arises
         2. General approach taken by courts in absence of express provision, normal view is roofer has to substantially perform before duty of payment arises
   3. **Major Policy Issue**
      1. Forfeiture, windfall vs. freedom of K
      2. **Ex. Plumbing Case**
         1. Windfall, forfeiture: If the homeowner doesn’t have to pay, builder has to forfeit labor, and the homeowner gets a brand new, functioning home
         2. Freedom of K: Homeowner wanted a specific type of pipe. It was specified in the K. What happened to freedom of K?
   4. **Why Conditions?**
      1. Risk allocation
         1. If a condition is not included, the potential for risks is high
            1. Ex. "I can't afford this house without getting this loan at this rate"
      2. Quality Control
         1. Often put in as a way of saying "I want a certain quality"
            1. Either personal approval or architect or engineer
            2. Condition duty to pay on the party saying "its ok"
      3. Insurance Companies
         1. Duty to pay under the policy is conditioned on you doing certain things
            1. Can't be sued for not doing these things but you can lose your policy if you don't pay your premiums
      4. Setting up times of performance
         1. Setting things up for who has to do what and in what order
         2. Something in the k called alternate conditions precedent
            1. May say in the k that builder puts in foundation, if done, owner pays 10%, if the owner pays 10% the builder goes ahead and frames the house, when the house is framed, owner pays 20%, if paid, builder puts the roof on the house, etc.
            2. Set up so each party has some protection

Each is a condition precedent to the next step

* 1. **Difference between a Promise and Express condition**
     1. ***Condition*** means some operative fact subsequent to accept and prior to discharge, a fact upon which the rights and duties of the parties depend
     2. ***Promise*** is always made by the act or acts of one of the parties; such as being words or other conduct expressing intention; a fact can be made to operate as a condition only by the agreement of both parties or by the construction of the law
        1. The purpose of a promise ***is the creation of a duty*** or ***disability*** in the ***promisor***
     3. The ***fulfilment of a promise discharges a duty;*** the occurrence of a ***condition*** ***creates a duty***
        1. The non-fulfillment of a promise is called a breach of K, creates in the other party a right to damages
        2. Non-occurrence of a condition will prevent the existence of a duty in the other party, but it may not create an right to recover damages
  2. ***Merritt Hill v. Windy Heights***
     1. Buyer entered into K with seller to purchase majority stock in a vineyard. Learned seller had not obtained title insurance pursuant to the K, refused to close, sued to get his deposit back after its return was refused by seller.
     2. Court: Seller’s undertaking to produce a title insurance policy and mortgage confrimation at closing constituted a condition and not a promise, the breach of which excused the buyer’s performance and entitled a return of its deposit
        1. A ***promise*** is a “manifestation of intent to act or refrain from acting in a special way, so made as to justify a promisee in understanding that a commitment has been made
        2. A ***condition*** is “an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a K becomes due.”
           1. Here, clearly a condition to acquire the insurance. Not going to get consequential damages however because no promise to perform the condition in the K, just a condition precedent to performance
     3. **Duty Conditioned:** Buyer’s duty to pay the price and go through with the transaction is conditioned on seller acquiring title insurance and mortgage confirmation
     4. **Mutuality Argument:** Implied obligation for seller to try their best to get the title insurance
        1. If you had no obligation for seller to get title insurance, it would lead to seller having a free way out of K
     5. **Drafting Lessons:** If you want to make it an express condition
        1. In the actual K, there was a section of conditions
        2. “Which provides the P’s obligation to pay the purchase price and complete the purchase of the vineyard is “subject” to fulfilment of those requirements
        3. If we draft it, we will say “expressly conditioned upon fulfilment of these conditions”
           1. If you set up a separate section, it is great benefit if you follow it. Nothing worse if you don’t follow it. If you define something under a section, for god’s sake follow the definition, don’t use it in some other way
  3. ***Jacob and Youngs v. Kent*** 
     1. P was under K with D to build a home using Redding Pipe for all plumbing. Used some Redding, some other types, but all pipe was of high quality. K specified Redding Pipe. To replace the pipe, P would have to tear down the whole house. D refused to pay.
     2. Court: P’s omission of the specified pipe was neither fraudulent nor willful, and P was ready to present evidence that the pipe used was essentially identical to Redding. P was due payment
     3. **Doctrine of Substantial Performance:** If you got close, should be able to collect subject to an offset
     4. **Owner Argument:** Duty to pay expressly conditioned don architect issuing the certificate of completion. Builder made the mess, went to architect, architect refused to issue certificate, no certificate, no pay. Used the wrong pipe. Redding was stipulated.
     5. **Takeaway-** The measure of damages is not cost of replacement but difference in value in cases of substantial performance if the defect is trivial
        1. Some promises though dependent and thus conditions when there is a departure in point of substance, ***will be viewed as independent and collateral*** when the departure is insignificant
        2. **Forfeiture v. Windfall**- Refusing P relief would result in D getting a brand new home for free, payment for P would not result in a windfall because he still made expenditures and have substantially performed the K
        3. **Cardozo** **says** the appropriate damage measure here is ***diminished value*** which is nothing. Pipe is essentially the same
     6. **Other “Not Used” Theories**
        1. **Estoppel:** Contractor wants to say that he was mislead into thinking what he was doing (negligent pipe installation) was ok, we weren’t careful, ought to be estopped
        2. **Usage of Trade:** Normal to trade out pipes, everyone does it, owner should have known better. If you want specific type, specify the brand. Usage of trade argument would be to say that the term “redding” just meant “top quality pipe”
        3. **Liquidated Damages:** Huge sum of money due, what stops payment is a minor issue/breach. Is this ok?
     7. **Have to weigh:**
        1. Purpose to be served, desire to be gratified, excuse for a deviation from letter, cruelty of enforced adherence
  4. ***Brown-Marx***
     1. P gets a loan from D on the condition that they make a certain amount of money per year in rent from tenants