1895

Voluntary Subscription Contracts

Louis Hiram Kilbourne
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VOLUNTARY SUBSCRIPTION CONTRACTS.

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THESIS PRESENTED BY
LOUIS HIRAM HILECOURNE
FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY
SCHOOL OF LAW
1935
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VOLUNTARY SUBSCRIPTION CONTRACTS.

INTRODUCTION

There is, probably, no more productive source of litigation known to the law, which has been so neglected by the text writers as the subject of voluntary subscriptions; newspaper subscriptions, subscriptions to the stock of corporations, and in fact all classes of subscriptions wherein the subscriber receives some other and more substantial reward than the sense of his own well-doing, have been skilfully and successfully treated by scores of able writers, but the voluntary subscription to a work of charity or necessity has remained almost unnoticed, or, at best, has been treated only in a superficial and careless manner.

Ever since the great philanthropic and educational institutions of the world have been in successful operation they have largely been supported by the voluntary subscriptions of generous men, who have given liberally to promote their growth and efficacy. But complications are constantly arising: the scheming of dishonest men is frequently interfering to prevent the use of the funds as the subscriber wishes; or perhaps, the subscriber himself repenting his hasty generosity
seeks to avoid his just obligations and refuses to pay; these complications are constantly dragging the subject into the courts, and causing almost endless expense and litigation.

Voluntary subscriptions comprise mainly works of necessity and charity, for the modern broad meaning of the word charity is sufficient to take in nearly all classes of subscriptions made from motives of pure generosity. The word charity as used in the Massachusetts Sunday Law, includes "whatever proceeds from a sense of moral duty or a feeling of kindness and humanity, and is intended wholly for the relief or comfort of another and not for one's own benefit or pleasure."

(a) This is the meaning of the word charity as generally applied by the courts, Justice Gray in Jackson v Phillips (b) making it even stronger; he says, "A charity, in a legal sense, may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is call-

(a) Doyle v Lynn and Boston R.R. Co., 118 Mass. 125.
(b) 14 Allen (Mass.) 532.
ed charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

A work of necessity is one authorized by the pressing needs or exigencies of the occasion; an invasion by a foreign enemy, rebellion, mob violence, fire or flood, may all be occasions when the generous citizen will subscribe sums of money to relieve from present danger; these subscriptions must necessarily be voluntary, and they are governed by the same laws that regulate charity.

From these constructions of the words "necessity" and "charity" it will be seen that there can be but few voluntary contracts of subscription that will not be placed by the courts in either one or the other of these classes.

It has been my aim in this paper to treat only of voluntary subscriptions in a full and complete manner. To this end I have endeavored to avoid all phases of subscription contract law not having a direct bearing upon the subject of voluntary subscriptions; I have been aided by the American and English Encyclopaedia of Law and by one or two of the works on contract, notably that of Mr. Parsons, who is an exception to the ordinary writer on contracts in that he devotes at least four pages of his work to a discussion of these principles.
CHAPTER I.
DEFINITION AND DERIVATION.

Sec. 1. Derivation. The word subscribe is derived directly from the Latin. It is formed by joining the preposition "sub", (under) to the infinitive of the verb "scribo" (to write). This combination makes the word "subscribere" (to write under). The final syllable "ere" has been dropped in the English, and the word subscribe remains.

Sec. 2. Definitions.

(1) Subscribe. In the law of contracts, "to write under; to write the name under; to write the name at the bottom or end of a writing." (a)

(2) Subscription. "The act of writing one's name under a written instrument; the affixing one's signature to any document, whether for the purpose of authenticating it or attesting it, of adopting its terms as one's own expressions, or binding one's self by an engagement which it contains". When used as a noun it means the contract itself, "A contract whereby one engages to furnish a sum of money for a designated purpose, either gratuitously, as in case of subscribing to a charity, or in consideration of an equivalent to be

(a) Davis v Shield, 32 Wendell 336.
Prigden v Prigden, 4 Col. 233.
to be rendered as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like". (a)

(3) Subscriber. "One who writes his name under a writing for the purpose of adopting its expressions as his own". (b)

(4) Subscription list. "A list of subscribers to some agreement with each other or with a third person." (b)

Sec. 5. Relation to the American Law of Contract. The word subscribe in its modern contract sense, means "to give assent by writing the name under." This, it is seen, is a somewhat broader meaning than was given to the word in its early and usual sense. If the signature has been obtained in a legal manner, the subscriber has assented to the exact terms and obligations of the contract to which his name has been placed. His act is binding, and he can be compelled by a court of justice to meet the obligations which he has taken upon himself.

(a) Coon v Ringdon, 4 Col. 433.
(b) Black's Law Dictionary.
CHAPTER II.
THE CONTRACT.

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In the contract of subscription all the elements necessary to any valid contract must be present. They are (1) competent parties (2) mutual assent (3) a good consideration (4) a legal object and (5) execution in due form. These contracts are construed in the same manner as any valid contract and by exactly the same rules. (a) In this chapter the various elements which go to make up a valid contract of subscription will be discussed in their order.

Sec. 1. Competent Parties. A subscription to be valid and enforceable must be entered into by a person or association capable of making a valid contract. In Presbyterian Church v. Cooper (b) it was held that a subscription by a ladies association not legally capable of contracting was not enforceable against the twenty-five or thirty ladies who composed such association. This same doctrine has been held in similar cases such as Y.M.C.A., Political Clubs and the like, and is applied in case the subscriber is insane or otherwise mentally incompetent. (c)

(a) Richelieu v. Hotel Co. v International Encaust. Co. 23 N.E.10 (Ill.); Smith v. Bowles, 16 Atlantic Rep. 553 (Vt.);
(b) 45 Hun (N.Y.) 455.
(c) 23rd St. Church v. Cornwall, 51 N.Y. Superior Ct.20
But while it is necessary that the subscriber must be legally capable of contracting, it is not always necessary that the person to whom the subscription is payable be a person legally capable of taking at the time the subscription is made. The beneficiary may not be in existence at the time the subscription is made, or if he is, he may be incapable of taking until the conditions of the subscription have been performed. But, such subscription cannot be enforced until there is a party capable of enforcing it; the promise may be made to an incapable person, but a responsible person alone can enforce it; in other words the promisee must become a person capable of taking before he can maintain a suit upon the contract.

This is conclusively shown in the case of Hopkins v Upsuhr, (a). In this case a voluntary subscription was made to donate cash for the building of a church not yet begun. It was held that the beneficiary was incapable of enforcing the contract until the trustees became parties capable of taking. This happened when they allowed work to be commenced upon the church relying upon this subscription for payment.

Sec. 2. Mutual Assent. It is necessary that a person

(a) 20 Tex. 33.
who puts his name to a subscription paper should know just what obligation he is taking upon himself. In order to do this there must be a clear and intelligent understanding between the subscriber and the person to whom the subscription is made. Whenever the subscription paper contains terms and agreements, if such terms and agreements are truly carried out there is said to be mutual assent. There is a clear meeting of minds upon the same subject matter and an enforceable contract is the result. (a)

In order that there may be a clear and intelligent assent to the exact terms of the subscription, there are certain elements which must be eliminated, in order that the subscriber's real assent to the exact contract, be secured. These elements are (1) mistake: "some unintentional act, omission or error, arising from ignorance, surprise, imposition or misplaced confidence," (b); (2) misrepresentation: "an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to it and influential in producing it". (c); (3) fraud: "is the cause of an error bearing upon a material part of a contract, created or continued by artifice, with designs to obtain some unjust advan-

(a) Comstock v Howd, 15 Mich. 237.
(b) Story's Eq. Juris. Vol.I. Sec. 110.
(c) Wise v Fuller, 22 N.J. Eq. 262.
tage of one party or to cause inconvenience or loss to the
other! (a)" : (4) undue influence: "consists for this connection
of taking an unfair advantage of another's weakness of mind:
of taking a grossly oppressive and unfair advantage of another
necessity or distress". (b): (5) duress: "unlawful constraint
exercised upon a man whereby he is forced to do some act
against his will." (c)

It is very clearly to be seen that if even one of the
above elements is present in the contract it will be void.
There can be no intelligent assent.

Sec. 3. Consideration. When the subscription is made
to a charitable or other object there is usually no consider-
ation mentioned, but before such subscription can ripen into
an enforcible contract a consideration must spring up. In
rare cases a nominal sum is given to a subscriber to make his
subscription binding at once, but oftener the consideration
comes into existence after the subscription has been made.
There are various kinds of considerations which may render the
subscription valid, (1) promise for a promise. When the
offer contained in the subscription paper has been accepted
in terms, by a subscriber, he is bound to carry out his ob-

(a) Middlebury College v Loomis, 1 Vt. 183. Civil Code La.
Art. 1847.
(b) Black's Law Dictionary page 1906
(c) " " " " 402.
ligation and pay the amount subscribed. This consideration rests on a promise for a promise. (a) In the case of Bohn Mfg. Co. v Lewis, (b) the plaintiff undertook to expend money in the erection of a manufactory in the city of St. Paul upon the condition that certain sums should be subscribed and paid by the citizens thereof in aid of the enterprise. It was held that the promise of the plaintiff was sufficient consideration for the promise of the defendant, and that the defendant must pay the sum subscribed by him upon the faith of plaintiff’s promise. (2) A seal. It is now common to append a seal to a subscription paper. An individual seal may be used after each name, or a single seal may be appended to the paper with a statement that each subscriber accepts the same as his seal. In either case the presence of the seal is conclusive evidence of the presence of the consideration and an action upon the subscription will lie without any further act upon the part of either party. (c) (3) The fulfillment of conditions. Subscriptions are frequently made upon certain conditions, as that something be done, or that a certain amount of money in the aggregate be subscribed. When this is the case the performance of the condition upon the part

(a) Parsonage Fund v Ripley, 8 Mo. 443; Amherst Academy v Cowles, 6 Pick. (Mass.) 427; Bohn Mfg. Co. v Lewis 45 Minn.1

(b) Ball v Dunsterville, 4 Term Rep. 313.

Cooch v Goodman, 2 O.2. 580.
of the promisee, who is the person who has accepted the offer contained in the subscription, constitutes a valuable consideration. This was so held in the case of the Lafayette Monument Co. v Hagoon, (a) In this case the defendant proposed to the county supervisors that if the county would, within two years, raise by taxation the sum of $2000. towards the payment for a soldier's monument, proposed to be erected by plaintiff, the defendant would himself give $1000. to the object. The county acting under the proposition raised the $2000. by taxation. Defendant refused to pay. Held that defendant's proposal constituted a subscription and became binding when acted on by the county. When this condition was accepted, by performance of the condition a valuable consideration arose. This point seems to be well settled and there is abundance of authority in support of the proposition. (b)

When the subscription or a material part thereof has not been complied with, the subscription if unpaid cannot be enforced and if paid the sum can be recovered back by the subscriber with interest from the date of payment. (c) This failure must, however, be absolute. It must not be a possi-

(a) 73 Wis. 627.
(b) Miller v Ballard, 42 Ill. 577.; Williams Col. v Danforth, 12 Pickering (Mass.) 541.
(c) Fort Wayne Electric Co. v Miller, 30 N.E. 25 (Indiana)
ble or probable one, and where the subscribers agree different conditions to their subscriptions the liability of one is not affected by the failure of the condition of any other. (a) (4) Work and labor performed or liability incurred upon the faith of the subscription. Another very frequent consideration for subscriptions is the fact that some work or labor has been done or liability incurred before the revocation of the subscription, relying upon the offers contained in the subscription papers. In these cases such work and labor constitute a valuable consideration and the subscriber is bound. Thus, borrowing money (b), furnishing materials (c), and building a bridge (d), have all been held to constitute a valuable consideration rendering the contract enforceable.

It is not necessary that a subscription be accepted in express terms; the cases hold that an acceptance may be implied, either from performance of the condition stipulated in the subscription paper or from some unequivocal act done on the faith of the subscription. In the absence of one or the other of the above circumstances the subscription is "nudum pactum", a mere offer, and cannot be enforced. (e)

(a) Davis v Shafer, 50 Fed. 764.
(b) Mc Clure v Wilson, 43 Ill. 351.
(c) Pryor v Cain, 25 Ill. 322.
(d) Cooper v Mc Crimmin, 33 Tex. 322.
(e) Church v Kendall, 131 Mass. 528.
(5) Mutual promises of subscribers. There are two lines of decisions on this point. In some cases it has been said that the promise of each subscriber is the consideration for the promise of the others, and no one can recede without the consent of all, and the subscription paper may therefore be enforced against all. (a) Such subscription cannot be enforced in New York and Massachusetts unless money is paid out, or labor performed, relying upon the faith of the promise and before such promise is revoked. (b)

The objection to this view is, that if the mutual promises do constitute a sufficient consideration for each other, so as to create a valid contract, it is a contract between co-signers only, and not between them and a third person who is not a signor. Parsons on "Contracts" says, "To say that they (i.e. the subscriptions.) are obligatory, because they are all promises, and the promise of each subscriber is a valid consideration for the promise of any other, seems to be reasoning in a vicious circle, the very question is, are the promises binding? For if not they are no considerations for each other. To say that they are binding because they are such considerations is only to say that they are binding

(a) Troy Academy v Nelson, 24 Vt. 180 ; Gittings v Mayhew, 6 Md. 113 ; Chamber v Calhoun, 3 Harris (Pa.) 13.
(b) Farmington Academy v Allen, 14 Mass. 172 ; Church v Kendall, 121 Mass. 520 ; Orphan's Home v Sharp, 12 Mo. Ap. 150.
because they are binding; it assumes the very thing in ques-
tion."

Such mutual promises might, however, support an action against a single individual who refuses to pay, brought by his co-subscribers, they having accomplished the object for which the subscription was made. (a) (b) **Moral obligation.** Some of the earlier cases have held that the moral obligation of the subscriber to pay is sufficient to constitute a good consideration for his promise. The case of Caul v Gibson (b) was the leading case upon this proposition. The rule was never a general one and later cases hold that when taken alone it is not a sufficient consideration.

Sec. 4. **Legal object.** It is a general maxim of the law that "anything that is contrary to public policy is not to be permitted". This rule applies with special signifi-
cance to subscriptions. A subscription to a church, a hos-
pital, or a charity of any kind, is manifestly for the public good, and is, therefore, looked upon with great favor; But, on the contrary a subscription to maintain a gambling-house or a house of prostitution would be as manifestly against public policy as the other is for it. The object of the subscription must be one permitted by law before such sub-

(a) George v Harris, 4 N.H. 553.
(b) 3 Pa. St. 410.
scription can be enforced; the interests of society demand it, and the courts will interfere to see that it is not departed from.

Sec. 5. Due form. Subscriptions are rarely if ever permitted by parol. The very nature of a subscription requires a writing, to which the signing of the name gives assent. This however does not preclude the person from making an oral gift but such oral gift would not be enforced as a subscription unless there was a writing. This writing may however be of the most informal character. The usual subscription paper rarely is a formal document. The subscription paper should state however (1) the object of the subscription (2) any necessary conditions (3) the beneficiary (4) to whom payment is to be made or some method by which he is to be ascertained. If these facts appear however informally upon the face of the paper the subscriber is deemed to know to what conditions he is appending his signature and is held accordingly.
CHAPTER III.

THE CONTRACT (continued)

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Sec. I. Nature of the liability. The signers of a subscription paper in the ordinary form are severally not jointly liable. The act of a subscriber in no way interferes with the rights and liabilities of any co-subscriber. Each one acts for himself, and in so doing incurs no liability for the acts of another although their names are appended to the same contract. But, two or more persons may, by special agreement, make a joint subscription and be jointly bound. This fact should, however, appear upon the face of the subscription paper else they will be held to have subscribed severally.

(a)

When an organization capable of contracting makes a subscription such subscription is enforceable only against the organization itself, and not against the individual members. A subscription by an incapable organization cannot be enforced such organization unless it can be proved that it was authorized by the members thereof, in which case the subscription will be treated as a joint one and may be enforced against the individual members. (a)

(a) Robertson v. March, 4 Ill. 103.
Sec. 2. **Subscription made on Sunday.** Most states have very rigid statutes upon the subject of Sunday contracts, and with very few exceptions declare such contracts void.

Among the notable exceptions most states recognize works of necessity and charity. Under this exception come in a large share of the ordinary contracts of subscription. Any subscription for religious purposes, for relieving the sick, furnishing medical aid, nurses, or assisting in any way to relieve suffering would be permitted as a work of charity. A subscription to rescue property or persons from fire or flood, to repel invasion by a foreign enemy, or to suppress domestic violence, would be enforced, even though made on Sunday, because such subscription would constitute a work of necessity.

The fact as to whether a subscription is to a work of necessity or charity is for the court to determine in each particular instance coming before it; therefore all the facts surrounding the subscription will be admitted by the court in order to arrive at a clear and logical understanding of the matter.(a)

Sec. 5. **Revocation.** A promise to pay a subscription to some charitable object is a mere offer which may be revoked

(a) Allen v Duffie, 43 Mich. 1; Dale v Krupp, 33 Pa. St. 393; Smith v Watson, 14 Vt. 532.
at any time before it is accepted by the promisee. (a) An acceptance can be shown only by some act of the promisee by which legal liability is incurred or money expended on the faith of the promise. But where the subscription list when signed amounts to a binding promise on both sides there can be no withdrawal.

In the case of Buchel v Lott (b) a railroad company proposed to extend its road to C for a bonus of $25000. Defendant signed a subscription list binding himself to pay to the company $30025 if its road should be constructed to "C" within six months. The subscription list of only $23000 was raised which the company rejected. Defendant then notified the committee in charge of the list that he withdrew his subscription. With knowledge of this withdrawal the company agreed to build the road and actually did construct to C within the six months and then sued defendant for the amount of his subscription. Held that the defendant was liable for his subscription. His promise upon the subscription paper was binding when signed and he cannot refuse to meet it.

Sec. 4. Implied revocation. A subscription to a charitable, educational, or similar object, is, until acted upon, in the nature of an offer continuously repeated until accepted.

(a) Grand Lodge v Farnham, 70 Cal. 133. (b) 15 S.W. (Tex.) 413.
or revoked. Hence if a subscriber, or, as he stands, the person making the offer, dies (a) or becomes insane (b), before his offer is accepted, the subscription is regarded as impliedly revoked.

This rule is undoubtedly a just one, because it might put the person to whom the offer is made, in a position whereby he might take advantage of the circumstances in a grossly unfair manner.

(a) Pratt v Baptist Society, 33 Ill. 475.  
(b) Beach v M.E. Church, 33 Ill. 177.
CHAPTER IV.

ACTION TO ENFORCE SUBSCRIPTION.

Sec. 1. **Parties.** The subscription paper usually has a person named therein as payee, or as least indicates the manner by which the payee is to be selected. This payee is chosen for the purpose of receiving the money, and he may maintain an action upon the subscription to compel its payment. (a)

It frequently happens that the subscribers authorize one of their number to do something in furtherance of the common design. If this subscriber, relying upon the subscriptions, incurs expense or assumes liabilities he may sue in his own name, a subscriber who refuses to pay. (b)

It also sometimes happens that the subscribers in furtherance of the common object assign the subscription paper to a contractor, or to some person authorized to carry out the work. This person after he has commenced the work, or has incurred liability thereon, can compel the payment of subscriptions by an action in his own name. (c)

One who is appointed to receive subscriptions for a

(a) Robertson v March, supra.; Blodgett v Morrill, 20 Vt. 509.
(b) Mc Clure v Wilson, supra.; Swain v Hill, 30 Mo. App. 436.
(c) Hopkins v Upsuhr, supra.
society is the trustee of an express trust, and may sue upon the subscription paper without joining the society, (a) but where the subscription is not payable to any particular person, committee, or board, the action must be in the name of all the remaining subscribers. (b) 

To sum it all up in a few words, there must be a payee named in the paper or at least a manner of selecting one pointed out. This payee can compel the payment of the subscriptions by an action at law. No other person can compel a payment unless he has been authorized to do work or to incur liability upon the faith of the contract of subscription, or has had it assigned to him by the other subscribers in payment for work done by him in furtherance of the common object.

Sec. 2. What may be pleaded. 1st, by plaintiff—If by the terms of subscription the amounts subscribed are due and payable on completion of the object a complaint for the collection of the amount, need not aver a demand for payment. The subscription is due according to the very terms of the subscription contract. (c)

If the object of the subscription is of a public nature, an averment of notice of completion is unnecessary to make

(a) Landwerlen v Wheeler, 103 Ind. 528.
(b) Cross v Jackson, 5 Hill (N.Y.) 472.
(c) Allen v Clinton County, 101 Ind. 553.
the complaint good. The fact that the object is of a public nature is sufficient notice to all concerned. This would be aptly illustrated by a subscription to a public highway. (a)

2nd, by defendant— In defense the subscriber may plead that his subscription was obtained by fraud, duress or undue influence or that he was laboring under a mistake as to the facts or object of the subscription. If the subscription has not been performed according to the terms set forth in the subscription paper, the subscriber may successfully plead this fact in defense of an action brought to compel payment, or in reply thereto when offered as an offset. (b)

Where the contract is on its face incomplete the defendant will be allowed to file special pleas setting up defenses which he expects to prove by parol evidence. (c)

Sec. 3. Evidence. If a subscription be full and complete upon its face so far as the conditions on which it is made, the general rule is that "parol evidence is not admissible to vary the terms of a written contract," applies, and the subscriber will not be permitted to go outside of the document signed by him for his proof. Parol proof will however be admitted to prove the genuineness of his signature or the

(a) Allen v Clinton County, supra.
(b) Brimhall v Van Campen, 3 Minn. 13.
(c) Hendryx v Academy of Music, 73 Ga. 437.
factum of the paper itself. (a)

If the subscription paper does not purport to contain the whole contract parol evidence may be admitted to prove other portions thereof not inconsistent with the writing.

An instance of this is found in the case of Hendryx v Academy of Music (supra). The subscription was in the following words: "We the undersigned, hereby subscribe the amount opposite our names, and agree to pay the same in four quarterly installments, viz, February 15th, April 15th, June 15th, and August 15th for the purpose of erecting an academy of music." It was held that this was an incomplete agreement, being silent as to the location and nature of the structure, the specific uses to which it was to be put, the manner of conducting its business, etc. To complete this, parol evidence was held to be not only admissible but indispensable.

The very best evidence as to the contract and its terms is the subscription paper itself. So far as set out literally upon the paper it is always admissible as competent evidence. (b)

Soc. 4. Measure of recovery. The usual amount of the recovery is limited to the amount subscribed in the contract,

(a) Free Will Baptist Parish v Perham, 24 Atlantic 350.
(b) Miller v Preston, 4 N.M. 314.
but if the amount expended is less than the whole amount subscribed, the recovery will be limited to the amount so expended and will be divided among the subscribers "pro rata." (a)

Louis Hiram Kilbourne

---THE END---

(a) Miller v Ballard, 4 Ill. 377.; Bryant v Goodnow, 5 Pick. (Mass.) 323.