NOTE

Enlistment of Minors Into Military Service

Common Law

The common law has never interfered with the free and voluntary enlistment of minors capable of bearing arms,[1] and in the absence of some controlling statute, a minor can make a binding contract of enlistment in military service.[2] Such contract is valid at common law on the broad ground of public policy which requires that minors be at liberty to enter into binding agreements to serve the state whenever such contracts are not positively forbidden by the state.[3] Moreover enlistment contracts by minors do not fall within the general rule of municipal law that infants under twenty-one years cannot bind themselves by contract. "The capacity of all citizens, able to bear arms, to bind themselves to do so by voluntary enlistment is in itself a high rule of public law, to which the artificial and arbitrary rule of the municipal law forms no exception."[4] The minor is subject to no incapacity by any discretionary rule, since "there is but little room for discretion when he is in the line of his allegiance and public duty".[5] Furthermore, a contract of an infant may bind him where it is beneficial, and courts have held the enlistment of a minor for the purpose of defending the state is for the minor's benefit.[6]

Statutory Provisions

Congress, by virtue of its power to raise and support armies and provide and maintain a navy, may require military service of minors.[7] Since the exigencies of the country may be such as to require the enlistment of these infants without the consent of their parents,[8] the demands of the government will thereby supersede the parents' right to custody and dominion over the child and the attendant right to his services and wages.[9] Moreover, a minor who is subject to military draft should be at liberty to enlist without limitation, and thereby render in a less objectionable form the military service which the state requires. What a minor can be compelled

1. United States v. Blakeney, 3 Gratt. 405 (Va. 1847).
2. *In re* Morissey, 137 U. S. 157 (1890); *Ex parte* Beaver, 271 Fed. 493 (1921).
3. Commonwealth v. Gamble, 11 S. and R. 93 (Pa. 1824); United States v. Blakeney, 3 Gratt. 405 (Va. 1847).
4. United States v. Blakeney, 3 Gratt. 405 (Va. 1847).
5. *Ibid.*
6. Acker v. Bell, 62 Fla. 108, 57 So. 356 (1911); Commonwealth v. Gamble, 11 S. and R. 93 (Pa. 1824). Assuming that the common law rule that contracts of an infant may be avoided by him is applicable to the enlistment of a minor, the enlistment is merely voidable and not void. Commonwealth v. Frost, 13 Mass. 491 (1816); *In re* Graham, 53 N. C. 416 (1861).
"There would be an end to all safety if a minor could insinuate himself into an army, and after having perhaps jeoparded its very existence by betraying its secrets to the enemy, escape military punishment by claiming the privileges of infancy." *In re* Cosenow, 37 Fed. 668 (C. C. E. D. Mich. 1889).
7. United States v. Williams, 302 U. S. 46 (1937); Selective Draft Law Cases, 245 U. S. 366, 377-378 (1918).
8. *In re* Horton, 98 Fed. 606 (N. D. Cal. 1899); *In re* Cosenow, 37 Fed. 668 (C. C. E. D. Mich. 1889); Commonwealth v. Downes, 24 Pick. 227 (Mass. 1836).
9. United States v. Williams, 302 U. S. 46 (1937); Elliott v. Harris, 24 App. D. C. 11 (1904), *appeal dismissed*, 199 U. S. 615 (1905); Acker v. Bell, 62 Fla. 108, 57 So. 356 (1911).

to do, he may contract to do or do voluntarily, and his contract of enlistment in such a situation is binding.[10]

A court's interpretation of some controlling statute, at a time when interested parties are seeking to obtain release of a minor from the services by writ of *habeas corpus,* largely determines the present law regarding enlistment of minors. It has been held, for instance, that the statute stating that minors between the ages of fourteen and eighteen years shall not be enlisted in the navy without parental consent is a determination by Congress that minors over fourteen have the capacity to make binding, non-voidable contracts for such service.[11] On the other hand, if a statute prescribes the age for enlistment, it has been held that the enlistment of a minor below the ages which the statute specifically authorizes is absolutely void and not merely voidable, even if the consent of the parents is obtained.[12] It is the intention of the lawmakers, in passing such a statute, to negative the competency of a minor under the specified age to acquire the status of a soldier by enlisting, and to deprive his attempt to do so of the effect of subjecting him to military authority.[13] However, since minors *over* the specified age are competent to contract, they are competent to bind themselves by any representation or estoppel that may be an ingredient of the transaction out of which the contract arises. It is not reasonable to suppose that Congress intended to place it in the power of such a minor to deceive military authorities by certain representations, and then to allow him to recall his representations and repudiate his contract after he has been accepted as a soldier and received the benefits of such a contract. The privileges and disabilities of infancy should not be extended to a party capable of so contracting to protect him against the consequences of his deliberate agreement.[14]

A provision in a statute that no person under a certain age shall be enlisted in the military service without written consent of parents or guardians is a provision existing only for the benefit of such parents or guardians. It means simply that the government will not disturb the control of parents over their child without their consent and gives the right to such parents to invoke the aid of a court in securing restoration of a minor to their control. But it does not give the minor himself a privilege to get out of the military service once he is in, on the ground that parental consent to his enlistment is lacking.[15]

In those few cases which contend that a minor's enlistment is absolutely void for failure to obtain parental consent, a division of opinion exists as to the effect of the minor's continuance in service after reaching the age at which he might have enlisted without parental consent. One case holds that his continuance in service does not amount to a re-enlistment so as to dispense with the necessity for parental consent,[16] while other cases hold that if a minor continues in service and receives pay at a time when he is authorized by law to make a valid contract of enlistment, his action would of necessity not amount to a ratification of the void enlistment, but

10. Lanahan v. Birge, 30 Conn. 438 (1862); Moncrief v. Jones, 33 Ga. 450 (1863).

11. United States v. Williams, 302 U. S. 46 (1937), *rehearing denied,* 302 U. S. 779 (1937).

12. Hoskins v. Pell, 239 Fed. 279 (C. C. A. 5th, 1917); *In re* Hearn, 32 Fed. 141 (N. D. Ohio, 1887).

13. Hoskins v. Pell, 239 Fed. 279 (C. C. A. 5th, 1917).

14. *In re* Cosenow, 37 Fed. 668 (C. C. E. D. Mich. 1889); *In re* Davison, 21 Fed. 618 (C. C. S. D. N. Y. 1884).

15. *In re* Morissey, 137 U. S. 157 (1890); *Ex parte* Beaver, 271 Fed. 493 (1921).

16. *In re* Falconer, 91 Fed. 649 (S. D. N. Y. 1898).

would be equivalent to a re-enlistment at the proper age.[17] However, these decisions did not rely on the leading case of *In re Morissey*,[18] holding that an enlistment without parental consent is not void, but merely confers a right on the parents to have the enlistment avoided, and the courts referred instead to some old cases which must be regarded as overruled by implication in the *Morissey* case. Cases holding that the enlistment contract of a minor is voidable, and not void, assert that if the infant remains in the service and receives pay for nearly a year after he becomes twenty-one, the action of the parents in allowing him to so remain amounts to a ratification of the enlistment contract.[19]

It is well established that no parent has authority to enlist a minor son in the military forces or to compel the son to enlist.[20] As Mr. Justice Story said, "it would indeed be a strong proposition to maintain that a father might, in time of war, enlist his son as a common soldier in the army without the son's consent, and, by virtue of his common law right to his services and wages, compel him to serve during the whole period of his minority without a right to receive to his own use any of the earnings of his laborious and perilous course of life".[21]

The Problem of Parental Consent

In the absence of any statutory requirement that the consent of parents be obtained for the enlistment of a minor, the general rule is that the enlistment of a minor without such consent is valid.[22] However, it has been held to the contrary [23] that where Congress authorizes the enlistment of boys in the service but does not specify the manner in which they shall be enlisted, it should not be presumed, in view of the control of parents over sons at common law, that Congress intended to supersede and take away all parental control over minors where it remained silent in this regard. This minority asserts that Congress intended to authorize such army employment in subordination to the established rights of parents and that it required parental consent.

Various statutory provisions that minors under a certain age shall not be enlisted or mustered into service without the consent of their parents, guardians or masters, if they have any who are entitled to their custody or control, have been held to confer a right on these persons to avoid enlistment of minors under such age where they have not consented thereto.[24] The present Federal statutes require consent of parents or guardians, if any, for the enlistment of a minor under eighteen in the Army [25] and Navy.[26] However, a minor who is over the minimum age for enlistment is bound by any enlistment contract to which he is a party, and he cannot

17. *Ex parte* Hubbard, 182 Fed. 76 (C. C. D. Mass. 1910), followed in Hoskins v. Pell, 239 Fed. 279 (C. C. A. 5th, 1917); Commonwealth *ex rel.* Delly v. Selfridge, 7 Phila. 81 (Pa. 1868).

18. 137 U. S. 157 (1890), cited note 15 *supra*.

19. State v. Dimick, 12 N. H. 194 (1841).

20. Mears v. Bickford, 55 Maine 528 (1867); Taylor v. Mechanics' Savings Bank, 970 Mass. 345 (1867).

21. United States v. Bainbridge, 1 Mason 71 (C. C. 1st, 1816).

22. *Ex parte* Winfield, 236 Fed. 552 (E. D. Va. 1916); Lanahan v. Birge, 30 Conn. 438 (1862); Birdsong v. Blackman, 127 Miss. 693, 90 So. 441 (1921).

23. Commonwealth v. Downes, 24 Pick. 227 (Mass. 1836).

24. Reed v. Cushman, 251 Fed. 872 (C. C. A. 1st, 1918); *Ex parte* Dostal, 243 Fed. 664 (N. D. Ohio, 1917); United States *ex rel.* Lazarus v. Brown, 242 Fed. 983 (E. D. Pa. 1917); *Ex parte* Lewkowitz, 163 Fed. 646 (C. C. S. D. N. Y. 1908).

25. 39 Stat. 186 (1916), 10 U. S. C. A. § 627 (1934).

26. 37 Stat. 356 (1912), 34 U. S. C. A. § 161 (1934).

avoid it merely because he did not obtain the consent of his parents to such contract.[27]

It has been held that minors between eighteen and twenty-one might enlist without the consent of their parents or guardians under statutes providing that boys between the ages of fourteen[28] and eighteen years may be enlisted in the service *with* the consent of their parents.[29] In reaching their conclusion that enlistments of boys over eighteen were proper notwithstanding lack of parental consent, the decisions[30] are in accordance with the maxim of interpretation that when statutes expressly provide a rule for one particular class of persons, the rule is not to be applied to any other class of persons which might have been, but were not, expressly included therein.[31] The present statutory provision that "no minor under the age of fourteen years shall be enlisted in the naval service; and minors between the ages of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians",[32] has been construed as authorizing the enlistment of minors over eighteen without parental consent.[33]

It has been held that a minor having alien parents residing abroad whose authority as parents or guardians depends upon a foreign law is not required to obtain the consent of his parents to his enlistment, under a statute requiring a minor of a certain age to obtain the consent of his parents or guardian "provided that such minor has such parents or guardians entitled to his custody and control".[34] Furthermore, the subsequent arrival of such alien parents in this country will not invalidate the enlistment even if they do not approve of or consent to the enlistment.[35] Moreover, in those enlistment cases where a guardian is involved, the guardian whose consent is necessary to the enlistment of a minor is one who is acting at the time of the enlistment, and who is then entitled to the minor's legal custody and control. In a situation where a minor enlisted without the consent of his parents who resided abroad, and subsequent to the enlistment a resident guardian was appointed, the guardian was not entitled to secure the discharge of the minor for want of consent to his enlistment since the court held that a guardian capable of obtaining such discharge must be *in esse* at the time of the enlistment.[36]

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27. Hoskins v. Dickerson, 239 Fed. 275 (C. C. A. 5th, 1917); *Ex parte* Dostal, 243 Fed. 664 (N. D. Ohio, 1917); *Ex parte* Winfield, 236 Fed. 552 (E. D. Va. 1916); *Ex parte* Dunakin, 202 Fed. 290 (E. D. Kan. 1913). There is some authority that such an enlistment is void even as to the minor. People *ex rel.* Frey v. Warden, 100 N. Y. 20, 2 N. E. 870 (1885) (enlistment under state statute in national guard void on application by infant for discharge for want of consent of parents).

28. Also thirteen and sixteen under various amendments.

29. Thomas v. Winne, 122 Fed. 395 (C. C. A. 4th, 1903); *In re* Horton, 98 Fed. 606 (N. D. Cal. 1899).

30. See note 30 *supra.*

31. Under such a statute requiring parental consent for enlistment up to eighteen, it was held that where a minor seventeen had enlisted in the Navy without his father's consent, the latter could not secure the discharge of his son after he became eighteen because, by implication, the statute did not require parental consent for enlistment of minors who were eighteen. United States *ex rel.* Hendricks v. Pendleton, 167 Fed. 690 (C. C. E. D. Pa. 1909).

32. 37 STAT. 356 (1912), 34 U. S. C. A. § 161 (1934).

33. United States v. Williams, 302 U. S. 46 (1937), *rehearing denied*, 302 U. S. 779 (1937). This case overrules by implication *In re* McLane, 16 Fed. Cas. 235, No. 8,876 (S. D. N. Y. 1870), and *In re* McNulty, 16 Fed. Cas. 336, No. 8,917 (D. Mass. 1873).

34. *Ex parte* Dostal, 243 Fed. 664 (N. D. Ohio, 1917).

35. *Ibid.*

36. *In re* Perrone, 89 Fed. 150 (N. D. Cal. 1898).

Where a statute merely requires the consent of a parent to enlistment of a minor son, oral consent is sometimes sufficient. Moreover, it has been said that a parent or guardian may waive a statutory provision that the consent of such parent or guardian be obtained in writing.[37] But it has also been held that the mere acquiescence of the parent in an enlistment or a delay in avoiding the same does not amount to a legal consent or ratification where the law requires the consent to be in writing.[38] It has been asserted, however, that there may be an implied consent to an enlistment [39] and that a valid consent to an enlistment may also be given after the minor has enlisted.[40] Moreover, where a parent with knowledge of his minor son's enlistment without his consent, acquiesces therein or remains silent while the minor continues in service for some time, such conduct bars the right of the parent to avoid the enlistment for want of consent thereto.[41]

CONCLUSION

New legislation pending at the time of this writing which has as its purpose the lowering of the draft age to include eighteen and nineteen year-olds will of necessity eliminate most of the problems regarding enlistment of minors in this age group. Since they will be subject to the draft, they should be permitted to receive whatever advantages voluntary enlistment has to offer without being exposed to the legal obstructions normally encumbering such enlistment. However, by the very lowering of the draft age to include eighteen-year-olds, a greater pressure to enlist, arising out of the imminence of early conscription and certain psychological factors, will begin to exert itself on those minors below eighteen, and the problems of enlistment will possibly increase rather than diminish by the passage of this new act.

R. W. McC.

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37. *Ex parte* Dostal, 243 Fed. 664 (N. D. Ohio, 1917).

38. *In re* Falconer, 91 Fed. 649 (S. D. N. Y. 1898); State v. Dimick, 12 N. H. 194 (1841); *In re* Kiechta, 8 Ohio N P N S 613 (1909).

39. *Ex parte* Brown, 1 Fed. Cas. 972 (C. C. 1839).

40. State v. Dimick, 12 N. H. 194 (1841); State v. Brearly, 5 N. J. L. 555 (1819).

41. *Ex parte* Dunakin, 202 Fed. 290 (E. D. Ky. 1913).