

In re PERRONE.

(District Court, N. D. California. August 13, 1898.)

No. 11,535.

ARMY—ENLISTMENT OF MINOR—RIGHT TO DISCHARGE.

Rev. St. § 1117, requiring the consent of the parents or guardian of a minor to his enlistment in the military service of the United States, "provided, that such minor has such parents or guardian entitled to his custody and control," does not authorize a court to discharge from the service a minor whose parents are nonresident aliens, and who at the time of enlistment had no guardian, on the application of a guardian since appointed.

Application for Writ of Habeas Corpus.

A. D. Splivelo, for petitioner.

DE HAVEN, District Judge. Application for a writ of habeas corpus in behalf of Orazio Perrone, a minor, at present in the army of United States volunteers. The petitioner is the guardian of said minor, and in his petition for the writ alleges that his ward's enlistment was made without the written consent of his parents or guardian. The petition further shows that at the time of such enlistment the parents of the minor were, and still are, residents of Italy, and it was admitted upon the hearing of this application that the petitioner was appointed guardian of such minor since his enlistment. The purpose for which the writ is applied for is to obtain a judgment of this court discharging the minor from the military service of the United States, and directing that he be placed in the custody of the petitioner, as his guardian. The application is based upon section 1117 of the United States Revised Statutes, which reads as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian: provided, that such minor has such parents or guardian entitled to his custody and control."

This section has no application to the facts presented here. The enlistment of the minor was binding upon him. In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57. In that case the supreme court, in construing the above section, said:

"But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court, and secure the restoration of a minor to his or her control, but it gives no privilege to the minor."

Whether this section could be successfully invoked by parents who were alien residents of a foreign country at the time of the enlistment of a minor son is unnecessary to be determined at this time. It is sufficient to say in relation to this that the parents are not here insisting upon any right to the custody or control of the minor. The sole question is whether this petitioner, who has become the guardian of the minor since his enlistment, is within the provisions of the section above quoted, and so entitled to avoid such enlistment. In my opinion, he is not. The guardian whose written consent is

required by that section is one who was such at the time of the enlistment, and who was then entitled to the legal custody and control of the minor. This would be the proper construction of the section without its proviso, but the proviso places the matter beyond question. Application for writ denied.

UNITED STATES v. COOS BAY WAGON-ROAD CO.

(Circuit Court, D. Oregon. August 25, 1898.)

1. PUBLIC LANDS—GRANTS FOR PUBLIC IMPROVEMENTS—CONCLUSIVENESS OF DECISION OF LAND DEPARTMENT.

Whether lands are within the limits or subject to the operation of a grant for public improvements is not a question of fact, within the rule that the judgment of the land department is final upon questions of fact.

2. SAME—EFFECT OF ISSUANCE OF PATENT.

The land department cannot enlarge the limits of a grant of lands by congress, and its action in issuing patents thereunder for lands lying outside the boundary fixed by the act itself is without validity to convey title, and will be canceled at suit of the government.

3. SAME—LANDS RESERVED FROM GRANT—HOMESTEAD SETTLER.

Unsurveyed land lying within the boundaries of a grant reserving from its operation all lands to which homestead or pre-emption rights had attached, which at the date of the grant was occupied by a homestead settler, who took timely action after its survey to acquire title, was not subject to the grant, and its certification thereunder by the land department conveyed no title.

John H. Hall, U. S. Atty.

E. B. Watson, for defendant.

BELLINGER, District Judge. This is a suit to cancel certain patents to lands under a grant by the United States, and for other relief. The facts in the case, as appears from the bill of complaint, are as follows: On the 3d day of March, 1869, the congress of the United States passed an act granting to the state of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in the state of Oregon, the alternate sections of public land, designated by odd numbers, to the extent of three sections in width, on each side of said road; and said act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of said road; and said act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and that said grant should not embrace any mineral lands of the United States, or any lands to which homestead or pre-emption rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the act. On the 22d day of October, 1870, the legislature of Oregon granted all the lands and rights inuring to it under this grant to the defendant company, upon the conditions prescribed in the act of congress. On June 18, 1874, congress passed an act by which it was provided:

“That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon as in said acts provided to have been constructed and completed,