

IN SENATE OF THE UNITED STATES.

JULY 1, 1842.

Ordered to be printed.—To accompany Senate bill 172.

Mr. SMITH, of Indiana, submitted the following

REPORT :

*The Committee on Public Lands, to whom was referred "a bill extending the right of pre-emption to certain settlers in the Territory of Iowa," report :*

The object of the bill is to grant the right of pre-emption to lands lying in the county of Dubuque, in the Territory of Iowa, to settlers upon what is called the Dubuque claim. This claim covers over 140,000 acres of land, and is the obstacle sought to be removed by the passage of the bill referred to the committee, as by the acts of Congress the right of pre-emption or of disposition is excluded from lands thus situated. The committee are aware that this claim has been from time to time before Congress, at the instance of the claimants ; that it does not properly belong, merely as such, to the Committee on Public Lands ; and, disclaiming any desire to take cognizance of matters that do not legitimately connect themselves with the subject before them, they conceive it to be indispensable to a decision upon the question submitted, to examine the claim set up, in opposition to the right of the United States to dispose of these lands as other public lands are disposed of, as upon the validity of the Dubuque claim must depend such right of disposition. The committee are not unapprized that their decision will not be decisive of the claim, but they deem it proper to express such views as they entertain in relation to it, for the purpose of sustaining the conclusion to which they have finally come. They proceed, without further introductory remarks, to present to the Senate the material facts necessary to a correct understanding of the claim ; and, as the agreement between the Fox Indians and Dubuque, made in council at Prairie du Chein on the 22d of September, 1788, is the foundation of his claim, it is incorporated at length in this report :

"Copy of the council held by the Reynards [Foxes], that is to say, of the branch of five villages, with the approbation of the rest of their people, explained by M. Quinantotaye, deputed by them in their presence and in ours, we the undersigned make known that the Reynards permit Mr. Dubuque, called by them the Little Night [la Petite Nuit], to work at the mines as long as he shall please, and to withdraw from it, without specifying any term to him ; moreover that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretensions to it without the consent of the Sieur Julien Dubuque ; and, in case he shall find nothing within, he shall

be free to search wherever it shall seem good to him, and to work peaceably, without any one hurting him, or doing him any prejudice in his labors. Thus we chiefs, and by the voice of all our villages, have agreed with Julien Dubuque, selling and delivering to him this day as above mentioned." Signed by the Indians.

On the 22d of October, 1796, more than eight years after the execution of this permit, DuLaque petitioned Governor Carondelet on the subject of this grant or permit, and as this petition is one of the main links in his chain of title, and as the committee desire to place the matter in its true light before the Senate, they give the petition entire :

"The most humble petitioner to your excellency, named Julien Dubuque, having made a settlement upon the frontiers of your Government, in the midst of the Indian nations who are the inhabitants of the country, has bought a tract of land from these Indians and the mines it contains, and, by his perseverance, has surmounted all obstacles, as expensive as they were dangerous; and, after many voyages, has come to be the peaceable possessor of a tract of land on the western bank, to which he has given the name of "Mines of Spain," in commemoration of the Government to which he belongs. As the place of the settlement is but a point, and the different mines which he works are scattered at a distance of more than three leagues from each other, your most humble petitioner prays your excellency to be pleased to grant him the peaceable possession of the mines and lands, that is to say, from the coast above the little river Maquanquetois to the coast of the Mesquabemanque, which forms about six leagues on the west bank of the Mississippi, by a depth of three leagues; which demand your most humble petitioner ventures to hope your goodness will be pleased to grant him. I beseech this same goodness which forms the happiness of so many, to endeavor to pardon my style, and to be pleased to accept the pure simplicity of my heart, in default of my eloquence. I pray Heaven with the whole of my power, that it may preserve you, and may load you with its benefits, and I am, and shall be all my life,

"Your excellency's most humble, most obedient, and most submissive servant,

"J. DUBUQUE."

This petition was referred by Governor Carondelet to one Andrew Todd, a merchant, for his opinion, on the 29th of October, 1796. Todd returned his answer, as follows :

"In compliance with your superior order, in which you command me to give information on the solicitation of the individual interested in the foregoing memorial, I have to say that as to the land for which he asks, nothing occurs to me why it should not be granted, if you find it convenient, with the condition, nevertheless, that the grantee shall observe the provisions of his majesty relating to the trade with the Indians; and that this be absolutely prohibited to him, unless he shall have my consent, in writing."

On the 10th of November, 1796, Governor Carondelet sanctioned the application of Dubuque in the following language :

"Granted as asked, under the restrictions expressed in the information given by the merchant, Don Andrew Todd.

"The BARON DE CARONDELET."

Under this evidence of right Dubuque held the possession of these mines at his will until the treaty of 3d November, 1804, made by General Harrison

with the Indians for the district of country including the Dubuque claim, when a saving clause was inserted in the treaty acknowledging the validity of this claim, and saving it from the operation of the treaty; previous to which, however, on the 1st of January, 1806, Dubuque had sold one half of his claim to one Auguste Chouteau. Such being the facts of the case so far as this claim is involved, the questions arise what were the nature and legal character of the grant under which Dubuque claimed these lands at the time of the treaty? and secondly, what effect had the treaty upon his claim?

The committee think it very obvious that the grant, permit, or concession, by whatever name it may be called, of the Indians in council to Dubuque, was never intended by either of the parties to give any greater interest in the land or mines to Dubuque than a mere *personal permit* or *privilege* of working the mines as long as he pleased, and of leaving them whenever he should think proper, "without any one hurting him, or doing him any prejudice in his labors." This view is not only sustained by a fair construction of the paper itself, but by the fact that there was no specified limits to the assumed grant—no consideration paid. The Indians continued in the possession of the lands as before up to the date of the treaty; but another position, perhaps more conclusive, may be assumed, in the want of power in the Indian tribes to sell or convey lands in their possession to individuals.

The grant of the Spanish governor, admitting his power to make a valid concession or title to Dubuque, does not profess to do so. It merely recognises and affirms the contract made by Dubuque with the Indians, made a little more specific as to boundaries, and grants to him the "peaceable possession" of the lands and mines as prayed for in his petition. The right to the lands was neither asked for by Dubuque in his petition nor granted by the governor. It may, therefore, be safely assumed that the whole object of the request, as well as of the grant, was on the one side to ask, and on the other side to give, a personal permission to possess the lands and work the mines "peaceably without any one hurting him [Dubuque], or doing him any prejudice." This construction of the contract between the parties is sustained by the consideration that the Indians had no power to make a grant of greater force with an individual; that such is the legal import of the papers and facts of the case; that it is and was the settled policy of the Spanish Government not to sell their mines, and they can not be presumed to have done so in this case; that the form of the concession was not accompanied by any order of survey, or any declaration that a patent would subsequently issue, provisions usually contained in a Spanish grant or concession.

The next question is, did the clause of the treaty of 1804, saving from its provisions this claim, aid its defects as a claim for any greater interest than a mere personal privilege? It will hardly be contended that a saving clause in a treaty can enlarge or diminish the extent of the claim saved from its operation. The claim stands upon its own merits. If valid, the treaty could not affect it. If defective, the treaty could not give it validity, unless by an express provision to that effect. The view, however, which the committee have taken of the nature of the claim and of its legal import, renders it unnecessary to go at large into the construction of general treaty stipulations, as the interest of Dubuque, being a mere personal privilege, accompanied by a naked right of possession at most, when saved from the operation of a general treaty, would retain its original character, and receive no additional sanction from such saving cause.

If these facts be correctly stated, and the committee have succeeded in the application of the correct principles to them, it follows that the claim of Dubuque did not survive him, nor was it such an interest as he could legally convey in his lifetime, and therefore it does not present any obstacle to the relief contemplated by the bill.

The remaining question is, whether it is proper to subject these lands to the operation of the laws in force, including the pre-emption lands, for the disposal of the public lands as in ordinary cases. After much reflection, the committee have come to the conclusion that, as the Dubuque claim is, in their opinion, invalid, as the Government, under the same opinion, took possession of the lands covered by this claim, laid off towns, sold lots, leased lead mines, and received the rents—as settlers took possession of the farming lands with these facts before them, and the additional fact that the pre-emptions were secured to other settlers on the public lands, and as these settlers have made lasting and valuable improvements upon the lands—it is believed to be the only just course to the parties concerned to subject these lands to the laws in force including the pre-emption laws, reserving to the persons claiming under Dubuque the right to enter a like quantity of the public lands subject to private entry, should their claims ultimately prove valid. This course would do justice to the settler, quiet his title, and secure to him the reward of his labor. The Government would receive the value of the land, and the claimants under Dubuque would have ample redress in the grant named. The committee are pleased to know that they are not now making a decision to be cited as a precedent, as the principle they have adopted has been sanctioned in numerous cases similarly circumstanced. They, therefore, report the bill to the Senate amended conformably to these views.