

IN THE SENATE OF THE UNITED STATES.

JULY 28, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

H. L. THISTLE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Opinion of the Court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this tenth day of July,
[SEAL.] A. D. 1856.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

IN THE MATTER OF THE CLAIM OF HEZEKIAH L. THISTLE *against* THE UNITED STATES GOVERNMENT.

To the honorable John J. Gilchrist, presiding judge, and the honorable Isaac Blackford and George P. Scarburgh, judges of the Court of Claims:

The petition of Hezekiah L. Thistle respectfully shows to this honorable Court:

First. That your petitioner is a citizen of the United States, and now residing in the city, county, and State of New York.

Second. That your petitioner was the originator, inventor, and discoverer of certain valuable improvements in the construction of saddle-trees of dragoon and pack saddles, for riding or transmitting heavy burdens on horses or mules; which said improvements were briefly as follows: a peculiar formation and adaptation of the side bars, which, combining the concave and convex formation of the horse's back, and extending down on the arch of the horse's ribs, gave a greater bearing than is usual in the ordinary saddle-tree, and left the vertebræ an

withers free from pressure. Also a peculiar formation and adaptation of the seat of said saddle, which would relieve the pressure upon the muscles of the rider's legs, as existing in the ordinary saddle, and thus preventing the ruptures which they (the ordinary saddles) caused.

Your petitioner shows that he was the originator, discoverer, and inventor of the method and process of conforming and shaping said bars as aforesaid, and of fitting and conforming the foundation of the rider's seat as aforesaid. The entire details, specifications of which were furnished to the Commissioner of Patents, are hereinafter mentioned.

Third. Your petitioner further shows, that on or about the fifth day of January, A. D. one thousand eight hundred and forty-seven, he filed in the office of the United States Commissioner of Patents in Washington the requisite petition, affidavit and specifications, drawings and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above-mentioned invention, discovery and improvement, and that on the said day he paid the fees and charges required by law to be paid upon filing application for letters patent, and received the treasurer's certificate therefor; whereby the United States government became bound to investigate and pass upon your petitioner's said application for letters patent, according to law, and the regulations of the Patent Office. That said application for letters patent, together with the said petition, affidavit, specifications, drawings and model, were afterwards and before the twenty-sixth day of May, of the said year, to wit, A. D. 1847, with some slight modifications in the said specification, reported to the examining officer of the Patent Office, and that thereupon your petitioner's application for the said letters patent took its place on the files of the Patent Office, to be acted upon in its turn. And your petitioner prays that said petition, affidavit, specifications, drawings, model, &c., be considered as part of this petition, and that he may refer to them as such.

Fourth. Your petitioner further shows, that after the said 23d day of May, and before his said application for letters patent had been reached in its turn, to wit, on or about the twelfth day of November, A. D. 1847, one Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specification, drawings and model, claiming in his petition to be the originator, inventor and discoverer of certain valuable improvements in a dragoon and pack saddle; that said Grimsley's said petition, affidavit, specifications, drawings and models, (to which your petitioner hereby prays to refer and make a part of this his petition,) embraced and embodied the greater part of your petitioner's discovery and invention, as set forth in his said application for letters patent; and that said Grimsley's said application for patenting a dragoon and pack saddle covered the same grounds, and embraced the same claims which were set forth in your petitioner's said application; and your petitioner alleges and shows, that the said Grimsley was not the first inventor, originator or discoverer of his said alleged and pretended improvements in a dragoon and pack saddle.

Fifth. Your petitioner further shows, that the then Commissioner of Patents did not give your said petitioner notice of the said conflict-

ing claim and application for letters patent, as required by the 8th and 12th sections of the United States Patent Laws passed July 4, 1836, and the acts amendatory thereof.

Sixth. Your petitioner further shows, that afterwards and on the 3d day of December, A. D. 1847, and before his said application for letters patent had been reached and acted upon in its turn, that an official letter or note was sent by the Honorable William L. Marcy, the then Secretary of War, to the Honorable Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit :

“WASHINGTON, *December 3.*

“SIR: It is represented that the early issue of a patent to Mr. Grimsley for his invention of a dragoon saddle will facilitate a supply for the government. I, therefore, take the liberty to urge that it may be issued to him as soon as practicable.

“Yours, truly,

“WILLIAM L. MARCY.

“Hon. E. BURKE,

Commissioner of Patents.”

Your petitioner further sets forth in the same connexion the said Commissioner's endorsement upon said official letter or note to the “Examiner” in the Patent Office, of which the following is a copy, to wit:

“As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

“This note should be filed with the other papers.

“EDMUND BURKE.

“DECEMBER 4, 1847.”

Which said official letter or note and its said endorsement are now on file in the office of the Commissioner of Patents, and your petitioner prays that he may be allowed to refer to them and make them a part of this his petition.

Your petitioner represents and shows that thereupon said Grimsley's said application for letters patent was taken up by the said examiner before its turn, there being at that time many other applications on file in the Patent Office, including your petitioner's aforesaid application, which, according to the statute and the rules of the Patent Office, should have been acted upon before said Grimsley's said application; and that upon his, the said examiner's, report, the Commissioner of Patents caused the said Grimsley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after the filing of said Grimsley's application, the said Commissioner of Patents caused to be issued out of his said office letters patent to the said Grimsley for his said pretended discovery and invention of an improved dragoon and pack saddle; and your petitioner shows that said letters patent were issued contrary to statute and the rules and regulations of the said Patent Office; and that your petitioner's aforesaid application still remains in the Patent Office on file, not acted upon, and postponed.

Seventh. Your petitioner, therefore, represents and claims that, by reason of the premises aforesaid, he has been unjustly and illegally deprived of and injured as to his rights and property, by the action of the United States government, through its officers and agents, and that he has been prevented from and deprived of the enjoyment of his said invention and discovery, and that, by reason of the said premises, he has been prevented from enjoying, and deprived of the smallest pecuniary results from his said discovery, origination, and invention. Your petitioner also shows that all his preliminary steps and proceedings in making his said application for letters patent were perfectly formal, correct, and pursuant to the statute in such case made and provided. And your petitioner further shows that his said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars, and therefore claims that, by reason of the said premises, that he has sustained and suffered damage and loss, at the hands of the United States government, in the sum of one hundred thousand dollars.

Ninth. Your petitioner shows that during the 36th session of the United States Congress, and during the winter of 1847 and 1848, your petitioner memorialized Congress of and concerning the aforesaid infringements and violation of your petitioner's rights, and that his said memorial and petition was referred to the Committee on Patents, to investigate and report upon the same. The said committee decided that the subject matter of the said petition did not come within the powers and jurisdiction of Congress, and so deciding, refused to investigate and take testimony in the matter, but decided and held that your petitioner's only remedy was an action at law against the then Commissioner of Patents for malpractice. Your petitioner also shows that no subsequent action has been taken by Congress, or your petitioner, upon this his said claim up to the time of filing this his said petition.

Wherefore your petitioner prays the adjudication and order of this your honorable Court in his behalf, and that such relief may be granted and decreed to your petitioner in the premises as shall seem meet to the Court.

Dated November 8, 1855.

GEORGE D. KELLOGG,

Attorney for Petitioner, 25 Nassau street, New York.

STATE OF NEW YORK, }
City and county of New York, } ss.

Hezekiah L. Thistle, the said petitioner, being duly sworn, says: That he has heard read the foregoing petition, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

H. L. THISTLE.

Sworn to before me, this 13th day of November, 1855.

STRATFORD H. BAILEY,

Commissioner of Court of Claims for State of New York

UNITED STATES COURT OF CLAIMS.

IN THE MATTER OF THE CLAIM OF HEZEKIAH L. THISTLE *vs.* THE UNITED STATES GOVERNMENT.

Petitioner's Brief.

The claimant conceives himself to be entitled to present his claim and ask for the favorable decision of this Court, under each and every class of jurisdiction specified in the act of Congress establishing this Court. (see act to establish Court of Claims, passed February 24, 1855, section 1,) on these grounds:

First point.—"Congress shall have power, &c., to promote the progress of science and useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries. and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."*

Congress has exercised that power by passing laws from time to time entitled "Acts to promote the progress of the useful arts."† Of which laws, the acts of 1836, 1839, and 1842, were in full force at the time of the petitioner's application for letters patent.‡

Second point.—These acts prescribe the duties to be performed by the United States, acting through or by its officers, agents, and the "heads of department," as well as the duties of those applying for letters patent.

The sixth and ninth sections of the patent laws of 1836 specify what should be done by the applicant, which was done in this case.§ And the United States, by receiving the fees prescribed by the 9th section of the said patent laws, did impliedly, if not expressly, contract to perform the duties which the government had imposed upon itself, by virtue of the seventh and eighth sections of the said act of 1836. ||

Third point.—The government, by its officers of the Patent Office, *did enter* upon its duties in this case as prescribed by the seventh section of said act;¶ an examination was made, and the application was placed upon the files of the Patent Office to be acted upon in its turn.**

It then became the duty of the Commissioner to issue letters patent therefor; if any objection had been found upon such examination, then it was the duty of the Commissioner, acting for the government, to have notified the applicant,†† so that all things directed to be done on the part of the applicant, or the Commissioner of Patents, might be done; but no such notice was given to the applicant, and therefore his right to such patent was established.

Fourth point.—The United States, through its officers and heads of departments, violated the 8th section of the patent laws of 1836, and

* Constitution of the United States, art 1, sec. 8.

† Patent Laws from the year 1790 to 1842.

‡ Petition, third clause.

§ Petition, third clause.

|| Curtiss on Patents, pp. 637, 638.

¶ Patent Law of 1836, sec. 7.

** Petition, third clause.

†† Patent Laws of 1836, sections 8 and 12.

their contract with the applicant, in not notifying this claimant that Thornton Grimsley's application for letters patent interfered with the then pending application of this petitioner. And the government also violated the whole spirit of the patent laws, the regulations of the Patent Office, and the contract with this petitioner, in issuing letters patent to Grimsley for improvements in a dragoon and pack saddle, of which he was not the first inventor, while the claimant's application was waiting its turn upon the files of the Patent Office for letters patent.

Fifth point.—It cannot be necessary to add argument, to establish the principle that the United States are equitably and legally liable for all violations of its laws by its own officers, especially those connected with the executive departments, the same as individuals or corporations.

Prior to the passage of the act establishing this Court, there was no way in which a claim could be enforced against the United States, and therefore parties were compelled to sue the officers of government as individuals, alleging malpractice; or to petition Congress.

This opinion is now exploded. This Court has decided, in the case of Isaac Swain,* that the government is liable for injury sustained by citizens in consequence of the improper conduct of its agents.

The superior court of the city of New York, after an elaborate argument before its full bench of six judges, decided that the New York and New Haven railroad company were liable in damages for the false and fraudulent certificates of stock given by Robert Schuyler, its transfer agent.†—(The decision is not yet reported, but soon will be in the 3d volume of Duer's reports.) The supreme court of the State of New York has also made a similar decision.‡ The above decisions answer the view that was taken by the committee of Congress when petitioned by the claimant.§

Sixth point.—The fact that the Commissioner of Patents violated the law and injured the claimant at the instigation of the head of another department,|| is an additional reason why this claim should be allowed. Admitting that the reason given was the true reason, with all the justification claimed, yet the claimant had a property in his invention which the law recognized, and no private property could be taken constitutionally for public use, either directly or indirectly, without compensating the owner,¶ and the government is both liable and able to make such compensation.

GEO. D. KELLOGG,

Attorney for Petitioner, 25 Nassau street, N. Y.

A. THOMPSON,

Of counsel.

* Decision of United States Court of Claims made in the case of Isaac Swain, on or about October 29, 1855.

† Decided on or about June 23, 1855.

‡ 1 Abbot's Practice Reports, (N. Y.) 417.

§ Petition, *ninth* clause.

|| Petition, *sixth* clause.

¶ Constitution of the U. S., art. 5; and 2d vol. Kent's Com., pp. 392 to 397, and cases there cited.

HEZEKIAH L. THISTLE *vs.* THE UNITED STATES.

The opinion of the Court was delivered by SCARBURGH, J.

The petitioner alleges that he was "the originator, inventor, and discoverer of certain valuable improvements," specified in his petition, "in the construction of saddle-trees of dragoon and pack-saddles, for riding or transmitting heavy burdens on horses and mules."

On or about the 5th day of January, A. D. 1847, he filed in the office of the Commissioner of Patents "the requisite petition, affidavit, and specifications, drawings, and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above mentioned invention, discovery, and improvement," and then paid the fees and charges required by law, and received the treasurer's certificate therefor.

The application for letters patent, together with the petition, affidavit, specifications, drawings and model were afterwards, and before the 26th day of May, A. D. 1847, with some slight modifications in the specifications, reported to the examining officer of the Patent Office, and thereupon the petitioner's application for letters patent took its place on the files of the Patent Office, to be acted upon in its turn.

On or about the 12th day of November, A. D. 1847, before the petitioner's application for letters patent had been reached in its turn, Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specifications, drawings, and model, claiming in his petition to be the originator, inventor, and discoverer of certain valuable improvements in a dragoon and pack-saddle. Grimsley's petition, affidavit, specifications, drawings and models embraced and embodied the greater part of the petitioner's discovery and invention, as set forth in his application for letters patent; and Grimsley's application for patenting a dragoon and pack-saddle covered the same grounds and embraced the same claims which were set forth in the petitioner's application, but Grimsley was not the first inventor, originator or discover of his alleged and pretended improvements in a dragoon and pack-saddle.

The "then Commissioner of Patents did not give" the "petitioner notice of the said conflicting claim and application for letters patent, as required by the eighth and twelfth sections of the United States patent laws passed July 4th, 1836, and the act amendatory thereof."

On the 3d day of December, A. D. 1847, before the petitioner's application for letters patent had been reached and acted upon in its turn, "an official letter or note was sent by the Hon. William L. Marcy, the then Secretary of War, to the Hon. Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit:

"WASHINGTON, December 3.

"SIR: It is represented that the early issue of a patent to Mr. Grimsley, for his invention of a dragoon saddle, will facilitate a sup-

ply for the government. I therefore take the liberty to urge that it may be issued to him as soon as practicable.

"Yours, truly,

"W. L. MARCY.

"Hon. E. BURKE,

"*Commissioner of Patents.*"

The Commissioner made the following "endorsement upon said official letter or note to the 'examiner' in the Patent Office:

"As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

"This note should be filed with the other papers.

"EDMUND BURKE.

"DECEMBER 14, 1847."

Thereupon Grimsley's application for letters patent was taken up by the examiner before its turn, and upon his report the Commissioner of Patents caused Grimley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after filing his petition, the Commissioner of Patents caused to be issued out of his office letters patent to Grimsley for his pretended discovery and invention of an improved dragoon and pack-saddle. The "said letters were issued contrary to statute and regulations of the said Patent Office," and the petitioner's application still remains in the Patent Office, on file, not acted upon, and postponed.

The petitioner, during the winter of 1847-'48, memorialized Congress, and the Committee on Patents made a report unfavorable to his claim. He now insists that his "said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars," and he claims this sum against the United States. Such is the petitioner's case, as it is stated in his petition. If any wrong has been done him, it was committed by the United States, or any officer of theirs, under such circumstances as render them peculiarly responsible to the petitioner. Taking, as we must at this stage of the case, the allegations of the petitioner to be true, the most that he has shown is, that he has been injured by the misconduct in office of the Commissioner of Patents. But the United States are not ordinarily responsible for either the malfeasance or nonfeasance in office of a public officer; and it does not seem to us that this case constitutes an exception to the general rule. We are, therefore, of the opinion that the petitioner is not entitled to relief. No order will be made directing testimony to be taken in this case.