

tempted to secure the rights, of an enlisted man. To avoid the consequences of his last crime he sets up as a defense that he has committed three previous offenses: (1) A former desertion; (2) an escape from confinement after conviction of that crime, and without waiting for a certificate of dishonorable discharge; (3) a fraudulent re-enlistment in violation of the law and under an assumed name. It was not claimed on the argument that during the time of his actual service he could commit with impunity *any* military offense. It was only contended that he could not commit the offense of desertion. The distinction is not very apparent. It would seem that he must be regarded either as a civilian or a soldier. If the former, he was not amenable to the military law. If the latter, he was subject to that law for any offenses against its provisions. But the claim to immunity from punishment for desertion would even extend to desertion by a sentry from his post, by which the safety of the army might be compromised, or to desertions in time of war in the face of the enemy, and even to desertions *to* the enemy for the purpose of conveying plans of fortifications or other information obtained in the course of his service.

It may be urged with great force (1) that by the general principles of law a man cannot profit by his own wrong, still less by his crime; (2) that the obvious intent of the statutory provisions prohibiting the enlistment of deserters was to attach an additional penalty for a crime, and not to confer an immunity from the consequences of its repetition; and (3) that the interests and even the necessities of the service forbid the allowance of the defense set up by the petitioner. But this question it is unnecessary, perhaps improper, now to decide; for even if the ruling of the court-martial was erroneous, this court has no jurisdiction to correct the error or to reverse its judgment.

Petitioner remanded.

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### *In re* BOSTON & FAIRHAVEN IRON WORKS, Bankrupts.

(Circuit Court, D. Massachusetts. April 30, 1885.)

#### BANKRUPTCY—CLAIM FOR PROFITS FOR INFRINGEMENT OF PATENT.

A claim for an account of profits against an infringer of a patent-right is not provable against his estate in bankruptcy under Rev. St. § 5067.

#### Appeal in Bankruptcy.

*Browne & Browne*, for petitioners.

*C. E. Washburn*, for defendant.

COLT, J. On March 2, 1878, the Boston & Fairhaven Iron Works filed a petition in bankruptcy in the United States district court of Massachusetts, and were adjudged bankrupts. On the twenty-second

of March, 1880, one Cyril C. Child, of Boston, recovered judgment in the United States circuit court for this district against the bankrupt corporation, for the sum of \$5,640.26, and \$1,773.28, costs of suit, upon a claim for profits from the infringement of a patent. On July 19, 1884, the proof of claim was duly presented before the register, who refused to allow the same, upon the ground that it appeared to be a claim for damages for infringement of a patent-right not converted into a judgment, or otherwise liquidated, prior to the date of bankruptcy. Subsequently, the district court held that the claim was provable against the estate under section 5067 of the Revised Statutes. This ruling was based upon the assumption admitted by counsel that the decree in the patent suit was not for damages but for the profits of the bankrupt corporation, as an infringer of the patent. The present hearing arises on an appeal by the assignees to this ruling of the district court.

A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment prior to the date of proceedings in bankruptcy. *In re Schuchardt*, 15 N. B. R. 161; *Black v. McClelland*, 12 N. B. R. 481; *In re Hennocksburgh*, 7 N. B. R. 37.

A claim for an account of profits against an infringer of a patent-right has been held to be provable in bankruptcy, on the ground that it is not a claim for damages, but is more like an equitable claim for money had and received, for the use of the patentee, the wrong-doer being a trustee of the profits for the patentee. *Watson v. Holliday*, 20 Ch. Div. 780; *Re Blandin*, 1 Low. 543.

But this view has been disapproved by the supreme court in *Root v. Railway Co.* 105 U. S. 189, 214, where, upon careful consideration, it was held that the infringer of a patent-right was not a trustee of the profits derived from his wrong for the patentee; that to hold otherwise would, in effect, extend the jurisdiction of equity to every case of tort where the wrong-doer had realized a pecuniary profit from his wrong. The court decided that a bill in equity for a naked account of profits and damages against an infringer of a patent could not be sustained upon the ground that the infringer was a trustee for the profits. See, also, *Child v. Boston & Fairhaven Iron Works*,<sup>1</sup> recently decided by the supreme court of Massachusetts.

It seems to us that the reasoning of the court in *Root v. Railway Co.* is decisive of the question raised by this appeal. It follows that the claim of Child was not a claim provable against the estate of the bankrupts, and should not be allowed, and that the ruling of the district court should be reversed.

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<sup>1</sup> 137 Mass. 516

UNITED STATES *v.* SEAMAN.

(Circuit Court, S. D. New York. April 7, 1885.)

1. FEDERAL ELECTIONS—REV. ST. §§ 5511, 5514—FRAUDULENT ATTEMPT TO VOTE AT ELECTION FOR REPRESENTATIVE IN CONGRESS—INDICTMENT.

An indictment charging a party with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York, by which state officers and representatives to congress are voted for on separate ballots, which are deposited in separate ballot-boxes, that fails to allege that such party attempted to vote for a representative in congress, is insufficient.

2. SAME—CONSTRUCTION OF REV. ST. §§ 5511, 5514.

The essence of the crime created by section 5511 of the United States Revised Statutes is an attempt to vote unlawfully for a representative in congress, and not merely an attempt to vote unlawfully at an election at which a representative may be voted for.

On Motion in Arrest of Judgment.

*Elihu Root*, U. S. Dist. Atty., *Benj. B. Foster*, Asst. U. S. Dist. Atty., and *Charles A. Hess*, for defendant.

*WALLACE, J.* The defendant was tried and convicted upon an indictment charging him with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York on the fourth day of November, 1884. The indictment did not allege that the defendant attempted to vote for a representative in congress. Nor did the evidence upon the trial show such an attempt specifically. State and local officers were voted for at that election. There were seven separate ballots and separate boxes. Under the laws of this state separate ballots are required for representatives in congress from those which contain the names of state officers and local officers. It appeared by the evidence that the defendant presented himself at the polls and handed to one of the inspectors of election a ballot or ballots, when a question arose as to his right to vote by the name which he gave, and he was arrested. At the close of the evidence the counsel for the defendant asked for an instruction that the defendant be acquitted upon several grounds, and among them, because there was no proof that he had attempted to vote for a representative in congress. The court refused to give this instruction to the jury, and instructed them that they were authorized to find the defendant guilty if they were satisfied upon the evidence that he attempted to vote at the election under an assumed name.

The question is now made, upon a motion in arrest of judgment and for a new trial, whether the indictment was sufficient, and whether there was error in the ruling at the trial. The offense for which the defendant was indicted was created by the act of congress of May 31, 1870, commonly known as the enforcement act, and is now found in section 5511, Rev. St., in the chapter relating to crimes against the elective franchise. The section declares: