

but at an angle thereto. "Laterally out of alignment to the run" is not equivalent to "at an angle to the plane of the fabric." That the applicant did not intend it to be so understood is shown by his repeated use of the word laterally, in the specifications, as the equivalent of off to one side; and by this sentence: "The clearance afforded . . . makes it possible to hold the needle down closer to the fabric. . . ." There is no disclosure of any up and down punch system, such as the defendants use.

2. Pivoted latch needles are old in the art. Holders which have an opening to give room for the insertion of a needle, such as that of an egg-cup, are old for use in darning. The method of reforming loops in knitted goods with pivoted latch needles was known prior to the application for this patent. The combination of the use of the egg-cup type holder and the pivoted latch needle did not entitle Stephens to a patent; and the addition of the element that the needle should be held at an angle to the plane of the fabric, if that is in fact what the claim means, is insufficient to raise the method to the dignity of invention.

*Decree modified
and, as modified,
affirmed.*

IVANHOE BUILDING & LOAN ASSN. v. ORR,
TRUSTEE IN BANKRUPTCY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 611. Argued April 5, 1935.—Decided April 29, 1935.

1. A creditor of a bankrupt, claiming on a bond secured by a mortgage on real estate not owned by the bankrupt and upon which the creditor has foreclosed, is not a "secured creditor" of the bankrupt within the meaning of §§ 1 (23) and 57 (e) of the Bankruptcy

Act, and is not precluded thereby from proving his claim for the principal of the bond and interest, though he may not collect and retain dividends which, with the fruits of the foreclosure, will exceed that amount. P. 245.

2. The case of a bankrupt indebted to a creditor on a bond secured by a mortgage on property of a third person which the creditor has foreclosed, is not a case of mutual debts between bankrupt and creditor, within the meaning of § 68 (a) of the Bankruptcy Act, and that section does not limit the creditor's proof of claim to the difference between the debt and the avails of the foreclosure. Pp. 246-247.

73 F. (2d) 609, reversed.

CERTIORARI, 294 U. S. 700, to review the affirmance of a judgment reducing a claim in bankruptcy.

Mr. Abraham Alboum, with whom *Mr. Maurice J. Zucker* was on the brief, for petitioner.

Mr. Saul Nemser, with whom *Mr. Charles E. Hendrickson* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case the question is whether a creditor of a bankrupt, who has recovered a portion of the debt owed him by foreclosure of a mortgage on property not owned by the bankrupt, may prove for the full amount of the debt, or only for the balance required to make him whole.

The owners of real estate in Newark, New Jersey, executed to the petitioner a bond in the penal sum of \$23,000, conditioned for the payment of \$11,500, secured by a mortgage on the land. The mortgagors subsequently conveyed the premises to the Eastern Sash and Door Company, which expressly assumed the mortgage debt. That company afterward conveyed to one Yavne. A default occurred and the petitioner filed a foreclosure bill against Yavne. The amount due was found to be \$10,220.96.

with interest and costs. The property was sold by the sheriff and bid in by the petitioner for \$100. Meanwhile the Sash and Door Company had been adjudicated a bankrupt. The petitioner presented a claim against the estate for \$10,739.94, the amount then due on the bond less the \$100 bid at the sale. It was stipulated that the mortgaged property acquired in foreclosure was worth \$9,000. The referee reduced the claim to the difference,—\$1,739.94,—and ruled the petitioner was not entitled to prove for any greater sum. The District Court and the Circuit Court of Appeals have held the referee's ruling was right.¹ The result appearing to be contrary to the weight of authority² we granted certiorari.³

Decision must be governed by relevant provisions of the Bankruptcy Act. The definition found in § 1 (23)⁴ is:

“ ‘Secured creditor’ shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.”

Section 57 (e)⁵ directs that “claims of secured creditors . . . shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities . . .”

Unless the petitioner was a secured creditor as defined by § 1 (23) it was not bound to have its security or the avails thereof valued and to prove only for the difference between that value and the face amount of the debt. Petitioner does not come within the definition, for at the date of bankruptcy it held no security against the bank-

¹ 73 F. (2d) 609.

² Rule 38, § 5 (b).

³ 294 U. S. 700.

⁴ U. S. C. Tit. 11, § 1 (23).

⁵ U. S. C. Tit. 11, § 93 (e).

rupt company's property, nor security given by any other person who in turn was secured by the bankrupt's assets.⁶ Sections 1 (23) and 57 (e) do not, therefore, forbid the proof of a claim for the principal of the bond with interest, though the petitioner may not collect and retain dividends which with the sum realized from the foreclosure will more than make up that amount. The court below was of this opinion, but thought that § 68 (a)⁷ forbade proof of a claim for more than the balance of the debt after application of the avails of the foreclosure. That section directs, "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The theory upon which this section was held to control the right to prove was thus stated:

"While the obligation of the bankrupt to pay the mortgage still remained, the mortgagee had gotten possession of the security, and, in enforcing this obligation against the bankrupt, the appellant-creditor [petitioner] must reduce its claim by the admitted value of the security less the \$100 paid for it. The bankrupt owed the appellant [petitioner] the amount of the mortgage, and the appellant [petitioner] equitably owed the bankrupt the value of the security in his possession."

⁶ The point was involved and necessarily decided, though not adverted to, in *Hiscock v. Varick Bank*, 206 U. S. 28; see the same case below *sub nom. In re Mertens*, 144 Fed. 818, 820. See also *In re Headley*, 97 Fed. 765; *Swarts v. Fourth Nat. Bank*, 117 Fed. 1; *In re Noyes Bros.*, 127 Fed. 286; *In re Sweetser*, 128 Fed. 165; *Gorman v. Wright*, 136 Fed. 164; *Board of County Commissioners v. Hurley*, 169 Fed. 92; *In re Bailey*, 176 Fed. 990; *In re Keep Shirt Co.*, 200 Fed. 80; *In re Thompson*, 208 Fed. 207; *Young v. Gordon*, 219 Fed. 168; *In re Pan-American Match Co.*, 242 Fed. 995; *In re Anderson*, 11 F. (2d) 380; *Hampel v. Minkwitz*, 18 F. (2d) 3; *Bankers Trust Co. v. Irving Trust Co.*, 73 F. (2d) 296.

⁷ U. S. C. Tit. 11, § 108 (a).

This novel application of § 68 (a) is, we think, inadmissible. A creditor holding security who realizes upon it, does not "owe" his debtor the amount realized. The well understood concept of mutual debts does not embrace such a situation as is here disclosed.

Judgment reversed.

BULL, EXECUTOR, v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 649. Argued April 9, 1935.—Decided April 29, 1935.

1. Moneys received by a deceased partner's estate as his share of profits earned by the firm before he died, are taxable as his income and also are to be included as part of his estate in computing the federal estate tax. P. 254.
2. Where the articles of a personal service partnership having no invested capital provide that in the event of a partner's death the survivors, if his representative does not object, shall be at liberty to continue the business for a year, the estate in that case to share the profits or losses as the deceased partner would if living, the profits coming to the estate from such continuation of the business are not to be regarded as the fruits of a sale of any interest of the deceased to the survivors, but are income of the estate, taxable as such; they are no part of the corpus of the estate left by the decedent upon which the federal estate tax is to be computed. P. 255.
3. Retention by the Government of money wrongfully exacted as taxes, is immoral and amounts in law to a fraud on the taxpayer's rights. P. 261.
4. A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction, and this even though an independent suit against the Government to enforce the claim would be barred by the statute of limitations. P. 261.
5. Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely. P. 262.