The next question is as to so much of the decree as required appellants to pay to the receiver the sum of $11,889.57, being the amount of the bid made by them, through J. F. Loomis, at the sale by Ward, assignee, of lumber and material included in the general assignment made by the Hughes Lumber Company. As before stated, this material was not covered by the Barton mortgage, and its proceeds were properly distributable among all the creditors of the assignors. The facts show that appellants, through Loomis, as their agent, became the absolute purchasers of this lumber, etc., at the price of $11,889.57. Loomis says that their understanding with him was that, if the creditors all agreed to the plan of reorganization, the purchase should inure to the equal benefit of all, and the material in that event would be transferred to the new corporation. If that plan fell through, then he says he was to manage the transaction for the exclusive benefit of those he represented. It is evident that, if all interested under this deed of assignment had agreed to accept the proposed arrangement, there would have been no necessity for paying the price of this lumber to Ward or any one else. The acceptance of the obligations of the new corporation in substitution of the benefits provided by this assignment would have operated as a release and satisfaction of this deed of trust. In that event the payment of the price to Ward, and receiving it back again, would have been an idle ceremony. But neither Ward nor appellants waited the acceptance of this plan by all. Upon the supposition that all would assent to the plan, Ward, by direction of D. W. Hughes and appellants, turned this lumber and material over to the new corporation, or to Hughes for the new corporation, without requiring the payment of the purchase money, and without any other consideration than the supposed consent of all concerned. We have already stated the character of the relief sought by the amended bill of the Radford Trust Company by reason of this state of facts. After the appointment of C. E. Stivers as permanent receiver under the bill and amended bill of that corporation, the Rogersville National Bank, a large general creditor of both the Hughes Lumber Company and D. W. Hughes, and one of the defendants brought in by the amended bill of the Radford Trust Company, filed a petition and cross bill in the principal cause, in which, by permission of the court, the receiver joined, setting out the facts concerning this sale of lumber by Ward, and seeking relief on account thereof against Ward personally, and against J. F. Loomis and appellants by reason of their participation with Ward in a breach of trust. Upon all the pleadings and proof, the court below held Ward liable "to account to the nonassenting creditors of the Hughes Lumber Company for the price of the property sold by him for which the purchasers had not paid," but also held that appellants, as purchasers, should be first liable, and Ward only in the event the purchase price was not paid by them. The court further held that the fund thus realized should be distributed among the creditors secured by the assignment of the Hughes Lumber Company who had not accepted the bonds of the Hughes Bros. Manufacturing Company in payment of the claims against the original corporation. We see no error in this decree of which appellants

can complain. They bought this property at the public sale held by Ward as assignee. They agreed to pay for it the sum of $11,889.57. They have not done so. In reliance upon the supposed willingness of all parties interested, they have suffered the property to pass into the possession of the Hughes Bros. Manufacturing Company. That company has used it up, or otherwise disposed of it. It cannot now be recovered by Ward, or by the creditors entitled to it. That appellants did this in reliance that all parties would accept the bonds of the new corporation for their debts, and thus release the assignee from liability to account for the trust assets, is no defense as against the demands of creditors who did not waive their rights under the assignment to Ward. The liability of appellants for the price agreed to be paid is clear. This purchase price, or the proceeds of the sale, stands in the place of the property assigned, and is properly distributable among such creditors as have not waived their right to enforce this assignment. The great majority of the creditors secured under this general assignment have accepted the bonds of the new corporation, and rely upon the mortgage made by the new corporation as a substitute for the Barton mortgage and the assignment to Ward. They thereby elected to take a security inconsistent with that first provided. The effect of this exchange of obligations and securities was to release this assignment, as far as they were interested therein. This left it in force, however, as to all who refused to accept the plan of settlement. The principle involved is precisely that which controlled the decision in regard to the release of the Barton mortgage. There is no room for distinguishing between the effect of such an election as a release of the assignment to Ward, and an election on like facts which we hold to operate as a release of the Barton mortgage. Complainants now hold the bonds of the Hughes Bros. Manufacturing Company, secured by a mortgage upon its plant and realty, as security for the payment of their debts. The acceptance of these bonds operated as a release of the assignment to Ward, as well as a release of the mortgage to Barton. The suggestion that appellants are entitled to relief as against the Hughes Bros. Manufacturing Company, and to priority of satisfaction out of the mortgaged property of that corporation, by reason of its use of this lumber without paying for same, is a question not made in any pleading, or raised by any assignment of error. Touching it we express no opinion, as it should not be decided until presented in some proper pleading, to the end that other creditors of that corporation may be heard. The decree of the circuit court must be affirmed.

FIRST NAT. BANK OF CEREDO et al. v. SOCIETY FOR SAVINGS et al.

(Circuit Court of Appeals, Fourth Circuit. May 14, 1897.)

No. 221.

1. JURISDICTION OF FEDERAL CIRCUIT COURTS — MANDAMUS TO LEVY TAX—INJUNCTION.
A federal circuit court issued a mandamus requiring the county court to levy a tax to pay a judgment against the county. Certain inhabitants of the town filed a bill in a state court to enjoin the levy on property in the town, claiming that such property was not subject to the claim upon which the judgment was based. This injunction suit was then removed by defendants to the federal court. *Held*, that the latter court had jurisdiction thereof, as it involved the enforcement of a judgment of a federal court acting under the federal laws and constitution.

2. COUNTIES — INVALID ROAD IMPROVEMENT BONDS — JUDGMENT FOR MONEY HAD AND RECEIVED—EXEMPTION OF TOWN PROPERTY.
A town charter exempted the inhabitants from county road taxes. Bonds issued and sold by the county for road improvements were subsequently declared invalid, but a judgment was rendered against the county as for money had and received, for the amount paid in by the purchasers of the bonds. To enforce this judgment, a mandamus was issued requiring the levy of a tax to pay the judgment, whereupon certain inhabitants of the town sought to enjoin the levy as to their property. *Held*, that the exemption in the charter did not avail owners of town property, as the judgment was against the whole county for money which it was bound to return to the judgment creditors.

Appeal from the Circuit Court of the United States for the District of West Virginia.

John H. Holt, for appellants.
Frank B. Enslow, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The bill was filed originally in the circuit court for Wayne county, state of West Virginia. The complainants are citizens and taxpayers of the town of Ceredo, situated in Wayne county, and the defendants are the Society for Savings, a corporation of the state of Ohio, the county court of Wayne county, and the sheriff of that county. The prayer of the bill is for an injunction against these defendants forbidding them from levying a tax upon the taxable property within the town of Ceredo, in obedience to the exigency of a writ of mandamus issued out of the circuit court of the United States for the district of West Virginia, and directed to the said county court, instructing it to levy a tax on the taxable property of the county for the purpose of paying a judgment of the federal court against the county.

The facts of the case are these: The town of Ceredo was incorporated by an act of the legislature of West Virginia passed the 23d of February, 1866. By the twenty-eighth section of this act it is declared that the said town and taxable persons and property therein