

It is objected by the counsel of one of the parties interested adversely to Neilson, that if the latter thought the lots mortgaged to him possessed any peculiar value, he should have required them to be sold separately, and not having done so, he cannot now insist upon receiving more of the proceeds of sale than is attributable to the quantity of land contained in his mortgage.

But the answer to this, which I consider sufficient, is, that neither Neilson nor Caton were parties to the cause under which the property was sold ; and, that the sale was made under a mortgage prior in date and paramount in title to the deed under which they claimed.

This objection then being, as I think, untenable, the question resolves itself into one of fact, and that, of course, depends upon the evidence taken in relation to it.

In the Auditor's report of November last, in speaking of the evidence of the defendant, William Carroll, and that of James H. Stimpson, the only witnesses who had then been examined upon this point, he remarked, that their testimony was so completely at variance as to be altogether irreconcilable ; and, he submitted the propriety of authorizing the parties to take further proof to remove the difficulty. An order was subsequently passed for that purpose, and upon reading the depositions taken under this last order, and considering it together with the proof previously on file, I am very decidedly of opinion, that the lots in question, numbered 15, 16, 145 and 229, were worth, at least, as much as all the rest of the property comprehended in these proceedings ; and, therefore, after the full satisfaction of the mortgage to the late Charles Carroll of Carrollton, the surplus proceeds of sale must be applied, in proper proportions, to the payment of the mortgage to Neilson, and to the creditors of Richard Caton.

Wherefore, it is ordered, this 28th of January, 1850, that this case be, and the same is hereby, referred to the Auditor, with directions to state an account accordingly. Exceptions of the parties at variance with this order are overruled.

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[No appeal was taken from either of the orders in this case.]