

Neale and Lockett, filed a copy of this mortgage or assignment of the interest of Mrs. Smith therein, in this Court, and the auditor, by an account marked C, appropriated, of the proceeds of sale to which Mrs. Smith was entitled, the sum of \$3,286 50 to Neale and Lockett, making a rebate from the face of the assignment, of \$50 39, the debt from Smith to them not having all matured, and on the 15th of November, 1850, this account was confirmed by the Court's order, so far as the assignment to Neale and Lockett, and the claims of other parties, against which objections had not been interposed, were concerned.

The application now on the part of the petitioner, the trustee of Mrs. Smith, is, that the account C may be corrected, and this claim of Neale and Lockett disallowed and rejected. And this application is founded upon the following averment in the petition, "And your petitioner would further state, that notwithstanding said allowance" (meaning the allowance of the claim of Neale and Lockett, in account C), "by which said Neale and Lockett will receive full satisfaction and payment from the interest of Mrs. Smith in said estate, they, the said Neale and Lockett, afterwards sold the property mentioned in the mortgage from Smith the husband to them," thus in effect charging, though the amount to which the sales were made is not stated, that these gentlemen, if permitted to receive the sum awarded them in the account by the auditor, will be twice paid.

The answer of Neale and Lockett to the petition, states, that much of the property mortgaged by Smith to them, belonged to the estate of his father, and that the sales made of that portion which really belonged to him, amounted only to \$500, leaving a balance due them exceeding the sum allowed them in the account of the auditor.

The argument now made on the part of the petitioner is, that inasmuch as Neale and Lockett have by their answer admitted that they surrendered to the administrator *d. b. n.* of the father of Smith, a portion of the property conveyed to them by the deed of Smith, they are incapable of performing that con-