SOUTHERN CITIZEN.

BY BENJAMIN SWAIM. *WHAT DO WE LIVE FOR, BUT TO IMPROVE OURSELVES AND BE USEFUL TO ONE ANOTHER?* VOLUME I.—NUMBER 48

TERMS—$2 IN ADVANCE.] ASHBOROUGH, N. C. SATURDAY DECEMBER 2, 1837. [Or $3 AFTER 3 MONTHS

SOUTHERN CITIZEN,
By B. Swaim
Every Saturday Morning.

TERMS.

Two Dollars per annum in advance; or Three Dollars, if not paid within three months from the date of the 1st No. received.

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THE EDITOR.

LEGAL DEPARTMENT

IGNORANCE OF THE LAW EXCUSETH NO MAN.

ASHBOROUGH, N. C.

Saturday, Dec. 2, 1837.

TRUSTS—EXECUTIONS—ATTACHMENTS.

Question.

On the 9th of Oct. 1837, W. P. executed a Deed of Trust to S. W. L. Trustee, for the purpose of securing the payment of about $675 to J. B. L. and others, mentioned in the Deed. The property in the Deed is supposed to be worth $1000 to $1100. On the 10th Oct. the Deed was proved before the Clerk and registered agreeable to law. The Deed specifies that the said debts are to be paid by the 1st January 1838; or in default the Trustee is authorised to sell the property at public vendue, after giving 20 days notice; and with the proceeds of the sale to satisfy the above named debts, with all cost and charges; and to pay the surplus, if any, to the said W. P. or his heirs, assigns, &c. On the 12th Oct. H. C. warranted W. P. and obtained Judgment and Execution, and on the 13th had the Execution Levied on the property mentioned in the Deed of Trust, subject to the Deed in Trust. On the 13th Oct. T. W. and K. B. E. warranted the same, and obtained Judgments and Executions, and Levied as above on the 14th October; W. M. M. and others warranted and obtained Judgments and Executions on the 12th Oct. but did not have them Levied until the 14th Oct.; on the 15th W. P. left the County and State. On the 16th or 17th of Oct. J. G. & C. W. H. took out attachments and Levied on the same property; and on the 18th or 19th Oct. L. R. took out an attachment and Levied on the same. And there are other debts which will not be due until about the 1st of January next; and when they become due, the persons will take out attachments and Levy on the same property: and it is supposed the property will not be sufficient to pay all the debts. All the persons who have Executions have agreed not to sell under their Executions: But to wait and let the Trustee sell at the time specified in the Deed, and claim the surplus in his hands under their Executions. Now the question is this: Is the Trustee *bound* or *authorised* to pay the surplus on the Executions? or to W. P. agreeable to the words of the Trust? and if on the Executions, which of the above persons will have the preference—the oldest *Judgment, Execution*, or *Levy*? and what kind of a receipt or obligation must the Trustee take from them to make him safe, if he should hereafter be called on by W. P. or his heirs, to render an account of his Trust? and what per cent. commission is the Trustee allowed? Your answer to the above will oblige all the parties interested, and your friend

L.

ANSWER.

1. *As to the preference.* These Executions must be satisfied according to their priority of *actual levy*, without respect to their date, or the date of their respective judgments.

2. *As to the Attachments.* The proper way to proceed on the attachments, would be, for the plaintiffs in attachment to summon the Trustee as garnishee; and have the Sarplus condemned in his hands as soon as possible.—They cannot obtain final Judgment on attachment till the end of thirty days from the return, and conditional Judgment of condemnation. And in the mean time, the lean of the attachment is not complete, so but that an Execution has preference, if actually levied. The attachments will have preference, according to the date of their respective *final judgments*. And consequently all the Executions levied before the dates of those final judgments, will be entitled to the preference over the attachments.

3. *As to the Trustee.* He is bound to pay over the surplus, if any, according to the preference above stated. And by so doing he executes the trust, just as well as if he had paid the surplus to the debtor himself. And in fact, if he is notified of the levy of an Execution, or an Attachment, or having rendered a Garnishment,—he cannot safely pay the *Trustor* or *debtor* the surplus. For this might, and most probably would, subject him to the recovery of the ment—creditors.

4. *As to the form of the Receipt &c.* This is not at all material. Any thing that shows the payment of the debt, out of what fund, and by whom it was paid, is sufficient. The following is a good form:

December 2nd 1837.

Received of S. W. L. Trustee of W. P. the sum of——in part of an Execution against the said W. P. in favor of ——now in my hands for collection, and heretofore levied on the surplus property contained in said trust; which payment is made out of the surplus proceeds of the sale made by the said S. W. L. on the——day of——1837.

A B, *Constable.*

5. *As to Commissions.* This is not regulated by law at all, more than other charges for services rendered. The Trustee may retain a sufficient per cent. to indemnify him for all trouble and expense necessary for executing the trust. But he cannot make it a source of profit. This is usually a matter of agreement among all the parties interested; and varies from 2 1-2 to 5 per cent. on the amount of proceeds. If however the parties cannot agree, it becomes the province of the Trustee to retain whatever he conscientiously believes to be right. And if he *cabbages too deep*, those interested in the surplus must sue him, and recover the excess,—to be judged of by a judicial tribunal having cognisance thereof.

6. *Promiscuous Remarks.* We would not be understood that it is absolutely necessary for the Trustee to render a garnishment on the attachments, as above recommended: we only consider it the preferable course. If any doubt should remain, as to the manner in which we have said the trustee may, and ought to dispose of the surplus, it will appear clear and rational, by reflecting that when the property of the debtor falls into the custody of the law, for the payment of his debts, as it does whenever it is seized by virtue of Executions or Attachments, then the officers of the law at once become his agents—legally authorised to receive and receipt for all the proceeds of such property as may lawfully come into their hands, or such as they have a right to claim.

We have taken the more pains to examine this subject carefully, and explain it practically, in consequence of the liberal patronage we have heretofore been favored with from that quarter. Though we have not the pleasure of a personal acquaintence with our Querest, we are free to acknowledge that gentleman as possessing higher claims on our gratitude for past favors, than any other man East of the City of Raleigh. Should the parties interested in the above case, conclude to start up a considerable accession to our Subscription list, it will please us all the better.

(Question by a Subscriber.)

A Levies an Execution on a certain parcel of property—say 5 negroes. Afterwards, an Execution issues from Court, and the Sheriff levies it on the same property, and removes it. Can the Sheriff hold the proceeds of the sale, because his Execution was issued by the Court, and A's Execution was issued by a single Justice?

ANSWER.

By deciding this question absolutely *either way*, we run some risk of misleading the reader. There is no doubt that the Sheriff may make a good sale of the property; and that the purchaser will acquire a good title. The only question is, whether the Constable can sue and recover from the Sheriff enough of the proceeds to satisfy his Execution. And this must depend on the single fact, whether the Constable was *diligent* or *negligent*. In some cases we should say that levying on property, and leaving it with the debtor, without taking bond and security for its delivery, would of itself be *evidence* of *negligence*: while, on the other hand, there may be cases differently circumstanced, where the officer had left the property with the debtor without being justly chargeable with negligence. So that this, like every other case of like nature, must turn upon its own peculiar circumstances.

We hold very clearly, that a *Court* Execution has no advantage over a *Justice's* Execution, except in the *time* that its *lein* attaches to the property of the debtor. The lien of the latter is from the *levy*; and of the former, from the *teste*. Yet it is to be understood, that although the teste of a Court Execution creates a lein on the personal property of the debtor, so as to prevent him from conveying it away fraudulently—yet a Justice's Execution may be levied in the meantime, and the property legally sold under it, if it can be done before the Court Execution is actually levied.

As authority for the remarks above made, we refer to the case of Lash & others vs. Gibson, Reported in 1 Murphey 266; and Hattan & Wife vs. Dew, 2 Murphey 260. Also, our Act of 1828, on the subject of Executions issued by a Justice of the Peace.

(Question by a Subscriber.)

This question is badly written; but so well as we can make it out, the sense of it is as follows:

If a man use profane language in the presence of a Justice, who has him arrested by a Constable, then present, without a warrant,—Is the Constable entitled to cost? and how much? Where the offence is committed, not in the presence of the Justice; and the informer will not take his part of the forfeiture, how must the Justice proceed?

ANSWER.

1. The law does not, in so many express words, give a Constable any fee for an arrest without warrant; and as the acts of Assembly allowing fees to Constables are all inovations on the common law, (for there was a time when no fees were allowed at all) we think those acts must have a strict and literal construction.

2. As to the course for the Justice to pursue, where the informer is entitled to a part of the *forfeiture*, but claims nothing—just let the Judgment be entered in the usual form; and then underneath, or somewhere on the same paper, let the informer enter a release of his part of the Judgment. The release may be in these words:

I, A B, Informer in this case, do hereby release my interest in the Judgement.

A. B. [seal.]

From the Rutherfordton Gazette.

SUPERIOR COURT.

The Superior Court for this county, after a session of two weeks, adjourned on Saturday last, without getting near through the Docket. There was no case of much importance tried, except the case of State vs. Logan B. Henderson, from Lincoln, who was charged with the murder of Marcus L. Hoke.—We never before witnessed a trial which produced so much excitement. The case was taken up on Friday morning of the first week; the evidence was not closed until next evening. To give a minute statement of the evidence, would require more time than we can command: we will therefore only attempt to give its substance, in as few words as possible. It was proven that on the 17th of August last, the Prisoner was about sitting out in company of some young ladies to visit a Cotton Factory two miles from Lincolnton, belonging to the Father of the deceased, when he was informed the deceased had insulted and abused Maj. Henderson, the father of the Prisoner, an old and infirm man.—Young Henderson then enquired of two gentlemen, to whom he had been referred, for the particulars of the quarrel between Hoke and his Father, he was informed that Hoke had called his Father a damned liar, and an old grey headed scoundrel. Henderson declared his intention of thrashing Hoke, and enquired for pistols; but on being told that Hoke could not be armed, that he had not had time to arm himself; he then said he did not want them, he could whip him without. He then went into a Store and enquired for a stick, as he said for the purpose of thrashing a damned rascal. He was shown an axe helve, he said that would not do, it would kill the rascal. He then asked a young man by the name of Ramsour, if he had any stout sticks, who answered in the affirmative, and stepped and brought a cane, remarking at the same time that it had a spear in it; Henderson stated that he did not want one with a spear, but after driving it against the floor several times, said he supposed it would do, and started off towards Hoke's house, and discovered Hoke walking from his father's Store to his own. Henderson called to him and walked on to his Store, where he, Hoke, had taken his seat under the Piazza, and struck him; Hoke put his hand to his breast as if to draw something out, Henderson gave back, Hoke advanced upon him and stepped off the Piazza, when Henderson again struck him with the cane; Hoke was then seen to have a Pistol presented: Henderson gave back, drew a Bowie Knife and they both advanced on each other, and were for some time in close combat.—When they separated it was discovered that Hoke had been stabbed in the abdomen just above the hip, of which wound he died 13 hours afterwards. Henderson was also stabbed, an inch and a half lower than the deceased, his life was saved by the knife striking the hip bone. It was in evidence that Hoke had armed himself a few minutes before the unfortunate affair, with a Pistol and Bowie Knife, saying that he had understood that Walter Henderson had threatened to attack him. After the engagement, but while under excitement and before the wound of the deceased had been pronounced dangerous, Henderson said "I have given him what he wanted, if he is not satisfied, he can have another chance on half an hour's notice; I wish I had killed him." But when they were first separated Henderson on being asked why he had stabbed Hoke said he would not have done it if Hoke had not drawn his Pistol.

This we believe was substantially the evidence. We write from memory, and may be incorrect as to some particulars. After the evidence was closed, which was on Saturday evening, the case was argued at great length, and with much ability on both sides, on the part of the State, by Solicitor Guinn, and Messrs. Slipp and Woodfin, for the Prisoner, by Messrs. Burton, Caldwell, Carson and Alexander. It was some time after night, before the argument was closed, when his Hon. Judge Settle, delivered an able and feeling charge to the Jury. The Jury retired, and in a few minutes returned a verdict pronouncing the prisoner not guilty of the felony and murder, as charged in the Bill of indictment, but guilty of Manslaughter. Whereupon his Hon. Judge Settle ordered him to be branded and imprisoned for six months. From that portion of the sentence, inflicting the punishment of branding an appeal was taken. It is not our intention to make any comments on this trial.

We take this occasion of expressing our entire approbation of the demeanor of Judge Settle on the Bench.

DELAY.—Who is there livtng who never chid himself for delay, again and again, thousand upon thousand of times? Delay and procrastination, half indolence and half indecision, are most effectual robbers of time, and defrauders of men's purposes. The delays of good and dutiful intentions, which ultimately lead to the defeat of them, cause more regret and repentance in most men's lives, probably, than any other class of causes. The sacred command on this head, as on every other, is perfectly adapted to the nature and need of man: "What thy hand findeth to do, do it with all thy might."

One should never give a good purpose time to cool; nor allow a score of obligations to run up a score of debts and then clog his heels with duns. These things should all be kept ahead like a drove of sheep, or else they will loiter and hang behind much to the plague of their overseer. It was the advice of one who accomplished an incredible amount of literary labor, to do instantly whatever is to be done, and take the hours of reflection or recreation after business, and never before it. When a regiment is under march, the rear is often thrown into confusion, because the front do not move steadily and without interruption. It is the same thing with business. If that which is first in hand is not instantly, steadily and readily despatched, other things accumulate behind, till affairs begin to press all at once, and no human brain can stand the confusion. The contrary is a habit of mind which is very apt to beset men of intellect and talent, especially when their time is not regularly filled up, but left at their own arrangement. It is like the ivy round the oak, and ends by limiting, if it does not destroy, the power of many and necessary exertion.

STRANGE INCIDENT.

A young lady in Missouri, was sleeping one morning in her bed, when a bee more industrious than she, came buzzing into her room in quest of honey. Spying her ruby lips, it alighted, no doubt mistaking them for a rose. The buzzing of his little wings awoke the fair one, who in an instant, struck the honey searching insect with her hand, and recieved in return a sting on her lip. She went with her swolen lip to a young man, who happened to be near, and begged him to extricate the sting. He set his head to work to devise a plan to effect his purpose; and finally concluded that the only way was to suck it out. He proposed the plan—she agreed—the sting was extracted; but it seems it went to the young man's heart, for he kept trying to extract bee stings from his lips till they were summoned by Old Cupid, to appear at Hymen's holy alter

Brownsville Banner.

Laziness.—A man of considerable wealth, and no small degree of indolence, while sitting in his easy chear, sipping his coffee from the urn, told his servant to hand him his handkerchief. The servant did so, and was then commanded to hold it to his nose. He again obeyed, and the man sat a moment, and half starting from his chair angrily cried, "Why don't you blow! you know what I wanted.—*Yeo. Gaz.*

Idleness.—Dr. Blair says that idleness is the great corruption of youth; and the bane and dishonor of middle age. He who, in the prime of life, finds time to hang heavy on his hands, may, with