commissioners' court had no power to remove said Street and appoint another clerk to said court, therefore it is ordered that a peremptory *mandamus* issue, if necessary, to restore said Street to his office.

AUGUSTUS COLLINS and ANSON COLLINS, Plaintiffs in Error, *v.* JOHN WAGGONER, Defendant in Error.

ERROR TO MADISON.

If a replication departs from the declaration, it is error.
Upon all contracts made before the first of May, 1821, the defendant had a right to replevy for three years, unless the plaintiff indorsed on the execution, that paper of the State Bank of Illinois would be received in discharge of the execution.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of trespass for entering the defendant's close and taking and carrying away his personal goods. The plaintiffs here, who were defendants below, pleaded a judgment obtained by them before one David Moore, a justice of the peace in and for the county of Madison, against the said Waggoner. That on said judgment an execution issued, directed to any constable of Madison county, whereby such constable was commanded to levy upon the goods and chattels of the said Waggoner. That said execution came to the hands of one Isaac McMahon, then a constable of said county; that said constable, by virtue of said execution, and by the direction of the plaintiffs, entered the close and took and carried away the goods, &c., as averred in the declaration; which entering and carrying away was the same trespass complained of, and of no other were they guilty.

To this plea said Waggoner replied: That the cause of action on which the judgment mentioned in said plea was rendered, arose before the first of May, 1821. That there was no indorsement on said execution in the plea mentioned, as is required in and by the twenty-seventh section of the act of the legislature of the state of Illinois, entitled "an act establishing the State Bank of Illinois." That said Waggoner did, at different times, before the said trespass was committed, tender to the said Isaac McMahon the full amount of the said execution, and then and there offered to pay the same in notes of the said Bank, or to replevy the same for three years, as by law he might do, all of which the said Isaac

McMahon refused to accept, permit or suffer, and whereupon the said defendant committed the trespass as in the declaration alleged, and this he is ready to verify. To this replication there was a demurrer, and that demurrer overruled by the court below. To reverse that judgment this writ of error is prosecuted. Three objections are raised, one to the declaration, and two to the replication: 1. The action is misconceived. 2. The replication is a departure from the declaration, showing a trespass in McMahon only; and 3. There is no law authorizing a replevy of three years as averred in the replication.

And first, is the action misconceived. The injury complained of is the forcibly entering the close of the said Waggoner, and taking and carrying away his goods and chattels. Surely it can not be contended seriously that for this injury, case is the remedy. If the refusal to take bail, or to permit the party to replevy was the foundation of the complaint, then case would lie; but if, after such refusal, the officer proceeds to levy and distress, trespass can be supported. We will consider the second and third objections together, viz.: That the replication is a departure from the declaration, and shows a trespass in McMahon, the constable only, and that there is no law authorizing a replevy of three years. The first of these objections we think is well taken, and we have no doubt, if it had been raised below, (which we think was the duty of the counsel to have done, and the practice of raising objections here, which might have been urged below, this court can not but reprobate,) would have been sustained. Although the cause of action arose before the first of May, 1821, yet the plaintiffs in the execution, had their election to indorse that state paper would, or would not be received. If they did not elect to indorse that state paper would be received, we conceive from the law, the defendant had the privilege to replevy the debt for three years. The statutes upon this subject are complicated, but this seems to be the true construction, that upon all contracts entered into before the first of May, 1821, if the plaintiff in an execution, does not indorse that paper of the State Bank of Illinois, or either of its branches, will be received, the defendant will have the right to replevy for three years. It clearly appears in this case that notwithstanding the plaintiffs did not indorse on their execution, yet they had a right to direct the officer to levy, until the offer to pay or replevy was made, nor does it appear from the replication, for it is not so averred, that the plaintiffs ever had notice of the offer made by the said Waggoner to the said constable, to pay or replevy the said execu-

tion, and until they had notice of that fact, the plaintiffs could not be liable. The replication showing a trespass in McMahon only, is a departure from the declaration, and therefore bad. (1) Let the judgment below be reversed, and the costs abide the event of the suit in the court below, and the cause remanded with leave to the plaintiff in that court to amend his replication.

Judgement reversed.

THOMAS GILL, Appellant, *v.* JAMES CALDWELL, Appellee.

APPEAL FROM CRAWFORD.

Swearing a witness by an uplifted hand, is a legal swearing, independent of the statute.

Oaths are to be administered to all persons according to their opinions, and as it most affects their consciences.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of slander commenced by the plaintiff here, against the defendant, in the court below, for charging him with swearing false in a certain judicial proceeding before one Thomas Kennedy, a justice of the peace.

The declaration avers that said Gill "was sworn regularly and legally by the said justice, and then and there took his corporal oath." From the bill of exceptions taken in the cause, it appears that on the trial below, the justice of the peace, Kennedy, testified, "that there was before him the trial mentioned in the declaration, that he administered to said Gill what he conceived to be an oath, that Gill swore by an uplifted hand, that no bible was used, and that Gill was not asked how he took his oath." The defendant's counsel then moved to exclude the testimony of Kennedy, it not proving a legal oath administered, nor such an one as would support the averment in the declaration, which motion the court below sustained, and excluded the testimony, and this we are called upon to correct. If the said Gill was sworn by an uplifted hand, it surely can not be said to be a departure from the declaration; the only question to be settled is, is it that kind of oath which the law recognizes? The pure principle of the common law is, that oaths are to be admin-

(1) This is a familiar rule of pleading. *Hite* v. *Wells*, 17 Ill., 88.