&c. A motion is made in arrest of judgment, on the following reasons: First, Turby is jointly interested, and is not a party, Second, That if Tate could sue alone, it would only be for costs that would accrue. Third, It has not been alleged in the declaration, that judgment was recovered on the note of Tate to Rector and Co., for which the writing declared on was given as an indemnity. Fourth, The breach is not sufficiently assigned Upon these reasons the Court arrested the judgment. As to the first objection, there is nothing in it. As to the second, that Tate could only sue for costs,if he could sue at all, he must sue for all, for Barcroft binds hims lf to become responsible. The breach is, 164 that he has not done it. This objection is not tenable. The third objection is, the want of the allegation that judgment was recovered against Tate, on the note to Rector & Co. The undertaking is not that Barcroft will indemnify, but that he will become responsible. The breach is, that he has not become responsible, &c.; therefore,this objection is not well founded. Fourth,The breach is not sufficiently assigned. The breach here is as large as the covenant, and that is enough. If a breach is not well assigned, in most cases, it is only cause of demurrer, and not cause in arrest of judgment. The breach is, perhaps, larger than the covenant, but should have been demurred to; so this objection fails.(*a*) But, yet, this judgment of the Circuit Court cannot be reversed, because, on the whole record, judgment is given for the right party. The declaration should have stated with whom Barcroft covenanted, and to [116] whom he was to become responsible, which it does not do. It is, therefore, defective, and such a one as no judgment ought to be given on. It is a rule of revising courts, that if, on the whole of the record, judgment is given for the right party, it ought to stand. (*b*)

Therefore, this judgment is affirmed, with costs.

(*a*) Labarge v. McCausland, 3 Mo. R. 585; Keatly v. McLaugherty, 4 Mo. R. 221.
(*b*) Dube v. Smith, *post* 313; Wear v. McCorkle, *post* 588; Wathen v. English, *post* 746; Crocker v. Mann, 3 Mo. R. 472; Coleman v. McKnight, 4 Mo. R. 83.

BAILY v. GENTRY AND WIFE.

1. CONSTITUTIONAL LAW.—It is the duty of the court to inquire into the constitutionality of an act of the Legislature.
2. SAME.—The act of the Legislature of this State, granting a stay of execution for two and a half years, unless the plaintiff or his agent will endorse thereon, that property at two-thirds its value will be taken in satisfaction, is repugnant to the constitution of the United States and of this State, and, therefore, void.

COOK, J. This is an application for a supersedeas, in the following case: Gentry and wife obtained judgment against Baily in the Circuit Court of Cooper county, in an action of debt, founded on his bill obligatory; 165 and on the 9th day of September, 1821, caused an execution to issue thereon, on which the sheriff returned, that on the 1st day of October, 1821, he levied said execution on a negro man, the property of the defendant, and there being no endorsement thereon, by the plaintiff, the defendant, on the 13th day of February, 1822, offered his bond, with security, agreeably to law, to stay all further proceedings on said execution, which bond he had taken as sufficient, and returned it with the execution. The plaintiff moved the Court to quash the proceedings of the sheriff, in taking said bond, and award to them an alias execution, on the ground, that the law, under which the sheriff acted, was unconstitutional and void; whereupon, the Court adjudged, that the proceedings had on said execution be quashed and set aside, and the plaintiff have an alias execution. In support of the application, it is insisted, first, that the Circuit Court erred in setting aside the proceedings of the Sheriff on the execution, and secondly, in awarding an alias execution. In support of the first error assigned, the act of the last session of the General Assembly of this State, pointing out the manner in which execution may be stayed, &c., is relied on. The application is opposed, on the ground,that so much of the act referred to,as provides for staying execu- [117] tions, is repugnant to the Constitution of the United States, and to the Constitution of this State, and, therefore, void: first, because it impairs the obligation of contracts; secondly, because, in effect, it makes something else, besides gold and silver coin, a tender payment of debts; thirdly, because it is retrospective in its operation; and fourthly, because it would effect an unconstitutional delay of justice. It is contended, in support of the application, first, that the act under consideration is not repugnant to the Constution of the United States, nor to the Constitution of this State; and secondly, that the Court is bound to observe the provisions of the act of the General Assembly, without regard to the Constitution.

The last point is first in order, inasmuch as it tends to preclude any 166 investigation of the validity of the act. It will, therefore, be first considered. A course of adjudication, almost entirely uniform and uninterrupted since the adoption of the Federal and State Constitutions, as well in the Supreme Court of the United States as in most of the State Courts, would (but for the zealous manner in which this point was urged in argument), have been deemed satisfactory and conclusive. It is contended that the judiciary, in deciding on the validity of the acts of the Legislature, usurps a supremacy in government destructive of the powers and independence of its co-ordinate branches, and that the decision of the Court, pronouncing such act unconstitutional, is a virtual repeal thereof. If the declared will of the Legislature, whether consonant or repugnant to the Constitution, has the force and effect of law, and the co-ordinate branches of the government bound to conform to it, until the Legislature itself shall declare a different will, then is the Constitution, as to that body, a mere nullity, a dead letter, and the acts of one branch of the government, created by, and deriving all its powers under the Constitution, are paramount to it. That the Legislature are not under the control of any other branch of the government, as to what they shall do or omit to do, is clear; as in the case put in argument, that if they should neglect to assemble for the purpose of enacting laws necessary for the government of the State, or being assembled, should (in cases where legislative aid is necessary to give effect to constitutional provisions, in relation to other branches of the government), exercise their powers so improvidently as to embarrass the administration of justice, the judiciary would neither be competent to command them to meet and enact laws, nor to modify what they had done, but must decide and construe their express enactments. To the objection that the Court, in deciding an act of the Legislature to be unconstitutional, virtually repeals the law, it is but necessary to answer, that it is not the judgment of the Court which destroys the effect of the act; the Legislature being prohibited, by the Constitution, from passing such law, the act itself is void, and therefore requires no act of the Court, or any other authority, to repeal it. Since the case 167 of Marbury v. Madison, decided in the Supreme Court of the United States (1 Cranch's Rep. 137), this question has been generally looked upon as settled.

M'GIRK, C. J. In the second section of the sixth article of the constitution of the United States, it is provided, that "this constitution, and the laws of the United States, made in pursuance thereof, &c., shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstand- [118] ing." It is conceived that this provision not only gives the power to the State Judges, but expressly makes it their duty, to decide on the constitutionality of the laws of the State, whenever they are supposed to conflict with the constitution of the United States. But on the question, whose province is it to decide whether acts of the State Legislature contravene the State constitution? our constitution is silent. The powers of the government are divided into three distinct departments, each of which is to be confided to a separate magistracy (art. 2, of constitution of this State). The third article creates the legislative power, and vests it in a General Assembly. The fourth article creates and vests the supreme executive power in a Governor. The fifth article creates and vests the judicial power, in matters of law and equity, in a Supreme Court, and other Courts, therein provided for. The constitution of the United States makes a similar distribution of the powers of the general