

undertakes to impose the condition, or to make the release depend upon the condition, that Rice should not be thereby released. To give effect to this condition would be [*333] to destroy the release *itself, even as to Wiley. The condition, therefore, is repugnant to the previous covenant, and must destroy it, or be destroyed by it. When that is the case, the rule of law is well settled, that the condition must give way that the covenant may stand. The legal effect of this instrument is substantially the same of that in the case of *Benjamin v. McConnel*, 4 Gilh. R. 536. To the release in that case was appended this condition: "Provided, that this shall not operate so as to release C. Benjamin from a note given by him under the firm of C. Benjamin & Co., on the 4th day of December, 1839, which last mentioned note is not canceled, or is the said Delahay bound therefor." Here, too, was a condition appended which, if given effect, would have destroyed the release and rendered the whole instrument a nullity. The court there said: "A proviso in a contract totally repugnant to the contract itself is void." And cites 5 Bac. Abr. 702 G., for the following: "If two are bound in an obligation, and the obligor releases one of them, with a proviso that the other shall not take advantage of it, this proviso is void." But it is unnecessary to multiply authorities upon a proposition which is nowhere controverted. Here is a clear case where the proviso must be disregarded, or the covenant destroyed, and the whole instrument held a nullity. The condition must be disregarded and effect given to the body of the instrument. No doubt it was the intention of the parties to release one and not the other, but this the law will not allow, but will defeat such illegal intention.

The demurrer was improperly sustained to the plea, and the judgment must be reversed and the cause remanded.

Judgment reversed.

18 Ill. 334 (1857)

THE PEOPLE, on the relation of THOMAS R. COURTNEY, v. JESSE K. DUBOIS, Auditor, etc.

Application for a Mandamus.

LEGAL TENDER—*Coin*.—Silver or gold coin of the United States, coined prior to the 1st day of June, 1853, is a legal tender for all debts, according to their nominal value, for any sums whatever.

PUTTING BANK IN DEFAULT—*Averments in protest*.—To put a bank in default for non-payment of specie, the protest should aver that the specie tendered in payment of its bills, if greater in amount than \$5, and of the denomination of quarters, was of the coinage authorized by the law of 1853. Without such averment there is not an appearance of default to justify the auditor to proceed against the bank.

THOMAS COURTNEY, by his petition, showed that the Bank of Ottawa, organized under the general banking law of 1851, *had issued bills for circulation. That on [*334] the 18th day of May, 1857, he was the legal holder of two bills of said bank of the denomination of \$5 each; that he, on that day, presented said bills for redemption to the cashier of the bank, and demanded coin therefor. That the cashier refused to redeem said bills in gold coin, or in any other manner than in quarter dollars of United States coinage, which the petitioner refused to receive. That petitioner caused a demand to be made by a notary public, and that the cashier of the bank refused to pay the notary anything but quarter dollars for the bills, and the notary thereupon protested. That he forwarded the bills and the protest to the auditor, requesting him to notify the bank to pay in conformity with the act of 1851, and the amendatory act of 1857. That the auditor refused to notify the bank, because the tender by the officers of the bank was a legal one. Petitioner alleges that tender was illegal, and insists that the bills should have been redeemed in gold coin. Prayed for an alternative *mandamus* against the auditor to show cause why he did not give the notice, etc.

The protest states that he "demanded payment of the bills, in specie, of the cashier, which he tendered in American quarter dollars, but refused to redeem the same in gold."

The auditor admitted the facts stated in the petition, and