REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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but in case my son Winter should die and leave no issue, then I I give the said negroes to my son Charles and his heirs forever." Winter died without issue, and the limitation to Charles was adjudged good, as an executory devise; the words "*and leaving no issue*," confining the limitation to the time of his death. The case of *Higgenbotham* v. *Rucker*, was a parol gift of slaves stated by the jury to have been a gift of slaves by the plaintiff to his daughter, the wife of the defendant, to *her and the heirs of her body*, and in case she died *without issue*, (that is, children, the jury say,) of her body, then the negroes to return to the plaintiff. The wife died in less than a year, without issue; and this remainder was adjudged a good one; because the limitation of the father, confined the dying without issue to happen in his life, and therefore, was good within the rule. This case tends to confirm, not only that rule, but to obviate the distinction between a deed and will. I think, therefore, that the judgment should be reversed, but as two Judges are for affirming it, that must be the judgment of the Court.

Judgment affirmed.

CROUGHTON *v.* DUVAL.

Thursday, October 29th, 1801.

A surety to a bond prior to the act of 1794, is not absolved from the obligation by requesting the obligee to sue, and his failure to do so.*

Duval filed a bill in the High Court of Chancery, stating, that he had become surety for Campbell, in some bonds to
[70] Croughton. That the plaintiff had requested the defendant to sue Campbell, but never could prevail upon him to do so. That after Campbell's death, the plaintiff solicited the defendant to take administration on his estate, and offered to be his security; but this also was declined. The bill, therefore, prays that the bonds may be delivered up. The answer denies any peremptory request to sue: but two witnesses prove the request; and one speaks of the probable ability of Camp-

*The act of 1794 (copied into 1 R. C. of 1819, p. 461, § 6; and with additions, into Code of 1849, p. 587, § 4, 5) authorizes a surety, by written notice to oblige the creditor to sue upon the bond, &c., which he is to do within reasonable time, or forfeit his right against the surety.

See note, p. 74.

bell to have paid about that time. The Court of Chancery granted a perpetual injunction to any further proceedings on the said bonds; and Croughton appealed to this Court.

WARDEN, for the appellant.

It is not proved that Campbell was insolvent: nor is it even fully established, that Duval requested Croughton to bring suit. But, if both had been shewn in the clearest manner, that would not have altered the case. The Chancellor's principle is too broad; for, it is not true that one man is bound to do for another what the latter requests, although it might not prejudice the former. Duval might have paid the debt and taken an assignment of the bond, which would have enabled him to sue Campbell, or he might have brought a bill in Chancery, in the nature of a *quia timet*, and prayed that Campbell might be decreed to pay the debt, and save him harmless. [*Bracken* v. *Bentley*,] 1 Ch. Rep. 110; [*Ayloff* v. *Fanshaw*,] 1 Ch. Cas. 300; [*Hayes* v. *Hayes*, Ibid.] 223; [*Renelaugh* v. *Hayes*,] 1 Vern. 190; Fowl. Exch. 38, 39; Fonbl. Treat. Eq. 43. But, having neglected them all, he has no equity against the creditor. Croughton was not bound to adminster; he was not next of kin; and, if there was any advantage to have been derived from it, Duval might have taken the administration himself. The act of 1794, [R. C. c. 174, § 2, ed. 1803; c. 116, § 6, ed. 1819,] has no influence on the question; because it relates to future bonds only.

NICHOLAS, WICKHAM, CALL and RANDOLPH, contra.

The refusal of Croughton to bring suit, released Duval from his obligation, as payment of the debt might then have been enforced. The answer does not deny the request [71] to sue, and the depositions prove it. The indulgence under these circumstances was unreasonable, and changed the nature of the contract. *Nisbet* v. *Smith* et al. 2 Bro. C. C. 579; *Rees* v. *Berrington*, 2 Ves. jun. 540; Crompt. Chy. 44. Civilians make a distinction between perfect and imperfect obligations; the first is, where a man is not bound from any circumstance to do a benefit to another, such as to lend him money or other aid; but the second is, where he is bound, from a prior consideration, to perform some act in order to save the other from injury, or to retribute him for something had, or some wrong sustained. In the present case, the obligation to sue was of the perfect kind; because the circumstances and relation of the parties required that indulgence should not be given by one, to the injury of the other. But, for another reason,

the request was proper; because it prevented circuity of action; and if Duval could have brought a bill of *quia timet*, there is the same reason for relief upon the request; because, there is no magic in the bill, to render that right upon the suit, which would not have been right without it. If the act of Assembly proves nothing for us, it has nothing against us; because it only enacts what was equity before.

WARDEN, in reply.

The cases cited on the other side have no influence on the cause. That of *Nisbet* v. *Smith*, 2 Bro. C. C. 579, was the case of an additional security taken by the creditor; and he had thereby contracted for a future day of payment, which put it out of his power to enforce satisfaction of the debt in the mean time. The same observation applies to that of *Rees* v. *Berrington*, 2 Ves. jun. 540, and to the case from Crompt. Therefore, no principle is to be drawn from those cases, which will affect the decision to be given in this. A [72] mere delay to bring suit, clearly does not exonerate the security; for, generally speaking, a recovery can be had against the surety at any time when it can be obtained against the principal; and no case is shewn where a mere request to sue has been held to alter the law in this respect. Duval has no just cause of complaint; because he might have paid the debt and pursued Campbell.

PENDLETON, President, delivered the resolution of the Court, as follows:

This is an appeal from the decree of the Court of Chancery, where Mr. Duval exhibited his bill, stating that, on the 23d of April, 1793, he, as security for Mr. Alexander Campbell, entered into three bonds to Mr. Croughton, for £113 4s. 4d. each: one payable in October, 1793, another in January, 1794, and the third in April, 1794, all bearing interest from October, 1790. That, Mr. Campbell's circumstances being in a declining state, Duval, in October, 1794, when all the bonds had become due, applied to Croughton, who well knew Campbell's circumstances, and requested him to bring suits on the bonds, which he declined doing, till after Mr. Campbell's death, insolvent, in 1796; his inducement for which forbearance, was Campbell's being his counsel in an important suit then depending, and his expectation that Campbell would be able to pay him from the fruits of a suit, then depending in this Court. That, after Campbell's death, Duval again applied to Crough-

ton to administer on his estate, by which the debts might have been secured; but he refused to do so, and Duval not being a creditor, could not obtain such administration. That, in 1798, he received a letter from the appellant Southcomb, intimating his claim to the bonds; which he answered, assigning reasons against his liability. Croughton and Southcomb are made defendants, and required to answer the bill; and the prayer is, that the bonds may be cancelled so far as respects the plaintiff, or that other relief may be afforded. The proofs fix the request to sue in 1794, but go no further. It is not proved that any new arrangements are made between the creditor and the principal, to obtain a forbearance of the suits; for, although it is stated that Campbell expected to pay from the effect of a suit depending, it does not appear [73] that Croughton had *bound himself* to wait till the event of that suit. It is, therefore, a naked case for the question, whether a creditor, by delaying to commence suit, when requested by a surety, without any thing done on his part, which may amount to a new contract with the principal, shall lose his remedy against the surety? The question is new, and, indeed, important; as there may, perhaps, be hundreds of bonds, dated prior to the act of [Dec.] 1794, [—Mar. 1795, R. C. c. 116, §6, ed. 1819,] existing in the State, and probably not one of them in which the creditor has not forborne to sue for a considerable time beyond the day of payment; which, it is urged, will amount to a discharge of the surety. It would, indeed, be much more important, if that act of 1794 had not settled the question from that period. The act does not take away any remedy which the surety was entitled to before; and we come to consider what that remedy was? It is clear, that the plaintiff might have paid the money, and proceeded to a suit himself, or if that was inconvenient, he might have brought his bill of *quia timet*, to have compelled the principal to pay, and the creditor to receive the money; but that the creditor should lose his debt, because he was merely passive, in forbearing a suit which the surety requested him to bring, without any thing active between him and the principal, tending to shew a new contract for forbearance, is not, and the Court believe cannot be, proved by any of the cases produced, or existing. In the case quoted, from 2 Bro. C. C. 579, the creditor commenced suit, and upon the principal giving a note to confess judgment, agreed to stay execution for three years; which the Chancellor considered as a new contract, and compromise with the principal, without the consent of the surety, and which deprived him of his remedy by the bill of *quia timet;* and,

therefore, that the surety was discharged. In the case in 2 Ves. jun. 540, the creditor took from the principal several notes and drafts, which were returned, and new ones given, from time to time, which amounted to a new contract, and all this without consulting the surety, who had this further [74] equity in that case; that while those notes were transacting, considering himself as discharged, he had paid over to the principal more money than the amount of the debt, which had come to the surety's hands; and the Chancellor adjudged that *that* surety was discharged. The circumstances, discussed in those cases, so far from proving that the surety is discharged by a bare request to sue, not complied with, tend to establish the contrary, that such request and a bare forbearance to sue, does not amount to a discharge. Sureties are so far favored in equity, that the Court will never extend relief against them, further than, by their contract, they are bound at law; but fair creditors are also favorites in that Court, and will not be deprived of their legal rights, without some fraud, or neglect in doing what they were bound to do. It was certainly unkind in Croughton not to sue when he was requested by the surety, which was so far a breach of his moral duty, but it was truly said, that this duty was such as the civilians describe as an imperfect obligation, the performance of which was merely voluntary, and could not be enforced by a court of justice; many instances of which were mentioned, and many more might have been added. The parties here had plain remedies: the creditor to sue, if he chose it; and, as he did not, Mr. Duval's remedy is before pointed out; which he, neglecting to pursue, was, at least, as much in fault as the creditor; and where equity is equal, the law must prevail. The decree is, therefore, to be reversed, with costs, by the unanimous opinion of the Court; and, in consequence of Mr. Duval's consent, entered in the record, he is decreed to pay the several sums according to the bonds. The costs in that Court to be equally borne by the parties, as it seems to have been by consent, to settle a new point.*

[* See *Hill* v. *Bull*, Gilmer, 149; *Ward* v. *Johnson*, 6 Munf. 6; *Hunt* v. *The United States*, 1 Gallison, 32; *King* v. *Baldwin* et al., 2 Johns. Ch. R. 559. 17 Johns. R. 384; *Cope* v. *Smith* et al.: 8 Serg. & Raw. 110, and the recent case of *Norris* v. *Crummey* et al., 2 Rand. 323, in which, the principal cases are reviewed by GREEN, J. p. 335-338.

Lord Ch. ELDON said, in *Samuell* v. *Howarth*, (Aug. 7th, 1817,) 3 Meriv 277-8, "it is firmly established, that the same principles which have been held to discharge the surety in Equity, will operate to discharge him at law." See, however, the case of *Davey* et al. v. *Pendergrass*, M. T. 1821, K. B, 5 Barn. & Ald. 187, 2 Chitty's R. 336, S. C., where this subject is fully considered. The point adjudicated was, that it is not any defence at *law*, to an action on a *bond*, against a surety, that by a *parol* agreement, time has been given to the principal.

ABBOTT, C. J. said, "the ground of my opinion in this case is, that general rule of the common law, which requires, that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity. The operation of this rule is, indeed, sometimes such, as to make it imperative upon a Court of Equity to interpose and grant relief; but it by no means follows that the rule of law is to be broken down, because a Court having jurisdiction of another kind, will interpose where there is a particular case, in which the rule of law may be found to operate harshly. There is great objection to a Court of Law taking upon itself to act as a Court of Equity, because they have not the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a Court of Equity. If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond, conditioned for payment of money at a certain day, it will not prevent the party from proceeding at Law immediately, whatever the consideration for the delay may be. And, if that be so, how can the giving of time to a third person, by such an agreement, prevent the obligee of the bond from proceeding at Law against the surety? There may, indeed, be such a consideration for the agreement, as may induce a Court of Equity to direct that the party shall not proceed to enforce his remedy at Law. But a parol agreement of this nature, can never operate to control the obligation of this bond in a Court of Law. The decisions which have taken place in the Courts of Equity in cases of this nature, have always, as I understand them proceeded on the notion, that at Law, the thing prayed for could not be done. Bills of Exchange stand upon a very different footing; there the law merchant operates, and the Courts of Law decide upon them with reference to that law. Guaranties for the payment of debts, [*Samuell* v. *Howarth*, was a case of guaranty.] are not, in general, instruments under seal, and there is no strict technical rule, which, as to them, prevents a Court of Law from looking to the real justice of the case." HOLROYD and BEST, Just. to same effect.

And *Bultell* v. *Jarrold*, (not reported,) cited by Mr. Maule, in *Davey* et al. v. *Pendergrass*, and relied on by the Court, which was an action of debt on a recognizance of bail; the defence pleaded was, time given to the principal, to which there was a demurrer; the Court (of Exchequer) gave judgment for the plaintiff, on the ground, that this could only be taken advantage of by an application to the equitable jurisdiction of the Court; and of this opinion, was the House of Lords. See the cases cited in the preceding part of this note.]