<u>Novel 4.</u>

That creditors must first sue the principal debtors, and they may sue mandators, guarantors of money agreed to be paid on a day fixed, and sureties (by stipulation:, only if the former are found to be insolvent.
(Ut creditors primo debitores principales convenient, et secundo loco, si illi non solvendo esse reperiantur, mandatores vel constitutae pecuniae reos vel fideiussores.)

Emperor Justinian to Johannes, glorious Praetorian Prefect.

<u>Preface.</u> We have deemed it best, on account of its importance in settling continuously recurring questions, to revive and make effective an ancient law which in an unknown manner had fallen almost out of use, and to do so not merely in its ancient form—for it was defective in some respects—but to amend it in a manner that is proper and pleasing to God.

c. 1. So if any one makes a loan of money to another for which a surety, by stipulation and mandate and by promising to pay another's existing debt, is also responsible, the lender shall not, at the beginning, sue such surety, and shall not, while neglecting the principal debtor, make trouble for the intercessors, but he shall first sue the party who received the money and contracted the debt. If he recovers his debt from him, he shall refrain from troubling the others. For what has the o do with outsiders, if he is paid by the party who received the money? If, however, he is unable to recover the debt or any part of it from the principal debtor, he may have recourse against the surety, for the remainder which he cannot recover from the former. And this applies when neither the principal debtor nor the surety are absent. But if the surety is in the same jurisdiction, and the principal debtor is not, it would be harsh to send the creditor to some other place, and he may immediately demand payment from such surety. A suitable amelioration must, however, be provided in this matter. The ancient law did nothing in that respect, although the great Papinian showed the means. If the creditor, therefore, sued such surety, and the latter wants to produce the principal debtor in court, the judge presiding in the

cause must give them time to do so, so that such principal debtor may first be compelled to sustain the burden of the action, and so that the former may be held liable only in the reserve. And the presiding judge must lend his assistance in this respect to the surety, for it is just that this should be done, so that they may in the meantime be released by the principal debtor so produced. But if the time fixed passes by—for the judge must also fix such time—(and the debtor is not produced), then the surety, mandatory or guarantor, must sustain the burden of the action and pay the debt, the rights of action over against the principal debtor passing to them.

c. 2. The creditor shall not seek to obtain (in a hypothecary action) the property of the debtor which is held by other persons until after he has had recourse to a personal action against the sureties. He may thereafter pursue the property of the principal debtor, held by others, and having sued (in a hypothecary action to enforce his lien) those who detain it, without receiving satisfaction in that manner, he may then have recourse to the (pledges) property of the sureties (held by others). The same is to be said if all these parties have other intercessors,[a] who are liable to them, and against whom a hypothecary action lies. The creditor may pursue the principal debtor and the (pledged) property remaining in his hands, either in a personal or hypothecary action or both, aside from right, in the regular order, above provided for in connection with other persons and other cases. Nor do these provisions apply solely to creditors (above contemplated), but also in cases where a person buys something from another and someone else becomes a guarantor for the vendor in connection with the sale, and the sale is found to be defective, the purchaser shall not immediately sue the guarantor or the party who holds some of the property sold, but shall first sue the vendor, then the guarantor and lastly the party who holds the property. The distinction as to the presence or absence of the parties in the jurisdiction of a surety on the one hand and the principal debtor on the other, heretofor referred to, shall also apply here, as well as in all other cases in which sureties are involved, and not only as to the parties themselves but also as to their heirs and successors. In this manner shall the ancient law, as here amended, be again in force and operate with justice among our subjects—not, however,

disturbing guarantees of bankers, which, on account of their usefulness, shall remain as at present.[b]

a. The exact meaning is somewhat doubtful and perhaps refers to second sureties, etc. taken by the first sureties in order to hold the latter harmless; or it might refer to additional sureties etc. taken who guaranteed the solvency of the first (fidejussio fidejussionis), or it may refer to both situations. In any event, the intention of the law clearly is that any form of suretyship should be governed by this law and that, with certain exceptions, the surety should not be sued until after suit against the principal debtor.

b. The exception here stated relating to bankers is not a part of c. 2, supra, but is the end of c. 3 (see that c. attached to C. 7.72). The exception was eliminated by Nov. 136, c. 1, where a pact to the contrary was entered into with bankers. See that Novel appended to C. 8.13.27.

c. 3. And next we enact a measure which may not be acceptable to some creditors, but which out of humanitarian considerations we deem necessary. If a creditor lends money to a debtor, relying upon the property of the latter which consists of only immovable property, and the creditor sues the debtor and demands his money, but it is not easy for the debtor to pay and he has no movable property (for we allow the creditor, if he whishes, to take movable property instead of money, and no purchaser is found for the immovable property because the creditor, forsooth, gives it out that the property is pledged to him, thus deterring anyone from purchasing it—in such case the magistrates (judges) in this fortunate city of our glorious republic, according to the jurisdiction vested in them by law and by us, and the presidents of the people in the provinces, shall cause an accurate valuation to be made of the property of the debtor, and give possession of such immovable property to the various creditors in proportion to their debts and under such conditions as the debtor is able to meet. The rule of distribution shall be as follows: He shall give the better property to the creditor, letting the debtor retain the worse, after payment of the creditor (according to the valuation as aforesaid). For it would not be just that the lender of money, who is unable to collect it, but is compelled to

accept land, should not receive the best property of the debtor, and he shall at least have the consolation that, though he does not receive the money, nor movable property, he at least has land that is not valueless. In this, then, the beneficence of this law is clear. And creditors must remember that the matter would have come to the same point anyway, though this law has not been enacted. For a debtor who is destitute of money and of purchasers for his property, could only have assigned his property for benefit of creditors, and so the creditor, not able to get his money, would in turn probably have received the property. Hence, we, acting humanely, as becomes a lawgiver, come to the assistance of unfortunate debtors in a matter which involves detriment and a bitter result both to the creditor as well as the debtor, and we should not at the same time, appear harsh to creditors simply ordering them to do something, which they would ultimately have to do in any event, even though they persisted in refusing to obey this law. If a creditor is ready to furnish a purchaser, the debtor must sell under such equitable conditions, fixed by the judge, as he is able to meet. For the interests of creditors must be protected without hardship to debtors. Following herein the ancient laws, the term creditor embraces every party who has a right of action against another, though the debt does not arise out of a loan, but out of some other contract, not, however, disturbing guarantees of bankers, which, on account of their usefulness, shall remain as at present.

Epilogue. Your Eminence will make these provisions, enacted for the benefit of our subjects, known by customary edicts, in every part of the empire, so that even those of our subjects who live in the provinces, may know how much care we exercise on behalf of their welfare.
Given March 16, 535.

Note.

This singular Novel does not stand alone in making the foregoing provisions. Justinian enacted by Novel 120, c. 7, in 544 A.D. that where estates of Christian religious organizations were in financial difficulties, payment might be made in a

manner similar to that stated in Novel 4; but the creditor was not given the right to choose the best lands, but was required to accept land of medium quality.