Novel 112.

Concerning matters in litigation, and concerning the bond to be given by the plaintiffs before summoning the defendants, and when a plaintiff cannot claim his privilege where he cannot (otherwise) be compelled to litigate against his will.

Emperor Justinian to Theodotus, Praetorian Prefect.

Preface. Many things have been said about matters in litigation, both by ancient lawgivers as well as by imperial constitutions. Now some judges have besought us to decide a controversy still brought up in the courts in regard to this matter and to clarify the laws and constitutions in reference thereto, so that there may be no doubt in the future as to what matters may be said to be in litigation.

c. 1. We therefore ordain that any movable, immovable or self-moving property shall be understood to be in litigation, concerning the ownership of which a question is raised between plaintiff and the possessor, either pursuant to judicial summons or pursuant to (a rescript in answer to) a petition to the emperor, filed with a judge and by him made known to the adversary of the complainant. The former constitution of Our Clemency shall hereafter be in force in such cases, by which we made a distinction among purchasers with and without knowledge. We have thought it best to add that if a defendant dies during the pendency of a suit, and his heirs want to divide his property among themselves, this may be done without hindrance. For since property in litigation goes to heirs by succession, a diversion of property among the heirs should not be considered as a sale. We also ordain by this law that if one of the litigants, expecting to depart this life, leaves any property, the ownership of which is in litigation, to anyone as a legacy, by a last will and testament, then if his heir is declared to be the owner thereof[a] by a judicial decree (in the litigation), the legatee will receive what has been so left him; but if the heir is defeated by decree of the judge, then the legatee shall not have the right to demand from the heir any other property in place of the legacy, since the testator, knowing the property to be in litigation, left it to the legatee, depending on the event of the suit. Hence we permit the legatee to become, if he thinks it advantageous to him, a

party to the suit, so that he cannot accuse the heir of negligence or perfidy. But from the appellation of property in litigation, mortgages are excluded.[b] And a distinction is to be observed in them, so that, if movable, immovable, or self-moving property is specially mortgaged, the debtor may sell such property to whomever, and when, he wishes, provided he pays its price, up to the amount of the debt, to the creditor.[c] If the debtor fails to do this, the creditor having a mortgage on the property sold may reclaim it to the extent necessary to satisfy his debt. These provisions apply unless the same property was, perchance, pledged to other creditors, either by special or general mortgage. If that is the case, each creditor has a preference under law, in accordance with the date of his lien. Whence it is clear that so much less do we want general mortgages to be embraced in the appellation of matters in litigation, but actions concerning the same shall be tried according to former laws, and shall be governed by those applicable thereto. We make these provisions concerning matters in litigation and concerning special and general mortgage, so that no doubt may hereafter arise in court regarding them, but suits of that kind shall be prosecuted to the end in accordance with the foregoing distinction.

a. See headnote to C. 8.25 on this subject. It must be remembered, as pointed out in C. 8.36.3, that the legatee could not carry on the suit, but that it must be carried on by the heirs. The Novel gives the legatee the right, however, to participate in the suit, so that his rights might be preserved.

b. See C. 8.36.1 and C. 8.27.2. The idea seems to be that where a man held a mortgage, he might sell under his mortgage, not withstanding the fact that the mortgagor might dispute the right. See 9 Donnellus 1163-1164.

c. See on this subject headnote to C. 8.25. While the Novel speaks of the right of sale by the debtor of the property specially pledged, and says nothing of the right of sale where all his property is covered by a general mortgage, it does not intend to forbid the debtor from selling the property, if he can, and thereby satisfy all the creditors; but the rights of the creditors are preserved by this Novel in accordance with their priority. See 9 Donnellus 1037-1038.

c. 2. We have found another remedy, through our forethought, to eliminate vexatious suits and frauds of bailiffs. For we ordain that judges, if they determine to have anyone summoned, must add to their interlocutory decrees the condition that the complaint shall not be given to defendants and fees shall not be paid to bailiffs unless the plaintiff subscribes the complaint in person or by notary, and unless the plaintiff, at the peril of the official staff, furnishes a bond, made a matter of record, with surety, promising that he will remain in court to the end of the suit and prosecute his action either in person or by a lawful agent, and that if he is subsequently shown to have commenced the suit unjustly, he will pay to the defendant as costs and expense, the tenth part of the amount mentioned in his complaint. If the plaintiff says that he cannot furnish a surety, he must confirm that statement under oath, in the presence of the holy gospels before the judge who is to try the case, and he may thereupon give a simple bond under oath, promising therein what has been mentioned above. **1.** If these things are not done in the manner aforesaid, the defendant need not give any answer to the bailiff. And if any judge, or his official staff, or any bailiff, dare to summon anyone contrary to the foregoing provisions, a penalty of ten pounds of gold shall be collected from the judge and his staff, the bailiff's property shall be confiscated, and he shall be sent into exile for five years. The penalty incurred under the law shall be collected at the peril of the officiating Count of the Crown Domain and paid into our fisc. All damage, moreover, which the defendant has suffered by reason of being summoned in contravention to the tenor of this law, shall be paid out of the property of the plaintiff, at the peril of the judge whose bailiff summoned the defendant, as well as at the peril of the judge's official staff, so that our subjects, delivered into our power by God, may everywhere be preserved unharmed. Suits, however, commenced in court by consent of both parties, are exempt from the penalty of this constitution and shall be carried on as provided in other constitutions.

Note.

Bankers were especially exempted from giving the surety mentioned in this chapter. See Edict 7, c. 5, appended to C. 8.13.27. [Not appended in this edition].

c. 3. Since, moreover, we want suits to be quickly finished, we oppose the fraud of those who commence actions but do not wish to prosecute them to the end, saying that under the law no one needs to carry on a suit. Desirous to do away with such fraud, we order that the law so mentioned cannot be used by those who commence an action against another, either through judicial summons or through a petition directed to the emperor (and a rescript) filed with the judge and brought to the knowledge of the adversary, and when the matter has legally commenced to be examined by the judge. A man who is ready to hale his adversary into court cannot unjustly refuse to prosecute his action, since such refusal is becoming to a defendant rather than a plaintiff. We therefore ordain that a plaintiff must prosecute his action to completion. If he delays to do so, the defendant may have him called before the judge before whom issue has been joined, to admonish the plaintiff to come into court either personally or by a lawful procurator. If he still fails to do so, he shall be called by three separate edicts, the calls to be not less than thirty days apart. And we order that the ordinary judges may call all absent parties into court no only through the voices of criers but also through edicts, for only a few that are present can hear the voice of a crier, but edicts posted up through many days may be made known to all. Judges who examine cases by imperial order may, pursuant to the present law, call partied who are absent into court by edicts, so that cases are not dragged out indefinitely. **1.** If the trial has not yet commenced (i.e. if the issues have not been joined), and the plaintiff had only filed his petition to have defendant summoned, or, after a petition to us, our rescript or mandate thereon has been filed with the judge, and the defendant has only been notified thereof, in such case, too, the defendant may go before the proper judge to have his adversary called in like manner, and if the plaintiff appears, the matter shall be examined in legal manner to the end of the suit. **2.** But if, after being called by edicts, he refuses to come into court and prosecute the action either in person, or, as has been stated, by lawful procurator, then he shall have another year; but if he fails to prosecute his action within that time, the judge is given power even in his absence to examine the allegations of the party that is present, according to law, and to give a just decision when the truth has been ascertained. If the plaintiff appears within the year and

wants to carry on his suit, the judge must first collect from him and pay to defendant the costs and expenses incurred by the latter in remaining in court by reason of the suit, and the plaintiff shall then remain till the litigation is ended. For if he comes and pays the expenses and costs, merely to interrupt the running of the year, and again departs before the litigation has been ended, then he shall, after the issuance of the aforementioned edicts, and after the year has passed, lose all right of action which he thought he had against the defendant. For a party who abandons a suit, once interrupted, a second time, commits a greater fraud than a party who deserts a suit only once. The privilege under the law which does not compel a party to prosecute any actions of his own is extended only to those who do not institute a suit against their adversaries in the manner above mentioned.

Epilogue. The provisions herein shall apply to cases which have not yet been finished by judicial decision, by amicable settlement, or in any other manner recognized by law.
Given September 10, 541.

Note.

Novel 96, c. 1, appended to note C. 2.2.4 [not appended in this edition] provided that a plaintiff should give a bond, before serving summons on the defendant, to the effect that he would join issue with the defendant within two months. Chapter 2 of the present Novel (112) provided that a plaintiff should furnish a bond that he would remain in court and prosecute his suit. These provisions were aimed at designing plaintiffs who by an unjust suit might inflict endless damage on a defendant. Previous to Justinian, no provisions had been made for proceedings in case plaintiff failed to prosecute his action. Steinwenter 193; Girard 142, note. Chapter 3 of Novel 112 specifically provided for a method whereby a defendant could require the plaintiff to prosecute his suit or suffer the consequences. The provisions are not dissimilar to those made for like cases in C. 3.1.13. But a modification appears. If edicts were issued for the appearance of the plaintiff and he failed to appear, judgment could not be taken at once, but only after the expiration of a year. This provision doubtless applied not only where the

plaintiff failed to appear before, but also after, joinder of issue. The period was the same in either case. In C. 3.1.13 it was provided that judgment cold not be taken until the last semester of a three years' period, but the foregoing chapter of Novel 112 modified that provision. It generally considered that the one year's period above mentioned applied not only where the plaintiff, but also in case the defendant, was absent. Steinwenter 140; 2 Cujacius 972 (on Novel 69). It may be noted, however, that Cujacius states that if the party deserted a case after joinder of issue, final judgment was possible immediately, while a year was given if issue had not been joined, and Girard 1142, note 1, appears to think that the period prescribed by C. 3.1.13 remained effective. See note (f) to C. 3.1.13, referring to C. 7.43.8. it will be further noted that Justinian provided that edicts should be issued at periods of thirty days apart, instead of ten days, as previously.