Novel 53.

If anyone summons another before a foreign tribunal, he must furnish a surety that if her loses the suit, he will pay the defendant, against whom a vexatious suit was brought, the amount ordered by the judge; that a defendant receiving a summons shall have twenty days in which to deliberate whether he wants to litigate and accept the appointed referee. And concerning him who, after giving a bond under oath, remains absent, that he must pay plaintiff all damage, and after giving a surety may thereafter carry on the suit. And in which case a position in the imperial service may be pledged. And that those who were joined in wedlock without dowry or prenuptial gift shall, if poor, be called to a fourth of the property of a deceased spouse who was rich, whether children survive or not.

Note.

Chapter 5 deals with pledges of positions in the imperial service and is appended to C. 8.13.27. Chapter 6 deals with poor widows who had no dowry, and is appended to C. 6.18.[1]

Justinian to Johannes, Praetorian Prefect of the Orient the second time, ex-consul and patrician.

Preface. Many have appeared before us and have shown us that either pursuant to our command or a judicial order, they have been cited and even dragged by someone to court in another province; that although this brought misery upon them, and they were forcibly compelled to appear by commands or judicial orders, those that caused them to appear, and received a bond that the parties who were cited by them would appear in a definite judicial tribunal within a certain time, remained in their (own) province, leaving the person cited or taken (to court) to be afflicted with expenses in a foreign land.

Note.

Ordinarily the plaintiff was required to follow the forum of the defendant. But for some special reasons, as bias of the ordinary judge, unusual power of an opponent or other reasons, the emperor might be asked to appoint a special judge to hear a case, and the praetorian prefect might hear it. In such event, a defendant might be cited to appear anywhere in the empire, according to the emperor's order, and the praetorian prefect had the right to cause anyone to appear before him at his

[1] These chapters are not so appended in this edition.

seat of government. 3 Bethmann-Hollweg 56; Steinwenter 177. It is such a situation that is referred to above. Cujacius on this Novel (vol. 2 at 961). See also Novel 151, and note C. 3.14.1.

c. 1. Deploring such condition, we ordain that if anything of that sort takes place, and the time has passed which the plaintiff fixed in the (defendant's) bond for appearance or for his production in court, and the defendant is present, but the plaintiff is absent, and the latter does not appear within ten days after the defendant arrived in the province, the defendant who appears before the judge and shows the facts, shall be immediately released; he shall state his expenses of the journey and of his stay abroad under oath and the judge shall condemn the plaintiff, who brought his suit rashly, in that amount. And since it is the custom that defendants are not brought or cited into court until the plaintiff has given sureties, in a certain amount, that he will prosecute the suit and submit to the decision given, such amount shall be demanded from them and given to the defendant who, without reason, suffered a vexatious suit. If the latter declares under oath that his expenses have been larger - the judge having fixed the amount at a reasonable sum, which under the law is called a taxatio - that, too, shall be collected, in addition. Thus the parties may learn not to amuse themselves with the property of another, but to choose the courts situated in the province (where the parties live) and engage in litigation with his adversaries there.

Note.

The oath under which the costs above mentioned were fixed was the so-called assessment oath, considered at C. 5.53. The party swore to the costs, but a maximum amount was fixed by the judge, so as to keep it within reason. See also C. 7.51. and Nov. 82, c. 10, thereto appended [not appended in this edition], relating to costs.

c. 2. While we know that plaintiffs here generally give sureties for citing the defendants, they sometimes seek to escape from doing so if the defendants are summoned into another province. So we ordain that the judge here, or the glorious

quaestor who gives his attention to imperial letters,[a] if any such order is made, shall not permit a defendant to be taken to another province, until the plaintiff has given a bond with surety in the court to which the defendant is to be summoned, to the effect that if he fails to prosecute his cause or fails to be successful, he will pay to the defendant the amount which, according the distance of the place, will be awarded him, and all the provisions of law which we have made shall be followed, so that the amount fixed shall be demanded from the sureties and given to the defendant. The latter shall fix his expenses under oath - within proper limitation fixed by the judge - and if he swears that he had paid out a greater amount, that too shall be paid, so that our legislation may appear complete.

[a] This doubtless refers to imperial orders directing a trial in a province and which were required to bear the signature or notation of the quaestor. See Novel 114, appended to C. 7.61.3 [not appended in this edition].

c. 3. The following also was formerly well arranged, but at the present time some parties make the mildness of our laws the occasion for injuries, purposely making trouble. Former laws provided that the defendant should have ten days for deliberation, after receiving the summons and complaint (libellum conventionis), in order to look into the matter and determine whether to confess the action or settle it, or, on the other hand, subscribe the complaint (acknowledging receipt) and enter into a bond for appearance. Some parties have concocted trouble in connection with the law which provides that no one may object to a judge after joinder of issue or ask that another may sit with him.[a] Bailiffs, particularly, have acted trickily, and have, as soon as the summons to appear has been given, and often even before the complaint has been delivered or a bond for appearance given by defendant, forced an unwilling defendant to go before the appointed referee, compelling him, while uniformed in regard to the matter, to join issue, so that he would thereafter have no opportunity either to object to the judge (referee) or at least ask that another might sit with him, although the judge might be suspected as biased. Thus they act at pleasure, and, circumventing the man by their tricks, rob him at will. **1.** We, therefore, ordain, that whenever a summons to appear is served, the complaint shall

also be delivered, and the defendant shall have, not only ten days, as formerly, but twenty days, in which he may, if he wishes, object to the judge (referee) or ask that another sit with him, or in which he may acknowledge the debt and come to an amicable settlement with his adversary, so that he may not, through wrong fraud, fall into the power of a judge, who may, perhaps, be suspected by him, perhaps may be unfavorable to him, or may have something personal against him, and so that a man who is sued may not be deprived of an opportunity to know the reason for which he is summoned. **2.** When he receives the complaint, he must enter into an undertaking, with surety, for his personal appearance, pay the fees provided by our constitution, subscribe what is called his answer (libellum contradictionis), noting also the time when the complaint was delivered to him, so that no fraud may be perpetrated in that connection. When, thereafter, issue should be joined before the judge, the defendant shall be asked whether the aforementioned twenty days for deliberation have passed. The latter must state the truth, which, further, will appear from the date of the complaint and his subscription thereof. And if the defendant says that the twenty days have passed, the issue shall be joined. But in the meantime it shall be permissible to object to the judge (referee), ask for another or for a colleague who may sit with him, or to settle the case amicably, and during that time no damage shall be inflicted on the defendant, nor shall he be troubled by the bailiffs, and he need but give the bond for his appearance as may be ordered by those who have the right to do so, and then have twenty days' time for deliberation. If these provisions are not followed, then, although a joinder of issue appears to have taken place, it shall be void, and all things may be done during such twenty days, as though no issue had been joined at all.

[a] C.J. 3.1.16 and 18 and note.

c. 4. If an objection is made to a judge (referee), and another is appointed, the party may not also object to the latter,[a] who was appointed on his request. But as we look after his interests, so, too, we deny the right to prejudice the interests of the plaintiff through delay. If the defendant has sworn to appear,[b] and he leaves this city (Constantinople) before issue is joined, the plaintiff may, though issue is not joined,

go before the designated judge and acquaint him with the facts. If such judge is himself a magistrate, he may order the defendant to be brought before him, as a perjurer and as one who through flight became his own accuser. If such judge is not a magistrate, but is a referee appointed by some one, either by an imperial order or by a magistrate, he shall refer the matter to the one who appointed him, so that the defendant may be produced and the plaintiff's cause may not remain in a state of doubt, while the referee, the issues not having been joined, is unable to act,[c] and the defendant, disregarding the law and his oath, leaves the plaintiff destitute of any legal aid. **1.** And in order that the case may not remain in suspense while the defendant hides and his production in court is delayed, the judge shall make immediate inquiry where the defendant has gone, fix a day for him to appear - provided he has the opportunity to do, and is not, as happens purposely kept away by plaintiff and prevented from appearing - and if he does not, the judge may examine the case ex parte, and put the plaintiff in possession of the defendant's property for the amount shown to be due, to hold such property as security for the debt. Whenever the defendant appears, he must first indemnify the plaintiff for all his damages; he will thereupon receive back his property, and may then, upon giving surety, defend the case.

[a] See note C. 3.1.18.

[b] A simple oath for appearance was all that was required by persons owning real estate or who were of illustrious rank. Note C. 2.2.4. The Institutes, 4.11.2, provide: "If the defendant is sued on his own account, he is not compelled to give security for payment of the damages assessed, whether the action be real or personal; all that he has to do is to enter into a personal engagement that he will subject himself to the jurisdiction of the court down to final judgment, the mode of making such engagement being either a promise under oath, which is called a sworn recognizance, or a bare promise, or giving of sureties, according to the defendant's rank or station."

[c] Note C. 3.3.2. A referee's power did not really commence until after joinder of issue. The order of possession, mentioned further on in this law, was made by the magistrate, not the referee. Cujacius on Novel 53; C. 3.1.13.3.

c. 5. It is proper also to settle by a general law a dispute concerning another subject. Formerly there was much doubt whether positions of state service could be made subject to a mortgage or not. But this is already settled by law,[a] and it is clear that positions which may be sold, may also be mortgaged. Considering the subject more deeply, we know that anciently no such position could be subject to a mortgage except as to some old and very insecure accounts. But gradually the emperors, taking pity on creditors who came before them, permitted it, although every position of state service is a public one, and no remuneration is attached thereto except through imperial bounty. **1.** We therefore ordain that such public positions, which do not pass to heirs (militial excasu), cannot be mortgaged to anyone except it be to one who gave the money for the specific purpose of getting the position. We grant no such right to other creditors. But if the decedent leaves children or a wife, a preference is given them. They may come before us and receive (the value of the position), not as a paternal inheritance, though that is small, but as an imperial bounty, so that aid may be extended not only to those who leave property as well as those who have nothing. If there is no child or wife, nor a creditor who gave the money for the specific purpose of getting the position, then the other creditors may share therein, in order that it may not appear as though we were doing something unjust and were enacting this law for any but a just purpose and one acceptable to God. But the privileges specially granted the worshipful silentiarii (life guards of the palace) shall remain in force.

[a] C.J. 8.13.27.

c. 6. The whole law is founded upon justice. We notice, however, that some men have married without a dowry, then die and the children inherit the property according to law. But the women who have been the legal wives till the death of the husband, receive nothing, because neither a dowry nor a pre-nuptial gift was given, and hence live in extreme poverty. We therefore ordain that the wife shall be protected by the property left by the decedent and shall share therein with the children. And as we have enacted[a] that if a husband who marries a wife without a

dowry divorces her, she shall receive a fourth of his property, so in the foregoing case, too, she shall receive a fourth of his property whether there are many or few children; if the husband bequeaths property to her which amounts to less than such fourth, the deficiency shall be supplied. So that, as we have aided wives, married without a dowry, when inflicted by wrong through a divorce by the husband, so, too, the same rights shall be enjoyed by those who remain with their husbands through life. To be sure, the provision as to the fourth part, shall, as in the former law, equally apply to husbands. For as in the case of the former law, so too in this, we legislate equally for both. **1.** If the woman has property of her own, which is in the household of her husband or at some other place, she shall have the right to take and have that as her own undiminished, and her property shall in no manner be subject to the debts of her husband, except in so far as she, according to this law, is responsible as heir of her husband. **2.** We have made the provisions herein, however, (only) for cases where one or the other of the spouses, husband or wife, who gave neither a dowry no prenuptial gift, are in want; that is to say, when the person deceased is rich and the survivor poor. If the survivor should, perchance, be rich, it would not be just, that he or she, who gave no such dowry or prenuptial gift, should be a burden on the children, for there is another law[b] of ours which provides that a woman who brings no dowry cannot claim any property of her husband's because of any prenuptial gift. This shall apply here also, unless the husband, perchance, leaves her a legacy or a part of the inheritance, for that we do not forbid, so that our laws may remain in harmony throughout and the want of one of the spouses may be alleviated by the riches of the other.

[a] Novel 22, c. 18.

[b] Novel 74, c. 4; Nov. 91, c. 2; Nov. 117, c. 4.

Epilogue. Your Sublimity will take care that this is carried into effect, and cause it to be published and made known to all, so that they may act accordingly.
Given October 1, 537.