THE SUMMONS.

A Study in Jewish and Comparative Procedure.

PRIMITIVE METHODS. When, in the course of the evolution of the Jewish law, the ancient practice of redressing wrongs by self-help had given way to a more orderly procedure, some method must have been devised by which the aggrieved person brought his opponent before the court.[1] The evolution of this process may be traced in every system of law and a comparative study discloses the successive steps to have been substantially as follows: at first every man did what was right in his own eyes[2] and used such force as was necessary to redress his wrongs. Thereafter the exercise of this force was controlled and legalized through a long period of legal evolution in which various forms were adopted under the influence of tribal, royal, ecclesiastical administrators. But the older practice of self-help never quite disappeared and even in our own times we find ample illustration in all contemporary legal systems of such primitive survivals of the days when there were no courts of law.

The method of bringing a defendant before the tribal chieftain was originally only a shade less violent than that permissible under the earlier system of self-help. The person aggrieved, with or without the assistance of his friends, dragged the defendant before the judgment seat. In a later stage of society in which the amelioration of manners had proceeded so as to reduce the necessity for forcible or violent methods, the complainant instead of dragging the defendant to court would simply call upon him to follow into the presence of the clan chieftain, judge, king or priest, who was to hear and determine the controversy, and seize him only if

[1] For an illustration of this process of evolution from self-help to judicial procedure see Retaliation and Compensation by D. W. Amram in Jewish Quarterly Review (N. S.) II, 191.

[2] Deuteronomy 12:8; Judges 17:6; 21:25.

he refused to follow.[3] Perhaps the cases of the slave, taken by his master before the judges for the purpose of having a record of his perpetual servitude made[4] and of the rebellious and disobedient son taken to court by his parents[5] are typical of this ancient procedure.

This procedure would soon tend to become formal and in order to oblige the defendant to follow the plaintiff to the tribunal appropriate words would have to be spoken. Failure to appear would then become contempt of court and the insulted dignity of the tribal chieftain, or royal judge or priestly dignitary would avenge itself on the defendant. The merits of the plaintiff's case would then be postponed to the claim of court for redress for the affront. The penalty might be a fine,[6] banishment and outlawry,[7] confiscation[8] or judgment by default.[9]

Refusal to follow the plaintiff to appear before the tribunal would be rare indeed. For whether it be the tribal chieftain, or the King or other presiding official, he is recognized as invested with sacro-sanctitude, either as a god himself or as the mouthpiece of deity. In Exodus[10] the judge is called *Elohim*, God,[11] and in Deuteronomy[12] in the

[3] This seems to have been the ancient practice in Rome under the law of the Twelve Tables "*Si in jus vocat ito; ni it, antestamino; igitur em capito*" which may be translated "If one summons another he must go, if he does not go, let it be witnessed; and let him take him forcibly." See varying translations of Howe (Studies in the Civil Law, 1896, p. 292); Wigmore (Kocourek and Wigmore's Sources of Ancient and Primitive Law, 1915, p. 465); and Hunter (Roman Law, 1885, p. 17). In Greece a similar practice prevailed. The *prosklesis* corresponding to the *in jus vocatio*, and the *kleteres* to the *antestatis*. This procedure was followed if the plaintiff was entitled to have bail for appearance by the defendant, and the latter could not furnish it. The plaintiff could then arrest the defendant. But it seems that ultimately this was allowed in Attica only against strangers and not against citizens, Meier & Schömann der Attische Process (1824) p. 580. Is our rule requiring a non-resident plaintiff to give security for costs a faint survival of this ancient right?

[4] Exodus 21: 6.

[5] Deuteronomy 21: 19.

[6] On the Gold Coast. Post, Afrikanische Jurisprudenz (1887) II, 102.

[7] Among the ancient Germans, Brunner, Deutsche Rechtsgeschichte, II, 461, and Bohemians, Dareste, etud. d'hist. du droit, 172.

[8] Among the Slavs the income of the confiscated property was applied in satisfaction of plaintiff's claim. Maciejowski, Slaw. Rechtsgeschichte, II, 76.

[9] Among the ancient Hindoos, Kohler, Altindisches Prozessrecht, 23. And see generally Post, Grundriss der Ethnologischen Jurisprudenz, II, 520–526.

[10] Exodus 21: 6; 22: 7–8.

[11] Psalm 82: 16. See also Post, Afrikanische Jur. II, 101.

[12] Deuteronomy 1: 17.

charge to the courts the judges are told, "Ye shall not be afraid of the face of any man, for the judgment is of God."[13]

THE OLDEST FORMULAE OF SUMMONS. There are at least two Biblical passages in which ancient formulae of summons are given: (1) When Moses summoned Korah and his tribe to appear before the judgment seat of God he said:[14] "You and all your company appear before Yahveh. You and they and Aaron, tomorrow!" (2) Job in despair at his inability to obtain justice from God said:[15] "He is not a man like me, that I could answer him, let us go together to court." These phrases, especially the latter, have the technical flavor of legal formulae.[16] When Job says: "*nabo yahadav bamishpat,*"[17] "let us go to court together," he is using a phrase similar to the well known summons at Roman Law, "*in jus eamus.*"[18]

SUMMONS BY PLAINTIFF. It is probable that the practice of summons by plaintiff himself is older than the practice of summons by an official of the tribunal,[19] and the formula cited from the Book of Job[20] is probably a very ancient one. In the modern summons the defendant is directed to appear before the court;[21] in the old formulae he is directed to accompany the plaintiff to the court forthwith. In the case of

[13] It appears that the modern punishment by fine or imprisonment for contempt of court finds its origin in the sacro-sanct character of the official before whom the matter was to be tried and who punishes for disobedience.

[14] Numbers 16: 16.

[15] Job 9: 32.

[16] This is, of course, less perceptible in the English translation, but quite marked in the Hebrew.

[17] Several variants of the formula may be noted. The one cited in the text is the most colloquial. In Isaiah 41: 1 a somewhat more stately phrase is used, "*Yahdav lamishpat nikrabah,*" "together let us approach the court." The word *mishpat* which I translate "court" is usually rendered "judgment." In these formulae it seems obviously to refer to the place of judgment. I have everywhere taken the liberty to make my own translations of the Hebrew texts. The usual Bible translations frequently fail to render the true meaning because of the use of English archaisms and on account of the churchy bias of the translators.

[18] The other phrases used in the older Roman law all indicate that plaintiff himself delivered the summons, thus: "*te in jus voco,*" "*ambula in jus,*" "*Sequere ad tribunal,*" Hunter, Roman Law, p. 968, and see references in Baron, Institutionen und Civil prozess, Berlin (1884) p. 378.

[19] This is also the opinion of Post, Grundriss, II, 520.

[20] Job 9: 32.

[21] The forms of modern summons are substantially uniform except where changed or abbreviated by statute.

the two women who litigated the right of possession of the child before King Solomon,[22] the record indicates that one had brought the other with her into the King's court. So when Boaz wants his kinsman to appear before the court at the city gate, he hails him, passing, with the words "Ho, you there, turn aside and sit down here"[23]—a summons which, though seemingly impolite, the kinsman promptly obeyed. And so Job contemplating his insignificance before the great God that was hurting him, says in substance, "and do you deign to look at me and bring me into court with you."[24] There seems to be no evidence that the old Jewish law required the summons by the plaintiff to be attested. The practice in other ancient systems was different.[25]

The ancient practice of summons by plaintiff was superseded by the official summons, served by a messenger of the court,[26] with us the Sheriff, but we may still see a trace of the older practice in modern procedure, when the clerk of the court having written out the summons delivers it to the plaintiff or his attorney. It is true that the latter generally takes it to the sheriff who makes service of the writ on the defendant, but in some jurisdictions he is permitted to serve it himself.[27]

[22] 1 Kings 3: 16, etc.
[23] Ruth 4: 1.
[24] Job 14: 3, and see Job 22: 4.
[25] At Greek Law the plaintiff served the summons on the defendant in the presence of witnesses by whom the service was subsequently proven. These were the *kleteres*. Meier and Schömann, Der Attische Process (1824) p. 575. A similar practice existed in the old Germanic law Post, Eth. Juris. 2: 521. Heffter, Die Athenaische Gerichtsverfassung (1822) p. 28, cites Aristophanes, Wasps 1397 for the formula used in Greece. Philocleon is summoned by several persons whom he has injured. Each of the plaintiffs brings a witness to prove the summons. One of them says (Aristophanes, Trans. Bohn Ed., p. 238): "I summon you, whoever you are, before the market clerks for injury done to my wares having this Chaerephon as my witness." A moment later, Philocleon's son says to him, "See, here comes another to summon you, as it seems. Certainly he has his witness with him." And when this second plaintiff appears, he says, "Old man, I summon you for outrage." In Njal's Saga (Kocourek and Wigmore's "Sources of Ancient and Primitive Law," p. 135) Njal advises Gunnar, "Then thou shalt say in a loud voice, so that thy companions may hear, I summon thee in the suit which Unna, Mord's daughter, has made over to me with her plighted hand." The importance of a correct recitation of the formula is there set forth. See also practice under the Salic Law. Kocourek and Wigmore's "Sources, etc.," p. 500.
[26] So called at Jewish law.
[27] Encyc. of Pleading and Practice 20: 1103.

OFFICIAL SUMMONS. Although as above stated the earlier form of summons indicated that it was made by the plaintiff in person, there are biblical indicia that the summons by an officer of the court was also known in early times. In the record of the procedure in the case of a levirate marriage the widow appears before the elders and, after she has made her complaint against her deceased husband's brother, "the elders of his city shall summon (call) him."[28] This is clearly a summons issued by the court and probably delivered by one of their officers, for it is unlikely that in such case the plaintiff would be invested with this authority. Absalom's method of ingratiating himself with the people and undermining the authority of the King also indicates that the suitors came to the King's court, from which summons issued to the defendant.[29]

The story of Korah[30] suggests a very interesting form of procedure. Looking upon Korah and his associates as having infringed upon the rights of Moses and Aaron as leaders of the people, Moses desired to obtain redress, not by the exercise of his power or by force, but by a decree of Yahveh, who appears here in the function of judge before whom Moses as plaintiff brings his complaint against Korah and others, defendants. Moses sent a messenger to two of the defendants, Dathan and Abiram, summoning them to appear. They refused to obey the summons. Subsequently, Moses himself says to Korah, the chief of the defendants, "You and all your company appear before Yahveh. You and they and Aaron, tomorrow." This would seem to be a case in which Moses as Yahveh's representative first sends an official summons through a messenger, and follows it up by delivering it himself as the complainant, summoning the defendants to appear before the judge, Yahveh, at a fixed time, and it suggests the following as a formula which might have been used by either the plaintiff or a court officer in ordinary legal proceedings, "*Heye attah*

[28] Deuteronomy 25: 8.
[29] 2 Samuel 15: 2, etc.
[30] Numbers 16.

lifne bet-din mahar," "Be thou before the court tomorrow."[31] Long before the Third Century of the Christian Era[32] the practice of sending an official summons had superseded the summons by plaintiff himself. And the official gave notice to the defendant or defendants to appear before the court at a certain time.[33] At Roman Law, this practice was not fully established until the time of Constantine in the Fourth Century.[34]

With the establishment of the practice of official summons the formula underwent an appropriate change. Maimonides[35] in the Twelfth Century upon the authority of a Talmudic dictum of an authority in the Third Century[36] suggests the following formula, "(Plaintiff) has sent me (meaning the officer making the service) in the name of three judges."[37] And a modern writer[38] suggests the following, "(Defendant) is ordered to be prepared to appear on (appearance day), at the complaint of (plaintiff)."

WRITTEN SUMMONS.[39] Although a literate people, the Jews do not seem to have used the written summons until a comparatively late period (about the second century of the Christian Era), at least a hundred years before it appears

[31] That this interpretation of the procedure in the case of Korah is not fanciful is indicated by the fact that Raba (a Babylonian authority of the Third century) in whose day the practice of sending a court official to summon the defendant had been established since time immemorial, finds authority for it in this biblical story. The Talmudic text (Moed-Katon 16a) reads as follows: "Raba said, what is the authority for sending an official of the court to summon him (defendant)? It is written, 'and Moses sent to summon Dathan and Abiram the sons of Eliab.' And what is the authority for summoning him before court? It is written, 'and Moses said to Korah thou and all thy company.' Before a distinguished man (a judge)? For it is written, 'before the Lord' (Yahveh). Thou and this one? As it is written, 'thou and they and Aaron.' Fixing a time (a day for the appearance of the defendant)? As it is written, 'tomorrow.'"

[32] Moed Katon 16a, and see note 31.

[33] Hoshen Mishpat 11: 1.

[34] Hunter, Roman Law, p. 972. See also Greenidge, "The legal procedure of Cicero's time," Oxford (1901) p. 141, etc.

[35] Moses ben Maimon, one of the greatest figures in post-biblical Jewish history (1135–1204) and author *inter alia* of a great code of the entire Jewish law.

[36] Babylonian Talmud, Sanhedrin 8a.

[37] Maimonides, Sanhedrin 25: 7.

[38] Fassel, Das mosaisch-rabbinische Gerichts-Verfahren (1859).

[39] Technical terms used for written summons were "*diska*" (Gittin 88a), "*diska dehazmanutha*" (Kiddushin 70b), "*pithka dehazmana*" (Kiddushin 70a), "*iggeret hazmanah*" (Rashi Gittin 88a), "*shetar hazmanah*" (Hoshen Mishpat 11: 6).

in Roman procedure.[40] Old Hindoo Law also seems to have had written summons, and either this or oral summons could be used.[41] This seems to have been the Jewish practice, in which the written summons, far from supplanting the oral summons,[42] seems rather to have been exceptional.

The earliest Jewish reference to the written summons is in the Court of Abba Areka[43] of Sura in Babylonia in the beginning of the Third Cenutry, where the practice seems well established. Again toward the end of the Third Century there is reference to a written summons issued by the Chief Justice Rab Nahman in an action of slander[44] and delivered to the defendant. It is probable that the written summons was used only in cases where the defendant lived at a distance and the court official was not presumed to be known or his authority recognized. It was also used in cases, as in the summons issued by Rab Nahman, where the defendant

[40] The practice of using written summons *libellus conventionis* was fully established by the time of Justinian, and if a passage in a Constitution of Diocletian and Maximian (C. 2, 2, 4) has not been altered by Trebonian, in accordance with a practice not unusual with him, the written summons was already known in their day. Hunter, Roman Law, p. 972.

[41] Post, Grundriss Eth. Juris., II, 522, note 4, citing Kohler, Altindisches Prozessrecht, p. 21.

[41] Post, Grundriss Eth. Juris. II, 522, note 4, citing Kohler, Altindisches Prozessrecht, p. 21.

[42] That the oral summons was the first and for a long time the common form is sufficiently indicated in the Talmudic as well as in the later literature. See discussion, Baba Kamma 112b, 113a; also Hoshen Mishpat 11:1 to 5, and see also Fassel, p. 11.

[43] He is usually known as "Rab," *i. e.*, The Master. The Talmudic text cited as authority for the use of the written summons by Rab states that he signed official documents by affixing his name to the margin instead of at the foot, and this fact is mentioned incidentally in a discussion as to what is the proper place for the signature of subscribing witnesses. The word used for documents "*diske*" does not mean summons but official documents generally. In Baba Kamma 112b the word "*diske*" is used for a writ of certiorari from the great *Beth-din* to remove a cause from a lower court. The passage citing Rab as authority is found in Gittin, 88a, and the interpretation of the word "*diska*" as including summons is given in Hoshen Mishpat 11:6 upon the authority of Rashi (Rabbi Solomon Bar Isaac, the most distinguished commentator of the eleventh century). Rashi says in his note to Gittin 88a that Rab, in sending out a "*diska*" to summon defendants to court before him had the summons (*iggeret hazmanah*) written by the scribe, and then signed it either at the bottom or on the margin without giving this matter very much consideration.

[44] In this case the summons was issued by the chief justice Rab Nahman, residing at Shekan-Zib or Nehardea (prior to the year 297 of the present era) in an action of slander in which Rabbi Judah was defendant. (Kiddushin 70b.) The date is fixed by the death of Rabbi Huna in 297. He was consulted with reference to this summons. (Kiddushin 70a.)

was a person of distinction.[45] Certain it is that the written summons does not seem to be mentioned by Maimonides and no form of it appears in any of the form books.[46] It seems, however, to have been used only on occasions, and there is a decision in the seventeenth century[47] which provides that the cost of preparing the writ of summons is paid by the plaintiff.[48]

NOTICE OF APPEARANCE DAY. When the summons was oral and made by the plaintiff himself, under the old procedure, the defendant was obliged to accompany the plaintiff forthwith because under the primitive practice the case was heard on the same day on which the defendant was summoned.[49] When the service was made by an official of the court after the plaintiff had made his complaint to the court, the practice might well have been similar and the hearing summary. The service of the summons in such cases would consist of the notice given by the official to the defendant, who would be obliged at once to accompany the official to the court, there to meet the plaintiff and to be prepared to plead. And inasmuch as in all early procedure the distinction between the right of redress against the defendant for crimes, torts and contracts and other obligations was not made and the defendant was in all instances in effect arrested and brought before the court,[50] there was no occasion for fixing an appearance day.

[45] See note 44. Post, Grundriss Eth. Juris. II, 523, notes that the form of summons varies according to the rank and standing of the defendant.

[46] The form books consulted are the Sefer Hashetaroth of Rabbi Judah Ben Barzilai of Barcelona, ed. 1898, Berlin; Seder Tikkune Shetaroth, ed. 1773, Hamburg and Butzow; Sefer Nahlath Shibeah, ed. 1784, Furth; Tikkun Soferim, ed. 1789, Livorno; Tikkun Shetaroth, ed. 1698, Furth.

[47] By Rabbi Shabbethi Ben Meir Hakohen, a Russian authority of the Seventeenth Century. See "Shak" cited in Baer Heteb to Hoshen Mishpat 11: 1.

[48] The writer is informed by a rabbinical authority in Philadelphia, who frequently acts judicially, that he does not use a written summons and that he knows of no form for this writ. The form given in the Jewish Encyclopaedia, Article "Summons," is not a summons at all but, as there appears, it is the beginning of an execution process, a sort of rule on the defendant to show cause why judgment should not be entered against him and execution issued thereon because of his default of appearance.

[49] For variations in practice see Post Grundriss d. Eth. Juris. II, 523.

[50] There are many modern survivals of this ancient right to arrest the defendant in all cases and the exemption of the defendant from arrest in purely civil actions is the result of comparatively modern ameliorating legislation.

When a class of civil actions was first recognized in which the defendant was not required to appear and plead immediately, it would obviously become necessary for the court to fix an appearance day and for the official delivering the summons to the defendant to advise him of the date. That this was defendant's right appears from a passage in the book of Job.[51] Job's complaint seems to have been that as between God and himself there was no court before which his cause could be tried. As he puts it,[52] "he is not a man, as I am, that I should answer him, let us come together into court! There is no arbiter between us who might lay his hand upon us both." It follows then that if the contest between God and himself is a matter of strength, "Lo, he is mighty," and if it is a matter of justice, "Who is there to fix the time for my appearance in court?"[53]

The time fixed for judicial hearings was usually one of the regular assembly days on which market was held, court sat and other public functions took place, but it seems that the court may fix another day.[54]

NOTICE OF PLAINTIFF'S CLAIM. Of course, the defendant was entitled to know the name of the plaintiff, when summoned by an official. It is only by the exercise of a primitive autocratic power that any official could command the presence of a defendant without advising him at least of the name of the complainant. This is especially true when we remember that proceedings at law even for the purpose of punishing crimes were always instituted by some one who was aggrieved and that the idea of action by the public through state officials, without the intervention of private prosecutors, is comparatively modern.[55] But it is an open question at Jewish law whether the defendant was entitled

[51] Job 9: 19.
[52] Job 9: 32.
[53] Job 9: 19.
[54] Talm. Babyl. Baba Kamma 113a, 82a, Talm. Jer. Ketubot 1: 1. Of course, the appearance day must be a *dies juridicus*.
[55] The theory frequently expressed that actions at law, although admittedly instituted by private parties, are in legal theory presumed to have been instituted by the court upon its own motion, does not find any substantial support in the history of legal procedure.

at the time of the service of the summons to be advised of the nature of the plaintiff's claim. In the Baer Heteb[56] a case is cited[57] in which A summoned B without stating the nature of his claim. B replied that he would refuse to go to court unless A first told him the nature of the complaint. Upon this statement of facts judgment was given for A upon the alleged authority of a Talmudic dictum[58] to the effect that "one does not publish his pleadings except before the court." But there is much respectable opinion *contra* and it is doubtful whether the weight of authority can be said to incline to either side.[59]

WHO ISSUES SUMMONS. When summons issued in the name of the king or clan chieftain it was, of course, sufficiently validated by his mandate. But when in later times courts were constituted with more than one judge, the question arose whether a summons issued in the name of one of the judges was valid and bound the defendant to appear. Raba[60] was of the opinion that when three judges are holding court and the summons is served in the name of one of them, it

[56] A commentary to the Hoshen Mishpat by Zachariah Mendel and usually published with the text of the latter.

[57] From the Book "Beer Sheba."

[58] Babyl. Talmud Baba Bathra, 31a.

[59] Shabbethi ben Meir Ha-kohen, who is generally cited as Shak from the initial letters of his treatise, Sifte Kohen, is of the opinion (Baer Heteb to Hoshen Mishpat 11: 1) that the defendant is entitled to know the cause of complaint when summoned. This authority is followed by Bloch, Die Civilprocess-Ordnung nach Mosaisch-Rabbinischem Rechte (1882) p. 23, the reason given being that the defendant, if told the nature of the claim, may either admit it and thus avoid the law suit or at once prepare for his defense. In the Pithe Teshubah, another commentary to the Hoshen Mishpat, a number of opinions are quoted on both sides. A suggestion is made in one of the opinions that a distinction should be drawn whether the court is in the same town or not. Another is of the opinion that the defendant should be informed whether the complaint is a civil or a criminal one. Fassel, Das Mosaisch-rabbinische Gerichts-verfahren (1859) p. 11, takes the view, curiously enough, that the nature of the claim need not be stated *in limine* for "not even the judges need know it" (!) "Dass der Gegenstand der Klage dem Beklagten nicht bekannt gegeben zu werden braucht, verstehet sich von selbst, da ihn nicht einmal der Richter kennen muss." Baron, Inst. und Civilprozess. p. 378, is of the opinion that at Roman Law it is doubtful whether the nature of the complaint had to be stated to the defendant when summoned. Hunter, Roman Law, p. 968, intimates that no such notice had to be given to the defendant until under the imperial constitutions, the summons was no longer a private act of the complainant but was issued on plaintiff's application by officers of a court of justice.

[60] Babyl. Talm. Sanhedrin, 8a.

is void, if served on any day other than Monday or Thursday, which were the regular court days, but if the service was on the regular court day it was valid. On other days the summons must issue in the name of all of the judges in order to be valid.[61]

SERVICE OF SUMMONS. The purpose of service of the summons is to give proper notice to the defendant to appear in court to answer the claim of the plaintiff. It is to be taken for granted that the early rules of procedure, during the period in which the summons could be served by the plaintiff himself, were free from the technicalities which characterize the later procedure. In modern law, three distinct methods of service are recognized—personal service where the defendant, himself, is notified, substituted service, where some one other than the defendant, who is, in law, recognized as his actual or implied agent for this purpose, is notified, and, third, service by publication where the legal presumption arises that the defendant will see or hear of the publication and thus be informed of his duty to appear. Anciently the general rule was that the defendant himself must be served.[62]

SUBSTITUTED SERVICE. The modern rule with regard to substituted service is substantially this, that some person other than the defendant may be served for him only where the defendant himself cannot be served by reason of his absence from the jurisdiction or from his place of residence at the time when the official appears to make the service of the summons.[63] This rule, though comparatively modern in

[61] This rule is restated by Maimonides, Sanhedrin 25:7 and in Hoshen Mishpat 11:2. The reason for the rule seems to be that when the summons issues and is served on a regular court day when all the judges are known to be in session the presumption is that although the court official declares the name of only one of the judges he is acting by the authority of the whole court. This presumption of the validity of the summons does not exist when it is served on a day other than the regular court day. In modern American practice the writ of summons issues in the name of the president judge of the court.

[62] Babyl. Talm. Baba Kamma 112b, 113a. Maimonides says (Sanhedrin 25:10) if he is in the *Medinah* (province or city) *i. e.*, in the jurisdiction of the court and the court officer cannot find him, no time is set for the hearing until he is found and summoned. The service on the defendant personally is strictly speaking the only "personal" service. Journey v. Dickerson 21 Iowa 308.

[63] Castleton vs. Weybridge 46 Vermont 474.

Anglo-American law[64] is a revival, or perhaps a survival, of an ancient rule which may have existed in Anglo-Saxon procedure as it did elsewhere, based on the idea of family or clan solidarity. Under the *Lex Salica*[65] "he who summons another shall walk with witnesses to the home of that man, and if he be not at home, shall bid the wife or any one of the family to make known to him that he has been summoned to court." When Moses summoned the clan of Korah, it was by notice to their chieftain Korah.[66] Under the Talmudic law[67] the rule was extended and where a defendant was absent from the jurisdiction,[68] the summons could be served on a neighbor,[69] the presumption being that the latter would notify the defendant immediately on his return. But if the defendant was within the jurisdiction, personal service was essential. And this rule survived in Oriental[70] and European[71] Jewish communities. If, however, the absent defendant on returning was obliged to pass the court house, the substituted service was invalid, and similarly if he returned at any time after the day on which the substituted service was made.[72]

[64] 19 Enc. of Pleading vs. Practice 620.

[65] Kocourek & Wigmore, "Sources of Ancient and Primitive Law," p. 500.

[66] Numbers 16: 16.

[67] Babyl. Talm. Baba Kamma 112b, 113a.

[68] The words here translated by jurisdiction are *Mata*, "town" in the Talmudic text Baba Kamma 112b and *medinah*, "district" in Maimonides, Sanhedrin 25: 10. It seems that originally the jurisdiction extended only to the town. Maimonides apparently recognizes it as extending in the "district." Both words seem to be used in the sense of place where the court holds its sessions. See Rashi to Talmudic text *ad loc* and Baer Hagolah *ad* Hoshen Mishpat 11: 3.

[69] Even on a woman, who is generally incompetent in legal matters, Talm. Babyl. Baba Kamma 112b, 113a.

[70] Maimonides Sanhedrin 25: 10.

[71] Hoshen Mishpat 11: 3. The reason given why substituted service is not permissible where the defendant is within the jurisdiction is that the person to whom the court officer has given notice of the summons might in such cases assume that as the defendant is in town, the court officer met him personally and served him and hence he, the neighbor, would be relieved of the responsibility of making known the service to the defendant.

[72] Talm. Babyl. Baba Kamma 112b, 113a. The reasons given for these rules are as follows: If the defendant in coming to town must pass the court house, the people on whom the substituted service was made may presume that he was met by the court officer and personally served, and as to the second rule, if the defendant returned at some time later than the day on which the substituted service was made, there is a presumption that the persons on whom the substituted service was made had forgotten it and thus in either of the two cases mentioned, the substituted service may in fact not give actual notice to the

EXEMPTION FROM SERVICE OF SUMMONS. All persons are not entirely equal before the law, and even in the most democratic communities in modern times privileges and exemptions, an inheritance from earlier days, are still granted to certain favored persons. Among these privileges is exemption from service of a summons in civil cases,[73] enjoyed by the sovereign and his representative, an ambassador or minister, the members of the legislature, while the same is in session, judges, litigants, attorneys-at-law and witnesses while engaged in trial of causes, and for a reasonable period before and after the same while going to and returning from court, soldiers and sailors while actually in service.

The King was himself the chief justice and no doubt the special porch in King Solomon's palace where that monarch sat on the judgment seat[74] was built in accordance with general oriental custom. It is inconceivable that the King should be subject to any legal process especially in civil matters and it hardly requires the authority of the Mishnah[75] to give us this assurance.[76] But the King's son is looked upon as a commoner.[77]

defendant. Fassel, Das Mosaisch-rabbinische Gerichts-verfahren, p. 11, states that the oral summons must be served by the court official but that the written summons may be served by any one including the plaintiff himself. The authorities cited by him do not substantiate this statement and it, perhaps, is merely the statement of a rule of some local Jewish community with which the author was familiar.

[73] 32 Encyc. of Pleading & Practice 490, etc.

[74] 1 Kings 7: 7.

[75] Mishnah Sanhedrin 2: 1.

[76] The Mishnah in recording the fact that the King "neither judges nor is judged," reflects the later stage of Jewish history during which the judicial function had been separated from the regal, and the Sanhedrin had established itself as the High Court of the Kingdom. In stating that the King is not judged the Mishnah, as appears from the Talmudic comments on it, refers only to the case of homicide committed by the King. It must have been inconceivable to the lawyers of that day that the King might be sued in a civil action. He was exempt from judgment even for murder. After the royal line of David had become extinct, it was looked back upon as endowed with many mythical virtues, among them that the kings of this line were in fact subject to the law. (Talm. Babl. Sanhedrin 19a) as contrasted with the wicked Kings of Israel, *i. e.*, of the later dynasties, whose oppressions and opposition to the Sanhedrin gave them an unsavory name in history written by the representatives of the Sanhedrical party. Thus the Talmud (ibid) records a tale of King Alexander Jannaeus (105–79 B. C. E.) which is alleged to have been the reason for the rule that the king should not be judged. The king was summoned to appear before the Sanhedrin to answer for a murder committed by one of his slaves. He was disrespectful and they were cowed by his royal authority and only the Chief Justice

The high priest was not exempt.[78] But it is probable that high priests and other ecclesiastical functionaries while on duty in the temple precincts,[79] were exempt not only because of their sacred office, but because of the character of the sanctuary itself. This was the rule of the Roman law.[80]

The judge hearing a cause, a party to litigation actually pleading before the court, a person whose presence is required in a court of justice, are exempt from service of a summons at Roman Law.[81] Under the Salic Law persons occupied in the King's service cannot be summoned but lose their exemption if occupied inside the hundred with their own affairs.[82]

Honorable persons of certain classes are exempt at Jewish law. Rabbi Judah, chief of the Great Babylonian Academy at Pumbeditha, when summoned to appear before the Chief Justice Rab Nahman of Nahardea was indisposed to recognize the summons but was persuaded to do so by his friend, the equally distinguished Rabbi Huna.[83] The later law, however, did not exempt distinguished scholars but granted them the privilege of having their pleadings recorded in their home instead of presenting them in open court. But they had to be taken down by the official scribe

Simon ben Shetah, the King's brother-in-law, ventured to rebuke him for his contempt of court. And it was then that the Sanhedrin decided that the King cannot be judged. The story recorded by Josephus "Antiquities," Book 14, cap. 9, in which King Herod is the hero of an incident of contempt of the authority of the Sanhedrin probably refers to the same incident with a change of name. See Frankel, Der gerichtliche Beweis, Berlin (1846) p. 159, note, and Maimonides Melakhim 3: 7.

[77] Talm. Babl. Sanhedrin 18b. At a time when there were no more Kings in Israel and the subject had become one of purely academic discussion.

[78] Mishnah Sanhedrin 2: 1, after the high priesthood had disappeared with the fall of the temple in the year 70.

[79] 1 Chronicles 16: 22.

[80] Hunter Roman Law, p. 971.

[81] Hunter, p. 971, Baron, Inst. u. civilproz., p. 378.

[82] Kocourek & Wigmore's "Sources," p. 500.

[83] Talm. Babyl. Kiddushin 70a. It is very likely, however, that the real reason for the failure of Rabbi Judah to claim exemption from service in this case was that the chief justice was the son-in-law of the *Resh Galutha*, the officially recognized Prince of the Jews in Babylonia, who was invested with such powers by the reigning king as to enable him to make it very unpleasant for those who gave offense to him or to any of the persons who were under his especial protection or favor.

and in the presence of the plaintiff.[84] At Roman law, a person to whom deference is due could not be summoned by the one who owed this deference except through special permission of the praetor.[85] Hence a son could not summon a father, nor a freedman his patron, without such special permission. If such summons issued without permission, a penalty was inflicted upon the plaintiff.[86] In Greece, this rule seems not to have prevailed and children could summon their parents.[87]

The law of Deuteronomy[88] provides "when a man takes a new wife he shall not go out in the army, *neither shall he be charged with any business.* He shall be free for his house for one year and shall cheer his wife whom he has taken."[89] It is very doubtful as to what is meant precisely by the words that he shall not be "charged with any business." The period of exemption of one year and the juxtaposition of this phrase with the one relating to exemption from military service makes it probable that the exemption is from duties and responsibilities laid upon him by the governing power, *i. e.*, public business.[90] At the later Jewish law, the bridegroom was exempt from service of summons seven days before the wedding and fourteen days thereafter, and the father of a new-born son was exempt on the day of circumcision.[91] At Roman law[92] the bridegroom during the performance of the marriage and one performing the funeral rites for a parent or following a dead body were exempt from summons.

At Roman Law[93] no man could be summoned while inside his house. If he allowed the complainant to enter or

[84] Hoshen Mishpat 124 and Baer Hagolah and Baer Heteb *ad loc.*
[85] Hunter, p. 970.
[86] Hunter, p. 971.
[87] Meier & Schömann, Der Attische Process, p. 570.
[88] Deuteronomy 24: 5.
[89] There was evidently no fear that this exemption would be abused by "slackers."
[90] Aben Ezra ad Deut. 24: 5. According to Rashi *ad loc.* it refers to non-combatant military service.
[91] Bloch. Die Civilprocess-ordnung nach mos.-talm. Rechte. Budapest, (1882) p. 13. Hukkot Hadayanim, Lemberg (1879) 2a, states the period of exemption to be 3 days before the marriage day and 7 days thereafter.
[92] Hunter, Roman Law, p. 971.
[93] Hunter, Roman Law, p. 971. Baron, Inst. u. civilprozess, p. 37.

showed himself so as to be visible from the public highway, he lost his exemption, but in no case could the complainant drag him out of his own house. Cicero thus expresses the Roman feeling on the subject: "What is there more hallowed, what more fortified by every sense of duty than each citizen's home? Here are his altars, here his hearths, here his household gods; here his sacred things, his worships, his ceremonies are all contained. This refuge is so hallowed by all that to force away any man thence is impious."[94] Among the Greeks a similar rule prevailed. As long as the defendant remained secreted in his house he was safe, because under the prevailing religious idea no stranger could enter the home in the absence of the master or without his consent.[95] The taboo of Deuteronomy[96] which prevented the creditor from entering the debtor's house for the purpose of taking his pledge but required the creditor to stand without to receive the pledge, has a similar origin. It is obvious in such cases that there can be no notion of a man's house being his castle. The poor man's hut can offer no resistance to the invading creditor and it is protected from violence only by the character of sanctity that religion has given to it. Probably the most extreme case is that of the Kandhs among whom the murderer is protected if he takes refuge in the house of the avenger, who then leaves his house and besieges it until his victim attempts to escape.[97]

There are four classes who are wholly or partly *non sui juris* and as to whom the rule of exemption from service of a summons varies: women, minors, persons of unsound mind or physically defective and slaves.

Women, whose position in all patriarchal societies was legally restricted, do not seem to have been exempt from service of summons at Jewish law, although certain privileges were enjoyed by women of respectability in that they were not obliged to plead in person before the court but their

[94] Cicero, Pro Domo 41.
[95] Meier & Schömann, p. 588.
[96] Deuteronomy 24: 10–11.
[97] Zeitschrift fur vergleichende Rechtswissenschaft VIII, 268. Post Grundriss II, 254.

pleadings were taken at their home by the official scribes in the presence of the plaintiff,[98] a privilege similar to that enjoyed by distinguished scholars.[99] In Greece, the rule with regard to women was the same as for minors.[100] In ancient Babylonia,[101] it seems that the married woman was not exempt from service of the summons; nor at Roman law, except that she could not be taken to court by force.[102] This would indicate a condition of legal independence similar to that which women finally attained in modern times under remedial legislation.

At Jewish law minors are not liable for torts[103] and perhaps not even for necessaries,[104] but in any event no action can be brought against them during minority.[105] If an infant heir is liable for a debt of the ancestor, as a rule no action lies until he has attained his majority, and in cases where such action does lie during minority, a guardian *ad litem* must be appointed to be summoned.[106] The latter rule was similar to the rule of Greek law where the minor could not be sued, but where a *Kurios* was appointed for him in cases in which he was obliged to account, and both the minor and his *Kurios* were then summoned.[107] At Roman law the rule in regard to actions brought against a minor under a curator was that if the minor was present he might be sued with the consent of his curator, or the curator alone could be sued; but if the minor was absent, the curator alone could be sued.[108]

Persons of unsound mind, deaf-mutes and idiots are at Jewish law in the same legal category as minors,[109] and at Roman law if under a curator they are subject to the same

[98] Hoshen Mishpat 124.
[99] *Supra.*
[100] *Infra.* Meier & Schömann, p. 571.
[101] Schorr, "Urkunden," p. 346.
[102] Baron, Inst. u. Civilpr., p. 378.
[103] Talm. Babyl. Baba Kamma 87a.
[104] Hoshen Mishpat 235: 15.
[105] Jewish Quarterly Review VII, 172.
[106] Jewish Encyclopaedia, Article, Debts of Decedents, vol. IV, p. 492.
[107] Meier & Schömann, p. 572.
[108] Hunter, p. 733.
[109] Jewish Encyclopedia, Article, Insanity, vol. VI, p. 605.

rule as minors under a curator.[110] Slaves could be served with summons at Greek law in actions for torts committed by them without the master's authority, although if condemned, the master had to pay the judgment.[111]

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[110] Hunter, p. 733.

[111] Meier & Schömann, p. 572. For status of slave at Jewish Law see Article "Slavery" in Jewish Encyclopedia and Kahn: Die Sclaverei nach Bibel und Talmud, Prague, 1888.