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John M. Kelly

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AUDI ALTERAM PARTEM

It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of every case: not only the plaintiff or prosecutor, but also the defendant must be heard. This rule is recognized in England as one of fundamental¹ justice, and a failure to observe it makes the whole proceeding defective and voidable; in the United States of America the principle is part of the notion of "due process" and is equally well protected. "A person's right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence," said Justice Black in *In re Oliver*.² In England the rule is often said to spring from the idea of "natural justice,"³ and thus ranks alongside the rule that no one may be a judge in his own cause. English judges, however, are slow to decide cases by reference only to philosophical concepts, and much prefer to rely on precedent. One might, then, have expected to be able to trace the English decisions on the rule called *audi alteram partem* back through a series of precedents to one ancient, seminal case in which, exceptionally, the rule is developed from first principles; yet the fact is that, in the two oldest English cases which mention the rule, sources are cited which belong not to abstract philosophy, but to the worlds of pagan and Christian Latin literature, and thus ultimately to Greek and Roman antiquity.

It may accordingly be instructive, both for its own sake and for that of demonstrating an unusual source for a common law rule, to examine the standing of the idea *audi alteram partem* in the Greek and Roman worlds.

On reading the many classical texts which contain a reference to this idea one is struck by the curious dichotomy of purpose behind the principle. The common law, as has been said, tends to think of *audi alteram partem* as essentially a rule of natural justice; the classical world thought of it in two ways, both as a rule of justice and as a rule of wisdom. Of course these two notions, justice and wisdom, border on each other and indeed overlap to some extent; both imply a correct decision, but the idea of wisdom seems to concentrate on the quality of mind of the person who produces the correct decision; justice suggests rather the effect of a correct decision seen from the point of view of those affected by it. It is only the latter element which underlies the modern common law understanding of *audi alteram partem*; one hears both sides of a case, because if one does not it is *unfair to the party unheard*. In the Greek and Roman worlds, on the other hand, not only this notion appears, but also the idea that one ought to hear both sides of a case, because otherwise one may *make a mistake*.

Thus in classical Greece one finds, on the one hand, Demosthenes' statement

1. The word "fundamental" is used by Esher, M. R., in *Hopkins v. Smethwick Local Board of Health*, 24 Q.B.D. 712, 716 (1890).

2. 333 U.S. 257, 273 (1948).

3. See R. F. V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 171 (1961); EMLYN C. WADE & G. GODFREY PHILLIPS, *CONSTITUTIONAL LAW* (6th ed.) 614f. (1960); FREDERICK H. LAWSON & D. J. BENTLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 13f. (1961).

that the Athenian judicial oath (attributed doubtfully to Solon) contained a promise by every judge to listen equally to prosecutor and defendant (*καὶ ἀκροάσομαι τοῦ τε κατηγοροῦ καὶ τοῦ ἀπολογουμένου ὁμοίως ἀμφοῖν*)⁴; and in other passages we learn from him that even apart from this oath the ordinary laws of Athens (*οἱ νόμοι*) enjoined an equal hearing to both sides.⁵ Demosthenes adds an interesting piece of psychology: Solon saw that human beings enjoy hearing an accusation more than a defense, and therefore realized that a defendant, speaking after his accuser, could be protected from an incorrect judgment only if the judge showed an equal degree of attention to both parties (*παρασχῶν αὐτὸν ἴσον καὶ κοινὸν ἀμφοτέροις ἀκροατήν*). Here the idea of *audi alteram partem* is shading somewhat into the idea of judicial impartiality. A generation earlier, two characters in Aristophanes' *Wasps* reproduce the conflict between the ideal of justice, that both sides should be heard, and the ideal of convenience, that the second party need not be heard if the matter is clear enough already:

Bdelycleon: Πρὸς τῶν θεῶν, μὴ προκαταγίγνωσκ', ὦ πάτερ,
πρὶν ἂν γ' ἀκούῃς ἀμφοτέρων.

Philocleon: Ἄλλ', ὦγαθέ,
τὸ πρᾶγμα φανερὸν ἔστιν · αὐτὸ γὰρ βρᾶ.⁶

And a generation after Demosthenes we find Menander⁷ writing a little *sententia* whose inspiration seems to be justice: Punish no one unexamined (*Ἀνεξέταστον μὴ κόλαζε μηδένα*). Many Greek (as well as Roman) writers regard the condemnation of someone without trial as being tyrannical, unjust and illegal,⁸ and Thucydides assimilates a sentence passed without trial to a sentence passed on an unheard defendant when he writes of the execution by the Athenians of a captured Spartan delegation untried and unheard (*ἀκρίτους καὶ βουλομένους ἔστιν αἰεπεῖν*).⁹

On the other hand there are classical Greek references to the idea of *audi alteram partem* where it is seen as a maxim of popular wisdom, morally almost as empty of content as our "look before you leap." Euripides in the *Heraclidae* makes the chorus say:

Τὶς ἂν δίκην κρίνειεν ἢ γνοίη λόγον,
πρὶν ἂν παρ' ἀμφοῖν μῦθον ἐκμάθῃ σαφῶς;¹⁰

And in his *Andromache* exactly the same note (wisdom or cleverness rather than

4. "I will give impartial hearing to prosecutor and defendant alike." In *Timocr.* 149-151.

5. *De Corona* 1. 6-7.

6. Bdelycleon: "Come, don't decide against us, pray don't, father, before you've heard both sides."

Philocleon: "But, my dear boy, the thing's self-evident, speaks for itself." 919ff.

7. *Fragm.* 17.

8. As to this, see my article *Demokratie und Strafverfahren in der klassischen Literatur*, due to appear shortly in a volume of essays in honor of the late Professor V. Arangio-Ruiz.

9. THUCYDIDES, *HISTORY* 2. 67: "unjudged and although wishing to say something."

10. "Who would judge a dispute or decide a matter before getting a clear statement from both sides?" 179-81. See also the following verses.

justice) is struck when Orestes, congratulating himself on having listened to reports from his rival Neoptolemus, says:

Σοφόν τι χρῆμα τοῦ διδάξαντος βροτούς
λόγους ἀκούειν τῶν ἐναντίων πάρα.¹¹

Aristophanes, again in the *Wasps*,¹² gives us the idea in the form of a proverb (in which form it was also known in the Roman world):¹³

Ἡ ποῦ σοφὸς ἦν ὅστις ἔφασκεν· Πρὶν ἂν ἀμφοῖν μῦθον
ἀκούσης, οὐκ ἂν δικάσῃς.

"It was a wise man who said: Don't give your judgment before you've heard what both sides have to say." What is at work in these texts, particularly in the last one, is not the lawyer's "Hear both sides, otherwise you will be doing an injustice"; it is the cautious countryman's "Hear both sides, otherwise you are likely to make a fool of yourself."¹⁴

This notion in turn reflects a kind of pride in giving a correct judgment and adds a dimension of verisimilitude to the famous trial scene depicted on the shield of Achilles in the eighteenth book of the *Iliad*.¹⁵ Here the elders sit in a "sacred circle" around the contestants, and eagerly give their judgments in turn; before them lie two talents of gold to be given as a reward to "that one among them who would utter the straightest judgment" (ὅς μετὰ τοῖσι δίκην ἰθύντατα εἴποι).¹⁶ (Both the parties in this lawsuit — which probably reflects the conditions of the second millennium B.C. — are heard by the elders before the judgments are given.)

The same division between wisdom and justice in the foundation of the rule *audi alteram partem* can be traced in the Roman sources, though here, as is not surprising considering the Roman legal genius, the latter motive predominates very heavily.

The maxim *audi alteram partem* does not occur at all in the *Digest* of

11. "Wise was the rede of him who taught that men should hear the reasonings of the other side." 957ff.

12. 725f.

13. See Cicero, *ad Atticum* 7. 18. 4; *infra*, notes 24 and 25.

14. Other Greek texts which might be mentioned are: Pseudo-Plato, *Demodocus* 383a, in which the practice of hearing the other side is discussed in the light of both of justice and of wisdom: "For it is right and just also to give a hearing to the defendant and to what he has to say in defense and rebuttal; the same holds true of the plaintiff. For it is impossible to hear and judge a man by fair standards unless both parties to a litigation have been heard." (Δίκαιον δὲ εἶναι καὶ τοῦ ἀπολογουμένου ἀκούσαι πρὸς τοῦ ἐπαινεῖν ἢ μεμψεσθαι, ὥσπερ καὶ τοῦ κατηγοροῦντος. Πῶς γὰρ ἂν τις ἢ δίκην καλῶς δικάσαι ἢ ἀνθρώπου κατὰ τρόπον κρίναι δύναίτο, μὴ ἀμφοτέρων τῶν ἀντιδίκων ἀκούσας) Also Lucian, "About Not Believing Calumny Too Easily," cited in THEODORETUS, *ECCLESIASTICAL HISTORY* 1. 33.

15. 497ff.

16. The exact meaning of the text has been hotly controverted in the past; the interpretation given here accords with H. Sidgwick in 8 *CLASSICAL REVIEW* 1ff. (1894), and with ERIC WOLF, 1 *GRIECHISCHES RECHTSDENKEN* 89 (1950). In spite of serious difficulties it seems on the whole the most plausible.

Justinian, and one has to search very hard to find even a hint of the notion in specifically legal texts;¹⁷ but this may be at least partly because the idea was familiar and taken for granted. The secular writers, on the other hand, make the principle explicit. Thus the elder Seneca, in a *controversia*, makes an accused person, prevented by a magistrate from making a speech, complain that even those accused of treachery to the state are given a hearing before being executed (*cum nec proditores inauditi pereant*).¹⁸ Tacitus reports an attempt to have the notorious informer Crispus condemned unheard; those who resisted this course thought that an accused ought to be heard according to the customary law (*more audiendum*) no matter how guilty and detested he might be.¹⁹ Suetonius, in one of many references in literature to the one-sidedness of the justice of the Emperor Claudius, tells of an advocate who cravenly thanked Claudius for allowing an accused man to make his defense, but added (under his breath, one supposes): *et tamen fieri solet* ("but of course it is the custom").²⁰ Apuleius gives a picture of magistrates who try to save an old man from being lynched; what the magistrates suggest is *ut rite et more maiorum iudicio reddito et utrimquesaecus allegationibus examinatis, civiliter sententia promeretur, nec ad instar barbaricae feritatis vel tyrannicae impotentiae damnaretur aliquis inauditus et in pace placida tam dirum saeculo proderetur exemplum. Placuit salubre consilium. . .*²¹ To hear both sides, plaintiff or prosecutor and defendant, was thus clearly part of the Roman *mos maiorum*, and where the principle was neglected, where men were condemned unheard, the Roman lay writers reacted invariably with disapproval.²² Many Roman texts can be cited which, without specifically saying that *audi alteram partem* is a rule of law, yet make it clear that its neglect is wrongful.²³

On the other hand, the notion of *audi alteram partem* as a maxim of mere wisdom is not entirely lacking in the Roman texts. Thus Cicero, writing to Atticus, says his brother Quintus has complained to him that he is being hard pressed by Atticus for payment of a debt; Cicero, however, refrains from re-proaching Atticus, because he has not heard Atticus's side of the story:

Ego autem, etsi illud *ψευδοσιόδειον* — ita enim putatur — observo,

17. See, e.g., DIGESTA 48. 8. 2: *Inauditum filium pater occidere non potest. . .* ("A father may not kill a son without a hearing").

18. *Controversia* exc. 6. 10.

19. HISTORIA 2. 10.

20. DE VITA CAESARUM V (*Divus Claudius*) 15.

21. "to proceed by examination of witnesses on both sides, like good citizens, and with order of justice according to the ancient custom; for the giving of any hasty sentence or judgment without hearing of the contrary part, such as the barbarous and cruel tyrants are accustomed to use, would give an ill example in time of peace to their successors. This safe opinion succeeded. . ." *Met.* 10. 6.

22. The Romans, too, associated the ideas of *indemnatus* (one punished without a proper trial) and *inauditus* (one condemned unheard). As to *indemnatus*, see my article mentioned *supra*, note 8.

23. Seneca, *Medea*, 199-200; *Apocoloc.* 10.4; 12. 3. 19; 14. 2; Pliny, *epistulae* 4. 11. 6; Suetonius, *Claudius* 38, *Galba* 14, *Vitellius* 14; Tacitus, *Dialogus de Oratoribus* 16; *Historia* 1. 6; *Annales* 2. 77; 12. 22; Curtius Rufus, *Historie Alexandri Magni* 6. 10; 8. 7; Justinus, *epistula Pompeii Trog.* 22. 3. 7; Symmachus, *rel.* 34. 10; Avitus, *carmina* 6. 605.

μηδὲ δίκην,²⁴ praesertim in te, a quo nihil umquam vidi temere fieri, tamen illius querela movebar. Hoc quidquid est, te scire volui.²⁵

What is interesting here is the reference of *μηδὲ δίκην* to wisdom rather than to justice; when Cicero says he does not want to offend the principle, he adds "least of all in your case, Atticus, by whom I never saw anything being done rashly" (not "unjustly"). Tacitus, in writing incredulously of the rumor that Tiberius had connived at the poisoning of his son Drusus, say *quis enim mediocri prudentia, nedum Tiberius tantis rebus exercitus, inaudito filio exitum offerret?* ("for what man of even moderate wisdom, not to speak of Tiberius, who was experienced in such great affairs, would force death upon his son without hearing his defence?")²⁶ Here again, unwisdom rather than injustice is the uppermost idea.²⁷

Side by side with the notion of *audi alteram partem* as a rule of justice, its conception as a saw or maxim of popular wisdom seems to have lasted into the Middle Ages. In the great hall of the Rathaus in Nürnberg there appears the inscription "Eins manns red ist eine halbe red, man soll die teyl verhören bed"; in the front hall of the Römer in Frankfurt-am-Main there is a similar inscription: "Eyns mans redde ein halbe redde, man sal sie billich verhören bede," and the portrait of the Emperor Lothar (died 1137) in the Römer carries the motto "*audi alteram partem*," because he was accustomed to say "Mit Urteil sprechen gar nicht eile, bis du gehört hast beide Teile."²⁸ All these rustic-sounding German maxims give the impression of being inspired by a desire for wisdom as much as for justice.

It is extremely probable that many of the Greek and Roman texts which refer to the principle of *audi alteram partem* as a rule of justice were known to the English lawyers of the Renaissance;²⁹ at any rate, it is interesting to find that, in the earliest English case which deals with the point,³⁰ the authority cited for the proposition that justice required both sides to be heard is a couplet from the *Medea*³¹ of Seneca:

24. *μηδὲ δίκην* [δικάσης πριν αν ἀμφοῖν μῦθον ἀκούσης]: see Ernst L. Leutsch and F. G. Schneidewin, *Paroem. graec.* II. 759. It is interesting to find a Roman barrister relying on a Greek maxim of this kind; Cicero was fond of using Greek expressions, but surely in this context he would have used a Roman tag, had one existed.

25. "Still, I will observe the saying, falsely ascribed to Hesiod, 'Hear both sides,' particularly in the case of yourself, whom I have never known to do anything rash. But I was affected by his grievance. I wanted you to know about it, such as it is." *Ad Atticum* 7. 18. 4.

26. *Annales* 4. 11.

27. See perhaps also Pliny, *epistulae* 10. 59, a letter to Trajan in which he refers to the emperor a document containing the other side of a case. His purpose is to make it easy for Trajan to decide (*Quo facilius velut audita utraque parte dispiceres quid statuendum putares*). The quality of the judicial function rather than the goodness of the result is in the foreground.

28. All this information is to be found, with further references, in GEORG BÜCHMANN, *GEFLÜGELTE WORTE* 387 (18th ed., 1895).

29. Seneca was well known in 16th-century England. Shakespeare, who may have read him at school, mentions him in *Hamlet* II. ii. 419.

30. Boswel's Case, 6 Co. Rep. 48b, 52, 77 Eng. Rep. 326, 331 (K.B. 1606).

31. 199-200.

Qui statuit aliquid parte inaudita altera
Aequum licet statuerit, haud aequus fuit.³²

The idea of *audi alteram partem* seen explicitly as a rule of *natural* justice goes back to the late Latin of the Fathers of the Church. Christian polemic seems to have enlisted the principle of *audi alteram partem*, found so profusely in lay literature, as has been shown, in aid of the Christian faith, which tended to be "condemned unheard" by contemporary paganism. Thus Tertullian wrote:

Respondendi, altercandi facultas patet, quando nec liceat indefensos et inauditos omnino damnari. Sed Christianis solis nihil permittitur loqui, quod causam purget, quod veritatem defendat, quod iudicem non faciat iniustum. Sed illud solum expectatur quod odio publico necessarium est, confessio nominis, non examinatio criminis. . . .³³

The reason for pagan unwillingness to hear the proofs of the Christian faith Tertullian finds in the pagans' suspicion that, if they *did* once listen to the other side they would be unable to condemn it (because they would be converted):

Quid hic deperit legibus in suo regno dominantibus, si audiatur? Ad hoc magis gloriabitur potestas eorum, quo etiam auditam damnabunt veritatem? Ceterum inauditum si damnent, praeter invidiam iniquitatis etiam suspicionem merebuntur alicuius conscientiae, nolentes audire quod auditum damnare non possunt.³⁴

The same thought is found in Lactantius in his title *De Justitia*:

Ab hoc tamen, si fieri potest, humanitatis jure postulamus, ut non prius damnet, quam universa cognoverit. Nam si sacrilegis, et proditoribus, et veneficis potestas defendendi sui datur, nec praedamnari quemquam incognita causa licet: non iniuste petere videmur. . . . Sed . . . verentur, ne si audierint, damnare non possint.³⁵

It will be noticed that here for the first time we find the principle *audi alteram partem* given some kind of philosophical basis: Lactantius calls it a *ius*

32. "Who judges, one side unheard, although he judges justly, has not been at all just."

33. "There is open opportunity of reply and debate, as it is not lawful to condemn in any way the undefended and the unheard. To Christians alone it is not permitted to speak what will cleanse the charge, what will defend the truth, what will make the judge just; but what is sought is only what public hatred demands, the confession of the name, not the examination of the charge." *Apologia* 2. 2.

34. "How will it harm the laws, secure in their domain, if there is a hearing? Will not their power be glorified so much the more when they condemn the truth after hearing? But if they condemn the unheard, in addition to the odium of an unjust deed they well deserve the suspicion of doing it with a sense of guilt, not having wanted to hear what they could not condemn if they heard." *Apologia* 1. 3.

35. "We demand this, if it is possible, by the right of humanity that he not condemn before he knows everything. And if this right of defense is given to the sacrilegious, and to traitors, and to poisoners, and it is not lawful to condemn anyone in advance before his case be tried, we do not appear to ask unjustly. . . . But they are fearful that if they hear, they cannot condemn." *Divin. inst.* 5. 1. (*de non damnandis reis, inaudita causa*, etc.) (MIGNE, PATROLOGIA LATINA vol. 6, col. 546f.).

humanitatis. But the fullest and most compelling statement of the rule is found in the writing of the fourth century bishop Lucifer of Cagliari in Sardinia, in his defense of St. Athanasius. The passage deserves to be cited at length:

Cogis nos, Constanti, absentem damnare consacerdotem nostrum religiosum Athanasium: sed divina id facere prohibemur lege: impellis auctoritate latius regali Domini sacerdotes ad effundendum cruorem, ignorans jura justitiae, tradita nobis divinitus, te conatum ex nostris auferre mentibus. An divinitus poteris asserere permissum, absentem, inauditum, et quod est maximum, innocentem damnari? Quomodo etenim arbitraris divinitus permissum, puniri inauditus, quando videas Adam et Evam principes nostri generis auditos sententia percussos Dei? "*Et vocavit Deus Adam, et dixit ei: Adam, ubi es? et dixit, Vocem tuam audivi, Domine, in paradiso, et timui, quia nudus sum, et abscondi me. Et dixit illi Deus: Quis tibi indicavit, quia nudus es, nisi de ligno de quo praeceperam tibi, de hoc solo ne manducares, ex eo manducasti? Et dixit Adam: Mulier quam dedisti, ipsa mihi dedit de ligno, et manducavi. Et dixit Deus mulieri: Quid hoc fecisti? Et dixit mulier: Serpens persuasit mihi, et manducavi. . . . Abel interficitur justus, et interrogatus Cain sumit sententiam; et tu Domini inauditum vis puniri sacerdotem? . . . Numquid non licuerat Deo, priusquam Cain convocaret atque interrogaret, punire? sed noluit; dans formam, quo genere inciperemus judicare commissos nobis. . . . Igitur si iudicium Dei antistitum tam decet esse justum, quod Dei esse dicatur iudicio terminatum, quomodo tu inauditum jubebas damnari a nobis? . . . Si populus idcirco ad nos confluit, ut secundum Dei legem iudicetur, cur tu inquires, Damnate innocentem?*"³⁶

This seems to be the first trace of the idea that the principle of *audi alteram partem* originates in divine example and is therefore inherently entitled to obedience from human beings. This view may have been a commonplace in the Christian world, as is suggested by the unexpected reappearance, 1400 years later, of exactly the same quaint reasoning in the other early English case on the rule, that of Dr. Bentley in 1723,³⁷ in which Justice Fortescue said:

36. "You compel us, Constans, to condemn our pious fellow priest Athanasius. But we are prohibited from doing this by divine law. By the sweeping use of royal authority you ask the priests of the Lord to shed blood; ignorant of the laws of justice, divinely given to us, you try to take them from our minds. By what divine right can you assert that it is permissible to condemn one who is absent, unheard, and, above all innocent? How do you believe it divinely permitted to punish a person unheard when you see that Adam and Eve, the origin of our race, were heard before they were struck by the sentence of God? 'Then God called Adam and said to him, Adam, where are you? And Adam said, I heard your voice, Lord, in paradise, and I was afraid, because I am naked, and I hid myself. And God said to him, Who showed you that you are naked, except that you have eaten from the tree from which alone I commanded not to eat? And Adam said, The woman that you gave me, she gave me from the tree, and I ate. And God said to the woman, Why did you do this? And the woman said, The serpent persuaded me, and I ate. . . .' Abel a just man was killed, and Cain having been questioned, received his sentence. And you wish to punish a priest of the Lord without a hearing? . . . Was it not lawful for God to punish Cain before he called him and questioned him? But He did not want to, giving a model by which we might begin to judge those committed to us. . . . Therefore if the judgment of God's bishops ought to be so just that it may be said to be the judgment of God, how can you order that someone be condemned by us unheard? . . . If the people, then, come to us to be judged according to the law of God, why do you ask, Condemn the innocent?" *Pro S. Athan.* 1. 1 (MIGNE, PATROLOGIA LATINA vol. 13, col. 817ff.).

37. *The King v. The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (1723).

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam, says God, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also.³⁸

It is certain that, inasmuch as the rule *audi alteram partem* does in fact represent an idea of instinctual or natural justice, it must have a place in the heart of every human judge, independently of precedent or authority; yet that equally strong English legal instinct, to search for precedent and authority for everything, led English lawyers back to classical and Christian antiquity. In their hands what was at least partly no more than a maxim of popular wisdom has been turned into a powerful support of freedom and justice.

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38. Biblical scenes are doubtful sources of authority for the status of *audi alteram partem* as a divinely inspired law. Certainly God "heard" Adam and Eve and Cain; but in St. Matthew's account of the Last Judgment according to the words of Christ, salvation and punishment are awarded before those being judged can say anything (Matt. 25. 31ff.). And, as R. F. V. Heuston wrote (*op. cit. supra* note 3, at 172) in connection with Dr. Bentley's Case, "it has . . . been noticed that the Biblical precedents on the point are conflicting, for at the lugubrious dinner-party recorded in Daniel V, at which the moving finger interrupted the proceedings by writing on the wall 'mene, mene, tekel, upharsin' ('you have been weighed in the balance and found wanting') the prophet does not indicate that Belshazzar was given either summons, information of the nature of the complaint, or any opportunity to answer."