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## Pleading--When Is an Action Commenced?

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The moral code of mankind was not enacted and it cannot be amended by legislatures.<sup>14</sup>

In view of the above discussion, it would seem that the Kentucky Court in the *McAfee* case followed the better reasoned cases in holding that a conviction under the federal income tax statute for willfully failing to make a federal income tax return did not involve moral turpitude in disbarment proceedings. However, it appears that the court erred in failing to consider that, though the minimum requirements for a conviction did not involve moral turpitude *per se*, the *facts* and *circumstances* under which the conviction was obtained may have involved moral turpitude. This short-sighted holding by the court, which it followed in a later decision,<sup>15</sup> might permit a person convicted for violation of the federal income tax laws under *any* circumstances to continue the practice of law in Kentucky. On this basis, the holding of the principle case is unsound in theory and in practice.

*Wilbur D. Short*

PLEADING—WHEN IS AN ACTION COMMENCED?—On January 2, 1956, plaintiff, a resident of Virginia, was injured in an automobile collision in Kentucky involving defendant, a Kentucky resident. On December 31, 1956, plaintiff's attorney filed a complaint with the deputy clerk of the United States District Court for the Eastern District of Kentucky. The attorney submitted typed copies of the summons, along with the complaint, and suggested to the clerk that she issue the summons that day. However, the clerk did not issue the summons until January 3, 1957. Defendant interposed the statute of limitations as a defense,<sup>1</sup> arguing that the cause of action did not accrue within one year next before the commencement of the action since the Kentucky Rules of Civil Procedure require the filing of a complaint *and* issuance of summons for the commencement of an action.<sup>2</sup> *Held*: Since failure to issue the summons was due solely to a matter over which the plaintiff had no control, and since he had done everything humanly possible to cause the summons to be issued, the cause of action was saved. *Hagy v. Allen*, 153 F. Supp. 302 (E.D. Ky. 1957).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Kentucky State Bar Association v. Brown*, 302 S.W. 2d 834 (Ky. 1957).

<sup>1</sup> Ky. Rev. Stat. sec. 413.140 (1959) provides that an action for an injury to the person of the plaintiff shall be commenced within one year after the cause of action accrued.

<sup>2</sup> Kentucky Rules of Civil Procedure 3 (1953) provides: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

This case points up an important difference between the Federal Rules of Civil Procedure and the Kentucky Rules of Civil Procedure as respects the commencement of an action. Federal Civil Rule 3 provides that an action is commenced by filing a complaint with the court. Kentucky Civil Rule 3 provides that an action is commenced by the filing of a complaint with the court *and* the issuance of a summons in good faith.<sup>3</sup> While plaintiff brought the action in Federal Court, the commencement of an action is a matter of substantive law,<sup>4</sup> and under the doctrine of *Erie v. Tompkins*,<sup>5</sup> the substantive law of the state must be applied.

Plaintiff had clearly complied with the first requirement of Kentucky Civil Rule 3. The question is thus presented as to the extent to which a plaintiff must accept responsibility for the issuance of a summons. Kentucky Civil Rule 4.01 provides that upon filing of the complaint the clerk shall forthwith issue the required summons. Thus, it would appear that once the complaint is filed with the clerk, the duty of the plaintiff is fulfilled and an action should be deemed commenced.<sup>6</sup>

While the court does not insist that the summons reach the sheriff within a year after the cause of action accrues, it appears to require that the summons actually be issued. Under the forerunner of the present rule,<sup>7</sup> issuance of a summons meant ". . . going out of the hands of the clerk, express or implied, to be delivered to the sheriff for service."<sup>8</sup> Thus, it was held that the process was issued where summons was: (1) placed in the hands of plaintiff's attorney,<sup>9</sup> (2) left in the hands of the clerk,<sup>10</sup> and (3) placed in a chute, as was customary, for the sheriff to pick up.<sup>11</sup> The test in such cases as to whether summons has issued is whether the parties have acted in good faith. Filing petition without causing summons to issue on it does not toll the statute of limitations.<sup>12</sup> The filing of a petition and directing of

<sup>3</sup> The form of Ky. Civ. Rule 3 was controlled in part by Ky. Rev. Stat. sec. 413.250 (1959) which provides: "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action."

<sup>4</sup> *Ragan v. Merchants Transfer Co.*, 337 U.S. 530 (1949).

<sup>5</sup> 304 U.S. 64 (1938).

<sup>6</sup> *Clay*, Kentucky Civil Rules 11 (1954).

<sup>7</sup> Kentucky Code of Civil Practice sec. 39 (1948) provided: "An action is commenced by filing . . . a petition . . . and . . . by causing a summons to be issued, or a warning order to be made thereon."

<sup>8</sup> *Louisville & N. R.R. v. Little*, 264 Ky. 579, 583-84, 95 S.W. 2d 253, 255 (1936), quoting from *Webster v. Sharpe*, 116 N.C. 466, 468, 21 S.E. 912, 914 (1895).

<sup>9</sup> *Rucker's Admr. v. Roadway Express, Inc.*, 279 Ky. 707, 181 S.W. 2d 840 (1939).

<sup>10</sup> *Blue Grass Mining Co. v. Stamper* 267 Ky. 643, 103 S.W. 2d 112 (1937).

<sup>11</sup> *Blackburn v. Louisville*, 21 Ky. L. Rep. 1716, 55 S.W. 1075 (1900).

<sup>12</sup> *Louisville & N. R.R. v. Napier*, 230 Ky. 323, 19 S.W. 2d 997, 999 (1929).

the clerk to issue the summons is not the commencement of an action if no summons is actually issued.<sup>13</sup> The action is commenced for all purposes when the first summons is issued.<sup>14</sup>

Since the clerk made no effort to issue the summons until the 3rd of January 1957, both statute and case law required that the plaintiff lose his cause of action. However, the court's ruling that the action should be considered as commenced prior to the actual issuance of the summons would be a desirable modification of the present law for two reasons. First, Kentucky Civil Rule 12.01 provides that the defendant shall have twenty days *after service* of summons upon him to answer. Thus, since the time for answer is measured, not from time of issuance of the summons, but from time of service, there is no prejudice to the defendant's ability to answer if the action is deemed to commence from the time the complaint is filed. Secondly, the plaintiff's attorney should be able to rely on the clerk's complying with the Rule of Procedure which commanded her to "forthwith issue the required summons."<sup>15</sup> Here, plaintiff's attorney suggested that she issue the summons immediately and even supplied her with the necessary papers, requiring only her signature. It was impossible for the attorney to compel her to do more without physical force.

The Federal Rules Committee rejected the notion, which was added to Rule 3 by the Kentucky Rules Committee, that issuance of summons should commence the action. It would have been better had Kentucky followed the Federal Rule, thereby permitting Rule 3 to be construed with Rule 4.01 (requiring that the clerk issue a summons forthwith). Then, omission to act by the clerk could not possibly be attributed to the plaintiff, requiring a strained interpretation of Rule 3 to avoid injustice. However, the Kentucky Rules Committee could not abrogate the requirement of Kentucky Revised Statutes Section 413.140 that a summons be issued to commence the action. Therefore, instead of straining the Kentucky cases to permit plaintiff to bring the action, the court should have simply recognized the rule requiring an issuance of a summons and left it to the legislature to remedy the inherent injustice of the rule.

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<sup>13</sup> *Casey v. Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528, 530 (1913).

<sup>14</sup> *Ideal Savings Loan and Building Assn. of Newport, Ky. v. Town of Park Hills*, 281 Ky. 571, 136 S.W. 2d 748 (1940).

<sup>15</sup> Ky. R. Civ. P. 4.01.