



**THE ATTORNEY GENERAL
OF TEXAS**

PRICE DANIEL
ATTORNEY GENERAL

AUSTIN, TEXAS

May 6, 1947

Hon. A. C. Winborn
District Attorney
Houston 2, Texas

Attention: Honorable James Anderson, Jr.
Assistant District Attorney

Opinion No. V-189

Re: The necessity for alias citation where service has not been had ten days before appearance day in Justice Court, under Supreme Court Rules 533 to 537.

Dear Sir:

Your request for an opinion upon the above subject matter is as follows:

"A great deal of confusion has resulted in the local justice of the peace courts from an interpretation of Rules 533, 534, 535 and 537, contained in Volume X., No. 3, page 109, of the Texas Bar Journal. This article seems to imply that if citation is not served at least ten days before appearance day, it will be necessary to get out a second citation in order to get the defendant into court.

"By Article 2036, in such a situation the defendant would have to plead at the next term of court, and another citation would not be necessary. In the justice court where this question has arisen, call day is the second Monday of each month. While Article 2036 has been repealed by Rule 107, the case of *Mims v. H. A. James, Inc.*, 175 S. W. (2d) 74, holds that Rule 107 does not apply to justice courts. Therefore, notwithstanding Rules 535 and 537, is Article 2036 still in effect for procedure in the justice of the peace courts?"

The advisory opinion referred to by you is as follows:

"QUESTION: In the Justice Court under Rules 533, 534, 535 and 537, if a personal citation is served on appearance day, or on the day subsequent, of the term to which it is returnable, would it be good service for a subsequent term?

"ANSWER: No. The above rules were taken from Articles 2400, 2401, 2404 and 2009 of the Revised Statutes. The only change with reference to personal citation was that the citations should be directed to the party rather than to an officer of a named county.

"The above statutes relating to the Justice Court procedure did not require ten days service of citation, but Article 2381 provided that the rules governing District Courts should apply in the Justice Court in the issuance and return of citation.

"The Supreme Court in adopting the rules took a part of Article 2009, applying to District and County Courts and in Rule 535 applied it to Justice Courts, requiring ten days service citations.

"Article 2036 provided that citations shall be served before the return day thereof. The defendant shall not be required to plead at the return term of the Court unless the citation be served at least ten days before the first day of such term, exclusive of the days of service and return, but when a citation is served before the return day thereof and less than ten days before the first day of such term, exclusive of service and returns, such service shall compel the defendant to plead at the next succeeding term.

"Article 2036 was repealed by the rules and was not carried into the new rules.

"In view of the above it is the opinion of the committee that to be effective at all, the citation must be served at least ten days before the appearance day stated therein, and unless this is done the defendant is not required to answer at any time before a new citation is served on him."

We think the committee's opinion announces the true construction of the Rules.

It follows, as you fear, that this construction will lead to considerable delay and expense. This would seem to be a fitting opportunity to request the Supreme Court to amend the rules involved.

This particular problem was among those discussed at a meeting of the Rules Committee of the State Bar sitting with the Supreme Court at Austin on April 25, 1947. As a result of such discussion, it has been recommended by that group that the following changes be made in the rules:

"Rule 534. Citation. -- Require citation in justice court to direct the defendant to answer on the first Monday after the expiration of 10 days after the service of citation.

"Rule 537. Appearance Day. -- Change appearance day in justice court to harmonize with the above Amendment to rule 534. See Rule 237."

SUMMARY

Under Court Rules 533, 534, 535 and 537, a citation issued out of a Justice Court must be served at least ten days before the appearance day stated therein, and unless this is done the defendant is not required to answer at any time before a new citation is served on him.

Yours very truly

APPROVED: May 6, 1947

Price Daniel
ATTORNEY GENERAL
OS/WB/IH

ATTORNEY GENERAL OF TEXAS

By

Ocie Speer
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Assistant