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# Open Court

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cut and removed.<sup>14</sup> In the South Carolina case,<sup>15</sup> apparently holding to the contrary, there was no damage to the freehold, the vendee having cut the timber, and the vendee's claim was further held to be too indefinite. As the principal case arose, however, there was no place for equitable or specific relief, to which monetary relief might have been attached as an incident. Unless, therefore, the measure of damages applicable would work a hardship, there seems to be no reason why the court was not justified in compelling the plaintiff in the principal case to sue in contract.

A. B. RAYMER.

## OPEN COURT

### REPORT OF THE NORTH CAROLINA JUDICIAL CONFERENCE\*

It is recommended by the Judicial Conference that the General Assembly consider the advisability of submitting to the qualified voters of the state, at the next general election, an amendment or amendments to the Constitution, altering Article IV, Sections 10 and 23, together with such other sections as may require revision, so as to permit, or to provide for, a more flexible adjustment of the courts, which is thought to be necessary to meet the present needs and demands of the state.

In addition, it is suggested that the following proposed bills be transmitted to the legislature with recommendation by the Conference that they be enacted into laws:

The General Assembly of North Carolina do enact:

Section 1: That in all criminal actions below the capital felonies the judges of the Superior Court in imposing imprisonment may exercise a sound discretion in fixing the period of such imprisonment and the time when such sentence shall commence, provided nevertheless that such period so fixed shall be within the limits now or here-

<sup>14</sup> *McCowen v. Pew*, 147 Cal. 299, 81 Pac. 985 (1905), rehearing in 123 Pac. 191, 354 (1912). This case is exactly in point with the principal case. *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809 (1891) gives specific performance with abatement in price for deficiency in acreage; *Williams v. Lilley*, *supra* note 5; *Peoples Street R. Co. v. Spencer*, *supra* note 5. For cases giving no abatement where the premises are damaged by fire, see *Strong v. Moore*, *Caldwell v. Frazier*, and *Gamble v. Garlock*, *supra* note 3; *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383 (1912).

<sup>15</sup> *Latimer v. Marchbanks*, 57 S. C. 267, 35 S. E. 481 (1900).

\* The LAW REVIEW desires to provide a permanent record of this report of the Judicial Conference for its readers.

after prescribed by law, and further subject to such classification of prisoners as the General Assembly may prescribe; and said judges may recommend to the Governor certain conditions in the judgment upon which the prisoner may be paroled after the service of a part of the sentence, and they may also recommend to the Governor that in case of a breach of said condition the prisoner is to be taken and required to serve the remainder of the original sentence.

Section 2: This Act shall be in force on and after its ratification.

A BILL TO BE ENTITLED "AN ACT TO AMEND CHAPTER 66, PUBLIC LAWS, 1927, RELATING TO PROCESS AND PLEADINGS IN CIVIL ACTIONS AND SPECIAL PROCEEDINGS."

The General Assembly of North Carolina do enact:

Section 1: That Section 476 of the Consolidated Statute of 1919, as amended by Chapters 66 and 132 of the Public Laws of 1927 be, and the same hereby is, amended by striking out the following words: "Upon the return of a summons unserved for want of time to make service, as to any defendant or defendants not served, the clerk shall, within three (3) days thereafter issue an alias or pluries summons, as the case may require; provided, that."

Section 2: That Section 480 of the Consolidated Statutes of 1919 be, and the same hereby is, amended by adding at the end of said section the following words: "An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses."

Section 3: That Chapter 66, Public Laws of 1927, Section five (5) thereof (being an amendment to Section 753 of the Consolidated Statutes), be amended by striking out the following words in line eight (8) thereof: "On a day named in the summons" and by adding at the end of said section the following: "Provided, however, that in special proceedings before the Clerk, the plaintiff or petitioner shall not be required to serve a copy of the petition upon each of the defendants, as required in civil actions, but in lieu thereof such petitioner or petitioners may deliver to the Clerk at the time of the issuance of the summons copies (not to exceed three) of the petition for the use of the defendants; and provided further that the summons in special proceedings shall command the sheriff or other proper officer to summons the defendant, or defendants to appear and answer the complaint of the plaintiff within ten (10) days after its service upon defendant or defendants in lieu of thirty (30) days as required in civil actions.

Section 4: That all laws and clauses of laws in conflict with this act be, and they are hereby repealed.

Section 5: That this act shall be in force from and after its ratification.

A BILL TO BE ENTITLED "AN ACT TO PROVIDE FOR THE ISSUANCE OF ALIAS AND PLURIES SUMMONSES."

The General Assembly of North Carolina do enact:

Section 1: That Section 476 of the Consolidated Statutes of 1919, as amended by Chapters 66 and 132 of the Public Laws of 1927 be, and the same hereby is, amended by striking out the following words: "Upon the return of a summons unserved for want of time to make service, as to any defendant or defendants not served, the clerk shall, within three (3) days thereafter issue an alias or pluries summons, as the case may require; provided, that."

Section 2: That Section 480 of the Consolidated Statutes of 1919 be, and the same hereby is, amended by adding at the end of said section the following words: "An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses."

Section 3: That all laws and clauses of laws in conflict with this Act be, and they hereby are, repealed.

Section 4: That this Act shall be in force from and after its ratification.

A BILL TO BE ENTITLED "AN ACT TO AMEND THE LAWS OF NORTH CAROLINA RELATING TO JURORS."

The General Assembly of North Carolina do enact:

Section 1: *Persons Liable to Jury Service.*

(a) That all citizens of this state over twenty-one years of age who shall have been residents of the county one year next preceding the placing of their names upon the jury list hereinafter provided, and competent in other respects, except those now exempt by law, or who hereafter become exempt by law, shall remain and be liable to serve as jurors; but no officer, soldier, seaman or marine of the United States Army or Navy shall be considered a resident of this state by reason of being stationed herein, nor shall an inmate of any charitable institution be qualified to serve as juror.

(b) The following persons shall be disqualified from serving as jurors: Idiots and lunatics, persons convicted of bribery, perjury, embezzlement of public funds, treason, felony and petit larceny.

(c) But no person over seventy years of age shall be compelled to serve as a juror.

Section 2: *Exemption from Jury Service.*

(a) All practicing physicians, licensed druggists, telegraph operators who are in the regular employment of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the Gospel, officers or employees of a State Hospital for the Insane, active members of a fire company, funeral directors or embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks, rural free delivery mail carriers, locomotive engineers and railroad conductors in active service, and all members of the National Guard of North Carolina who comply with and perform all duties required of them as members of said National Guard, shall be exempt from service as jurors.

(b) On the first days of January and July of each year the Commanding Officer of each such company, troop, battery or division of the National Guard of North Carolina shall file with the Clerk of the Superior Court of the county in which said company, troop, battery or division is located, a statement giving the names and rank of each member of his organization who has performed all military duties required of such member during the preceding six months, and any member of such military organization whose name shall not appear upon the statement shall not receive the benefit of the exemption provided above during the six months immediately following the filing of said statement.

Section 3: *Clerk to Keep Record of Jurors.*

The Clerk of the Superior Court shall record alphabetically in a book kept for that purpose the names of all grand or petit jurors or talesmen who serve in his court with the term at which they served.

Section 4: *July List Compiled by Jury Commission.*

(a) That the jury list shall be compiled by a jury commission, consisting of five members, none of whom shall be practicing attorneys, to be appointed in each county of the state every two years by the resident Judge of the Judicial District in which said county is situate, for a term of two years, who shall be competent to serve as jurors, shall be men of intelligence, morality and integrity, and, so far as practicable, acquainted with the citizenship of the county for which they shall be appointed and residents of different sections of

such county. A majority of said jury commission shall be members of the dominant political party of such county according to the last election therein for members of the State House of Representatives.

(b) *Appointment Certified—Oaths, Compensation, etc.*

Such appointment shall be certified by the Judge to the Clerk of the Superior Court who shall enter the same on the minutes of such court. Every jury commissioner shall have a fee of Ten Dollars per day for the time actually engaged in making out the said list of jurors and performing the duties herein imposed upon him, to be paid by the Treasurer of the County for which he is appointed on the certificate of the Judge making the appointment and, in case of his death, removal or inability to act, on a certificate of his successor in office or of the Judge designated to hold his court.

(c) *Eligibility to Re-appointment—Notice of Appointment—Oath.*

No jury commissioner shall be eligible to re-appointment for at least two years after the expiration of his term of office. Such commissioners shall be immediately notified of their appointment by the Clerk of the Superior Court and, before entering upon the discharge of their duties, shall each take and subscribe an oath or affirmation before the clerk of said court in the following form: "I do solemnly swear (or affirm) that I will honestly, without favor or prejudice, perform the duties of Jury Commissioner during my term of office; that in selecting persons to be drawn as jurors I will select none but persons whom I believe to be of good repute for intelligence and honesty; and that in all my selections, I will endeavor to promote only the impartial administration of justice."

(d) *List of Jurors to be Prepared by Jury Commission.*

Such commission shall, not later than the first day of June of each year during their continuance in office, prepare a list of such of the citizens of such county (not excluded or exempt by law) as are of good moral character and of sufficient intelligence to insure a high average of fitness and capacity for jury service.

(e) *Number of Persons Selected, etc.*

The whole number of persons selected in said county shall be based on the number of weeks of the Superior Court then scheduled to be held in the county for the next ensuing year; and the Jury Commission shall select for each civil week fifty persons and for each criminal week seventy persons and shall add to that number two hun-

dred persons, in order that there may be a sufficiency of jurors; and, as nearly as may be practicable, the same percentage of persons so selected shall be taken from each township in the county. The list so prepared, certified under the hands of the Jury Commission, shall be delivered to the Clerk of the Superior Court and safely kept by him, and the said Chairman of the Commission shall retain a duplicate thereof to be disposed of as hereinafter provided.

(f) *Jury Box to be Provided.*

The County Commissioners of each county of the state shall, before the first day of June, 1929, provide and deliver to the Clerk of the Superior Court of each of such counties, a jury box, with two divisions marked No. 1 and No. 2, respectively, each box to have two locks and two keys, the key of one to be kept by the Sheriff of the County and the other key and the box by the Clerk of the Superior Court of such county.

(g) *Names of Jurors to be Written on Paper Scrolls, to be Folded and Deposited with said List in the Jury Box.*

When such list is made out, the Jury Commission shall cause all names thereon to be fairly written, each on a separate scroll of paper of equal size, and shall so fold said scrolls that they will resemble each other as nearly as may be, and shall deposit said scrolls with said duplicate list in the division marked No. 1 in said Jury Box, both divisions of which shall be safely kept by said clerk, securely locked and opened only as hereinafter provided. In the event that the scrolls so placed in the jury box shall be lost or destroyed by fire or otherwise, the Commission shall, as soon as practicable, cause all the names of the persons named in the certified list retained by the Commission to be fairly written, each on a separate scroll of paper, of equal size, and shall so fold said scrolls that they will resemble each other as nearly as may be, and shall deposit said scrolls in the division marked No. 1 of the jury box as herein described which shall be provided by the County Commissioners.

(h) *Manner for Drawing Panel for Term.*

At least twenty days before each regular or special term of the Superior Court, the Clerk of the Superior Court shall, in the presence of the sheriff and at least one of the jury commissioners, cause to be drawn from the jury box out of partition No. 1, by a child not more than ten years of age, for each week of an exclusively civil term, forty of said scrolls; for each week of exclusively criminal

term in which no grand jury is to be drawn, forty of said scrolls; for each week of an exclusively criminal term in which a grand jury is to be drawn, sixty of said scrolls; for each week of a mixed term, if a grand jury is to be drawn, sixty of said scrolls; and for each week of such mixed term, if no grand jury is to be drawn, forty of said scrolls; the persons whose names are inscribed on said scrolls shall serve as jurors for the week of the ensuing term of the Superior Court for which they are drawn. The scrolls so drawn shall be put in partition marked No. 2 of said jury box.

(i) *Disqualified Persons Drawn.*

If any of the persons so drawn have an action, civil or criminal, pending and at issue which may be tried during the week for which they are drawn, the scrolls containing their names shall be returned into partition No. 1 of the said jury box; and if any of the persons so drawn to serve as jurors are dead or removed from the county, the scrolls with the names of such persons shall be destroyed; and in such cases other persons shall be drawn in their stead.

(j) The drawing out of partition No. 1 and placing in No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned to partition No. 1 and drawn out again when jurors shall next be drawn. In placing the scrolls in partition No. 1 they shall be thoroughly shaken and mixed.

(k) *No Person Liable to Serve as Juror more than once during same year.*

No person who has actually attended the Superior Court and served as a regular juror shall be liable to be drawn again during the same year, unless all persons whose names are in the jury box shall have been drawn to serve during such year.

(l) *Drawing when Clerk of Superior Court Fails to Draw.*

If the Clerk of the Superior Court for any cause fails to draw the jury for any term of the Superior Court, regular or special, the Sheriff of the County, in the presence of at least one of the Jury Commissioners of the County, shall draw such jury in the manner herein provided.

(m) *Summons to Jurors Drawn—to Attend Until Discharged.*

The Clerk of the Superior Court shall, within five days from the drawing, deliver the list of jurors drawn for the Superior Court to the Sheriff of the County, who shall summon the persons therein named to attend as jurors at such court. The summons shall be served



personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned; or the summons may be served by telephone and such service shall be valid and binding on the person so served. When summons is served by telephone the return of the officer shall state that it was served by telephone.

Section 5: Sub-sections (a) (b) and (c) of Section 4 hereof, shall go into effect from and after April 15, 1929.

Sub-sections (d) (e) (f) and (g) of Section 4 hereof, shall go into effect from and after May 15, 1929.

Sub-sections (h) (i) (j) (k) (l) and (m) of Section 4 hereof, shall go into effect from and after June 1, 1929.

Section 6: All laws and clauses of laws in conflict with this act are hereby repealed.

A BILL TO BE ENTITLED "AN ACT TO AMEND THE LAWS OF NORTH CAROLINA RELATIVE TO JURY SERVICE."

The General Assembly of North Carolina do enact:

Section 1: *The Selection of Jurors for the Trial of Causes.*

In the selection of a jury for the trial of any cause, except a capital felony, all the remaining jurors of the panel not drawn upon the grand jury shall be duly called and sworn and the presiding judge shall make all challenges for cause to the said jurors and examine them to ascertain whether they, or any of them, are related to any party, or have any interest in the case, or have formed or expressed any opinion, or are sensible of any bias or prejudice therein, or for any reason cannot render an impartial verdict therein, and shall excuse such as may be found subject to challenge for cause and such as do not stand indifferent between the parties, provided that any party or counsel for any party shall have the right to suggest to the judge any cause or causes about which the jurors may be questioned. And he shall direct the Clerk of the Superior Court to write upon separate slips of paper or scrolls the names remaining on said panel, free from just cause or exception, and place the same in a box or hat prepared for the purpose, wherein the said scrolls shall be well shaken and mixed, and to draw therefrom eighteen of the said scrolls and to make a list of the jurors whose names are written thereon which shall be tendered to all the parties to the action. When there are more than two antagonistic parties the number of jurors thus drawn and tendered shall be increased by three jurors for each additional an-

tagonistic party, to be drawn as herein indicated. From the list of jurors so tendered, each antagonistic party beginning with the plaintiff or the state, shall alternately strike three jurors, and the remaining twelve jurors shall be impanelled to try the cause. If the parties or their counsel decline or fail to strike off any of the eighteen or more, or if after one or more has been stricken off, and the number remaining is greater than twelve and the party or his counsel entitled next in order to strike off, decline or fail to do so, then the other antagonistic parties shall proceed to strike off from said list until each shall have stricken off the full number of three jurors to which he is entitled hereunder and no more, and thereafter the Clerk of the Court shall, beginning with the last name remaining on the said list and proceeding toward the first name thereon, in regular order, strike enough names to reduce the number of jurors to twelve, who shall be impanelled to try the cause.

Section 2: *Summons to Talesmen—Disqualifications.*

(a) That there may not be a deficiency of jurors, the sheriff shall by order of the court, summon from day to day, of the bystanders, other jurors, being freeholders within the county where the court is held, and the judge may, in his discretion, direct tales jurors to be drawn from the jury box, during the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for the state, the plaintiff or the defendant, instruct the sheriff to summon such jurors outside of the court house. It shall be a disqualification and a ground for challenge to any tales juror, not drawn from the box, that such juror has an action pending and at issue, is not freeholder or has served in the same court as juror, grand or petit, within one year next preceding such term of court, but it shall not be a disqualification and ground for challenge to any juror drawn from the box that he is not a freeholder or that he has served as a juror in the same court within one year.

(c) *How Talesmen summoned when Sheriff Interested.*

When, in the trial of any action before a jury, the sheriff of the county in which the cause is to be tried, is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on

account of indirect interest or in relation to the cause of action, to be entrusted with the summoning of the tales jury in any particular cause pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff.

(d) *Penalty for Disobeying Summons.*

Every person on the original venire or special venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of Twenty Dollars, to be imposed by the court; but each delinquent jury man shall have until the next succeeding term to make his excuse for non-attendance, and, if he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person summoned as a tales juror who shall not appear and serve as a juror shall be fined in the sum of Twenty Dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs.

Section 3: *Jury Sworn—Judge to Decide upon Competency—Challenges.*

The petit jury of the original panel as well as the talesmen and special veniremen shall be sworn as prescribed in the chapter entitled, "Oaths." Nothing herein contained shall be construed to deny to any party in any cause the usual challenge to the array; and the only challenges for cause, all of which shall be made by the presiding judge, of his own motion or upon suggestion of counsel, in all causes except capital felonies, shall be to the following persons and for the following causes, except as provided in Sections 6 and 7 hereof:

(a) A person called for jury service who is not a bona fide resident of the county in which the trial is had or from which the jury is summoned.

(b) A person who has a suit pending and at issue in the Superior Court of the county in which the trial is had.

(c) A person under the age of twenty-one years.

(d) A person who is an atheist or denies the existence of Almighty God.

(e) A person related by blood or marriage to any of the parties within the ninth degree.

(f) A person wanting in intelligence or good moral character.

(g) A person of the same society or corporation when such society

or corporation is interested in the litigation, or the tenant, or "within the distress" of either party, or the master, servant, agent, counselor, steward or attorney of either party.

(h) A person prejudiced or biased to such an extent that he cannot render a fair and impartial verdict in the cause.

(i) A person summoned as a tales juror or special venireman, not drawn from the jury box, who is not a freeholder within the county from which he is summoned, or who has served in the same court as grand or petit juror within one year next preceding the term of court at which he is called for service as a juror. The judge shall decide all questions as to the competency of jurors in both civil and criminal actions.

*Section 4: No Peremptory Challenges Except in the Trial of Capital Felonies.*

No peremptory challenges shall be permitted except in the trial of capital felonies.

*Section 5: Jurors Summoned from other Counties in Civil and Criminal Actions.*

When it is suggested on oath or affirmation, as provided by Section four hundred seventy-one of the Consolidated Statutes of North Carolina that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the presiding judge, instead of making order for removal, may cause as many jurors as he deems necessary to be summoned from any adjoining county or any county in the same judicial district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in such county and in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order.

In case a jury is not obtained from those so summoned, the judge may, in like manner, from time to time, order additional jurors summoned from any adjoining county or any county in the same judicial district, or from the county where the trial is being held, until a jury is obtained. Jurors summoned from a county other than the county of the trial are subject to challenge for cause as other jurors, but not because of non-residence in the county of the trial or service within

one year, or if drawn from the jury box, not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of the trial.

*Section 6: Jurors for Courts other than the Superior Court—Procedure.*

(a) Jurors for service in all the courts other than the Superior Courts, except the courts of Justices of the Peace, and courts of Mayors of Towns and Cities having the criminal jurisdiction of Justices of the Peace, shall be secured as provided in Section one thousand five hundred ninety-three and one thousand five hundred ninety-four of Vol. 1 and sub-sections V and W of Section one thousand six hundred and eight, Vol. 3 of the Consolidated Statutes of North Carolina, except that the duties therein required of the Register of Deeds and in his office shall be performed by the Clerk of the Superior Court and in the office of the said clerk, and the procedure in the said courts shall conform to the provisions of this Act in the drawing, summoning, swearing, challenging, making the jury list, striking and empanelling the jury; and the judges, recorders and clerks of such courts shall, in respect thereto, discharge the duties herein imposed upon the Judges and Clerks of the Superior Court.

*(b) Jurors for Justices Court.*

Jurors for service in the courts of Justices of the Peace and in the courts of Mayors of Towns and Cities, having criminal jurisdiction of the Justices of the Peace, shall be secured as provided in Article fourteen, Chapter twenty-seven of the Consolidated Statutes of North Carolina, except that the list of jurors mentioned therein shall be furnished by the Clerk of the Superior Court of the county and not by the Clerk of the Board of Commissioners as provided therein.

Section 7. The provisions of this Act shall go into effect from and after July 1, 1929.

Section 8. All laws and clauses of laws in conflict with this Act are hereby repealed.

A BILL TO BE ENTITLED "AN ACT TO PROVIDE FOR THE APPOINTMENT OF FOREMEN OF GRAND JURIES, IN THE EVENT OF DISABILITY OR OTHER CAUSE."

The General Assembly of North Carolina do enact:

Section 1: That Section 2336 of the Consolidated Statutes of North Carolina be amended as follows: Add at the end of said section the following: In case of the absence of the foreman, or in case of his inability to serve, the presiding judge shall appoint an acting foreman, who shall have all powers vested by law in the foreman.

Section 2: All laws and clauses of laws in conflict with this Act are hereby repealed; and this Act shall be in force from and after its ratification.

A BILL TO BE ENTITLED "AN ACT TO FURNISH INFORMATION TO THE JUDGES OF THE SUPERIOR COURT TO ENABLE THEM TO LEARN THE CONDITIONS EXISTING."

Section 1: It shall be the duty of the Clerks of the Superior Court and they are required to make reports to the judge holding the courts in the district at the first term of court in the spring and fall terms of the number of cases on the summons and civil issue dockets in their respective counties, stating separately the number of appeals from Justices of the Peace and divorce cases, and shall also report the status of any failure of guardians, administrators, executors, trustees, assignees to file reports required of them, so as to acquaint the judge with the status of matters which may need attention.

three terms of court in the spring or in the fall of any year.

Section 3: This Act shall be in force from and after the first day of July, 1929.

A BILL TO BE ENTITLED "AN ACT TO AUTHORIZE THE SUPREME COURT TO ESTABLISH BY GENERAL RULES, THE FORMS OF PROCESS, WRITS, PLEADINGS, PRACTICE, AND PROCEDURE."

The General Assembly of North Carolina do enact:

Section 1: That in order to simplify the practice and procedure in the courts of the state and facilitate the trials of actions, the Supreme Court of North Carolina shall have the power to prescribe by General Rules for the Superior Courts and Inferior Courts of the state, the forms of process, writs, pleadings and motions, and the practice and procedure in all actions.