Service of Process under Lemons v. Old Hickory Council, Boy Scouts of America, Inc.: Exalting Procedure over Precedent

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Service of Process Under *Lemons v. Old Hickory Council, Boy Scouts of America Inc.*: Exalting Procedure Over Precedent?

North Carolina Rule of Civil Procedure 4(c) requires a summons to be served within thirty days of its issuance.[1] North Carolina case law establishes that a summons served after its expiration date is a nullity, ineffective to confer personal jurisdiction over the defendant.[2] The North Carolina Supreme Court deviated from its traditionally strict compliance with rules regulating service of process[3] in *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*,[4] however, holding that rule 6(b) of the North Carolina Rules of Civil Procedure[5] applies to rule 4(c). This application gives trial courts discretion to grant a *nunc pro tunc*[6] enlargement of time for service of process when, as a result of excusable neglect, a summons was served after its expiration date.[7] The *Lemons* court was guided primarily by rules of statutory construction, but its construction has undermined the traditional concepts of personal jurisdiction and statutes of limitation. Under *Lemons*, a plaintiff who allows his summons to die[8] after the statute of limitations has run can circumvent the time bar and hale the defendant into court by serving the defunct summons, then moving the court to validate retroactively the ineffective service.

This Note examines the threat *Lemons* poses to the concepts of personal jurisdiction and statutes of limitations. It then contrasts Federal Rule of Civil Procedure 4—to which federal rule 6(b)(2) properly applies—to North Carolina rule 4, which should not be supplemented. Finally, the Note approves an amendment to rule 6 now before the North Carolina General Assembly that

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1. "Personal service or substituted personal service of summons . . . must be made within 30 days after the date of the issuance of summons . . . ." N.C. R. Civ. P. 4(c).

2. A court can assert personal jurisdiction over a defendant who does not appear voluntarily only upon proper service of a valid summons. Collins v. Highway Comm'n, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953); Hodges v. Home Ins. Co., 233 N.C. 289, 293, 63 S.E.2d 819, 822 (1951); Adams v. Cleve, 218 N.C. 302, 304, 10 S.E.2d 911, 912 (1940); Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). An expired summons loses its ability to confer jurisdiction. Sink v. Easter, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974); Webb v. Seaboard Air Line R.R., 268 N.C. 552, 554, 151 S.E.2d 19, 20 (1966); Green v. Chrismon, 223 N.C. 724, 726, 28 S.E.2d 215, 216 (1943).

3. *See, e.g.*, Guthrie v. Ray, 293 N.C. 67, 69, 235 S.E.2d 146, 148 (1977); Sink v. Easter, 284 N.C. 555, 560, 202 S.E.2d 138, 142 (1974); Lowman v. Ballard & Co., 168 N.C. 16, 18, 84 S.E. 21, 22 (1915).

4. 322 N.C. 271, 367 S.E.2d 655 (1988).

5. "When by [the North Carolina Rules of Civil Procedure] . . . an act is required or allowed to be done at or within a specified time . . . [u]pon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." N.C. R. Civ. P. 6(b).

6. This term is defined as "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect." Black's Law Dictionary 964 (5th ed. 1979).

7. In *Lemons* the court used its discretionary power under rule 6(b) to enlarge the rule 4(c) time period even though the statute of limitations had expired and, on the date of late service, plaintiff still had more than 30 days to obtain a valid alias summons under rule 4(d). *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656; *see infra* text accompanying notes 15-16 & 47.

8. *See infra* notes 49-50 and accompanying text.

would prohibit the application of rule 6 to rule 4.[9]

Plaintiff in *Lemons* was struck on the head by a falling flagpole on May 15, 1982, while attending a Boy Scout-A-Rama sponsored by defendant.[10] Plaintiff filed a timely action in negligence, but took a voluntary dismissal without prejudice under rule 41(a) on February 6, 1985.[11] She commenced a second action by filing an identical complaint on February 6, 1986, the last day before her claim would have been time-barred.[12]

The original summons for the second action was returned unserved. Plaintiff obtained a valid alias summons[13] on May 2, 1986. The May 2 summons—valid only until June 2[14]—was served on June 5.[15] On June 23, defendant moved to dismiss for failure to state a claim for relief, lack of personal jurisdiction, insufficient process, and insufficient service of process.[16] On September 10, plaintiff obtained a second alias summons. The September 10 summons, although served within the required thirty days, did not relate back to the date the complaint was filed because it had not been issued within ninety days of issuance of the May 2 summons.[17]

On October 13, 1986, plaintiff moved under rule 6(b) for a retroactive extension of time from June 2 to June 6 in which to serve her May 2 summons.[18] The trial court found as fact that plaintiff's failure to serve the May 2 summons on time was the result of excusable neglect[19] and thus met the standard for a

9. H.R. 150, 139th N.C. Gen. Assembly (1989); *see infra* text accompanying notes 125-29 (discussing the bill).

10. *Lemons*, 322 N.C. at 272, 367 S.E.2d at 657.

11. *Id.* Under the North Carolina Rules of Civil Procedure, "an action . . . may be dismissed by the plaintiff without order of the court. . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice." N.C. R. Civ. P. 41(a).

12. *Lemons*, 322 N.C. at 272, 367 S.E.2d at 656. The three-year statute of limitations on Mrs. Lemons' claim ordinarily would have run on March 14, 1985. *See* N.C. Gen. Stat. § 1-52(16) (1983). Under rule 41(a), however, the plaintiff who takes a voluntary dismissal has one additional year to refile. N.C. R. Civ. P. 41(a).

13. An alias summons is "issued when the original has not produced its effect because defective in form or manner of service." Black's Law Dictionary 66 (5th ed. 1979). North Carolina rule 4 authorizes the use of the alias summons to extend the time to effect service of process. N.C. R. Civ. P. 4(d)(2); *see infra* note 47 and accompanying text.

14. Rule 4(c) requires a summons to be served within 30 days of issuance. N.C. R. Civ. P. 4(c).

15. *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656.

16. *Id.* At the time defendant filed its motion to dismiss, plaintiff still had 38 days to obtain a valid alias summons. *See* N.C. R. Civ. P. 4(d) (allowing plaintiff 90 days to obtain an alias summons after securing original summons).

17. *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656 (relying on N.C. R. Civ. P. 4(d)); *see infra* text accompanying note 50.

18. *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656. In support of her 6(b) motion, plaintiff filed her personal affidavit stating that she had "[a]t all times . . . relied upon [her attorney] to prosecute [her] claim, including the accomplishing of service of process in an appropriate manner and at an appropriate time." Record at 23, *Lemons* (No. 8721SC110). The affidavit asserted that Mrs. Lemons had spoken to her attorney and "tried to keep informed as to the proceedings," but was told only that "several problems were preventing the case from reaching trial." *Id.* Mrs. Lemons certified that she was unaware of both the voluntary dismissal in the first action and defendant's pending motion to dismiss in the second action until she personally telephoned the Clerk of Superior Court on August 4, 1986. *Id.*

19. A client's reliance on counsel, even if counsel is inexcusably remiss in his professional responsibilities, constitutes excusable neglect as to the client. Moore v. Deal, 239 N.C. 224, 231, 79

time enlargement under rule 6(b).[20] The trial court concluded, however, that "as a matter of law, Rule 6(b) of the North Carolina Rules of Civil Procedure does not confer upon the Court the authority to permit an enlargement of time within which service is to be completed pursuant to Rule[s] 4(c) and (d)."[21]

A unanimous panel of the North Carolina Court of Appeals affirmed the trial court's decision.[22] The appeals court cited the established rule that a summons not served within thirty days of its issuance "loses its vitality and . . . does not confer jurisdiction upon the court over the defendant."[23] The court of appeals assumed that unless a civil procedure rule explicitly provided otherwise, existing case law should control.[24] Examining rule 6(b), the court concluded that it did not amount to statutory authorization for late service of summons, but was intended instead to allow an "enlargement of time for filing pleadings, motions, interrogatories, [and] the taking of depositions."[25] Finding no statutory authorization for a court to "breathe life back into a [legally defunct] summons," the court of appeals concluded that the case had been dismissed correctly for lack of jurisdiction over defendant.[26]

The North Carolina Supreme Court reversed.[27] Writing for a majority of four,[28] Justice Mitchell conceded that a summons not served within thirty days of issuance becomes *functus officio*.[29] He characterized the crucial issue in *Lemons*, however, not as whether an expired summons is legally defunct, but "whether by adopting Rule 6(b), the General Assembly has given our trial courts authority to breathe new life and effectiveness into such a summons retroactively."[30] Relying on the philosophy underlying the North Carolina rules and on a literal reading of rule 6(b), Justice Mitchell concluded that the legislature intended for trial courts to have such discretionary authority.

S.E.2d 507, 511 (1954); Norton v. Sawyer, 30 N.C. App. 420, 423, 227 S.E.2d 148, 151-52, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976).

20. *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656; *see supra* note 5 (text of rule 6(b)).

21. Lemons v. Old Hickory Council, Boy Scouts of America, Inc., No. 86CVS662, Trial Court Order (Forsyth County Superior Court Nov. 10, 1986). The trial court did not elaborate on its reasoning, but simply made clear that "[i]f it were permitted under Rule 6(b), the Court would exercise its discretion and enlarge the time *nunc pro tunc*." *Id.*

22. Lemons v. Old Hickory Council, Boy Scouts of America, Inc., No. 8721SC110, slip op. at 5 (N.C. App. July 7, 1987), *rev'd*, 322 N.C. 271, 367 S.E.2d 655 (1988).

23. *Id.* at 3-4 (citation omitted).

24. *See id.* at 5.

25. *Id.* at 4-5 (citing Chesire v. Benson Aircraft Corp., 17 N.C. App. 74, 80, 193 S.E.2d 362, 365 (1972)).

26. *Id.*

27. *Lemons*, 322 N.C. at 277, 367 S.E.2d at 658.

28. Justice Mitchell was joined by Justices Frye, Webb, and Whichard. Justice Martin filed a dissent that was joined by Chief Justice Exum and Justice Meyer. *See infra* notes 38-45 and accompanying text (analysis of the dissenting opinion). One commentator, noting the split of the high court and the rulings of the lower courts, commented that the *Lemons* "outcome represent[ed] an oddity in that seven of the [eleven] judges called upon to rule on the question" disagreed with the final holding. *Summons Resurrection Called 'Unbelievable'*, N.C. Law. Weekly, May 6, 1988, at 4, col. 1.

29. *Lemons*, 322 N.C. at 274, 367 S.E.2d at 657. The court apparently was using the term "*functus officio*" to mean legally defunct. *Cf.* BLACK'S LAW DICTIONARY 606 (5th ed. 1979) ("an instrument which has fulfilled [its] purpose . . . and is therefore of no further virtue or effect").

30. *Lemons*, 322 N.C. at 274, 367 S.E.2d at 657.

Justice Mitchell began his analysis by noting that the rules were enacted in an attempt " 'to eliminate the sporting element from litigation.' "[31] He noted that in order to prevent disqualification of meritorious claims through procedural technicalities, drafters of the rules had envisioned that " 'the rules [would be] applied as a harmonious whole' " and that " '[n]o single rule [would] be given disproportionate emphasis over another rule which also ha[d] application.' "[32] Justice Mitchell concluded that unless expressly exclusive, rules 4(c) and 6(b) should be applied conjunctively.[33]

Justice Mitchell then looked at the plain language of rule 6(b) to determine whether rule 4 was specifically excluded from its scope. He observed that rule 6(b) applies when another rule requires an act " 'to be done at or within a specified time.' "[34] Although rule 6(b) does not specify the rules to which it applies, it does list six rules to which it does not apply.[35] The court noted that rule 4 is not one of the specified exceptions. Justice Mitchell then applied the maxim *expressio unius est exclusio alterius*[36] to conclude that rule 6(b) clearly is intended to supplement rule 4.[37]

Justice Martin penned a vigorous dissent.[38] He criticized the majority's contradiction of "a constant line of authority" that "[s]ervice of a summons after the date of its return is a nullity" incapable of conferring personal jurisdiction over the defendant.[39] Justice Martin noted that trial courts historically have had authority to enlarge time periods for procedural acts.[40] He speculated that it was the inability of an expired summons to confer personal jurisdiction, not an inherent lack of authority to control procedural acts, that had dissuaded courts

31. *Id.* (quoting W. SCHUFORD, N.C. CIVIL PRACTICE AND PROCEDURE § 1-3 (3d ed. 1988)).

32. *Id.* at 275, 367 S.E.2d at 657 (quoting Sizemore, *General Scope and Philosophy of the New Rules*, 5 WAKE FOREST INTRA. L. REV. 1, 6 (1968)).

33. *Id.*

34. *Id.* at 275, 367 S.E.2d at 657-58 (quoting N.C. R. CIV. P. 6(b)).

35. *Id.* Exempt time periods are those specified in rules 50(b); 52; 59(b), (d), and (e); and 60. N.C. R. CIV. P. 6(b). All of the enumerated exceptions to North Carolina rule 6(b), like those in the analogous federal rule, are intended to preserve the integrity of a final judgment. *See* Chesire v. Benson Aircraft Corp., 17 N.C. App. 74, 80, 193 S.E.2d 362, 365 (1972) (rule 6(b) not applied to extend time limit for bringing appeal); FED. R. CIV. P. 6(b) commentary.

36. The express exclusion of some implies inclusion of all others. Campbell v. First Baptist Church of Durham, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979).

37. *Lemons*, 322 N.C. at 276-77, 367 S.E.2d at 658. Justice Mitchell then hinted that the majority had been constrained by rules of statutory construction. Rather than applaud the result in *Lemons*, he commented that "[t]he General Assembly, of course, is always free to add [rule 4 as] an exclusion [from rule 6(b)] if it desires." *Id.* at 277, 367 S.E.2d at 658.

38. *Id.* at 277-79, 367 S.E.2d at 658-59. (Martin, J., dissenting).

39. *Id.* at 277-78, 367 S.E.2d at 659 (Martin, J., dissenting); *see, e.g.*, Webb v. Seaboard Air Line R.R., 268 N.C. 552, 554, 151 S.E.2d 19, 20 (1966) (summons served after return date is a nullity); Green v. Chrismon, 223 N.C. 724, 727, 28 S.E.2d 215, 217 (1943) (same); Hatch v. Alamance Ry., 183 N.C. 618, 625-26, 112 S.E. 529, 533 (1922) (same); Cole v. Cole, 37 N.C. App. 737, 738, 247 S.E.2d 16, 17 (1978) (same).

40. *Lemons*, 322 N.C. at 278, 367 S.E.2d at 659 (Martin, J., dissenting). According to Justice Martin, "Rule 6(b) is nothing new to our courts; it basically carries forward the provision of former N.C. GEN. STAT. § 1-152 which permitted the trial judges in their discretion to enlarge the time for the doing of any act." *Id.* (Martin, J., dissenting). The official comment to rule 6(b) supports this position. *See* N.C. R. CIV. P. 6(b) comment ("[rule 6(b)] is based upon the federal rule, [and] is more detailed than former [state] statutory provisions. However, there is no basic change in procedure" from these former state statutes).

from granting retroactive extensions of time for service of summons.[41] An expired summons is a nullity and even with a broad grant of discretionary power, he argued, trial judges "are not empowered to make something out of nothing."[42]

Justice Martin next attacked the majority's conclusion that a conjunctive reading of rules 4 and 6(b) would eliminate the sporting element from litigation. He opined that "[a]uthorizing the trial judge to amend in his discretion the rules with respect to service of summons" would only encourage procedural gamesmanship.[43] Instead, "[l]awyers need definite rules to guide them with respect to the commencement of lawsuits and obtaining jurisdiction over parties."[44] Justice Martin concluded that rule 4, standing alone, provides the needed clarity and predictability: "Rule 4 provides a comprehensive, statutory framework . . . that requires no supplement from any other rule."[45]

To understand the significance of *Lemons*, one must first look at the normal operation of North Carolina rule 4. Although rule 4(c) requires that a summons be served within thirty days of issuance, plaintiffs unable to make service within this thirty-day lifespan are not summarily thrown out of court.[46] Under rule 4(d), a plaintiff has ninety days from the date of issue to secure an extension of time to serve an unserved or invalidly served summons.[47] Each 4(d) extension entitles the plaintiff to thirty days to serve the renewed process (in the form of an alias summons) and ninety days to apply for a successive extension, if needed.[48] Under rule 4(e), an action is discontinued if the plaintiff neither continues the

41. *Lemons*, 322 N.C. at 278, 367 S.E.2d at 659 (Martin, J., dissenting).

42. *Id.* (Martin, J., dissenting).

43. *Id.* at 279, 367 S.E.2d at 659 (Martin, J., dissenting).

44. *Id.* (Martin, J., dissenting).

45. *Id.* (Martin, J., dissenting). The dissenters implicitly rejected Justice Mitchell's application of the *expressio unius est exclusio alterius* maxim to rule 6(b). Defendant had argued that the comprehensiveness of rule 4 rendered the maxim inapplicable and militated against supplementation by rule 6(b). Defendant-Appellee's New Brief at 5-7, *Lemons* (No. 438PA87).

46. N.C. R. Civ. P. 4(c).

47. *Id.* 4(d). Extensions may be obtained either by "secur[ing] an endorsement upon the original summons," *id.* 4(d)(1), or by "su[ing] out an alias . . . summons." *Id.* 4(d)(2).

48. *See id.* 4(e). Rule 4 does not place a limit on the number of times a party may obtain a time extension. Furthermore, the party seeking a 4(d) extension need not file a motion, but need only request an extension from the Clerk of Court. *See* Brown v. Overby, 61 N.C. App. 329, 331, 300 S.E.2d 565, 566-67 (1983); Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 569, 225 S.E.2d 329, 332 (1976). The North Carolina Court of Appeals once held that plaintiff's failure to deliver a summons to the sheriff for service rendered the summons incapable of supporting a rule 4(d) extension. Adams v. Brooks, 73 N.C. App. 624, 627, 327 S.E.2d 19, 21, *cert. denied*, 313 N.C. 596, 332 S.E.2d 177 (1985), *overruled by* Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986). Plaintiff in *Adams* filed her complaint two days before the statute of limitations ran. *Id.* at 624, 327 S.E.2d at 20. She subsequently obtained 16 rule 4(d)(1) extensions, failing the first 15 times to deliver the summons to the sheriff for service. *Id.* The court of appeals held that plaintiff's failure to deliver the original summons to the sheriff within its 30-day lifespan invalidated the summons as the basis for any 4(d) extension. *Id.* at 627, 327 S.E.2d at 21.

Under very different facts the North Carolina Supreme Court overruled *Adams* and held that failure to deliver a summons to the sheriff did not render it incapable of supporting an extension. Smith v. Starnes, 317 N.C. 613, 617, 346 S.E.2d 424, 428 (1986). In *Starnes*, unlike *Adams*, plaintiff made a good-faith attempt to serve process by mail before applying for an extension. *Id.* at 613-14, 346 S.E.2d at 425. In expressly overruling *Adams*, the *Starnes* majority made no comment to suggest that Adams' conduct was improper. *See id.* at 618, 346 S.E.2d at 428. Adams' conduct, however, seems contrary to the purposes underlying the North Carolina rules and may, as a deliberate

chain of extensions nor serves a valid alias summons within the applicable time period.[49] Discontinuance does not necessarily signal the death of an action, however. A new alias summons may be issued, but such a summons does not relate back to the date the complaint was filed. Instead, "the action [is] deemed to have commenced on the date of . . . issuance" of the new alias summons.[50]

One area of North Carolina law significantly disrupted by *Lemons* was personal jurisdiction. The initial step in any lawsuit is the court's acquisition of personal jurisdiction over the defendant. This can be accomplished by service of summons[51] or by defendant's voluntary appearance.[52] Only after the court gains jurisdiction over defendant is it entitled to affect defendant's existing rights.[53] The *Lemons* decision empowers a trial court to validate retroactively an untimely service of process, thereby altering a defendant's rights as they existed *before* the court obtained personal jurisdiction. For instance, before *Lemons*, a default judgment entered after defendant had been served with an expired summons was a nullity, incapable of being "validated by subsequent acts of the court."[54] Under *Lemons*, however, the court has a mechanism to make such a judgment effective. A court may use the *Lemons* maneuver to assert personal jurisdiction, *nunc pro tunc*, after an expired summons has been served but before a default judgment is entered. The court thereby extinguishes the defendant's opportunity to rely on lack of jurisdiction to avoid a default judgment, a right she possessed before the court gained jurisdiction by granting plaintiff's 6(b)

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delay of litigation, be a rule 11 violation. *See* N.C. R. CIV. P. 11 (extension requests may not be "interposed for delay").

49. N.C. R. CIV. P. 4(e).

50. *Id.* Thus, under rule 4, a great burden of diligence falls upon the plaintiff whose statute of limitations expires after the complaint is filed, but before process can be served. A discontinuance under these circumstances is equivalent to a dismissal with prejudice. *Cf.* Townsel v. County of Contra Costa, 820 F.2d 319, 320-21 (9th Cir. 1987) (noting same effect under federal rules).

51. Collins v. Highway Comm'n, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953); Hodges v. Home Ins. Co., 233 N.C. 289, 293, 63 S.E.2d 819, 822 (1951); Adams v. Cleve, 218 N.C. 302, 304, 10 S.E.2d 911, 912 (1940). One purpose of the rule 4 summons is " 'to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.' " Wiles v. Welparnel Constr. Co., 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1973) (quoting 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063, at 204 (1969)); *see also* Harris v. Maready, 311 N.C. 536, 542, 319 S.E.2d 912, 916 (1984) (jurisdiction acquired by service of process pursuant to rule 4). Only compliance with specific requirements for the form of the summons and the manner of service secure personal jurisdiction. *See* Williams v. Hartis, 18 N.C. App. 89, 92, 195 S.E.2d 806, 808 (1973) ("Statutory provisions prescribing the manner of service of process must be strictly construed."); *see also* Sink v. Easter, 284 N.C. 555, 559-60, 202 S.E.2d 138, 142 (1974) (plaintiff complied with requirements for service by publication). A summons served after its return date is invalid, even if the defendant acquired timely knowledge of the action. Hatch v. Alamance Ry., 183 N.C. 617, 621, 112 S.E. 529, 531 (1922) (expired summons ineffective when served after timely attempted service on unauthorized corporate officer).

52. McLean v. Matheny, 240 N.C. 785, 787, 84 S.E.2d 190, 192 (1954); Williams v. Williams, 46 N.C. App. 787, 788, 266 S.E.2d 25, 27 (1980).

53. *See Hodges*, 233 N.C. at 293, 63 S.E.2d at 822 (defendant's rights must not be affected until he is formally before the court). It is well settled that when a court acts without jurisdiction, its acts are void. Southern Athletic/Bike v. House of Sports, Inc., 53 N.C. App. 804, 806, 281 S.E.2d 698, 699 (1981), *disc. rev. denied*, 304 N.C. 729, 288 S.E.2d 381 (1982); Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, 42 N.C. App. 722, 724, 257 S.E.2d 654, 655 (1979); Cole v. Cole, 37 N.C. App. 737, 738, 247 S.E.2d 16, 17 (1978).

54. *Cole*, 37 N.C. App. at 738, 247 S.E.2d at 17.

motion.[55]

The North Carolina Supreme Court consistently has foreclosed parties from proceeding in litigation if personal jurisdiction has not been established through proper procedures. In a situation similar to *Lemons*, the North Carolina Supreme Court rejected the notion that a trial court could obtain jurisdiction over the defendant by an untimely served summons.[56] In *Hatch v. Alamance Railway*[57] the sheriff kept the summons in his possession, awaiting defendant's return from out of state.[58] Meanwhile, both the summons service period and the statute of limitations expired.[59] Plaintiff subsequently obtained an alias summons, which was invalid as facially defective.[60] Defendant was served within the time prescribed for service of the alias summons, and the sheriff returned both the original and the alias summonses to the court.[61] The trial court concluded that the original summons had been served validly.[62] The North Carolina Supreme Court reversed.[63] It was unclear to the court which summons actually had been served. Even assuming that it had been the original summons and not the invalid alias, the trial court had not obtained jurisdiction because it lacked "power to impart vitality to an exhausted process."[64]

More recently, in *Sink v. Easter*[65] the North Carolina Supreme Court held that even though defendant stipulated that service had been effective, an invalid service could not confer jurisdiction over defendant.[66] In *Sink* plaintiff's action was discontinued for failure to renew the summons after the statute of limitations had run.[67] Plaintiff then inappropriately attempted service by publication.[68] In response, defendant moved to dismiss for lack of jurisdiction, but his motion was denied.[69] Defendant then moved for summary judgment, stipulating

55. Technically, a court in the *Lemons* situation gains jurisdiction over the defendant only on the date it announces that prior service of summons was effective. Before that date, the only link between defendant and the court is an expired summons, which is a nullity. *See supra* notes 2 & 51 and accompanying text. The hypothetical situation presented in the text presents a result even more out of line with North Carolina precedent if the statute of limitations expired between the time the plaintiff filed the complaint and served the invalid process. In that situation, granting a retroactive extension not only validates the previously void default judgment, but also extinguishes defendant's vested right to rely on the statute of limitations as a defense. *See infra* text accompanying notes 83-88 (discussing the statute of limitations defense).

56. Hatch v. Alamance Ry., 183 N.C. 617, 112 S.E. 529 (1922). The *Hatch* court made this ruling even though the Code of Civil Procedure "invest[ed] the [trial] Court with ample powers, in all questions of practice and procedure, both as to amendments and continuances . . . at the discretion of the Judge presiding, who is presumed, best, to know what . . . indulgence will promote the ends of justice, in each particular case." Austin v. Clark, 70 N.C. 373, 374 (1874) (per curiam).

57. 183 N.C. 617, 112 S.E. 529 (1922).

58. *Id.* at 619-20, 112 S.E.2d at 530.

59. *Id.* at 619, 112 S.E. at 530.

60. *Id.* at 621, 112 S.E. at 530.

61. *Id.* at 620, 112 S.E. at 530.

62. *Id.* at 625, 112 S.E. at 533.

63. *Id.* at 626, 112 S.E.2d at 533.

64. *Id.* at 625, 112 S.E. at 533.

65. 284 N.C. 555, 202 S.E.2d 138 (1974).

66. *Id.* at 561, 202 S.E.2d at 143.

67. *Id.* See *supra* text accompanying notes 49-50 for a discussion of discontinuance.

68. *Sink*, 284 N.C. at 561, 202 S.E.2d at 143.

69. *Id.* at 556, 202 S.E.2d at 140.

to service of process, but claiming that plaintiff's action was time-barred.[70] The supreme court held that, notwithstanding defendant's stipulation, the trial court never had jurisdiction over the defendant and was powerless to make any ruling other than granting defendant's earlier motion to dismiss for lack of jurisdiction.[71]

The personal jurisdiction problem recognized in *Hatch* and *Sink* does not disappear under *Lemons*, even though *Lemons* assumes that a defunct summons may be revived and then confer jurisdiction. Adequate and official notice of a lawsuit is the defendant's due process right;[72] a summons exists to serve this function.[73] It would be constitutionally impermissible for a court, upon mere motion of the plaintiff, to proclaim jurisdiction over a defendant who has not received sufficient and effective notice by summons.[74] Thus, a trial court lacks constitutional authority to apply rule 6(b) after the fact in order to activate an inadequate summons and thereby compel a defendant into court.

Plaintiff Lemons, of course, did not rely merely on a rule 6(b) revival of her defunct May 2 summons[75] to establish jurisdiction over the defendant. She went one step further and sued out a second alias summons on September 10.[76] It was upon service of this September 10 summons that the trial court first gained personal jurisdiction over defendant.[77] At that point, the court refused to grant plaintiff's subsequent motion for a *nunc pro tunc* time extension in which to serve the May 2 summons.[78] The court may well have reasoned that granting such a motion would be back-dating its own jurisdiction by almost three months.[79] More importantly, the trial court may have realized that granting plaintiff's rule 6(b) motion would have affected defendant's rights as they stood before the court had obtained personal jurisdiction over it.[80] This would have conflicted directly with the due process requirement that "[u]ntil the party defendant is . . . brought into court, [its] rights are unaffected by the pendency of the action."[81] Under this analysis, the trial court might have concluded that using rule 6(b) to back-date validly acquired jurisdiction violated defendant's

70. *Id.* at 561, 202 S.E.2d at 143.

71. *Id.*

72. Mullane v. Central Hanover Bank, 339 U.S. 306, 313 (1950); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 10, 149 S.E.2d 570, 577 (1966); Collins v. Highway Comm'n, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953).

73. *Mullane* at 313; *see also* Wiles v. Welparnel Constr. Co., 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1973) (purpose of rule 4 is to mark assertion of jurisdiction over action).

74. *See Mullane*, 339 U.S. at 313; *B-W Acceptance Corp.*, 268 N.C. at 10, 149 S.E.2d at 577; *Collins*, 237 N.C. at 281, 74 S.E.2d at 713.

75. *Lemons*, 322 N.C. at 272-73, 367 S.E.2d at 656.

76. *Id.* at 273, 367 S.E.2d at 656; *see supra* text accompanying note 17.

77. *Lemons*, 322 N.C. at 273, 367 S.E.2d at 656. This September 10 summons did not relate back to the date the complaint was filed. *See supra* notes 17 & 48 and accompanying text. Thus, the statute of limitations had expired before the court ever obtained jurisdiction over defendant. Defendant-Appellee's New Brief at 3.

78. *See supra* text accompanying notes 19-21.

79. *See* Defendant-Appellee's New Brief at 3.

80. In *Lemons*, granting plaintiff's time enlargement motion at this point would have destroyed defendant's right to rely on expiration of the statute of limitations, a right defendant acquired prior to September 10. *See infra* text accompanying notes 86-88.

81. Hodges v. Home Ins. Co., 233 N.C. 289, 293, 63 S.E.2d 819, 822 (1951).

right to procedural due process.[82]

A second area of North Carolina law significantly upset by *Lemons* is the well-established precedent construing statutes of limitations rigidly.[83] Statutes of limitations provide security against stale claims;[84] they derive their "greatest benefit from . . . predictability."[85] North Carolina precedent supports this goal by dictating that expiration of plaintiff's limitation period vests in defendant an unqualified right to rely on the time bar.[86] Once this right has vested, a trial court that uses rule 6(b) discretionary power to assert prevesting date jurisdiction effectively extinguishes this right. North Carolina precedent strictly forbids a trial court from using its discretion in a way that will interfere with a litigant's vested rights.[87] More directly, state precedent requires that statutes of limitations be applied uniformly; alterations are not within the trial court's discretion.[88]

The North Carolina Supreme Court strongly stated this protective stance toward the statute of limitations in the well-known case *Shearin v. Lloyd*.[89] In *Shearin* the court rejected use of the "discovery rule" to preserve plaintiff's cause of action beyond the statutory limitations period.[90] Accordingly, the *Shearin* court held that plaintiff's negligence action accrued the day defendant surgeon performed an operation that left a surgical tool in plaintiff's abdomen, notwithstanding plaintiff's inability to discover the instrument until much later.[91] The *Shearin* court preached steadfast adherence to the legislatively imposed period of limitations in all cases, regardless of the merits of the plaintiff's

82. The supreme court did not consider this due process issue. Actually, it did not significantly mention that the trial court first obtained jurisdiction over defendant via the September 10 summons. It is unclear whether the high court viewed this step as indispensable to its holding or whether it would have reached the same result had plaintiff relied merely on the late service of her May 2 summons and a 6(b) motion to establish jurisdiction.

83. Because rule 4(d) provides a generous schedule of time extensions for service, and rule 4(e) allows an action to be recommenced after a discontinuance, the *Lemons* problem should arise only when the statute of limitations and the rule 4(d) 90-day grace period both have expired before the plaintiff becomes aware of the nonservice. Thus, application of rule 6(b) to rule 4(c) will amount, in most cases, to a retroactive amendment of the statute of limitations.

It is interesting to note that in *Lemons* itself, the "*Lemons* problem" should not have arisen. At the time defendant filed its motion to dismiss for lack of personal jurisdiction, plaintiff had more than 30 days in which to obtain an extension under rule 4(d). *See supra* notes 13-16 & 46-48 and accompanying text. As plaintiff's counsel commented after *Lemons* was handed down: "A lawyer has to stop just short of pleading his own malpractice to gain the benefit of this ruling." *Summons Resurrection Called 'Unbelievable'*, N.C. Law. Weekly, May 30, 1988, at 4, col. 1.

84. Shearin v. Lloyd, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1959).

85. Defendant-Appellee's New Brief at 8.

86. North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 84, 240 S.E.2d 345, 352 (1977) (legislative change in limitations period does not affect actions already barred under old law); McCrater v. Stone & Webster Eng'g Corp., 248 N.C. 707, 710, 104 S.E.2d 858, 861 (1974) (same); Waldrop v. Hodges, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) (same).

87. Gilchrist v. Kitchen, 86 N.C. 39, 41 (1882).

88. *Shearin*, 246 N.C. at 371, 98 S.E.2d at 514 (court must follow letter of law when applying statute of limitations); Stanley v. Brown, 43 N.C. App. 503, 507, 259 S.E.2d 408, 410 (1979) ("it is the duty of this Court to enforce the statute of limitations which the General Assembly has enacted to protect defendants against stale claims").

89. 246 N.C. 363, 98 S.E.2d 508 (1959).

90. *Id.* at 371, 98 S.E.2d at 514.

91. *Id.* at 370, 98 S.E.2d at 513-14.

action.[92] The court reasoned that only by uniform application could the purposes of the time bar—to provide security to potential defendants and to prevent the litigation of stale claims—be realized.[93]

North Carolina law also prohibits the legislature from extending the limitations period once a defendant has gained a vested right to rely on its expiration. In *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*[94] the North Carolina Supreme Court held that plaintiff's action—time-barred by a three year limitations period—was not revived when the legislature subsequently changed the limitations period in such actions to ten years.[95] The court reasoned that the new statute should apply to actions not yet barred at the time the law was enacted, but that could not be "deemed retroactive [so as to] impair [the defendant's] vested rights."[96]

Despite the firmness with which the court has applied the statute of limitations in the past, the *Lemons* decision gives the trial court discretionary power to set aside the time bar for an errant plaintiff who makes the proper motion. The court's newly found discretionary authority emanates either from the tribunal's inherent power to regulate procedures in disputes properly before it or from a grant of power by the legislature. Whatever its ultimate origin, the very existence of this discretionary power conflicts with well-entrenched precedent and produces results inconsistent with the purposes of statutes of limitations. Traditionally, the virtues of the time bar—security and predictability—have been advanced through "inflexible and unyielding" application.[97] Giving a trial judge discretion to ignore a statute of limitations undermines these purposes and turns the time bar into an "empty husk[ ] containing no meaning and providing no security."[98]

Rather than ponder the potentially adverse effect of its decision, the *Lemons* majority bypassed the jurisdiction and statute of limitations issues altogether and held for the plaintiff on the ground that the North Carolina Rules of Civil Procedure were intended to be construed *in pari materia*.[99] This conclusion

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92. *Id.* at 370, 98 S.E.2d at 514.

93. *See id.* at 371, 98 S.E.2d at 514.

94. 294 N.C. 73, 240 S.E.2d 345 (1978).

95. *Id.* at 84, 240 S.E.2d at 352.

96. *Id.*

97. *Shearin*, 246 N.C. at 370, 98 S.E.2d at 514; *see also* Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 86, 194 S.E.2d 817, 822, (1973) (quoting *Shearin*); Jewell v. Price, 264 N.C. 459, 463, 142 S.E.2d 1, 4 (1965) (same); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) (same).

98. Defendant-Appellee's New Brief at 8-9.

99. "Upon the same matter or subject. Statutes *in pari materia* are to be construed together." BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

The leading North Carolina case applying two rules of civil procedure *in pari materia* is Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986). In *Estrada* plaintiff filed a complaint the day before his statute of limitations expired. Two minutes after filing the complaint, plaintiff filed a notice of dismissal without prejudice pursuant to rule 41(a), thereby giving himself an additional year to reassert his claim. *See supra* note 11. The North Carolina Supreme Court disqualified the complaint, holding that rules 41 and 11 must be construed harmoniously: "[T]he complaint . . . was a sham pleading subject to being stricken" under rule 11(a). *Estrada*, 316 N.C. at 322, 341 S.E.2d at 543.

seems logical, particularly in light of the drafters' intent that the rules be applied harmoniously.[100] The court's conclusion is bolstered by the language of rule 6(b), which purports to apply to any rule not specifically mentioned as an exception.[101] As discussed below, however, the court erred by failing to take into account the fundamental differences in derivation and function between rule 4 and the rest of the North Carolina rules.[102]

Most of the North Carolina rules were patterned after the Federal Rules of Civil Procedure,[103] which seek to exalt the merits of an action over its procedural format.[104] The aim of the North Carolina rules is to "achieve simplicity, speed and financial economy in litigation."[105] Similarly, the federal rules seek to promote the "just, speedy, and inexpensive determination of every action."[106] In light of the similarities between the two rules systems, the North Carolina Supreme Court has announced that it will look to case law interpreting the federal rules for guidance in applying the North Carolina rules.[107] Despite ample precedent,[108] however, plaintiff Lemons did not cite in her brief one case applying federal rule 6(b)(2)[109] to federal rule 4.[110] To do so would have revealed that even under the liberally construed federal rules,[111] courts give deference to the rules regulating service of process when considering rule 6(b) time enlargements for service of summons.

In order to advance the goal of speedy and just dispute resolution, federal rule 4(j) "force[s] parties and their attorneys to be diligent in prosecuting their causes of action."[112] Accordingly, a summons must be served within 120 days of issuance or the action is dismissed without prejudice.[113] The plaintiff can

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100. *See supra* text accompanying note 32.

101. *See supra* text accompanying notes 34-37.

102. *See infra* notes 119-22 and accompanying text.

103. Sutton v. Duke, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970).

104. Foman v. Davis, 371 U.S. 178, 181 (1962).

105. Sizemore, *General Scope and Philosophy of the New Rules*, 5 WAKE FOREST INTRA. L. REV. 1, 6 (1968).

106. FED. R. CIV. P. 1.

107. Sutton v. Duke, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970).

108. Federal courts addressed the *Lemons* problem under analogous federal rules in numerous cases before *Lemons* was decided. *E.g.*, Putnam v. Morris, 833 F.2d 903 (10th Cir. 1987); Townsel v. County of Contra Costa, 820 F.2d 319 (9th Cir. 1987); Braxton v. United States, 817 F.2d 238 (3d Cir. 1987); Lovelace v. Acme Mkts., Inc., 820 F.2d 81 (3d Cir.), *cert. denied*, 108 S. Ct. 455 (1987); United States *ex rel.* DeLoss v. Kenner Gen. Contractors, 764 F.2d 707 (9th Cir. 1985); Wei v. Hawaii, 763 F.2d 370 (9th Cir. 1985); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985); Boykin v. Commerce Union Bank, 109 F.R.D. 344 (W.D. Tenn. 1986); Williams v. Allen, 616 F. Supp. 653 (E.D.N.Y. 1985); Arroyo v. Wheat, 102 F.R.D. 516 (D. Nev. 1984); Burks v. Griffith, 100 F.R.D. 491 (N.D.N.Y. 1984). The issue also has been addressed under the federal rules since *Lemons*. *E.g.*, Dominic v. Hess Oil V.I. Corp., 841 F.2d 513 (3d Cir. 1988).

109. "When by these rules . . . an act is required or allowed to be done at or within a specified time, the court . . . may . . . upon motion made after the specified period permit the act to be done where the failure to act was the result of excusable neglect." FED. R. CIV. P. 6(b)(2). Federal rule 6(b)(2) is substantially the same as North Carolina rule 6(b). *See supra* note 5.

110. Federal rule 4 differs materially from North Carolina rule 4. *Compare supra* text accompanying notes 46-50 (North Carolina rule 4) *with infra* text accompanying notes 112-14 (federal rule 4).

111. Schlagenhauf v. Holder, 379 U.S. 104, 121 (1964); Parker v. Heresz, 295 F.2d 731, 735 (7th Cir. 1961).

112. Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985).

113. FED. R. CIV. P. 4(j).

avoid dismissal only when he is able to "show good cause why service was not made" within 120 days.[114] Federal courts faced with the *Lemons* situation have insisted routinely that the party seeking the time enlargement meet both the rule 4(j) "good cause" standard and the rule 6(b)(2) "excusable neglect" standard.[115] These courts realize that the goals of prompt and fair dispute resolution can be met only when the plaintiff shows proper diligence in pursuing his action.[116]

Like the federal rule, North Carolina rule 4 is designed to ensure plaintiff diligence. Unlike the federal rule, however, the North Carolina rule does not measure diligence by a subjective definition such as "good cause," but rather by an objective criterion requiring the plaintiff to obtain an extension within a specified number of days.[117] Just as courts applying federal rule 6(b)(2) to service of process defer to the standard of diligence announced by federal rule 4(j), North Carolina courts in the *Lemons* situation should defer to the diligence standards of North Carolina rule 4. It is only through unrelaxed persistence on the part of the plaintiff that the purposes of the rules—simplicity, speed, and economy[118]—can be achieved.

Quite apart from federal courts' deference to the strictures of rule 4, there is another reason why Mrs. Lemons' motion to apply North Carolina rule 6(b) to North Carolina rule 4 should have been denied. In contrast to the other North Carolina Rules of Civil Procedure, rule 4 was not patterned after the federal rules, but is largely a recodification of well-developed North Carolina law.[119] Essentially, rule 4 duplicates a comprehensive and completely evolved scheme for service of summons.[120] The current rule 4 includes as a major component

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114. *Id.*

115. *E.g.*, Townsel v. County of Contra Costa, 820 F.2d 319, 320 (9th Cir. 1987); Braxton v. United States, 817 F.2d 238, 241-42 (3d Cir. 1987); Lovelace v. Acme Mkts., Inc., 820 F.2d 81, 84 (3d Cir.), *cert. denied*, 108 S. Ct. 455 (1987); United States *ex rel.* DeLoss v. Kenner Gen. Contractors, 764 F.2d 707, 711 (9th Cir. 1985); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1305 (5th Cir. 1985); Boykin v. Commerce Union Bank, 109 F.R.D. 344, 350 (W.D. Tenn. 1986); Arroyo v. Wheat, 102 F.R.D. 517, 518 (D. Nev. 1984).

Some cases imply that good cause is a more stringent standard than excusable neglect. *See, e.g.*, *Lovelace*, 820 F.2d at 84 ("legislative history provides only one example where an extension for good cause would be permissible—specifically when the defendant intentionally evades service of process") (citing 128 CONG. REC. H9848, 9852 n.25 (daily ed. Dec. 15, 1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4434, 4446 n.25). Other cases imply that the same conduct will fulfill both standards. *See, e.g.*, *Winters*, 776 F.2d at 1305 (good cause requires a showing sufficient to support a finding of excusable neglect). The specific interpretation of the good-cause standard of rule 4(j) is not important for the analysis in this Note, however. What is important is that federal courts consistently give deference to the 4(j) good-cause standard when applying rule 6(b)(2), even though 6(b)(2) announces its own standard as excusable neglect.

116. *Cf. Wei*, 763 F.2d at 372 (insufficiently stringent good-cause showing will undermine purpose of rules).

117. *See* N.C. R. CIV. P. 4(d). While the state and federal methods of defining diligence are different, the sanctions for laxity are equivalent. Under the North Carolina rule, failure to obtain a timely extension results in discontinuance with leave to recommence. *See supra* text accompanying notes 49-50. Under the federal rule, lack of diligence results in dismissal without prejudice. *See supra* text accompanying note 113. In either case, inattentiveness after the statute of limitations has run will result in the equivalent of dismissal with prejudice. *See supra* note 50.

118. *See supra* text accompanying note 105.

119. *See* N.C. R. CIV. P. 4 comment.

120. *See id.*

the historically liberal provisions enabling time extensions by alias summons.[121] It would be illogical to supplement through rule 6(b) an already generous and thorough scheme for service of process. Indeed, the maxim *expressio unius est exclusio alterius*, applied by the *Lemons* court to determine that the plain language of rule 6(b) governs rule 4(c), has been interpreted to mean that a comprehensive statutory provision excludes all other possible methods of performance.[122] Thus, if applied to rule 4 rather than to rule 6(b), the maxim would have yielded an opposite result.

The plaintiff in *Lemons* certainly presents a sympathetic figure for whom it is tempting to fashion a remedy. However, sympathy for a plaintiff should not defeat a defendant's due process right to adequate notice before being subjected to the jurisdiction of a court. At the least, *Lemons* has compromised the traditional functions of personal jurisdiction and statutes of limitations by allowing a court to back-date its own jurisdiction. At the worst, *Lemons* may have created an unconstitutional procedure to bring a defendant under the jurisdiction of the court.[123] In a case such as *Lemons*, it is wise to bear in mind the warning of Lord Campbell: " 'Hard cases must not make bad laws.' "[124]

Early in the 1989 session of the North Carolina General Assembly, House Representative Donald Dawkins advocated a terse response to *Lemons*. He proposed amending rule 6(b) specifically to exclude rule 4 from its scope.[125] Representative Dawkins proposed simply adding rule 4 to an existing clause of rule 6(b) listing those rules to which 6(b) does not apply.[126] The amendment would dictate that "neither the court nor the parties may extend the time for taking any action under Rules 4(a), (c), (d), (e), [or] (f) . . . except to the extent and under the conditions stated in them."[127]

Given that the *Lemons* court felt constrained by the rules of statutory construction, the appropriate body to overrule *Lemons* is the North Carolina General Assembly. The legislative response should be calculated to answer *Lemons* directly, regardless of whether the court interpreted the rules correctly. The heart of the *Lemons* opinion was the application of the maxim *expressio unius est exclusio alterius* to rule 6(b).[128] The appropriate legislative response to *Lemons* is to make rule 6(b) inapplicable to rule 4 even after application of the maxim. The amendment proposed by Representative Dawkins achieves this by including rule 4 in the list of specific exceptions to rule 6(b).[129] Representative Dawkins'

121. *Compare* Green v. Chrismon, 223 N.C. 724, 726-27, 28 S.E.2d 215, 216 (1943) (provisions under old statutes) *with supra* text accompanying notes 46-50 (provisions of current rule 4).

122. State *ex rel.* Attorney General v. Knight, 109 N.C. 333, 337, 85 S.E. 418, 420 (1915) ("[w]hen the law is in the affirmative, that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done . . . in another manner, upon the maxim *expressio unius est exclusio alterius*").

123. *See supra* notes 72-82 and accompanyng text.

124. Shearin v. Lloyd, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957) (quoting Lord Campbell).

125. H.R. 150, 139th N.C. Gen. Assembly (Feb. 6, 1989).

126. *Id.*

127. *Id.*

128. *See supra* text accompanying notes 33-37.

129. *See supra* text accompanying notes 35-36 & 125-27.

proposal should be enacted into law to alleviate the legal and conceptual problems created by *Lemons* in the areas of personal jurisdiction and statutes of limitations and to restore the procedures regulating service of process to their previous level of certainty.

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