the necessity of anticipating all possible theories of recovery embraced in the pleaded facts and of offering all evidence material to any argument which might be advanced later. If such evidence is objected to as irrelevant, offering counsel will be faced with the dilemma either of gambling that the argument at which it is aimed will not be advanced later or of revealing to his opponent a better theory than that upon which the opponent is proceeding. If surplus facts have been pleaded the only alternative open to perplexed counsel would seem to be to move that certain facts, irrelevant to the argument then being urged by the opposition but possibly relevant to another argument, be stricken from the pleadings.[22] Such tactics may result in a virtual return to "theory pleading" in spite of the intent of the Illinois Civil Practice Act to establish "fact pleading."[23]

Procedure—Federal Rules—Service of District Court Process Outside the District—[Federal].—The plaintiff brought an action for damages against the Franklin County Distilling Company in the United States District Court for the Western District of Kentucky and also named the National Distillers Products Corporation a party defendant. Franklin, a Delaware corporation, carried on business solely within the eastern district of Kentucky, while National, a Virginia corporation, had its principal place of business in the western district, in Louisville. The plaintiff, also of Louisville, caused both corporations to be served personally with process issued from the western district court. Upon Franklin's appearance to protest jurisdiction, *held*, that despite Rule 4(f)[1] of the Federal Rules of Civil Procedure, process of the district court does not extend beyond the boundaries of the district. *Richard v. Franklin County Distilling Co.*[2]

Before the adoption of the new federal rules in 1938, it was well established that service of process could not be made outside the federal district where suit was brought.[3] It was also settled that where two or more defendants "resided" in different

[22] Such a procedure would not have been open to the defendant in the instant case because there were no additional, nonessential facts in the pleadings. The plaintiff's amended complaint upon which the case was tried set forth the policy and the relevant facts as to the payment of premiums by the insured until the last premium upon which he had defaulted. All the facts alleged were appropriate to each of the arguments subsequently urged by the plaintiff.

[23] Ill. Rev. Stat. (1941) c. 110, § 157. For a discussion of fact pleading and a justification for allowing change of theory at trial, consult Clark, Code Pleading 174–78, especially 176 n. 137 (1928).

[1] Rule 4(f) provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and when a statute of the United States so provides, beyond the territorial limits of that state." Consult 28 U.S.C.A. foll. § 723c (1941) for the rules in their entirety.

[2] 38 F. Supp. 513 (Ky. 1941).

[3] Robertson v. Railroad Labor Board, 268 U.S. 619 (1925); Toland v. Sprague, 12 Pet. (U.S.) *300 (1838); United States Judicial Code §§ 51–52, 36 Stat. 1101 (1911), 28 U.S.C.A. §§ 112–13 (1927). This rule was applied to corporations. Herriage v. Texas & Pacific R. Co., 11 F. (2d) 671 (D. C. La. 1926); Gioia v. Clyde S. S. Co., 3 F. (2d) 822 (D.C.N.Y. 1924); J. E. Petty & Co., Inc. v. Dock Contractor Co., 283 Fed. 338 (D. C. Pa. 1922); Tauza v. Pennsylvania R. Co., 232 Fed. 294 (D.C. N.Y. 1916). At least one case allowed service of process outside the district. Wefel v. Brown & Son Lumber Co., 58 F. (2d) 667 (D.C. Ala. 1932); Lemon v. Imperial Window Glass Co., 199 Fed. 927 (D. C. Va. 1912) (semble).

federal districts of the state, suit could be brought in either district, and a duplicate writ issued by the court could be served by the marshal of the other district on the defendant residing in that district.[4] But since a corporation is regarded as a resident of the state of incorporation,[5] service of process under this rule could not confer jurisdiction over a foreign corporation not within the district.

It is clear that, considered alone, Rule 4(f) was adopted to remove such difficulties by allowing the process of one federal district court to run anywhere within the state in which the court sits.[6] There is evidence that the rule was intended particularly to apply to service of process on corporations doing business in other districts of the same state.[7] Nevertheless, the court in the instant case held that Rule 4(f) extends the jurisdiction[8] of the district courts and is, therefore, in conflict with Rule 82,[9] which prohibits such extension. The slight weight of authority among the district courts which have considered the point supports the holding in its result, but for different reasons.[10]

Rule 4(f) and Rule 82 are not, however, irreconcilable. The term jurisdiction may

[4] United States Judicial Code § 52, 36 Stat. 1101 (1911), 28 U.S.C.A. § 113 (1927); Regan v. Midland Packing Co., 298 Fed. 500 (D. C. Iowa 1924).

[5] Creager v. Collier & Son Co., 36 F. (2d) 781 (D. C. Texas 1929). This doctrine has not been changed by the decision in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165 (1939) (non-resident corporation subject to suit in federal court in district in which its appointed agent resides). In Federal Venue Requirements for Foreign Corporations, 49 Yale L. J. 724 (1940), the author comments adversely on the failure of the Neirbo case to affect this doctrine. But cf. Williams v. James, 34 F. Supp. 61, 65 (La. 1940), where the court says that the Supreme Court by the Neirbo case has given to a corporation a residence at the place where it does business.

[6] Consult 1 Moore and Friedman, Moore's Federal Practice 361 (1938).

[7] This application of Rule 4(f) was illustrated in an example given by Judge Donworth in Proceedings before the New York Institute on Federal Rules 292 (Am. Bar Ass'n 1938). For a view that the enforcement of Rule 4(f) is desirable, consult 1 Moore and Friedman, Moore's Federal Practice 360–63 (1938). It is even desirable in the Neirbo situation, note 5 supra, since a corporation may be allowed to avoid the consequences of the Neirbo decision by appointing agents for service of process in districts wherein it does not conduct business. Venue of Actions Against Foreign Corporations in the Federal Courts, 53 Harv. L. Rev. 660, 666–67 (1940).

[8] Thus it has been held that though service of process is in itself procedural, the effect of service is jurisdictional. Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422 (C.C.A. 2d 1916); cf. Petty & Co., Inc. v. Dock Contractor Co., 283 Fed. 341 (C.C.A. 3d 1922).

[9] "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." 28 U.S.C.A. foll. § 723c (1941).

[10] Carby v. Greco, 31 F. Supp. 251 (Ky. 1940) (Rule 4(f) held obnoxious to Rule 82 which embodies the enabling act); Melekov v. Collins, 30 F. Supp. 159 (Calif. 1939) (Rule 4(f) said to violate both enabling act and Rule 82); Gibbs v. Emerson Electric Mfg. Co., 29 F. Supp. 810 (Mo. 1939) (Rule 4(f) held limited by Rule 82, since the former attempts to enlarge the court's venue); see Contracting Division v. New York Life Ins. Co., 113 F. (2d) 864 (C.C.A. 2d 1940) (approving Melekov case, supra). Contra: Williams v. James, 34 F. Supp. 61 (La. 1940) (Rule 4(f) upheld on presumption that Supreme Court knew what it was doing); Devier v. George Cole Motor Co., 27 F. Supp. 978 (Va. 1939) (Rule 4(f) applied without supporting argument).

mean either[11] jurisdiction of the subject matter[12] or jurisdiction of the person.[13] The meaning which must be sought in this instance is the meaning which the Supreme Court intended[14] in its use of the term "jurisdiction" in Rule 82, and since the rules have the force of statute,[15] it is proper to resort to principles of statutory construction.[16] Rule 82 is an interpretation clause; such clauses ought not be extended beyond their necessary limits nor allowed to defeat the intention of the enacting body otherwise clearly manifested.[17] Further, where possibly conflicting sections of the same act can be rendered harmonious by reasonable interpretations of each, such interpretations must be made.[18] By these canons, "jurisdiction" in Rule 82 should be interpreted to mean jurisdiction of the subject matter; it does not then conflict with Rule 4(f), which plainly enlarges only the personal jurisdiction of the district court.[19]

Moreover, a literal reading of Rule 82 eliminates any conflict between it and Rule 4(f). Rule 82 speaks of the jurisdiction of "the district courts" in the plural. Rule 4(f), which allows the process of an *individual* court of one district to run throughout other federal districts of the same state, does not enlarge the *collective* jurisdiction of the district courts to which Rule 82 refers.

It has also been objected that Rule 4(f) is in derogation of the express limitation placed upon the Supreme Court in the enabling act to the effect that "said rules shall

[11] This twofold application of the term "jurisdiction" introduces the apparent circularity into the reasoning of the court in Jones v. Illinois Central R. Co., 188 Iowa 850, 859–60, 175 N.W. 316, 317–18 (1919), to the effect that the court must first have jurisdiction before it can acquire jurisdiction by service of process. Sometimes courts distinguish a third sort of jurisdiction, viz., jurisdiction of the particular cause, involving questions of venue. Petty & Co., Inc. v. Dock Contractor Co., 283 Fed. 338, 339 (D. C. Pa. 1922).

[12] 28 U.S.C.A. §§ 41–53 (1927).

[13] Pennoyer v. Neff, 95 U.S. 714 (1877); Blandin v. Ostrander, 239 Fed. 700 (C.C.A. 2d 1917); Schibsby v. Westenholz, L.R. 6 Q.B. 155 (1870).

[14] Enacting bodies can define the terms which they use, and courts will recognize and apply these definitions in construing the act. See Farmers' Bank v. Hale, 59 N.Y. 53, 62 (1874); Herold v. State, 21 Neb. 50, 53, 31 N.W. 258, 260 (1887); Jones v. Surprise, 64 N.H. 243, 245, 9 Atl. 384, 385 (1886).

[15] 48 Stat. 1064 (1934), 28 U.S.C.A. §§ 723b, 723c (1941), construed in the present case, 38 F. Supp. 513, 515 (Ky. 1941), and in Sibbach v. Wilson & Co., 108 F. (2d) 415 (C.C.A. 7th 1939) (Federal Rule 35(a) declared a legislative enactment).

[16] It is not certain that only the rules of statutory construction would be applicable since the new federal rules are not, strictly speaking, a statute, though they are given statutory effect. The rules of construction applicable to statutes, however, are the most stringent of interpretive rules. If construction is to be used in arriving at the Supreme Court's intent, application of these strict rules is permissible, since use of more lenient rules would lead to the same result.

[17] Black, Interpretation of Laws 191 et seq. (1896).

[18] Ibid., at 60 et seq.

[19] It is entirely possible that Rule 82 was promulgated to protect against the danger of affecting jurisdiction of the subject matter by possible interpretations of the liberal joinder, class action, and interpleader provisions of the new federal rules, and that the Supreme Court did not have Rule 4(f) in mind. Rule 82, therefore, is not rendered meaningless by the arguments in the present discussion.

neither abridge, enlarge, nor modify the substantive rights of any litigant,"[20] and is therefore void as a rule which the Court did not have power to promulgate.[21] This objection would seem to underlie the argument of the court in the principal case, since on a previous occasion this same court stated that Rule 82 was merely a restatement of the restrictions of the enabling act.[22]

Enlarging the personal jurisdiction of a district court, by means of an extension of the territorial limits of service of process, is, however, a matter of procedure rather than of substance.[23] The essential function of service of process is to give the defendant formal notice of the suit and an opportunity to defend himself.[24] The territorial limit is but a matter of convenience in the proper performance of this function.[25] Labelling the extension of the territorial limit a matter of procedure is, therefore, clearly in accord with the principle that the proper grounds for distinguishing between substance and procedure should be on the basis of the function to be served.[26] Furthermore, Rule 4(f) was regarded as procedural by the advisory committee which aided the Supreme Court in formulating the rules[27] and has been so regarded by textwriters.[28]

Finally, Rule 1 of the new rules requires that the rules "be construed to secure the

[20] 48 Stat. 1064 (1934), 28 U.C.S.A. § 723b (1941).

[21] This argument was accepted in Melekov v. Collins, 30 F. Supp. 159 (Calif. 1939).

[22] Carby v. Greco, 31 F. Supp. 251 (Ky. 1940).

[23] "The chief difficulty in drawing this distinction is that the terms involved have acquired no settled meaning." Sunderland, Character and Extent of Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise, 21 A.B.A.J. 404, 405 (1935). It has even been contended that the legislature has no power to impose procedural rules on the courts. Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).

[24] See Nations v. Johnson, 24 How. (U.S.) 195, 203 (1860); Toland v. Sprague, 12 Pet. (U.S.) *300, *329 (1838); Buchanan v. Rucker, 9 East 192 (K.B. 1808).

[25] Territorial limits for the service of process of district courts have been extended to include the entire state in many other cases by act of Congress. 28 U.S.C.A. § 113 (1927) (suits in states containing more than one district where two or more defendants reside in different districts); § 115 (suits of local nature); § 116 (property in different districts of same state); 47 U.S.C.A. § 13 (1928) (suits against a railroad or telegraph company whose agent fails to operate line in certain manner). Territorial limits have even been extended to include the entire United States. 15 U.S.C.A. § 5 (1941) (bringing in additional parties under the Sherman Act).

[26] ". . . . no intelligent conclusion can be reached in any particular case until the fundamental purpose for which the classification is being made is taken into consideration." Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 355–56 (1933). Consult also Stumberg, Principles of Conflict of Laws 148 (1937); Sunderland, op. cit. supra note 23. Professor Kocourek regards Cook's analysis as the best yet produced. Kocourek, Substance and Procedure, 10 Fordham L. Rev. 157 (1941).

[27] Clark, in Proceedings before the Cleveland Institute on Federal Rules 205–6 (Am. Bar Ass'n 1938); Mitchell, in Proceedings before the Cleveland Institute on Federal Rules 183 (Am. Bar Ass'n 1938); Report of Supreme Court Advisory Committee on Rules for Civil Procedure 13, 14 (April 1937); Advisory Committee Preliminary Draft 10–12 (May 1936).

[28] 17 Hughes, Federal Practice 201–4 (1940); 1 Moore and Friedman, Moore's Federal Practice 361 (1938).

just, speedy, and inexpensive determination of every action."[29] The application of Rule 4(f) serves this purpose without serious inconvenience to corporate defendants.

Workmen's Compensation Acts—Compensation—Right of Claimant Previously Compensated by Lump Sum Settlement for Permanent Total Disability to Compensation for Subsequent Injury—[Washington].—The claimant sustained a serious injury to his back in 1933 while engaged in extrahazardous employment and in 1938 was classified under the Washington Workmen's Compensation Act as permanently and totally disabled.[1] A monthly pension was awarded,[2] but upon the petition of the claimant and his wife this pension was converted into a lump sum payment under Section 7681 of the act.[3] Although this settlement was made in good faith, the claimant subsequently recovered sufficiently to return to extrahazardous employment with another employer, in whose service he received an injury to his hand in 1939. The Supervisor of Industrial Insurance rejected his claim for compensation for the hand injury, but upon a rehearing the Joint Board of the Department of Labor and Industries reversed this decision. The superior court affirmed the Joint Board's finding for the claimant. On appeal the supreme court *held*, that the claimant could not, in legal effect, be further disabled, since he had already received the "highest disability rating" and the maximum compensation allowable under the act. Judgment reversed, one justice dissenting. *Harrington v. Dept. of Labor and Industries.*[4]

Consideration of the Washington Workmen's Compensation Act is particularly important because the few cases from other states involving the same problem were decided under diverse statutes.[5] The claimant in the instant case requested an additional

[29] 28 U.S.C.A. foll. § 723c (1941).

[1] The provision under which the claimant was classified defines permanent total disability as ". . . . loss of both legs, or arms, of one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation." Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b).

[2] Such a monthly pension award is payable only during the period of disability. Wash. Rev. Stat. Ann. (Remington, 1932) § 7679(b).

[3] Upon the written application of the beneficiary and within the discretion of the Department of Labor and Industries, a monthly pension for permanent total disability may be converted to a lump sum payment which shall be equal or proportionate to the value of the annuity then remaining, but in no case to exceed the sum of $4,000. Wash. Rev. Stat. Ann. (Remington, 1932) § 7681. The claimant received a permanent partial disability award of $600.00, a pension payment of $36.56, and a permanent total disability award of $3,363.43, making a total of $3,999.99.

[4] 113 P. (2d) 518 (Wash. 1941).

[5] Compensation for further injuries was denied claimants still receiving pension payments under prior permanent total disability awards in Ingram v. Rainey, Inc., 127 Pa. Super. 481, 193 Atl. 335 (1937), construing Pa. Stat. Ann. (Purdon, 1939) tit. 77, §§ 511–13, and in Van Tassel v. Basic Refractories Corp., 216 App. Div. 774, 214 N.Y. Supp. 491 (1926), construing the New York Workmen's Compensation Law, N.Y.L. 1922, c. 615, discussed note 11 infra. But a workman previously awarded the maximum payments allowable under the Oklahoma Workmen's Compensation Act nevertheless received an award for temporary total disability upon a second injury. Asplund Construction Co. v. State Industrial Com'n, 185 Okla. 171, 90