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Variance and Failure of Proof in Montana

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Thus, in Montana, compliance with the statute is a condition precedent to application of the doctrine of relation back. A failure to comply does not render a completed appropriation invalid. It does, however, date the acquired right as of the date of actual application of the water to a beneficial use. In order to secure the benefit of relation back, it is necessary to comply with the provisions of the statute, for a failure to comply therewith amounts to a waiver of the doctrine of relation.

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VARIANCE AND FAILURE OF PROOF IN MONTANA

In Montana, and in code states generally, there are three recognized degrees of deviation between pleading and proof. They are in the order of their seriousness, immaterial variance, material variance, and failure of proof. Material variance is defined as any variance which "has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits,"[1] and when such variance occurs the court may order the pleadings to be amended upon such terms as may be just. A variance which does not so mislead the adverse party is deemed immaterial, and the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.[2] A failure of proof arises where the allegation of the claim or defense is unproved, not in some particular or particulars only, but in its general scope and meaning.[3]

There is a well defined distinction between material and immaterial variance. Formal, technical or slight variances will be considered immaterial and either disregarded or amended by the court's order.[4] Material variances must be objected to, and before a variance will be treated as material the injured party must show to the court's satisfaction that he has actually been misled and in what particulars.[5] If the objection is not made, the point is waived and the pleading will be held to be amended to conform to the proof, if necessary, on appeal.[6]

There is more difficulty in marking the line between vari-

[1]R.C.M. 1947, § 93-3901 (9183).
[2]R.C.M. 1947, § 93-3902 (9184).
[3]R.C.M. 1947, § 93-3903 (9185).
[4]Baker v. Briscoe (1888) 8 Mont. 214, 19 P. 589.
[5]Wilcox v. Newman (1920) 58 Mont. 54, 190 P. 138.
[6]Mosher v. Sutton's New Theatre Co. (1913) 48 Mont. 137, 137 P. 534.

ance and failure of proof. A failure of proof exists wherever the cause of action stated in the complaint is unproved, either because of complete lack of evidence to support the material allegations of the complaint, or because an attempt has been made to prove some cause of action other than that declared upon.[7]

In either case, the consequences are vastly different from those of variance. Objection need not be made when the evidence is offered, but may be made at any time during the trial or may be made for the first time on motion for a new trial.[8] Further, while variance may be cured by amendment at any stage of the trial, failure of proof may not.[9]

Under the codes, the method of distinguishing between variance and failure of proof has a far reaching effect in the field of pleading. The number of cases thrown out of court on purely technical grounds has been in direct proportion to the strict or liberal nature of the test used to determine whether a particular discrepancy between pleading and proof is an immaterial variance, a material variance, or a failure of proof. Though one of the primary purposes of the codes of civil procedure was to do away with excessively technical rules of pleading and achieve a swift and thorough adjudication of the rights of the parties, the courts of many jurisdictions have circumvented this purpose by a judicial construction of the code rules almost as strict as that which prevailed at common law. Thus, the courts of several states[10] have held that the complaint must not only state facts sufficient to constitute a cause of action but must proceed upon a definite theory of recovery, and the evidence produced must not only support the facts alleged, but also the particular theory, or there will be a failure of proof. This view was stated in the Indiana case of *Mescall* v. *Tully*:[11]

> "It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made elastic so as to take form with varying views of counsel."

[7]Gregory v. Chicago M. St. P. Ry. (1910) 42 Mont. 551, 113 P. 1123.
[8]Forsell v. Pittsburgh and Montana Copper Company (1908) 38 Mont. 403, 100 P. 218.
[9]Legatt v. Palmer (1909) 39 Mont. 302, 102 P. 327.
[10]Albertsworth, *The Theory of the Pleadings in Code States*, 10 CALIF. L. REV. 202 (1921). Professor Albertsworth includes in this category New York, Massachusetts, Indiana, Missouri, Nebraska, Minnesota, South Dakota, Kentucky, and New Mexico.
[11](1883) 91 Ind. 96.

In these states, a complaint may state facts sufficient to constitute a cause of action, and sufficient evidence may be introduced in support of these allegations of fact to justify a verdict for the plaintiff, only to be reversed for failure of proof in the appellate court because the proof did not support the particular theory upon which the court presumed the pleading was drawn.

The test used to determine whether a particular deviation is a variance or failure of proof in such states is: Does the evidence sustain the legal theory upon which the complaint was apparently drawn? The answer to this question will depend to a great extent on whether the court believes that the set of facts stated in the complaint constitute a tort action or a contract action, a law case or an equity suit, or a case arising under one statute or another, etc. Surprise is not an element. A piece of evidence can be fully known to both parties and indispensible to the trial of the case, yet its introduction may bring about a failure of proof and a new trial.

This problem has troubled courts ever since the inception of the codes. It was discussed by Justice Peckham in 1872, dissenting from the holding of the majority of the New York court in the case of *DeGraw* v. *Elmore*.[12] The case was one in which the plaintiff alleged that he had paid the defendant $9,000 for worthless stock because of the defendant's fraudulent misrepresentations of its value. It was shown at the trial that the $9,000 had not actually been paid, but had been credited upon a pre-existing debt. The majority of the court held there was a failure of proof because the evidence proved a contractual right while the allegations of the complaint appeared to have contemplated an action of fraud. In his dissent, Justice Peckham said:

> ". . . First. The merits of the cause have been fully tried, without surprise to either party. No matter what the form of the pleadings, the trial must always involve the same question of fraud in the sale of stock to the plaintiff.
>
> "If the complaint be simply for the original money due to the plaintiff, the defendant sets up payment by this stock, and then the question arises whether the sale was fair or fraudulent. It is the only question in dispute, and that question has been fairly tried. The only benefit that could arise by the proposed amendment of the complaint would be to have pleadings that would conceal the real matter in dispute.
>
> "Second. The complaint is suficient as it is. It is

[12](1872) 50 N.Y. 1.

within the plain meaning and spirit of the code. It 'contains a statement of the facts constituting the cause of action in ordinary language, in such a manner to enable a person of common understanding to know what is intended.'

"The only objection is that it alleges that the plaintiff paid the money for the stock, when in fact, the stock was received by the plaintiff in payment of $9,000, money defendant confessedly owed plaintiff, a mistake in stating the precise consideration. The defendant understood the complaint; there was no pretense that he was misled by it.

"This variance between the pleading and the proof, the court had full authority to amend or disregard under the Code.

"This question of pleading has been a terror to suitors for many years before the Code. Legislatures have sought in vain to give relief, and now, if this decision be sustained, I think our movement is backward much more than half a century.

"England was our original model, but she is far more liberal in disregarding variances in pleadings, both civil and criminal, than we are.

"By our Code we have fully repudiated the practice of special pleading, and this decision seems to hold that we shall not have the benefit of the Code.

"Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried.

"But the cases of loss and damage to suitors by some defect of pleading have been innumerable."

The *DeGraw* case illustrates some of the difficulties of this method of determination. The appellate court found a failure of proof where the trial judge and the dissenting justice of the Supreme Court held there was only an immaterial variance.

The New York cases coming after *DeGraw* v. *Elmore* are a welter of confusing and contradictory statements as to the effect of variance, failure of proof, and other aspects of pleading.[13] Other states have experienced the same difficulty and the rigid and formalistic results have led to changes by judicial decision[14] and some attempts at change by legislation[15] where the courts were inflexible. The basic nature of the problem

[13]For a resume of the decisions see 10 CALIF. L. REV. 206, and Clark, HANDBOOK OF CODE PLEADING (2nd ed. 1947) § 43, p. 259.

[14]In this group Professor Albertsworth places Wisconsin, Kansas, California, and Arkansas.

[15]Indiana Annotated Statutes, Burns, 1933 § 2-1071, 2-3231.

was emphasized by Judge Clark in his work on code pleading, where he concluded:

> "While many cases seem to treat the problem of variance as an isolated one, it is in substance the fundamental pleading question of how a case or defense must be stated."[16]

More in harmony with the spirit of code pleading, and simpler and more effective in its application is the rule adopted in some other jurisdictions, of which Connecticut, Rhode Island, and Maryland are typical. The test is simply an extension of that used to distinguish between material and immaterial variance: Has the adverse party been misled to his prejudice in maintaining his action or defense on the merits?[17] In these states the important consideration is not whether the evidence is within the scope of the cause of action apparently contemplated by the complaint, but whether the pleading, fairly construed, is sufficient to notify the adverse party that this issue will be raised.

It should be noted here that this test does not obliterate the distinction between material variance and failure of proof, though the same method is used to determine the presence of each. Under this system a material variance is declared when there is a deviation between pleading and proof which has misled the other party, but which may be cured by amendment. A failure of proof is a deviation so misleading and prejudicial that no amendment will cure it. The difference is one of degree to be determined by the court.[18]

A good statement of the operation of this rule is given in the two Wisconsin cases, *Bannen* v. *Kindling*[19] and *Bieri* v. *Fonger*.[20] In the *Bieri* case the court said:

> ". . . in testing a complaint for sufficiency the ques-

[16]Clark, *op. cit.* p. 740.

[17]In Rose v. Van Bosch, 119 Conn. 514, 177 A. 566 (1935) the court said: "Every variance is not a fatal variance. Where the difference between the allegations and the proof is so slight and unimportant that the adverse party is not misled, it is generally treated as an immaterial variance, but where the difference is so substantial that the adverse party is misled by the averment and would be prejudiced on the merits of the case, it may be held to be a fatal variance, though the court may permit an amendment to the pleading to conform to the proof. In this state, all immaterial variances are to be wholly disregarded, and material variances may be cured by amendment at any stage of the trial, and if the adverse party has been misled to his prejudice, or put to additional expense, or if it is necessary to postpone the trial, the amendment is to be allowed only upon terms fixed by the court."

[18]*Ibid.*

[19](1910) 142 Wis. 613, 126 N.W. 5.

[20](1909) 139 Wis. 150, 120 N.W. 862.

tion is not whether it states the cause of action the pleader had in mind, or states the facts essential to a cause of action with technical accuracy and certainty, but is, as said in the initial case,[21] whether, giving the pleading the benefit of every reasonable inference it expressly or by inference, or both, states a good cause of action.

"In harmony with the foregoing rule if a good cause of action is established upon a trial and all controversies in reference to the matter are tried fully without objection and such cause is within the jurisdiction of the court and might have been but was not fully pleaded or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to correspond with the cause proved, either before or after verdict, saving the substantial rights of the adverse party, or, if need be to sustain the judgment, it will, on appeal, be deemed amended in accordance with the judgment. This has been declared so many times that it has become quite elementary. The fact is that there is little room if any, for more technicalities in our system of jurisprudence. It deals with rights and remedies for the sole purpose of the attainment of justice, not for the purpose of dignifying into a controlling feature any of the numerous little inconsequential defects that may arise in the course of litigation, not seasonably mentioned by the adverse party, or, if mentioned, not affecting him substantially in any aspect of the matter. Here all the facts were stated essential to a cause of action for damages for assault and battery. If the pleader had, in addition, stated defectively a cause of action for trespass to real estate, but in a manner indicating that a cause of action of that character was in mind, the complaint would have been held good on demurrer because of facts stated constituting the cause of action for assault and battery. . . ."

In the *Bannen* case, it was objected that the cause of action proved was a different one than that declared upon and the court said:

"The last proposition is that the complaint shows that plaintiff rescinded the agreement for the formation of a corporation, which is the foundation of the cause of action and, as he elected to rescind, he cannot proceed for specific performance.

"This last proposition seems to have sprung from a variety of misconceptions: (a) Plaintiff attempted to

[21]The court is referring to Swift v. James (1880) 50 Wis. 540, 7 N.W. 656, a case involving a similar fact situation but not presenting any issue of variance or failure of proof.

> state a cause of action for specific performance of the agreement to form a corporation, and to participate therein in equal proportions, and that no other cause of action is, therefore, available on the pleading. Plaintiff evidently did not attempt to state any particular cause of action by name. He intended to state, and seems to have succeeded well in stating, a history, in detail, of the making of the contract with appellant, Kindling, the acts done under it by both parties, the breach of it by Kindling, and participation in his wrongdoing by others who thereby became connected with the subject of the action, intending to state plainly all facts and praying, specifically, for such relief, leaving it to the court, upon the case as ultimately established by evidence, to award the proper relief. That was right. Plaintiff's cause of action is not, necessarily, for specific performance, as we have indicated. It is for any relief within the field covered by the pleadings, which may be established by the evidence."

These jurisdictions show a corresponding tendency to interpret liberally the language of pleadings. An illustrative case is *D'Onofrio* v. *First National Stores, Inc.*,[22] decided in the Supreme Court of Rhode Island, involving the application of certain sections of the Rhode Island Sales of Goods Act.[23] The questioned portion of the complaint read:

> "And plaintiff says that the defendant corporation did then and there impliedly warrant the quality or fitness of the aforesaid canned corn for human consumption. And plaintiff avers that there has been a breach of the aforesaid implied warranty of quality or fitness."[24]

The defendant claimed that the complaint was drawn under paragraph 15 (1)[25] of the statute, but that the proof brought the case within 15 (4).[26] The court concluded that the complaint was drawn mostly under 15 (2),[27] saying:

[22](1942) 68 R.I. 144, 26 A. (2d) 758.
[23]R.I. Gen. Laws, 1938, Ch. 459.
[24]Note 21, *supra*.
[25]"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's judgment (whether he is the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose."
[26]"In the case of a contract to sell or a sale of a specific article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose."
[27]"When goods are bought by description from one who deals in goods of that description, there is an implied warranty that the goods shall be of merchantable quality."

> "Undoubtedly certain language of the plaintiff's declaration closely resembled part of the language appearing in 15 (1). Nevertheless the plaintiff has not declared on said subsection by specific reference thereto by number, nor has she in her declaration quoted from said subsection. On the other hand, the portion of her declaration in which she alleges the defendant's implied warranty and the breach thereof tends to indicate that she had 15 (2) in mind as a basis for her recovery. . . . It may be noted that the word 'quality' occurs only in said 15 (2)."

It decided that the defendant's claim of failure of proof was groundless, and said:

> "The declaration, therefore, sounds partly under 15 (1) and partly under 15 (2). It appears to contain in the portion above quoted an allegation in substance that there was on the part of the defendant an implied warranty of the merchantability of the corn in question, which warranty had been breached. While the declaration may have been open to the criticism that it was vague and indefinite, if not duplicitous, nevertheless it was not demurred to, and no bill of particulars was asked for by the defendant. Under such circumstances the plaintiff can take advantage of such proof as may properly be applicable to any part of her declaration, and the defendant is not in a position to urge that there is a failure of proof or a variance between the allegations of the declarations and the plaintiff's evidence in support thereof. We find, therefore, that there was no such material failure of proof or variance in the above respect as would justify the direction of a verdict for the defendant on that ground."

The rationale of the movement toward liberality of construction was summed up in *Rose* v. *Van Bosch*:[28]

> "It is a fundamental rule that the proof must correspond with the allegations, and a discrepancy in this regard was held at common law to constitute a variance. The doctrine of variances, founded in the strict logic of pleading, made a wreck of many meritorious actions and defenses where the pleader had misconceived his facts or been disappointed in his proof. . . . 'The codes, while not departing from the rule that the allegations and the proof must correspond, have so far modified the common law doctrine of variance as to apply it sensibly for the furtherance, rather than the defeat of justice.' Bryant, *Code*

[28]Note 17, *supra.*

Pleading, p. 304, #252. 'It was the purpose of the practice act, however, to do away with technicalities in pleading and discourage claims of variance.' *Osborn* v. *Norwalk,* 77 Conn. 663."

In Montana, the narrower view has been the rule, but there is a tendency to greater liberality in some of the later cases. Although listed by legal writers[29] as not having the "theory of the pleadings" doctrine, Montana has adhered to a very narrow concept of cause of action,[30] and this, coupled with the rigid test as to what is a variance and what is a failure of proof, has subjected pleading in this state to most of the evils found in the strict "theory" states.

One of the first and most frequently cited cases is *Pierce* v. *Great Falls & Canada Ry.*[31] This was a case in which a passenger was injured when the defendant's train was derailed. The complaint alleged that the derailment had been caused by the negligence of the railroad in failing to provide a properly equipped engine, train, and roadbed, and employees competent to discharge their duties. The railroad's answer alleged that the derailment was caused by an act of God, a violent and unprecedented windstorm which blew the train off the track. The plaintiff's reply denied that there was any such violent wind raging. Her proof was confined to an attempt to show that the railroad had been negligent in sending the train out in such a storm. The defendant's motion for non-suit on the grounds of failure of proof was denied and the jury found for the plaintiff. Upon appeal, the Supreme Court held that there was a failure of proof and the lower court should have granted the non-suit. The case, however, does not attempt to lay down a definite rule as to what constitutes failure of proof, since the plaintiff's evidence was in direct contradiction to specific allegations of her complaint and reply.

The next important case on the subject was *Spellman* v. *Rhode.*[32] There the plaintiff, a homesteader, had been deprived of some of the lands he claimed under the federal homestead law, by the defendant, who had moved in and occupied them while the plaintiff was away, driving the plaintiff off the land with threats

[29]10 CALIF. L. REV. p. 222; Clark, CODE PLEADING, p. 263, note. 156.
[30]See the opinion of Justice Calloway in Glass v. Basin & Bay State Mining Co., (1904) 31 Mont. 21, 77 P. 302, (citing Indiana decisions); Outlook Elevator Co. v. American Surety Co. of New York, et al, (1926), 70 Mont. 8, 223 P. 905; also the dissent of Justice Angstman in Mason v. Madsen (1931) 90 Mont. 489, 4 P. (2d) 475.
[31](1899) 22 Mont. 445, 56 P. 857.
[32](1905) 33 Mont. 21, 81 P. 395.

of violence when he attempted to assert his rights. The complaint contained many allegations proper only to an action in the nature of ejectment, but the trial court adopted the theory that it was a summary action for forcible entry under the statute,[33] which read:

> "Every person is guilty of a forcible entry who either: (1) By breaking open doors, windows, or other parts of house, or by any kind of violence or circumstances of terror enters upon or into any real property or mining claim; or (2) who, after entering peaceably upon real property or mining claim, turns out by force, threats or menacing conduct, the party in possession."

The proof established the entry by the defendant and the subsequent turning out of the plaintiff by force and threats, and a verdict was rendered for the plaintiff. From the judgment, and an order denying a new trial, the defendant appealed, claiming that the complaint did not state a cause of action and that the evidence was insufficient to support the verdict. The court found the complaint sufficient, holding that it stated a cause of action under the first subdivision of the statute. Upon the second ground of appeal, however, it held that the evidence had proved a cause of action under the *second* subdivision and there was, therefore, a failure of proof.[34] It should be noted that there was no claim by the defendant that he was misled in making his defense by the allegations of the complaint. The court decided that he *might have been misled* and that this was sufficient for a failure of proof.[35] This case was followed by the Montana courts for many years.

The case of *Kalispell Liquor & Tobacco Co.* v. *McGovern et al.*[36] was decided at the same term of court as the *Spellman* case. It was a case in which one defendant, Kipp, had guaranteed the payment for all goods bought by the other defendant, McGovern. The promise was not in writing and confessedly void under the

[33] R.C.M. 1895, § 2080; R.C.M. 1947, § 93-9701 (9887).

[34] A comparison of this case with D'Onofrio v. First National Stores, Inc., quoted on pp. 6 and 7, will illustrate the completely different approach to the question of construction of pleadings which accompanies the difference in the rule on variance and failure of proof.

[35] "The defendant is entitled to know with reasonable certainty what defense he is required to make. It seems manifest that, when charged with forcible entry, by means of violence and circumstances of terror, he cannot be convicted upon evidence which tends only to show that he entered peaceably, and thereafter, by force, threats, or menacing conduct, turned the plaintiff out. The contention that the evidence is insufficient to support the verdict must therefore be sustained."

[36] (1905) 33 Mont. 394, 84 P. 709.

statute of frauds. The plaintiff, nevertheless, brought suit on the promise and attached Kipp's property, whereupon Kipp again promised to pay, this time in writing, in consideration of the dissolution of the attachment by the plaintiff. The present suit was brought upon the original contract of purchase, but the proof offered sustained only the second, written, contract. There was a verdict and judgment for the plaintiff in the lower court, but the Supreme Court held there was a failure of proof, because one contract had been declared upon and another proved.

Three years after the *Spellman* decision, the case of *Forsell* v. *Pittsburgh and Montana Copper Co.*[37] came before the court. The plaintiff, a miner, had been injured when the cage in which he was riding slipped down the shaft from the level where he was at work. The complaint alleged:[38]

> "The defendant copper company disregarded and failed in its duty of using ordinary care to make the said place where plaintiff was at work reasonably safe, and it negligently permitted the brakes on said engine to be defective and in such condition that no man could clamp them tight enough to prevent the cage from slipping down the shaft when the cage would be placed at rest by said engineer."

Under this allegation the trial court permitted the introduction of evidence tending to show that the brake was too light for the work imposed upon it, that the exhaust was improperly connected, and that the effect of the back pressure of steam was injurious. At the conclusion of the plaintiff's case, the defendant moved for a non-suit on the grounds of failure of proof but the motion was overruled and the plaintiff had judgment. From the judgment and an order denying a new trial, the defendant appealed. The Supreme Court reversed the decision of the lower court and found that there was a failure of proof. It held that none of the evidence should have been admitted except that which showed the negligent disrepair of the brake itself. The doctrine of the *Spellman* case was quoted with approval, and there was no consideration of whether or not the defendant had been misled.

The same manner of analysis was followed in the case of *Knuckey v. Butte Electric Ry. et al.*[39] in which the plaintiff was allowed, under an allegation that a street car started suddenly while he was in the act of alighting, to prove that the car had not stopped, but had slowed down and then speeded up with a violent jerk, throwing him to the ground. The trial court held

[37] (1908) 38 Mont. 403, 100 P. 218.
[38] *Ibid.* p. 407.
[39] (1910) 41 Mont. 314, 108 P. 785.

this an immaterial variance and overruled a motion for a non-suit. This result was reversed in the Supreme Court, which held that there was a failure of proof. The court devoted much of its opinion to pointing out the differences between the allegations of the complaint and the proof produced, and the differing theories of law which might be advanced, etc., but gave no consideration to the question whether the defendant had been so misled that he was unprepared to meet these changes.

The *Knuckey* case was followed by the case of *Ryan Co.* v. *Russell*,[40] in which the trial court had overruled both the defendant's motion for non-suit, on the ground of material variance, and the plaintiff's application to amend. The plaintiff had pleaded a written contract and proved the contract with a number of modifications. In holding that there was a material variance, the court reviewed the statutory sections at some length,[41] and then said:

> "It is often difficult to distinguish between a material variance and a failure of proof, and this record illustrates the difficulty as well as one could. We are inclined to the view that it cannot be said that the allegations of the complaint in their general scope and meaning are unproved, but the variance was such as in the ordinary course of the trial of a lawsuit would prejudice the defendant. He may not have been able to demonstrate that he was unable to meet the changed conditions solely because he had not been notified of plaintiff's claim that the original contract had been modified; but the character of the variance was such that the statement by his counsel that the defendant was taken by surprise, that he was not prepared to meet the evidence of the modification, and that he would be pre-

[40] (1916) 52 Mont. 596, 161 P. 309.

[41] "Our Code recognizes three degrees of disagreement between the pleadings and proof. A *material* variance is one which actually misleads the adverse party to his prejudice in maintaining his action or defense on the merits. An *immaterial* variance is a discrepancy between the pleading and proof of a character so slight that the adverse party cannot say that he was misled thereby. A *failure of proof* results when the evidence offered so far departs from the cause of action pleaded that it may fairly be said that the allegations of the pleading in their general scope and meaning are unproved. If the variance is a material one the court should permit the pleading to be amended, upon such terms as may be just. If the variance is immaterial, the court may direct the facts to be found according to the evidence, or may permit the pleading to be amended without the imposition of terms. If there is a failure of proof, of course, there is no ground for amending and the offending party is out of court. From necessity these statutes are very general in their terms. No hard and fast rule can be prescribed for determining whether in a given instance a party has actually been misled to this prejudice. Every case must depend upon its own peculiar facts and circumstances."

judiced in making his defense on the merits, should have been accepted as sufficient proof of the facts. . . .

"The justice of the case requires that a new trial be had in order that the pleadings may be redrafted properly and the cause tried upon its merits and a correct theory."

The court also rather emphasized the view that the function of pleadings is to form issues for the trial, and not primarily to notify the adverse party of the issues to be tried, saying:

"Counsel for the respondent concede that there was a variance between plaintiff's pleading and proof, but insist that it was not of sufficient consequence to warrant a new trial. The purpose of pleadings is to present the issues for trial. The complaint in this case is intended to set forth in legal and logical form the plaintiff's cause of action, and, with the answer and reply, to present a proposition affirmed on the one hand and denied on the other. The object of the complaint is to apprise the defendant of the precise points upon which he will be called to offer proof."[42]

The decisions up to and including the *Russell* case indicate that at that time there was no positive method of distinguishing between the various degrees of discrepancy between the pleading and proof. The differentiation between material variance and failure of proof depended completely upon whether the judges felt that the evidence present left the allegations of the complaint unproved in their general scope and meaning. In these cases the court placed great emphasis upon the possibility that the adverse party *might be* misled by a deviation from the plead-

[42]A further illustration of the differences in the manner of construing pleadings engendered by the different rules upon variance and failure of proof may be had by contrasting the above statement as to the purpose of pleadings with the approach of the Rhode Island court in Rose v. Van Bosch, previously cited, where the court stressed the function of pleadings only in notifying the adverse party of the claim against him saying:

"The trial court's conclusion was that 'there was a material variance between the amended complaint and the proof,' as the complaint alleged the turning over of a sum of money while the proof was that no money was turned over, but a cause of action was assigned. . . . The amended complaint in the instant case clearly shows that the plaintiff based his action on the claim that the defendant Carl had fraudulently disposed of and concealed his assets while insolvent, for the purpose of preventing collection of the plaintiff's judgment. It is alleged that this was accomplished by turning over a sum of money, received in his lawsuit, to his wife. The defendant was thus apprised of the true nature of the plaintiff's grievance. He knew the lawsuit referred to, and that his wife had received all the money therefrom. He could not have been misled to his prejudice in making his defense."

ings, but demanded no showing that he *had been* misled before declaring a failure of proof.

It was made plain by these decisions that the Montana Supreme Court would demand very strict conformity of proof to pleading, with the penalty of a ruling of a failure of proof to be inflicted for very slight deviations from the cause of action declared upon, even though the facts were known in advance to the adverse party and there was no possibility of his being misled. The adverse party could be perfectly aware of all the issues, they might be completely heard and adjudicated in the trial court, and the case, nevertheless, would be thrown out on appeal because of failure of proof, leaving the parties to the expense and delay of another trial to decide exactly the same issues.

Shortly after the *Russell* case, however, a current of decisions began to work some change in the Montana rule. The first of these was *Wilcox* v. *Newman,*[43] a case in which the lower court had granted a non-suit because of a variance which the plaintiff refused to amend. The Supreme Court reversed this decision, first quoting the language of the statute, then saying:

> "Under such statutes it is not enough for the party to allege merely that he has been misled, but it must be proved to the satisfaction of the court. An affidavit should ordinarily be filed showing in what respect the party was misled. . . ."

The variance, if one existed, was held to be immaterial, and not grounds for a non-suit. The case was plainly one of variance and the question of failure of proof was neither raised nor considered, but the decision had important consequences.

Two years later, in 1922, the case of *Wasley* v. *Dryden*[44] came before the Supreme Court. The defendant had moved for a directed verdict at the close of the evidence on the grounds, among others, that the evidence did not support the material allegations of the complaint and that there was a fatal variance between the pleading and the proof. Although labelled "variance," the claim was actually one of failure of proof. No objection was made to the evidence as it was offered; no showing was made that the defendant was misled; and the matter was brought up on a mo-

[43](1920) 58 Mont. 54, 190 P. 138. See also Watts v. Billings Bench Water Association, (1926) 78 Mont. 199, 253 P. 260. There the claim was failure of proof but the court refused to entertain it because of the slight and technical nature of the deviation. The complaint had alleged breaking of a water ditch by lateral pressure, and consequent flooding of the plaintiff's land. The proof showed breaking by both lateral pressure and overflow. It was held to be an immaterial variance because there was no affirmative showing of surprise.

[44](1923) 66 Mont. 17, 212 P. 491.

tion for a directed verdict. The case was a proper one for a claim of failure of proof under the doctrine of *Kalispell Liquor Co.* case,[45] since the plaintiff had alleged one contract of employment upon certain fixed terms, and had proved no less than seven agreements, embracing various terms and scattered periods of time. The Supreme Court held, however, that the motion had been properly overruled, since no showing of surprise had been offered. The test of the *Wilcox* case was quoted with approval, although the court pointed out that no showing of surprise would have been acceptable, since the defendant's answer revealed that he must have had occasion to look into his employment of the plaintiff and ascertain the actual nature of the transaction.

The case of *Schauer* v. *Morgan*,[46] decided in 1923, was, like the *Kalispell Liquor Co.* case, an action on a guaranty contract. The suit was brought upon the note of a corporation of which the defendants were directors. They had guaranteed, in writing, an account for which the note was given. The note was referred to in the guaranty contract as having been given for the account. At the trial the evidence proved liability on the guaranty contract, and defendants moved for a directed verdict. Their contention was that they could not be held upon the note, since they had not signed it, and that the contract proved was not the one alleged, because it was the guaranty contract that was proved. The motion was overruled and judgment was entered for the plaintiff. The Supreme Court held that the defendants could not have been misled, because they were fully informed of the entire transaction, and that it was, therefore, an immaterial variance. This result is completely opposed to the holding in the *Kalispell Liquor* case.

The next important decision came in the case of *Peabody* v. *N. P. Ry. Co.*[47] The plaintiff, a passenger in an automobile, was injured when struck by a crossing gate, and alleged that the injury resulted when the defendant's watchman "suddenly and without warning lowered and dropped said crossing gate upon the plaintiff." In her proof, she showed that the gate had actually been lowered in front of the automobile, but too late for the driver to stop. The defendant asked for a directed verdict on the grounds of a fatal variance, which was refused, and the jury found for the plaintiff. This was, as in the case of *Wasley* v. *Dryden*, actually a claim of failure of proof. There was no objection to the evidence, no showing of surprise, and, as the

[45]Note 36, *supra*.
[46](1923) 67 Mont. 445, 216 P. 347.
[47](1927) 80 Mont. 492, 261 P. 261.

respondent pointed out, the plea was not made until all the evidence on both sides was in, which is appropriate to a plea of failure of proof, but not to one of variance. The court held that, since no showing was made of surprise, or any claim that defendant was misled, the variance if any, was immaterial. This result is very similar to that reached in the more liberal jurisdictions.

The case of *Kakos* v. *Bryam,*[48] in 1931, may have ended the progress toward a more liberal rule. That was a personal injury case under the Federal Employers Liability Act. The plaintiff, a railroad worker, had been injured when struck by some ties which fell from a flat car which he and a fellow employee were unloading. The proof which he offered varied from the allegations of his complaint as to the way in which the ties had been stacked, and how they had fallen. The trial court sustained a motion for a non-suit on the grounds of variance. (Apparently the claim in the lower court was made or intended as one of failure of proof, since the respondent, upon appeal, relied entirely upon failure of proof and the statutory section defining it.) The Supreme Court reversed this decision and granted a new trial, ruling that it was a case of immaterial variance, because no proof had been offered that the defendant was misled. The court made no mention of the claim of failure of proof and treated the problem as one of variance. However, in its decision it relied exclusively upon cases prior to *Wilcox* v. *Newman,* saying:

> "The plaintiff must, of course, stand or fall upon the cause of action stated in his complaint. (*Pierce* v. *Great Falls and Canada Ry. Co.*, 22 Mont. 445, 56 Pac. 867). He is required to state his cause in ordinary and concise language. (Sec. 9129, subd. 2, Rev. Codes, 1921). The facts must be 'stated by direct averment so that the party who is to answer may understand the specific acts of remissness with which he is charged and that material issues may be framed for trial.' (*Stricklin* v. *Chicago M. & S.P. Ry. Co.*, 59 Mont. 376, 197 Pac. 839, 840.) The pleader must confine his proofs within the cause of action he states; he may not go beyond the material allegations of his pleading, for it would be folly to require the plaintiff to state his cause of action, if in the trial he could abandon the grounds stated and recover upon other which are substantially different from those alleged. (*Forsell* v. *Pittsburgh and Montana Copper Co.*, 38 Mont. 403, 100 Pac. 218.) If this were not so, the very purpose of pleadings would be destroyed, and, instead of the complaint apprising the defendant of the proof which he would be called upon to

[48] (1931) 88 Mont. 309, 292 P. 909.

meet, it would become a device to entrap him. (*Flaherty* v. *Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416.)"

The court also quoted the resume of the statutes given in *Ryan* v. *Russell*[49] and cases which had previously construed those statutes,[50] all of which adhered to the older strict rule.

Two principal cases involving the question of variance have been decided in the Supreme Court since *Kakos* v. *Bryam*, namely, *Pritchard Petroleum Co.* v. *Farmers Co-operative Oil and Supply Co.*,[51] and *Crenshaw* v. *Crenshaw*.[52] These cases rely almost exclusively upon *Kakos* v. *Bryam* for authority upon the subject of variance. No question of failure of proof was presented in either case, so it is impossible to say how much weight the court would give the dictum of the *Kakos* case. For this reason, the present position of Montana is in doubt, and the progress of the *Dryden, Schauer,* and *Peabody* cases may be abandoned in favor of a return to *Ryan Co.* v. *Russell.*

As has been pointed out, the test as to whether a particular deviation from the pleading is a variance or failure of proof is of great importance throughout the field of pleading and procedure. The rule prevailing in certain jurisdictions, principally Indiana and New York, that all evidence submitted must support the theory most apparent of the fact of the pleading, leads to a narrow construction of pleadings, difficulty in the presentation of evidence, and rejection of many meritorious claims on purely technical and procedural grounds. A more liberal rule is in force in other jurisdictions, including Rhode Island, Connecticut, Maryland, and Wisconsin. All variances are considered immaterial unless they mislead the other party to his prejudice, and he must prove to the satisfaction of the trial court that he was actually misled. A failure of proof will not be declared to exist unless the party has been so prejudiced that no amendment could cure the defect. This rule exists under precisely the same Code provisions as does the stricter rule, and gives a result more in harmony with the purposes of the Code.

It is to be hoped that the Supreme Court of Montana will continue the progress made toward the more liberal view. This could be done under existing precedents and would result in speedier, more efficient administration of justice, with less time and attention devoted to mere procedural details.

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[49]Note 41, *supra.*
[50]Gregory v. Chicago M. St. P. Ry. Co. (1911) 42 Mont. 551; Milwaukee Land Co. v. Ruesink, (1915) 50 Mont. 489, 148 P. 396.
[51](1948) .....Mont....., 190 P. (2d) 45.
[52](1947) 120 Mont. 190, 182 P. (2d) 477.