Pleadings -- Material and Immaterial Variance

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capias, an exigent, five exactions at five consecutive county courts, and a proclamation at the door of a place for divine worship were required before an outlawry could be incurred. North Carolina's outlawry is less sanguinary, but the procedure is dangerously simple.⁶³

Nothing remains of the social order for which outlawry was fashioned. A re-evaluation of this archaic statute is recommended before any irreparable injustice occurs which could reflect upon the dignity of the laws of North Carolina.

BOBBY G. DEAVER

Pleadings—Material and Immaterial Variance

In Hall v. Poteat¹ the plaintiff alleged that the defendant negligently drove his automobile, without lights, from the right shoulder of the highway into the path of the plaintiff's oncoming automobile. It was further alleged that this occurred so suddenly that it was impossible for the plaintiff to avoid a collision. On trial the plaintiff's testimony tended to show that the defendant's automobile was stopped, without lights, in the plaintiff's lane of travel when the collision occurred. No objection to the introduction of this evidence was made by the defendant. On motion, the trial court granted a judgment of involuntary nonsuit. On appeal, the North Carolina Supreme Court, although conceding that the plaintiff's testimony was sufficient to support a finding of negligence on the part of the defendant,² held that the variance between the plaintiff's allegations and proof was material, and thus fatal. Accordingly the judgment of nonsuit was affirmed.

Variance occurs when the proof does not conform to the case pleaded. North Carolina, like most code jurisdictions,³ has by statute set out three degrees of deviation of facts proved from facts pleaded.⁴ As a literal reading of these statutes seems plainly to

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¹ 257 N.C. 458, 125 S.E.2d 924 (1962).
² 257 N.C. at 463, 125 S.E.2d at 928.
³ See CLARK, CODE PLEADING § 120 (2d ed. 1947).
⁴ The first two degrees are defined in N.C. GEN. STAT. § 1-168 (1953):
  "1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just. 2. Where the variance is not material as herein provided, the judge may direct the fact
contemplate, and indeed, as our court consistently construed them until the fairly recent past, the overall statutory purpose is to work increasingly severe consequences, ranging from mere momentary interruption to nonsuit, upon a plaintiff whose proof varies from his pleading as the degree of deviation increases. Thus the slightest degree, an immaterial variance, is to be disregarded. Next, when a variance is so great as to be prejudicially misleading to the defendant, it is deemed material and requires an amendment. But a defendant, in order to avail himself of this remedial action, must in apt time raise the point and satisfy the trial court that the variance is material under the prejudicially misleading test. If he fails seasonably to raise the point, he impliedly consents to litigating the issues on the proof offered. The variance, though possibly "material" under the test, is "deemed immaterial" by the failure of the defendant in apt time to suggest its prejudicially misleading to be found according to the evidence, or may order an immediate amendment without costs." N.C. Gen. Stat. § 1-169 (1953) defines the third degree: "Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof." Thus, there is under this scheme no "fatal" variance.


Chief Justice Clark, concurring in Wright v. Insurance Co., 138 N.C. 488, 495-96, 51 S.E. 55, 58 (1905), stated that "this section [G.S. § 1-168] further provides that the adverse party must allege that he was misled, and must prove that fact 'to the satisfaction of the court' and wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action or loss of substantial rights by either party. The sole object is that the cause shall be tried and decided upon its merits. Here the defendant did not allege that he was misled.... Had he done so, justice and the statute prescribed as the sole remedy an amendment upon such terms as the court might deem just. The court could not visit upon the plaintiff, as a penalty for inadvertence in pleading, or a mistaken allegation of fact (if made) a dismissal of the action."
quality to the court.\textsuperscript{8} If the point is raised and it is decided that the variance is material the court is obligated to protect the defendant from this heretofore unexpected offer of proof by granting a continuance so that he may adequately prepare to counter it.\textsuperscript{9} Thus, a material variance under the statutory scheme is not such a drastic failure of proof as to justify nonsuit, this final penalty being reserved for the ultimate degree of deviation, which is denominated a "total failure of proof."\textsuperscript{10} The obvious occasion for applying this last label and imposing this penalty occurs when the plaintiff attempts to prove a cause of action entirely different from that which was alleged.\textsuperscript{11}

That adherence to any scheme involving such conceptually elusive gradations will present difficult problems\textsuperscript{12} of analysis from

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  \item \textsuperscript{8} E.g., Simmons v. John L. Roper Lumber Co., 174 N.C. 220, 93 S.E. 736 (1917). It follows also that once the point is raised on trial the trial judge's finding that the variance is immaterial is binding unless there is an abuse of discretion. See Dellinger v. Charlotte Elec. Ry., 160 N.C. 532, 76 S.E. 494 (1912), where a variance was deemed immaterial, the supreme court resting part of its decision on the fact that the trial judge had deemed it such on objection by the defendant.
  \item \textsuperscript{9} Where there has been some change made in the nature of the action by an amendment adding new allegations and such change materially affects the rights of the adverse party, he is entitled to a continuance as a matter of right. Nassaney v. Culler, 224 N.C. 323, 30 S.E.2d 226 (1944).
  \item \textsuperscript{10} N.C. GEN. STAT. § 1-169 (1953).
  \item \textsuperscript{11} Smith v. Cook, 196 N.C. 558, 146 S.E. 229 (1929); Talley v. Harriss Granite Quarries Co., 174 N.C. 445, 93 S.E. 995 (1917); Hunt v. Vanderbilt, 115 N.C. 559, 20 S.E. 168 (1894). Adherence to this statutory pattern obviously requires recognition of a degree of variance lying between the merely immaterial and the total failure of proof which constitute the extremes of the scheme of deviation. Since this intermediate stage necessarily contemplates some substantial degree of deviation, this deviation must occur with respect to factual detail within the various "ultimate facts" making up a particular cause of action. "Total failure of proof" must then mean a failure to introduce any evidence more than a scintilla in respect of any particular essential element in the cause of action, rather than a mere variance from "evidentiary" fact pleaded in specifying facts presumably beyond the actual requirements of the pleading. This is borne out by the fact that the court has held a "total failure of proof" not only to occur when the plaintiff proves or attempts to prove a different cause of action, cases cited \textit{supra}, but also when the plaintiff fails to produce enough evidence to substantiate that which he has pleaded. See, e.g., McCoy v. Railroad, 142 N.C. 383, 55 S.E. 270 (1906). Justice Seawell made such a conceptual analysis, stating that "it has been considered as axiomatic that a difference between the allegations of a complaint and the evidence adduced to support them does not constitute a material variance unless there is a substantial departure in the evidence from the issues upon which the cause of action depends." Whichard v. Lipe, 221 N.C. 53, 56, 19 S.E.2d 14, 16 (1942) (dissent).
  \item \textsuperscript{12} These problems, though, are no more difficult than those closely related ones constantly faced in determining whether the plaintiff has suc-
case to case is obvious, but the scheme seems plain. Furthermore, it makes sense in terms of trial convenience. It contemplates that a defendant must signify such discomfiture as he may feel from unexpected proof immediately as he feels it. This is certainly no particular hardship, and it allows the trial court to make an immediate appraisal of the probable extent of the defendant's inability by virtue of surprise to counter the offered proof. This is presumably to be done on the basis of a practical appraisal of the extent to which any investigation of facts reasonably prompted by the "ultimate facts" pleaded would necessarily have prepared him to counter the evidence now offered. Thus the notice-giving function of pleadings can adequately be policed at a stage of trial and under conditions which protect both parties against unjustifiable results in terms of the ultimate merits of the case. If the case he has attempted to prove is within reasonable limits, the plaintiff is protected against a dismissal. The defendant, on the other hand, by having the right to a continuance is given adequate opportunity to prepare to meet the now questioned proof. Thus the ultimate result is that under this scheme a case may fairly be tried on its merits in one action.3

As indicated, our court for many years consistently maintained the integrity of this statutory scheme.4 But with Whichard v. Lipe5 decided in 1942, the court, by reversing a judgment for the plaintiff on the basis of a "material variance" although there had

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3 As stated by Justice Seawell, dissenting in Whichard v. Lipe, 221 N.C. 53, 58, 19 S.E.2d 14, 17 (1942), "the purpose of our own and similar statutes is to prevent cases from being thrown out of court upon the technicalities so favored by the common law and to enable courts of justice, when once their jurisdiction has attached, to reach their objectives without frustration and without the added expense and vexation of being compelled to march out of court and back again upon a matter not vital or determinative of the controversy." See also note 7 supra quoting from Wright v. Insurance Co., 138 N.C. 489, 51 S.E. 55 (1905).

4 See notes 5-8 & 11 supra. In the earlier cases there appears to have been only one case that definitely failed to adhere to the statutory scheme. See Abernathy v. Seagle, 98 N.C. 553, 4 S.E. 542 (1887).

5 221 N.C. 53, 19 S.E.2d 14 (1942). The action was brought against the owner of a truck alleging liability in tort under the doctrine of respondeat superior. In her complaint the plaintiff alleged the identity of the driver. On trial she failed to prove his identity, introducing instead evidence tending to show that some agent was driving the truck. The defendant failed to object to the presentation of this evidence. Motion to nonsuit was denied, and a judgment was rendered for plaintiff. On appeal the Supreme Court reversed on the grounds of a "material variance."
been no objection during trial by the defendant to the evidence presented, introduced a new approach of which the instant case is the most recent example. Despite Justice Seawell's dissent pointing out the drastic nature of the departure and the virtues of the scheme abandoned, the court has used this decision as precedent in a new line of cases which in effect equates that degree of variance which formerly could be deemed "material" only if properly objected to by the defendant during trial, with that which had previously been considered a "total failure of proof." The result is that any variance that is found to be "material," is flatly dubbed "fatal," with the consequence that a defendant need no longer...

16 221 N.C. 55, 19 S.E.2d 15. It is also interesting to note that Justice Seawell, after describing the statutory variance scheme and its application, stated that even with all that he had said previously "there are many cases in the books which, under our modern liberal practice, lead to the conclusion that the variance here is immaterial." 221 N.C. at 58, 19 S.E.2d at 17. With this statement as a starting point a study of the cases that have followed indicates that this decision not only changed the court's attitude as to the consequences of "material variance" but also restricted its view as to the nature of immaterial variances. Compare Dellinger v. Charlotte Elec. Ry., 160 N.C. 532, 76 S.E. 494 (1912), and Wright v. Insurance Co., 138 N.C. 488, 51 S.E. 55 (1905), with Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1958) and Messick v. Turnage, 240 N.C. 625, 83 S.E.2d 654 (1954). There are decisions seemingly applying a liberal view of immaterial variance, e.g., Rick v. Murphey, 251 N.C. 162, 110 S.E.2d 815 (1959), but looking at the cases in their sum total many decisions have been appealed since Whichard that previously would not have been considered by defendants' attorneys as giving grounds for hope that the court would find "material variance." Thus what realistically is no variance at all is sometimes spoken of as being an immaterial variance. See, e.g., Krider v. Martelle, 252 N.C. 474, 113 S.E.2d 924 (1960). It is also interesting to note that terms such as "proof without allegation is as unavailing as allegation without proof" and "the plaintiff must make out his case secundum allegata" which now abound in the new line of decisions, cases cited note 17 infra and which form a basis for nonsuit on the grounds of a "material variance," e.g., Messick v. Turnage, supra, were formerly used only when the deviation amounted to a total failure of proof. E.g., McCoy v. Railroad, 142 N.C. 383, 55 S.E. 270 (1905).


18 A fatal variance between allegation and proof usually results in a dismissal of the proceedings, as this amounts to a total failure of proof on the declaration of the cause alleged. Stafford v. Yale, 228 N.C. 220, 222, 44 S.E.2d 872, 873 (1947). (Emphasis added.) A material variance is "fatal."
suggest seasonably to the trial court that he has been misled to his prejudice by the plaintiff's offer of proof. Now he can with impunity fail to note any surprise felt, fail to object to the evidence, and take advantage of the discovered "material variance" by motion for nonsuit at the close of the plaintiff's case. With few exceptions19 this approach is now well settled in our decisions.

As a result there is now understandably a premium placed on prolixity of pleadings and on undue pleading of various alternative evidentiary factual theories20 as plaintiffs seek to protect themselves against the exigencies of trial developments which may find them nonsuited on the basis of a fairly minor deviation of exact fact proved from exact fact pleaded.21 Furthermore, since a nonsuited

E.g., Hall v. Poteat, 257 N.C. 458, 461, 125 S.E.2d 924, 927 (1962). Thus, in the earlier cases following Whichard the court felt some qualms about placing a "material variance" in the same category as a "total failure of proof." Although the result is now the same, the distinction in labels has now at last been abandoned.

19 Zager v. Setzer, 242 N.C. 493, 88 S.E.2d 94 (1955); Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950). Both of these cases at first reading appear to reiterate the rule prior to Whichard but are easily distinguishable on the basis that the supreme court decides that in both of these cases there was not a "material variance" because it did not find that the defendant was materially prejudiced. Thus the court on its own now decides whether or not there was a "material variance." Under the old rule the burden was placed on the defendant to show by objection that he was being prejudiced by the introduction of certain evidence. See notes 7 & 8 and accompanying text. See also Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Martin Flying Service, Inc. v. Martin, 233 N.C. 17, 62 S.E.2d 528 (1958).

20 As demonstrated by the principal case a mistake in pleading a small evidentiary fact can lead to the dire consequence of a material variance. Thus the attorney, attempting to plead a cause of action grounded on negligence, for example, is placed in difficult straits; especially if he is not certain of all the details of his client's case. There appear two alternatives. The first is to plead "ultimate facts" thus leaving a greater leeway for acceptable deviation. Although this technique was used successfully in at least one case, Rick v. Murphey, 251 N.C. 162, 110 S.E.2d 815 (1959), the pleader risks the more than likely prospect of having his complaint demurred to successfully either prior to trial or ore tenus in the Supreme Court since the court is stringent in requiring the pleader to allege in his complaint with great particularity the acts or omissions giving rise to the cause of action. E.g., Tysinger v. Coble Dairy Prod., 225 N.C. 717, 36 S.E.2d 246 (1945). Thus, choosing the lesser of two evils the cautious pleader should choose to plead with prolixity, alleging all that did or could have happened. By following this procedure the plaintiff is safe for "it is sufficient to impose liability to establish any one of the negligent acts enumerated in the complaint which proximately results in the damage charged." Krider v. Martello, 252 N.C. 474, 475, 113 S.E.2d 924, 926 (1960). (Emphasis added.)

21 As noted previously the negligence action gives rise to the greatest difficulties for the unwary pleader. Perfect examples of the great restrictions placed upon the pleader are supplied by the cases arising out of automobile
plaintiff may always commence again, the nonsuit actually accomplishes nothing in terms of remedying the immediate problem of variance that a continuance under the law as formerly applied would not do. It merely adds further expense since the plaintiff now has to commence a new action rather than simply seeing that the case is put back on the trial calendar after the time allowed defendant in the continuance order has expired.

For the foregoing reasons it would appear that the pre-

ard application of our statutory variance scheme was much preferable to that which is presently applied. Reappraisal by the court to reinstate authority of the earlier line of cases would seem to be in order. Another possibility would be for the General Assembly to enact a "litigation by consent" type of statute which, avoiding outright the troublesome variance conceptions, would approach the problem in head-on fashion.

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collisions. The principle case does not stand alone in finding a "material variance" for slight variations of fact proved from fact pleaded. In Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1955) the plaintiff alleged that prior to the collision between his automobile and that of the defendant's, the defendant's car was "wobbling." On trial the evidence showed that the defendant's car proceeded in a straight line to the point of impact. The court held that this was a "material variance." See also Brady v. Nehi Beverage Co., 242 N.C. 32, 86 S.E.2d 901 (1955). The ultimate in granting a nonsuit on the basis of failure of the plaintiff to prove exactly that which he had alleged is Messick v. Turnage, 240 N.C. 625, 83 S.E.2d 654 (1954). In that case the plaintiff sued for injuries arising when plaster fell from the ceiling of the defendant's theatre. A nonsuit was affirmed by the supreme court when it was found that the falling plaster was due to a leaking bathroom rather than from rainwater seeping through the roof as alleged.

N.C. GEN. STAT. § 1-25 (1953) reads in part: "If an action is commenced within the time prescribed therefore, and the plaintiff is nonsuited ... the plaintiff ... may commence a new action within one year after such nonsuit ...."

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." FED. R. CIV. P. 15(b).