COMMENT:

VARYING APPROACHES TO THE PROBLEM OF VARIANCE BETWEEN PLEADING AND PROOF

*Antonio R. Bautista**

Pleadings control the type, pace, size, quality and shape of litigation. Since matters outside the pleadings are generally not triable, evidence on such matters is virtually excludible on grounds of irrelevance.[1] But the possibility always exists that such evidence may find its way into the record, whether wittingly or unwittingly. Since evidence extraneous

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* Senior Partner, Antonio R. Bautista & Partners; Professorial Lecturer, University of the Philippines College of Law and Ateneo de Manila College of Law.

[1] As a general rule, relevance is determined by the governing substantive law and by the pleadings. In fact, to pleadings are attributable the additional function of ascertaining the governing substantive principle. Edward W. Cleary, *The Uses of Pleading*, 40 KY.L.J. 46 (1951).

"Before a court can properly decide a case and enter judgment, the court must have obtained jurisdiction over the parties and over the controversy to be decided. The adversary must be given fair notice of the case alleged so that he or she will be able to prepare a responsive case. There must be some appropriate time and place set apart for allowing the parties to present their evidence and their arguments to the tribunal. The controversy must be defined so that the court and the parties may know how to direct their efforts and so that the court may rule on questions of relevancy. The issues of fact and of law must be framed clearly enough so that the tribunal knows what to decide. The basis for the judgment should be so laid that parties may determine its scope whenever that becomes important, either for enforcing the judgment itself or in some later proceeding." FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 127-28 (3d ed. 1985).

"Notice the tactical dilemma faced by a party when the opposition seeks to introduce evidence at trial on an issue that clearly is not within the pleadings. The litigant may object and keep the evidence out, but this will induce the other side to request leave to amend, perhaps even to add an issue of which the party seeking amendment previously was not aware. On the other hand, a failure to object may be taken as implied consent to try the issue, thus permitting an amendment to conform to the proof. Whenever a party fails to object in this situation a second dilemma must be faced — whether or not to produce evidence on the point in question." JOHN J. COUND, ET AL., CIVIL PROCEDURE 531 (5th ed. 1989).

to the pleadings may become part of the record, there naturally arises the problem of the effect, if any, this variant evidence may have on such matters as, say, the status of the pleadings themselves and on the ultimate judgment which may be rendered.

The incidence of variant evidence will always be high. Plain sense and common prudence dictate that the pleader will do better to overplead and underprove his case rather than underplead and underprove it. The only possible disincentive against overpleading is the increased docketing fees which will have to be assessed on the basis of the amount of damages and monies claimed, it now being required that every pleading specify the amount of monies and damages sought to be recovered, lest recovery of such be barred.[2]

There is, therefore, no requirement for the matching of allegation and proof. Excessive allegations may simply be put down as surplusage which by themselves alone may be harmless. Underproving one's case may produce an emotional letdown but this has no practical bearing on the case.

It is, nonetheless, generally correct to state that the evidence must conform to the pleadings. The even more basic general rule is that a claim or defense could be sustained only if it was both pleaded in full and proved in conformity therewith.[3]

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[2] Batas Pambansa Blg. 129 (1981), sec. 33, par. (1), as amended by Rep. Act No. 7691 (1994), defines the exclusive original jurisdiction of inferior courts over civil actions in terms of the "value of the properties or amount of demand exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs, the amount of which must be specifically alleged." All claims for damages must now be *specifically alleged* for the purpose of determining jurisdiction. *See* Davao Light Power Co., Inc. v. Dinopol, G.R. No. 75195, 29 August 1988, 164 SCRA 748, 751-52.

[3] RICHARD H. FIELD, ET AL., MATERIALS FOR A BASIC COURSE ON CIVIL PROCEDURE 425-26 (1984). The rule is quite harsh as it requires a party who pleads to prove the alleged facts even if they are immaterial. This rule has however been tempered by codal provisions where amendment of the pleadings is ordered only to correct a material variance. (SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 515-16 [3d ed. 1923]). Thus, the following provisions of the California Code of Civil Procedure are instructive:

> Sec. 469. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a

In performing their notice-giving and issue-defining functions,[4] the pleadings themselves serve as the means by which the parties communicate to the court and to each other the nature of their claims and defenses and the res judicata effect of whatever judgment the court may render.[5]

The introduction of non-conforming evidence poses the real risk, therefore, that the case may stray away from the narrow parameters as defined by the pleadings into uncharted territory. No such risk should be cause for any concern where the introduction of variant evidence was made with the consent of the parties. The allowance of such evidence into the record without objection is tantamount to a consent, at least implied, to the corresponding amendment of the pleadings.

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party has been so misled, the Court may order the pleading to be amended, upon such terms as may be just.

Sec. 470. *Immaterial variance, how provided for.* Where the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Sec. 471. *What not to be deemed a variance.* Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

[4] "What is the purpose of the pleadings in an action? From the standpoint of the parties and their attorneys, the pleadings should serve to inform each side of the contentions of the other as to matters of fact. They should tell the defendant what he is being sued for; they should tell the plaintiff what defenses the defendant proposes to make. The pleadings should thus facilitate preparation for trial and prevent surprises of either party at least as to matters of fact if a trial takes place. From the standpoint of the court, the pleadings should formulate the issues to be tried, and should inform the trier of the nature of the cause. . . ." Sidney Post Simpson, *A Possible Solution of the Pleading Problem*, 53 HARV. L. REV. 169, 170-73 (1939).

"While the complaint, from the viewpoint of the draftsman, is not well drawn, and while criticism of it in incidental particulars is easy, still the broad question is, Does it fairly apprise the defendants of the plaintiff's real contentions and claims against them? Would they be misled to their surprise and injury if they placed faith in its allegations?" Lizarraga Hermanos v. Yap Tico, 24 Phil. 504, 508-09 (1916).

"The object of pleadings is to draw the lines of battle." The Mentholatum Co., Inc., et al. v. Mangaliman, et al., 72 Phil. 524, 539 (1941).

[5] *See* Norwood v. McDonald, et al., 8 December 1943, 142 Ohio St. 299, 52 N.E. 2d 67; Elliott v. Mosgrove, et al., 19 September 1939, 162 Ore. 507, 93 P.2d 1070.

Admission of the non-conforming evidence, and the corresponding amendments of the pleadings to conform to the evidence as actually admitted, are based on the non-prejudicial character of such evidence. The parties, having allowed the evidence in, were presumably not surprised thereby nor was this evidence probably all that material.

The parties are presumed to be focused on their controversy even if their minds may fleet away momentarily from the defining pleadings. The non-objection to the introduction of variant evidence consists therefore with the parties' implicit understanding that this evidence bears on their controversy. If, however, upon a strict review, it should appear that the evidence had strayed beyond the pleadings, then this may be less on account of a failure to grasp the limits of the issue than to an intention to re-define this issue.

While it is true that amendment of the pleading remains discretionary with the court, allowance of this amendment is much more easily justified where there was no objection to the trial of the issue. Even if the admission of the evidence were objected to as having been outside the pleadings, the amendments should be allowed so that the merits of the action may be better appreciated. All these points are encapsulized in a codal provision, which is now section 5 of rule 10 of the 1997 Rules of Civil Procedure:

> Section 5. *Amendment to conform to or authorize presentation of evidence.* — When issues not raised by the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so with liberality if the presentation of the merits of the action and the ends of substantial

> justice will be subserved thereby. The court may grant a continuance to enable the amendment to be made.

The predecessor provision of the above-quoted section 5 is section 109 of the former Code of Civil Procedure (Act No. 109) which makes the issue of admissibility of the variant evidence depend on whether a party has been surprised thereby.

> *Variance.* — An immaterial variance between the allegation in a pleading and the proof shall be disregarded, and the facts found according to the evidence, and the pleading shall be forthwith amended in accordance with the facts found, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a variance is material and that a party has been misled, courts shall not dismiss the action by reason of the variance, but shall, upon such terms as may be just, order the pleadings to be forthwith amended in accordance with the facts, and determine the action upon the actual facts as established. The amendments provided in this section may be made either in the Court of First Instance or in the Supreme Court, at any stage of the action.

Neither the present section 5 of rule 10 nor section 109 of the old Code of Civil Procedure contemplates a variance which was long foreseen with actually predetermined results as distinguished from a variance which innocently emerged as the case wound along. There is a manifest common pre-occupation with having the case determined "when the presentation or the merits of the action and the ends of substantial justice will be subserved thereby," or that "the action [be determined] upon the actual facts as established." So long that there will be no resulting unfairness or surprise, the Rules will readily allow an amendment of the pleadings to meet a situation of pleading-proof variance. Pleadings are, after all, the handiwork of counsel rather than of their clients.

Section 5 of rule 10 is purely of American origin. It is an exact, word-for-word replica of rule 15 paragraph (b) of the Federal Rules of Civil Procedure. Observably, it has a broader sweep than section 109 of the Code of Civil Procedure in that it covers a situation where the variant

evidence has not been actually introduced but is merely proposed for admission. Thus, an amendment of the pleadings is allowed under section 5 of rule 10 "as may be necessary to cause them to conform to the evidence and to raise these issues." It is not, therefore, completely accurate to state that the Rule, as now framed, "is intended to correct **defective** pleadings (defective in the sense that they did not raise issues which however were eventually discussed and proved in the course of the hearing)."[6]

I. WHERE THE VARIANT EVIDENCE WAS ADMITTED WITHOUT OBJECTION

The primacy of proof over pleadings is recognized, without any serious question, where the proof came in without objection by any party. The codal provision itself expressly and unequivocably extends this recognition. In fact, a formal amendment in such case is not even necessary to make the pleadings conform to the proof. The statute says so in no uncertain terms: "[f]ailure to amend does not affect the result of the trial of these issues." If an amendment were necessary, the statute says it may be effected "upon motion of any party, even after judgment."

The rule is easily justified. Where variant evidence was admitted without objection, it may fairly be assumed that no party was surprised or prejudiced by this admission. Else, he would have objected. Implicit here is the notion of estoppel. The burden of making objection is on the party and not on the court. This kind of reasoning was articulated by the Supreme Court in an early case in the following language:

> It frequently happens that defects in pleadings are cured by evidence admitted without objection. Judges are not expected to read the pleadings for the purpose of knowing what proof is admissible and what proof is not admissible, until their attention is called thereto. If defective pleadings are cured by proof adduced during the trial of the cause, the court is justified in rendering his decision upon a

[6] I EDGARDO L. PARAS, RULES OF COURT ANNOTATED 259 (1st ed. 1975).

> preponderance of the proof, even though some of the important facts would not have been admitted had proper objection been made.[7]

The curative effect on pleadings of variant evidence which is admitted without objection was dramatized in *Del Val v. Del Val.*[8] Here, the complaint, which was for partition, failed to describe the land sought to be partitioned. Still, the defect was held to have been cured because evidence was adduced without objection at the trial clearly describing the real estate sought to be partitioned.

What may even be more dramatically startling is the implied amendment by variant proof of a complaint which did not even allege a cause of action. The competing considerations were ventilated in the opinions of *Lizarraga Hermanos v. Yap Tico.*[9] The majority opinion expostulated:

> Much objection has been made to that branch of our decision which provides that, under the Code of Civil Procedure, the introduction of evidence upon the trial, without objection on the part of the defendant, which establishes a cause of action against the defendant, will prevent him from thereafter raising the question that the complaint does not state facts sufficient to constitute a cause of action, as well as from taking advantage of an equivalent objection made before the trial. Cases are cited to the effect that "such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time;" and that "pleadings which wholly and completely fail to state any cause of action or defense, so that the admitted allegations cannot be assumed to have been proved, is not cured by verdict."
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> It must be observed, however, that we are not asserting that a cure of the complaint is brought about by a verdict or a judgment. Our contention is that the cure is brought about by defendant's

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[7] Karagdag v. Barado, et al., 33 Phil. 529, 533 (1916).
[8] 29 Phil. 534 (1916).
[9] 24 Phil. 504 (1913).

> own act. An issue may be joined as well at the trial as before. The reason why issues are required by law to be joined before trials is to give all the parties due notice of the claims made against them, thereby offering full and fair opportunity to produce their witnesses and meet the charges against them. But, where the issue, by some defect in the complaint or answer, has not really been joined before the trial, the parties may, by mutual consent, join issue at the trial. Issues may be raised between the parties in other ways than by pleadings. They may be raised on the trial by the evidence of the parties. However defective the complaint may be, if the parties go to trial, and, without objection from the defendant, the plaintiff proves facts sufficient to constitute the particular cause of action which it was intended his complaint should allege and the defendant voluntarily produces his witnesses to meet the cause of action thus proved, there is then and there joined an issue as fully and effectively as if it had been joined long before by the most perfect pleadings. As we have already said, the purpose of pleadings is to notify the parties of the claims which each has against the other and what each expects to prove.
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> This is in order that each may have a fair opportunity to rebut the evidence of the other by the production of witnesses of his own. If each can be informed of the claims and demands of the other and can have a fair opportunity to produce his evidence in relation thereto, then the object of pleadings has been subserved. When, therefore, upon the trial the plaintiff, by his own proof, tenders the issue which the complaint was intended to tender, and the defendant accepts it and presents his evidence in relation thereto, is it not unreasonable to say that, thereafter, the defendant may, nevertheless, successfully move to dismiss the whole matter for the reason that the complaint did not state facts sufficient to constitute a cause of action? If necessary, may not the complaint be amended to meet the situation? (citations omitted)[10]

Justice Trent's dissent in *Yap Tico* presents the case equally strongly for the proposition that a complaint cannot be conformably amended to supply a missing cause of action. Protesting the majority's position, Justice Trent warned:

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[10] Lizarraga Hermanos v. Yap Tico, 24 Phil. 504, 519-21 (1913).

By mutual consent, the pleadings may be wholly abandoned and an action in its inception *ex contractu* may conclude *ex delicto*. The court will be powerless to rule upon the admission of evidence so long as the parties mutually agree that it shall be received. By the same method, parties may confer jurisdiction upon the court of the subject matter of the action (a heretofore unheard-of privilege). . .

On appeal to this court, the pleadings will serve no useful purpose. If a transcript of the record is not elevated to this court, the inquiry on appeal will be limited to a consideration of the facts found in the decision of the lower court. If the facts of the case are not sufficiently set out in the decision of the trial court, an embarrassing situation will result. The pleadings cannot be relied upon to state the issues upon which the case was tried, and it will be necessary to either hazard a guess as to what occurred in the lower court or remand the case with a request for additional facts. . .

It is unnecessary to enumerate the formidable opportunities for mischief made possible by this very liberal rule for raising an issue. They will undoubtedly suggest themselves as occasion arises to take advantage of the rule. Pleadings, under the new rule, will become a mere formality; an open sesame to a field of maneuvering, where counsel will bargain and bicker in the presence of the court as to what the issues of the case shall be.

Finally, in any methodical system of raising issues for trial, there must occur isolated instances where a departure from established rules would work a saving of time. But this loss is supposed to be more than compensated by time saved in a great number of other cases by adhering to the system. System, method, adherence to a fixed procedure, in any undertaking is usually recognized as saving of energy and expense; a guaranty of stability and a surety of dispatch. But if the system be not observed, its beneficial results cannot be obtained. It is only when the cases where the system is inconvenient assume the dignity of a class that its procedure should be amended or disregarded. Admitting for the moment that the doctrine laid down by the court will, in the present case, permit a judgment upon the very merits of the case, as well as saving of time, it must be remembered that the court has laid its rules in general language, and we must look beyond the present case to note their possible effect. I have always believed and still believe that there are certain well-established rules of pleading

> which are conducive to fairness and justice, and without which the administration of justice must necessarily suffer. I am very much of the opinion that the actual operation of these two rules of pleading will require endless emendations and qualifications to prevent a failure of justice in cases as they come up and that in the end we shall have a system of pleading more cumbersome than the common law itself.[11]

However persuasive the *Yap Tico* dissent may be, the rule stated by the majority prevails to date. The court in such a situation is even regarded as being under a duty to render a judgment and to award relief as warranted both by the pleadings and the evidence.[12]

Where the variant evidence has been admitted without objection, the pleadings may be amended "at any time" — so the statutory rule says. The Supreme Court has applied this provision literally. Accordingly, a complaint was allowed to be amended after trial had commenced to include two additional defendants.[13] An answer was also allowed to be amended to conform to the evidence even after plaintiff had walked out of the courtroom.[14]

An extreme case is *Torres v. Caluag, et al.*[15] In this case, a person claiming to be the owner of the lot in question was held to have been impliedly impleaded already in an ejectment suit against the tenant because this alleged owner had testified in the case. The Court said that this alleged owner had thereby already threshed out the issue of ownership between herself and the plaintiff in the ejectment case although this alleged owner was not actually impleaded in the case.

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[11] Lizarraga Hermanos v. Yap Tico, 24 Phil. 504, 545-48 (1913).

[12] Valmilero v. Kong Chang Seng, 33 Phil. 84 (1915); Roces v. Jalandoni, et al., 12 Phil. 599 (1909); De Leon v. Padua, 75 Phil. 548 (1945) — answer allowed to be amended to include defense of res judicata. De la Rosa v. Arenas, 7 Phil. 556 (1907) — amendment of answer allowed to include defense of extraordinary prescription although defense originally pleaded was ordinary prescription only.

[13] Cabello v. Cabello, 37 Phil. 328 (1917).

[14] Casilan v. Gancayco, 104 Phil. 418 (1958).

[15] G.R. No. L-20906, 30 July 1966, 17 SCRA 808.

Amendments to a pleading may therefore be allowed even on appeal.[16] Thus, in *Dayao v. Shell Company of the Philippines*,[17] plaintiff in an ejectment suit in the city court was allowed, on appeal to the Court of First Instance, to amend his complaint to allege an additional ground for ejectment. In another case,[18] the answer was allowed to be amended in the Supreme Court to enable the defendants to eliminate from their answer an admission fatal to their defense. Similarly, in *International Films, Ltd. v. The Lyric Film Exchange*,[19] the Supreme Court allowed the answer to be amended to allow the defendant to question plaintiff's personality. The Court reasoned that the power to allow amendment is discretionary with the court and that in this case an amendment would not cause any prejudice to any party.

There have been instances, however, where the amendment was not allowed to conform to the variant evidence which was admitted without objection. Thus, in one mortgage foreclosure action,[20] the defendant sought leave to amend his answer, after the plaintiff had rested his case, to allege payment of usurious interest. The trial court's refusal here was affirmed by the Supreme Court on the reasoning that to allow the proposed amendment "would have the effect of unnecessarily prolonging the trial, there being no reason why the defense of usury was not pleaded in the original answer." But, in another case,[21] the Court acknowledged an overpayment by the defendant although he did not claim any such overpayment in his counterclaim since he did not file any answer and was in default. This result probably was strongly induced by the mandate of the rule that a compulsory counterclaim not set up "shall be barred."[22]

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[16] Jalandoni v. Ledesma, 64 Phil. 1058 (1937) (unpublished).

[17] G.R. No. L-32475, 30 April 1980, 97 SCRA 407.

[18] Harty v. Macabuhay, 39 Phil. 495 (1919).

[19] 63 Phil. 778 (1936).

[20] Lerma v. Reyes, et al., 103 Phil. 1027 (1958).

[21] Edward A. Keller & Co., Ltd. v. COB Group Marketing, Inc., G.R. No. L-68097, 16 January 1986, 141 SCRA 86.

[22] RULES OF COURT, Rule 9, sec. 2. The Rules of Civil Procedure (Rules 1 - 71) were revised in 1997.

Similarly, amendment of a complaint after trial was disallowed where the purpose was to change the cause of action from re-vindication to rescission of contract.[23] But there was no indication in this case that the authorized change was to conform to the evidence, but there was an implication that the Supreme Court could not have cared less if the amendment were so intended.

Not all pleading defects can be cured by evidence admitted without objection. At least this is the rule in respect to an implied admission which derives from a party's failure to specifically deny under oath the genuineness and authenticity of an actionable document. This exception was established in *Ramirez v. Orientalist Co.*[24]

> We are of the opinion that the failure of the defendant corporation to make any issue in its answer with regard to the authority of Ramon J. Fernandez to bind it, and particularly its failure to deny specifically under oath the genuineness and due execution of the contracts sued upon, have the effect of eliminating the question of his authority from the case, considered as a matter of mere pleading. The statute (sec. 103) plainly says that if a written instrument, the foundation of the suit, is not denied upon oath, it shall be deemed to be admitted. It is familiar doctrine that an admission made in a pleading can not be controverted by the party making such admission; and all proof submitted by him contrary thereto or inconsistent therewith should simply be ignored by the court, whether objection is interposed by the opposite party or not. We can see no reason why a constructive admission, created by the express words of the statute, should be considered to have less effect than any other admission.
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> The parties to an action are required to submit their respective contentions to the court in their complaint and answer. These documents supply the materials which the court must use in order to discover the points of contention between the parties; and where the statute says that the due execution of a document which supplies the foundation of an action is to be taken as admitted unless denied under oath, the failure of the defendant to make such denial must

[23] Torres v. Tomacruz, 49 Phil. 913 (1927).

[24] 38 Phil. 634 (1918).

> be taken to operate as a conclusive admission, so long as the pleadings remain in that form.
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> It is true that it is declared in section 109 of the Code of Civil Procedure that immaterial variances between the allegations of a pleading and the proof shall be disregarded and the facts shall be found according to the evidence. The same section, however, recognizes the necessity for an amendment of the pleadings, in all cases where the variance is substantial, to bring them into conformity with the facts proved. That section has, in our opinion, by no means abrogated the general and fundamental principle that relief can only be granted upon matters which are put in issue by the pleadings. A judgment must be in conformity with the case made in the pleadings and established by the proof, and relief can not be granted that is substantially inconsistent with either. A party can no more succeed upon a case proved but not allowed than upon a case alleged but not proved. This rule, of course, operates with like effect upon both parties, and applies equally to the defendant's special defense as to the plaintiff's cause of action.
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> Of course this Court, under section 109 of the Code of Civil Procedure, has authority even now to permit the answer of the defendant to be amended; and if we believed that the interests of justice so required, we would either exercise that authority or remand the cause for a new trial in the court below. As will appear further on in this opinion, however, we think that the interests of justice will best be promoted by deciding the case, without more ado, upon the issues presented in the record as it now stands.[25]

Against the foregoing position may be ranged the doctrine that pleadings are mere formal instruments to facilitate the administration of justice. Thus, in *Alonso v. Villamor*,[26] amendment of the complaint was allowed even after judgment, the effect of the amendment being the substitution of the plaintiff with the real party in interest. The justifying language of the Court has become classic:

> There is nothing sacred about processes or pleadings, their forms or contents. Their sole purpose is to facilitate the application

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[25] Ramirez v. Orientalist Co., 38 Phil. 634, 646-47 (1918).

[26] 16 Phil. 315 (1910).

> of justice to the rival claims of contending parties. They were created, not to hinder and delay, but to facilitate and promote, the administration of justice. They do not constitute the thing itself, which courts are always striving to secure to litigants. They are designed as the means best adapted to obtain that thing. In other words, they are a means to an end. When they lose the character of the one and become the other, the administration of justice is at fault and courts are correspondingly remiss in the performance of their obvious duty.
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> The error in this case is purely technical. To take advantage of it for other purposes than to cure it, does not appeal to a fair sense of justice. Its presentation as fatal to the plaintiff's case smacks of skill rather than right. A litigation is not a game of technicalities in which one, more deeply schooled and skilled in the subtle art of movement and position, entraps and destroys the other. It is, rather, a contest in which each contending party fully and fairly lays before the court the facts in issue and then, brushing aside as wholly trivial and indecisive all imperfections of form and technicalities of procedure, asks that justice be done upon the merits. Lawsuits, unlike duels, are not to be won by a rapier's thrust. Technicality, when it deserts its proper office as an aid to justice and becomes its great hindrance and chief enemy, deserves scant consideration from courts. There should be no vested rights in technicalities. No litigants should be permitted to challenge a record of a court of these Islands for defect of form when his substantial rights have not been prejudiced thereby.[27]

There is no problem as to dispensability of a formal amendment. It is well-settled that where variant evidence was admitted without objection, a formal amendment of the pleadings is not strictly indispensable.[28] In such cases the court may simply treat the pleading as having been amended to conform to the evidence although not actually or physically amended.[29] A clear application of this doctrine was made in *City of Manila v. Bacay*.[30] This was an ejectment complaint for non-payment of rentals. At the trial, plaintiff proved without objection that he demanded

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[27] Alonso v. Villamor, 16 Phil. 315, 321-22 (1910).

[28] Garcia v. De Manzano, 39 Phil. 577 (1919).

[29] Tuason v. Bolaños, 95 Phil. 106 (1954).

[30] G.R. Nos. L-19358-59, 31 March 1964, 10 SCRA 629.

that defendant vacate the premises because he needed these premises for himself. The complaint was deemed to have been *ipso facto* amended by the inclusion of this allegation.

Northern Cement Corp. v. Intermediate Appellate Court[31] contains a reasonably good summary of rulings dispensing with the need for a formal amendment to conform to the evidence:

> There have been instances where the Court has held that even without the necessary amendment, the amount proved at the trial may be validly awarded, as in *Tuazon v. Bolanes*, where we said that if the facts shown entitled plaintiff to relief other than that asked for, no amendment to the complaint was necessary, especially where defendant had himself raised the point on which recovery was based. The appellate court could treat the pleading as amended to conform to the evidence although the pleadings were not actually amended. Amendment is also unnecessary when only clerical errors or non-substantial matters are involved, as we held in *Bank of the Philippine Islands v. Laguna*. In *Co Tiamco v. Diaz*, we stressed that the rule on amendment need not be applied rigidly, particularly where no surprise or prejudice is caused the objecting party. And in the recent case of *National Power Corporation v. Court of Appeals*, we held that where there is a variance in the defendant's pleadings and the evidence adduced by it at the trial, the Court may treat the pleading as amended to conform with the evidence.
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> It is the view of the Court that pursuant to the above-mentioned rule and in light of the decisions cited, the trial court should not be precluded from awarding an amount higher than that claimed in the pleadings notwithstanding the absence of the required amendment. But this is upon the condition that the evidence of such higher amount has been presented properly, with full opportunity on the part of the opposing parties to support their respective contentions and to refute each other's evidence.
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> We find in the case at bar that there was a failure of the above-stated condition. The record discloses that although NCC was allowed to adduce evidence in support of its claim for refund

[31] G.R. No. L-68636, 29 February 1988, 158 SCRA 408.

> beyond the amount indicated in its counterclaim, Shipside's rebuttal evidence was practically brushed aside on the ground that it was not permitted by the stipulation of facts earlier entered into by the parties, besides being hearsay and self-serving. This was not consistent with due process and therefore vitiated the findings of the trial court based on the unilateral assertions of the petitioner.
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> On the said stipulation of facts, Shipside says it was limited only to allowing NCC to prove additional payments of the accountabilities covered by Shipside's claims. If it did not object to the presentation of evidence regarding the alleged excess payments of NCC, it was because it was led to believe that such evidence would refer only to the payments covered by the complaint. We agree that under the Aldanese ruling cited by the respondent court below, it could present rebuttal evidence on the petitioner's counterclaim.[32]

The failure to amend does not affect the result of the trial of the variant issues. In that event, the court acquired jurisdiction over such issues.[33] Judgment will thence be rendered but not on the basis of the issues alleged but on the basis of the issues discussed and proved in the course of the trial.[34]

II. WHERE THERE IS AN OBJECTION TO THE ADMISSION OF VARIANT EVIDENCE

Where evidence departs from the pleadings, it would be subject to the objection of irrelevancy or immateriality. In this case, the trial court may do either of the following things: (1) overrule the objection and admit the evidence, (2) sustain the objection and reject the evidence, or (3) sustain the objection but allow the pleadings to be amended so as to make the variant evidence material and relevant. This latter recourse is expressly authorized by the codal rule "when the presentation on the merits of the

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[32] Northern Cement Corp. v. Intermediate Appellate Court, G.R. No. L-68636, 29 February 1988, 158 SCRA 408, 417-18.

[33] Balais v. Balais, G.R. No. L-33924, 18 March 1988, 159 SCRA 37.

[34] Universal Motors Corp. vs. Court of Appeals, G.R. No. 47432, 27 January 1992, 205 SCRA 448.

action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." The court, so the code goes further to say, "may grant a continuance to enable the objecting party to meet such evidence."

In *Co Tiamco v. Diaz*,[35] the ejectment complaint did not allege any prior demand to vacate, but plaintiff was able to adduce, over objection, evidence of such demand. The Supreme Court approved the admission of this evidence on the ground that the defendant would not thereby be prejudiced. It would have been preferable, however, said the Court, if the trial court, before admitting the evidence, had allowed the amendment "as a matter of formality."[36]

III. THE PROBLEM OF VARIANCE IN CRIMINAL CASES

The problem of variance in criminal cases is of an entirely different dimension than that in civil cases. This is because constitutional rights of the accused, such as that to be informed of the nature and cause of the accusation against him and of his right against double jeopardy, impinge on matters of pleading and proof. The information cannot be as readily amended to make it conform with the evidence in the same way as the pleading in a civil case may be amended. After the accused has pleaded to the complaint or information and during the trial, this complaint or information can no longer be amended except as to matters of form and at the discretion of the court "when the same can be done without prejudice to the rights of the accused."[37]

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[35] 75 Phil. 672 (1946).

[36] *Compare with* Fianza v. Reavis, 7 Phil. 610 (1907), aff'd 215 U.S. 16, 40 Phil. 1017 (1909) — amendment to complaint allowed during the trial, despite defendant's objection, to conform to facts proved.

[37] People v. Molero, G.R. No. 67842, 24 September 1986, 144 SCRA 397.

Chances that the accused may suffer prejudicial surprise by a variance between allegation and proof seem to be greater in criminal cases than in civil cases. Thus, an information's allegation of the date of the commission of the offense of qualified theft as of August 1969 cannot be amended after the accused had been arraigned and had pleaded to August 1964, because disparity of the years between 1964 and 1969 is so great as to surprise and prejudice the accused.[38]

But where the conforming amendment is on a formal and insubstantial matter, it is as easily allowed as in civil cases. An amendment deleting the word "orally" from a charge of grave threats to conform to the evidence is merely a formal amendment since it did not affect the nature of the crime as originally charged. The particular manner in which the threat is made is not a qualifying ingredient of the offense.[39] Similarly, an information which alleges acts charging willful falsification but which turned out to be not willful but negligent presents a case of variance which may be cured.[40] So, also, may an accused charged with willful malversation be validly convicted of malversation through negligence where the evidence sustains the latter mode of committing the offense?[41]

But one charged with rape cannot be convicted of qualified seduction.[42] The same principle is true with respect to simple seduction.[43]

At bottom, however, the fact of variance between allegation and proof does not preclude conviction. The rule on the matter is quite liberal and is stated in section 4 of rule 120:

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[38]People v. Reyes, G.R. No. L-32557, 23 October 1981, 108 SCRA 203; *See also* Rocaberte v. People, G.R. No. 72994, 23 January 1991, 193 SCRA 152.

[39] Reyes v. People, G.R. No. L-21528-29, 28 March 1969, 27 SCRA 686.

[40] Samson v. Court of Appeals, 103 Phil. 277 (1958).

[41] Cabello v. Sandiganbayan, G.R. No. 93885, 14 May 1991, 197 SCRA 1994.

[42] People v. Castro, G.R. No. L-33175, 19 August 1974, 58 SCRA 473; Barba v. People, G.R. No. L-32267-70, 26 March 1979, 89 SCRA 112.

[43] People v. Teodosio, G.R. No. 97496, 3 June 1991, 198 SCRA 121.

> Section 4. *Judgment in case of variance between allegation and proof.* — When there is variance between the offense charged in the complaint or information, and that proved or established by the evidence, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved.[44]

The statute goes on to define when an offense charged necessarily includes those which are proved and vice-versa:

> Section 5. *When an offense includes or is included in another.* — An offense charged necessarily includes that which is proved, when some of the essential elements or ingredients of the former, as this is alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form a part of those constituting the latter.[45]

In practical terms, the above rules translate as follows:

> (1) When the offense proved is less serious, then it is necessarily included in the offense charged, as when the offense proved is homicide and the offense charged is murder, the defendant shall be convicted of the offense proved;[46]
>
> (2) When the offense proved is more serious, then it is not included in the offense charged (as when the offense originally proved is serious physical injury and the offense charged is slight physical injury), the defendant shall be convicted only of the offense charged.[47]

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[44] RULES OF COURT, Rule 120, sec. 4.
[45] RULES OF COURT, Rule 120, sec. 5.
[46] *See* People v. Calma, 97 Phil. 969 (1955) (unrep.).
[47] U.S. v. De Guzman, 8 Phil. 21 (1907).

> (3) When the offense proved is neither included in, nor does it include, the offense charged and is different therefrom (as when the offense charged is **estafa** and the offense charged is theft), the court should dismiss the action and order the filing of a new information charging the proper offense.[48]

IV. ASSESSMENT AND EVALUATION

The varying approaches to the problem of variance between allegation and proof affirm that pleadings do not have a stranglehold on the evidence which may be admitted at trials. The door for the amendment of the pleadings to make them conform with the evidence is widely open. The principal restraining considerations are in deference merely to the elementary requirements of fairness to all parties and the avoidance of all surprise.

It is quite clear that in the general run of cases, the exclusion of variant evidence will do more harm than good. The harm is somewhat akin to what will follow a reversion to the formalism of common-law pleading, and the good is hard to conceive.

There is probably one solitary instance only where a variant evidence cannot prevail over the pleadings and the latter cannot be conformingly amended. This singular occasion is where the defendant had been declared in default. The rule here is that the judgment against the defaulted party "shall not exceed the amount or be different in kind from that prayed for" even as this may be in accordance with the evidence adduced.[49] This rule is based on the inarticulate assumption that a party wittingly and knowingly allows himself to be defaulted on the expectation that the judgment prayed for in the complaint establishes an uppermost

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[48] People v. Yusay, 50 Phil. 598 (1927).

[49] RULES OF COURT, Rule 9, sec. 3, par. (d).

limit, in terms of quality and amount, of the relief which may be obtained against him.

But, in all these cases, the pleadings must give way to what is presumably the greater force — that of the evidence. The implicit theory may well be that a *proved* claim or defense has greater equity than one which has been merely *alleged*.

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