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RIGHT OF THE TRIAL COURT TO INSTRUCT AND ALLOW RECOVERY ON EVIDENCE INADMISSIBLE UNDER THE PLEADINGS BUT RECEIVED WITHOUT OBJECTION

On the question of the right of a trial court to instruct and allow recovery on evidence inadmissible under the pleadings, but received without objection, there is a diversity of opinion in different jurisdictions,[1] while in Missouri the decisions are discordant.[2] It is well settled, however, that where such evidence is admitted and the adverse party asks instructions upon it himself, he is precluded from later complaining,[3] since he has adopted the error as his own. Nor can an instruction be given which contradicts the allegations of a party's pleadings even though evidence in support of it may have been admitted without objection.[4] This would permit a party to recover upon a different cause of action than that alleged, and amounts to a failure of proof.

There are decisions in Missouri which deny the right of a trial court to instruct on any issues other than those made by the pleadings. Such language as: "a party can only recover on the case he makes in his pleadings"[5] or "No rule is better settled than that which holds a plaintiff to a recovery upon the specific acts of negligence averred and upon no other,"[6] clearly negative the right. There are a number of other cases, however, which hold that where evidence inadmissible under the pleadings is received without objection, which evidence constitutes a variance and not a failure of proof, such variance is waived by failure to make timely objection, and the trial court may instruct and allow recovery upon it unless the party takes the steps provided by statute.[7]

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[1] Thompson on Trials (2nd Edition), Sections 2309, 2312.
[2] See Litton vs. Railroad, 111 Mo. App. 140, 145.
[3] McDonald & Co. vs. Cash & Hinds, 45 Mo. App. 81.
Hilz vs. Railway, 101 Mo. 36.
Strother vs. De Witt, 98 Mo. App. 293.
[4] Bruce vs. Sims, 34 Mo. 246.
Capitol Bank vs. Armstrong, *et al.*, 62 Mo. 59.
Iron Mountain Bank vs. Murdock, 62 Mo. 70.
[5] Glass *et al.* vs. Gelvin, 80 Mo. 297, 302.
[6] Wilder vs. Railroads, 164 Mo. App. 114, 121.
[7] Brown vs. Railroad, 31 Mo. App. 661.
Hensler vs. Stix, 113 Mo. App. 162.
Ingwersen vs. Railroad, 116 Mo. App. 139
Carson vs. Quinn, 127 Mo. App. 525.
Seni vs. Railroad, 112 Mo. App. 74.
Chouquette vs. Railroad, 152 Mo. 257.
And cases cited *infra*.

The rule stated is predicated upon the proposition that such evidence does not constitute a failure of proof,[8] and some of the decisions can be reconciled by the failure of the court to properly distinguish between a variance and a failure of proof. An examination of two conflicting cases will illustrate this point.

In *Price v. Railroad*[9] the plaintiff alleged that he was injured in alighting from the train due to defendant's failure to stop a reasonable time to permit him to leave the cars. Evidence was admitted without objection that the station was not lighted, and the defendant cross-examined the plaintiff and other witnesses upon this point. An instruction was given for the plaintiff upon this evidence and the case on appeal was reversed for this error. The majority opinion declared this constituted a failure of proof and to allow recovery thereon would permit the plaintiff to recover on a different cause of action than that alleged, and furthermore, they held, the instructions can never enlarge the issues made by the pleadings despite the fact that such evidence is received without objection. In a strong dissenting opinion Nortoni, J., held this a mere variance, and if the defendant failed to file the affidavit of surprise provided by statute[10] he must be deemed to have waived the variance.

In accord with this dissenting opinion is *Litton v. Railroad.*[11] Here the plaintiff alleged his cattle were killed due to defendant's negligence in failing to maintain a fence as provided by statute. On the trial plaintiff proved without objection that the animals got upon the track through a gate negligently left open; this evidence was conceded to be inadmissible under the pleadings. The court over the defendant's objection instructed on this evidence and on appeal the trial court was sustained. The minority opinion in *Price v. Railroad* and the foregoing appear to be correct in principle and more in keeping with the spirit of the code. A failure of proof is said to exist "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.*"[11] In Price v. Railroad the plaintiff complained that his right as a passenger was violated by certain negligent acts of the defendant and the evidence disclosed that such right was violated not only by the specified negligent act, but also by

[8] See Section 2021 R. S. 1909.
[9] 72 Mo. 414.
[10] Section 1846, R. S. 1909.
[11] Section 2021, R. S. 1909.

another negligent act. Certainly the latter evidence does not fail to support the allegation of the petition "in its entire scope and meaning" since the gravamen of the complaint is negligence to the plaintiff as a passenger. It is only a variance and so holds *Litton v. Railroad* and other analogous cases.[12]

The statutes provide that "No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits; when it shall be alleged that a party has been misled, that fact shall be proved to the satisfaction of the court, by affidavit showing in what respect he has been misled, and thereupon the court may order the pleadings to be amended upon such terms as shall be just."[14] If the evidence constitutes not a failure of proof but a variance between the *allegata* and *probata* and the adverse party fails to object to the admission of such evidence, that in itself is strong proof that he has not been misled to his prejudice and if he fails to file the affidavit as provided in the section quoted, then the variance must be deemed immaterial and the court has the power either before or after judgment to amend the pleading to conform to the evidence.[15] If the adverse party has failed to file the affidavit as provided and thereby deprived the other party of his right to have the pleading amended,[16] surely he should not have the case reversed by reason of a variance which ought to be deemed immaterial. In such a case it can not be said a party's substantial rights are disregarded and such error, if there be any, is no ground for reversal. [17] Furthermore, for the fault of a party in failing to make timely objection to the introduction of evidence and in filing his affidavit to enable the court to determine whether the variance has been material, there should be no reversal since "It shall be the duty of the courts to so construe the provisions of law relating to pleadings as to place the party not in fault as nearly as possible in the same condition he would

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[12] 111 Mo. App. 140.
[13] Von Tuebra vs. Gas Light Co., 209 Mo. 648.
Mellor vs. Railroad, 105 Mo. 455, 470.
[14] Section 1846, R. S. 1909.
[15] Sections 1848, 1851, R. S. 1909.
[16] Mellor vs. Railroad, 105 Mo. 455, 471.
[17] Section 1850, R. S. 1909, "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

be in if no mistake had been made."[18] The fault of the party in not pursuing the steps enumerated above has prevented the other party from amending his pleading and if anyone should suffer, it should be the party in fault.

Price v. Railroad has never been directly overruled and in some subsequent cases has been followed.[19] The cases last cited state that the plaintiff can recover only upon the specific act of negligence averred, a proposition entirely too broad. *Price v. Railroad* may be considered discredited by *Litton v. Railroad* and the cases following it.[20]

Most of the foregoing discussion has been devoted to evidence inadmissible under the petition, but received without objection. The same principles apply to defenses inadmissible under the answer. Thus in *Hill v. Meyer Bros. Drug Co.*[21] the defendant put in a general denial and without objection was allowed to introduce evidence of contributory negligence. The refusal of the trial court to instruct for the defendant on this point was held error. The defect in the defendant's pleading was held to have been waived. In Gibson Bros. v. Jenkins[22] Smith, J., declared the waiver of the question of pleading was limited to cases where the unobjected to testimony tends to establish an unpleaded defense which is not new matter. This language was used in a rehearing of the case and, as in the first hearing of the case, it had been decided that sufficient and timely objection had been made to the evidence in question, it must be regarded as dictum. It is inconsistent with language used by the same judge in *Carter v. Shotwell*[23] and

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[18] Section 1865, R. S. 1909.

[19] Wilder vs. Street Railway Co., 164 Mo. App. 114. Plaintiff alleged negligence and on trial evidence made a case under the humanitarian doctrine and jury were instructed thereon. Reversed for error.

Orcutt vs. Century Bldg. Co., 201 Mo. 424, 443.

Hamilton vs. Railway Co., 114 Mo. App. 504. These and other cases persist in laying down unqualifiedly the rule that the plaintiff can recover only upon the specific act of negligence averred. These cases cannot be reconciled with the other cases cited.

[20] Later decisions of the Supreme Court are in direct conflict with Price vs. Railroad. See Fisher & Co. vs. Realty Co., 159 Mo. 562, and State *ex rel* United Rys. Co. vs. Reynolds, 257 Mo. 19 wherein Litton vs. Railroad is approved, *l. c.*, 28.

[21] 140 Mo. 433.

[22] 97 Mo. App. 27, 38.

[23] 42 Mo. App. 663. Defendant pleaded general denial but evidence tended to show fraud. Court refused to instruct on the fraud issue. Case reversed on another point but the court held the defendant was entitled to the instruction as the plaintiff had waived the defect by failure to object. See to the same effect Stewart vs. Goodrich, 9 Mo. App. 125.

Madison v. Railroad.[24] There is more reason to allow the defendant this privilege than the plaintiff since, if the former loses his opportunity to use a defense to the action, final judgment for the plaintiff will be conclusive against him even though he may have a good defense to the action, whereas the plaintiff may generally bring a new action and remedy his petition. M. R. S.

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[24] 60 Mo. App. 599.