THE EFFECT OF VARIANCE BETWEEN THE PLEADING AND THE PROOF IN INDIANA CRIMINAL PROCEDURE

When a fact, or facts, in the accusatory pleading of a criminal proceeding do not correspond with the proof produced at the trial, there has been a procedural error by the prosecution. This error, or non-correspondence of the pleading and the proof, is in certain circumstances properly termed a variance. A number of Indiana decisions have employed the principle of variance as the basis for granting a new trial to an accused. These decisions are not clear as to the nature of a variance, or as to the judicial standard proper to establish a variance as reversible error.

Historical Development

The history of the principle of variance is at best fragmentary. Its history, of course, is closely associated with that of the indictment, which from its origin has been governed by extremely strict rules.[1] One of the earliest rules of criminal pleading required that all the elements of a crime be set out in the indictment with certainty and particularity.[2] This rule caused extreme intricacy and elaboration in indictments.[3] A corollary of this rule held it necessary to prove the averments of an indictment as laid. It is probable that within the working of these two rules the principle of variance arose.[4]

The strictness of these, and other, rules of criminal pleading was intensified by the severity of the common law sanctions. Many judges, during the course of the seventeenth and eighteenth centuries, in administering the common law preferred to mete out life imprisonment or transportation rather than the death penalty called for by numerous capital crimes. They were quick to utilize technical procedural errors arising in criminal cases to mitigate the severity of the law.[5] As a result, the form of the indictment became very important. Indictments became

1. One writer has attributed this strictness as being, ". . . derived principally from the laws relating to appeals. . . . The utmost particularity was required of the appellor in the statement of his case, which was enrolled before the coroners, and variances between the allegations so made and those made before the justices were fatal." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 275 (1883).

2. "[This] rule . . . was some sort of security against the arbitrary multiplication of offenses and extension of the criminal law by judicial legislation in times when there were no definitions of crimes established by statute, or indeed by any generally recognized authority. . . . The fact is that looseness in the legal definitions of crimes can be met only by strictness and technicality in indictments." *Id.* at 293.

3. For examples of an early indictment, see *id.* at 288-91.

4. *Id.* at 285.

5. See generally HALL, THEFT, LAW AND SOCIETY c. 4 (2nd ed. 1952); 1 STEPHEN, *op. cit. supra* note 1, at 284.

filled with allegations which had been introduced largely by overly cautious pleaders, and retained because there was risk in omitting and none in retaining them.[6] This verbosity increased the opportunity for courts to use the technicality of variance as a mitigating factor.[7]

Concomitant with the severity of the criminal sanction was the harshness of the sixteenth century criminal procedure. There were no modern constitutional safeguards for an accused. The advantageous position of the Crown in a criminal proceeding,[8] in contrast with the attempts by the courts to mitigate the criminal sanctions, produced a paradox.[9] The acrimony and innate unfairness of the criminal procedure, in conjunction with the inquisitory methods of the Star Chamber, caused a public demand in the mid-seventeenth century for humanization of the criminal procedure. This demand was not fully realized in England until the mid-nineteenth century.[10] However, this desire for humanization was carried to the colonies of the New World, and was later incorporated into constitutional guarantees of protection for an accused. The strict rules of criminal pleading and practice persisted and became a part of America's legal inheritance from England.

A Variance and a Failure of Proof

Under Article 1 §13 of the Constitution of Indiana, the defendant is entitled, ". . . to demand the nature and cause of the accusation

6. Note, 29 KY. L. J. 362 (1935).

7. It is interesting to note that in England from 1800-1860 there was a legislative movement to mitigate the harshness of the criminal law sanctions. HALL, *op. cit. supra* note 5, at 133-41. In the same period several statutes were passed to remove many of the situations in which the defendant had been able to take advantage of a variance. 1 STEPHEN, *op. cit. supra* note 1, at 284-86.

8. See generally 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 223-35 (3d ed. 1944).

9. In the words of Stephen: "There was a strange alternation in the provisions of the law . . . by which irrational advantages were given alternatively to the Crown and to the prisoner. In favour of the prisoner it was provided that the most trumpery failure to fulfil the requirements of an irrational system should be sufficient to secure him practical impunity for his crime. I say practical impunity because the chance of his being indicted a second time and of the prosecution being able to prove that the flaw in the first indictment was such that he had never been legally in peril, and could not plead *autrefois acquit,* was not great. On the other hand, in favour of the Crown, it was provided that the prisoner should not be entitled to a copy of the indictment in cases in felony, but only to have it read over to him slowly, when he was put up to plead, a rule which made it exceedingly difficult for him to take advantage of any defect. But then again, any person might point out such a flaw, and it was in a sort of way the duty of the judge as counsel for the prisoner to do so. On the other hand, some flaws were, and others were not, waived by pleading to the indictment.

"In short, it is scarcely a parody to say, that from the earliest times to our own days, the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty." 1 STEPHEN, *op. cit. supra* note 1, at 284.

10. See 9 HOLDSWORTH, *op. cit. supra* note 8, at 234, 235.

against him, and to have a copy thereof."[11] This requires "that the facts constituting the alleged offense shall be charged in direct and unmistakable terms with clearness and all necessary certainty."[12] It is the combination of this constitutional right with the rule requiring the crime to be proved as it is laid in the accusatory pleading that affords the possibility of a procedural discrepancy between the pleadings and the proof. Categorically this discrepancy can be of two types, a failure of proof or a variance. A failure of proof typically arises in the following situations: (1) An allegation of one crime and proof of another[13]—e.g., a charge of larceny and proof of embezzlement;[14] (2) An allegation of one degree of a statutory crime and proof of another degree of that crime—e.g., a charge of first degree burglary of a dwelling house and proof of

11. IND. CONST. art. 1 § 13. This requires the indictment to embrace a charge of all the particulars that enter into the statutory description of the offense, either in the language of the statute or equivalent language. Kimmel v. State, 198 Ind. 444, 15 N.E. 16 (1926); Howard v. State, 67 Ind. 401 (1879); *accord,* State v. Price, 206 Ind. 498, 190 N.E. 174 (1934); Brockway v. State, 192 Ind. 656, 138 N.E. 88 (1923); Hinshaw v. State, 188 Ind. 147, 122 N.E. 418 (1919); Strader v. State, 92 Ind. 376 (1883).

12. In McLaughlin v. State, 45 Ind. 338, 344 (1873), Downey, C.J. quoted Wharton in giving the reasoning behind this requirement: "'The principal objects in requiring a reasonable degree of particularity in charging an offense are (1) in order to identify the charge, lest the grand jury should find a bill for one offense and the defendant be put upon his trial for another without any authority. (2) That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds, the offense, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same offense. (3) To warrant the court in granting or refusing any particular right or indulgence, which the defendant claims as incident to the nature of the case. (4) To enable the defendant to prepare for his defense, in particular cases, and to plead in all, or if he prefer it, to submit to the court, by demurrer or motion to quash, whether the facts alleged, supposing them to be true, so support the conclusion in law, as to render it necessary for him to make any answer to the charge. (5) To enable the court, looking at the record after conviction of the particular crime, and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment on the offender.'"

If matter, otherwise material, is alleged to be unknown in the indictment or affidavit, the constitutional requirement is fulfilled. Carter v. State, 172 Ind. 227, 87 N.E. 1081 (1908). Whitney v. State, 10 Ind. 404 (1858).

13. Situation 1 is not limited to instances where both crimes are derived from separate statutes. A single statute may delineate more than one offense, *e.g.,* the Indiana rape statute, IND. ANN. STAT. § 10-4201 (Burns 1956). Thus, it would be a failure of proof to charge rape of one class and prove rape of another. Greer v. State, 50 Ind. 267 (1875); *accord,* Robb v. State, 52 Ind. 216 (1875). The issue of included offenses may change the above situation. There is no failure of proof when the offense charged necessarily includes within it the offense proved. IND. ANN. STAT. § 9-1817 (Burns 1956). "Lesser offense" as used in the statute means any one of the offenses defined in the particular statutory crime. Ramsey v. State, 204 Ind. 212, 183 N.E. 649 (1932). *E.g.,* a rape includes an assault and battery, therefore, there would be no failure of proof to charge rape and to prove merely assault and battery. West v. State, 228 Ind. 431, 92 N.E.2d 852 (1950); *accord,* Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938); Marco v. State, 188 Ind. 540, 125 N.E. 34 (1919).

14. Vinnedge v. State, 167 Ind. 415, 79 N.E. 353 (1906); Jones v. State, 59 Ind. 229 (1877); *accord,* Tullis v. State, 230 Ind. 311, 103 N.E.2d 353 (1952); Gentry v. State, 223 Ind. 459, 61 N.E.2d 641 (1945); *cf.* Madison v. State, 130 N.E.2d 35, 49 (Ind. 1955).

burglary of a warehouse;[15] (3) A failure to prove an essential element of the crime alleged—e.g., a charge of rape but no proof of penetration, or a charge of burglary but no proof of a breaking and entry.[16] On the other hand a variance typically arises when the state, in attempting to prove the crime alleged, proves a fact which varies in some degree from the statement of fact in the allegation—e.g., a charge of larceny from John Doe and proof of larceny from Richard Roe, or a charge of assault and battery with a stone and proof of assault and battery with a stick.[17] Technically the latter situation is the only one which is a variance.[18] In other words, a variance can only arise where there has been a discrepancy between the charge of a particular statutory crime and the proof of that same crime as to a fact descriptive of the offense.[19] The first three situations are properly termed a failure of proof, or what could be termed a "total" failure of proof. In situations 1 and 2 there is proof of a different statutory crime, or degree of crime, than was averred in the accusatory pleading. A conviction in either case would be grounds for reversal.[20] Likewise, situation 3 is a failure of proof, but here there is a failure to prove any crime whatever. A conviction in such a case would not be sustained by sufficient evidence and would be

15. *Cf.* Brown v. State, 229 Ind. 470, 474-75, 99 N.E.2d 103, 105 (1951).

16. See *e.g.*, La Mar v. State, 231 Ind. 508, 109 N.E.2d 614 (1953); Culley v. State, 192 Ind. 687, 138 N.E. 260 (1922); McFarland v. State, 154 Ind. 442, 56 N.E. 910 (1900); King v. State, 44 Ind. 285 (1873).

17. See *e.g.*, Crouch v. State, 229 Ind. 326, 97 N.E.2d 860 (1951); McCrillis v. State, 69 Ind. 159 (1879); Vance v. State, 65 Ind. 460 (1879); Ryan v. State, 52 Ind. 167 (1875); Widner v. State, 25 Ind. 234 (1865); Groves v. State, 6 Blackf. 490 (Ind. 1843).

18. Apparently there is no Indiana case on point, but variant evidence cannot be grounds for an attack if a defendant has pleaded guilty to the charge. State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908).

19. In a sense all allegations in an accusatory pleading can be said to be describing the offense. However, there is a rule which makes a distinction between allegations in the accusatory pleading which are matters of substance and allegations which are matters of description. Foreman v. State, 201 Ind. 224, 226, 169 N.E. 125, 126 (1929). Presumably the former allegations are those of essential elements of the crime, such as seen in situation 3 above and note 15 *supra*. The descriptive allegations are those in which a variance generally arises. The line between the two types is an arbitrary one. The rule delineates two types of descriptive allegations: those which are legally essential, and those which are not, or are unnecessary. One rule seems to have been that both had to be proved as alleged. Droneberger v. State, 112 Ind. 105, 13 N.E. 259 (1887); Dennis v. State, 91 Ind. 291 (1883); Wertz v. State, 42 Ind. 161 (1873); Fulk v. State, 19 Ind. App. 352, 49 N.E. 465 (1898). However, the general rule has been that only those descriptive allegations which are legally essential need be proved as alleged. Foreman v. State, *supra;* Kirts v. State, 198 Ind. 39, 151 N.E. 132 (1926); Drake v. State, 145 Ind. 210, 41 N.E. 799 (1895); Mergentheim v. State, 107 Ind. 567, 574. 8 N.E. 568, 571 (1886); *accord,* United States v. Howard, 26 Fed. Cas. 388, No. 15,403 (C.C.D. Mass. 1837).

20. IND. ANN. STAT. § 9-1903 (9) (Burns 1956); Thetge v. State, 83 Ind. 126 (1882); McGuire v. State, 50 Ind. 284 (1875). *Supra* notes 12, 13 and 14.

contrary to law.[21]

Some Indiana decisions have failed to distinguish between the above situations. Cases falling within situations 1 and 2 have been decided on the issue of variance,[22] and cases falling within the variance situation have been dealt with as a failure of proof.[23] This has muddled the law in this area. To a certain degree it is true that a variance can be said to be a "failure to prove" the exact crime charged. Likewise, the charge and the proof in a failure of proof situation can be termed "variant." However, in regard to their legal meanings and procedural effects, it must be recognized that they are technically different legal concepts.[24] A failure of proof is fatal to the prosecution's case.[25] Historically when all variances were deemed fatal, the distinction between a variance and a failure of proof was unnecessary, for the practical effect of both was the same. However, no such strict rule as to variance exists in Indiana today. Not all variances between the indictment or the affidavit and the proof at the trial are fatal. To be fatal a variance must be material. Thus, the salient consideration is a determination of what is, and what should be, the judicial standard of this materiality in Indiana.

A Material Variance and an Immaterial Variance

Two judicial standards have been used by the Indiana courts in determining whether a variance is material, and therefore fatal, to the prosecution's case. The earliest standard was the "material allegation" test. If a fact as proved varies from a fact recited in a "material allegation" in the accusatory pleading, generally the variance is fatal. The scope of this test is apparently dependent upon two interrelated questions: (1) What allegations are material and must be proved, and what may be disregarded as surplusage? (2) What is sufficient proof of a material allegation?

To satisfy the strict common law mandate of certainty and particularity every conceivable descriptive fact of the offense was alleged.[26]

21. IND. ANN. STAT. § 9-1903 (9) (Burns 1956); Barry v. State, 187 Ind. 49, 118 N.E. 309 (1917); Lee v. State, 156 Ind. 541, 60 N.E. 299 (1901); Bruce v. State, 87 Ind. 450 (1882). See also McCormick v. State, 127 N.E.2d 341 (Ind. 1955); Carrier v. State, 227 Ind. 726, 89 N.E.2d 74 (1949); Price v. State, 204 Ind. 316, 184 N.E. 181 (1933); Chapman v. State, 157 Ind. 300, 61 N.E. 670 (1901).

22. See *e.g.*, Tullis v. State, 230 Ind. 311, 103 N.E.2d 353 (1952); Gentry v. State, 223 Ind. 459, 61 N.E.2d 641 (1945); Rogers v. State, 220 Ind. 443, 44 N.E.2d 343 (1942); Greer v. State, 50 Ind. 267 (1875).

23. See *e.g.*, Price v. State, 204 Ind. 316, 184 N.E. 1811 (1932); Winlock v. State, 121 Ind. 531, 23 N.E. 514 (1889).

24. The question of what stage in the criminal proceeding at which the accused can raise an objection to either of the two procedural discrepancies makes this technical distinction necessary. See note 91 *infra*.

25. See notes 19 and 20 *supra*.

26. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 288-91 (1883).

Once alleged these facts had to be proved. As a result, there were few, if any, immaterial allegations in the verbose common law indictment or affidavit. Apparently Indiana has never required the degree of particularity demanded by the early criminal law. The combination of judicial decisions[27] and several statutes[28] served to relax the common law rules pertaining to the indictment and affidavit. As a result, not every allegation in the accusatory pleading needs to be proved as alleged. Only the material allegations constituting the offense charged need be proved beyond a reasonable doubt.[29] Allegations not essential to such purpose, which can be entirely omitted without affecting the sufficiency of the charge against the defendant, are considered as mere surplusage and can be disregarded.[30] For example, in an indictment for burglary the value of the goods stolen is not an element of the offense; therefore, it is not necessary to allege the value. However, if such an allegation is made, it can be disregarded as mere surplusage, and a variance between the value alleged and the value proved would not, therefore, be fatal.[31] On the other hand a breaking and entry would be an element of the crime of burglary.[32] It would be a material allegation and would necessitate proof beyond a reasonable doubt.[33]

Article 1 §13 requires that the offense be clearly set forth in the ac-

27. See *e.g.,* Sneed v. State, 130 N.E.2d 32 (Ind. 1955); Schuble v. State, 226 Ind. 299, 79 N.E.2d 647 (1948); State v. Tillett, 173 Ind. 133, 89 N.E. 589 (1909); Thomas v. State, 103 Ind. 419, 2 N.E. 808 (1885); Myers v. State, 101 Ind. 379 (1884); Choen v. State, 52 Ind. 347 (1876); Carlisle v. State, 32 Ind. 55 (1869); Johnson v. State, 13 Ind. App. 299, 41 N.E. 550 (1895).

28. IND. ANN. STAT. §§ 9-1105 to 9-1108, 9-1110, 9-1111, 9-1118, 9-1119, 9-1121, 9-1124, 9-1126, 9-1127, 9-1133, 9-1135 (Burns 1956).

29. See Rhoades v. State, 224 Ind. 569, 70 N.E.2d 27 (1946); Scherer v. State, 188 Ind. 14, 121 N.E. 926 (1919). If the allegations are not proved beyond a reasonable doubt, the prosecution's case fails. *E.g.,* Redmon v. State, 126 N.E.2d 485 (Ind. 1955). A line of early cases indicated that every allegation in the charge had to be proved as laid even if the allegation could have been omitted without affecting the indictment. Droneberger v. State, 112 Ind. 105, 13 N.E. 259 (1887); Dennis v. State, 91 Ind. 291 (1883); Fulk v. State, 19 Ind. App. 352, 49 N.E. 465 (1898). However, this was not true in the majority of cases. Apparently material allegations are those which are averments of substance, or those which are legally essential descriptive allegations, see note 19 *supra.*

30. IND. ANN. STAT. § 9-1127 (6) (Burns 1956), provides that: "No indictment or affidavit shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment or other proceeding be stayed, arrested or in any other manner affected . . . (6) For any surplusage . . . when there is sufficient matter alleged to indicate the crime and person charged." See Crickmore v. State, 213 Ind. 586, 12 N.E.2d 266 (1938); Semon v. State, 158 Ind. 55, 62 N.E. 625 (1902); Drake v. State, 145 Ind. 210, 41 N.E. 799 (1895).

31. Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Pacelli v. State, 201 Ind. 455, 166 N.E. 649 (1929). See also Hull v. State, 120 Ind. 153, 22 N.E. 117 (1889); Johnson v. State, 13 Ind. App. 299, 41 N.E. 550 (1895).

32. IND. ANN. STAT. § 10-701 (Burns 1956).

33. Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949). See also note 29 *supra.*

cusatory pleading in plain and concise language.[34] In meeting this requirement it is not clear what standard is used by the Indiana courts in marginal cases to draw the line between those allegations which are material and those which are surplusage. The courts seem to look to the gravamen of the offense within its statutory definition and decide this question on the merits of the particular fact situation.[35]

It is clear that once a court labels an allegation surplusage, under the "material allegation" test, there can be no fatal variance as to descriptive facts within that allegation.[36] A fatal variance can arise only where the variant descriptive fact is averred in a material allegation. For example, in an indictment for larceny the defendant is charged with theft of a horse on April 17, 1946. The proof is that the defendant stole a cow on April 17, 1946. The subject-matter of larceny is a material element of the crime;[37] therefore, the variance is fatal.[38] On the other hand if the proof was that the defendant stole a horse on April 18, 1946, the variance would not be fatal. Ordinarily time is not essential to the crime of larceny; therefore, the allegation as to time is surplusage and can be disregarded.[39]

Many variance cases arise when the pleader is unnecessarily particular in describing the offense. In other words, some description is necessary, but the pleader goes further and alleges unnecessary matters of description.[40] The rule is that the pleader must then prove both as alleged.[41] For example, in an indictment for the theft of a revolver, it is

34. See note 12 *supra.*

35. See Kirts v. State, 198 Ind. 39, 151 N.E. 132 (1926); Selby v. State, 161 Ind. 667, 69 N.E. 463 (1903); Musgrave v. State, 133 Ind. 297, 32 N.E. 885 (1892); Thomas v. State, 103 Ind. 419, 2 N.E. 808 (1885); Markle v. State, 3 Ind. 535 (1852); Ritchey v. State, 7 Blackf. 168 (Ind. 1844). See also note 16 *supra.*

36. See *e.g.,* Crickmore v. State, 213 Ind. 586, 12 N.E.2d 266 (1938); Ford v. State, 112 Ind. 373, 14 N.E. 241 (1887).

37. UNDERHILL, CRIMINAL EVIDENCE § 510 (4th ed. 1935).

38. See *e.g.,* State v. Gross, 175 Ind. 597, 95 N.E. 117 (1911); State v. McCormick, 141 Ind. 685, 40 N.E. 1089 (1895); State v. Pease, 74 Ind. 263 (1881); McLaughlin v. State, 52 Ind. 279 (1875); Thrasher v. State, 6 Blackf. 460 (Ind. 1843).

39. *Cf.* Crickmore v. State, 213 Ind. 586, 12 N.E.2d 266 (1938).

40. The question arises as to what description is necessary. There are many rules in regard to this. *E.g.,* generally, the name of the one injured in his person or property by the act of the accused, or the name of one whose identity is essential to a proper description of the offense should be alleged. Gullett v. State, 233 Ind. 6, 116 N.E.2d 234 (1953). For a general discussion on this point, see Schuble v. State, 226 Ind. 299, 79 N.E.2d 647 (1948), and Markle v. State, 3 Ind. 535 (1852).

41. A clear statement of the rule is found in Hull v. State, 120 Ind. 153, 154, 22 N.E. 117 (1889): "Where unnecessary descriptive matter is mingled with matter of essential description, the whole must be proved as laid, but the limit of the doctrine is, that, if the entire averment, whereof the descriptive matter is a part is surplusage, it may be rejected and the descriptive matter falls with it and need not be proved." *C.f.* Lewis v. State, 113 Ind. 59, 14 N.E. 892 (1887); Hamilton v. State, 60 Ind. 193 (1877); Wilcox v. State, 7 Blackf. 456 (Ind. 1845); Johnson v. State, 13 Ind. App. 299, 300, 41 N.E. 550, 551 (1895). The general rule in Indiana criminal practice is that

necessary to allege that a revolver was stolen, but not necessary to allege its type;[42] however, if the type is alleged as being a "Smith and Weston" and the proof at the trial shows it to have been a "Smith and Wesson," under this rule, the variance between the allegations and the proof is fatal.[43] Thus, the pleader by merely alleging an otherwise unnecessary descriptive fact makes that fact a material allegation.[44] Therefore, it must be proved as laid. This position has never been directly repudiated in Indiana.[45]

The second question involved in the "material allegation" test is a determination of what variances within a material allegation are fatal. The early Indiana rule was that "sufficient proof" meant precise conformity of the material allegation to the proof.[46] An exception was that trifling discrepancies such as clerical errors, or spelling, causing a slight variance in names, places, time, values, etc., were generally not fatal vari-

---

"what is unnecessary to allege is ordinarily unnecessary to prove." Marks v. State, 220 Ind. 9, 24, 40 N.E.2d 108, 113 (1942). See notes 29 and 30 *supra*. The rule propounded in the *Hull* case, *supra*, is an exception to this general rule. The limit of the rule in the *Hull* case is apparently analogous to the rule that descriptive matter not legally essential can be disregarded, *supra* note 19.

42. The general rule in regard to larceny is that the kind of property must be alleged; however, it is not necessary to specify and describe it from other property of the same class. Foust v. State, 200 Ind. 76, 161 N.E. 371 (1928). See Markle v. State, 3 Ind. 535 (1852).

43. Morgan v. State, 51 Ind. 73 (1875); *c.f.* Tate v. State, 5 Blackf. 174 (Ind. 1839). See note 41 *supra*.

44. It is interesting that where the pleader does become minute in the accusatory pleading and alleges unnecessary descriptive facts, the omission of such facts would not make the pleading bad against a motion to quash; however, a pleading which includes unnecessary and inaccurate descriptive facts would not be safe against a seasonable objection of variance. Foust v. State, 200 Ind. 76, 161 N.E. 371 (1928).

45. Although not directly repudiated, the rule has been subject to attack. See McCallister v. State, 217 Ind. 65, 26 N.E.2d 391 (1946); or it has been ruled inapplicable when actually it did apply. See Souerdike v. State, 230 Ind. 192, 102 N.E.2d 367 (1951); Kirts v. State, 198 Ind. 39, 151 N.E. 132 (1926); Kruger v. State, 135 Ind. 573, 35 N.E. 1019 (1893); Mergentheim v. State, 107 Ind. 567, 8 N.E. 568 (1886).

46. For example, a charge of exhibiting a pool table for purposes of gaming, and proof of exhibiting a billiard table was a fatal variance, Sumner v. State, 74 Ind. 52 (1881); a charge for suffering a minor to play billiards, and proof of suffering a minor to play "fifteen-ball" pool was fatal, Squier v. State, 66 Ind. 317 (1879); a charge of managing a "pigeon-hole" (pool) table, and proof of managing a "Jenny Lind" (type of pool table with no pockets) table was fatal, Bartender v. State, 51 Ind. 73 (1875); a variance between the date of bond sued upon in the charge, and the proof of that date was fatal, Comparet v. State, 7 Blackf. 553 (Ind. 1845); a charge of playing cards and winning from A.M. and A.C. and G.H., and proof of winning by the defendant and another, as partners, from A.C. and G.H. was fatal, Wilcox v. State, 7 Blackf. 456 (Ind. 1845); a charge of assault and battery on Ratherine Swails, and proof of assault and battery on Catherine Swails was fatal, Swails v. State, 7 Blackf. 324 (Ind. 1844); a charge of suffering a mare to be run in a race, and proof of suffering a horse to be run was fatal, Thrasher v. State 6 Blackf. 460 (Ind. 1843); and, a charge of winning $5.00 on an election bet, and proof of winning a promisory note of $5.00 was fatal, Tate v. State, 5 Blackf. 174 (Ind. 1839). See also Hamilton v. State, 60 Ind. 193 (1877); Ball v. State, 26 Ind. 155 (1866).

ances.[47] These were excepted by labeling the trifles "surplusage" not necessitating proof,[48] by labeling them as essentially "non-descriptive,"[49] or, by saying they were immaterial or merely "literal" variances not affecting the substantial rights of the defendant.[50] The early rule has been relaxed somewhat to the requirement that there must be substantial conformity of the material allegation to the proof.[51]

This "material allegation" rule has prevailed in the majority of Indiana variance decisions.[52] The test of this rule is whether the variant allegation is materially descriptive of the offense. If so, it has to be proved substantially as laid. The strictness with which this rule is applied depends upon how narrowly or how broadly the court answers the question of what is material allegation.

In some early decisions a different test for determining the materiality of a variance was announced.[53] Under this test a variance is not material unless it is substantial enough to mislead the defendant, or expose him to the peril of being twice put in jeopardy for the same offense.[54] On its face this test was a radical departure from the afore-

47. This exception is in accord with the general rule in Indiana that minor defects do not have a vitiating effect on the accusatory pleading. Post v. State, 197 Ind. 193, 150 N.E. 99 (1926); Bader v. State, 176 Ind. 268, 94 N.E. 1009 (1911); State v. Hedge, 6 Ind. 330 (1855). See also Walter v. State, 105 Ind. 589, 5 N.E. 735 (1886); Myers v. State, 101 Ind. 379, 382 (1884); Miller v. State, 69 Ind. 284 (1879). Many variances in names are considered immaterial by the doctrine of idem sonans. The rule as "that if the names may be sounded alike, without doing violence to the power of the letters found in the variant othography, then the variance is immaterial." Black v. State, 57 Ind. 109 (1877); *accord,* Pacelli v. State, 201 Ind. 455, 166 N.E. 649 (1929); Smurr v. State, 88 Ind. 504 (1883). *E.g.,* "McGloflin" and "McLaughlin," McLaughlin v. State, 52 Ind. 476 (1876); "Adanson" and "Adamson," James v. State, 7 Blackf. 325 (Ind. 1844); "Beckwith" and "Beckworth," Stewart v. State, 4 Blackf. 171 (Ind. 1836), have been held to be idem sonans.

48. Drake v. State, 101 Ind. 379 (1884).

49. Foreman v. State, 201 Ind. 224, 167 N.E. 125 (1929); Kirts v. State, 198 Ind. 39, 151 N.E. 132 (1926); Mergentheim v. State, 107 Ind. 567, 8 N.E. 568 (1886).

50. Dant v. State, 106 Ind. 79, 80, 5 N.E. 870 (1885).

51. There is no definition as to just what is meant by "substantial." Apparently it is a relaxation of the early rule of "preciseness," *supra* note 45. See Gipe v. State, 167 Ind. 433, 75 N.E. 881 (1905). See also Schlegel v. State, 228 Ind. 205, 210, 91 N.E.2d 167, 168 (1950); State v. Gross, 175 Ind. 597, 601, 95 N.E. 117, 118 (1911); Hull v. State, 120 Ind. 153, 154, 22 N.E. 117, 118 (1889); Lewis v. State, 113 Ind. 59, 61, 14 N.E. 892, 893 (1887); Droneberger v. State, 112 Ind. 105, 106, 13 N.E. 259 (1887); State v. Hays, 21 Ind. 176 (1863).

52. See *e.g.,* Crouch v. State, 229 Ind. 326, 97 N. E.2d 860 (1951); Rhoades v. State, 224 Ind. 569, 70 N.E.2d 27 (1946); Price v. State, 204 Ind. 316, 184 N.E. 181 (1932); Foreman v. State, 201 Ind. 224, 167 N.E. 125 (1929).

53. Oats v. State, 153 Ind. 436, 439, 55 N.E. 226, 227 (1899); Kruger v. State, 135 Ind. 573, 577-78, 35 N.E. 1019, 1021 (1893); Thomas v. State, 103 Ind. 419, 2 N.E. 808 (1885); Saxton v. State, 8 Blackf. 201 (Ind. 1846).

54. In Madison v. State, 130 N.E.2d 35, 48 (Ind. 1955), the "modern" view was succinctly stated: ". . . the test [of a material variance] is, (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or

mentioned one. No longer would the question of variance be determined by arbitrary technical rules as to what constituted a material allegation. Instead, the fatality of a variance would be decided on the basis of substance, i.e. whether the variance itself was material. However, the test produced no such radical change in the majority of Indiana variance decisions. Most courts have made no mention of this test in deciding a variance case, but have retained the "material allegation" test.[55] A few decisions have used this test in regard to a particular category of variance.[56] Thus, the effect of the test has not been great. However, some Indiana decisions have made the fatality of a variance dependent not on whether it is in respect to a material allegation, but on whether the variance itself affects the substantial rights of the accused.[57] If this is the present Indiana position, the determination of what constitutes a material allegation would be moot in a variance situation. This is the more modern view and has been accepted by a number of jurisdictions.[58] However, it is not clear whether this "modern" test or the "material allegation" test would prevail in a variance case in Indiana. Both tests have been employed; neither has been repudiated in favor of the other.

The issue of variance recently arose in the case of *Madison v. State*.[59] The case involved an indictment for murder in which it was alleged that the defendant killed by means of a hand grenade loaded with "nitroglycerine." The proof at the trial showed the hand grenade was loaded with "T.N.T." The case came before the Indiana Supreme Court and was reversed on grounds other than a variance. However, the "opinion of the court," written by one justice, discussed at length the question of a material variance.[60] Four justices in a separate opinion concurred with the reasoning for reversal, but disagreed with the discussion of the Indiana rules regarding variance.[61] Both opinions are dicta in regard to variance; however, they serve as an apt illustration of the principles and effects of both judicial tests.

---

prejudiced thereby?; (2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?"

55. See notes 46, 51, and 52 *supra*.

56. See *e.g.*, Gears v. State, 203 Ind. 3, 176 N.E. 553 (1931), and Headlee v. State, 201 Ind. 545, 168 N.E. 692 (1929), where this test was used in regard to a variance in names; however, there was no indication that the test would be extended to other categories of variance.

57. See note 53 *supra*. See also Madison v. State, 130 N.E.2d 35 (Ind. 1955); Souerdike v. State, 230 Ind. 192, 102 N.E.2d 367 (1951); McCallister v. State, 217 Ind. 65, 26 N.E.2d 391 (1940); Kokenes v. State 213 Ind. 476, 492, 13 N.E.2d 524, 531 (1938).

58. 42 C.J.S., *Indictments and Informations* § 254 (1944). See note 112 *infra*.

59. 130 N.E.2d 35 (Ind. 1955).

60. 130 N.E.2d 35, 40-46 (Ind. 1955).

61. 130 N.E.2d 35 at 46-51.

The "court's" opinion admitted that the indictment was overly specific, as the allegation of the type of explosive the grenade contained was unnecessary; but it reasoned that since the means of committing murder was a material allegation and "nitroglycerine" was descriptive of it, both had to be proved as alleged. Since this had not been done, there was a fatal variance. In other words, the effect of the variance was decided within the strict context of the "material allegation" test.[62] The concurring "majority" opinion used the "modern" test of variance and looked to the merits of the case to see if the variance had injured the accused in his defense. It concluded that it had not; therefore, the variance was not fatal.

Essentially the "court's" opinion seems to have felt that the jury was prejudiced by the variant evidence, and the defendant was injured thereby.[63] The other four judges did not agree that the defendant was injured. This type of result undoubtedly arises when a decision rests not on strict technical rules, but on an analysis of the merits of the particular case before a court. However, the "court's" opinion did not disagree solely on the merits of the case, but based its reasoning upon the "material allegation" test. Logically the mere fact that the variant descriptive matter is in a material allegation does not in itself make that matter prejudicial to the defendant.[64] Likewise, it does not always follow that

62. In fact the dictum of the "court's" opinion was stricter than most early common law authority in requiring precise conformity between pleading and the proof in regard to means of committing murder when the variant means produce the same type of death. 1 EAST, PLEAS OF THE CROWN 341 (1806); 2 HALE, PLEAS OF THE CROWN 185 (1736). See Ryan v. State, 52 Ind. 167 (1875); Dukes v. State, 11 Ind. 557 (1858); Carter v. State, 2 Ind. 617 (1851). The general rule apparently is, ". . . in case the means by which the homicide was committed are alleged, the proof must correspond with the allegation, *although substantial correspondence is sufficient.*" (emphasis added.) Gipe v. State, 165 Ind. 433, 75 N.E. 881 (1905). See also Waggoner v. State, 155 Ind. 341, 58 N.E. 190 (1900). Thus, a charge of murder with a blunt instrument and proof of murder by a pistol shot has been held not to be fatally variant. Hicks v. State, 213 Ind. 277, 294, 11 N.E.2d 171, 178 (1937). *Compare* Sullivan v. State, 163 Ark. 353, 258 S.W. 980 (1924). See generally State v. Spahr, 186 Ind. 589, 117 N.E. 648 (1917). *But cf.* Shelton v. State, 209 Ind. 534, 199 N.E. 148 (1936).

63. The "court's" opinion seems to have felt that there was a deliberate attempt by the prosecution to prejudice the defendant. Madison v. State, 130 N.E.2d 35, 40 (Ind. 1955).

64. It is even more illogical to assume that minutely variant descriptive facts, unnecessarily averred, are always prejudicial. This point was made in Smith v. State, 185 Ga. 365, 372, 195 S.E. 144, 147 (1938) (concurring opinion): "If the averment be one which it is useless to state, it remains useless even if stated. An immaterial thing, so long as in a changing world it remains in fact immaterial, is not changed in quality by its mere statement. Wishes cannot be made into horses by their mere expression. If it should be shown that the inclusion of some so-called immaterial fact could work harm to the defendant, then it would follow that the fact was not immaterial. The 'immaterial' neither helps nor harms . . . the mere omission to prove some trivial, immaterial, additional fact, which has been set forth in an otherwise clear, full, and valid indictment, should not operate to set free one who has been tried and convicted thereunder." See also note 67 *infra*.

an immaterial allegation ipso facto causes no injury to the accused in his defense.[65]

The principle of variance is interwoven with the constitutional requirement of Article 1 § 13.[66] It would seem that this requirement can be fulfilled best by an examination of the facts of each case to determine prejudice rather than by an adherence to the mechanistic "material allegation" test. It is logically apparent that if the principle of variance is necessary in our modern criminal procedure, the "majority" concurring view would be the better of the two expressed in the *Madison* decision. It is more in line with the statutory rules in Indiana regarding indictments and affidavits.[67] Indeed, it seems to be the view prevalent in most jurisdictions, and in the federal courts.[68]

The radius of permissable variance in a criminal proceeding is interdependent upon the constitutional guarantee regarding double jeopardy.[69] This is evidenced by the second phase of the "modern" test for determining the materiality of a variance, viz., is the defendant exposed to the peril of being twice put in jeopardy for the same offense by the variance.[70] Specifically the question is: Does jeopardy attach on an in-

65. It has been recognized that surplus allegations may prejudice a defendant. Bowen v. State, 189 Ind. 644, 650, 128 N.E. 926, 928 (1920). See Sloan v. United States, 31 F.2d 902, 904 (8th Cir. 1929). Apparently this reasoning has not been analogized as yet to a situation where a variance appears in a surplus allegation. *Cf.* Madison v. State, 130 N.E.2d 35, 51 (Ind. 1955).

66. See note 12 *supra.*

67. IND. ANN. STAT. § 9-1127 (10) (Burns 1956) provides: "No indictment or affidavit shall be deemed invalid, nor shall be set aside or quashed, nor shall the trial, judgment or other proceeding be stayed, arrested or in any manner affected . . .. (10) For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This is similar to the federal rule. FED. R. CRIM. P. 52(a). On its face the Indiana statute seems to warrant the application of the "modern" test in a variance situation. However, only a few decisions have interpreted the statute to require a court to determine whether a variance tends to prejudice the defendant's substantial rights before adjudging it fatal. Lucas v. State, 187 Ind. 709, 121 N. E. 274 (1918); Drake v. State, 145 Ind. 210, 41 N.E. 799 (1895); Thomas v. State, 103 Ind. 419, 2 N.E. 808 (1885); *cf.* Madison v. State, 130 N.E.2d 35, 49 (Ind. 1955).

68. Berger v. United States, 295 U.S. 78, 82 (1934); United States v. Rosenblum, 176 F.2d 321 (7th Cir. 1949); United States v. Tandaric, 152 F.2d 3, 6 (7th Cir. 1945); Sloan v. United States, 31 F.2d 902 (8th Cir. 1929); State v. Hoffman, 78 Ariz. 319, 279 P.2d 898 (1955); People v. Garamony, 359 Ill. 210, 194 N.E. 320 (1935); People v. Larrabee, 113 Cal. App. 745, 299 Pac. 85 (1931); Wise v. State, 28 Okla. Crim. 324, 230 Pac. 930 (1924); State v. Wright, 103 Kan. 584, 175 Pac. 381 (1918). See C.J.S., *Indictments and Informations* § 254 (1944).

69. IND. CONST. art. 1 § 14. "Jeopardy is the peril and danger to life or liberty in which a person is put when he has been regularly and sufficiently charged with the commission of a crime; has been arraigned and pleaded to such charge; has been put upon his trial and duly sworn to try the cause and charged with due deliverance." Armentrout v. State, 214 Ind. 273, 275, 15 N.E.2d 363, 364 (1938). See Haase v. State, 8 Ind. App. 488, 493, 36 N.E. 54, 55 (1894).

70. See Commonwealth v. Lawton, 170 Pa. Super, 9, 84 A.2d 384 (1951); Commonwealth v. Kramer, 146 Pa. Super. 91, 22 A.2d 46 (1941).

dictment which is invalidated because of a variance? This question generally arises in three situations.[71]

> (1) The defendant is indicted, and, after the trial begins, a variance appears. The defendant seasonably objects to the variance, but is overruled and convicted. On appeal the cause is reversed because the variance is deemed material, and a new trial is granted. On the new trial, the defendant pleads former jeopardy.

It is clear that the defendant has waived his right to claim former jeopardy.[72] The new trial would place the defendant in the same position as if no previous trial had been conducted; therefore, jeopardy did not attach on the first trial.[73]

> (2) A variance appears during the trial, and the defendant seasonably objects. He thereupon is acquitted by a directed verdict, or the case is dismissed either by the court or by a nolle prosequi by the prosecution. Subsequently the prosecution enters another indictment against the accused which remedies the variance, and the defendant pleads former jeopardy.[74]

This point does not appear to have arisen in Indiana. The prevailing rule in other jurisdictions is that an acquittal or dismissal due to a material variance is no bar to a second prosecution on a new indictment.[75]

---

71. In these three situations, on the second trial, the court would have to review the record of the prior prosecution. The defendant's seasonable plea of former jeopardy necessitates such a review. Mann v. State, 205 Ind. 491, 498, 187 N.E. 343 (1933).

72. Although no such exact case has arisen in Indiana; however, IND. ANN. STAT. § 9-1902 (Burns 1956), and analogous cases clearly indicate that there has been a waiver of the right to claim double jeopardy in this situation. Jacoby v. State, 210 Ind. 49, 199 N.E. 563 (1936); State *ex rel* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); Patterson v. State, 70 Ind. 341 (1880); Veatch v. State, 60 Ind. 291 (1878); *Ex parte* Bradley, 48 Ind. 548 (1874); Ford v. State, 7 Ind. App. 567, 35 N.E. 34 (1893). Similarly the defendant can waive double jeopardy by attacking the indictment on other pleas such as a motion to quash. Blocher v. State, 177 Ind. 356, 98 N.E. 118 (1912).

73. IND. ANN. STAT. §§ 9-1901, 9-1902 (Burns 1956); State v. Balsey, 159 Ind. 395, 65 N.E. 185 (1902).

74. After such dismissal or acquittal on a defective indictment, the court may direct the retention of the defendant so that he can be placed on trial on a new indictment. IND. ANN. STAT. § 9-1812 (Burns 1956). See State v. Simpson, 166 Ind. 211, 76 N.E. 554 (1906); Rowland v. State, 126 Ind. 517, 26 N. E. 485 (1891).

75. *Ex parte* Rhinelander, 11 F. Supp. 298 (W.D. Tex. 1935); United States v. Phelan, 250 Fed. 927 (D.C.D. Mass. 1917); State v. Midgely, 28 N.J. Super. App. Div. 491, 101 A.2d 51 (1953); Young v. State, 185 Tenn. 596, 206 S.W.2d 805 (1947); Oliver v. State, 234 Ala. 460, 175 So. 305 (1937); State v. Schwartz, 5 W.W. Har. 418 (Del. 1932), 166 Atl. 666; Commonwealth v. Compopiano, 254 Mass. 560, 150 N.E. 844 (1926); State v. Crisp, 188 N.C. 799, 125 S.E. 543 (1924); State v. Hayes, 296 Mo. 58, 246 S.W. 948 (1922); State v. Jacoby, 25 N.M. 224, 180 Pac. 462 (1919); State v. Wilson, 91 Wash. 136, 157 Pac. 474 (1916); Carter v. Commonwealth, 25 Ky. L. Rep. 688, 76 S.W. 337 (1903); Hite v. State, 9 Yerg. 357 (Tenn. 1836). The question arises whether

However, an acquittal due to an immaterial variance is a bar to a second prosecution.[76] Several jurisdictions have enacted statutes to this effect.[77] Such statutes have been held to be constitutionally valid.[78] There is authority that an acquittal due to a variance is no bar to a subsequent prosecution regardless of whether the variance is material or immaterial, so long as the defendant objected to the variant evidence at the first trial and the objection was sustained. These decisions base their reasoning on grounds of estoppel.[79] This seems to be sound. When a defendant pleads former acquittal in this situation, he is in effect saying that the variance in the first prosecution was immaterial.[80] There is no sound reason why a defendant should be able to plead two inconsistent positions, and thereby excuse himself from a trial on the merits.[81]

---

or not the plea of res judicata could operate to bar the second prosecution. It is not clear if an Indiana court will allow such a plea in a criminal case; however, there is no valid reason why res judicata is not applicable to a criminal proceeding. United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948); State v. Coblentz, 169 Md. 159, 180 Atl. 266 (1935). Res judicata requires a judgment on the merits. Burrell v. Jean, 196 Ind. 187, 146 N.E. 754 (1925); Hine v. Wright, 110 Ind. App. 385, 36 N.E.2d 972 (1941). The situation above would not be a judgment on the merits. State v. Midgely, 28 N. J. Super. App. Div. 491, 101 A.2d 51, 55 (1953). Therefore, res judicata would not help the defendant. Commonwealth v. Comber, 170 Pa. Super. 466, 87 A.2d 90 (1952); State v. Midgely, *supra*. For a general discussion of the applicability of res judicata in criminal cases, see Schmidt, *Res Adjudicata in Criminal Cases*, 25 CALIF. S. BAR J. 366 (1951) and McLaren, *Doctrine of Res Judicata*, 10 WASH L. REV. 198 (1935).

76. Drake v. Commonwealth, 29 Ky. L. Rep. 981, 96 S.W. 580 (1906); People v. Terrill, 132 Cal. 497, 64 Pac. 894 (1901); State v. Copeland, 46 S.C. 1, 23 S.E. 980 (1896); People v. Hughes, 41 Cal. 234 (1871).

77. ARK. STAT. ANN. § 43-1227 (1947); KAN. GEN. STAT. ANN. § 21-115 (1949); KY. CRIM. CODE PRAC. AND SERVICE § 178 (Russell 1954); MASS. ANN. LAWS c. 263, § 8 (1956); MICH. COMP. LAWS § 723.6 (1948); MISS. CODE ANN. § 2433 (1942); N.Y. CONS. LAWS ANN. § 452 (McKinney 1945); S.C. CODE § 17-410 (1952). These statutes generally state that the variance must be material; however, when they do not, they have been construed to mean the variance must be material. *E.g.*, Johnson v. State, 199 Ark. 196, 133 S.W.2d 15 (1939).

78. *E.g.*, People v. McNealy, 17 Cal. 333 (1861).

79. The defendant's position in these circumstances has been characterized in State v. Cootner, 60 So.2d 734, 737 (Fla. 1952): "May a defendant who obtains an instructed verdict on the ground that there is a material variance between the allegation and proof . . . escape on the ground that the variance claimed in the first prosecution was an immaterial variance? In other words, can he escape trial by taking these two inconsistent positions? Can he blow 'hot one minute and cold the next'?" See also Salta v. United States 44 F.2d 752 (1st Cir. 1930); United States v. Hunter, 123 F. Supp. 1 (D.C. Md. 1954); State v. Drakeford, 162 N.C. 667, 78 S.E. 308 (1913). *But cf.* State v. Kincaid, 9 N.J. Misc. C.P. 1194, 157 Atl. 442 (1931).

80. The defendant has the burden of proving the identity of the two offenses. His plea of former jeopardy would necessitate his proving it by means of the record of the first trial. Alyea v. State, 198 Ind. 364, 152 N.E. 801 (1926); Mood v. State, 194 Ind. 357, 142 N.E. 641 (1924). This would necessitate his taking the two inconsistent positions.

81. The constitutional right against double jeopardy is not an absolute one. It may be waived. Reynolds v. Dowd, 232 Ind. 593, 114 N.E.2d 840 (1953). See note 72 *supra*. The theory of estoppel is similar to such a theory of waiver. There is language in Joy

It would seem likely that Indiana would conform to the majority rule in this situation.[82] The Indiana test for determining whether double jeopardy exists is the so-called "identity of the offense" test or "same evidence" test; that is, whether the second indictment recites the same identical act and crime as the former indictment, and calls for the production of the same evidence to prove both indictments.[83] Stated in another way the test is "whether if what is set out in the second indictment had been proved under the first, there could have been a conviction."[84] It would seem to follow that under this test an acquittal due to a material variance would not bar a subsequent prosecution.[85] The second phase of the "modern" test of a material variance further substantiates this position. It says essentially that if a defendant cannot protect himself on any future indictment for the same offense by alleging that the two offenses were identical, then the variance is material.

> (3) A variance appears in the original trial. The defendant does not object, but due to error of the court or jury the variance is thought to be material and the defendant is acquitted. The defendant is reindicted, and on the subsequent trial pleads former acquittal.

Under the majority rule, if the variance was in fact material, jeopardy does not attach. However, if in the second trial the variance in the first proceeding is adjudged immaterial, former jeopardy is a good plea to bar the second prosecution.[86] This position would seem to be in accord with the rules regarding double jeopardy in Indiana. It would seem logical that if a variance is in fact immaterial, the indictment would

---

v. State, 14 Ind. 139, 152 (1860), to indicate that Indiana would accept this position on a theory of waiver. In other words, since the first indictment was eliminated at the instance of the accused, he has waived his constitutional right.

82. A different situation would exist if the state, seeing that its evidence would create a variance, and before the evidence was admitted, moved for a nolle prosequi. In such a situation in Indiana it is possible jeopardy would attach. *Cf.* Gillespie v. State, 168 Ind. 298, 319, 80 N.E. 829, 836 (1907); Hensley v. State, 107 Ind. 587, 8 N.E. 692 (1886). In Indiana jeopardy attaches after the jury has been impanelled or the trial has begun. Gillespie v. State, *supra.*

83. Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924); Smith v. State, 85 Ind. 553 (1882); State v. Elder, 65 Ind. 382 (1879); State v. Gapen, 17 Ind. App. 524, 45 N.E. 678 (1896).

84. Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951); State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907); Freeman v. State, 119 Ind. 501, 21 N.E. 1101 (1889); Miller v. State, 33 Ind. App. 509, 71 N.E. 248 (1904).

85. This is apparently the reasoning prevailing in the majority rule. Oliver v. State, 234 Ala. 460, 175 So. 305 (1937).

86. Steck v. United States, 15 F.2d 606 (D.C. Cir. 1926); Nordlinger v. United States, 24 App. D.C. 406 (D.C. Cir. 1904); Driggers v. State, 137 Fla. 182, 188 So. 118 (1939); People v. Hughes, 41 Cal. 234 (1871); Durham v. People, 5 Ill. 172 (1843).

essentially be the same, and a defendant should be protected from a subsequent prosecution.

If the variance is a necessary principle in our criminal procedure, the attachment of jeopardy alone should not be the "acid test" for determining its materiality.[87] However, it should be utilized as a factor in determining that materiality. As a whole, the reasoning behind the majority rule in the above situations appears sound. There is nothing in this rule which is in conflict with the Indiana constitutional guarantee against double jeopardy. It is a contradiction in terms to say that a person can be put in jeopardy by an indictment under which he can not be convicted. This is the general rule in Indiana.[88] It would seem to be immaterial whether this inability to convict arises from a variance, or from some defect in the indictment itself. If a variance is of such a character that a conviction is legally impossible, no jeopardy should attach. Moreover, under the strict application of the "same evidence" test the second prosecution is not the same as the original one if there has been a material variance. There seems to be nothing in the Indiana case law which would prevent the courts from accepting this position, or the legislature from enacting a statute to this effect.

The Proper Way to Raise the Question of Variance

In order for the defendant to take advantage of a variance, he must seasonably raise the question of its materiality in the trial court. If he does not, he has waived his right to raise the question. It is well settled

87. This point was made well by the "court's" opinion in Madison v. State, 130 N.E.2d 35, 41 (Ind. 1955).

88. In Indiana one of the prerequisites for the attachment of jeopardy is a valid indictment; thus, a trial and acquittal under an indictment which does not charge a public offense is not a bar to a prosecution for the same act under a sufficient indictment. Shepler v. State, 114 Ind. 194, 16 N.E. 521 (1888); State v. Bogard, 25 Ind. App. 123, 57 N.E. 722 (1900). As stated in Joy v. State, 14 Ind. 139, 146-47 (1860): ". . . all the necessary preliminary things of record do not exist, so as to place the prisoner in jeopardy, when the indictment is so defective in form, that, supposing the defendant found guilty by the jury, he would be entitled to have any judgment against him reversed. Therefore, after the trial has commenced, if the judge discovers any imperfection which will render a verdict against the prisoner void or voidable, upon his motion, he may stop the trial, and what has transpired will be no bar to future proceedings; consequently a prosecuting attorney, under our practice, might enter a nolle prosequi to such an indictment, and procure a new one." *Cf.* Klein v. State, 157 Ind. 146, 60 N.E. 1036 (1901); Fritz v. State, 40 Ind. 18 (1872); Weinzorphlin v. State, 7 Blackf. 186 (Ind. 1844). A defective indictment may bar a subsequent prosecution in the situation where the defendant is convicted and elects not to attack th defect in the indictment, but to let the judgment be. Such a judgment is voidable, but only at the instance of the defendant. State v. Bogard, *supra;* State v. George, 53 Ind. 434 (1876); Fritz v. State, *supra.*

in Indiana[89] and other American jurisdictions[90] that to raise the question seasonably the defendant should object to the introduction of variant proof, and in the event of an adverse ruling, assign it as reason for a new trial.[91] This is true no matter which test of a material variance is used. A variance cannot be raised for the first time on a motion for a new trial, or by an assignment that the verdict is not sustained by sufficient evidence;[92] nor can a motion in arrest of judgment raise the question of variance.[93]

There is reason in not allowing a defendant to raise a complaint of variance after the verdict. The trial court should have the opportunity of deciding if the variance is either to a material allegation, or is prejudicial to the accused.[94] Moreover, under the "modern" test, it would seem that a defendant would not in fact be misled or prejudiced if he did not object seasonably.[95] Likewise, it would seem illogical to allow the de-

89. Madison v. State, 130 N.E.2d 35, 49 (Ind. 1955); Utley v. State, 228 Ind. 210, 91 N.E.2d 355 (1950); Mates v. State, 200 Ind. 551, 165 N.E. 316 (1929); Foust v. State, 200 Ind. 76, 161 N.E. 371 (1928); Donnelly v. State, 194 Ind. 136, 142 N.E. 219 (1923); Bradley v. State, 165 Ind. 397, 75 N.E. 873 (1906); Miller v. State, 165 Ind. 566, 76 N.E. 245 (1905); Kruger v. State, 135 Ind. 573, 35 N.E. 1019 (1893); Taylor v. State, 130 Ind. 66, 29 N.E. 415 (1891); Graves v. State, 121 Ind. 357, 23 N.E. 155 (1889).

90. *E.g.*, People v. Garomony, 359 Ill. 210, 194 N.E. 320 (1935); State v. Fike, 324 Mo. 801, 24 S.W.2d 1027 (1929); State v. Miller, 318 Mo. 581, 300 S.W. 765 (1927); Commonwealth v. Goldsmith, 249 Mass. 159, 143 N.E. 812 (1924); State v. Padilla, 18 N.M. 573, 139 Pac. 143 (1914). *But cf.* Gaskins v. State, 86 Ga. App. 766, 72 S.E.2d 547 (1952).

91. In Madison v. State, 130 N.E.2d 35, 45-46 (Ind. 1955), the "court's" opinion conceded that this was the prevailing law, but it questioned its logic. In doing so it relied upon a series of recent decisions concerning fraudulent checks to substantiate its point, viz., Rogers v. State, 220 Ind. 443, 44 N.E.2d 343 (1942), and Tullis v. State, 230 Ind. 311, 103 N.E.2d 353 (1952). This issue is evidence that it is important to keep in mind the technical distinction between the two legal concepts of variance and failure of proof. The *Rogers* case, *supra,* held that there was a fatal variance between a charge of issuing a fraudulent check in payment of an obligation and proof of issuing a fraudulent check to purchase property. The *Tullis* case, *supra,* held that there was a fatal variance between a charge of issuing a fraudulent check to obtain money and proof of issuing a fraudulent check in payment of an obligation. The statute in point—IND. ANN. STAT. § 10-2105 (Burns 1956)—delineates two distinct crimes, (1) issuing a fraudulent check for obtaining money or something of value, and (2) issuing a fraudulent check to pay an obligation. If one is charged and the other is proved, there has been a failure of proof, but not a variance. The *Rogers* and *Tullis* decisions, *supra,* did not make this distinction, but erroneously discussed the defect in terms of a fatal variance. Likewise, this distinction was not made by the "court's" opinion. The "majority" concurring opinion, although not free from ambiguity on this point, seemingly does recognize this distinction. Madison v. State, *supra* at pp. 49-50. There may, or may not, be reason to allow a defendant to raise the question of a "total" failure of proof for the first time after the verdict. However, there seems to be no logical reason for changing the settled law that an objection to a variance cannot be raised after the verdict.

92. Gillespie v. State, 194 Ind. 154, 142 N.E. 220 (1924).

93. EWBANK, INDIANA CRIMINAL LAW §§ 200 and 510 (Symmes 1956).

94. See Madison v. State, 130 N.E.2d 35, 49 (Ind. 1955); State v. Fike, 324 Mo. 801, 24 S.W.2d 1027 (1929); State v. Padilla, 18 N.M. 573, 139 Pac. 143 (1914).

95. See People v. Garamony, 359 Ill. 210, 194 N.E. 320 (1935).

fendant to speculate on a favorable verdict, and if convicted, first raise an objection of variance.

Amendment of the Indictment or Affidavit after the Defendant Pleads

Interwoven with the problem of variance is the ability of the state to amend the indictment or affidavit after the defendant pleads. It is clear that at the common law no such amendment was possible.[96] However, Indiana and most American jurisdictions have changed this by statute.[97] In Indiana the ability of the state to amend an indictment or affidavit depends upon whether the amendment is of a matter of substance or form.[98] Substance has been interpreted to mean "that which is essential to the making of a valid charge of the crime."[99] In other words, if a matter in a material allegation is amended, the amendment is of substance and not statutorily authorized.[100] An exception is that a clerical

96. *Ex parte* Bain, 121 U.S. 1, (1887); *cf.* United States v. Denny, 165 F.2d 321 (7th Cir. 1947).

97. *E.g.*, ALA. CODE ANN. tit. 15 § 253 (1940); IDAHO CODE ANN. § 19-1420 (1948); IOWA CODE ANN. § 773.42 (1950); LA. REV. STAT. ANN. §§ 15:253 and 15:364 (1951); ME. REV. STAT. ANN. c. 144 § 14 (1954); MICH. COMP. LAWS § 767.76 (1948); MONT. REV. CODE ANN. § 94-6430 (1947); N.J. REV. STAT. § 2:188 (1940); OHIO REV. CODE ANN. § 29:4130 (Page 1954); PA. STAT. ANN. tit, 19, § 432 (Purdon 1930); S.C. CODE § 17-410 (1952). The federal rules provide for an amendment of the information. FED. R. CRIM. P. 7 (e).

98. IND. ANN. STAT. § 9-1133 (Burns 1956). This statute was passed in 1935 and reflects the trend toward relaxing the rigidity of the common law. It reads: "The court may at any time before, during or after the trial amend the indictment or affidavit in respect to any defect, imperfection or omission in form, provided no change is made in the name or identity of the defendant or defendants or of the crime sought to be charged." Thus, if the crime charged is a misdemeanor, and the amended pleading makes the charge a felony, the amendment is improper. Drury v. State, 223 Ind. 140. 59 N.E. 2d 116 (1945). If an amendment is authorized, the amended indictment or affidavit is not a commencing of a new action against the defendant. Barrett v. State, 175 Ind. 112, 73 N.E. 543 (1911). It follows that in the event of an amendment it would not be necessary to reswear the affidavit or resubmit the indictment to the grand jury. Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945).

99. Souerdike v. State, 230 Ind. 192, 196, 102 N.E.2d 367, 368 (1951). Another test of form or substance is whether a defense under the indictment or affidavit as it originally stood is equally applicable after the amendment; if it is, the amendment is as to form and statutorily authorized. Jeffers v. State, 232 Ind. 650, 114 N.E.2d 880 (1953); Souerdike v. State, *supra*.

100. Thus, *e.g.*, in a charge of auto theft from "Robert Grindle," an amendment to theft from "Mary Louise Grindle" would not be proper, for the ownership of property stolen is a material descriptive allegation of the crime of vehicle taking, IND. ANN. STAT. § 10-3011 (Burns 1956), Gullett v. State, 233 Ind. 6, 116 N.E.2d 234 (1953); in a charge of drunken driving "on state road 45," an amendment to drunken driving "on state road 445" would be proper, for it is not essential to the charge of drunken driving, IND. ANN. STAT. § 47-2001 (Burns 1956), to name the exact place within the county where the driving was done; therefore, the state road number was surplus allegation, Souerdike v. State, 230 Ind. 192, 102 N.E.2d 367 (1951); in charge of perjury before "Walter Mybeck, Clerk of Lake Superior Court," an amendment to perjury before "Walter W. Krause, Deputy Clerk" would not be proper, for the name of the officer before whom the instrument was sworn to is a material descriptive allegation of the crime of perjury, IND. ANN. STAT. § 9-1116 (Burns 1956), Gardner v. State, 229 Ind.

or typographical error may be amended, regardless of its being within a material allegation.[101]

Most of the decisions arising under the amendment statute have interpreted it rather narrowly using reasoning analogous to that of the "material allegation" test of a material variance.[102] A few decisions have indicated a more liberal tendency to consider the evidence of the case and decide on the merits whether the amendment had surprised the accused, and thereby had prejudiced his substantial rights.[103] However, there is no indication that the interpretation of the statute has become liberal enough to allow an amendment of a material variance in order to make the pleading and the proof correspond.[104]

There is no indication that the amendment statute is being used to any extent in cases involving a variance. This no doubt is due to the fact that within its present interpretation it has no practical effect in a variance situation. In other words, if a trial court decides a variance is immaterial, in effect it achieves the same result as if it had employed the amendment statute; if it decides the variance is material, no amendment is possible.[105]

368, 97 N.E.2d 921 (1951); in a charge of murder on the "9th day of March," an amendment to murder on the "10th day of March" would be proper, for time is not of the essence of the offense of murder; therefore, owing to IND. ANN. STAT. § 9-1106 (Burns 1956), the time allegation is surplusage, Peats v. State, 213 Ind. 560, 12 N.E.2d 270 (1938). See also Krauss v. State, 225 Ind. 195, 73 N.E.2d 676 (1947); Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945).

101. Marshall v. State, 227 Ind. 1, 83 N.E.2d 763 (1949); Dwigans v. State, 222 Ind. 434, 54 N.E.2d 100 (1944); Edwards v. State, 220 Ind. 490, 44 N.E.2d 304 (1942).

102. *E.g.*, Gullett v. State, 233 Ind. 6, 116 N.E.2d 234 (1953); Souerdike v. State, 230 Ind. 192, 102 N.E.2d 367 (1951); Gardner v. State, 229 Ind. 368, 97 N.E.2d 921 (1951); Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945).

103. In Jeffers v. State, 232 Ind. 650, 114 N.E.2d 880 (1953), the charge was burglary, with breaking and entry of "Firman Equipment Company." The affidavit was amended to read "Firman Equipment Corporation." The amendment was to a material allegation; however, the Indiana Supreme Court considered the evidence and found that the company and corporation were the same and the defendant was not suprised or misled; therefore, he was not prejudiced. See also State *ex rel* Kaufman v. Gould, 229 Ind. 288, 98 N.E.2d 184 (1951); Edwards v. State, 220 Ind. 490, 44 N.E.2d 304 (1942). *Cf.* United States v. Fawcett, 115 F.2d 764 (3d Cir. 1940).

104. By definition an amendment of a material variance would change a matter which is of the essence of the charged offense; it would remove a defense based upon that variance; and, it would affect the substantial rights of the accused. Therefore, under the present construction of the amendment statute, such an amendment would be ipso facto of substance. The court in Graf v. State, 213 Ind. 661, 663, 14 N.E.2d 524, 525 (1938), in dicta used the Indiana amendment statute as the test of the materiality of a variance.

105. When the issue of variance has arisen in connection with the amendment statute, the defendant has attacked the property of the amendment on appeal. This is logical, for if the defendant could prove the variance below to have been material, the amendment would be unauthorized and reversal would follow. See Jeffers v. State, *supra* note 103; Souerdike v. State, 230 Ind. 192, 102 N.E.2d 367 (1951); State *ex rel* Kaufman v. Gould, *supra* note 103; Gilley v. State, 227 Ind. 701, 88 N.E.2d 759 (1949).

Conclusion

The case law is not clear as to the judicial standard an Indiana court will use to determine the materiality of a variance. The primary difficulty connected with the principle of variance is the protraction of a decision on the merits.[106] This is true regardless of which test is used by the court in determining the materiality of a variance. It is axiomatic that a fair trial should not be sacrificed for expediency in the criminal law. It has been stated that the Bill of Rights is essentially a document of criminal procedure.[107] The principle of variance is undeniably intertwined with the procedural safeguards of that document. However, it does not follow that the principle of variance as it now stands is indispensable in the criminal procedure. It is time to question the principle to see if there is reason for retaining it; or to see if there is a better alternative which will afford a greater degree of administrative expediency and at the same time conform to the constitutional safeguards.[108]

In every instance where the accused prevails on the issue of a material variance, either the state must start an entirely new prosecution, or must simply drop the prosecution.[109] Substantial time and effort could

106. Another difficulty with the principle of variance lies in the fact that many Indiana courts have in the past adhered to the stricter "material allegation" test. Presumably this will continue to be done. It is conceded that there are instances when variant evidence may work an injustice on an accused. However, the difficulty is that the courts which adhere to a position similar to that of the "court's" opinion in the *Madison* case, see note 89 *supra,* do not decide whether the variant proof did in fact create an injustice by an examination of the particular circumstances; rather they base their reasoning on an arbitrary rule of law which is cluttered with exceptions. It is true that reversals owing to a variance are relatively few. However, as was said by McClintock, *Indictment By A Grand Jury,* 26 MINN. L. REV. 153, 155 (1942): ". . . it would appear that the elimination of all cases where indictments or informations were held defective would have only a negligible effect on the percentage of conviction of criminals. But that does not indicate that a reformation of criminal procedure which would accomplish that result would not be worth while, for the widespread criticism of these cases in both legal and lay discussions of the problem of enforcement of the criminal law shows that the rulings on the sufficiency of the accusation, especially those which are made in the appellate court after the conviction of the accused, occupy a very prominent position in the 'show window of the bar,' and a procedural system which would satisfy the public that such rulings fully accorded with the policy behind the criminal law would go far toward restoring the prestige of the court in the administration of criminal justice."

107. Hall, *Objectives of Federal Criminal Procedural Revision,* 51 YALE L. J. 723, 728 (1942).

108. A number of jurisdictions have attempted by legislative action to provide an alternative in the so-called short form indictment. However, these statutes in order to be constitutionally valid, provide for a bill of particulars to accompany the short form indictment either as a matter of right or of discretion. Apparently these statutes have not been of much help, for there is still a chance of a variance between the bill of particulars and the proof. Note, 47 W. VA. L. Q. 336 (1941); note, 15 LA. L .REV. 830 (1955). See note, 53 HARV. L. REV. 122 (1949).

109. The defendant is charged and the trial begins. The state attempts to admit variant evidence and the defendant objects. The trial court determines the variance to be material—at this point obviously the type of test to be used becomes important, for the

be saved by allowing the prosecution to amend the indictment or affidavit so that the pleading and the proof correspond, and by permitting the court to grant a continuance to the defendant in the event he has been misled or prejudiced by the variant evidence.[110] This procedure would also remove the possibility of a defendant's escaping a decision on the merits owing to the statute of limitations,[111] or the possibility that the prosecution might be sufficiently harassed to proceed on a lesser charge in order to procure a conviction.

The granting of the amendment and continuance should lie within the discretion of the trial court. The question of the materiality of a variance should be decided on the merits of the case in order to determine whether the defendant was misled or prejudiced. A question of injustice to the defendant arising from a variance is essentially a factual one, and is best decided on the merits of the case and not by a strictly confined rule of law.[112] It does not logically follow that the failure to prove a material descriptive allegation works ipso facto an injustice to the defendant. The best course would seem to be adoption of the entire standard set forth in the "majority" concurring opinion of the *Madison* case. If the trial court deems the variance to be immaterial, an amendment should nevertheless be allowed in order to remove any possibility

---

application of the "material allegation" test would most likely produce a greater number of material variances. The trial court refuses to admit the variant evidence. At this point one of two things will likely occur, the court or the state will dismiss the prosecution, or, the court, on the defendant's motion, will direct a verdict in his favor. The prosecution then must go through the necessary procedural steps to recharge the defendant. The defenadnt has gained a brief respite in his prosecution. He may have been in fact misled or prejudiced by the variant proof; therefore, the result would be proper. However, there will still be a delay in arriving at a judgment on the merits.

110. This is essentially the procedure proposed by the American Law Institute. See MODEL CODE OF CRIMINAL PROCEDURE § 184 (1931). The same or similar procedure has been statutorily enacted in a number of jurisdictions. LA. REV. STAT. ANN. §§ 15:253 and 15:364 (1951); MICH. COMP. LAWS § 767.76 (1948); MISS. CODE ANN. § 2532 (1942); MONT. REV. CODES ANN. § 94-6430 (1947); OHIO REV. CODE ANN. § 29.4130 (Page 1954); PA. STAT. ANN. tit. 19 § 432 (1930); S.C. CODE § 17-410 (1952). See People v. Thompson, 3 Cal. App. 2d 359, 39 P.2d 425 (1934).

111. No Indiana case has arisen on this point; however the statute of limitations begins to run from the time the crime is so far consummated that a prosecution will lie. State v. Langdon, 139 Ind. 377, 65 N.E. 1 (1902). If a court does not hold an accused over, see note 74 *supra,* after an acquittal or dismissal owing to a variance, and an appreciable length of time follows before a reindictment, there would seem to be nothing to prevent the accused from successfully pleading the statute of limitations. See EWBANK, INDIANA CRIMINAL LAW § 45 (Symmes 1956).

112. This reasoning has been incorporated into the statutes outlined in note 110, *supra.* Some jurisdictions have promulgated the "modern" test into statute. See COLO. REV. STAT. ANN. § 39-7-17 (1953); MASS. ANN. LAWS c. 227 § 35 (1956); MO. ANN. STAT. § 546.080 (1953); N.J. REV. STAT. § 2:188 (9) (1940); PA. STAT. ANN. tit. 19 § 433 (1930).

of prejudicing the jury.[113] Should the defendant be unprepared to meet the amended indictment, he may make a timely request for a continuance on the ground of surprise, with an expectation of judicial liberality, perhaps conditioned by fear of reversal, in the granting of the request. And, of course, the defendant retains the right to appeal from the decision on the materiality of the variance.

In short, the suggested procedure requires a liberal amending policy in conjunction with an adoption by the courts of the "modern" test of a material variance. It is obvious that such a procedure is not possible within the present amendment statute. Although this procedure does not entirely eliminate the delays in the swift administration of criminal justice which the concept of variance introduces, still this effect can probably never be entirely removed so long as the defendant has a right to know the crime of which he is charged. There is a violation of this right if the state is permitted to introduce variant evidence and thereby surprise or mislead the accused in his defense. The suggested procedure would continue to safeguard this right and would be more expedient than the prevailing rules of variance.

113. The court in United States v. Liss, 137 F.2d 995 (2nd Cir. 1948), made the point that a variance though not fatal, nevertheless may not be harmless, as it may confuse the jury. To remove any such possibility the best procedure would be to amend all variances.