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## The Sufficiency of Indictments: The Problem of Provisions and Exceptions

Frederick W. Ford

*West Virginia University College of Law*

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## LEGISLATION

THE SUFFICIENCY OF INDICTMENTS; THE PROBLEM  
OF PROVISOS AND EXCEPTIONS

## I.

The problem of legislation, and more particularly of legislative draftsmanship, is the problem of precise expression.<sup>1</sup> In an endeavor to convey exact meaning it is thus customary, particularly in legislation, to state what is meant, and then for safety, to specify what is not meant. And as language is, at best, likely to include either too little or too much, the problem becomes unusually acute in the drafting of statutes, for as Plowden observed, "It is not the Words of the Law, but the internal sense of it, that makes the Law".<sup>2</sup> Thus the generality of a statute is often limited by an *exception* which is used to "restrain the enacting clause<sup>3</sup> to particular cases";<sup>4</sup> or a *proviso* which is used to "remove special cases from the general enactment and provide for them specially";<sup>5</sup> or a *savings clause* which is used to "preserve from destruction certain rights, remedies, or privileges".<sup>6</sup> If clauses which pur-

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<sup>1</sup> Clarity and accuracy are necessary, not only, in the formulation of the legislative policy, but also, in commission of that policy to the specific language of the statute. Each problem is separate and distinct. Each has received too little attention. But the problem of draftsmanship has been singularly neglected. In deed, the attitude is all too prevalent that draftsmanship is mere mechanics — that any vehicle is sufficient to express the legislative policy. However, as is so often the case, the problem of policy is also the problem of expression.

<sup>2</sup> *Eyston v. Studd*, 2 Plowd. 459a, at 465 (1816). Note also Mr. Justice Holmes' famous statement, "A word is not a crystal transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstance in which it is used." *Towne v. Eisner*, 245 U. S. 418, 425, 40 S. Ct. 189 (1917).

<sup>3</sup> All of the cases discussing the proviso or exception distinguish it from the "enacting clause", that is, that part of the purview or body of the act that sets forth the affirmative regulation. Thus use of the term "enacting clause" should not be confused with the term "enacting clause" more accurately used to refer to the clause "Be it enacted by the Legislature, etc."

<sup>4</sup> 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d ed. 1904) § 351; BLACK, INTERPRETATION OF LAWS (1896) §§ 107-9; JONES, STATUTE LAW MAKING (1912) 200-206.

<sup>5</sup> 2 LEWIS' SUTHERLAND, *op. cit. supra* n. 4; BLACK, *op. cit. supra* n. 4. Cf. "A proviso should only be used to create an exception. It should not be used to create a condition. A proviso excepts out of the earlier part of the section something which, but for the proviso, would be within it." RUSSELL, LEGISLATIVE DRAFTING AND FORMS (3d ed. 1931) 79.

<sup>6</sup> JONES, *op. cit. supra* n. 4, p. 202. Cf. "A savings clause in a statute is an exemption of a special thing out of the general things mentioned in the enactment. More particularly, it exempts existing rights or causes of action or pending proceedings from the operation of a statute which otherwise would change or destroy them." BLACK, *op. cit. supra* n. 4 at § 109.

port to except certain cases from the generality of the statute did in fact conform to their definitions the problem of statutory interpretation would be greatly simplified. But tradition has decreed that laws must be written in a redundant, ritualistic style and so phrases such as "*provided, however*" which should be limited to these excepting clauses have too frequently been used only because of their pomp and authoritative sound and without any intention that they should restrict the generality of the enactment.<sup>7</sup> Consequently, the rules of interpretation and construction have little application to many clauses, which masquerade in the form of provisos and exceptions. Their form belies their substance. This is particularly unfortunate in West Virginia, because the problem is not academic but lives to haunt every judge or practitioner who must determine the sufficiency of an indictment drafted under a statute containing an exception or proviso.

## II.

The general rule, that indictments drawn in the language of the statute are sufficient is followed in this state.<sup>8</sup> But the statutory language alone is not sufficient "where a statutory or common law definition of an offense includes generic terms (then) an indictment to be sufficient must give a more detailed specification of the accusation which it prefers; it must particularize".<sup>9</sup> Thus it is necessary to determine when the language of a statute specifies the elements which constitute a crime and when the language purports only to set forth certain defenses to the crime.<sup>10</sup> If the prosecutor looks only to the form of a statute and applies the definition of an exception or proviso set forth above he will of course conclude that the materials therein set forth are not a part

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<sup>7</sup> Cf. W. Va. Laws, 1921, c. 137. "And the state registrar shall keep a true and correct account of all fees by him received under these provisions and turn the same over to the state treasurer; *provided*, that the state registrar shall, upon request, of any parent or guardian, supply without fee, a certificate limited to a statement as to the date of birth of any child when the same shall be necessary for admission to school, or for the purpose of securing employment. And *provided further*, that the United States Census Bureau may obtain, without expense to the state, transcripts or certified copies of births and deaths without payment of the fees herein prescribed."

<sup>8</sup> State v. Wohlmouth, 78 W. Va. 404, 89 S. E. 7 (1916); but see, State v. Mitchell, 47 W. Va. 789, 35 S. E. 845 (1900). ". . . Though it is generally sufficient to follow the very words of the statute 'not unfrequently other rules will require it (the indictment) to be expanded beyond the statutory terms'."

<sup>9</sup> State v. Wohlmouth, *supra* n. 8, at 407.

<sup>10</sup> Cf. State v. Sutter, 71 W. Va. 371, 76 S. E. 811 (1912); State v. Weir, 71 W. Va. 93, 76 S. E. 138 (1912); State v. Lynch, 84 W. Va. 437, 100 S. E. 284 (1919); State v. Cunningham, 90 W. Va. 806, 111 S. E. 835 (1922).

of the offense. Unfortunately, however, these conclusions may not be concurred in by the court, for it may look behind the form to the substance of the provision and interpret the language "provided, however" to have only the effect of the simple conjunction, "and". The court may then declare the indictment fatally defective as omitting an essential element of the offense. Even this result, however, is uncertain, for the position of the exception in the statute and the time that it was placed there may determine its effect. For example, an exception appearing in the "enacting clause" must be "negatived" in an indictment laying an offense under that statute.<sup>11</sup> But if the exception is not in the "enacting clause", although in the same section, it is not necessary to negative the exception<sup>12</sup> unless it is closely connected with "the enacting clause"<sup>13</sup> or with an affirmative element of the crime.<sup>14</sup> Likewise, it is not necessary to negative a proviso contained in the same section as the "enacting clause"<sup>15</sup> unless there is danger that the court might interpret the phrase "provided, however" to mean simply "and".<sup>16</sup> In case the proviso or exception is contained in a subsequent section there is no necessity to negative it in the indictment,<sup>17</sup> except where the proviso or exception expresses the spirit of the statute and relates to the entire statute,<sup>18</sup> instead of being related to the immediately preceding section.<sup>19</sup> When a proviso

<sup>11</sup> State v. Sutter, *supra* n. 10. W. Va. Laws, 1911, c. 16, § 2. "If any person, except a licensed physician, dentist or veterinary surgeon, etc., have in his possession. . . ." This exception is said to be in the "enacting clause", and must be negatived in the indictment.

<sup>12</sup> W. Va. Laws, 1921, *supra* n. 11. ". . . and possession of cocaine . . . except by a licensed physician, . . . shall be *prima facie* evidence of an intent to sell . . ." This exception need not be negatived. *Cf.* Hills Case, 5 Gratt. 682 (Va. 1848).

<sup>13</sup> State v. Weller, 171 Ind. 53, 85 N. E. 761 (1908); GILLET, CRIM. LAW (2d ed.) § 132a. But in Hill's Case, *supra* n. 12, it was suggested that an exception is always a matter of defense and need not be incorporated in an indictment.

<sup>14</sup> State v. Railroad Co., 50 W. Va. 235, 40 S. E. 447 (1901); State v. Welch, 69 W. Va. 547, 72 S. E. 649 (1911); State v. Weir, *supra* n. 10.

<sup>15</sup> State v. Sutter, *supra* n. 10; State v. Kilpatrick, 88 W. Va. 381, 106 S. E. 887 (1921); State v. Richards, 32 W. Va. 348, 9 S. E. 245 (1889). *Accord:* State v. Cunningham, *supra* n. 10.

<sup>16</sup> State v. Cunningham, *supra* n. 10; *Cf.* State v. Summers, 118 Neb. 189, 223 N. W. 957 (1929).

<sup>17</sup> State v. Kilpatrick, *supra* n. 15; State v. Weller, *supra* n. 13.

<sup>18</sup> In this case it seems desirable to negative the proviso or exception for it might be argued by analogy from State v. Robinson, 67 Wash. 425, 121 Pac. 848 (1912), that if the general purpose of the act is to be kept in mind, a proviso in a subsequent section relating to the whole act may be interpreted as in the "enacting clause". In State v. Cunningham, *supra* n. 10, a similar result was reached where the court said the proviso was an additional clause defining the general intent of the statute.

<sup>19</sup> Chesapeake & O. Ry. Co. v. Peck, 6 W. Va. 397, 403 (1873).

is introduced into the statute by a subsequent amendment if its purpose is to change the meaning of the statute the elements of the proviso must be included in the indictment.<sup>20</sup> Where, however, the proviso is contained in the amendment but does not apply to the original act generally it need not be set forth in the indictment.<sup>21</sup> This judicial merry-go-round of rules is sufficient evidence of the uncertain effect of exceptions and provisos; it demonstrates that the distinction between exceptions, provisos and saving clauses, has vanished, if indeed, there ever was any practical distinction between them.

### III.

Thus in West Virginia, there is no "fixed and invariable meaning to a proviso".<sup>22</sup> Indeed, there seems to be a tendency to interpret a proviso to mean, if it has any meaning at all, that in spite of what has already been enacted, the new enactment shall also be law. In other words, the only effect of "*provided, however*" is "to separate or distinguish the different paragraphs and sentences".<sup>23</sup> Frequently, however, instead of separating the sentences it joins them.<sup>24</sup> The decisions, induced by the unwarranted use of the proviso, have destroyed its statutory usefulness and instead of being an aid to precise expression, it only lends confusion to statutes already burdened by waste words. Thus, the careful draftsman will avoid the "*provided, however*" phrase. When it is necessary to exempt a class from the generality of the enactment it is better to create a separate section, captioned with the single catchword — "Exception".<sup>25</sup> This simple device, although it may deprive the statute of much of its pomp and majesty, will lend clarity and strength to the statute and help to make it readable and understandable — though unfortunately this seems seldom to have been the object of statutory draftsmanship.

—FREDERICK W. FORD.

<sup>20</sup> *Markee v. People*, 103 Ill. App. 347 (1902).

<sup>21</sup> *Frix v. State*, 148 Tenn. 478, 256 S. W. 449 (1923).

<sup>22</sup> *Austin v. United States*, 155 U. S. 417, 431, 15 S. Ct. 167 (1894).

<sup>23</sup> *Georgia Banking Co. v. Smith*, 128 U. S. 174, 9 S. Ct. 47 (1888).

<sup>24</sup> See *State v. Cunningham*, *supra* n. 10.

<sup>25</sup> See, for example, WIS. STAT. (1929) § 14910. *Exceptions*. "This chapter shall not be construed to effect . . . etc." Perhaps the Iowa usage is even more precise. Regulations are made in general terms, with separate section providing *exemptions*. See, IOWA CODE (1927) § 3071. *Milk License Required*. "Every person engaging in the sale of milk or cream at retail, in any city or town, shall obtain a milk dealer's license from the department." § 3072. *Exemptions*. "The preceding section shall not apply: 1. To persons who supply milk . . . etc. 2. To persons who do not sell . . . etc." Note also that the use of the exception or proviso can frequently be avoided by the use of definitive sections.