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# The Canons of Construction in Georgia: "Anachronisms" in Action

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Consideration of communication, primarily written communication, constitutes the analytical fiber of the judicial diet. The communication context is not the normal one, however, nor does it pivot upon the typical sending-and-receiving sequence. Thus, the "message" in issue was neither directed to a court nor (usually) formulated with a court in mind; moreover, the fact of judicial consideration typically manifests the communication's failure of basic objective.

Born out of disagreement, therefore, the appeal to judicial disposition is one of last resort. Agreeing only that the written message controls the litigation, the contesting parties respectively beseech juristic imprimatur of resolution.

Thus mired in controversy, and confronting the legendary impreciseness of written language, the court broaches one of the most demanding undertakings in judicial process. It is the undertaking of reading, evaluating and legally translating writing—writing that governs the rights and obligations of people. It is the undertaking of the ages. It is the undertaking of "interpretation."

Judicial interpretation, however, is not only (and simply) something that courts do; it is also a *concept* of what courts do. There is, moreover, an interpretational concept for virtually every taste. Whatever the perspective, nevertheless, interpretation's massive literature is steeped in the terminology of "purpose," "intent" and "meaning." That terminology, in turn, serves to frame fervid debate (intriguingly historical and dramatically modern) over informational resources.

A healthy measure of the debate revolves around whatever constants inhabit the resource arsenal. It is at this juncture, finally but unfailingly, that one encounters the "canons": maxims, rules or

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precepts operating intrinsically upon the written composition and signaling direction for the judicial translation.

Two initial observations may be tendered concerning the canons of interpretation: The literature, almost uniformly, discredits them; the courts, almost uniformly, employ them. The purpose of this effort is briefly to reflect some sense of background, and illustratively to marshal the Georgia experiences with what are perhaps the three most famous canons of interpretation.[1]

## I. INTRODUCTION

### A. *In General*

The exercise of judicial translation could hardly begin in better company than Professor (later Justice) Frankfurter's famous threefold admonishment to his students: "(1) Read the statute; (2) read the statute; (3) read the statute."[2] It is precisely in that initial textual (statutory or otherwise) encounter, however, that the need for a semblance of convention is most critical. Working within the four corners of the communication in issue, the translation exercise has long depended upon historic maxims of meaning and composition. From early times, therefore, these canons of construction—brief propositions or presumptions of background principles—have served as "intrinsic aids" to judicial interpretation.[3]

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[1] For selected efforts over the years focusing peculiarly upon the Georgia legislature or legislation, see Sentell, *The Electoral Function of State Legislatures: An Illustrative Example*, 22 MERCER L. REV. 1 (1971); Sentell, *Local Legislation in Georgia: The Notice Requirement*, 7 GA. L. REV. 22 (1972); Sentell, *Repeals of Repeals: Statutory Musical Chairs*, 10 GA. ST. B.J. 41 (1973); Sentell, *Problems of Nothing: Unconstitutionality in Georgia*, 8 GA. L. REV. 101 (1973); Sentell, *"Reference Statutes"—Borrow Now and Pay Later?*, 10 GA. L. REV. 153 (1975); Sentell, *When Is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167 (1976); Sentell, *Unlawful Special Laws: A Postscript On The Proscription*, 30 MERCER L. REV. 319 (1978); Sentell, *Statutes of Nonstatutory Origin*, 14 GA. L. REV. 239 (1980); Sentell, *Codification and Consequences: The Georgian Motif*, 14 GA. L. REV. 737 (1980); Sentell, *Of Courts and Statutes and Sanitary Landfills*, 21 GA. ST. B.J. 72 (1984); Sentell, *Argumentum Ab Inconvenienti*, URB. GA., Mar. 1982, at 23; Sentell, *Unconstitutionality: Recent Sightings*, URB. GA., Apr. 1985, at 29; Sentell, *"Motive" and "Intent" in Statutory Interpretation: Their Role in Georgia Local Government Law*, URB. GA., Apr. 1989, at 24; Sentell, *Binding Contracts In Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95 (1989).

[2] H. FRIENDLY, BENCHMARKS 202 (1967).

[3] "Canon" itself is defined as "[a] law, rule, or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline." BLACK'S LAW DICTIONARY 260 (4th ed. 1951).

"Canons of construction" is narrowed to "[t]he system of fundamental rules and maxims

Derived from context and, in turn, refocusing attention upon context, the canons strive to achieve a unity of ultimate perspective for writer and reader of litigated language.[4] The magnitude of the aspiration eschews mechanical neatness; the nature of the analytical beast insures erratic results.

Little about the canons is noncontroversial. Their primary origin in Roman Law[5] is attributed to that legal system's advanced appreciation of the technique of interpretation.[6] The English common-law system, in contrast, reportedly groped its way more slowly through three stages of the early part of the fourteenth century.[7]

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which are recognized as governing the construction or interpretation of written instruments." *Id.*

[4] "Guidance may be drawn from consideration of the principles of composition, which may be supposed to apply to legislative drafting as well as other forms of writing. The cases contain an assortment of rules or canons pertaining to the use of 'intrinsic' aids of this kind." 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.01 (C. Sands rev. 4th ed. 1973). "Many efforts to ascertain meaning seem to be sustained by the forlorn hope that actual meaning can be ascertained by applying one or more of the so-called 'canons' or 'rules' of statutory interpretation." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 227 (1975).

[5] In the course of the growth and development of the law there have found their way into legal thought and literature a body of brief, epigrammatic principles known as maxims. A great many of them have been adopted from the Roman Law—as a matter of fact, Chancellor Kent has expressed the view that: "There are scarcely any maxims in the English law but what were derived from the Romans." Lattin, *Legal Maxims, and Their Use in Statutory Interpretations*, 26 GEO. L.J. 1, 1 (1937) (quoting 2 KENT'S COMMENTARIES § 553 (1858)).

[6]

> One cannot fail to be impressed by the strong contrast between the Common Law of England on the one hand, and the Civil and Canon Law of Rome on the other. . . . The stage of formal development preserved in the continental books has the inevitable effect of making our own law look singularly formless and primitive. . . . The canonists, however, were fortunate in inheriting a situation which the civilians had long ago revealed in its true perspective. That is to say, they frankly recognized that the written act of a legislator is by no means a simple affair. They discovered in practice, and openly stated in their teaching, that such a document must be interpreted somehow by some one, if it is to form an efficient unit in an advanced legal system.

T.F.T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION DURING THE FIRST HALF OF THE FOURTEENTH CENTURY 164 (1922).

[7]

> The formal side of judicial interpretation was so little developed that the courts themselves had no ordered ideas on the subject and were apt to regard each case purely on its merits without reference to any other case—still less to any general canon of interpretation—and trust implicitly to the light of nature and the inspiration of the moment. . . . It was only gradually that the courts made a practice of examining the intention of a statute in order to find a clue

Originally, judges themselves participated in formulating legislation, and its intention was a matter of their personal knowledge. A succeeding judicial generation inherited those preserved traditions and continued their approach to the exclusion of other sources. Only later, and gradually, did the courts become conscious of both their structural and functional isolation. Bereft of both personal knowledge and professional tradition, those courts eventually turned to the task of inferring the lawmaker's intent from the legislation itself. At that prolonged juncture, therefore, the common-law process found little alternative to the "science" of interpretation with its canonical entourage. It was, accordingly, a marriage of necessity.[8]

The reviews of the results have long been both mixed and intense. Appraising the interpretive maxims or canons, Lord Coke valued their worth as "a sure foundation or ground of art, and a 'conclusion of reason.' "[9] Contrarily, Lord Esher decried the same precepts as "almost invariably misleading."[10] Neither lord is without modern support. On the one hand, the principles are viewed, in context, as "a more realistic and practical approach."[11] On the other hand, they are scorned as "archaic and meaningless" rules which render construction "an impenetrable tangle of waste words."[12]

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to its interpretation, and only then as a result of a curious process of development which may be divided into three stages.

*Id.* at 39, 49.

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> One cannot expect a very highly developed science of interpretation until the courts are conscious of their isolation; when no outside help is to be expected from the legislature or the executive, and when the Judges no longer take so much part in the functions of government other than judicature, then the courts will have to accept statutes as the commands of an authority external to themselves whose will is known to them only as expressed in the written word. Then, too, will be felt the necessity of devising some means for making a document a satisfactory substitute for the verbal explanations of one man to another—in short, scientific drafting and scientific interpretation will have begun.

*Id.* at 56 (footnote omitted).

[9] Lattin, *supra* note 5, at 2 (quoting E. COKE, COMMENTARY UPON LITTLETON § 11.a. (1853)).

[10] *Id.* at 3 (quoting Yarmouth v. France, 19 Q.B.D. 647, 653 (1887)).

[11] F.J. MCCAFFREY, STATUTORY CONSTRUCTION § 2 (1953).

[12] Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382, 387 (1950).

By far the most influential modern criticism, indeed effective condemnation, came from the quarter of "legal realism."[13] It was that popular movement's favorite spokesperson who tendered the legendary discreditation of the canons.[14] In his classic "thrust-but-parry" exposition, Professor Llewellyn purported to demonstrate that every such norm was effectively cancelled by an anti-norm.[15] This matching exercise was a barren one, he maintained, and completely incapable of yielding effective construction.[16] The unique skill with which Llewellyn presented his attack, perhaps more than its substance, rendered subsequent praise for the canons a highly unfashionable, and extremely rare, commodity.[17] The canons of construction, it was popularly proclaimed, were anachronisms.[18]

Among the few rejecting the proffered imperative that courts spurn the canons were the courts themselves. Their steadfast employment of the maxims elicited grudging acknowledgement from even the harshest critics[19] and eventually accounted for the gradual return of a more tempered cast to the literature. Currently, the

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[13] *See* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 451 (1989).

[14] Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

[15] "When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point." *Id.* at 401. At the conclusion of his article, Professor Llewellyn set forth the "Thrust But Parry" arrangement for some 28 principles of construction. His plea was for construction based on the following approach: "The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language.*" *Id.*

[16] "Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . . ." *Id.*

[17] "It is now fashionable to repudiate all 'canons of interpretation' on the ground that they largely cancel each other out." R. DICKERSON, *supra* note 4, at 227. "In the literature dealing with the subject of statutory construction it has been fashionable in recent years to belittle the worth of such rules. Perhaps because they seem technical and legalistic it apparently is felt that they afford slight evidence of what a legislature actually intended." 2A J. SUTHERLAND, *supra* note 4, § 47.01.

[18] "Almost no one has had a favorable word to say about the canons in many years. For the most part, the canons are treated as anachronisms." Sunstein, *supra* note 13, at 452.

[19] Indeed, Llewellyn himself conceded the point: "Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue the general picture was clear, on this, to any eye which would see." Llewellyn, *supra* note 14, at 401. "Nevertheless, a thorough working knowledge of the canons is essential, since these doctrines are still used, albeit irregularly." O. HETZEL, LEGISLATIVE LAW AND PROCESS 307 (1980).

scholarship generally manifests resignation mingled with a felt need for precautionary refinement. Illustratively, there are the views that the canons reflect assumptions of legislative drafting rather than legislative consideration,[20] that the canons assist more with meaning than with intent,[21] that the canons serve as guideposts rather than goals[22] and that all canons are not created equal and thus their unconditioned repudiation is unrealistic.[23]

Even more intriguingly, the literary circle encompasses an outright and unequivocal modern attack upon the anti-maxim movement.[24] In thoughtful and highly articulate fashion, a self-described "general defense"[25] of the canons condemns the realists' "mutual contradiction" claim as "greatly overstated."[26] By absolute denial of a need for structure,[27] the defense maintains, the realism critics failed properly to appreciate both the worth and necessity of the canons "as background principles designed to help discern statutory meaning."[28] So understood, the canons continue as a "prominent feature" in both federal and state courts, and are found "in every area of modern law."[29] They operate internally as "rules of syntax or grammar";[30] they are time-honored in pointing up statutory meaning in a particular case;[31] they are far from obsolete;[32] they are, no less, "inevitable."[33] At this modern juncture, therefore, the historic canons of construction stir as much passion

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[20] O. HETZEL, *supra* note 19, at 307.

[21] 2A J. SUTHERLAND, *supra* note 4, § 47.01.

[22] Lattin, *supra* note 5, at 8.

[23] R. DICKERSON, *supra* note 4, at 227.

[24] Sunstein, *supra* note 13.

[25] *Id.* at 413.

[26] *Id.* at 452.

[27] "Llewellyn, like many of the realists, attempted to liberate legal thought from flawed structures by denying the need for structures altogether, but structures are inevitably present." *Id.*

[28] *Id.* at 413. This treatment then proceeds to subsume and build upon the traditional maxims to propose a "series of interpretive principles for judicial adoption in the regulatory state" that will "serve the purposes of deliberative government and, in particular, will alleviate rather than aggravate the defects in modern regulatory programs." *Id.*

[29] *Id.* at 452-53.

[30] *Id.* at 454.

[31] *See id.* at 456.

[32] *Id.* at 504.

[33] *Id.* "Because statutory meaning is a function of interpretive principles and cannot exist without them, something like 'canons' of construction, far from being obsolete, must occupy a prominent place in the theory and practice of statutory interpretation." *Id.*

in efforts for their justification as they earlier fueled in attempts at their obliteration.

### *B. In Particular*

Early interpretive parlance churned munificently in its formative outpouring of maxims. For virtually every occasion, and seemingly every taste, aphorisms abounded. Ranging from the pedantic to the ingenious, the "science" of construction maneuvered a terse adage of balm into the breach of each compositional quandary.[34]

From this mass of intrinsic aids to decisional construction, three canons are perhaps the most famous, the most frequently employed and the most analytically instructive.

*1. Noscitur a sociis* (known from its associates)—Standard exposition posits that words used together or in sequence may take (and be given) meaning from each other.[35] A court may clarify the meaning or intent of an unclear word or phrase, the maxim maintains, by considering the other words or phrases with which the questionable entity was used. This "birds of a feather" advisory reminds the reader and interpreter that words are perceived by the company in which they are mixed and counsels a construction moving from isolation to context. Clarification from the concrete, the norm suggests, presumptively advances the writer's purpose.

The *noscitur a sociis* canon of construction by no means escaped the Llewellyn hit list of mutual cancellation. On the one hand, that thesis elaborated, general words are to be limited by specific terms with which they are associated. As the counter-norm, however, "[g]eneral terms are to receive a general construction."[36] Reflective of this criticism, a more modern treatment warns of the canon's "fallacy" in assuming "the existence of specific meaning in particular words."[37]

Accordingly, virtually every treatise account of the canon goes to considerable pains to caution, qualify and condition. The canon is

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[34] For example, *Necessitas facit licitum quod alias non est licitum* (Necessity makes that lawful which otherwise is unlawful); *Satius est petere fontes quam sectari rivulos* (It is better to seek the fountains than to wander down the rivulets). These and others are contained in Lattin, *supra* note 5.

[35] *See, e.g.*, E.T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 190 (1940); F.J. MCCAFFREY, *supra* note 11, at 40-41; 2A J. SUTHERLAND, *supra* note 4, § 47.16.

[36] Llewellyn, *supra* note 14, at 405.

[37] 2A J. SUTHERLAND, *supra* note 4, § 47.16.

appropriately employed only in cases of ambiguity;[38] it "is a mere guide to legislative intent";[39] it must not be permitted to render general words meaningless;[40] it is only an instrumentality to remedy doubt;[41] and it promptly yields to plain intent.[42]

2. *Ejusdem generis* (of the same kind)—This second canon may be viewed as a variation on the first; it too borrows from association.[43] *Ejusdem generis* operates to restrict construction of a general phrase to things or persons of the same class as those already enumerated by preceding specific words.[44] The commentators assess the maxim as an effort at compromise or reconciliation. On the one hand, the general phrase ought not render the specific terms superfluous; on the other hand, the specific terms ought not render the general phrase partly redundant.[45] After all, the principle proposes, had the writer intended to infuse the general phrase with truly universal coverage, no specific terms would have been included.[46]

The traditional rationale of *ejusdem generis* is that the norm reflects the human habit of ordinary expression: It is logical to presume that the writer, having just employed the specifics, was still thinking of those specifics when concluding with the general phrase.[47] Some dispute that presumptive inference, casting doubt upon its lexicographical accuracy[48] and urging that it simply is not consistent with human speech habits.[49]

With *ejusdem generis*, as well, the commentary efforts at qualifi-

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[38] E.T. CRAWFORD, *supra* note 35, § 190.

[39] 2A J. SUTHERLAND, *supra* note 4, § 47.16.

[40] *Id.*

[41] E.T. CRAWFORD, *supra* note 35, § 190.

[42] F.J. MCCAFFREY, *supra* note 11, at 41.

[43] The canon has been characterized as "a more specialized version" of *noscitur a sociis*. R. DICKERSON, *supra* note 4, at 233-34.

[44] *See, e.g.*, E.T. CRAWFORD, *supra* note 35, § 191; F.J. MCCAFFREY, *supra* note 11, at 41-50; 2A J. SUTHERLAND, *supra* note 4, § 47.17; Sunstein, *supra* note 13, at 455.

[45] *See* 2A J. SUTHERLAND, *supra* note 4, § 47.17.

[46] *Id.*

[47] The maxim "derives from an understanding that the general words are probably not meant to include matters entirely far afield from the specific enumeration." Sunstein, *supra* note 13, at 455.

[48] "Whether the presumption is lexicographically accurate is not entirely clear." R. DICKERSON, *supra* note 4, at 234.

[49] "This rule . . . may be criticized because it is not necessarily in accord with the habits of speech of most people." E.T. CRAWFORD, *supra* note 35, § 192.

cation almost overwhelm the principle itself. Llewellyn opposed it with the adage that "[g]eneral words must operate on something,"[50] and modifications of the maxim find frequent expression: It applies only in cases of textual doubt;[51] it will not defeat plain intent;[52] it fails when the specific terms are themselves general, diverse or exhaustive;[53] and it will not extend the general to a higher rank than the highest inferior specifically enumerated.[54]

*3. Expressio unius est exclusio alterius* (expression of one thing excludes another)—This canon predisposes the interpreter to conclude that express reference to a person, thing or place excludes implied coverage of other persons, things or places.[55] It obviously differs from the first two maxims for it is designed to operate upon absence rather than presence; thus, the interpreter is not seeking to infer meaning from an expressed word or phrase.

Despite the popularity of the *expressio unius* canon, there is considerable disagreement over the soundness of its alleged "common sense" presumption of origin. Thus, in general the maxim logically reflects the processes of the human mind, some concur, and accurately supposes that the expression of one thing does not mean to express something else.[56] Others view the inference as in direct contradiction to personal speech patterns[57] and deem it to describe a conclusion rather than an approach.[58] More thoughtfully, it is observed that the operative omission may simply reflect inadvertence, nonconsensus or intentional delegation to the interpreter.[59]

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[50] Llewellyn, *supra* note 14, at 405.

[51] E.T. CRAWFORD, *supra* note 35, § 191.

[52] *Id.*

[53] *Id.*

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> [W]here a statute enumerates persons or things of an inferior rank, dignity or importance, it is not to be extended by the addition of general words to persons or things of a higher rank, dignity or importance than that of the highest enumerated, if there are any of a lower species to which the general words can apply.

*Id.*

[55] *See, e.g.*, E.T. CRAWFORD, *supra* note 35, § 195; R. DICKERSON, *supra* note 4, at 234; F.J. MCCAFFREY, *supra* note 11, at 50-51; 2A J. SUTHERLAND, *supra* note 4, § 47.23; Sunstein, *supra* note 13, at 455.

[56] F.J. MCCAFFREY, *supra* note 11, at 50-51.

[57] E.T. CRAWFORD, *supra* note 35, § 195.

[58] R. DICKERSON, *supra* note 4, at 234.

[59] Sun tein, *supra* note 13, at 455.

The Llewellyn assault upon the "thrust" of *expressio unius* countered with the following "parry": "The language may fairly comprehend many different cases where some only are expressly mentioned by way of example."[60] The typical reservations include the points that: the canon can not override clear legislative intent;[61] it does not operate upon mere affirmations of existing law;[62] its applicability depends upon context;[63] and it readily yields to special circumstances.[64]

## II. Noscitur a Sociis

### A. *Early On*

More than 100 years ago, the Georgia Supreme Court was already on familiar terms with the canon of *noscitur a sociis*. In the 1883 episode of *Mott v. Central Railroad*,[65] an adult brought an action for the wrongful death of his father under a statute providing that "[a] widow, or if no widow, a child or children may recover for the homicide of the husband or parent."[66] En route to denying the suit,[67] the supreme court's opinion recounted two facets of the statute's post-enactment history. First, the court had previously held the statutory measure of the child's damage to be that of reasonable support, thus clearly implying coverage limited to minor children.[68] Second, the legislature subsequently amended the statute but in no manner countered the judicial implication.[69]

With history unfolded, the court then expressly embraced the

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[60] Llewellyn, *supra* note 14, at 405.

[61] F.J. McCaffrey, *supra* note 11, at 51.

[62] E.T. Crawford, *supra* note 35, § 195.

[63] *Id.*

[64] 2A J. Sutherland, *supra* note 4, § 47.23.

[65] 70 Ga. 680 (1883).

[66] *Id.* at 681 (quoting Ga. Code § 2971 (1873)). The deceased had left no widow nor any minor children. *Id.*

[67] The supreme court affirmed the trial court's action in sustaining defendant's demurrer. *Id.* at 684.

[68] *Id.* at 682 (citing David v. Southwestern R.R., 41 Ga. 223 (1870)).

[69] *Id.* at 681-82 (citing Ga. Code § 2971 (1882)). The court discussed the amendment, enacted in 1878, as follows:

> The act of 1878 effected no other change in this decision than the measure of damages which it laid down. If it had been the intention of the legislature to have extended this right to adults as well as to minors, how easy would it have been to have so said.

*Id.* at 682-83.

"familiar rule of construction," *noscitur a sociis*.[70] That rule, the court asserted, "ascertains the precise meaning of words from others with which they are associated and from which they cannot be separated without impairing or destroying the evident sense they were designed to convey in the connection used."[71] In this case, the rule counseled that "the legislature meant to use the word 'children' in a limited and specific, and not in a generic or general sense."[72] As used with "widow," the covered "children" were limited to those children who "were dependent members of the family at the time of the homicide of the parent."[73] Obviously, that coverage did not extend to the deceased parent's children who were already adults at the time of the parent's death.

The supreme court's opinion and decision in *Mott* thus constituted an exercise in vintage statutory construction. The court announced its decisional objective as legislative intent and described the tools with which it would forge the interpretational bridge. Prominent among those tools, the "known by its associates" maxim claimed a role of linchpin significance. Solidly ensconced in the court's interpretation arsenal, therefore, *noscitur a sociis* enjoyed early evolutional eminence in proffered judicial rationale. Employed in conjunction with post-enactment judicial and legislative treatment, it afforded a ready avenue for delineating sharply between a term's statutory and literal meanings. *Mott* itself provided striking evidence of the difference a canon could make: A plaintiff conceded to be a "child" of the decedent could not pursue an action under a statute expressly creating an action for a "child" of decedents.

Cutting across the ages, the 1985 case of *McKenzie v. Seaboard System Railroad*[74] encompassed another wrongful death action against a railroad and another construction face-off. *McKenzie* focused upon statutory language relieving a party signing a pauper's

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[70] *Id.* at 683. The court described its task as having to look diligently for the legislature's intent by applying to the words "their ordinary signification" and interpreting them "according to their common sense." *Id.*

[71] *Id.*

[72] *Id.* at 684.

[73] *Id.* "What widow? What children? The widow who had the right to bring the suit and recover; the children who, under certain contingencies, might likewise bring this suit, or to whom it would survive in certain other contingencies, and who could recover." *Id.*

[74] 173 Ga. App. 402, 326 S.E.2d 502 (1985).

affidavit from " 'any deposit, fee, or other cost which is normally required in the court.' "[75] Urging the language to cover only the original filing fee, defendant sought to hold plaintiff responsible for other court costs incurred thereafter.[76] Rejecting that effort, the Georgia Court of Appeals held plaintiff relieved "of all court costs that would ordinarily have been incurred as incidents of the proceeding."[77] The court explained that it could find no reason to construe the statutory term "cost" in the narrow fashion proffered by defendant.[78] "When one seeks to ascertain the meaning of language," the court reflected by citing *Mott*, "the maxim 'noscitur a sociis' is as valid today as it was a century ago."[79] The passage of time had done little, therefore, to dilute the canon's significance. Indeed, with *McKenzie* the court unsheathed the maxim's other determinative edge: *noscitur a sociis* carried potential for the expansion of meaning as well as its contraction.

This historical perspective appropriately concludes by reverting to the supreme court's turn-of-the-century decision in *Davis v. Dougherty County*.[80] There the county defended the validity of its bond election advertisement by relying upon a statute applying to advertisements of " 'ordinaries, clerks, sheriffs, county bailiffs, administrators, executors, guardians, trustees or others.' "[81] Holding that statute inapplicable to bond election notices, the court was forced to concede the inclusion of "ordinaries."[82] It was true, the court further agreed, "that in some counties the ordinary is the officer who has jurisdiction in county matters."[83] In order to effect its escape from this painted corner, the court proceeded to associate the enumerated "ordinary" with the other statutory terms:

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[75] *Id.* at 403, 326 S.E.2d at 503 (quoting GA. CODE ANN. § 9-15-2 (1983)).

[76] *Id.* at 404, 326 S.E.2d at 504. Defendant thus sought to block plaintiff's refiling after voluntary dismissal without having paid any of the court costs allegedly accrued in the earlier proceeding.

[77] *Id.* at 404, 326 S.E.2d at 504.

[78] The court reasoned that the term must bear its "ordinary significations." *Id.*

[79] *Id.* The court reversed the trial court's dismissal of plaintiff's action. *Id.* at 406, 326 S.E.2d at 506.

[80] 116 Ga. 491, 42 S.E. 764 (1902).

[81] *Id.* at 492, 42 S.E. at 764 (quoting GA. CODE § 5458 (1895)). The county argued that this statute operated to modify GA. CODE § 377 (1895) requiring that the advertisements be published during a space of 30 days prior to the election. 116 Ga. at 492, 42 S.E. at 764.

[82] *Id.* at 493, 42 S.E. at 765. "It is true that among the officers enumerated is the ordinary . . . ." *Id.*

[83] *Id.*

"[A]pplying the rule of construction, noscitur a sociis, the ordinary referred to in this act is the officer who is the judge of the probate court, and not the ordinary who has charge of county affairs."[84] Again, the canon had assisted materially in performing rather radical statutory surgery, a procedure which, no less, determined the outcome of the litigation.[85]

### *B. In The Main*

Modern times confirm continuing reliance by Georgia's appellate courts upon the interpretational canon of *noscitur a sociis*. Selected litigational episodes illustrate the ancient maxim's remarkable potential for accommodating an impressive array of current construction concerns.

Presenting a particularly exotic environment, *Trust Company of Georgia v. Mortgage-Bond Company of New York*[86] featured a dissolved foreign corporation's attempt to revive a dormant Georgia judgment.[87] Disposition, the supreme court specified, lay solely in a section of Georgia's Corporation Code.[88] That section permitted the continued existence of "all corporations" for a period of three years after dissolution for the purpose of prosecuting or defending suits.[89] Denoting the issue a novel one, the court proclaimed resolution to depend "solely upon the intention of the General Assembly."[90] Pursuing that intent, the court first conceded that " 'all,' standing alone, is a completely comprehensive term, and therefore the phrase 'all corporations,' would seem to include foreign corporations."[91] However, the court qualified, these words "are contained in a *statute*, and are therefore not to be treated as mere abstract terms."[92] Plumbing the language for legislative purpose,[93]

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[84] *Id.* Accordingly, the modifying statute did not apply to notices of bond elections. *Id.*

[85] Reversing the trial judge, the court declared the bond election invalid. *Id.* at 495, 42 S.E. at 766.

[86] 203 Ga. 461, 46 S.E.2d 883 (1948).

[87] Plaintiff, though never engaged in business in Georgia, *id.* at 472, 46 S.E.2d at 889, had originally obtained the judgment in a Georgia superior court in 1936. *Id.* at 462, 46 S.E.2d at 884.

[88] *Id.* at 462, 46 S.E.2d at 884.

[89] *Id.* (citing 1937-38 Ga. Laws Ex. Sess. 214, 242, § 36).

[90] *Id.* at 472, 46 S.E.2d at 890.

[91] *Id.* at 473, 46 S.E.2d at 890.

[92] *Id.*

[93] "Perhaps the most important matter to be considered in the construction of any stat-

the court emphasized that provisions immediately preceding and following the section dealt only with Georgia corporations. Thus poised, the court executed the material leap: "We thus see that section 36 is set in the midst of other sections dealing mainly if not altogether with Georgia corporations, and this also is a circumstance to be considered. *Noscitur a sociis.*"[94] So considered, the provision did not extend to the foreign corporation and the court would not permit revival of the dormant judgment.[95]

*Trust Co.* thus exhibited an intriguing context for employment of the "known by its associates" canon. The language for interpretation—the term "all corporations"—was as expansive as it could be. Moreover, the term stood alone; the statutory structure was not the usual one of terms in sequence taking (and giving) meaning from (and to) each other. The crucial "association," therefore, went to the term's placement in a provision that itself was but a tile in a larger mosaic. The "Georgia" cast of that mosaic, in turn, refined the abstract into the concrete and reduced the comprehensiveness of "all" to the particularity of "some." It was not an instance of a term taking meaning from its associate, therefore, but rather one of the part taking the cast (albeit more focused) of the whole. That whole simply became less than the apparent sum of its parts, and *noscitur a sociis* played the intriguing role of common denominator.

Presenting the more sequential scenario, *Beazley v. DeKalb County*[96] also presented a challenge to county issuance of revenue certificates for constructing a "freight terminal."[97] Whether the county possessed that power was to be derived from a statute empowering local governments to issue certificates for "highways, parkways, airports, docks, piers, wharves, [and] terminals."[98] Obviously, therefore, the issue promptly devolved to a question of interpretation: Was the "terminal" proposed by this county the "ter-

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ute is the purpose for which it was enacted . . . ." *Id.* at 474, 46 S.E.2d at 891.

[94] *Id.* at 475, 46 S.E.2d at 891.

[95] *Id.* at 461, 46 S.E.2d at 884, *rev'g* 75 Ga. App. 211, 42 S.E.2d 781 (1947).

[96] 210 Ga. 41, 77 S.E.2d 740 (1953).

[97] *Id.* at 42, 77 S.E.2d at 741. The county had adopted a resolution authorizing the certificates and designating the proposed facility a "truck and railroad freight terminal facility." *Id.* at 43, 77 S.E.2d at 742.

[98] *Id.* at 42-43, 77 S.E.2d at 741-42 (citing Revenue Certificate Laws of 1937, 1937 Ga. Laws 761).

minal" authorized by the statute?[99]

Reviewing county evidence, the court noted the size of the proposed facility[100] and the purposes it was to serve. Among those purposes, the county proposed to lease permanent warehouse space to tenants "for the storage of goods, wares, or merchandise, whether coming over the railroads or truck lines at that point or not."[101] That purpose, the court asserted, was at odds with the "normal function of a terminal" which included receiving goods transported over common carrier and storing those goods "temporarily until delivered to the consignee."[102] This latter and "normal" function, the court decided, characterized the terminal anticipated by the statute. As the sole basis for this decision, the court relied upon the statute's "context" and "the meanings of the words with which it [terminals] is associated."[103] Expressly invoking *noscitur a sociis*,[104] the court emphasized that the term was "used in connection with the words 'highways,' 'parkways,' 'airports,' 'docks,' 'piers,' and 'wharves,' all having reference to ways, means, and facilities of transportation."[105] When "harmonized" with those words, the court held, the term "terminals" was woefully insufficient to support the county's proposed "general warehouse and storage business."[106] *Beazley* thus provided a perfect example of the "birds of a feather" analysis process. The supreme court's crucial distinction cut between "terminals" for temporary storage and "terminals" for warehousing; the statute under scrutiny envisioned

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[99] The court structured an approach of strict construction from the rule that grants of local government power are to be strictly construed, *id.* at 43, 77 S.E.2d at 742, and from the limited provision of the constitution authorizing revenue certificates only for facilities and undertaking " 'specifically authorized and enumerated' " in the 1937 statute. *Id.* at 43-44, 77 S.E.2d at 742 (citing GA. CONST. of 1945, art. VII, § VII, ¶ V).

[100] The court noted evidence that total terminal space in the Atlanta area was only 548,912 square feet, while the county's proposed structure would contain a total of 2,000,000 square feet. *Id.* at 46, 77 S.E.2d at 744.

[101] *Id.* at 46, 77 S.E.2d at 743.

[102] *Id.*

[103] *Id.* at 44, 77 S.E.2d at 743.

[104] " '*Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words.' " *Id.* at 45, 77 S.E.2d at 743 (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)).

[105] *Id.* at 45, 77 S.E.2d at 743.

[106] *Id.* at 46, 77 S.E.2d at 744, *rev'g* 87 Ga. App. 910, 75 S.E.2d 657 (1953). The supreme court held error in the trial judge's validation of the revenue certificates. 210 Ga. at 49, 77 S.E.2d at 745.

one but not the other. The court drew the line by reference to associated terms; those terms individually and collectively signaled "transportation." From that signal, the court arrived at the transient and temporary connotation, a context completely hostile to permanent storage facilities. In this analytical exercise, the *noscitur a sociis* maxim constituted the court's primary arrow in a quiver of strictly construing grants of local government authority. Again, therefore, the maxim proved indisputably versatile.[107]

On occasion, the canon's application will extract a two-tier construction from the court. Thus, not only must the court compare the term in issue to its associates, it must also (and first) read a degree of meaning into the associates themselves. Perhaps this initial phase of construction is simply more evident in some cases than others; after all, even the *Beazley* court had initially to read "transportation" from the likes of highways, airports, docks, piers and parkways.

In any event, a more obvious necessity for first-phase construction appeared in *Strickland v. Phillips Petroleum Co.*[108] There, the parties disputed a tax assessment levied upon the sale of motor fuel, with "sale" statutorily defined to mean " 'any exchange, gift or other disposition.' "[109] Seizing upon the expanse of "other dispo-

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[107] The court of appeals made somewhat similar use of the canon in Erickson v. Century Management Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980), to confine what it viewed as potentially "absurd results" of a statute limiting landowner liability for land and water areas made available to the public for recreational purposes without charge. *Erickson* featured a motel owner's effort to claim the statute's protection in the operation of a swimming pool, on grounds that the statute listed swimming as one of the covered "recreational purposes." The court rejected that effort by holding the statute applicable only "to large tracts of land or water." *Id.* at 508, 268 S.E.2d at 780. As for the statute's enumeration of "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites," the court maintained that "only two or three of these activities could conceivably be done" on other than "relatively large tracts of land and water." *Id.* at 509, 268 S.E.2d at 780. Asserted the court: " 'In the interpretation of statutory terms, the doctrine of construction, *noscitur a sociis* prevails. That is, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.' " *Id.* at 509, 268 S.E.2d at 780 (quoting 73 AM. JUR. 2d, *Statutes* § 213 (1974)). Three years later, the supreme court, although not adverting to the interpretation approach, expressly rejected *Erickson*'s rationale and held that the statute's applicability did not depend on the size of the tract. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

[108] 248 Ga. 582, 284 S.E.2d 271 (1981).

[109] *Id.* at 583, 284 S.E.2d at 273 (quoting GA. CODE ANN. § 92-1402 (Harrison Supp. 1973)). The taxpayer was a fuel distributor with conceded aggregate shortages of fuel for the assessment period. *Id.* at 582-83, 284 S.E.2d at 272.

sition," the assessor sought to include as "sold" the taxpayer's "unaccounted for losses" of fuel. Accordingly, assessor contended, " 'unaccounted for losses' of motor fuel constitute an 'other disposition' and thus may be treated as a sale."[110]

*Strickland*'s resolution pivoted, therefore, upon the interpretation to be afforded the statutory term "other disposition." Obviously, that term must be clarified in some fashion, its generality honed to a standard of taxation. Should the court utilize *noscitur a sociis* as its whetstone, the relevant associational points of reference were those of "exchange" and "gift." It was equally obvious, therefore, that these associates must themselves emit a signal sufficiently definite for the critical infusion.

The supreme court opted for employment of the canon, and immediately turned to fleshing out the associates. The court first borrowed from an Attorney General's opinion that the statute's "other more specific phrases contemplate a transfer of ownership."[111] Against that proffered backdrop, the court posited its own determinative formulation: "The term 'other disposition' clearly contemplates some affirmative action with regard to the product."[112] The court brought its analysis to a conclusion by holding that "[n]either a casualty loss nor ordinary shrinkage is an 'other disposition' within the meaning" of the sales tax statute.[113] Armed with that determination, the court rejected the assessor's rationale of taxation.

*Strickland* thus provided a distinctive exercise in *noscitur a sociis* via a two-tier analysis. The task of interpreting the statutory term "sale" called for clarifying the statutory term "other disposition." Clarification, in turn, required association with the additional definitional terms "exchange" and "gift." Because even those words possessed term-of-art flexibility, however, their initial

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[110] *Id.* at 583, 284 S.E.2d at 273.

[111] *Id.* at 583-84, 284 S.E.2d at 273 (quoting 66-152 Op. Att'y Gen. 390 (1966)). This opinion expressly engaged *noscitur a sociis* meaning " 'generally that a word or phrase may be known from its accompanying terms. Under this rule, words of general import, when associated together with other words of more specific import, are limited in a sense analogous to the more specific phrases.' " Thus, the opinion concluded, " '[t]he phrase 'or other disposition' should also be limited to situations where ownership is transferred and, therefore, a casualty loss en route (such as by fire or spillage) would not fall within the definition of 'sale.' " *Id.*

[112] *Id.* at 584, 284 S.E.2d at 273.

[113] *Id.*

construction predominated the analysis. Borrowing upon a translation of "exchange" and "gift" into "a transfer of ownership," the court evolved its own standard of "affirmative action." Extending that standard to "exchange" and "gift" but denying it to "unaccounted for losses," the court was positioned to likewise exclude those losses from the coverage of "sales." In this two-tier fashion, the "known by its associates" maxim worked its construction magic.

In some statutory settings, the sequential terms may not be as clarifying as they are antagonistic to each other. In that rather striking context, *noscitur a sociis* assumes an added dimension. The Georgia Court of Appeals perceived itself to confront that setting in *Saleem v. Board of Trustees*.[114] The litigation encompassed disagreement between a municipality and an employee over his status of disability. All conceded the injured employee's inability to continue his former duties as fireman; the municipality, however, pointed to the material statute's definition of "disability" as " 'the total and permanent physical or mental inability to perform one's regular, assigned or comparable duties.' "[115] As long as the employee could be "assigned" other post-injury duties, the municipality maintained, he was entitled to no disability pension.[116]

The court of appeals immediately detected the potential of statutory inconsistency. "To accept the city's interpretation," the court fretted, "would be to render the statutory terms 'regular' and 'comparable' totally meaningless."[117] Confronting that potential, the court wasted no analytical energy in mounting the canon. "The city's interpretation would also be violative of the maxim, *noscitur a sociis*, which directs that the precise meaning of words contained in a statute be ascertained 'from others with which they are associated and from which they cannot be separated without impairing or destroying the evident sense they were designed to convey in the connection used.' "[118] In effect, the court concluded, the statutory terms "regular" and "comparable" cancelled out the statutory

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[114] 180 Ga. App. 790, 351 S.E.2d 93 (1986).

[115] *Id.* at 791, 351 S.E.2d at 94 (quoting 1981 Ga. Laws 3553, 3556, § 3(a)).

[116] "The city contends that the language 'regular, assigned or comparable,' as used in the statute, encompasses any duties the city is willing to assign a disabled employee *after* he becomes disabled." *Id.* at 791, 351 S.E.2d at 94.

[117] *Id.*

[118] *Id.* (quoting Mott v. Central R.R., 70 Ga. 680, 683 (1883)).

term "assigned." With that cancellation, the employee qualified under the two remaining terms, and the lower tribunals had erred in denying his entitlement to a pension.[119]

*Saleem*'s deployment of *noscitur a sociis* thus evidences an even more dynamic role for the canon than that portrayed in standard formulations. If a term can be known, expanded or contracted by its associates, those associates may also resist being rendered meaningless by the term's literal effects. That resistance can apparently operate, moreover, even when the resisting terms ("regular," "comparable") are arguably more general in cast than the term ("assigned") being resisted. Indeed, *Saleem* confirms, that resistance may assume the traumatic proportions of constructional excision. "Association," it turns out, breeds obliteration.

### C. *Rejection*

Appreciation, it sometimes results, is sharpened by denial. An understanding of *noscitur a sociis* might therefore draw assistance from instances in which the canon was considered, even urged, but rejected. No exhaustive account is proposed; it will suffice simply to note one illustrative episode in each appellate court triggering divisiveness on the maxim's applicability.

*Nixon v. Nixon*[120] featured a widow's application for a year's support. The supreme court undertook to decide whether the proceeding was subject to a twenty-year statute of limitations covering " '[a]ll suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law.' "[121] A minority of the court perceived the proceeding to be free of the statute, on grounds that the widow's right was not one "accruing to her as an individual, or to a member of a class of individuals, within the meaning of this law."[122] Rather, the dissent maintained, the statute covered only designated individuals vested with particular rights by special legislative enactments.[123] In justification, the dissent called attention to the statute's prescribed applicability to

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[119] The court thus reversed the contrary decisions of both the municipal pension board and the superior court. *Id.* at 792, 351 S.E.2d at 95.

[120] 196 Ga. 148, 26 S.E.2d 711 (1943).

[121] *Id.* at 160, 26 S.E.2d at 718 (quoting GA. CODE § 3-704 (1933)).

[122] *Id.* at 161, 26 S.E.2d at 718 (Bell and Grice, JJ., dissenting). Justice Grice joined Justice Bell's dissent.

[123] *Id.* at 162, 26 S.E.2d at 719.

suits accruing " 'under statutes, acts of incorporation, or by operation of law.' "[124] Of the three terms, the dissent argued, the specific controlled the general. Thus, "the words 'acts of incorporation' should lend color to the other words of this statute,"[125] and "a general statute such as that providing for a year's support is not within the intent of [the act]."[126] For authority, the dissent relied squarely upon *noscitur a sociis*: "Words, like people, are known by the company they keep; and when the meaning of a word is doubtful, we may look to its associates to determine its meaning. Under this maxim, where general and specific words are used in the same connection, they take color from each other . . . ."[127]

A majority of the court took forceful issue with the dissent's invocation of the "known by associates" rationale.[128] "Such reasoning," the majority asserted, "fails to take account of the very language of the rule itself, which declares that it applies only to statutes where a contrary intention does not appear."[129] In formulating this statute of limitations, "the legislature was not interested in how closely these terms may be related, or whether related at all."[130] Rather, the majority concluded, the statute's "primary objective was to fix a limitation of twenty years on each, without regard to its relationship to the other."[131]

The court of appeals' illustrative disagreement over applicability resulted from *Atlanta Tallow Company v. Fireman's Fund Insurance Company*.[132] The disputed point went to an insurance policy providing coverage for money lost outside the insured's premises " 'while being conveyed by a messenger or any armored motor vehicle company.' "[133] The loss in issue occurred when the insured's employee left the funds locked in a locked car's glove compartment

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[124] *Id.* at 165, 26 S.E.2d at 720-21 (quoting GA. CODE § 3-704 (1933)).

[125] *Id.* at 165, 26 S.E.2d at 721.

[126] *Id.*

[127] *Id.*

[128] 196 Ga. at 154, 26 S.E.2d at 715. Chief Justice Duckworth wrote the court's majority opinion.

[129] *Id.* at 155, 26 S.E.2d at 715.

[130] *Id.*

[131] *Id.* The majority maintained that "the courts have no right to change legislative language which is clear and unambiguous, and thereby create uncertainty and confusion as to the meaning of a legislative enactment." *Id.*

[132] 119 Ga. App. 430, 167 S.E.2d 361 (1969).

[133] *Id.* at 431, 167 S.E.2d at 362.

for a ten-minute period.[134] Agreeing with the trial court's conclusion of noncoverage, a dissenting opinion promptly hoisted an analysis of canonical complexion.[135] Under the maxim of *noscitur a sociis*, the dissent elaborated, the "armored motor vehicle" infused meaning into the covered "messenger."[136] That infusion imported that the messenger's care and custody must be "of like character—not the same, of course, but *protective* in nature."[137] "Protective" care equated "personal possession," the dissent concluded, a quality obviously absent in the litigated scenario.[138]

Holding the policy provision to cover the lost funds, the court's majority opinion never referred to the analysis of association.[139] The court did, however, expressly reject the position that "the money must be carried on the messenger's person rather than in the vehicle of conveyance."[140] That position, the court summarily asserted, violated the "cardinal rule" of construction favorable to the insured.[141]

If these random illustrations are truly illustrative, they demonstrate substantial judicial disagreement over when to call upon the assistance of *noscitur a sociis*. There are, of course, two approaches (at least) to accounting for this disagreement. One view is that the two factions may genuinely differ over whether the language in issue is sufficiently ambiguous to require "construction." If no construction is necessary, then a fortiori no construction maxim is appropriate. Under this view, the need for assistance in determining outcome is considered before thought is given to the outcome to be reached. Under this view, the two factions could legitimately divide sharply over applicability, yet then proceed—one assisted and one unassisted—to reach the same result in the case.

The other view is that the two factions have already reached different results in the case, and the reversion to preliminaries is sim-

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[134] *Id.* The employee was returning from the bank to the insured's premises when he stopped long enough to obtain a sandwich to be eaten later. When he returned, he found the car open and the money gone. *Id.*

[135] *Id.* at 435-37, 167 S.E.2d at 365-66 (Eberhardt, J., dissenting).

[136] *Id.* at 436, 167 S.E.2d at 365.

[137] *Id.*

[138] *Id.*

[139] 119 Ga. App. at 431-32, 167 S.E.2d at 362-63. Judge Deen wrote the court's majority opinion.

[140] *Id.* at 432, 167 S.E.2d at 363.

[141] *Id.*

ply a search for means (any means) to an end. Under this view, the debate over applicability may constitute a facade; the maxim becomes only another argument for reaching (or avoiding) a result. In that event, the object of the disagreement is at odds with the objective of the canon—the objective of an informed decision rather than a contrived one.

Given these two possible perspectives, an evaluation of judicial disagreement over applicability of the maxim must begin by observing whether the two factions also reach different substantive results in the case. If so, the appropriate analysis then requires keen appraisal of the reasons given by each faction for its position on applicability. If those reasons are conclusory or, even worse, nonexistent, opinion writers cannot justifiably complain when they are charged with perverting the "science of interpretation."

### *D. Nonstatutory*

Language is of course not limited to statutes, and judicial construction is not limited to statutory language. Construction canons thus render service far beyond discovery of *legislative* intent and meaning; indeed, some of the more intensive exercises appear to occur in the interpretation of nonstatutory documents. Perhaps a brief sampling will assist in determining whether what has been done "to the least of these" holds general instructive promise.

If it is of special remembrance that a constitution is being expounded, must statutory construction canons be shunned in the process? The answer devolves from a line of cases illustrated by *Odom v. Downtown Development Authority*.[142] *Odom* featured a taxpayer's challenge to a development authority's efforts to finance construction and improvement of municipal facilities.[143] Validity, the supreme court concluded, required authorization by the Georgia Constitution.[144] The designated constitutional provision limited its delegation to " '[t]he development of trade, commerce, industry, and employment opportunities.' "[145] Although the proposed fa-

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[142] 251 Ga. 248, 305 S.E.2d 110 (1983).

[143] *Id.* at 248, 305 S.E.2d at 111. The municipality had attempted to use the "Downtown Development Authorities Law," GA. CODE ANN. ch. 36-42 (1983), for issuing bonds to construct a new city hall, refurbish the jail and improve city streets. *Id.*

[144] "[W]e conclude that the Downtown Development Authorities Law is solely based upon Art. IX, Sec. VI, Par. III." 251 Ga. at 253, 305 S.E.2d at 114.

[145] *Id.* at 250, 305 S.E.2d at 112 (quoting GA. CONST. art. IX, § VI, ¶ III).

cilities would not develop "trade, commerce, or industry,"[146] the court found that the projects would "provide employment opportunities."[147] Could that finding salvage the undertaking?

A majority of the court resolved the issue via a direct appeal to "the familiar rule of construction of *noscitur a sociis*."[148] That rule dictated that "the general term 'employment opportunities' . . . be limited by its antecedents."[149] So limited, the necessary "employment opportunities" must result from "trade, commerce, and industry directly financed by an authority."[150] Accordingly, the court held, the "employment opportunities" in issue were not the constitutionally required "employment opportunities," and could not save the challenged endeavors.[151]

*Odom* thus evidenced judicial employment of *noscitur a sociis* in full and vigorous measure. That the interpretation went to a provision of the constitution, rather than a statute, apparently played no role in the court's disposition. Certainly, it played no muting role. Indeed, the court took pains to expressly prefer that route of construction over "the ultra-liberal interpretation of the constitution" urged by the municipality.[152]

What went for the constitution, the court demonstrated in *Green v. Starling*,[153] also went for " 'a consent verdict for alimony.' "[154] The portion of the "verdict" in issue was its prescription that " 'plaintiff shall pay to the defendant the sum of $30 per month for a period of three years.' "[155] It was the husband's position in *Green* that this obligation ceased upon the wife's remar-

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[146] The court said that the project "does not appear to fit within the definitions of commerce, trade, or industry." *Id.* at 254, 305 S.E.2d at 115.

[147] *Id.* The court conceded that "the Project arguably would provide employment opportunities both in the course of its construction and operation and also within the trade, commerce, and industry the Project is designed to lure in the City." *Id.* at 254-55, 305 S.E.2d at 115.

[148] *Id.* at 255, 305 S.E.2d at 115. Justice Bell wrote the court's opinion, and Justices Clarke, Smith and Gregory dissented without opinions.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] 203 Ga. 10, 45 S.E.2d 188 (1947).

[154] *Id.* at 11, 45 S.E.2d at 189. A jury rendered the "consent verdict" in the context of a divorce proceeding, and the trial court then made the verdict the judgment in the case. *Id.*

[155] *Id.* at 11, 45 S.E.2d at 190.

riage within the three-year period.[156] In approaching resolution of the controversy, a majority of the supreme court canvassed the remainder of the "verdict."[157] On the one hand, the document stated no total amount, nor did it provide that the payments constituted a lump sum award. On the other hand, the measure was specific as to the husband's obligation for designated medical bills, a car and a parcel of land. Announcing that "the maxim *noscitur a sociis* . . . would seem to be applicable,"[158] the court answered the question with a question: "[S]ince the parties had in mind that the automobile and real estate should be awarded specifically and in fee simple, did they not at the same time and in like manner intend that the instalment payments should be unconditional?"[159] The wife's remarriage, the court therefore concluded, did not terminate her right to the monthly payments.[160]

In a sense, *Green* evidences consummate commitment to construction by canon. The context is not the typical one of language formulated by others which subsequently comes between the litigating parties. Rather, the dispute arises over language which the parties themselves earlier formulated and adopted for their own governance. When they subsequently disagree over the meaning of that language for unspecified circumstances, *noscitur a sociis* assists in clarifying their accomplishment. By virtue of that clarification, one of the parties discovers that the meaning he intended to express was not the meaning his language has put in place.

The court of appeals followed a similar route, in a somewhat similar setting, in *Chelsea Corporation v. Steward*.[161] There, the litigated language appeared in a rental contract stating that " 'employees of Landlord are expressly prohibited from receiving any goods, merchandise or property of any kind for and in behalf of tenants.' "[162] The provision released the landlord from any claims

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[156] *Id.* at 12, 45 S.E.2d at 190. The wife sought to have the husband ordered in contempt for failing to continue the payments. *Id.* at 10, 45 S.E.2d at 189.

[157] *See id.* at 11-12, 45 S.E.2d at 189-90. The court said the "cardinal rule" was to ascertain "the intention of the parties." *Id.* at 12, 45 S.E.2d at 190. Justice Bell wrote the opinion, and Justices Atkinson and Head dissented without opinions.

[158] *Id.* at 14, 45 S.E.2d at 191.

[159] *Id.*

[160] *Id.* at 14-15, 45 S.E.2d at 191. The court reversed the trial court's denial of the wife's petition. *Id.* at 15, 45 S.E.2d at 192.

[161] 82 Ga. App. 679, 62 S.E.2d 627 (1950).

[162] *Id.* at 682, 62 S.E.2d at 630.

for such property. The landlord then tendered this provision against the tenant's claim for damaged property entrusted to the landlord's employee for storage.[163]

In seeking "the intention of the parties,"[164] the court focused upon the meaning of the words "for" and "in behalf of."[165] "Though 'for' is a word of wide application its meaning is determined *noscitur a sociis*, from the context in which it is used . . . ."[166] So determined, the court announced, " 'for' is synonymous with 'in behalf of' " or " 'in the name of another.' "[167] Consequently, the court reasoned, any property received by defendant's employee from the tenant would not be received "in the name of" the tenant.[168] Thus, the contract's release did not apply to property delivered by the tenant to the defendant's employee. The court held the provision to afford the landlord no protection against the tenant's claim.[169]

One of the most vivid maxim invocations in Georgia's nonstatutory construction history occurred in *Anderson v. Southeastern Fidelity Insurance Company*.[170] *Anderson* projected the supreme court's inquiry into the scope of an insurance policy exclusion. That exclusion covered the automobile: " '(1) while rented . . . to others . . . ; (2) while used as a public livery conveyance . . . ; (3) while used or operated in any racing event, speed contest or exhibition.' "[171] The controversy pivoted on whether the exclusion covered an automobile engaged in an "impromptu . . . 'drag race.' "[172]

The court's opinion opened with an acknowledgement of *noscitur a sociis* and the observation that "[w]ords, like people, are

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[163] *Id.* Plaintiff alleged the landlord's agreement to store the property, delivery to the landlord's agent on the premises and the damaged condition of the property when returned to plaintiff. *Id.* at 680, 62 S.E.2d at 629.

[164] *Id.* at 686, 62 S.E.2d at 632.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 686, 62 S.E.2d at 632-33. The court said that "the words, 'for' and 'in behalf of' tenants, do not mean 'from' tenants." *Id.* at 686, 62 S.E.2d at 632.

[168] "One does not need to receive goods in the name of the very person who is delivering the goods. Such a fiction seems to us a folly, and ordinary men do not play at such games." *Id.* at 686, 62 S.E.2d at 633.

[169] *Id.* at 687, 62 S.E.2d at 633.

[170] 251 Ga. 556, 307 S.E.2d 499 (1983).

[171] *Id.* at 556, 307 S.E.2d at 499-500.

[172] *Id.* at 556, 307 S.E.2d at 499.

judged by the company they keep."[173] The judgment on this exclusion, the court explained, must be made on "two levels of . . . syntagmatic framework."[174] At the first level, the court focused upon the terms, "any racing event," "speed contest" or "exhibition." Finding little substantive difference between the first two entries, the court viewed the dominating term to be "exhibition." That term "impart[ed] a semantic content" to the preceding words; indeed, it "encompass[ed]" those words.[175] So viewed, both "racing event" and "speed contest" were restricted; they were "but instances wherein the operation of an automobile in an exhibition will be grounds for exclusion."[176]

The first level thus narrowed, the court moved to the "larger framework"—the entire text of the exclusion.[177] The first two listings in the exclusion—renting and public conveyance—signaled "*some* degree of structured deliberateness on the part of the insured," and neither appeared "to contemplate any impromptu or *ex tempore* use of a vehicle."[178] Consequently, "the common element of the first two exclusions can be seen to inform the third, in precisely the same manner in which the third term of the third exclusion can be seen to inform the first and critical term, 'any racing event.' "[179] "Informed" in this fashion, "the third subparagraph of the policy provision cannot serve to exclude liability coverage of the event in question."[180] With *Anderson*, the point was clear: The potential for *noscitur a sociis* appeared as unlimited as

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[173] *Id.* at 556, 307 S.E.2d at 500. Justice Weltner wrote the court's opinion.

[174] *Id.*

[175] *Id.* at 556-57, 307 S.E.2d at 500.

[176] *Id.* at 556, 307 S.E.2d at 500. "It should be noted that there has long existed a genre of public entertainment based upon the exhibition of unusual skills—not necessarily involving speed—in driving automobiles." *Id.* at 556-57, 307 S.E.2d at 500.

[177] *Id.* at 557, 307 S.E.2d at 500.

[178] *Id.* The court explained that the lease of the vehicle would create possessory rights and use as a taxicab (public livery) would mandate compliance with local police power regulations. *Id.*

[179] *Id.* at 557, 307 S.E.2d at 500. The court made note of the additional considerations of construing ambiguity against its draftsman and a public policy of adequate recourse for injured persons under compulsory motor vehicle liability insurance. *Id.*

[180] *Id.* at 558, 307 S.E.2d at 501. The court's decision reversed a contrary holding by the court of appeals. *Id.* at 556, 307 S.E.2d at 499, *rev'g* 166 Ga. App. 750, 305 S.E.2d 128 (1983). In his brief dissent, Chief Justice Marshall charged the court with a "most strained interpretation," devoid of "common sense and ordinary logic." He urged that the exclusion applied to both "commercial and noncommercial events, contests and exhibitions." *Id.* at 559, 307 S.E.2d at 501 (Marshall, C.J., dissenting).

the potential for language itself. Of multilevel capacity, and multifaceted in thrust, the canon's modern capacity for dispute resolution enjoyed unprecedented vitality.

## III. EJUSDEM GENERIS

### A. *Early On*

It is not surprising that a criminal indictment would number among the early victims of the Georgia Supreme Court's professions of preference for *ejusdem generis*. In its 1891 decision of *Sanders v. State*,[181] the court scrutinized an indictment charging defendant with converting beef cattle entrusted to him by their owner.[182] The court assessed the charge's sufficiency under a statute expressly covering "factors, commission merchants, warehousekeepers, wharfingers, wagoners, stage-drivers, common carriers, or any other bailees."[183] The indictment affording no information on defendant's capacity, the court sought to determine whether the phrase "or any other bailees" would work coverage. "[T]hese words," the court observed, "follow immediately an enumeration of several particular kinds of bailees and should be construed to mean other bailees of like character, bailees *ejusdem generis*."[184] Citing no prior decisions of its own,[185] the court proceeded to restrict the phrase to "such as might be termed 'professional' bailees, or bailees engaged in some sort of business which requires the custody, handling or transportation of the property of others."[186] As interpreted, the statute failed to support the indictment.[187]

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[181] 86 Ga. 717 (1891).

[182] *Id.* at 718. The indictment purported to charge larceny after trust. *Id.*

[183] *Id.* at 718 (citing GA. CODE § 4422 (1891)).

[184] *Id.* at 719.

[185] The court quoted from two textual authorities of the time: J.G. SUTHERLAND, STATUTORY CONSTRUCTION § 268 (1891); G.A. ENDLICH, INTERPRETATION OF STATUTES § 405 (1888). 86 Ga. at 719, 720. " 'When there are general words following particular and specific words, the former must be confined to things of the same kind.' " *Id.* at 719 (quoting J.G. SUTHERLAND, *supra*).

[186] 86 Ga. at 720.

> We take it that this section means the same as if it had read any other *like* bailees; that is, it was intended to apply to all bailees, who from the very nature of their business invite the confidence of the public, and the entrusting to them of personal property to be dealt with in the course of such business.

*Id.* at 718.

[187] *Id.* at 720. Another vintage application of the canon in the criminal context, Grier v. State, 103 Ga. 428, 30 S.E. 255 (1898), encompassed an indictment for defendant's unlaw-

Two years later, the court expressly extended its *Sanders* analysis beyond the province of criminal statutes. *Balkcom v. Empire Lumber Company*[188] featured a lien proceeding by suppliers of machinery, hardware and implements. That proceeding rested upon a statutory provision for " 'persons furnishing timber, logs, provisions or any other thing necessary to carry on the work of sawmills.' "[189] Again the court delineated between the essence of the statutory specifics and the general phrase upon which plaintiffs relied. The specifics "relate to a class of articles which are immediately consumed in their use,"[190] the court detected, thus confining the phrase "to things of like kind, *ejusdem generis*."[191] As confined, that phrase did not reach machinery, hardware and implements, objects belonging "to an entirely different class, possessing, more or less, the elements of permanency and durability."[192] Bereft of statutory foundation, therefore, plaintiffs' lien proceeding suffered the court's disallowance.[193]

At a fairly early point, as well, the court moved its *ejusdem generis* technique past statutes and to the language of a security deed. *Beavers v. LeSueur*[194] focused upon a deed specifying coverage of a stated note, future advances, possible future renewals and " 'any and all other indebtedness which the grantor herein may now owe or may hereafter owe to grantee.' "[195] Subsequent to the deed's execution, the grantee also employed the grantor as attorney. In that capacity, the grantee complained, grantor breached a

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fully taking "one black dress" without the owner's consent, under a statute proscribing the taking of " 'any timber, wood, rails, fruit, vegetables, corn, cotton, or any other article, thing, produce or property of any value whatever, from the land, inclosed or uninclosed, of another, without the consent of the owner.' " *Id.* at 429, 30 S.E. at 256 (quoting GA. PENAL CODE § 219 (1895)). Relying upon *ejusdem generis* as "a well-settled rule of construction," the court held legislative intent "to confine acts of criminal trespass to those where the trespasser took and carried away from the land something which was attached to, connected with, produced from, or incident to the land." *Id.* at 429-30, 30 S.E. at 256. That intent did not cover taking the personal goods of another, and the court held the indictment invalid. *Id.* at 430, 30 S.E. at 256.

[188] 91 Ga. 651, 17 S.E. 1020 (1893).

[189] *Id.* at 656, 17 S.E. at 1021 (quoting GA. CODE § 1985 (1882)).

[190] *Id.* at 656, 17 S.E. at 1021.

[191] *Id.*

[192] *Id.* at 656, 17 S.E. at 1022. This was true, the court maintained, although these items were "equally necessary to the carrying on of the work of saw-mills." *Id.*

[193] *Id.* at 657, 17 S.E. at 1022.

[194] 188 Ga. 393, 3 S.E.2d 667 (1939).

[195] *Id.* at 394, 3 S.E.2d at 669.

contract to exercise ordinary diligence thereby entitling grantee to damages.[196] Upon the grantee's attempt to foreclose the security deed for these damages, the court was forced to scrutinize the deed's "blanket clause."[197] In doing so, the court balanced the admittedly "broad" language of the clause against the "well-recognized rule of construction."[198] Under that rule, the court viewed the deed's specifics to embrace "as a class only such definite liabilities as were intentionally assumed."[199] Plaintiff's damage claim, the court distinguished, "was not an indebtedness of that kind."[200] Although "ex contractu," the claim "was yet contingent and unliquidated; and being predicated upon a charge of negligence, it was not intentionally assumed."[201] Accordingly, the court held the security deed inapplicable to plaintiff's claim for damages.[202]

Shortly after the turn of the century, the court found itself at irreconcilable odds over the proper role of *ejusdem generis*. Discussion of that occasion provides an appropriate benediction for survey of the canon's formative epoch. *Latham v. Stewart*[203] drew the court's attention to whether a provision of the general tax act applied to plaintiff's peddling of chickens, eggs and butter. The material statutory provision covered " 'every peddler . . . of any patent or proprietary medicines, or remedies, or appliances of any kind, or of special nostrums, or jewelry, or stationery, or drugs, or soap, or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not).' "[204]

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[196] *Id.* at 395, 3 S.E.2d at 669. Plaintiff employed defendant grantor to enforce an execution against a third party and alleged the grantor's negligence in carrying out the undertaking. *Id.* at 395-96, 3 S.E.2d at 669-70.

[197] *Id.* at 402, 3 S.E.2d at 673.

[198] *Id.* at 403-04, 3 S.E.2d at 673.

> It is a well-recognized rule of construction that when a statute or document enumerates by name several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being ejusdem generis with the things specifically named, unless, of course, there is something to show that a wider sense was intended.

*Id.* at 403, 3 S.E.2d at 673.

[199] *Id.* at 403, 3 S.E.2d at 673.

[200] *Id.* This was true, the court reasoned, even if the claim was "well-founded." *Id.*

[201] *Id.*

[202] *Id.* "So it could hardly have been contemplated by either party that the plaintiff, in accepting this deed as security for the obligations specifically mentioned, was also taking security for a possible liability for negligence." *Id.*

[203] 140 Ga. 188, 78 S.E. 812 (1913).

[204] *Id.* at 188-89, 78 S.E. at 813 (quoting GA. CODE § 946 (1910)).

Promptly engaging the canon of *ejusdem generis*, a majority of the court affirmed that "the general words ordinarily should be construed as referring to merchandise or commodities of the same kind as those specially named."[205] The enumerated terms in the tax act were "of a different nature altogether from articles of food," the court summarily maintained, "in which class chickens, eggs, and butter would fall."[206] Otherwise, the court asserted, the general phrase would be extended to "absurd" lengths[207] and the specific terms would be rendered "useless" and without reason.[208] Accordingly, the court enjoined county collection of the tax.[209]

A forceful two-justice dissent vigorously advanced a counterview.[210] Tracing evolution of the tax statute, the dissent reviewed earlier decisions affording its general phrase a restrictive reading.[211] Responding to those decisions, the dissent argued, the legislature had broadened that phrase to " 'any other kind of merchandise or commodity whatsoever (whether herein enumerated or not).' "[212] "[H]ow," the dissent incredulously queried, "can [it] be held that the general words 'merchandise or commodity,' shall be

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[205] *Id.* at 189, 78 S.E. at 812-13. Justice Atkinson wrote the court's majority opinion. He observed that chickens, eggs and butter clearly did not fall within the Act's specified terms, and moved to whether the products were comprehended by the general concluding phrase. "These are general words, which are preceded by words specially designating particular classes of merchandise or commodities." *Id.* at 189, 78 S.E. at 812.

[206] *Id.* at 189, 78 S.E. at 813. "It was evidently the legislative intent that the general words should apply only to merchandise or commodities which were of the same nature as those before specially named." *Id.*

[207] *Id.* at 190, 78 S.E. at 813. Among the absurdities would be rendering the legislature powerless to tax other commodities in different amounts, to create conflict with provisions which did impose different taxes on other commodities and to impose "a tax of $50 upon boys peddling newspapers on the streets." *Id.*

[208] *Id.* "The legislature might have taxed the peddling of articles of food had it been thought proper to do so . . . ." *Id.*

[209] *See id.* A concurring opinion by Presiding Justice Evans and Justice Beck observed that "[w]here you have general ancillary words, they should not be given such a construction as to do away with the specific proposition which they follow." *Id.* at 191, 78 S.E. at 813 (Evans and Beck, JJ., concurring).

[210] Justices Lumpkin and Hill dissented. 140 Ga. at 191-96, 78 S.E. at 813-16 (Lumpkin and Hill, JJ., dissenting).

[211] The dissent recounted Standard Oil Co. v. Swanson, 121 Ga. 412, 49 S.E. 262 (1904), employing *ejusdem generis* in construing the phrase "or other merchandise" appearing in the 1902 version of the statute. 140 Ga. at 193, 78 S.E. at 814 (Lumpkin and Hill, JJ., dissenting).

[212] 140 Ga. at 194, 78 S.E. at 815 (Lumpkin and Hill, JJ., dissenting) (quoting GA. CODE § 946 (1910)). "In 1909 the legislature materially changed the form of words used in the general tax act in relation to these specific taxes." *Id.*

construed to mean merchandise or commodity of like kind as the articles specified, when the legislature has declared in express words that they do not mean of like kind only, but '*of any other kind whatsoever*' . . ."?[213] The dissent was adamant: " 'Other kind,' is not the same as like kind, and can not be properly construed to mean the same."[214] Otherwise, the general phrase would be treated as "entirely stricken from the statute," thus contravening a fundamental presumption that the legislature intends all words to have "some meaning."[215] Moreover, the dissent persisted, the statutory specifics themselves were not of the same genus.[216] "If the enumeration itself includes different genera, . . . the doctrine of ejusdem generis has little or no application as to the words under discussion."[217]

For at least the last century, therefore, the Georgia Supreme Court has enjoyed an intimate relation with the constructional aid of *ejusdem generis*. Most at ease with the canon in restricting the open-ended coverage of criminal statutes, the court exhibited few qualms in translating textual theory on the maxim into decisional precepts. As it matched indictment charge with statutory crime, the court displayed considerable interpretive dexterity in narrowing the "general" to the same "kind" as the "specifics."

Promptly extending the canon's reach beyond the familiar, the court claimed intriguing new theaters of operation. Both noncriminal legislative enactments and nonstatutory documents yielded to the gravitational pull of the "well-settled" adage of structural adjustment. In the name of seeking scrivener's intent, the court's formative treatment of *ejusdem generis* signaled potential for sustained judicial innovation.

From the beginning it was evident that, once applicability was determined, the point of the canon's impact occurred prior to the conclusion on the meaning of the "general." Rather, the moment of

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[213] *Id.* "The statute does not say any other merchandise or commodity, as it formerly did, but any other *kind*." *Id.*

[214] *Id.*

[215] *Id.* at 195, 78 S.E. at 815.

[216] The dissent urged that "it may well be doubted whether it can be declared that patent medicines and stationery are of the same genus, or that jewelry and drugs belong to the same family of merchandise." *Id.*

[217] *Id.* The dissent discounted the majority opinion's example of "absurdity": "the illustration from newsboys does not seem to us very convincing . . . ." *Id.* at 196, 78 S.E. at 816.

creativity came in determining the "nature" of the "specifics." That was the juncture at which will could become way. In the process, enumerated terms could coalesce into "some kind of business" (*Sanders*), "articles immediately consumed in their use" (*Balkcom*) or "liabilities intentionally assumed" (*Beavers*). The freedom to work such translations obviously invested the interpreter with crucial discretion in shaping the "genera" which in turn cabined the "general." It is remarkable to witness that amount of Georgia judicial discretion being wielded so casually a hundred years ago. Judicial "activism" is in the eye of the beholder, and *ejusdem generis* afforded one early and distinctive perspective.

This is in no measure to minimize, however, either the initial determination on applicability itself or the tensions inherent in making that analytical commitment. The supreme court's early division in *Latham v. Stewart* strikingly captured the momentous character of those concerns. The majority's decision to engage the canon derived from a fear of the contrary conclusion. Primarily, that fear focused upon rendering the specifics of the statute "useless" and denigrating the reason for their inclusion, reason bound up with the practical necessity of imposing some limit upon the otherwise "absurd" universality of the general phrase. In contrast, the dissent's objection to applicability pivoted upon a legislative history viewed to compel fidelity to the admittedly expansive reach of the general phrase. Construction, the dissent declared, particularly *ejusdem generis* construction, was simply (and diametrically) at odds with legislative expression. Extracting confirmation from the utter diversity characterizing the specific terms themselves, the dissent's fear focused upon the prospect of effectively striking the general phrase from the statute. *Latham* thus almost perfectly illustrated the tensions surrounding an initial decision on the applicability of *ejusdem generis*.

### *B. In The Main*

The modern corpus of *ejusdem generis* utilization by Georgia's appellate courts reflects considerable activity and rich variety. The court of appeals, for example, finds occasion for the canon's applicability in what might be termed the "clerical" context. Thus, in

*General Motors Acceptance Corporation v. Monday*,[218] the court was called to decide whether recordation in the county of the mortgagor's residence afforded constructive notice of a conditional bill of sale for an automobile.[219] That decision depended upon a statute requiring recordation where located for " '[a]ll chattel mortgages of stocks of goods, wares, and merchandise, or other personal property.' "[220] Finding construction of the statute necessary,[221] the court divined statutory contemplation of "a merchant, or similar tradesman, who may live in one county and operate a store, or other business in another county."[222] The automobile in issue "was not ejusdem generis with stocks of goods, wares, and merchandise, it not appearing that the mortgagor was engaged in the business of keeping or storing automobiles in the county where this automobile was located when the conditional bill of sale was executed, or elsewhere."[223] Accordingly, recordation at the mortgagor's residence was sufficient.[224]

Similarly, *New London Square, Ltd. v. Diamond Electric & Supply Corporation*[225] raised the issue of attestation for a materialman's claim of lien.[226] In resolution, the court traced the legislative evolution of a statute requiring attestation of " 'any deed, . . . or of a mortgage, bond for title or other registrable instrument.' "[227] Finding the predominating historical concern to focus upon deeds, the court promptly advanced the maxim: "The logical construction of the words 'other registrable instruments' . . . is thus

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[218] 79 Ga. App. 609, 54 S.E.2d 479 (1949).

[219] *See id.* at 609, 54 S.E.2d at 481-82. The issue arose in the context of a foreclosure proceeding. *Id.* at 610, 54 S.E.2d at 480.

[220] *Id.* at 609, 54 S.E.2d at 481 (quoting GA. CODE § 67-108 (1933)).

[221] The court said the statute "must be construed in accordance with the doctrine of ejusdem generis." *Id.* at 609, 54 S.E.2d at 481.

[222] *Id.* "[A] person may live in one county and possess such property located in another county . . . ." *Id.*

[223] *Id.*

[224] *Id.* The mortgagor had recorded the bill of sale in the Georgia county of his residence, but had primarily kept the car in his possession where he was stationed at a military post in another Georgia county. *Id.* at 610, 54 S.E.2d at 480-81.

[225] 132 Ga. App. 433, 208 S.E.2d 348 (1974).

[226] *Id.* at 433, 208 S.E.2d at 348. The property owner opposed a foreclosure proceeding on grounds that the lien had not been attested. *Id.* at 433, 208 S.E.2d at 349.

[227] *Id.* at 433, 208 S.E.2d at 349 (quoting GA. CODE ANN. § 29-405 (Harrison 1969)). Indeed, another statute had expressly referred to it as " 'relating to the requirements for attestation or acknowledgement of deeds for record.' " *Id.* at 434, 208 S.E.2d at 349 (quoting 1963 Ga. Laws 212).

the ejusdem generis explanation that it means deeds and other instruments required by law to be executed with the formality of deeds."[228] A materialman's lien not involving an interest in land in the nature of the statutory specifics, the court refused to subject the document to the coverage of "other registrable instruments" so as to require attestation.[229]

Regulatory statutes provide another hospitable environment for the canon's utilization; the supreme court has proved adept at the exercise.[230] Illustratively, *Jenkins v. Jones*[231] featured a statute empowering municipalities "to regulate the running and operation of motor vehicles" and to regulate "speed, cut-outs, and headlights" and "requiring owners of motor vehicles to register."[232] The issue projected was whether the statute authorized municipalities to penalize motor vehicle operation while under the influence of liquors or drugs.[233] Given the statutory specifics, the court refused to derive power to prohibit intoxicated operation from authority to regulate "the running and operation of motor vehicles."[234] "Where general words are followed by a description of specified subjects," the court reasoned, "the meaning of the general words ordinarily will be presumed to be limited to the enumerated special subjects . . . ."[235] Leaving no doubt on the point, the court emphasized that "*[e]jusdem generis* is a rule of construction to ascertain

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[228] *Id.* at 434, 208 S.E.2d at 349.

[229] *Id.* Thus, the failure to attest did not invalidate the lien. *Id.*

[230] This is not to charge the court of appeals with dereliction in respect to regulatory measures. In McGee v. Bennett, 72 Ga. App. 271, 33 S.E.2d 577 (1945), one of the issues focused upon a statutory branding requirement for " 'calcium arsenate, lead arsenate, and dust mixtures containing sulphur, lead arsenate, and lime.' " *Id.* at 271, 33 S.E.2d at 579 (quoting GA. CODE § 5-1502 (1933)). Rejecting the contention that those specifics indicated coverage of substances containing "2% ceresan and 5% ceresan," the court expressly embraced *ejusdem generis*.

> The specific words which describe and enumerate the objects embraced in the statute, both preceding and following the general words "other fungicides" show that the legislature intended to embrace in the statute objects of the same class only, otherwise it would have used only the one compendious name "fungicides," commonly used on field crops.

*Id.* at 272, 3 S.E.2d at 579.

[231] 209 Ga. 758, 75 S.E.2d 815 (1953).

[232] *Id.* at 761, 75 S.E.2d at 818 (citing GA. CODE § 68-312 (1933)).

[233] *See id.* at 759-60, 75 S.E.2d at 817. The validity of a municipal ordinance effecting such a penalty was the subject of challenge in the case. *Id.* at 759, 75 S.E.2d at 817.

[234] *Id.* at 761, 75 S.E.2d at 818.

[235] *Id.*

and give effect to legislative intent."[236]

The purported regulation of chiropractors received similar disposition. *Georgia Board of Chiropractic Examiners v. Ball*[237] encompassed a license revocation procedure for the licensee's use of "display type advertising to advertise free x-rays."[238] Revocation power depended upon a statute stating eight grounds for cause.[239] As the court described them, "[s]even of these grounds refer to specific acts such as fraud, immoral conduct or violation of criminal laws."[240] The eighth ground, the ground of the proceeding against the licensee, provided " 'or any other immoral or unprofessional conduct.' "[241]

In undertaking its review, the court first sought to plumb the meaning of the "eighth ground." Invoking *ejusdem generis*, the court insisted that the "general expression" of that ground referred to acts which "must be of like character with those named."[242] As perceived, the ground failed to cover the licensee's charged conduct: His act "is not an act of like character to the seven specified grounds provided for . . . revocation."[243]

The operation of state banks provides yet another popular target of legislative regulation, specifically the bank's power to engage in other businesses. *Independent Insurance Agents of Georgia v. Department of Banking & Finance*[244] focused upon a bank's authority to operate a general insurance agency in a municipality of less than 5000 inhabitants. According to the court, state statutes enumerating specific powers of such banks granted no authority "to operate any business distinct from the banking business."[245]

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[236] *Id.* The court thus declared the ordinance invalid. *Id.* at 764, 75 S.E.2d at 819.

[237] 224 Ga. 85, 160 S.E.2d 340 (1968).

[238] *Id.* at 89, 160 S.E.2d at 343. The licensee challenged the validity of a rule covering such conduct which had been adopted by the board of examiners. *Id.* at 87, 160 S.E.2d at 342.

[239] *Id.* at 88-89, 160 S.E.2d at 343 (citing GA. CODE § 512 (1933)).

[240] *Id.* at 89, 160 S.E.2d at 343.

[241] *Id.* (quoting GA. CODE § 512 (1933)).

[242] *Id.*

[243] *Id.* Accordingly, the court invalidated so much of the board's rule as declared licensee's conduct cause for revocation. *Id.*

[244] 248 Ga. 787, 285 S.E.2d 535 (1982).

[245] *Id.* at 789, 285 S.E.2d at 537. The court summarized the statute then appearing as GA. CODE ANN. § 41A-1202 (Harrison 1974), "Additional Operational Powers," noting as an example of included powers that of acquiring and holding property in order to transact its business. *Id.*

Accordingly, the court reasoned, the statute's "incidental powers" provision[246] "should not be construed to allow such activity."[247] Expressly assimilating its approach to *ejusdem generis*,[248] the court declared it "reasonable to construe the general words, 'incidental power,' to grant powers similar in nature to those provided by subsections (a) through (i)."[249]

The maxim appears well in place, therefore, in the clerical and regulatory arenas. In both, the appellate courts freely engage the two-step process of extracting the essence from the legislative specifics and then impressing its gist upon the more general expression. Unlike *noscitur a sociis*, the nature of the *ejusdem generis* beast is entirely one-directional. Under the imprint of the former, that is, an "associate" can radiate either a narrower or broader meaning to its word companion. In contrast, the shaping associational influence of *ejusdem generis* operates to clarify by confinement. Indeed, it is precisely that trait that places the interpreting court on the analytical tightrope; the eternal balance must be struck so that neither the specifics nor the general are rendered completely superfluous. Whether the specifics follow (as in *Jenkins*) or precede (as in *Chiropractic Examiners*) the general, their infusion of meaning must temper rather than terminate. Intelligent, effective and sensitive employment of the canon, while productive, is an extremely delicate procedure. When expanded by assimilation (as in *Independent Insurance Agents*) to operate upon statutory clauses, the "science of interpretation" is revealed as the dynamic decisional determinant that it is.

Modern experience with *ejusdem generis* has by no means dispelled the maxim's earlier fascination with criminal statutes. *State v. Davis*[250] exuberantly makes the point, confronting the supreme court with a constitutional challenge to the state's "criminal solicitation" statute.[251] That statute placed one in violation when

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[246] " 'Banks and trust companies shall, in addition, have the power . . . to exercise all incidental powers as shall be necessary to carry on the banking or trust business . . . .' " *Id.* at 788, 285 S.E.2d at 536 (quoting GA. CODE. ANN. § 41A-1202 (Harrison 1974)).

[247] *Id.* at 789, 285 S.E.2d at 537.

[248] "Where general words follow a list of particulars, the general words are construed to embrace only objects similar in nature to the particulars." *Id.*

[249] *Id.* The court reversed the contrary conclusion of the court of appeals in the case. *Id.* at 789, 285 S.E.2d at 537, *rev'g* 158 Ga. App. 556, 281 S.E.2d 265 (1982).

[250] 246 Ga. 761, 272 S.E.2d 721 (1980).

[251] *Id.* at 761, 272 S.E.2d at 721 (citing GA. CODE ANN. § 26-1007 (Harrison Supp. 1978)).

" 'with intent that another person engage in conduct constituting a felony he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.' "[252] Considering the challenger's first amendment charges of vagueness and overbroadness,[253] the court located the phrase "or otherwise attempts to cause" as the statute's most suspect provision.[254] That provision could survive, the court reasoned, only if narrowly construed "in conformity with the first amendment."[255] To accomplish the feat, the court hoisted the "rule" of *ejusdem generis*; that rule would "limit" the words of the offending phrase "by the words immediately preceding them."[256] So limited, the court translated, "only a relatively overt statement or request intended to bring about action on the part of another person will bring a defendant within the statute."[257] As translated, the statute cleared the hurdle of unconstitutionality.[258]

In the nonconstitutional context, *State v. Mulkey*[259] gave equally impressive illustration of the canon's current reach into criminal law. *Mulkey* involved an arson prosecution, with defendant charging as violative of discovery procedures the admission into evidence of ignition tests conducted several years earlier.[260] Resolution turned upon whether those tests constituted "written scientific reports" defined by the discovery statute to include Georgia Bureau of Investigation reports, autopsy reports, blood alcohol test results "*and similar type reports* that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal

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[252] *Id.* at 761, 272 S.E.2d at 721-22 (quoting GA. CODE ANN. § 26-1007 (Harrison Supp. 1978)).

[253] *I.e.*, that it embraced speech protected by the first amendment. *Id.* at 762, 272 S.E.2d at 722.

[254] 246 Ga. 761, 762, 272 S.E.2d 721, 722 (quoting GA. CODE ANN. § 26-1007 (Harrison Supp. 1978)). In contrast, the court said that "[t]he words 'solicits, requests, commands' and 'importunes' are all clearly understandable so that any person seeking to avoid violation of the law could do so." *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] The court thus reversed the trial court's dismissal of the indictment.

[259] 252 Ga. 201, 312 S.E.2d 601 (1984).

[260] *Id.* at 201, 312 S.E.2d at 601-02. A fire safety specialist was permitted to describe ignition tests which he had conducted several years prior to the date of the alleged crime. *Id.* at 201, 312 S.E.2d at 601.

against the defendant."[261] Conceding the statutory phrase to be "somewhat ambiguous," the court professed "no difficulty in ascertaining the meaning of the General Assembly."[262] It was clear, the court insisted, that the statute's enumerated reports "are tests which generally are carried out during the course of the investigation of a crime."[263] Contrarily, the contested ignition tests "did not originate in the state's investigation and preparation for trial," constituting instead but a part of the experience possessed by the expert witness.[264] Under *ejusdem generis*, the court asserted, "the ignition tests were not of like character to the class of tests specified" in the discovery statute,[265] and their admission was therefore proper.[266]

*Davis* and *Mulkey* thus forcefully confirmed the canon's continuing hold on litigation involving criminal statutes. Indeed, that hold conscripted an added dimension in the former case, operating not only to reveal statutory meaning, but to snatch that meaning from the jaws of unconstitutionality. Translating "overt statement or request" from "or otherwise attempts," the court indicated an intriguing relation between *ejusdem generis* and the first amendment. The result of that relation—a "double-narrowing" analytical juggernaut—dramatically saved a statutory provision that even the court conceded might well have fallen victim to the vice of vagueness. Although the exercise of *Mulkey* was less dynamic, it too worked the necessary magic on a statutory phrase admittedly "somewhat ambiguous," cutting this time in the direction of, rather than away from, criminal conviction. Although the canon's thrust may be one-directional, the same cannot always be said for the result of that thrust.

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[261] *Id.* at 202, 312 S.E.2d at 601 (quoting GA. CODE ANN. § 17-7-211(a) (1982) (requiring a written report to defendant at least ten days before trial)).

[262] *Id.* at 202-03, 312 S.E.2d at 602-03.

[263] *Id.* at 203, 312 S.E.2d at 603.

[264] *Id.* The court said the tests "merely constituted a portion of the body of scientific experience, training, and knowledge which the fire safety specialist brought to the stand in his capacity as an expert, i.e., his expert qualifications."

[265] *Id.*

[266] The court's decision reversed that of the court of appeals. *Id.* at 201, 312 S.E.2d at 601, *rev'g* 167 Ga. App. 627, 307 S.E.2d 117 (1983). The court of appeals found the discovery statute's general phrase to be all encompassing: "We will not invest such clear language with the meaning that it involves only scientific tests of material directly involved in the crime charged." 167 Ga. App. at 630, 307 S.E.2d at 120-21.

A remaining sphere for the canon's contemporary influence, that of civil liability, finds example in any number of factual settings. Perhaps two selected cases, radically different in origin, will serve simply to hint at the litigational range. *Ford Motor Company v. Abercrombie*[267] featured controversy over unemployment compensation for Georgia employees affected by an employee work stoppage at the employer's Michigan plant.[268] The controlling Georgia statute disqualified an unemployed worker for benefits when work stoppage arose from "a labor dispute at the factory, establishment, or other premises at which he is or was last employed."[269] Holding that provision to bar the Georgia claimants, the supreme court reasoned that the Michigan plant and the Georgia plant "were inseparable and indispensable parts of one and the same 'factory, establishment, or other premises.' "[270] Rejecting claimants' contrary contention, the court explicitly reached for interpretative assistance: "Ejusdem generis would not alter the meaning of the words 'factory' and 'establishment,' but does restrict the general words, 'or other premises,' to premises similar in character and nature to that of the preceding words 'factory' and 'establishment.' "[271]

The court of appeals was no less explicit in *Lively v. Trust*,[272] a wrongful death action against a police officer who arrested plaintiffs' son. Plaintiffs founded their claim upon defendant's alleged negligence per se in violating a statute governing the conduct of officers encountering semiconscious persons.[273] The statute commanded the officer's "diligent effort to determine if such person is an epileptic or diabetic or a person who is suffering from any other type of illness which would cause semiconsciousness."[274] Plaintiffs claimed this statutory protection for their son's post-arrest death

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[267] 207 Ga. 464, 62 S.E.2d 209 (1950).

[268] In sympathy with a labor dispute at the Ford Motor Company's assembly plant in Michigan, employees at the parts-producing plant, also in Michigan, went out on strike. This resulted in a work stoppage at the Ford assembly plant in Georgia. *Id.* at 464-65, 62 S.E.2d at 211.

[269] *Id.* at 468, 62 S.E.2d at 214 (citing GA. CODE ANN. § 54-610(d) (Harrison Supp. 1947)).

[270] *Id.* at 470, 62 S.E.2d at 215.

[271] *Id.* The court reversed the court of appeals' contrary decision. *Id.* at 464, 62 S.E.2d 209, *rev'g* 81 Ga. App. 690, 59 S.E.2d 664 (1950).

[272] 184 Ga. App. 361, 361 S.E.2d 516 (1987).

[273] *Id.* at 362, 361 S.E.2d at 517. Defendant had arrested decedent after finding him sitting behind the wheel of a wrecked automobile and exhibiting conditions consistent with intoxication. *Id.* at 361, 361 S.E.2d at 517.

[274] *Id.* at 362, 361 S.E.2d at 517 (quoting GA. CODE ANN. § 30-1-3(b) (1982)).

from excessive amounts of prescription drugs.[275]

Reviewing the legislative history,[276] the court rejected plaintiffs' reading of the statutory phrase, "any other type of illness."[277] That phrase took meaning, the court asserted, from the statutory specifics, "permanent, handicapping diseases, beyond the individual's control, which may render the afflicted person temporarily unable to care for himself."[278] As thus amplified, the phrase in no manner covered drug overdose, "a temporary, self-inflicted condition which is fundamentally different in character from the diseases specifically identified in the statute."[279] Consequently, the court concluded, "under the principle of ejusdem generis, the statute cannot be construed to include intoxication and drug overdose under the general term 'illness.' "[280]

In civil litigation as in criminal, therefore, the canon cuts an impressive swath of directed statutory meaning. Given the terms, "factory," "establishment" and "other premises," the latter yields to deny unemployment benefits. Given "epileptic," "diabetic" and "other illness," the latter contracts to deny negligence per se. The results may be controversial, but the approach is specific: the well-settled rule of *ejusdem generis* carries the day.

### C. *Rejection*

With *ejusdem generis* as well, the instances of judicial rejection can be as instructive (and at least as interesting) as the occasions of application. In highly selective fashion, therefore, description of a few such instances may assist in assessing the canonistic cycle. In various contexts, both appellate courts occasionally take pains to unfurl the maxim only to disregard it. The analytical challenge lies in developing predictors forewarning of those occasions; judicial as-

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[275] *Id.* at 363, 361 S.E.2d at 518. Decedent died after being transported from the jail to the hospital; he had told defendant upon his arrest that he had taken only two pills from a container in the car. *Id.* at 361-62, 361 S.E.2d at 517.

[276] The court noted the bill's title referring to "*Certain* Illnesses," as well as commentary in a national publication signifying the Georgia statute's confinement to the enumerated illnesses. *Id.* at 361-62, 361 S.E.2d at 517-18.

[277] *Id.* at 363, 361 S.E.2d at 518 (citing GA. CODE ANN. § 30-1-3(b) (1982)).

[278] *Id.*

[279] *Id.* "How ironic it would be," the court remarked, "to interpret this statute as protecting an intoxicated person from being mistakenly identified and arrested as an intoxicated person." *Id.*

[280] *Id.* The court affirmed summary judgment for defendant.

sistance in meeting that challenge leaves much to be desired.

Perhaps it is appropriate to open with a context traditionally most congenial to the canon: a criminal statute's coverage of a challenged indictment. *Plapinger v. State*[281] featured defendant's attack upon an indictment charging unlawful disposition of grapes. The defect, defendant contended, arose from the statute under which the indictment was laid.[282] That statute formulated a felony for failing to pay for twenty-three specified agricultural products, "or other products or chattels."[283] Because grapes were not among the enumerated products, defendant maintained, they were not embraced by the statute's concluding general phrase. *Ejusdem generis*.

In a highly intriguing response, the Georgia Supreme Court rejected defendant's challenge by adopting the canonical basis of the challenge. Conceiving of "no other logical explanation" for the statute's general phrase, the court insisted that it must include other agricultural products "although not specifically enumerated."[284] The court then put forth its solitary rationale: "Ejusdem generis, of the same kind, class or nature, includes the product involved here."[285] Under that rationale, "[s]urely, it can not be said that grapes are not agricultural products."[286] Accordingly, the court held, the criminal statute supported the criminal indictment.

By purporting to utilize the canon, therefore, the supreme court in *Plapinger* denied defendant's effort to rely upon it. Left unanalyzed, of course, were the limitations (if any) which did encumber the general phrase, as well as the legislature's superfluous and energetic exercise in painstakingly ferreting out the twenty-three specifics.

The court of appeals' oscillation between rejection and utilization occurred in *Hardeman v. Liberty Mutual Insurance Company*.[287] The case presented the quandary whether workers' com-

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[281] 217 Ga. 11, 120 S.E.2d 609 (1961).

[282] *Id.* at 11, 120 S.E.2d at 610 (citing GA. CODE ANN. § 5-9914 (Harrison Supp. 1960)).

[283] *Id.* The statute expressly listed "cotton, corn, rice, crude turpentine, spirits of turpentine, rosin, pitch, tar, timber, pulpwood, poultry and poultry products, cattle, hogs, sheep, goats, horses, mules, pecans, peaches, apples, watermelons, cantaloupes, . . . ." *Id.* (quoting GA. CODE ANN. § 5-9914 (Harrison Supp. 1960)).

[284] *Id.* at 12, 120 S.E.2d at 610.

[285] *Id.*

[286] *Id.*

[287] 124 Ga. App. 710, 185 S.E.2d 789 (1971).

pensation benefits could be reduced for claimant's failure to accept recommended vocational rehabilitation services.[288] Claimed statutory authority for reduction provided that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment . . . shall bar said employee from further compensation."[289] Holding that authority insufficient, the trial judge found that rehabilitation services did not fall "within the meaning of 'other treatment' " in the statute.[290] *Ejusdem generis.*

In a highly tentative response, the court "granted" that "a strict application of ejusdem generis would eliminate orders involving job retraining alone."[291] Yet, the court equivocated, "such training in connection with psychological therapy is today recognized as a medical technique of prime significance in the salvaging of human resources."[292] Thus, the court proffered, refusal of such services might after all "justify reduction or cessation of payments,"[293] and the board should consider the matter on remand.

In apparently rejecting a "strict" application of the canon, the court in *Hardeman* then proceeded to proffer a perspective by which the canon might apply after all. If "rehabilitation services" could be portrayed with a modern therapeutic tint ("salvaging of human resources"), it might be maneuvered in the direction of the enumerated "medical" treatments and, under a "not-so-strict" application of *ejusdem generis*, be considered one of the "other treatments" of the same "kind" as the specifics.

Occasionally, the courts will bottom their rejection of the maxim upon some seemingly small facet of the statutory phraseology. In *Beck v. Wade*,[294] for example, the court of appeals seized upon the "disjunctive" linkage of "or" to make the point.[295] Thus, in reviewing a statute prohibiting a vehicle in unsafe condition "or which does not contain those parts" later specified (lights, reflectors, signals, horns, brakes and mirrors),[296] the court permitted the stat-

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[288] The compensation board had twice recommended the services, and claimant had steadfastly refused to use them. *Id.* at 712, 185 S.E.2d at 791.

[289] *Id.* (quoting 1937 Ga. Laws 528, 532).

[290] *Id.*

[291] *Id.*

[292] *Id.* at 712-13, 185 S.E.2d at 791.

[293] *Id.* at 713, 185 S.E.2d at 792.

[294] 100 Ga. App. 79, 110 S.E.2d 43 (1959).

[295] *Id.* at 82, 110 S.E.2d at 46.

[296] *Id.* at 81, 110 S.E.2d at 45-46 (citing GA. CODE ANN. ch. 68-17 (Harrison Supp. 1954)).

ute's coverage of doors.[297] Expressly spurning analogy to cases employing *ejusdem generis*,[298] the court observed that "[o]rdinarily in such a case the objects are linked by conjunctive rather than disjunctive words or phrases."[299] Here, the court delineated, the phrase, " '*or* does not contain those parts . . . ,' does not, we think, limit the effect only to the parts enumerated."[300]

Similarly, in *Hamlin v. Timberlake Grocery Company*,[301] the court recognized but rejected the canon in construing a security deed's "dragnet clause." The deed recited the specific debt then secured, "together with any and all other indebtedness . . . which may hereafter be owing . . . however incurred."[302] The court expressly distinguished prior decisions refusing to extend a "simple dragnet clause" to unliquidated tort claims.[303] The clause in issue, the court emphasized, "in addition to covering debts now or hereafter owing has the additional words 'however incurred.' "[304] The effect of that addition, the court declared, "eliminates the application of the ejusdem generis rule of construction by showing a clear intent" to cover obligations other than those "of the same kind as the primary . . . debt."[305]

On yet other occasions, the court will indicate as the special grounds for rejection the absence of phraseology. Illustratively, *Undercofler v. VFW Post 4625*[306] encompassed the state's effort to impose sales taxes upon receipts from the operation of slot machines. Claimed authority resided in a statutory provision enumerating a large number of taxable activities and concluding with "charges made for the operation of coin-operated musical devices and other such coin-operated amusement devices."[307] The applica-

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[297] *Id.* at 82, 110 S.E.2d at 46. Plaintiff was thus permitted to rely upon the statute in charging defendant taxi company with negligence per se in maintaining a cab with a defective door spring causing injury to plaintiff's daughter.

[298] *Id.* (citing Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953)).

[299] *Id.*

[300] *Id.*

[301] 130 Ga. App. 648, 204 S.E.2d 442 (1974).

[302] *Id.* at 649, 204 S.E.2d at 443.

[303] *Id.* at 650, 204 S.E.2d at 444 (citing Beavers v. LeSueur, 188 Ga. 393, 3 S.E.2d 667 (1939)).

[304] *Id.*

[305] *Id.* at 650-51, 204 S.E.2d at 444. The security deed was thus held to cover debts incurred on open account subsequent to the deed's execution. *Id.* at 651, 204 S.E.2d at 444.

[306] 110 Ga. App. 711, 139 S.E.2d 776 (1964).

[307] *Id.* at 713-14, 139 S.E.2d at 778 (quoting 1953 Ga. Laws 1st Session 192, 193, § 1).

bility of *ejusdem generis* constituted the point of extensive debate.

A minority opinion forcefully advanced the canon's cause in seeking legislative intent.[308] As a first step, the opinion observed that all statutorily specified taxable activities were activities of a "lawful nature."[309] That point, in turn, called forth the maxim: "Applying the restrictive rule of ejusdem generis, therefore, the general words, 'other such coin-operated amusement devices, etc.,' are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words, i.e., those of a *legal* or *lawful* nature."[310]

In vigorous response, the court's majority opinion charged the minority with "begging the question."[311] Having merely "assumed" that the statutory specifics were all "legal sales," the court asserted, the minority position rested upon a defective foundation.[312] "Such argument assumes an answer (that the inclusion clause applies only to legal sales) and then uses this answer as a major premise to prove (by application of the ejusdem generis rule) the answer assumed in the first instance."[313] In the absence of an express statutory statement that the specifics were "legal," therefore, the court could see no basis for infusing that prerequisite into the general phrase by operation of *ejusdem generis*.[314]

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[308] *Id.* at 720, 139 S.E.2d at 781-82. Chief Judge Felton wrote this opinion; it was termed a special concurrence because the majority affirmed summary judgment for the taxpayer on other procedural grounds in the case. *Id.* at 712-13, 139 S.E.2d at 777.

[309] *Id.* at 720, 139 S.E.2d at 781.

[310] *Id.* at 720, 139 S.E.2d at 781-82. Chief Judge Felton apparently carried his preference for *ejusdem generis* to the supreme court. See his dissent in Carroll v. Campbell, 226 Ga. 700, 177 S.E.2d 83 (1970) (Felton, C.J., dissenting), urging that the statutory term "direct appeal or otherwise" did not apply to a cross appeal. Writing only for himself, he contended that "[w]isdom, justice, equity and common sense dictate that we apply the ejusdem generis rule." *Id.* at 702, 177 S.E.2d at 85.

[311] *Undercofler*, 110 Ga. App. at 718, 139 S.E.2d at 780. Judge Pannell wrote the court's opinion. Five judges issued a special statement characterizing this portion of the opinion, as well as the special concurrence, obiter dictum. *Id.* at 725, 139 S.E.2d at 780.

[312] *Id.* at 718, 139 S.E.2d at 780.

[313] *Id.*

[314] The court later relied upon this decision to again reject the maxim in Chilivis v. Fleming, 139 Ga. App. 295, 228 S.E.2d 178 (1976), involving whether the term "games and amusement activities" covered the sale and purchase of lottery tickets. Opting for coverage, the court refused to modify the term by preceding language in the statute applying to tickets for admission to places of amusement.

> We fail to see how the charges made for participation in games and amusement activities can be restrained in their generality by applying the *ejusdem generis* rule so as to require the payment of an admission to a place where games and

Perhaps the most popular rejection technique is to oppose the canon with other construction approaches. Evidencing that technique, the court's opinion in *Bunkley v. Hendrix*[315] considered statutory negligence immunity for officers of "any public, charitable or nonprofit hospital, institution or organization."[316] "Using the statutory construction rule of ejusdem generis," plaintiff urged the statute to apply "only to hospitals and other health care institutions and organizations."[317] Disagreeing, and approving immunity for an officer of a nonprofit art association,[318] the court countered with "plain meaning" and "legislative intent."[319] Affirming summary judgment for defendant, the court simply could not believe that the statute "was intended to extend such protection only to health care facilities to the exclusion of other organizations equally desirable and beneficial."[320]

### *D. Nonstatutory*

*Ejusdem generis* does not operate on statutes alone; rather, its constructional influence extends to a host of other writings. A mere sampling of cases will confirm the encompassing range of the canon's reach.

In the early case of *Moss v. Strickland*,[321] the maxim's interpretative contractions gripped the state constitution. Defendant there sought to stave off a statutory land foreclosure proceeding brought

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> amusement activities are held, or that the games or amusements must be in, or require a *place* for holding them or where the player must be. To us the language prior thereto clearly indicates no intent to limit the generality of the words "games and amusements," but to the contrary.

*Id.* at 297, 228 S.E.2d at 180.

[315] 164 Ga. App. 401, 296 S.E.2d 223 (1982).

[316] *Id.* at 402, 296 S.E.2d at 223 (quoting GA. CODE ANN. § 105-114 (Harrison Supp. 1980)). The statute imposed liability upon covered officers only for gross negligence or wilful and wanton misconduct. *Id.* at 402, 296 S.E.2d at 224 (citing GA. CODE ANN. § 105-114, *supra*).

[317] *Id.* at 402, 296 S.E.2d at 224.

[318] Plaintiff herself was a member of the association and suffered injury when an art exhibit stand fell upon her after she had viewed a film. Defendant was a member of the association's board of governors and had voted to approve the association's sponsorship of showing old movies. *Id.* at 401, 296 S.E.2d at 223.

[319] *Id.* at 402, 296 S.E.2d at 224.

[320] *Id.* Otherwise, the court said, the legislature could have "specifically limit[ed] the term 'institution or organization' to health care entities." *Id.*

[321] 138 Ga. 539, 75 S.E. 622 (1912).

in the county of the land's location.[322] Defendant urged the proceeding to be at odds with the constitutional direction that "all other civil cases shall be tried in the county where the defendant resides."[323] In response, the supreme court canvassed preceding provisions, observing that "in all the specified actions for which a venue is fixed a personal judgment may be recovered."[324] Because a lien foreclosure yields no personal judgment,[325] the court held the proceeding untouched by the provision for "all other civil cases."[326] The court deemed its decision "inevitable from the application of the rule of ejusdem generis."[327]

Moving from public to private writings, the supreme court possessed no qualms over the canon's role in construing a last will and testament. *Gilmore v. Gilmore*[328] raised the issue of successor trustee powers, given the original trustee's authority to do "any and all things he may deem necessary, or that I [the testator] might do were I living."[329] That language, the court held, did not empower the original trustee to vest all his powers in his appointed successor.[330] Because the specific powers vested in the original trustee were "personal and discretionary," the court reasoned, the general terms were construed "not in the broad sense which they might have if standing alone, but, under the applicable ejusdem generis rule, as related to the preceding language delegating more definite

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[322] *Id.* at 540, 75 S.E. at 622. The action was one to foreclose an attorney's lien.

[323] *Id.* at 542, 75 S.E. at 623 (quoting GA. CIVIL CODE § 6543 (1911)).

[324] *Id.* at 542-43, 75 S.E. at 623. The court mentioned divorce cases, equity cases, cases against joint obligors and actions against the maker of promissory notes. *Id.* at 542, 75 S.E. at 623 (citing GA. CIVIL CODE §§ 6538-42 (1911)).

[325] "It is not an action in personam, because no personal judgment is recovered." *Id.* at 543, 75 S.E. at 624.

[326] *Id.* "The general provision that all other civil cases shall be tried in the county where the defendant resides comprehends cases of like character, that is, cases in which a judgment in personam may be recovered." *Id.*

[327] *Id.* Accordingly, the court held the statute authorizing the lien foreclosure proceeding not in conflict with the constitution. Some 65 years later, the court adopted its *Moss* rationale for a statute setting venue for a confirmation hearing on a land foreclosure sale. In Wall v. Federal Land Bank of Columbia, 240 Ga. 236, 240 S.E.2d 76 (1977), the court again contracted the meaning of "all other civil cases" to exclude the confirmation proceeding. On grounds that no judgment was rendered against the debtor in the proceeding, it too was not a civil case under the constitutional provision. *Id.* at 327-38, 240 S.E.2d at 78.

[328] 201 Ga. 770, 41 S.E.2d 229 (1947).

[329] *Id.* at 777, 41 S.E.2d at 233. Apparently, issues had arisen over the successor trustee's power to rent, lease or sell property without court orders. *Id.* at 774, 41 S.E.2d at 232.

[330] *Id.* at 777, 41 S.E.2d at 233.

and particular powers."[331]

Insurance policies provide a friendly environment for the canon, as illustrated by the court of appeals' decision in *State Farm Fire & Casualty Company v. Rowland*.[332] The subject policy provision featured express coverage of "private structures," excluding, however, "structures used in whole or in part for mercantile, manufacturing or farming purposes."[333] The litigated issue turned upon the insurer's attempted application of the exclusion to the insured's garage "outfitted as an automobile body paint and repair shop."[334] Rejecting that attempt, the court asserted that "the exclusion of structures used for 'mercantile, manufacturing, or farming purposes' is *ejusdem generis* with and places limits upon the general idea of 'private structures.' "[335] So limited, "private structures" included the garage; "mercantile or manufacturing establishments" did not.[336] The court thus affirmed a verdict for the insured.[337]

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[331] *Id.*

> So construed, the general authority is one relating to the discretionary routine administration and control, in the lifetime of [the original trustee], of the estate . . . and not an authority under which [original trustee] might appoint by will a successor trustee with all the powers lodged in him that were conferred by [testator] upon [original trustee].

*Id.* at 777, 41 S.E.2d at 234.

Some 35 years later, in Warner v. Trust Company Bank, 250 Ga. 204, 296 S.E.2d 553 (1982), the court relied upon its *Gilmore* rationale in construing a will authorizing the trustee to invade the principal in caring for testator's husband "to meet any emergency, such as prolonged illness." *Id.* at 204, 296 S.E.2d at 553. In that context, the court held, the invasion could not be made for any emergency but only for "health-related emergencies." Said the court: "The existence and proper application of the rule of *ejusdem generis* is too well known to permit cavil." *Id.* at 206, 296 S.E.2d at 555.

[332] 111 Ga. App. 743, 143 S.E.2d 193 (1965).

[333] *Id.* at 743, 143 S.E.2d at 193.

[334] *Id.* at 743, 143 S.E.2d at 194. A fire loss to the garage had occurred, and the insurer had refused to pay. *Id.*

[335] *Id.* at 747, 143 S.E.2d at 196.

[336] *Id.* at 747, 143 S.E.2d at 197.

[337] *Id.* Some nine years later, in Aetna Fire Underwriters Insurance Co. v. Crawley, 132 Ga. App. 181, 207 S.E.2d 666 (1974), the court employed the maxim in construing a homeowners policy expressly excluding coverage for damage by "flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water or spray." *Id.* at 182, 207 S.E.2d at 668. The court held this exclusion not to cover the surface water accumulating in an excavation and, through a sewer line, being forced by pressure into plaintiff's home through his appliance connections. Affording the specifics their "*ejusdem generis* sense," the court held their common and confining character to be that "they comprise water flowing on the surface of the ground at the time they enter the home of the insured." *Id.* at 182-83, 207 S.E.2d at 668.

The precept operates with equal effectiveness on private agreements between individuals. The court of appeals illustrated the point in *Chelsea Corporation v. Steward*,[338] rejecting a tenant's effort to constitute landlord's alleged oral agreement to provide storage space a part of the written contract between them. Refusing to consider the alleged agreement an amendment to specified "house rules," the court noted the nature of those rules.[339] "The alleged agreement by the corporate defendant to store the plaintiff's property is not of a species to be grouped or mated with the House Rules. One specifies an obligation of the landlord; the others specify the obligations of the tenants. The lion does not mate with the lamb; the lily may not be engrafted upon the rose; they are not *ejusdem generis*."[340]

Any canvass of nonstatutory context would be incomplete without reference to administrative rules and regulations. Precisely such measures—"Nursing Home" regulations of the State Department of Human Resources—provided the focus of *Carlo v. Ameri-*

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Although not involving an insurance policy, the earlier case of Light v. Smith, 86 Ga. App. 591, 71 S.E.2d 844 (1952), presented a similar context under a consignment agreement. There, defendant held plaintiff's property under a consignment relieving defendant from responsibility for loss of the property "by fire, accident, or otherwise." *Id.* at 600, 71 S.E.2d at 850. The court held that provision not to relieve defendant of liability for allowing a third party to repossess the property without legal proceeding. *Id.* Said the court: "The words 'or otherwise' are ejusdem generis, meaning a loss of the same kind or nature as 'fire or accident.' It does not serve as a specification which will free the defendant of standing idly and negligently by and permitting someone else to take the property bailed to him or consigned to him." *Id.*

[338] 82 Ga. App. 679, 62 S.E.2d 627 (1950).

[339] *Id.* at 685, 62 S.E.2d at 632. The contract contained a provision recognizing the possibility of amending the house rules in respect to a number of specified concerns. *Id.* at 684-85, 62 S.E.2d at 631-32.

[340] *Id.* at 685, 62 S.E.2d at 632. The alleged storage agreement could not be considered a part of the rental contract.

Although the court's language was less vivid, its decision in Barnard v. Barnard, 91 Ga. App. 502, 86 S.E.2d 533 (1955), was an equally apt example. There, defendant's written "acknowledgment of indebtedness" on real property specified that the sum owed plaintiff "shall become due and payable" if defendant "should sell, exchange, or otherwise dispose" of the property. *Id.* at 502, 86 S.E.2d at 535. Defendant having delivered a warranty deed to the property to a third party to secure a loan, plaintiff sought to invoke the "due and payable" clause. *Id.* Rejecting plaintiff's effort, the court reasoned that "the words 'sell,' 'exchange,' and 'dispose' are ejusdem generis;" thus, "exchange" and "dispose" were used synonymously with "sell," meaning "to divest one's self of all rights and interest in the thing sold." *Id.* at 502, 86 S.E.2d at 536. Because a warranty deed worked no such divestiture, defendant's act did not operate to "dispose" of the property so as to trigger the "due and payable" clause. *Id.* at 502, 86 S.E.2d at 536.

*cana Healthcare Corporation*.[341] The regulation in issue expressly provided for doors that swung out "on any platform, balcony or porch or terrace," concluding with the direction that "[e]xit doors . . . shall swing in the direction of exit from the structure."[342] Holding that direction not to cover a rest-room door opening outward into a hallway, the court deemed the reference to "exit doors" *ejusdem generis* to the specified doors.[343] The latter "seemingly intended to refer only to such doors as provide direct egress from the interior of the building to the outside."[344] So limited, the door to the rest room "could *not* be considered an 'exit door.' "[345]

Finally, the ultimate instance of universality occurs perhaps when a court engages the canon to restrict the court's own language. That instance virtually unfolded in *Connell v. Bland*,[346] encompassing an action for injuries caused when defendant's dog ran into plaintiff on plaintiff's own property.[347] "Notice of propensity" seized the court's attention, compelling its review of two prior decisions.[348] Those cases indicated that, if "domestic animals, such as oxen and horses," are wrongfully in place, the owner need possess no prior "notice" in order to be held for damages.[349] Although conceding dogs to be domestic animals, the court sought to contract its rationale. It accomplished that feat by observing that both prior cases dealt with horses.[350] Moreover, the quotation in those cases referred to "oxen and horses."[351] "We think," the court insisted,

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[341] 179 Ga. App. 678, 347 S.E.2d 282 (1986) (citing Georgia Dep't Hum. Resources Rules & Reg. ch. 290-5-8 (1981) [hereinafter DHR Rule]).

[342] *Id.* (quoting DHR Rule 290-5-8-18(29)(i)).

[343] *Id.* at 679, 347 S.E.2d at 284.

[344] *Id.* The court reasoned the intent to include facilitating a rapid and orderly evacuation of the premises with evacuating patients merely pushing the doorway in the outward direction. *Id.*

[345] *Id.* at 680, 347 S.E.2d at 284. "The purpose of such a door would primarily be to provide *access for* the limited use of the enclosed facilities, not to provide *exit from* the building itself." *Id.* The court thus held that the existence of and compliance with the regulation did not provide sufficient grounds for the trial court's summary judgment against a patient who was struck by the rest-room door as it swung into the hallway. *Id.*

[346] 122 Ga. App. 507, 177 S.E.2d 833 (1970).

[347] *Id.* at 508, 177 S.E.2d at 834.

[348] *Id.* at 509, 177 S.E.2d at 835. The two cases reviewed were Reed v. Southern Express Co., 95 Ga. 108, 22 S.E. 133 (1894), and Wright v. Turner, 35 Ga. App. 241, 132 S.E. 650 (1926). 122 Ga. at 510-11, 177 S.E.2d at 836.

[349] 122 Ga. at 511, 177 S.E.2d at 836.

[350] *Id.*

[351] *Id.* (referring to quotation from 1 AM. AND ENG. ENC. OF LAW, *Animals* § 6 (1st ed.

"that the ejusdem generis rule should apply in interpreting this holding."[352] Thus, "[w]hile dogs are domestic animals they are not 'such as oxen and horses.' "[353] With its own prior language under control, the court held error in the trial judge's refusal to direct a verdict for a dog owner having no previous knowledge of the dog's propensity.[354]

From language of the constitution to decisions of courts, from testators to landlords and from lions or lambs to oxen or dogs, *ejusdem generis* construes the written universe. Determining where actions are to be brought, what powers trustees shall exercise, what structures are insured and what swinging doors are exits, the canon leads (or is lead by) the court to resolution. A party who fails to bring the maxim to the court's attention in the appropriate instance ignores, no less, a weapon of incredible range in the arsenal of effective litigational tactics. If awaiting the context of *statutory* construction, that party waits without reason.

## IV. Expressio Unius Est Exclusio Alterius

### A. *Early On*

The Georgia Supreme Court's most intensive focus upon *expressio unius est exclusio alterius* occurred in the first volume of its reports; that treatment provides Georgia's classic exposition of the canon. The occasion was the court's 1846 decision of *Bailey v. Lumpkin*,[355] a statutory proceeding to foreclose a real estate mortgage.[356] The governing statute made provision for instances "of any dispute as to the amount due on any mortgage," permitted the mortgagor to plead prior payment or entitlement to set-off and directed the court's appointment of auditors.[357] Those provisions, maintained the mortgagee in *Bailey*, operated to preclude any other foreclosure defenses; specifically, they precluded the mortgagor's attempt to plead the defense of usury.[358] In essence, there-

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1887)).

[352] *Id.* at 511, 177 S.E.2d at 836.

[353] *Id.*

[354] *Id.* at 512, 177 S.E.2d at 837.

[355] 1 Ga. 392 (1846).

[356] *Id.* at 392.

[357] *Id.* at 403 (quoting Prince's Digest of the Laws of the State of Georgia 424 (2d ed. 1837)). The legislature had enacted the statute in 1799. *Id.*

[358] Defendant argued "that the right of defense against the foreclosure of a mortgage,

fore, plaintiff relied upon *expressio unius*, and the court announced its intention to examine the maxim's meaning, endeavoring to "reduce it, if possible, from a vague generality to a definite signification."[359]

Initially, the court postulated, the canon applied more appropriately to contracts (especially deeds) than to statutes,[360] and it possessed only the strength of an inference.[361] That inference was simply "*stronger* but not *conclusive*" that things not specified are excluded.[362] Accordingly, the foreclosure statute's express mention of payment and set-off did not conclusively infer the unavailability of a usury defense.[363] Indeed, the court reasoned, a plea in usury did create a "dispute about the amount due" within the language of the statute itself.[364] Accordingly, the court gleaned a legislative intent to specify a procedure for handling the defenses of payment and set-off and to leave any other legal defense to "the general law of pleading."[365] The court thus sustained the trial judge's refusal to strike defendant's plea.[366]

In one of its earliest (and most thorough) appraisals of the canon, therefore, the supreme court adopted a stance of moderation. Ascribing its origin principally to the law of contracts, the court

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given by this statute, is limited to payment and equitable off-sets, and, inasmuch as the plea of usury is neither payment nor set-off, it cannot be allowed." *Id.* at 403.

[359] *Id.* at 404.

[360] "A maxim very nearly identical with it, to-wit, *expressum facit cessare tacitum*, applies more particularly in the construction of statutes." *Id.*

[361] *Id.* at 404. The court quoted BROOM'S LEGAL MAXIMS 278 (1845): "[I]f you expressly name (in a deed or other contract, for example) some, out of certain requisites, the inference is *stronger* that those omitted are intended to be excluded, than if none at all had been mentioned." 1 Ga. at 404.

[362] 1 Ga. at 404.

[363] *Id.*

[364] *Id.* at 403.

[365] *Id.* at 404. "In the application of the maxim . . . to statutes, it is not to be understood that where the Legislature has put the strongest cases, the lesser are therefore to be excluded; but, on the contrary there are cases where, by construction, the greater are intended to include the less." *Id.*

[366] *Id.* at 405. The court supported its conclusion with a liberal construction of the statute which was declaratory of, rather than in derogation of, the common law.

> It will not be denied but that in England, upon a bill, to enforce a usurious security, the defendant could plead the statute of usury. If so, he may, under our statute, against a process to enforce a usurious security, also plead the statute of usury. Such a plea is not, as we think, expressly, or by fair construction, inhibited by the act of 1799.

*Id.*

formulated the maxim's impact as persuasive rather than conclusive. In determining the meaning of statutes, the court viewed the precept as subservient to the enacting legislature's intent and, apparently, even to other techniques of ascertaining that intent. Indeed, the court indicated the existence of a countering canon: the express ("strongest") did not always presume exclusion of the implied ("lesser"); sometimes, it presumed inclusion. With its 1846 exercise in *Bailey*, the court entered *expressio unius* upon the pages of the first officially recorded volume of its decisions. The entry, however, transmitted a tentative signal of suppression.[367]

Within five years, the court emitted analytical sparks of a more positive hue for the canon, albeit en route to a larger postulate. *Parham v. Justices of Decatur County*[368] encompassed a property owner's effort to enjoin the county's condemnation of his unenclosed land.[369] Assessing county authority,[370] the court observed of the material statute that it "makes provision for compensating the owner *only* when a public road is laid out through his *enclosed* ground."[371] The effect of that provision assumed pivotal significance for the litigation, and the court proceeded without hesitation in its enlistment of interpretative assistance. "[B]y designating enclosed grounds, they [the legislature] are to be held, as of purpose,

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[367] Even toward the conclusion of what might be deemed the canon's "formative period," the supreme court evidenced a continuing readiness to moderate the maxim when necessary. Georgia Power Co. v. Leonard, 187 Ga. 608, 1 S.E.2d 579 (1939), focused upon a landowner's easement to a power company, the instrument expressly reserving only the rights of cultivation, ingress and egress. Debate centered upon whether, under the canon of *expressio unius est exclusio alterius*, those express reservations constituted the grantor's only rights on the property. The court could not abide that result:

> Can it be said that the grantor in conveying this easement intended to limit his rights on the property to those enumerated? We do not think so. A grant, whether of an easement or a fee, should be so construed as to carry out the intentions of the parties. The reservation here made would seem to have been inserted from an abundance of caution. It reserved those privileges most essential to a full enjoyment of land of this character. It was inserted to insure those privileges, not to exclude others consistent with the easement granted.

*Id.* at 611, 1 S.E.2d at 581 (citation omitted). In this fashion, the court held one neither a trespasser nor a licensee who entered the land under the grantor's rights simply to rest. *Id.*

[368] 9 Ga. 341 (1851).

[369] *Id.* at 341-42.

[370] The county's authority derived from a legislative enactment of 1799, reenacted in 1818. *Id.* at 345-46 (citing PRINCE'S DIGEST OF THE LAWS OF THE STATE OF GEORGIA 733-40 (2d ed. 1837)).

[371] *Id.* at 346.

excluding all other grounds."[372] For this conclusion, the court advanced one precept: "*Expressio unius est exclusio alterius.*"[373] "Whatever may have been the reason of excluding other lands than enclosed lands from compensation," the court asserted, "they were excluded by the Act of 1799, and to this day they remain excluded."[374] Critical construction securely in place, the court launched a lengthy excursion into the sacredness of private property, the common law's unmatched heritage in protecting it and the blighted ineffectiveness of any legislative attempt at violation.[375] Inviting the General Assembly to amend the subject statute by commanding compensation, the court enjoined condemnation of plaintiff's unenclosed lands.[376]

The court's increasing devotion to the canon likewise surfaced in respect to yet another matter of early passion and prejudice—the right of an African-American citizen to hold elective office. In *White v. Clements*,[377] the challenge of an African-American's election as superior court clerk raised the issue of constitutional protection.[378] In an exhaustive and ringing denunciation of the challenge, the court anchored its analysis in the effect of other constitutionally stated disqualifications. The court reasoned that when the constitution "declares that certain things shall disqualify a citizen from exercising the right to vote, it by necessary implication, prohibits the Legislature from adding new disqualifications."[379] Extending that rationale to election, the court insisted that "if the Constitution prescribes a qualification for an officer, it by necessary implication denies to the Legislature the power to fix new and other qualifications."[380] Principle proclaimed, the court unfurled the support for its analysis: " 'The expression of one thing is the exclusion of others,' is a settled and sensible rule for the

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[372] *Id.* The court was unwilling to attribute the omission to legislative oversight. *Id.*

[373] *Id.* The court cited no authority for the maxim nor any case.

[374] *Id.*

[375] *Id.* at 349-55.

[376] *Id.* at 355. "The law ought to be so amended, as to provide for compensation in such cases, and no doubt will be at the next session of the Legislature, and the attention of the General Assembly is respectfully invited to the subject." *Id.*

[377] 39 Ga. 232 (1869).

[378] "We come now to the inquiry: Is this right protected in the Constitution from infringement?" *Id.* at 264.

[379] *Id.* at 265.

[380] *Id.*

construction of Statutes and Constitutions."[381]

By 1869, therefore, the Georgia Supreme Court had leveraged *expressio unius* from a "vague generality" of bare "inference" to a "settled and sensible rule." In effectuating that leverage, the court had pivoted upon the two foundational rights of private property and franchise. In both endeavors, moreover, the court had explicated the constructional maxim without hesitation and with no felt need for the citation of authority. In both endeavors, the court had engaged the maxim not simply to bolster a conclusion already adumbrated on other primary grounds, but rather as a first analytical principle in structuring an approach to the conclusion. From a posture perceived as more appropriate for resolving contractual differences between private parties (especially deeds), *expressio unius* now laid claim to prominence in the official circles of statutes and constitutions.

Over the next half-century, the canon persistently reared its countenance in the domain of taxation. Illustratively, *Atlanta Street Railroad v. City of Atlanta*[382] centered upon a contract between the parties exempting plaintiff railroad from taxation upon its "road, rolling and live stock."[383] Disagreement arose over whether that exemption covered plaintiff's lots, stables and buildings for sheltering cars.[384] Announcing an approach of strict construction,[385] the court immediately seized upon what it characterized as "*inclusio unius, exclusio alterius.*"[386] That rule, the court maintained, was "as old as the civil law of the Romans, and as sensible as it is venerable."[387]

Under it, "[t]he very fact that 'live stock' and 'rolling stock' are included, excludes the idea that stock invested in lots and tenements were meant to be exempt."[388] To imply the additional ex-

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[381] *Id.* The court emphatically marked the importance of the inclusions: "Had the Constitution said nothing about it [right to hold office], it might fairly be presumed that it was a matter of legislative discretion. But this [is] not the case. There are special disqualifications for various officers." *Id.*

[382] 66 Ga. 104 (1880).

[383] *Id.* at 105.

[384] *Id.*

[385] "All exemptions from liability to taxation are construed strictly." *Id.* at 107.

[386] *Id.* at 108.

[387] *Id.*

[388] *Id.* "We hold, then, that the absence of the word 'appurtenances' and the inclusion of the words 'live stock and rolling stock,' excludes the idea that *all* the capital stock was

emptions would render the express exemptions "unnecessary tautology," the court asserted, as it proceeded to a conclusion of taxability.[389]

Finally, in *Woodmen of the World v. Heflin*[390] the court engaged the canon in construing an insurance policy's reinstatement clause. That clause provided that receipt and retention of the reinstatement premium did not render the insurer responsible if the insured did not remain in good health for the next thirty days.[391] Under *expressio unius*, the court held, "the unconditional acceptance of premiums accruing *after* the 30-day period will operate to estop the association from raising the question that the insured did not remain in good health during the 30-day period."[392] As it closed out what might be termed the canon's "formative period," the court was emphatic that "the maxim that the express mention of one thing implies the exclusion of another should be given application."[393]

From roughly the mid-1800s to roughly the mid-1900s, the Georgia Supreme Court thus nurtured the canon of *expressio unius est exclusio alterius*. Under the court's care and feeding, the maxim emerged from the shadows and blossomed into a viable aid in the judicial "science" of interpretation. Without hesitancy or disguise, the court honed the precept's versatility, extending its operation into the disparate domains of statutes, constitutions, contracts and insurance policies. The judicial signal had shifted, it appeared, from one of suppression to one of expansion.

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exempted." *Id.* at 109.

[389] *Id.* The court evidenced a similar sentiment in Standard Oil Co. v. State Revenue Commissioner, 179 Ga. 371, 176 S.E. 1 (1934) (denying a sales tax exemption for the proceeds from the sale of gasoline). Noting the material statute's statement that the "tax" on retail sales of gasoline was not included, the court said that "[t]he statement of the subjects exempted works an exclusion of any others. The maxim inclusio unius exclusio alterius clearly excludes proceeds from the sale of gasoline from the operation of any exemption." *Id.* at 375, 176 S.E. at 4.

[390] 188 Ga. 234, 3 S.E.2d 559 (1939).

[391] *Id.* at 234, 3 S.E.2d at 560.

[392] *Id.* at 236, 3 S.E.2d at 561.

[393] *Id.* at 235, 3 S.E.2d at 561. "Policies of insurance, being prepared and written by the insurer, are to be construed strictly in favor of the insured and against the insurer." *Id.* at 235, 3 S.E.2d at 560 (citing Benevolent Burial Ass'n v. Harrison, 181 Ga. 230, 239, 181 S.E. 829, 834 (1935)).

### B. *In The Main*

The *expressio unius* canon enjoys a particular modern familiarity in the local government arena. There it duly accommodates the judicial exercise in strictly construing statutory grants of authority. In *City of Macon v. Walker*,[394] for example, the supreme court confronted a municipal official's claim of pension benefits.[395] Authority (indeed duty) to pay the benefits, the official urged, derived from implied powers emanating from the municipal charter's "general welfare" clause.[396] Reversing the trial judge, the supreme court sided with the municipality's denial of its own authority.[397] Claimant's implied-powers argument failed, the court explained, because the charter contained several express delegations of pension power for "certain designated employees."[398]

In the presence of those provisions, the court declared, "[t]he maxim, 'Expressio unius exclusio alterius,' is the rule of construction which should be applied."[399] Exacting that application, the court elaborated that "the State has, by its express grant of power to the city to retire and pension a limited class or group of its employees, by implication excluded from it the power to retire and pension those of another class or group."[400]

By this dazzling display of the canon, therefore, the *Walker* court strictly construed the municipal charter's general welfare provision. The exercise served to neutralize powers that might otherwise have been implied; the court held the implied powers to have been impliedly excluded.[401]

What the supreme court accomplished via a local statute, the

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[394] 204 Ga. 810, 51 S.E.2d 633 (1949).

[395] *Id.* at 810-11, 51 S.E.2d at 633. The official's immediate claim arose under a municipal ordinance. *Id.*

[396] *Id.* at 813, 51 S.E.2d at 635.

[397] That is, the municipality denied its authority to adopt the pension ordinance under which claimant's demand proceeded. *See id.* at 814, 51 S.E.2d at 635.

[398] *Id.* at 813, 51 S.E.2d at 635. These included members of the fire and police departments and employees of the water department. *Id.*

[399] *Id.* at 814, 51 S.E.2d at 635.

[400] *Id.* (citing Standard Oil Co. v. State Revenue Comm'r, 179 Ga. 371, 375, 176 S.E. 1, 4 (1934)). The court reasoned that "the natural and reasonable presumption is that the General Assembly has granted in express terms to this municipal corporation all the power it has designed to grant on the subject." *Id.* at 814, 51 S.E.2d at 635.

[401] Plaintiff's argument "might be more tenable if it were not for other express provisions on the subject of retirement and pensions found elsewhere in the city's charter." *Id.* at 813, 51 S.E.2d at 635.

court of appeals performed upon general legislation. *Johnson v. State*[402] encompassed controversy over a municipal contract with the wholesale distributor of electricity.[403] Ultimate resolution pivoted upon municipal authority to enter the contract, authority the municipality claimed from a general statute.[404] Reviewing respective positions, the court of appeals conceded the statute to authorize municipal rate contracts with bondholders.[405] "However," the court delineated, "this express statutory authority . . . does not extend to contracts with the wholesaler of electrical power."[406] For rationale, the court proffered two sources: the supreme court's decision in *Walker* and "Expressio unius est exclusio alterius."[407] Reversing the trial judge, the court invalidated the contract.[408]

In addition to power contests, the canon also prominently assists in determining local government personnel targeted by special statutory exactions. Providing apt illustration, *Taylor v. Davis*[409] featured a municipal school superintendent's effort to escape statutory ethics requirements.[410] Observing the statute's failure to define the covered "teacher," the supreme court reviewed its reference to "professional services" as the "practice of teaching, including administrative and supervisory services."[411] That reference served only to cast a teacher's nonteaching duties within the mandated standards,[412] the court held, but in no fashion captured school superintendents.[413] Disagreeing with the trial judge's contrary interpretation, the court's grounds for reversal were explicit:

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[402] 107 Ga. App. 16, 128 S.E.2d 651 (1962).

[403] *Id.* at 16, 128 S.E.2d at 651-52. The controversy arose as a result of an intervention in a proceeding to validate municipal revenue bonds. *Id.*

[404] *Id.* at 20, 128 S.E.2d at 655 (citing GA. CODE ANN. § 87-803(e) (Harrison 1957)).

[405] *See id.* at 20, 128 S.E.2d at 655.

[406] *Id.* at 21, 128 S.E.2d at 655.

[407] *Id.*

[408] "Since the invalidity of that contract makes it necessary to reverse the judgment of the trial court, it is unnecessary for us to pass on the other grounds of the intervention." *Id.*

[409] 242 Ga. 528, 250 S.E.2d 449 (1978).

[410] The superintendent was defending himself against a complaint of unprofessional conduct filed against him before the Professional Practices Commission of Georgia. *Id.* at 528, 250 S.E.2d at 449.

[411] *Id.* at 530, 250 S.E.2d at 450 (quoting GA. CODE ANN. § 32-838 (Harrison 1976)).

[412] "This is to say that the secondary or nonteaching activities of 'teacher' . . . are as much the proper subject of standards and codes of professional ethics as are their primary activities—that is, their teaching of their students." *Id.* at 531, 250 S.E.2d at 451.

[413] *Id.*

"Expressio unius exclusio alterius."[414]

The court took a similar tack in *Porter v. Calhoun County*.[415] There, a county probate judge, also appointed custodian of vital records, resisted the county's claim to fees collected in the latter capacity.[416] Sustaining the officer's position, the supreme court read general statutes to require that fees "be paid directly to the local custodians and not to the counties, except when the local custodian was an employee of the county board of health."[417] Reversing the court of appeals,[418] the court held the exception of health employees to imply that other custodians were entitled to the fees,[419] "[b]ecause," the court explained, "the expression or designation of one thing amounts to the exclusion of another, (expressio unius est exclusio alterius)."[420] Thus, if coverage of one thing excludes another, it followed that exception of one thing leaves another included.

The maxim also assisted in yet another "exception" context—the Georgia Constitution's exemption of "purely public charities" from ad valorem taxation. *Presbyterian Center, Inc. v. Henson*[421] focused upon that exemption as claimed by a nonprofit religious corporation for specified real property.[422] Conceding claimant's "laudable" and "beneficial" activities,[423] the supreme court nevertheless directed attention to the constitution's exact exemption language.[424] That exemption specified certain "property owned by religious groups, and then broadly exempted 'all institutions of purely public charity.' "[425] Accordingly, the court main-

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[414] *Id.* "Absent . . . a special statutory definition, the word 'teacher' does not include a superintendent of schools." *Id.* at 530, 250 S.E.2d at 450.

[415] 250 Ga. 566, 300 S.E.2d 143 (1983).

[416] *Id.* at 566, 300 S.E.2d at 143.

[417] *Id.* at 567, 300 S.E.2d at 144-45 (citing GA. CODE ANN. §§ 88-1701(c),(d), 88-1725(c) (Harrison 1979)).

[418] 162 Ga. App. 839, 293 S.E.2d 4 (1982).

[419] This was true, the court said, "notwithstanding any other offices they might have held." *Porter*, 250 Ga. at 568, 300 S.E.2d at 145.

[420] *Id.* at 567-68, 300 S.E.2d at 145.

[421] 221 Ga. 750, 146 S.E.2d 903 (1966).

[422] *Id.* at 750, 146 S.E.2d at 904.

[423] *Id.* at 754, 146 S.E.2d at 906.

[424] *Id.* at 753, 146 S.E.2d at 905-06 (citing GA. CONST. of 1945, art. VII, § I, ¶ IV).

[425] *Id.* at 753, 146 S.E.2d at 905 (citing GA. CONST., *supra* note 424, at art. VII, § I, ¶ IV). Claimant did not rely upon any of the express exemptions for religious groups; rather, it urged that religious purposes were charitable purposes and thus the broader exemption ap-

tained, "it appears that it was not intended that religious groups or institutions be considered charitable institutions for the purpose of this exemption."[426] Appearing to desire further support, the court insisted that "[a]pplication of the construction maxim that the enumeration of particular things excludes something not mentioned (*Expressio unius est exclusio alterius*) leads to the same conclusion."[427]

In *Neal v. Neal*[428] the court of appeals exhibited the maxim as its first line of analysis. There, plaintiff opposed defendant's collection of life insurance proceeds for her husband's death.[429] Plaintiff relied upon a statute barring insurance benefits to one who committed murder or voluntary manslaughter upon the deceased, and permitting as prima facie evidence of guilt a conviction for either crime.[430] Defendant countered with the argument that "by implication this statute renders her conviction for involuntary manslaughter admissible as *prima facie* evidence of her innocence of the greater offenses."[431] Rejecting that argument "for several reasons," the court was emphatic.[432] "In the first place, it violates the statutory construction maxim, '*expressio unius est exclusio alterius*'—the expression of one thing implies the exclusion of another."[433] Emphasizing its silence on evidence of innocence, the court stressed the statute's reference instead "only to pleas of guilty and judicial findings of guilt," and its provision that "they shall be admissible only as evidence of guilt."[434] Thus, the court reversed the trial judge's acceptance of defendant's involuntary manslaughter conviction as evidence of innocence.[435]

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plied. *Id.* at 752, 146 S.E.2d at 905.

[426] *Id.* at 753, 146 S.E.2d at 905-06.

[427] *Id.* at 753, 146 S.E.2d at 906. The court likewise noted the rule that tax exemptions are to be strictly construed against the taxpayer. *Id.*

[428] 160 Ga. App. 771, 287 S.E.2d 109 (1982).

[429] *Id.* at 771, 287 S.E.2d at 109. Plaintiff was the administrator of defendant's deceased husband's estate. *Id.*

[430] *Id.* at 772, 287 S.E.2d at 110 (citing GA. CODE ANN. § 56-2506 (Harrison 1977)).

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Id.* The court conjectured that, had the legislature intended otherwise, it would have expressly so provided. *Id.*

[435] *Id.* at 772-73, 287 S.E.2d at 110. Another "compelling reason" for its decision, the court added, was the greater burden of proof in a criminal case. Thus, it did not follow that "an acquittal under the criminal standard would demand a finding of innocence under the

In several contexts, the court has hugged the maxim in resolving issues of judicial procedure. *Sherman Stubbs Realty & Insurance, Inc. v. American Institute of Marketing Systems, Inc.*[436] provides appropriate illustration. There, defendant argued that a foreign corporation's failure to register as required by statute barred its action upon a contract for business done in Georgia.[437] Reviewing the registration requirement, the court emphasized the presence of "an express penalty" for failure of compliance.[438] Adopting an approach of *expressio unius* construction, the court held that "there was no legislative intent to impose any additional penalties."[439] Thus construed, the statute effected no bar to plaintiff's contract action.[440]

Although a completely different procedural setting, *D.C.A. v. State*[441] elicited a similar response. Arising in a juvenile court proceeding, the issue involved the sequestration of the juvenile's parents.[442] Rejecting the argued necessity of sequestration, the court rather found legislative evidence that the parents were to be present at all times.[443] Observing statutory permission for excluding the child from the hearing on occasion,[444] the court was struck by the legislative omission. "It does not make similar provision for exclusion of parents."[445] The court thus viewed its approach to be clearly revealed. "Obviously," it asserted, "this falls within the application of the maxim, expressio unius est exclusio alterius."[446]

" 'The maxim, expressio unius est exclusio alterius, has [long] been regarded as particularly applicable to statutes defining

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civil one." *Id.* at 772, 287 S.E.2d at 110.

[436] 117 Ga. App. 829, 162 S.E.2d 240 (1968).

[437] *Id.* at 830-31, 162 S.E.2d at 241 (citing GA. CODE ANN. § 22-1506 (Harrison 1966)).

[438] *Id.* at 831, 162 S.E.2d at 241. The penalty consisted of a monetary exaction. *Id.* (citing GA. CODE ANN. § 22-1506 (Harrison 1966)).

[439] *Id.* The court coupled the maxim with the other rule that statutes "involving restrictions on trade or common operations, etc., are to be strictly construed." *Id.*

[440] *Id.* at 830-31, 162 S.E.2d at 241-42.

[441] 135 Ga. App. 234, 217 S.E.2d 470 (1975).

[442] *Id.* at 235, 217 S.E.2d at 471. The court held the parents not to be "witnesses" within the meaning of the mandatory removal statute. *Id.* (citing GA. CODE ANN. § 38-1703 (Harrison 1974)).

[443] *Id.* at 235-36, 217 S.E.2d at 472.

[444] *Id.* at 236, 217 S.E.2d at 472 (citing GA. CODE ANN. § 24A-1801 (Harrison 1971)).

[445] *Id.*

[446] *Id.*

crimes . . . .' "[447] The court of appeals quoted this admonition in its decision of *Curtis v. State*,[448] a securities fraud case presenting the issue of punishment for a first offense.[449] There, a general punishment statute authorized punishments by fine and imprisonment "unless otherwise provided."[450] Specifically, the securities statute provided "a fine of not more than $500 for first offense," and fine or imprisonment "for subsequent offenses."[451] Because the securities statute did not affirmatively prohibit imprisonment for a first offense, the state contended, the general punishment statute authorized a prison sentence in that case.[452] Rejecting that contention, and hoisting the *expressio unius* maxim, the court viewed the legislative intent as "perfectly clear."[453] The securities statute's omission was not one of inadvertence, the court asserted, "because in the very same sentence it provided imprisonment on conviction of a second offense."[454] Thus, the "clear inference" was that the legislature "intended no punishment by imprisonment for a first offense."[455]

The maxim again inured to defendant's benefit in the more recent criminal setting of *Glisson v. State*.[456] That case featured a conviction for incest between a stepgrandfather and his stepgranddaughter and focused upon Georgia's incest statute.[457] A majority of the court noted the statute's mention of "*certain* persons related only by affinity"[458] and stressed the absence of the relation in issue.[459] Because "the statute does not include a prohibition

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[447] Curtis v. State, 102 Ga. App. 790, 802-03, 118 S.E.2d 264, 274 (1960) (quoting 50 AM. JUR. *Statutes* § 414 (1944)).

[448] *Id.*

[449] *Id.* at 799-803, 118 S.E.2d at 272-74.

[450] *Id.* at 801, 118 S.E.2d at 273 (citing GA. CODE ANN. § 27-2506 (Harrison Supp. 1957)).

[451] *Id.* at 801, 118 S.E.2d at 272-73 (quoting GA. CODE ANN. § 97-9901 (Harrison Supp. 1957)).

[452] *Id.* at 801, 118 S.E.2d at 273. The trial judge had imposed the prison sentence, and the state was attempting to justify it.

[453] *Id.* at 802-03, 118 S.E.2d at 273-74.

[454] *Id.* at 802, 118 S.E.2d at 273.

[455] *Id.* at 802, 118 S.E.2d at 273-74. Thus, the court reversed the trial court's first-offense sentences.

[456] 188 Ga. App. 152, 372 S.E.2d 462 (1988).

[457] *Id.* at 152-53, 372 S.E.2d at 463 (citing GA. CODE ANN. § 16-6-22 (1984)).

[458] *Id.* at 152, 372 S.E.2d at 463. Judge Sognier wrote the court's opinion.

[459] Covered affinity relations included father and stepdaughter, mother and stepson and brothers and sisters of the half blood. *Id.* (citing GA. CODE ANN. § 16-6-22 (1984)).

against sexual intercourse between a 'stepgrandfather' and 'stepgranddaughter,' it is excluded under the maxim *expressio unius est exclusio alterius*."[460] Accordingly, the court reversed the conviction.[461]

From strictly construing local government power grants to refining the criminal incest relation, *expressio unius* holds modern and possessive analytical sway upon Georgia's appellate courts. Like *noscitur a sociis* and *ejusdem generis*, the canon calls up an analysis of association. Unlike the former precepts, however, the association is one between "presence" and "absence," rather than "presence" and "presence." Thus, what is present excludes construction which implies the absent; it is not a matter of construing a part of what is present from another part of what is present. The directional gist of the precept, therefore, moves toward outright exclusion, rather than toward refining, constricting, supplementing or expanding. In this sense, the canon's application can have a decidedly more dynamic impact upon litigation.

As illustrated, the *expressio unius* canon plays both leading and supporting roles in judicial opinions. On occasion, the court will state the issue, announce its decision and quote the maxim as its sole rationale. On other occasions, the court analyzes the issue to a conclusion, alluding to the maxim either to reinforce the soundness of what it has done or to indicate another perspective through which its conclusion might be reached. However engaged, the object of the quest is, of course, "legislative intent."

The expansive legislative reach of the canon encompasses constitutional provisions, general statutes and local legislation. The two appellate courts appear equally disposed to employ the canon, and they employ it in resolving both procedural and substantive issues. Invocation frequently rests upon unanimous opinions, often to reverse disposition below. This latter point, indeed, bears emphasis. The extent to which lawyers and judges consider *expressio unius* in trying cases is, of course, unrecorded. The canon's record in the

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[460] *Id.* at 153, 372 S.E.2d at 463. "Since the relationship between appellant and the alleged victim is not one which is expressly enumerated in the statute, any sexual relationship between them would not be incestuous." *Id.*

[461] *Id.* Dissenting for himself and three other judges, Judge Pope found "no merit in defendant's argument that the relationship of stepgrandchildren is implicitly left out of the Georgia incest statute because the relationship between father and stepdaughter and mother and stepson was expressly included." *Id.* at 156, 372 S.E.2d at 466 (Pope, J., dissenting).

appellate courts is impressive, however, and all the more so when its role of reversal is observed. The maxim appears to be, therefore, (at least) an appellate court's precept.

### C. *Rejection*

Like the other canons, the *expressio unius* maxim does not enjoy an unblemished record of judicial acceptance. Both appellate courts expressly reject the precept when they deem the circumstances to warrant that response. Only a few instances will serve to illustrate some of the contexts in which the courts have declined invocation.

At the inception of what might be termed the "modern period," the court of appeals found occasion for caution in *Drake v. Parkman.*[462] There, plaintiff sought to recover a real-estate commission paid to defendant who, unknown to plaintiff, had failed to obtain a required broker's license.[463] Plaintiff could point to statutes mandating the license,[464] declaring brokering without a license a misdemeanor[465] and specifying that "[n]o person . . . shall have the right to enforce in any court any claim for commissions . . . for any business done as real-estate broker or salesman, without having previously obtained the license."[466] Defendant countered with the contention that the latter provision, prohibiting an unlicensed broker from recovering a commission, constituted the legislature's treatment of the problem.[467] Accordingly, defendant maintained, "the legislature necessarily excluded the other civil penalty of having to pay back the fees or compensation collected in an action therefor."[468] In essence, then, defendant rested his case squarely upon the *expressio unius* analysis.

Following professed "careful consideration,"[469] the court discredited defendant's position by observing that *expressio unius* is not a "universal" rule, but rather "is limited in use and application and

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[462] 79 Ga. App. 679, 54 S.E.2d 714 (1949).

[463] *Id.* at 679, 54 S.E.2d at 714. Defendant had negotiated the sale of plaintiff's real estate. *Id.*

[464] *Id.* at 680, 54 S.E.2d at 714 (citing GA. CODE ANN. § 84-1401 (Harrison 1937)).

[465] *Id.* (citing GA. CODE ANN. § 84-9921 (Harrison 1937)).

[466] *Id.* (quoting GA. CODE ANN. § 84-1413 (Harrison 1937)).

[467] *Id.* at 681, 54 S.E.2d at 716.

[468] *Id.*

[469] *Id.*

should be applied with caution."[470] The "clear," "principal" legislative purpose, the court maintained, was denial of the courts to those seeking enforcement of illegal contracts.[471] Permitting plaintiff's recovery of illegally paid fees would not violate that purpose: "[W]e do not think," the court announced, "that the rule of 'expressio unius est exclusio alterius' applies in this case."[472]

Although a civil proceeding, *Drake* featured construction of a criminal statute. While criminal statutes are particularly susceptible to *expressio unius* construction, *Drake* illustrated rejection. The court refused to allow one admittedly guilty of the criminally prohibited act to employ the statutory structure as a defense in a civil case. That structure illustrating a "clear" legislative "purpose," and the civil proceeding deemed not in conflict with that purpose, the court was unreceptive to the maxim. With the commission of the crime admitted, and with the legislature having proscribed one civil recovery, the court was unwilling to imply that proscription to preempt other civil facets, especially facets in keeping with the original legislative purpose. In that context, the court counseled "caution" in approaching *expressio unius*, and effected rejection.

More recently, a defendant brandished the canon in an even more intriguing fashion. *Culpepper v. Veal*[473] encompassed the ploy, presenting the supreme court with its occasion for drawing the line on *expressio unius*. In *Culpepper*, defendant challenged the constitutionality of a statute declaring an employee of a county school board ineligible for membership on the school board of another county.[474] Defendant premised his attack upon the statute's denial of equal protection in failing to prohibit "one from being a

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[470] *Id.* at 682, 54 S.E.2d at 716.

[471] *Id.*

> It seems clear that the legislature was legislating concerning the affirmative efforts of the broker or salesman to recover, and did not intend to deal expressly or impliedly with the rights of the other party dealing with the broker or salesman to recover moneys paid or to deal with the broker's or salesman's defensive rights in an action against him.

*Id.*

[472] *Id.* at 681-82, 54 S.E.2d at 716.

[473] 246 Ga. 563, 272 S.E.2d 253 (1980).

[474] *Id.* at 563-64, 272 S.E.2d at 254 (citing GA. CODE ANN. § 32-903.1 (Harrison 1976)). On the grounds afforded by this statute, citizens and taxpayers were seeking to oust defendant from his position on the county school board. *Id.* at 563, 272 S.E.2d at 254.

member of one county board of education who is an employee of the *same* county board of education."[475] To the response that the common-law rule on conflicts of interest would prohibit the latter case,[476] defendant advanced an innovative retort. Thus, "when the legislature enacted [the statute] enumerating those people not eligible to be members of county boards of education, it by implication excluded all categories not listed."[477] That exclusion, defendant maintained, extended to common-law rules as well.[478] In this fashion, therefore, defendant had bottomed his entire constitutional assault squarely upon an *expressio unius* rationale.

In highly summary dispensation, the supreme court disagreed with defendant's analysis. The court reasoned that the legislature's enactment of the eligibility statute did not require it "to enumerate categories of ineligible individuals otherwise excluded by law."[479] Accordingly, the court concluded, "the common law rule against serving two masters (or more appropriately here, being one's own master) is so strong as to survive a statute which seeks to enumerate and eliminate other areas of conflict of interest."[480] This surviving common-law prohibition rebutted defendant's equal protection complaint, therefore, and the court sustained the statute's validity.

On both setting and invocation, *Culpepper* constituted striking context for *expressio unius*. The setting was extraordinary: an effort to engage the canon, not primarily to construe the statute, but to demonstrate its lack of equal protection thereby triggering its unconstitutionality. Invocation was equally notable: an effort to accentuate the express and thereby not only exclude the implied from the statute, but supersede an express common-law principle. Under defendant's proffered version, *expressio unius* meant that when a statute enumerates some things, it impliedly excludes others and preempts common-law recognition of others. Although

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[475] *Id.* at 564, 54 S.E.2d at 254.

[476] "While the *statute* does not prohibit one from being a member of a county board of education who is employed by the same board, the common law rule in this state on conflicts of interest clearly prohibits such a situation." *Id.*

[477] *Id.*

[478] "He argues that any common law rule in existence prior to the enactment was superseded thereby." *Id.*

[479] *Id.* For example, the court reasoned, "[t]he statute does not exclude insane persons but that does not mean insane persons can be board members." *Id.*

[480] *Id.*

the supreme court expressly recognized defendant's contention as an invocation of *expressio unius est exclusio alterius*,[481] it refused to rise to the analytical bait. By deed rather than word, that is, the court refuted the appropriateness of the common-law canon. Primarily, it appeared, the court was more determined to confirm the strength of the common-law principle.

To this point, the "rejection" under review has of course been that of the judicial variety. That is not surprising, for the canon itself is one of judicial construction—an intrinsic aid to the court in reading and translating legislative language. Legislatures enact; courts construe; and only the entity that uses the canon, it would be typically supposed, could reject the canon.

Not so. On occasion, rejection is directed to and received by the court, and that is the final instance for illustration. *White Oak Acres, Inc. v. Campbell*[482] focused upon an issue of appellate procedure; although of course important, the case hardly appeared a likely vehicle for canonical innovation. Specifically, the issue devolved to whether the "Appellate Practice Act"[483] worked a repeal by implication upon local legislation structuring the "City Court of Savannah."[484] The court of appeals opened its review with the usual principles of paradox. On the one hand, repeals by implication are not judicially favored. On the other hand, the intention of the legislature is the cardinal rule for the court's guidance. Proceeding past preliminaries, the court conceded that the general statute did not expressly repeal the provision in issue. Yet, the general statute did declare that its "failure to specifically enumerate any . . . Act dealing with a matter covered hereby shall not be construed as continuing such . . . Act in effect."[485] Moreover, the court continued, the legislature had not stopped there; rather, it expressly proclaimed that "to this extent the doctrine of *expressio unius est exclusio alterius* shall not apply."[486] Given this "cardinal" direction, the court allowed repeal by implication to operate

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[481] *Id.*

[482] 113 Ga. App. 833, 149 S.E.2d 870 (1966).

[483] *Id.* at 833-34, 149 S.E.2d at 871 (citing GA. CODE ANN. § 70-301 (Harrison Supp. 1978)).

[484] *Id.* at 833, 149 S.E.2d at 871 (citing 1963 Ga. Laws 2319, 2320, § 1(a) (requiring motions for new trials within 10 days of the verdict)). The general statute allowed 30 days. *Id.* at 834-35, 149 S.E.2d at 871 (citing GA. CODE ANN. § 70-301, *supra* note 483)).

[485] *Id.* at 835, 149 S.E.2d at 872 (quoting 1965 Ga. Laws 18, 39, § 21(s)).

[486] *Id.*

upon the special act.[487]

In *White Oak Acres*, therefore, *expressio unius* had transcended traditional boundaries, and the legislature had come dangerously close to doing the same. Not content with formulation and enactment, the General Assembly had laid claim to the province of constructional canons. Purporting to deny judicial application of the canon, the legislature undeniably attempted to involve itself in statutory construction. To the extent the court yielded to this involvement, *expressio unius est exclusio alterius* had assumed new character. Rather than an aid to judicial interpretation, the canon became an instrument of legislative direction to the judiciary. Indeed, the direction exhibited a thrust sufficient to propel the court past its historic dislike of repeals by implication. The "rejection" of *expressio unius*, it appeared, had assumed a conceptual life of its own.

### *D. Nonstatutory*

It may well be that the *expressio unius* canon does not receive modern extralegislative application to the same extent as that sketched for the maxims of *noscitur a sociis* and *ejusdem generis*. The relative scarcity of decisions points at least toward that conclusion. If so, the facet is an interesting and ironic one, given the history of *expressio unius*. Early judicial discussions ascribed the canon's origin, it will be recalled, primarily to the law of contracts. Drawing the maxim into the statutory realm somewhat hesitantly, the courts continued its evolution in diverse nonstatutory domains. The cases, however, appear to indicate a reversal of that trend in more recent times.

There are nevertheless some current instances of the canon's nonstatutory consideration. Perhaps mention of two decisions by the court of appeals, both treating the language of insurance policies, will suffice for illustration.

*Macon Auto Auction, Inc. v. Georgia Casualty & Surety Company*[488] encompassed disagreement over coverage provided by an auto auction indemnity policy.[489] Defendant insurer charged that

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[487] Thus, the 30-day requirement for new trial motions prevailed.

[488] 104 Ga. App. 245, 121 S.E.2d 400 (1961).

[489] *Id.* at 246, 121 S.E.2d at 401. The policy provided for indemnity against pecuniary loss resulting from checks received by the insured in connection with sales made through its

plaintiff insured's failure to comply with a policy provision requiring timely notification of loss, proof of claim and filing of instrument barred plaintiff's claim.[490] Moreover, defendant argued, compliance with each of those requirements constituted a "condition precedent" to plaintiff's suit on the policy.[491] In rejecting defendant's position, the court relied primarily upon two points. First, the provision in issue did not itself declare its requirements to be conditions precedent.[492] Second, another provision in the policy, exacting a requirement plaintiff admittedly met,[493] did specify itself "a condition precedent to liability hereunder."[494] With a minimum expenditure of analytical energy, the court announced both reason and decision: "Since this one policy provision was made a condition precedent by the terms of the policy itself, we must conclude that all others were not such. *Expressio unius est exclusio alterius.*"[495] In this nonstatutory environment, therefore, the maxim not only operated, it operated both exclusively and conclusively.

The other instance was one of rejection, albeit equally favorable to the insured. *Alley v. Great American Insurance Company*[496] featured controversy over a provision extending coverage to one "operating an automobile owned by the state, or leased by the state under long term agreement."[497] Claimant's vehicle was neither owned by nor leased to the state, but was rather the subject of "a bailment which conveyed no property interest . . . to the state but a mere right to use."[498] Structuring its approach to resolution, the court deemed the provision to neither specifically include nor specifically exclude claimant's vehicle.[499] So positioned,

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auto auction. *Id.*

[490] *Id.* at 250-51, 121 S.E.2d at 404.

[491] *Id.* at 251, 121 S.E.2d at 404.

[492] "A reading of the policy will disclose that it was not so provided therein . . . ." *Id.*

[493] That is, timely report of the sales involved. *Id.*

[494] *Id.*

[495] *Id.*

[496] 160 Ga. App. 597, 287 S.E.2d 613 (1981).

[497] *Id.* at 598, 287 S.E.2d at 615.

[498] *Id.* at 599, 287 S.E.2d at 615-16. The vehicle was owned by the federal government and used by the state as a part of a contractual arrangement for operating its National Guard Training Center. *Id.* at 598, 287 S.E.2d at 615.

[499] "The issue presented for resolution in this case is whether the subject insurance policy provided liability coverage to a state employee who, during the course of his employment, operated a motor vehicle which was neither owned by nor leased to the state." *Id.* at 598, 287 S.E.2d at 615.

the court pondered but discarded *expressio unius*: "When construing the terms of an insurance policy as to the extent of the liability of the insurer, great caution is necessary in applying the legal maxim that the express mention of one thing implies the exclusion of another."[500] Instead, the court viewed the provision as "clearly susceptible to two constructions."[501] Given that perspective, yet another "rule" commanded adoption of the construction "most favorable to the insured."[502] Under that construction, finally, coverage enveloped the claimant.[503]

Thus, more than a trace of analytical irony tints the saga of *expressio unius*. Although originating in, and principally forged by, an environment of nonlegislative context, the canon has of late experienced disavowal of its heritage. Modern courts employ the maxim as an extremely popular, dynamic and decisive aid in construing statutes of all ilk. Indeed, appellate courts frequently and unequivocally engage the precept in reversing trial court dispositions. On the nonstatutory front, however, judicial hesitation, caution and outright rejection mark the contemporary account. Perhaps modern courts view statutes as more appropriate targets for the canon's distinctive exclusionary sway than language not formulated in legislative settings. For the latter, perhaps, the courts consider a directional gist toward refining, constricting and supplementing as more in keeping with the temper of the times. What this may reveal about current judicial perspectives on the times is deserving of separate but equal conjecture. In any event, the paradox which emerges, both historically and in modern invocation, warrants continuing observation of *expressio unius est exclusio alterius*.

## CONCLUSION

Because the consideration of written communication is the cornerstone of the judicial process, the technique involved in that consideration has intrigued the ages. That technique, judicial in-

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[500] *Id.* at 600, 287 S.E.2d at 616.

[501] *Id.*

[502] "We are guided . . . by the rule of construction that where the language contained in an insurance policy is susceptible to two or more constructions, the one most favorable to the insured will be adopted." *Id.*

[503] *Id.* at 600, 287 S.E.2d at 617. Indeed, the court held no ambiguity to remain in the policy once thus construed. *Id.* at 601, 287 S.E.2d at 617.

terpretation, attempts a highly delicate balance. On the one hand, it acknowledges the legendary imprecision of language. On the other hand, it seeks to glean from that language the elusive signals of purpose, meaning and intent. A "science" so inexact incessantly craves a semblance of constants—conventions assisting to impose order upon understanding.

Roman law, and subsequently the English common-law system, sought to appease this insatiable desire by offering up the canons of construction. The canons, fundamental maxims of compositional meaning, have proved both vulnerable and venerable. Their existence has provided an irresistible historic target for a labyrinth of denigrating commentary. Yet the courts, the construers themselves, have claimed the canons as their own, affording them a determinative role in judicial decisionmaking which transverses the spectrum of litigation. Accordingly, the critics are left with little choice but to concede the canons' existence and shaping influence, while pleading for caution in their invocation.

From the canonical mass, the most popular and powerful maxims of meaning are perhaps the three here selected for treatment: *Noscitur a sociis*, *Ejusdem generis* and *Expressio unius est exclusio alterius*. Although different, the three precepts are also similar—they counsel an analysis of associating what is present with what is to be determined. The writer, they presume, meant something by what he expressed; that expression, or at least a portion of it, they insist, offers the best hope for resolving the ambiguity at hand. As they occasionally broaden, frequently constrict and sometimes exclude, the maxims operate to propel the interpreter toward an intent, meaning or purpose that will decide the controversy.

Georgia's judicial commitment to the three canons can be traced to Georgia's genesis. For each canon, there is roughly a perspective of historical background, current practice, refusal to engage and nonstatutory application. This treatment has reflected each of these perspectives for each canon. It would be amazing if the saga did not include instances of apparent inconsistency and erratic results. There is no cause for amazement. It would be surprising if on occasion the courts did not hoist a canon simply to disguise a decision on other grounds. There is no cause for surprise.

These analytical glitches can in no fashion, however, detract from the study's major confirmations. Its three principal points translate into durability, versatility and vibrancy. From the begin-

ning to the present, Georgia's appellate courts profess unswerving devotion to the canons. The opinions indicate no qualms in their reliance upon the maxims, generally affording considerably more than lip service to their invocation. If the Georgia courts do not deem the canons of construction material instruments for decision-making, their opinions constitute a deception of unparalleled proportions.

Georgia's employment of the canons cuts across the broad expanse of the appellate agenda. Whether criminal, civil or constitutional, maxim-assisted rationale operates in varying degrees to achieve resolution. Whether legislative, constitutional, administrative or private, document after document yields to canon-controlled judicial elaboration of meaning. Intriguing analogies, unusual relations and striking similarities number among the by-products of this rich diversity.

Given their staying power and operative range, the canons infuse analytical vigor into the Georgia cases. Two-tiered and multilevel associations offer extra dimensions to judicial flexibility. Whether assisting the court in interpreting its own language or serving the legislature in attempting to effect its own construction, the maxims pulsate with proffered solutions. Playing both leading and supporting roles in judicial opinions, they perform distinctive service in reversing trial court dispositions. The attorney who ignores a canon's potential, especially in an appellate setting, misses an opportunity of possibly decisive significance.

In Georgia law, the anachronisms are not the canons of construction but rather those who fail to recognize their importance.[504]

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[504] Anachronism: "A person or a thing that is chronologically out of place." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 82 (1983).