Lord Tenterden's Rule: Why a List Might Backfire

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Fifteen ninety-six was the year that the first heliocentric book was published, the year that the first flush toilet was installed, and the year that an English farmer first learned about Lord Tenterden's rule. Under English medieval law, ownership of lands in church-owned fiefs included the duty to pay a tithe to the church. But an act of Parliament (during Henry VIII's dissolution of the monasteries) repealed this duty on land that was transferred to the king:

> "[A]ll monasteries, . . . colleges, . . . which hereafter shall happen to be dissolved, renounced, relinquished, forfeited, . . . or by any other means come to the King's Highness, shall [no longer have the duty to pay this tithe]."[1]

The act's meaning fell under scrutiny in the so-called Archbishop of Canterbury's Case. A dispute arose after a religious college and its medieval fiefs were transferred to the king under another act of Parliament. Ownership of a piece of the land made its way to a Lord Cobham, who then rented the land out to Farmer Green. Another piece of the land ended up with John Whitgift, the Archbishop of Canterbury, who rented the land out to Farmer Balser. The two farmers clashed over paying the tithes. For some reason that I can't fathom, Farmer Green sued Farmer Balser to stop him from paying.

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1 *Green v. Balser* (1596) 2 CO Rep. 46a, 46a–46b (Eng.) (known as the "Archbishop of Canterbury's Case") (quoting stat 31 Hen. 8.).

The question before the court was whether the statute that abolished the duty to tithe (quoted above) applied to this particular transfer. What do you think? Does this statute apply to the college? After all, the college came to the King's Highness, right? But how would the rule against surplusage affect this reading?

The judge decided that the list *dissolved, renounced, relinquished, forfeited* didn't make any sense if the phrase *any other means* covered everything on the list. So the judge ruled that this list was meant to communicate something more: the types of transfers intended by Parliament. And Parliament intended to limit the general catchall phrase *any other means* to "any other means that are inferior to an act of Parliament."

This rule later became associated with Lord Tenterden because, in *Sandiman v. Breach*, he restated the rule in a pithy form: "Where general words follow particular ones, the rule is to construe them as applicable to persons [or things, presumably] *ejusdem generis*."[2] *Ejusdem generis*, which is the rule's Latin name, translates to "of the same kind." And this pithy restatement increased awareness of the rule.

More Recent Cases

Over 400 years later, the U.S. Supreme Court provided another example of Lord Tenterden's rule in *Yates v. United States*.[3] In *Yates*, the crew of a fishing vessel had caught and kept fish that were too small under federal law. A peace officer boarded the vessel and saw the small fish. The officer put the fish aside in a separate container and told the captain that there would be a reckoning when the vessel reached port. But when the vessel did reach port, the peace officer was surprised to find that the fish in the container were larger. He smelled something fishy, so he

2 (1827) 7 B. & C. 99 (Eng.).

3 135 S. Ct. 1074 (2015).

questioned the crew. One of the crew admitted that the captain had told him to throw the undersized fish overboard. So Captain Yates was charged under this statute:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . shall be fined under this title, imprisoned not more than 20 years, or both.[4]

The captain knowingly concealed a tangible object beneath the waves to influence an investigation. Did the captain violate the statute?

Nope. The Court ruled 5–4 that the words *record* and *document* made a class of things used to store information, such as hard drives. And the split wasn't ideological: Justice Ruth Bader Ginsburg wrote the opinion, and Justice Elena Kagan wrote the dissent. This holding led the dissent to cite a Dr. Seuss book, *One Fish, Two Fish, Red Fish, Blue Fish*, as authority for the point that fish are tangible objects — but to no avail.

McBoyle v. United States[5] was an earlier example from the Court. The facts were simple: McBoyle was caught knowingly transporting a stolen airplane. He was charged under a statute that forbade transporting a stolen *motor vehicle*, which was defined as follows:

> The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.[6]

4 18 U.S.C. § 1519.

5 283 U.S. 25 (1931).

6 18 U.S.C. § 2311 (1931 version).

This definition did not include airplanes, according to Justice Oliver Wendell Holmes. He ruled that the list *automobile, automobile truck, automobile wagon, motor cycle* created a class that meant only "a vehicle running on land."[7] Airplanes didn't qualify.

You might think that this is all very straightforward, but let's see. Would that same *motor vehicle* definition apply to a self-propelled lawn mower?[8]

Does it run on rails? No. Does it run on land? Yes. Is it self-propelled? Yes. Is it a vehicle? (Does it carry stuff?) Yes, it carries grass. So it appears to fit the definition. But would an average person reading the statute think it covers a lawn mower? Would an average person think a lawn mower or an airplane is more like an automobile? This rule can be squirrelly.

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7 *McBoyle*, 283 U.S. at 26.

8 Photo by Charles & Hudson, Flickr: Husqvarna Product Tour, CC BY-SA 2.0, https://commons.wikimedia.org/w/index.php?curid=16866135.

A Hypothetical Example

Here's a hypothetical statute covering fruit:

> To be brought into jurisdiction X, cherries, tomatoes, cranberries, and other fruit must be inspected by [some designated person or entity].

We've named three types of fruit and added a catchall covering all fruit, so the listed fruit are redundant with the catchall. The list looks like surplusage, so we should apply *ejusdem* and look for distinctions between the listed fruit and other fruit. What comes to mind?

- The listed fruit aren't citrus, so no oranges or lemons.
- The listed fruit have edible skin, so no pineapples or kiwis.
- The listed fruit are red, so no blueberries or blackberries.
- The listed fruit are spherical, so no bananas or strawberries.

Which of these classes did the drafter intend? Maybe a judge could figure it out based on the law's purpose or the legislative history. But maybe it would be better to avoid the need.

Sutherland's well-known treatise on statutes has weighed in: "*Ejusdem generis* expresses a meaningful insight about language usage that can be a relevant aid, if not a simple and certain exponent, to resolve that issue . . . ."[9] So it makes sense, but it's not certain. Isn't certainty normally the legislator's wish? Doesn't drafting, at bottom, involve making sound predictions about how a court will apply certain words? And don't legislators and drafters have a duty to write statutes so that the public can reasonably predict their application and behave accordingly?

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[9] 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.18, at 393 (7th ed. 2014).

Ejusdem has been criticized.[10] The rule sometimes reflects the drafter's actual thinking, but often it does not. (I write as a professional drafter.) Nevertheless, a drafter's concern isn't with whether the rule makes sense. A drafter need only know that this rule is a fountain of uncertainty to see the wisdom of being wary of this type of list.

I offer two pieces of advice in the following sections.

Advice for Drafters

Don't shroud the law in a mist: do away with the list!

How could we improve the statute in *Yates*? Five of the Justices thought the phrase *record, document, or tangible object* meant an object that stores information.[11] The other four read the same phrase to cover all tangible objects. I don't know what the original intention was — which is kind of the problem — but simplified versions are better. If the drafter meant only an object that stores information, that intent was one Justice's vote away from failing. On the other hand, if the drafter meant to include any tangible object, the list actually failed. So don't write *record, document, or tangible object*. Instead:

- If you mean — as the majority thought — "any object that stores information," write that.
- If you mean — as the minority thought — to cover all tangible objects and computer files (which aren't tangible objects), write something like "any physical or virtual object."

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[10] *See, e.g.*, Joseph Kimble, Ejusdem Generis*: What Is It Good For?*, 100 Judicature 48 (Summer 2016) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2803520).

[11] *Yates*, 135 S. Ct. at 1081.

In both versions, no list precedes the general phrase; the redundancy is gone.

The list in *McBoyle* is also better when simplified. Don't write *an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle*. Instead:

- If you mean "a self-propelled vehicle that is driven on land," write that.
- If you mean — as I suspect was intended — a typical automobile, write: "a self-propelled vehicle designed primarily for driving on the road."

In either case, you shouldn't need a court decision to learn what your statute actually means.

***If you must have a belt and suspenders, use the word* including.**

Sometimes your client will really, really want to list something that belongs in the general category. I imagine that anybody who has spent much time drafting bills has heard someone say, "We're going to need a belt-and-suspenders law." But maybe that's just Colorado, where I draft. Anyway, recall that *ejusdem* typically applies when a general term follows specific items.[12] If, for example, you are writing a statute or rule that applies to fruit, you or your client may be concerned that it won't cover tomatoes. One possibility is to use an *including*-phrase:

> To be brought into jurisdiction X, fruit, including tomatoes, must be inspected by . . . .

[12] *But see* Kimble, 100 Judicature at 51–52 (arguing that the same logic applies when the specific terms follow the general term — and citing cases that have so concluded).

This way, courts are much more likely to understand your intention. The Sutherland treatise explains: "The word 'includes' is usually a term of enlargement, and not of limitation."[13] To the degree possible, it's best to keep the example to one item because *ejusdem* typically applies when a list accompanies a catchall. One item does not make a list.

Most of the time, courts understand *including*-phrases, but not always. Remember the rule against surplusage? This rule says that we should give every word meaning and effect. This formulation arguably doesn't do that. The word *tomatoes* is arguably redundant with the word *fruit*. So courts will occasionally apply the rule against surplusage to an *including*-phrase to reach an *ejusdem*-like result. Using just one item in the list helps protect against that. If you have more than one item, you have more risk of limiting the general term.

An example is *Shelby County State Bank v. Van Diest Supply Co.*[14] This was a simple bankruptcy case. When a person files for bankruptcy, the primary lienholders generally get the property covered by a lien, and this deprives the remaining creditors of its value. In this case, two creditors were fighting over the scope of a lien, so the court had to interpret a description of collateral to determine what the lien covered:

> All inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by Van Diest Supply Co. whether now owned or hereafter acquired . . . .[15]

Notice that the drafter used the cover-your-heinie phrase *but not limited to*. The court didn't care:

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[13] 2A Singer, § 47.7, at 310.

[14] 303 F.3d 832 (7th Cir. 2002).

[15] *Id.* at 834–35.

> [I]t would be bizarre as a commercial matter to claim a lien in everything, and then to describe in detail only a smaller part of that whole . . . . [I]f all goods of any kind are to be included, why mention only a few? A court required to give "reasonable and effective meaning to all terms" must shy away from finding that a significant phrase is nothing but surplusage.[16]

The court decided that the list made the general phrase ambiguous, and ultimately narrowed the lien to cover only the listed items. The court completely read out the catchall phrase.

And there are more such cases. In *Roberts v. General Motors Corp.*,[17] the New Hampshire Supreme Court, quoting a Massachusetts decision, likewise read an *including*-phrase to narrow the meaning:

> "[R]ules of statutory construction lead us to conclude . . . that the phrase 'including but not limited to,' which precedes the specification, limits the applicability of [the Consumer Protection Act] to those *types* of [acts] therein particularized."[18]

So be careful with an *including*-phrase. And don't think the phrase *including but not limited to* will save you. Persuade your client to avoid using an *including*-phrase unless the specific item could arguably fall both inside and outside the general phrase or term. And if at all possible, add only one item. If you need more than one item, include only what is necessary. The bigger the list, the bigger the risk.

If you don't need a belt and suspenders, you are better off getting rid of the list. Replace it with a general phrase that captures your intention. Remember that Lord Tenterden's rule is

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[16] *Id.* at 837.

[17] 643 A.2d 956 (N.H. 1994).

[18] *Id.* at 960 (quoting *Mahoney v. Baldwin*, 543 N.E.2d 435, 436 (Mass. Ct. App. 1989), *appeal denied*, 546 N.E.2d 375 (Mass. 1989)) (emphasis in *Mahoney*).

waiting to pounce, its tail twitching as it crouches and peers through the grass at your words.