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# The First Trademark Case at Common Law? The Story of *Singleton v. Bolton* (1783)

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As late nineteenth century jurists and textbook writers tried to piece together a “law of trade marks,” they looked back to *Singleton v. Bolton*, a decision of the Court of King’s Bench in 1783, as a seminal moment.<sup>1</sup> Henry Ludlow and Henry Jenkyns, whose 1873 text is one of the first book-length accounts of the law of trademarks, referred to the decision as “the first reported case of any real importance.”<sup>2</sup>

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\* Copyright © 2014 Lionel Bently. Herchel Smith Professor of Intellectual Property Law, University of Cambridge. My thanks go to Professors Anupam Chander and Robert Burrell for comments on an earlier draft, and to Sir John Baker, Tomas Gomez-Arostegui, and Isabella Alexander for advice on tracing common law cases. In what follows, “TNA” refers to The National Archive, Kew, Surrey, and “LMA” refers to the London Metropolitan Archive in London.

<sup>1</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.).

<sup>2</sup> HENRY LUDLOW & HENRY JENKYNs, *A TREATISE ON THE LAW OF TRADE-MARKS AND TRADE-NAMES* 10 (London, William Maxwell & Son 1873). A few years previously, giving a lecture to the Royal Society of Arts, W. Wybrow Robertson called it “[t]he first reported case on the subject at law” and observed that “[t]he remedy at law was

Grafton Dulany Cushing, writing in the *Harvard Law Review* in 1891, claimed that the case “laid the foundation of the law of trade-marks as at present developed,”<sup>3</sup> while Edward Rogers, probably the most influential American trademark commentator of the first half of the twentieth century, declared, “[t]rade-mark recognition and protection in modern times can be said to begin in England only as late as 1783.”<sup>4</sup> For Rogers it was in *Singleton v. Bolton* that it first became evident that “the judicial conscience had been . . . awakened.”<sup>5</sup>

This Article explores the background to the case, in order to determine what it decided. In doing so, it will be argued that *Singleton* was by no means the first case at common law, and that its status as the first “reported” case rather unduly elevated its importance. In fact, the report itself is short and difficult to interpret,<sup>6</sup> and I will suggest that this has led to some misunderstanding. Nevertheless, while *Singleton v. Bolton* thus looks less significant than has previously been suggested, it provides a valuable entry point for understanding eighteenth century trademark law, a subject hitherto barely recognized.<sup>7</sup> More importantly, even if it is not the first case to

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firmly established by this decision.” W. Wybrow Robertson, *On Trade Marks*, 17 J. SOC’Y ARTS 414, 415 (1869); see FRANCIS H. UPTON, *A TREATISE ON THE LAW OF TRADE MARKS* 24 (Albany, Weare C. Little 1860) (“[T]he case . . . is one of the earliest reported cases in the law of trade marks . . .”).

<sup>3</sup> Grafton Dulany Cushing, *On Certain Cases Analogous to Trade-Marks*, 4 HARV. L. REV. 321, 321 (1891); see also Frederic W. Hinrichs, *Trademarks and Unfair Competition in Trade*, 7 AM. LAW 285, 287 (1899) (noting that *Singleton v. Bolton* was the first case distinctly recognizing the right to bring an action for damages due to trademark infringement at common law); *Recent Cases*, 15 YALE L.J. 371, 379 (1906) (“Beginning in 1783 with the case of *Singleton v. Bolton* . . . there has been established the uniform fundamental principle of the right of protection to a trader in the use of his trade device.”).

<sup>4</sup> Both via his treatise, *Goodwill, Trademarks and Unfair Trading* (1914), and by his influence on the development of the Lanham Act. See Walter J. Derenberg, *The Contribution of Edward S. Rogers to the Trademark Act of 1946 in Historical Perspective*, 62 TRADEMARK REP. 189, 189 (1972).

<sup>5</sup> Edward S. Rogers, *Some Historical Matter Concerning Trade-marks*, 9 MICH. L. REV. 29, 40 n.30 (1910).

<sup>6</sup> The report, *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.), is set out below at text accompanying footnote 102.

<sup>7</sup> See FRANK M. ADAMS, *A TREATISE ON THE LAW OF TRADE-MARKS* 3 (London, George Bell 1874) (noting the law of trademarks is “much more recent” than that of patents “being almost exclusively the growth of the last seventy or eighty years”); EDWARD MORTON DANIEL, *THE TRADE MARKS REGISTRATION ACT, 1875, AND THE RULES THEREUNDER* 1 (London, Stevens & Haynes 1876) (“The law by which property in trade marks is recognised and protected is of very recent origin. . . . It was not until the present century that the principles upon which such property rests were ascertained and understood, and it is only in the last thirty years that cases upon the subject have become at all

recognize protection of trademarks at common law, it might well be the first case on the “first sale doctrine.”

### I. BACKGROUND

*Singleton v. Bolton* related to a medicine called *Dr. Johnson’s Yellow Ointment*.<sup>8</sup> The origin of the ointment is shrouded in mystery. Although the case occurred in the time of Dr. Samuel Johnson, of dictionary fame, the product was certainly being sold much earlier. A number of documents suggest that it may have dated back to the 1590s,<sup>9</sup> and there is some suggestion that the “Dr. Johnson” referred to in the product name was a Thomas Johnson.<sup>10</sup> But it is unlikely that this was the famous apothecary and botanist (1595/1600–1644), the author of the enlarged version of Gerard’s *Herball* (1633),<sup>11</sup> partly because the dates do not fit, and also because his attention was primarily focused on botany (and there is no reason to believe that *Dr. Johnson’s Yellow Ointment* was ever a designation for a herbal remedy).<sup>12</sup> There seems a possibility that the Thomas Johnson was his contemporary, who practiced in Friday Street, but that would not fit with the claim that the recipe originated in Vauxhall.<sup>13</sup> It may have been that it was the physician Christopher Johnson who died in

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frequent or important.”); DUNCAN M. KERLY, *THE LAW OF TRADE-MARKS, TRADE-NAME, AND MERCHANDISE MARKS 2* (London, Sweet & Maxwell 1894) (“The law on this subject cannot be traced back further than the present century.”).

<sup>8</sup> *Singleton*, 99 Eng. Rep. at 661.

<sup>9</sup> Writing in June 1796, William Singleton claimed the recipe had been sold upward of 200 years earlier. Letter from William Singleton to Mr. Smith, Bookseller (June 8, 1796) (LMA at B/SIN/46); Memorandum from William Singleton on How I Came Posses’d of an Ointment for All Disorders in the Eyes Call’d Dr. Johnsons Ointment (n.d.) (LMA at B/SIN/1) (“Dr. Johnson was a Physician and the sole inventor of this article who lived at Vauxhall.”); see also 2 A.C. WOOTTON, *CHRONICLES OF PHARMACY* 198-99 (1910) (suggesting the recipe went back to 1596).

<sup>10</sup> 23 LONDON COUNTY COUNCIL, *SURVEY OF LONDON* 123 (Howard Roberts & Walter H. Godfrey eds., 1951).

<sup>11</sup> C.J. King, *Thomas Johnson*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, <http://www.oxforddnb.com/view/article/14919> (last visited Sept. 22, 2013).

<sup>12</sup> H. WALLIS KEW & H.E. POWELL, *THOMAS JOHNSON: BOTANIST AND ROYALIST* 11-12 (1932). On the constituents of the ointment, see *infra* text accompanying notes 41-45.

<sup>13</sup> Stephen Green, *List of Proprietors with Brief Notes on Form of Descent* (1860, 1890) (LMA at B/SIN/2) (noting that “Dr. Johnson was a Physician living at Vauxhall” to which has been added “in 1596”); Memorandum from William Singleton, *supra* note 9 (“Dr. Johnson was a Physician and the sole inventor of this article who lived at Vauxhall.”).

1597.<sup>14</sup> There is also, of course, the possibility that “Dr. Johnson” was a complete fabrication.

The first concrete evidence of *Dr. Johnson’s Yellow Ointment* appears at the beginning of the eighteenth century in the journal, *General Remarks on Trade*. At this stage, the ointment is advertised as *Dr. Johnson’s Famous Yellow Ointment* by George Hinde living at “Fox-Hall,” and retailed at one shilling and six pence. It is described as a cure for ruby faces,<sup>15</sup> and an aid to removing pimples and smoothing the skin:

It is most excellent in the Cure of all Rubey Faces; it takes out speedily all Manner of Pimples, and makes the Skin Smooth: This Ointment Infallibly Cures and takes away all Carbuncles, Scabs, Scurf, or other Deformities of the Skin; it also Cures (or rather Destroys) Tetter and Ring-worms of all Sorts, Shingles, Scald-heads, and all Sores belonging to the Evil, the Itch, let it be never so inveterate, and Old Ulcers, of what Nature and Kind soever, or if they be of many Years continuance by a Due application of this Ointment, it perfectly Heals them, many Times Beyond expectation . . . .<sup>16</sup>

There followed an explanation as to how the remedy worked in terms of “humours,” as well as details as to how to apply the ointment, how the product appeared (“made up in Gally-pots, Seal’d with a Faulcon”), how long a pot could last (seven years), the price, and a list of outlets where the product could be purchased “pure, and in no way adulterated.”<sup>17</sup>

Little is known about George Hinde,<sup>18</sup> or his supposed relationship with the mysterious “Dr. Johnson.” Documents in the Singleton

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<sup>14</sup> WILLIAM MUNK, *Christopher Johnson*, in 1 MUNK’S ROLL OF MEMBERS OF THE COLLEGE OF PHYSICIANS 76 (1861).

<sup>15</sup> To modern medicine, having a red complexion might be a symptom of a number of diseases, but probably most commonly was erysipelas caused by infection of the skin by the bacteria, streptococcus.

<sup>16</sup> *The General Remark on Trade: With Curious Observations Done by the Ingenious, TRADERS EXCHANGE-HOUSE* (London) (No. 240), Sept. 5–8, 1707, at 2 (presenting an advertisement for “Dr. Johnson’s Famous Yellow Ointment”). The paper was two pages with three columns per page and Hinde’s advert takes up half of the final column on the second page.

<sup>17</sup> *Id.*

<sup>18</sup> There is evidence of a Thomas Hinde who in the 1670s was selling a “Famous and Wonderful Never-Failing Cordial Drink of the World.” See THOMAS HINDE, UNDER GOD: HUMBLY DESIRING HIS BLESSING TO THIS FAMOUS AND WONDERFUL NEVER-FAILING CORDIAL DRINK OF THE WORLD 1 (1678). See also advertisements in the British Library and Bodleian, now digitized on Early English Books Online at <http://eebo.chadwyck.com/home> (last visited Oct. 20, 2013). In a series of pamphlets dating from 1673 through to

manuscripts (surviving in London), created some time afterwards, suggest that Hinde was bequeathed the recipe by Dr. Johnson in 1635.<sup>19</sup> On George Hinde's death, the recipe passed to his son William Hinde and, on his decease to his daughter and her husband, Thomas Singleton.<sup>20</sup> Although this is said to have occurred in the 1720s, in 1743 there is another flurry of advertisements, in identical terms to those inserted by George Hinde in the 1700s, but explaining that George Hinde's daughter was selling the remedy at Thomas Singleton's house in Lambeth Butts.<sup>21</sup> Perhaps the omission of William Hinde from the provenance of the recipe was intended to keep matters simple, for the benefit of the public. Whatever the reason, thereafter, explanation as to the origins of Thomas Singleton's proprietorship of the recipe are omitted, the advertisements referring to the ointment as "By G.H. at Vauxhall; Now prepared by T. Singleton of Lambeth Butts."<sup>22</sup>

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1700, Anthony Daffy (and his successors, his wife Ellen and son Elias) alleged that Hinde had been a patient of his, and had developed the recipe based on some disclosures Daffy had made that would allow Hinde to avoid relapse into illness when traveling abroad. See ANTHONY DAFFY, *ELIXIR SALUTIS 4* (1673); see also Patrick Wallis & David Boyd Haycock, *Quackery and Commerce in Seventeenth Century London: The Proprietary Medicine Business of Anthony Daffy*, 25 *MED. HIST. SUPP.* 1, 25-26 (2005) (describing Daffy's disputes with Hinde and other counterfeiters). Hinde responded that the allegations were ridiculous, and that he could not have gleaned from Daffy a recipe Daffy had never possessed. Daffy's pamphlets continued to alert the public to Thomas Hinde's fraudulent behaviour (and that of his brother, Joseph Hinde) right up to the early 1700s. See ELIAS DAFFY, *DAFFY'S ORIGINAL AND FAMOUS ELIXIR SALUTIS 1* (1698).

<sup>19</sup> Green, *supra* note 13 (documenting that "Dr. Johnson bequeathed the Recipe for making the said Ointment at his decease to Georg Hinde" and showing in the margin "1635" with "1640" deleted).

<sup>20</sup> The Memorandum from William Singleton, *supra* note 9, states, "Dr. Johnson was a Physician and the sole inventor of this article who lived at Vauxhall and at his death bequeathed it to (or some time in his life instructed) George Hinde my Mother[s] Grandfather in the making and preparing the same who left it to William Hinde my Mother[s] Father . . ." In Green, *supra* note 13 (created even later, some time in the late nineteenth century), it is stated that "William Hinde, the grandfather of William Singleton gave the recipe as a portion on [his daughter's] marriage with Thomas Singleton, the father of William Singleton . . ." In the margin, the dates suggested for Thomas Singleton's succession are "1720/1729."

<sup>21</sup> See, e.g., *Dr. Johnson's Famous Yellow Ointment*, *DAILY POST* (London), Apr. 23, 1743, at 2 (advertisement for Yellow Ointment sold by George Hinde's daughter); *Dr. Johnson's Famous Yellow Ointment*, *DAILY GAZETTEER* (London), June 11, 1743, at 3 (same); *Dr. Johnson's Famous Yellow Ointment*, *DAILY ADVERTISER* (London), July 27, 1743, at 4 (same); *Dr. Johnson's Famous Yellow Ointment*, *DAILY POST* (London), Feb. 16, 1744, at 2 (same).

<sup>22</sup> *Dr. Johnson's Famous Yellow Ointment*, *LONDON EVENING POST*, Aug. 1-4, 1761, at 4; *Dr. Johnson's Famous Yellow Ointment*, *LLOYD'S EVENING POST & BRIT. CHRON.*, Aug. 5-7, 1761, at 130.

Thomas Singleton, who was by trade a builder, died on November 29, 1779, at age 79, and passed the secret on to his son, William.<sup>23</sup> William may well have been a member of the Corporation of Surgeons, as there is someone of that name listed on the list of the Court of Assistants for 1779.<sup>24</sup> By this period in the century, the description of the properties of the product changed: it had become an “eye ointment” rather than a remedy for “ruby faces.” William Singleton issued an advertisement to highlight his succession to his father, Thomas:

Dr. Johnson's *Famous*  
YELLOW OINTMENT  
Formerly Prepared by Thomas Singleton *Lambeth-Butts*,  
BUT NOW BY  
*William Singleton*, Son of the late *Thomas Singleton*,  
Who Begs leave to inform the public, that none is truly  
Genuine,  
but what is wrote with his name on the outside in blue  
Letters round the Gallipot.  
THE Virtues of his Ointment, amongst others, are these, viz.  
It is most excellent for the Cure of many Disorders in the  
Eyes, by using it on external Part of the Eye on the Lid,  
light and thin. It cures Scurvy and Scorbutic Humours, in any  
Part of the Body. And it is so ordered and prepared, that it first  
draws out the venomous Humour, and in a short Time heals the  
part affected, to Admiration. The first three or four times  
anointing may seem worse than the first, but afterwards  
you will find its Operation to Satisfaction. This Ointment has  
been in  
Mr. Singleton's Family for Upwards of One Hundred Years,  
and he is now the *real* Maker.

“\*†\* Beware of counterfeits. If sold at any other Shop near the  
Change Gate, except Mrs. Randall's, it is not the Ointment  
prepared by Wm Singleton.”<sup>25</sup>

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<sup>23</sup> Thomas Singleton's will, created September 7, 1779, was proved December 13, 1779. It describes the “receipt” (i.e., recipe) as “an unguentum or ointment called Dr. Johnson's Famous Yellow Ointment for the cure of rubey faces and other scrofulous disorders.” See Will of Thomas Singleton (Dec. 13, 1779) (TNA at PROB 11/1059/208).

<sup>24</sup> THE MEDICAL REGISTER FOR THE YEAR 1779, at 20 (London, J. Murray 1779) (a digital version of which can be found on the “Internet Archive,” <https://archive.org>).

<sup>25</sup> Handbill Advertising William Singleton's Succession to the Proprietorship of

Such advertising was by no means unusual.<sup>26</sup> In fact, the potential rewards from sales of medicines in the eighteenth century prompted some of the most innovative marketing.<sup>27</sup> As William Helfand explains, medicine sellers developed:

[N]ew marketing, publicity and advertising techniques; fashioned the arts of persuasion and salesmanship; created novel distribution systems; pioneered the emphasis on brand-named products; served as an economic link between the hinterland and the center; expanded markets; and helped to provide the entrepreneurship necessary for the growth of a modern society.<sup>28</sup>

Medicine sellers advertised on handbills, on hoardings, and in newspapers. They used imagery,<sup>29</sup> exaggerated claims (so-called “puffing”), as well as printed testimonials from satisfied customers.<sup>30</sup> They invented songs and lyrics with which their products could be associated. They disguised adverts as letters or news items, in order to gain the attention of those whose familiarity with adverts meant they paid less attention to them.<sup>31</sup> They sold books to accompany the products. They distributed their products from their own premises,<sup>32</sup>

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the Ointment (n.d.) (LMA at B/SIN/145).

<sup>26</sup> Juanita Burnby, *Pharmaceutical Advertisement in the 17th and 18th Centuries*, 22 EUR. J. MARKETING, 1988, at 24-25, 36 fig.8.

<sup>27</sup> See James Harvey Young, *Patent Medicines: An Early Example of Competitive Marketing*, 20 J. ECON. HIST. 648, 648-49, 652 (1960) (recognizing similar innovations in the United States). Indeed the first reported trademark case in the United States, *Thomson v. Winchester*, 36 Mass. (19 Pick.) 214 (1837), concerned just such a remedy.

<sup>28</sup> WILLIAM HELFAND, QUACK, QUACK, QUACK: THE SELLERS OF NOSTRUMS IN PRINTS, POSTERS, EPHEMERA AND BOOKS 42 (2002).

<sup>29</sup> See, e.g., *Anodyne Necklaces*, GEN. EVENING POST (London), Mar. 11-14, 1780, at 2 (containing a small picture in addition to verbal advertising).

<sup>30</sup> See, e.g., R. JAMES, A DISSERTATION ON FEVERS AND INFLAMMATORY DISTEMPERS (London, J. Newberry 1748) (cataloguing successes of “Dr. James’s Fever Powders”); *Restoration of Sight by Dr. James’s Fever Powder*, PUB. ADVERTISER (London), Mar. 27, 1786, at 4 (portraying a testimonial from C. W. Tonym that states Dr. James’s fever powders restored a woman’s sight); *To the Public: I Am Cured by the Use of Mr. Maredant’s Anti-Scorbutic Drops*, PUB. ADVERTISER (London), Sept. 1, 1763, at 3 (depicting an advertisement for “Maredant’s Drops” with a testimonial from Richard Johnson, a coachman).

<sup>31</sup> See, e.g., Advertisement, MORNING HERALD & DAILY ADVERTISER (London), Nov. 20, 1780, at 3 (disguising advertisements for “Persian Powder” and Greenough’s “Pectoral Lozenges of Tolu”); Advertisement, PARKER’S GEN. ADVERTISER (London), June 1, 1782, at 3 (containing an advertisement for John Hill’s “Pectoral Balsam of Honey”).

<sup>32</sup> On the significance of apothecaries in developing the “shop,” see generally

through printers (and their networks), through coffee houses and all sorts of other outlets (china shop, breeches maker, toy shops, and so on). Indeed, it was about the time of *Singleton v. Bolton* that Dr. Samuel Johnson observed that “the trade of advertising is [now] so near to perfection, that it is not easy to propose any improvement.”<sup>33</sup>

What was the *Dr. Johnson’s Yellow Ointment* made from? There is no recipe in the Singleton records. There is, of course, a good chance that the recipe was altered over the three — or possibly four — centuries in which it was made (production ceased only as late as 1975). For the most part, these sorts of secret recipes were handed down by showing a relative how to make the product, rather than reduction to writing. However, in the case of *Dr. Johnson’s Yellow Ointment* it seems that one of the successors to William Singleton, William Singleton Folgham, was required to write out the recipe in full and place it in a locked box in 1823.<sup>34</sup> According to one account, when the box was opened there was nothing there.<sup>35</sup> Stephen Green, who became the proprietor of the remedy thereafter, is said to have found it out by different means.<sup>36</sup> Certainly one component — “Singleton’s acid” — was made up for Green from the 1820s by the Society of Apothecaries (in their laboratory, albeit on the basis that it was “proprietary,” that is, exclusive to Green), and this continued at least through to the 1860s.<sup>37</sup> As he became old, Green described some parts of the process for making the ointment on different scraps of paper (it seems to assist his successors), but those that survive are difficult to decipher.<sup>38</sup> Certainly the ingredients included not just “Singleton’s acid,” but wax, butter, white spirit, and spermaceti.<sup>39</sup> The Singleton archive also, tantalisingly, contains a page of Greek writing, though in code.<sup>40</sup>

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Patrick Wallis, *Consumption, Retailing and Medicine in Early-Modern London*, 61 *ECON. HIST. REV.* 26 (2008).

<sup>33</sup> *Advertising Considered as an Art*, 2 *CHAMBERS’S EDINBURGH J.*, NO. 52, at 401 (1844) (quoting Samuel Johnson, *The Art of Advertising Exemplified*, in *THE IDLER* NO. 40 (1759)).

<sup>34</sup> Case of Letitia Mary Folgham, Submitted to Mr. Pepys for Opinion (Sept. 30, 1825) (LMA at B/SIN/10) (detailing an arbitration agreement brokered by Robert Bowyer).

<sup>35</sup> Letter from James S. Hepburn to Stephen Green Carlill (Oct. 23, 1896) (LMA at B/SIN/23) (relating that the chest had to be forced open and that: “[W]hen the sealed envelope was opened, it was found that there was no receipt inside it. Mr. Green however ultimately obtained possession of the receipt”).

<sup>36</sup> *Id.*

<sup>37</sup> Masters Report in Lunacy on Fifth Account of Above Committees of Estate of Eliza Folgham, a Lunatic (Mar. 3, 1846) (LMA at B/SIN/15).

<sup>38</sup> Letter from James S. Hepburn to Stephen Green Carlill, *supra* note 35.

<sup>39</sup> Memorandum from Stephen Green on Description of Method Adopted for



A number of third parties made concerted attempts to reverse engineer the product so as to deduce its ingredients, taking advantage of advances in chemistry which started to make such analysis possible. In the 1830s, anti-quack campaigner, Charles Cowan identified the main contents as “sulphuret of arsenic, with lard or spermaceti,” adding that “the nitrate of mercury ointment is sold under the same title.”<sup>41</sup> Thomas Clark, the apothecary at Glasgow infirmary (and later professor at Aberdeen), published a more detailed analysis, concluding that the ointment consisted of butter and “red precipitate of mercury prepared by way of the nitrate.”<sup>42</sup> A couple of decades later, the Glasgow Chemists Association had sought to identify its composition and to create a replica (which it called “citrine ointment”). The prevalent view was that it was based on bone marrow, dripping, or goose grease.<sup>43</sup> At the beginning of the twentieth century, an article in the *British Medical Journal* indicated that it was an ointment of dilute nitric acid.<sup>44</sup> According to Peter Homan, the description “Golden Ointment” was accepted as a synonym for Yellow Mercuric Oxide Ointment (*Unguentum Hydrargyri Oxidi Flavi*) by the British Pharmacopoeia and the National Formulary.<sup>45</sup>

Whatever the contents of the *Yellow Ointment*, Singleton’s archive gives us some indication of its success over the period from the 1770s onwards. Thomas Singleton’s sales were about £60 per year in the

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“Making the Powder,” “Taking Out and Preparing for Grinding,” and “Mixing” (1861, 1872, 1910) (LMA at B/SIN/32); Voucher of Stephen Green in Account with Langton, Harker and Stagg, Laurence Pountney Lane, E.C., for Purchase of Spermaceti, Endorsed (Mar. 1871–Aug. 1872) (LMA at B/SIN/26).

<sup>40</sup> Paper 3.4” by 7” Bearing 20 Lines Written in Greek Letters (1861) (LMA at B/SIN/31).

<sup>41</sup> CHARLES COWAN, *THE DANGER, IRRATIONALITY AND EVILS OF MEDICAL QUACKERY* 43 (London, Sherwood & Co. 1839). Cowan was the physician to the Reading Dispensary and also author of *Observations on Quackery*.

<sup>42</sup> Thomas Clark, *A Chemical Examination of Singleton’s Golden Ointment*, 1830 *GLASGOW MED. J.* 372, 373. For discussion of related explorations into the contents of medicine, see generally W. A. Campbell, *Some Early Chemical Analyses of Proprietary Medicines*, 69 *ISIS* 226 (1978).

<sup>43</sup> Notes Taken from Report in Pharmaceutical Journal on Meeting of Glasgow Chemists’s Association (1867) (LMA at B/SIN/163) (discussing the preparation of citrine ointment and the composition of Singleton’s ointment).

<sup>44</sup> *Patent Medicines*, 2 *BRIT. MED. J.* 1654, 1654 (1903) (referring to Singleton’s Golden Ointment as an imitation of “ung.hyd.nit.dil”). Only five years later, another article claimed the active ingredient as red mercuric oxide and the base as a combination of beeswax, lard, Japan wax, and purified coconut oil. Herbert Clifton, *The Composition of Certain Secret Remedies*, 1 *BRIT. MED. J.* 1373, 1373 (1908).

<sup>45</sup> Peter Homan, *Singleton of Lambeth’s Eye Ointment*, 275 *PHARMACEUTICAL J.* 808, 808 (2005).

years before his death, and William's efforts immediately increased sales, so that in 1783 he made £73 for the year.<sup>46</sup> By 1794 William Singleton was making £271 per year, and in the early nineteenth century income from sales leapt up into the thousands of pounds.<sup>47</sup> The accounts also reveal profit margins — or at least returns on the costs of ingredients — of about ten to one.<sup>48</sup> Viewed by comparison to the accounts that survive relating to Anthony Daffy's sales of "Daffy's Elixir Salutis" from the late seventeenth century,<sup>49</sup> or the sums earned by Newbery and James from the marketing of "Dr. James's Fever Powders" these sums are relatively small.<sup>50</sup>

The Defendant, James Bolton,<sup>51</sup> ran Bolton's Medicinal Shop, sometimes referred to as his "Medical warehouse." The shop was located at the Royal Exchange, the London stock exchange, near the South gate, and is referred to in advertisements from 1780,<sup>52</sup> including in a John Luffman song 'The Shops round The 'Change'.<sup>53</sup> It seems Bolton's was a retail outlet devoted to medicines, selling remedies from a range of different manufacturers.<sup>54</sup> The Singleton archive suggests

<sup>46</sup> Folio Containing Summary of Sales (1794) (LMA at B/SIN/39).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Wallis & Haycock, *supra* note 18, at 14.

<sup>50</sup> In one advertisement James alleged Newbery had made over £100,000 from the sale of the Fever Powders and Analeptic Pills. B.G.G. James, *Dr. James's Fever Powder and Analeptic Pills*, TIMES (London), Jan. 1, 1818, at 4B; see also S. ROSCOE, JOHN NEWBERY AND HIS SUCCESSORS, 1740–1814: A BIBLIOGRAPHY 17 (1973) (recounting that Francis Newbery was reputed to have died almost a millionaire).

<sup>51</sup> Bolton died in 1807, and his will is available at The National Archive. Will of James Bolton of Royal Exchange London (Mar. 28, 1807) (TNA at PROB/11/1457/312).

<sup>52</sup> See, e.g., *Antaphraditica*, MORNING HERALD (London), Nov. 7, 1780 (advertising a product for sale at "Bolton's Medicinal Shop"); *By Virtue of Authority*, GEN. ADVERTISER (London), Jan. 26, 1782 (same); *The Oriental Vegetable Cordial*, PARKER'S GEN. ADVERTISER (London), Dec. 7, 1782 (same). The last I have located is in the *Oracle and Daily Advertiser. The Universal Purifying, Anti-Venereal and Antiscorbutic Quintessence of Vegetables, Called Guttae Salutaris*, ORACLE & DAILY ADVERTISER (London), Jan. 23, 1800, at 4; see also *A Case of Insanity*, E. JOHNSON'S BRIT. GAZETTE & SUNDAY MONITOR (London), Apr. 30, 1797, at 5; *Grey's Toothache Lozenge*, TRUE BRITON (London), Feb. 16, 1798, at 8; *Palmer's Laxative Stomach Pills*, TRUE BRITON (London), Apr. 13, 1797, at 2.

<sup>53</sup> John Luffman, THE SHOPS ROUND THE 'CHANGE (1800) (verse three begins "To Birch for fine Turtle, to Bolton for Physic, The first allays hunger, the last cures the Phthisic.")

<sup>54</sup> See *His Infallible Powder for Horses*, WORLD (London), Jan. 28, 1788, at 6; *Sold at Bolton's Medicinal Warehouse*, BATH CHRON., Nov. 25, 1784, at 1; *Sterility and Imbecility*, GEN. ADVERTISER (London), Dec. 28, 1784, at 1; *Sold at Bolton's Medicinal Warehouse*, MORNING HERALD (London), May 26, 1785, at 1.

that Bolton had been engaged in selling medicines as Singleton's for several years, William Singleton noting that: "Bolton . . . has for a number of years counterfeited Mr. Singleton fathers name both in his Bill he delivers with his potts and also in Letter round the outside of the potts by saying Of Singleton Lambeth Butts . . ." <sup>55</sup>

The archive also includes a "counterfeit bill," a handbill that appears to have been issued by Bolton during the time of Thomas Singleton's life. It mimics Singleton's advertisement almost exactly, but identifies only one retailer, Bolton himself:

Dr. JOHNSON's  
Yellow, or Golden Ointment  
PREPARED BY

T. SINGLETON, Lambeth Butts:

Who respectfully informs the Public that the Virtues of this Yellow Ointment or Golden Unguent among others, are these, viz. It is most excellent in curing Disorders in the eyes, if carefully used to the external Part of the Eye, on the Lid, very light and thin, when going to Bed. It cures all Scurvy and scorbutic Humours in any Part of the Body; all Ruby Faces; it takes out speedily all Manner of Pimples, and makes the Skin smooth, it takes away all freckles in the Face, and infallibly cures Carbuncles, Scabs, Scurf and other deformities of the skin; it cures Tetter or Ringworms, though of many Years continuance; and by a due application, entirely destroys all Scurfy and Scorbutic Humours in any Part of the Body.

This Ointment is made up in Gallipots, sealed with a Falcon, and will hold good some Years. The Price of each Pot 2s 0d Duty included; and continues to be sold by Appointment of the Proprietor, Wholesale and retail, at BOLTON's Medicine Shops, the Front of the Royal Exchange, London  
Printed by Howard and Evens. <sup>56</sup>

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<sup>55</sup> Double Folios Containing Summary of Amounts of Ointment Sold 1777–1794 (1794) (LMA at B/SIN/44) [hereinafter Double Folios] (containing draft notice concerning sale of counterfeit ointment at "Bolton's Medicinal Shop").

<sup>56</sup> Handbill Advertising Sale of "Dr. Johnson's/Yellow, or Golden Ointment, Prepared By/T. Singleton/Lambeth Butts" (n.d.) (LMA at B/SIN/143).

## II. THE DECISION TO LITIGATE (AND TO DO SO AT COMMON LAW)

Why did Singleton litigate? In many cases of counterfeiting the matter was disputed through the periodical press, rather than in the courts.<sup>57</sup> The owners of secret recipes sought to alert their customers to the presence of spurious copies that might be being circulated, as well as to inform their customers of where the real product could be bought, what they would look or taste like.<sup>58</sup> For example, in 1709 two rivals issued advertisements and counter-advertisements over who had the right to sell “Tipping’s Liquor” — which was supposed to be “good against Stone, Gravel, Chellick etc.”<sup>59</sup> One advertiser, who was unnamed in the advertisement, asserted that the real product could only be obtained from “Mr. James at King Court in Lombard Street or the Widow Wakefield in Friday Street” and warned that:

Persons whose Fortunes are Desperate, and follow this kind of Piracy, have gotten, or made, a Liquor and Father’d it by the Name of Tipping notwithstanding near 20 Counterfeits of this Nature, have Rise and Fell within a few years. And one of the

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<sup>57</sup> A perusal of eighteenth century advertisements suggests at least two other strategies designed to generate legal deterrents against counterfeiting. The first was to sell the medicines in packaging bearing a particular signature, the view being taken that the “forging” of the signature would be a felony. The second was to inscribe a mark into the tax-stamp required to be included on the packaging of medicines under the Medicines Act, 1783, 23 Geo. 3, c. 62 (U.K.), the forging of which would be a capital offense. See *At This Season Dr. Steers’s Opodeldoc*, GEN. EVENING POST, Jan. 14–17, 1786, at 2; *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, GEN. EVENING POST, Jan. 14–16, 1783, at 2 [hereinafter *For Coughs*, GEN. EVENING POST].

<sup>58</sup> An advertisement for “Dr. Anderson’s, or the Famous Scots Pills” which sought “to prevent counterfeits from Scotland, as well as in and about London” asked customers “to take Notice, That the true Pills have their Boxes sealed on the top (in Black Wax) with a Lyon Rampant, and Three Mullets Argent, Dr. Anderson’s Head betwixt with his Name round it and Isabella English underneath the Shield in a Scroll.” See *Dr. Anderson’s, or the Famous Scots Pills*, LONDON GAZETTE, Oct. 17–21, 1780, at 3; *Dr. Anderson’s, or the Famous Scots Pills*, LONDON GAZETTE, July 20–23, 1776, at 3; *Dr. Anderson’s, or the Famous Scots Pills*, LONDON GAZETTE, Oct. 4–8, 1775, at 2. In one such advertisement, customers are warned to “Beware of Counterfeits, especially an Ignorant Pretender, one Mussen, who keeps a China Shop . . . and sells a notorious Counterfeit, instead of the true Pills.”

<sup>59</sup> The earliest advertisement I have been able to locate for this was in *The Post Man* for March 20–22, 1705, when the product could be bought from The Seven Stars in Garlick Street (southeast of St. Pauls). See *Whereas a Liquor Called Aqua Lithonriptica Vera*, POST MAN & HIST. ACCT. (London), Mar. 20–22, 1705, at 2. However, the Sloane Manuscripts contain a few pages from WILLIAM TIPPING, AN ACCOUNT OF A PLEASANT LIQUOR WHICH DISSOLVES THE STONE IN THE BLADDER OR KIDNEYS (1701), and an identical pamphlet, possibly published by John Jonston in 1652.

new Counterfeits has sprung from the same Stock, and Notwithstanding their specious Pretences, have changed their Hands from time to time, as they have often done, to carry on the Villainy, by the Ill Success they have had, have fully proved themselves to be Notorious Counterfeits.<sup>60</sup>

In response, Matthew Clerke, an apothecary from Duck Lane in West Smithfield, claimed that he:

[H]as the said Secret under the original Author's own Hand, communicated to him by William Tipping his Grandson, who together have a better Right to dispose and make Sale of the valuable Liquor that this Railor'd who will hardly clear himself from having dealt very unhandsomely and ungenerously by the first Author.<sup>61</sup>

In due course, in order to “quiet the publick and frequent Notices given in the News Papers” Clerke arranged for the grandson, William Tipping, to swear under oath before Sir Richard Levett that he had disclosed the recipe to Clerke and no one else.<sup>62</sup> Clerke went on to claim that those who pretended to sell Tipping's Liquor were either selling something that was “Spurious or Counterfeit and so derogating from the Honour and Praise of the Original Author, or has been surreptitiously obtain'd and so detrimental to his Family, and on both Accounts, deserves no Encouragement; but is of Right and faithfully prepar'd by Matthew Clerke.”<sup>63</sup> The unnamed combatant replied that William Tipping's grandfather had never possessed the recipe,<sup>64</sup> after which the vigorous battle seems to have gone quiet, the public (presumably) being left to decide.<sup>65</sup>

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<sup>60</sup> *Whereas Tipping Liquor*, POST MAN & HIST. ACCT., Apr. 9–12, 1709, at 2; *Whereas Tipping Liquor*, POST MAN & HIST. ACCT. (London), Apr. 26–28, 1709, at 2.

<sup>61</sup> *This Is to Give Notice that Tipping's Pleasant Liquor*, POST MAN & HIST. ACCT. (London), July 14–16, 1709, at 2; *Whereas in The Post Man*, DAILY COURANT (London), May 2, 1709, at 2.

<sup>62</sup> *Whereas William Tipping of London*, DAILY COURANT (London), Oct. 11, 1709, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Whereas William Tipping Hath Made an Affidavit*, POST MAN & HIST. ACCT. (London), Nov. 17, 1709, at 2; see also *Matthew Clarke, Apothecary in Duck Lane*, DAILY COURANT, Nov. 28, 1709, at 2.

<sup>65</sup> A decade later, however, a real legal battle was to ensue when William Tipping died intestate, and questions arose as to his widow's entitlement to the recipe (and particular whether it formed part of his estate). Lord Macclesfield L.C. held that whether it was part of the estate or not depended on whether the widow had found the recipe on a piece of paper or it had been communicated to her during the deceased's lifetime. *Tipping v. Tipping*, (1721) 22 Eng. Rep. 589; 1 P. Wms. 729, 729-

Singleton had, as we have seen, already tried to put down Bolton using adverts, but, even if this failed, his decision to try and use the courts does seem somewhat surprising, given the relatively small size of the business (compared to the costs of legal action). The costs awarded in some of the contemporary cases before Lord Mansfield were in the region of £30-£40, which at that stage would have been well over six months income for Singleton.<sup>66</sup> Singleton's decision to litigate is all the more remarkable because, despite the outcome, the business continued to flourish, with annual income increasing year on year after William took over from his father.<sup>67</sup>

Why did William Singleton proceed at common law,<sup>68</sup> rather than in Chancery? The explanation is also not obvious. An injunction would

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31; see *This Is to Give Notice*, POST MAN & HIST. ACCT. (London), Aug. 4-6, 1719, at 2 (advertising that the widow was fully instructed and continuing to make the recipe). For the Plaintiff's bill, see Plaintiff's Bill and Answer (1720) (TNA at C11/983/30).

<sup>66</sup> 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 739 n.3 (1992) (describing *Swinton v. Claphamson*, (July 10, 1765) (Eng.) (TNA at KB 139/98, fol. 66b, No. 71), where plaintiff received £49 plus costs, £49 10 sh. damages in total); *id.* at 741 n.2 (describing *Greenough v. Dalmahoy*, (Dec. 9, 1769) (Eng.) (TNA at KB 139/99, fol. 3b, No. 35), where plaintiff received £80 plus costs, £95 damages in total); *id.* at 742 n.1 (describing *Godfrey v. Ellison*, (June 13, 1770) (Eng.) (TNA at KB 139/99, fol. 29b, No. 50), where defendant received £22 10 sh. costs); *id.* at 747 n.2 (describing *Greenough v. Lambertson*, (Dec. 18, 1777) (Eng.) (TNA at KB 139/100, fol. 35b, No. 36), where plaintiff received £37 costs, £57 damages in total). For the complexities associated with costs, which derived from the Statute of Gloucester, 6 Edw. 1, c. 1 (1278) (Eng.), see WILLIAM TIDD, *THE LAW OF COSTS* (London, Strahan & Woodfall 1793).

<sup>67</sup> Folio Containing Summary of Sales, *supra* note 46.

<sup>68</sup> There were three common law courts — Exchequer, Common Pleas, and King's Bench — each of which could, by the 1700s, entertain personal actions such as “actions on the case.” See JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 49-50 (4th ed. 2002). The choice between them, Baker explains, “often depended on the sphere of practice of the attorney consulted, on subtle differences in costs, and procedural advantages.” *Id.* at 50. Although most of the common law cases discussed in this article were in King's Bench, it seems there was at least one case where a plaintiff succeeded in the Court of Common Pleas. *John Norton v. Benjamin Atkinson and Another* (Dec. 1774) (Eng.). In this case, Norton, the inventor of “Maredant's Antiscorbutic Drops,” proceeded in a plea of trespass upon the case against two confectioners who operated from 269 Borough High Street (on the south side of the River Thames over London Bridge) — Benjamin Atkinson and James Cole. Norton appointed Edward Stables his attorney, while Atkinson and Cole used James Gunter. The case came on before the Court of Common Pleas at the Guildhall in December 1774, and Norton was awarded £20 in damages by De Grey J. with the total award of damages and costs being recorded as £64 16 sh. See *The Co-Partnership or Joint-Trade and Dealing*, DAILY ADVERTISER (London), Apr. 5, 1774, at 2 (detailing the break-up of the partnership); News, GEN. EVENING POST (London), Dec. 10-13, 1774, at 4 (reporting the trial, suggesting the trial was December 3rd); TNA at IND 1/6541 (detailing judgment, but with no plea roll number); TNA at CP40/3715, App. 6

have had the advantage that it would have forced Bolton to stop trading in Singleton's ointment. Suing at common law meant that the best he could hope for was an award of damages and costs (the only remedies available at law). One answer may be that he was advised against proceeding in Chancery, as there was no authority in his favour, and some against.<sup>69</sup> In particular, there was *Blanchard v. Hill* (1742),<sup>70</sup> in which Lord Hardwicke declined to grant an injunction preventing the defendant from using Blanchard's mark, a picture of the "Great Mogul," the emperor of Delhi, with the words "The Great Mogul" above, on playing cards. The report, in Atkyns reports, is particularly unclear and the refusal of injunctive relief by Lord Hardwicke, a judge sympathetic to developing equitable principles to prevent fraud, has puzzled scholars.<sup>71</sup> The case has now been deciphered by Professor Norma Dawson who not only places it in the context of the regulation of heraldry by the Court of Chivalry, but also, through a close analysis of the pleadings, explains why Lord Hardwicke found as he did, rather than adopting the Attorney General's arguments (which were based on *Southern v. How*).<sup>72</sup> Professor Dawson shows that Blanchard based his title to the mark on the rules of the Company of the Makers of Playing Cards in the City of London, granted a Royal Charter by King Charles I on October 22, 1628. Indeed, Blanchard had, prior to seeking the assistance of the

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(appendix with list of attorneys).

<sup>69</sup> The first recorded case in which such relief was granted was *Day v. Day*, in 1816, where a manufacturer of blacking was ordered to refrain from using labels in imitation of those employed by the plaintiff. R.H. EDEN, *A TREATISE ON THE LAW OF INJUNCTIONS* 370 (2d ed. 1839); see also *Hogg v. Kirby*, (1803) 32 Eng. Rep. 336 (Ch.) 336; 8 Ves. Jun. 215, 215 (Ch.) granting of an injunction by Lord Eldon L.C. in order to prevent defendant from publishing magazine as if it was a continuation of the plaintiff's monthly magazine; 2 JOHN EYKYN HOVENDEN, *A GENERAL TREATISE ON THE PRINCIPLES AND PRACTICE BY WHICH COURTS OF EQUITY ARE GUIDED AS TO THE PREVENTION OR REMEDIAL CORRECTION OF FRAUD* 70 (1825).

<sup>70</sup> *Blanchard v. Hill*, (1742) 26 Eng. Rep. 692 (Ch.) 692; 2 Atk. 484, 484 (Ch.).

<sup>71</sup> See, e.g., EDWARD LLOYD, *THE LAW OF TRADE MARKS* 4 (2d ed. 1865) ("[I]t is not easy to follow the reasoning that led to Lord Hardwicke's conclusions."); L.B. SEBASTIAN, *THE LAW OF TRADE MARKS AND THEIR REGISTRATION* 6-7 (3d ed. 1890) (arguing that Lord Hardwicke was reluctant to recognise a monopoly, which Sebastian suggests might have been because he did not understand the difference between copyright, patents, and trademarks); UPTON, *supra* note 2, at 12-13 ("It is not easy to understand upon what grounds any reasonable apprehension of 'mischievous consequences,' could have been entertained, from such an exercise of the powers of the Court of Equity.").

<sup>72</sup> See generally Norma Dawson, *English Trade Mark Law in the Eighteenth Century: Blanchard v. Hill Revisited — Another "Case of Monopolies"?*, 24 J. LEGAL HIST. 111, 134 (2003) (discussing Lord Hardwicke's motivation for the *Blanchard* decision).

Court of Equity, already sought the assistance of the Court of the Company, and the pleadings were interpreted by the defendant and Lord Hardwicke as an attempt to enforce the judgment of the Company court. Lord Hardwicke saw the Charter as an illegitimate monopoly, and as the claim was directly based on the rules and practices under the Charter, he refused to grant injunctive relief.<sup>73</sup> However, while we now know that *Blanchard v. Hill* was a case with its own specificities, Singleton's legal advisor would likely have understood it on the basis of Atkyns's report alone (which was first published in 1765–1768, and produced in a second edition in 1781, only two years before *Singleton v. Bolton*).<sup>74</sup> Of course, it is equally possible that proceeding in Chancery might have been considered too expensive especially because in a case where the matter was uncertain, the Court might in any case send it to be tried at law.<sup>75</sup> A further possibility is that Singleton's lawyers knew of the favourable, albeit unreported, precedents at common law and advised that route without considering Equity.<sup>76</sup> Certainly, anyone who read the medical advertisements in the papers would have been aware that one such manufacturer, Thomas Greenough, succeeded in King's Bench against (by the time of *Singleton v. Bolton* in 1783) three counterfeiters of his "Pectoral Lozenges of Tolu" and obtained "considerable damages."<sup>77</sup>

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<sup>73</sup> See generally OLDHAM, *supra* note 66, at 739 (documenting the *Swinton v. Claphamson* case).

<sup>74</sup> 2 JOHN TRACY ATKYNS, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY, IN THE TIME OF LORD CHANCELLOR HARDWICKE 484 (2d ed. 1781). The version in the English reports derives from the 3rd edition, edited by Francis William Sanders and published in 1794. On the history of Atkyns reports, see N.G. Jones, *Atkyns, John Tracy (1706–1773)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com/view/article/864> (last visited Sept. 22, 2013).

<sup>75</sup> See, e.g., *Motley v. Downman*, (1837) 40 Eng. Rep. 824 (Ch.) 830; 2 My. & Cr. 1, 17 (Ch.) (Lord Cottenham L.C.) (refusing to maintain an injunction because rights were finely balanced and needed to be determined at law); John Morris, *On Fraudulent Trade Marks*, 5 SOL. J. & REP. 820, 821 (1861) ("[T]he Court of Chancery rarely ever grants an injunction until the legal right to the trade mark has been established by an action or issue at law.").

<sup>76</sup> See *infra* notes 120–129, 160–188 and accompanying text (discussing other cases that had already come before Lord Mansfield). There is also some evidence of an action in the 1730s before Lord Eyre C.J. concerning Godfrey's Cordial. BAKER, *supra* note 68, at 459 n.72, also refers to two seventeenth century cases that are mentioned in Girdler's manuscripts in Cambridge University Library: one, *Waldron v. Hill* (1659) in which a scythe-maker brought an action for use of his mark; the other, *W.E. v. R.M.* (1670), relating to cheese-making. Whether these could have been known, and whether cases on cheese and cloth would have been considered convincing precedents, requires further investigation.

<sup>77</sup> See *For Coughs*, GEN. EVENING POST, *supra* note 57, at 4; *For Coughs, Hoarseness*,



## III. THE HEARING AND DECISION

Whatever the reasons, Singleton proceeded in King's Bench.<sup>78</sup> The plea roll for the case survives in the National Archives in Kew,<sup>79</sup> and indicates that Singleton was represented by the attorney John Barber and Bolton by Thomas Thompson.<sup>80</sup> The pleadings recited that William Singleton was possessed of the "art, secret and mystery" of making an ointment called "Dr. Johnson's famous Yellow Ointment" and for "divers [sic] years" had made and sold that ointment in gallipots bearing Singleton's name, and had "thereby acquired to himself divers great gains and profits for the same." The plea complained that James Bolton, a shop owner, knowing about Singleton's practice, "contriving and wrongfully and fraudulently intending to injure the said William," had arranged for the manufacture of five thousand gallipots bearing Singleton's name and had filled them with an ointment resembling "Dr. Johnson's famous Yellow Ointment" and had sold and offered them for sale, depriving Singleton of sales and the profits thereupon. The plea claimed damages of £500. Bolton's response was merely that he was not guilty of the allegation.

An initial hearing took place on August 2, 1783. The surviving records offer no indication of who pleaded the case in court. William Murray, by now known as Lord Mansfield, the long serving Lord Chief Justice, was the presiding judge.<sup>81</sup> Singleton was non-suited.<sup>82</sup> Mansfield's notebooks, which survive in the Mansfield family seat in Scone, Scotland, and have been transcribed by the legal historian,

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*Etc. Pectoral Lozenges of Tolu*, PUB. ADVERTISER (London), Nov. 1, 1783, at 4; *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, LONDON CHRON., Dec. 2-4, 1783, at 2; *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, ST. JAMES' CHRON. (London), Jan. 3-6, 1784, at 2.

<sup>78</sup> For an account of proceedings in King's Bench, see generally 1 WILLIAM BOHUN, THE PRACTISING ATTORNEY OR LAWYER'S OFFICE (E. & R. Nutt & R. Gosling 1724). Beginning with a Bill of Middlesex, the defendant would be arrested and then issued with a declaration specifying the alleged wrongdoing, to which his attorney or counsel might plead, and if the defense is that there is no such action in law, demur. Where there is a denial, issue is joined, and the case may proceed to trial. No account survives of the course taken in *Singleton v. Bolton*.

<sup>79</sup> TNA at KB 122/485, roll number 1051.

<sup>80</sup> Barber was one "Barber and Holt" of Essex Ct., Middle Temple, and in the judgment books it is Holt who is acknowledged. See TNA at KB 139/101, fol. 71b, No. 192; TNA at KB 172/1, fol. 279 (listing attorneys admitted between 1729 and 1788, including Thomas Thompson, admitted 1777).

<sup>81</sup> Mansfield was Chief Justice from 1756 through 1788.

<sup>82</sup> *Singleton v. Bolton*, Trinity Term 23 Geo. 3 (1783) (TNA at KB 168/27, fol. 40) ("London. Wm Singleton v. James Bolton -ex Ca -2 - Holte B - 7- B-").

Professor James Oldham, offer the only surviving details of these initial proceedings.<sup>83</sup> These refer to the proceedings in these terms:

Case, for Inscribing, Painting and Marking on Divers Gallipots in the Shape & Imitation of the Plaintiff's Wherein He Put & Sold an Ointment for the Cure of Disorders in the Eyes, Called Doctor Johnson's Yellow Ointment, the Inscription T. Singleton, Lambeth Butts, and for Putting in Said Gallipots a Mixture Resembling Plaintiff's & Fraudulently Selling the Same to Persons Requiring Dr. Johnson's Famous Yellow Ointment Prepared by the Plaintiff; 2d. for fraudulently Exposing to Sale & Selling an Ointment Resembling That Prepared by Plaintiff As the Ointment Prepared & Sold by Plaintiff.

Plea: Not Guilty.

Nonsuit.<sup>84</sup>

The summary of the allegation was almost certainly written by a clerk,<sup>85</sup> before the hearing took place, as an aid to the court when the hearing came on. In contrast to other similar sorts of cases,<sup>86</sup> the Mansfield notebooks contain no record of the evidence given in the case.<sup>87</sup> Although we cannot be certain of the reason for this, it probably suggests that the court got to (what it saw as) the nub of the case following opening submissions, so that it proved unnecessary to hear any witnesses. The decision to “non-suit” recognized a legal (rather than evidential) defect in Singleton’s claim.<sup>88</sup>

Singleton then brought a motion for a new trial on November 13, 1783.<sup>89</sup> Lord Mansfield again rejected the claim, and Bolton recovered costs totalling £29.<sup>90</sup> The report of the reasoning in this hearing is

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<sup>83</sup> See OLDHAM, *supra* note 66, at 769 (transcribing Mansfield’s notes).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 164 n.10.

<sup>86</sup> See, e.g., OLDHAM, *supra* note 66, at 739, 741-42, 746 (discussing the evidence provided in *Swinton v. Claphamson*, *Greenough v. Dalmahoy*, *Greenough v. Lambertson*, and *Godfry v. Ellison*, discussed below).

<sup>87</sup> *Id.* at 769. That said, in the report Lord Mansfield is supposed to have said that “no evidence was given of the defendant having sold it as if prepared by the plaintiff” — suggesting that evidence may have been tendered.

<sup>88</sup> See OLDHAM, *supra* note 66, at 150 (explaining situations in which a plaintiff was non-suited as ones where the judge concluded that “the undisputed facts yield no legal basis for recovery”).

<sup>89</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.).

<sup>90</sup> TNA: KB 139/101, fol. 71b, No. 192, *supra* note 79. The date of the award is

contained in “Douglas’s Reports,” and it was this that came to influence the late nineteenth century jurists. Although most of the reports in “Douglas” were prepared by Sylvester Douglas,<sup>91</sup> First Baron Glenbervie, who was a barrister from Lincoln’s Inn and has a good reputation for accuracy,<sup>92</sup> the history of the report of *Singleton v. Bolton* is more complex and uncertain. In fact, the *Singleton* case first appeared in 1831 — almost fifty years after the decision itself — in the fourth edition of “Douglas” edited by Henry Roscoe (1800–1836).<sup>93</sup> In the preface, the editor says he relied on the manuscripts of Mr. Justice (Sir Soulden) Lawrence (1751–1814), Mr. Justice (Simon) Le Blanc (1748/9–1816), Mr. Justice Francis Buller (1746–1800), Mr. George Wilson, Thomas Davenport, Mr. Bowyer, and an unknown reporter. It is possible that the manuscript came from Bowyer, who might have been Robert Bowyer who conducted the arbitration over ownership of the recipe in the 1820s. Another possibility is that the note on the hearing on November 13 that formed the basis of the report was a note by Mr. Justice Buller, and that he rather than Lord Mansfield had heard the case.<sup>94</sup> The *General Evening Post* for November 15, 1783 reports that on the previous day Lord Mansfield had been needed in the House of Lords and Buller J sat in King’s Bench in his place. Roscoe included a case in the third volume of Douglas from November 14, 1783 (i.e., *Denn dem Briddon and Another v. Page*).<sup>95</sup> However, it is notable that Roscoe explains that this report was derived from the manuscripts of Buller J (and there is no such annotation for *Singleton*). Moreover, the third volume also offers a reference to another case determined on November 13, 1783, *Ellis v. Galindo*, that was decided

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November 19, 1783. There are two entries in the Index of Judgments, TNA: KB 168/151, one for Trinity (referring to 40), and one for Hilary Term in the next regnal year (referring to 16).

<sup>91</sup> *Singleton*, 99 Eng. Rep. at 661.

<sup>92</sup> Van Vechten Veeder, *The English Reports, 1292–1865*, 15 HARV. L. REV. 1, 22 (1901) (referring to the excellence of Douglas’s work).

<sup>93</sup> 3 HENRY ROSCOE, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING’S BENCH IN THE TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, AND TWENTY-FIFTH YEARS OF THE REIGN OF GEORGE III FROM THE MANUSCRIPTS OF THE RIGHT HON. SYLVESTER DOUGLAS, BARON GLENBERVIE, AND ALSO FROM THE MANUSCRIPTS OF MR. JUSTICE LAWRENCE, MR. JUSTICE LE BLANC, MR. GEORGE WILSON, &C. 293 (Henry Roscoe ed., 1831).

<sup>94</sup> If the decision was in fact one of Buller J.’s rather than Lord Mansfield C.J.’s, it would not alter its significance as a matter of precedent, but it might mean that Lord Mansfield C.J.’s other decision shed less light on the interpretation of *Singleton* than is supposed in what follows.

<sup>95</sup> *Denn Dem. Briddon and Another v. Page*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 294, 294 (K.B.).

by the Court *en banc*. This was included in the new edition by way of a footnote to *Dingwall v. Dunster*, from November 15, 1779, in the first volume of Douglas.<sup>96</sup> This would seem to confirm that Lord Mansfield was present on November 13.<sup>97</sup> Most likely, the report derived from papers then in the possession of John Lucius Dampier. Part of that collection can today be found in Lincoln's Inn library,<sup>98</sup> and some of the cases in the volume are clearly drawn from bench papers of some of the judges in King's Bench therein. However, while *Singleton* is not amongst the surviving papers, it seems likely that it was at the time. An index created by Soulden Lawrence, now held in Lincoln's Inn library, has a reference to the case.<sup>99</sup> Unfortunately, the whereabouts of the manuscript to which the index refers is unknown. It is therefore impossible to guess who created the report, or to estimate how reliable an account of Lord Mansfield's words it might be.<sup>100</sup>

The report of the case relates that the Defendant had begun selling a medicine under the name *Dr. Johnson's Yellow Ointment*, that the Plaintiff had brought an action against him which had gone to trial, at which point Singleton had been "non-suited" but had obtained a rule for a new trial,<sup>101</sup> and that this was discharged by Lord Mansfield.<sup>102</sup> The Judge is reported as having stated:

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<sup>96</sup> *Dingwall v. Dunster* (1779) 99 Eng. Rep. 161 (K.B.) 161, 163; 1 Doug. 247, 247, 250 (K.B.).

<sup>97</sup> However, it seems unlikely that Willes J. in fact sat on November 13th, as on November 12th Lord Mansfield C.J. had postponed a trial because Willes J. had rushed away to Oxford to see his son who was "dangerously ill." Buller J. deputized for Willes J. in giving the charge to the Grand Jury on November 16th.

<sup>98</sup> Edmund Heward, *Dampier Manuscripts at Lincoln's Inn*, 9 J. LEGAL HIST. 357, 357 (1988).

<sup>99</sup> SOULDEN LAWRENCE, INDEX TO THE NAMES OF THE CASES IN MSS NOTES AND MY PAPER BOOKS AND IN THE PAPER BOOKS OF ASHURST AND BULLER JUSTICES OF THE KING'S BENCH 45 (n.d.) (in Dampier collection at Lincoln's Inn Library, London) (referring to *Singleton v. Bolton* as being at "E.152"). I am grateful to Guy Holborn, the librarian at Lincoln's Inn, and Professor Oldham, who is transcribing the manuscripts for the Selden Society, for help in pursuing this question.

<sup>100</sup> This is not to say that the manuscript might not have been used as a precedent prior to publication in 1831. See James Oldham, *The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges*, in MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES 30, 35-37 (Anthony Musson & Chantal Stebbings eds., 2012) (discussing the importance of manuscript reports in influencing court proceedings, and specifically referring to the third volume of ROSCOE, *supra* note 93, at 35, 37).

<sup>101</sup> See OLDHAM, *supra* note 66, at 769 n.1 (stating that "a subsequent motion for a new trial was rejected").

<sup>102</sup> *Id.* For background on the procedural mechanisms involved, see generally WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS

[I]f the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both the plaintiff and defendant use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration.<sup>103</sup>

#### IV. UNDERSTANDING THE REPORTED DECISION: FOUR INTERPRETATIONS

So what was the holding in *Singleton v. Bolton*? Why did Singleton lose? The report, whatever its origins or accuracy, has been subject to at least three readings. Some commentators have taken the view that Singleton's title was insufficiently established. Others consider this a case of a descriptive or generic mark. Yet others argue that the court would not protect a quack remedy. I will look at these suggestions in turn, before offering a fourth.

##### A. Title

Commentaries, albeit over 50 years later, read the judgment as one in which the plaintiff's title was insufficient. The rationale for the decision (in legal terms, the *ratio decidendi*) was to be found in Lord Mansfield's reported statement that there was "no patent, nor any letters of administration."<sup>104</sup> One author, writing in the *Monthly Law Magazine* in 1841, thus observed that: "[T]he plaintiff had acquired no better right to the medicine and the mark than the defendant. They were both using a mark and selling a medicine which belonged as

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(1790).

<sup>103</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.); see also OLDHAM, *supra* note 66, at 769 n.1; ROSCOE, *supra* note 93, at 293, 293 n.a (Roscoe has added a footnote to the report, which contains a reference to the 1824 decision of *Sykes v. Sykes*, (1824) 107 Eng. Rep. 834 (K.B.)). The report contains no reference to *Singleton v. Bolton*, but seems to have proceeded on the basis that the common law action was well-established, the case importantly extending liability to the situation in which goods bearing a trader's mark placed there without the owner's authorization are supplied to a distributor who, while not himself misled by the mark, will pass on the goods to others who will be misled. The reports of Richard Vaughan Barnewall and Cresswell Cresswell are regarded as highly accurate, and it seems likely that counsel, Henry Brougham, did not cite the *Singleton* case.

<sup>104</sup> *Singleton*, 99 Eng. Rep. at 661.

much to one as the other.”<sup>105</sup> Making a similar point, another commentator saw the case as turning on the fact that the name was that of a third person, and argued that there was no restriction on such behavior.<sup>106</sup> The implication of this interpretation is that the conclusion in *Singleton* would have been different if William Singleton could have demonstrated that he had in some sense continued operating the business of Thomas Singleton, that is, as we would conceptualize it today, that he had been assigned the goodwill in the business.<sup>107</sup>

Some support for the view that this was the basis for the decision can be found in differences between the plea contained in the plea roll and the report of the later hearing. The plea roll nowhere mentions Thomas Singleton, resting the claim purely on William Singleton’s possession of the “secret, art and mystery,” and use of the name.<sup>108</sup> Yet the summary of the facts for the November ruling begins by referring to Thomas Singleton, highlighting, perhaps that by this point the history of the passage of the secret had taken on legal significance.<sup>109</sup>

Furthermore, a decision that Mansfield had given only a few months earlier (and while the *Singleton* case was pending trial), *Norton v. Hayman*, seems to have been based on just such reasoning. This case related to the recipe for “Maredant’s Antiscorbutic Drops,”<sup>110</sup> sales of which (at half a guinea and six shillings a bottle) apparently generated to £8000 per year. The remedy was said to have been invented by a

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<sup>105</sup> *Trade Marks*, MONTHLY L. MAG., Dec. 1840, at 203, reprinted in 25 AM. JURIST & L. MAG. 269, 271 (1841).

<sup>106</sup> *The Infringement of Unpatented Inventions*, 3 PENN. L.J. 143, 147 (1844); see also SEBASTIAN, *supra* note 71, at 7.

<sup>107</sup> This also was my initial reading. See Lionel Bently, *From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 3, 8 n.19 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

<sup>108</sup> TNA at KB 122/485, roll number 1051, *supra* note 79.

<sup>109</sup> *Singleton*, 99 Eng. Rep. at 661.

<sup>110</sup> See generally JOHN NORTON, AN ACCOUNT OF REMARKABLE CURES, PERFORMED BY THE USE OF MAREDANT’S ANTISCORBUTIC DROPS, PREPARED BY JOHN NORTON, SURGEON, IN GOLDEN-SQUARE, LONDON (1772) (comprising testimonials as to the effectiveness of the remedy). The medicine was “chiefly composed of mercury.” FRANCIS SPILSBURY, FREE THOUGHTS ON QUACKS AND THEIR MEDICINES 62 (1776) [hereinafter FREE THOUGHTS]. Compare the Patent, which stated “[t]he substances used in the preparation of the medicine are calomel, gentian root, ginger, orange peel and cochineal.” PATENTS FOR INVENTIONS: ABRIDGEMENTS OR SPECIFICATIONS RELATING TO MEDICINE, SURGERY, AND DENTISTRY 24 (London, George E. Eyre and William Spottiswoode 2d ed. 1872).

surgeon, John Norton, who had obtained a patent for it in 1764.<sup>111</sup> After he died in 1783,<sup>112</sup> and some years after the patent had lapsed, John Hayman of Golden Square,<sup>113</sup> began making the Drops.<sup>114</sup> The widow of the surgeon, Mrs. Norton, to whom her husband had communicated the recipe (and bequeathed its benefit),<sup>115</sup> brought an action in King's Bench against Hayman. At the trial at Westminster Hall on July 15, 1783, Mrs. Norton was non-suited. According to the newspaper report, the trial lasted several hours and "it came out in evidence . . . that Mr. Norton, the inventor, had, in his lifetime, communicated the invaluable secret of the composition to his late

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<sup>111</sup> The patent, which would be number 820 in Woodcroft's Index, was dated November 30, 1764, and the specification was deposited in the Rolls Chapel. A pamphlet published in 1776 assumed that the medicine was unpatented (contrasting the circumstances with those pertaining to "Dr. James's Fever Powders"). TO THE MASTER, WARDENS, AND COURT OF ASSISTANTS OF THE CORPORATION OF SURGEONS, ON THEIR PERMITTING ALIENS, APOTHECARIES, AND QUACKS TO ENCROACH UPON THE PROVINCE OF SURGEONS, MEMBERS OF THE CORPORATION 25-28 (London, 1776) (discussing NORTON, *supra* note 110, and proposing that the Corporation tax the money he made from the Drops).

<sup>112</sup> MORNING CHRON. & LONDON ADVERTISER, May 24, 1783, at 3 (stating that Norton died on May 23, 1783).

<sup>113</sup> For an image of Hayman's trade card, showing the house at Golden Square, which was built by Norton, but later became "the residence and property of his assistant and successor," John Hayman, see PROSPECT OF THE ORIGINAL HOUSE, BUILT BY THE LATE SURGEON NORTON, INVENTOR OF MAREDANT'S DROPS, THE SOUTH SIDE OF GOLDEN SQUARE, LONDON (n.d.), available at <http://www.tate.org.uk/art/artworks/british--school-prospect-of-the-original-house-built-by-the-late-surgeon-norton-inventor-t11373>.

<sup>114</sup> In fact, Hayman had already been selling "Maredant's Drops." See Advertisement, *Maredant's Drops*, FELIX FARLEY'S BRISTOL J. (London), May 11, 1782, at 4 (specifically cautioning the public about Hayman's remedy and stating that his claim to have assisted in the preparation of the remedy and thus learned the recipe from Norton was "absolutely false").

<sup>115</sup> MORNING HERALD & DAILY ADVERTISER (London), May 29, 1783, at 3 (asserting she was the "only person whom her late husband ever instructed the secret of preparing that inestimable Medicine"); MORNING HERALD & DAILY ADVERTISER (London), June 3, 1783, at 3 (reporting funeral of Norton on May 31, 1783, and that he had bequeathed the recipe to his wife). Hayman admitted Mrs. Norton's familiarity with the recipe in JOHN HAYMAN, A TREATISE ON THE SCURVY, &C. COPIOUSLY EXPLAINING, FROM EXPERIMENTAL CERTAINTIES, THE NATURE AND AFFINITY OF SCORBUTIC DISEASES WITH SOME NEW THOUGHTS ON THE BEST MEANS OF PREVENTING AND CORRECTING THEM, TO WHICH IS ADDED AN ACCOUNT OF THE SUCCESS AND EFFICACY OF HAYMAN'S MAREDANT'S DROPS 23-24 (London, 1791). In fact, two others, Norton's father of Charles Street in Covent Garden and Joseph Deering, of Upper James St., Golden Square, also claimed to be able to make the remedy. The latter, like Hayman, had been a servant of Norton, but from 1778 had offered his own version of anti-scorbutic drops. See WESTMINSTER J. & LONDON POL. MISCELLANY, Jan. 24, 1778, at 4 (now at John St., Golden Square).

chief manager and assistant . . . which stamps what may be termed a legal sanction on his preparation of that medicine.”<sup>116</sup>

Is it possible, then, that Lord Mansfield effectively followed *Norton v. Hayman*, non-suiting William Singleton in August and then rejecting William Singleton’s claim in November because he, like Mrs. Norton, failed to establish title to the recipe? Two matters suggest that this was probably not the basis for Singleton’s failure. Firstly, it is clear that Thomas Singleton did leave the recipe in his will to William Singleton. Although William could not trace assignments back to “Dr. Johnson,” the supposed inventor, he certainly could demonstrate some sort of title. Second, and more significantly, in the report, the words of Lord Mansfield relating to title come after his conclusion as to the “name” issue, and following the phrase “[t]he only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended.”<sup>117</sup> Lord Mansfield thus appears to be highlighting that there was no other basis for interference once the action based on the trademark fell away: Singleton had failed to claim, let alone establish, that he had any distinct basis for the action, based perhaps on a patent,<sup>118</sup> or, possibly rights in the trade secret passed to him on the death of a prior owner (through “letters of administration”).<sup>119</sup>

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<sup>116</sup> MORNING CHRON. & LONDON ADVERTISER, July 19, 1783, at 3. Also repeated in WHITEHALL EVENING POST (London), July 17–19, 1783, at 4; GAZETEER & NEW DAILY ADVERTISER (London), July 19, 1783, at 3; PARKER’S GEN. ADVERTISER & MORNING INTELLIGENCER (London), July 19, 1783, at 3; GEN. EVENING POST (London), July 22–24, 1783, at 4; FELIX FARLEY’S BRISTOL J. (London), July 26, 1783, at 1. The effect of the evidence was disputed by Norton’s surviving brother, William Norton, and in 1786 Hayman brought an action against him for libel, being awarded 10 shillings in damages. See THE TRIAL AT FULL LENGTH, AS TAKEN DOWN BY MR. BLANCHARD, SHORTHAND WRITER, BETWEEN MR. JOHN HAYMAN, OF GREAT MARLBOROUGH-STREET, PLAINTIFF, AND MR. WILLIAM NORTON, OF WARWICK-STREET, GOLDEN-SQUARE 1-3, 61 (1786). Hayman himself referred to Lord Mansfield C.J.’s findings in his advertising in 1800. HAYMAN’S OR THE GENUINE ORIGINAL NORTON’S MAREDANT’S ANTISCORBUTIC DROPS 1 (1800).

<sup>117</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.).

<sup>118</sup> *Id.* Lord Mansfield was, when he was a law officer, charged with dealing with patent applications at a time when applications relating to pharmaceutical patents were becoming common. While Nehemiah Grew’s 1698 “Epsom Salts” is frequently cited as the first pharmaceutical patent, and there were five more between the turn of the century and 1740, the 1740s saw fourteen such applications, and the 1750s saw twenty-one patent grants for medicines. See ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 86, 98 (2009); see also F.H. Rawlings, *Old Proprietary Medicine*, 26 PHARMACEUTICAL HISTORIAN 4, 4-8 (1996).

<sup>119</sup> *Singleton*, 99 Eng. Rep. at 661. Whether an attempt to transfer rights in trade secrets in this way would be recognized in law was unclear. For the difficulties with



Moreover, it seems unlikely that Lord Mansfield would have meant that Singleton could not use the name “Dr. Johnson” without demonstrating some inherited right to do so.<sup>120</sup> In fact, an earlier decision in a case in which Lord Mansfield presided, *Swinton v. Claphamson* in 1765, suggests this could not have been the explanation.<sup>121</sup> The case related to Daffy’s *Elixir Salutis*, a preparation said to have been invented by Anthony Daffy in the mid-seventeenth century.<sup>122</sup> One advertisement from 1743 proclaims *Daffy’s Elixir* to be “[u]niversally allow’d to be the most beneficial Cordial in the World, and Sovereign Remedy to most Distempers incident to Mankind; approv’d of and recommended by the most eminent of the College of Physicians in London, who publickly declare it to be the best Family Medicine ever expos’d to sale.”<sup>123</sup> The elixir was sold by Mrs. Mary Swinton of 46 Salisbury Court,<sup>124</sup> which, according to the evidence presented to the Court (if not in truth), was the house originally occupied by the inventor,<sup>125</sup> and signified by a sign comprising two

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the position today, see generally TANYA APLIN, LIONEL BENTLY, PHILLIP JOHNSON & SIMON MALYNICZ, *GURRY ON CONFIDENCE: THE LAW OF CONFIDENTIAL INFORMATION* ch. 8 (2012). For uncertainties in relation to the development of protection for such secrets, see generally *id.* at ch. 2 (describing the history of protection of confidential information as obscure).

<sup>120</sup> L.B. Sebastian, who interprets *Singleton v. Bolton* in this way, suggests that by 1878 it was no longer the law. SEBASTIAN, *supra* note 71, at 4, 7.

<sup>121</sup> See OLDHAM, *supra* note 66, at 739 (transcriptions of Mansfield’s notes).

<sup>122</sup> See Anthony Daffy, *Advertisement for Elixir Salutis*, MERCURIUS ANGLICUS, Mar. 6, 1680, at 92 (complaining about counterfeits and claims that he was dead). Daffy was then based at Prujean’s Court in Old Bailey, and claimed to have made the elixir for over 20 years. See also BANKS’S CURRENT INTELLIGENCE (London), Mar. 13–20, 1680, at 2b; Advertisement, THE PROTESTANT (DOMESTICK) INTELLIGENCE (London), Mar. 16, 1680, at 2b. After Daffy’s death his wife, Ellen, continued to make and sell Elixir, but moved to Salisbury Court. Advertisement, LONDON GAZETTE, Apr. 12–15, 1686. For a detailed account of the fate of the business, and the dispute that occurred when Ellen remarried Charles Trubshaw, see Wallis & Haycock, *supra* note 18, at 7–8.

<sup>123</sup> The advertisement was inserted by Richard Rock of King Arms Court. Richard Rock, Advertisement, DAILY POST (London), Oct. 26, 1743, at 2.

<sup>124</sup> Wallis, *Eighteenth Century Medics*, has an entry for Peter Swinton, 1728–1785, a surgeon-apothecary at Salisbury Court, Fleet St. PETER JOHN WALLIS & RUTH V. WALLIS, *EIGHTEENTH CENTURY MEDICS* 582 (2d ed. 1988).

<sup>125</sup> A pamphlet, *Directions Given by Anthony Daffy* (1700), refers to Ellen Daffy making the Elixir in Salisbury Court, “a large golden call being over the gate.” ELLEN DAFFY, *DIRECTIONS GIVEN BY ANTHONY DAFFEY* (1700). According to Wallis & Haycock, *supra* note 18, at 9, Ellen Daffy moved with Trubshaw to Salisbury Court, so Anthony Daffy had never in fact lived there, and when Trubshaw’s marriage to Ellen broke down, Ellen moved out to a nearby house “known as Dr. Brown’s, notable for the large golden ball over the gate, and running a rival Elixir business from there.”

large golden balls.<sup>126</sup> The case was heard before Lord Mansfield at the Guildhall, and his notes relate how various witnesses testified that they had gone to the wrong address, and in various ways were induced to purchase an elixir from a Mrs. Elizabeth Snell and Thomas Claphamson, who traded in the name Trubshaw.<sup>127</sup> The deception involved putting a sign outside the house, also of two golden balls, and confirming orally that the goods were “Daffy’s.” The case is reported in three newspapers, which all explain that:

[T]hey imposed an Elixir on many persons as and for the true Daffy’s Elixir, made by the Plaintiff; and for a false publication, to the Plaintiff’s prejudice, that his wife is not niece and representative of Anthony and Mary Daffy, deceas’d, or possessed of his original receipt . . . .<sup>128</sup>

After a full hearing “of Counsel learned on both sides,”<sup>129</sup> the jury found for the Plaintiff and awarded damages and costs. For the moment, it is simply important to notice that the Court, with Lord Mansfield presiding, enforced Swinton’s rights in relation to “Daffy’s Elixir” without requiring proof of her connection to Daffy.<sup>130</sup>

### B. Descriptiveness or Genericism

Some nineteenth century commentators interpreted *Singleton v. Bolton* as involving a description in common use to describe an article, its nature, or its qualities. Indeed, the first reported U.S. case on trademarks, *Samuel Thomson v. Hosea Winchester*, in the Massachusetts Supreme Judicial Court, seems to have adopted just such an

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<sup>126</sup> See also Mary Swinton, Advertisement, *MORNING CHRON.* (London), June 1, 1775, at 4 (advertisement by Swinton a decade later).

<sup>127</sup> See OLDHAM, *supra* note 66, at 739.

<sup>128</sup> *LONDON EVENING POST*, July 13–16, 1765, at 3; see also *PUB. ADVERTISER* (London), July 13, 1765, at 3; *PUB. LEDGER* (London), July 12, 1765, at 662; *LLOYD’S EVENING POST* (London), July 10–12, 1765, at 6, col.B. On newspapers reporting in this period, see James Oldham, *Law Reports in London Newspapers, 1756–1786*, 31 *AM. J. LEGAL HIST.* 177, 179 (1987), noting that “reports often appeared verbatim, or almost so, in several newspapers,” and suggesting that this was sometimes because of “borrowing” but also because the reporters made their stories simultaneously available to more than one paper.

<sup>129</sup> *LONDON EVENING POST*, July 13–16, 1765, at 3; TNA at KB 139/98 (indicating these were Poole for the plaintiff, and G. Watkin for the defendant).

<sup>130</sup> Although the evidence before Lord Mansfield C.J. in that case suggested Swinton did have some sort of connection, details from the inconclusive litigation over entitlement to the Daffy recipe in the late seventeenth century would suggest, in fact, that matters were much murkier. See Wallis & Haycock, *supra* note 18, at 7-8.

interpretation. There, Chief Justice Lemuel Shaw emphasized that an inventor of a medicine might have no right to the exclusive use of the name given thereto “if this term has acquired a generic meaning, descriptive of a general kind, quality or class of medicines, as for instance, James’s Powders, or Turlington’s balsam.”<sup>131</sup> The U.S. commentator, Francis Henry Upton, in his 1860 treatise takes the proposition further: Because Singleton had no exclusive right in the recipe, he contends, the defendant (or anyone else) could make a similar medicine and call it by the name that Singleton and his precursors had popularized.<sup>132</sup>

This interpretation appears to have relied on the section of the report that stated that “both the plaintiff and the defendant use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff.”<sup>133</sup> The implication seems to be that the name of the original inventor is “public juris,” and that there would only have been liability if the defendant had used the name Singleton. This is the understanding of the commentator in *The Jurist*, who warns that the effect of indicating a manufacturer alongside the product name could be to genericize the trademark, citing *Singleton v. Bolton*.<sup>134</sup> Presumably, some of the difficulty lay in Singleton being described as the manufacturer, leaving “Dr. Johnson’s” as capable of being regarded as a description of the product itself (if not the identical product, then a product designed to treat the same malady in the same way).

Perhaps some support for this interpretation can be found in a further decision of Lord Mansfield’s court, *Godfrey v. Ellison*. There is

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<sup>131</sup> *Thomson v. Winchester*, 36 Mass. (19 Pick.) 214, 216 (1837). There were also a number of other cases decided in the state courts of the United States. See *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439, 466 (1870) (referring to *Singleton* and observing that “[t]hese cases are all decided on the principle that the names used in the respective cases had become generic — merely descriptive of the kind or quality of the articles to which they were respectively applied, without reference to any particular manufacturer”); *Cong. & Empire Spring Co. v. High Rock Cong. Spring Co.*, 57 Barb. 526, 535 (N.Y. Sup. Ct. 1867); *Newman v. Alvord & Bailey*, 49 Barb. 588, 596 (N.Y. Sup. Ct. 1867); *Town v. Stetson*, 5 Abb. Pr. (n.s.) 218, 219-20 (N.Y.C.P. 1868); *Superior Court of Chicago: George Sherwood et al. v. Alfred H. Andrews et al.*, 14 AM. L. REG. 588, 591 (1866).

<sup>132</sup> UPTON, *supra* note 2, at 24.

<sup>133</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.).

<sup>134</sup> T.T. (probably Thomas Turner), *Trade Marks*, 14 JURIST, 223, 225 (1850) (“[W]hen a proper name is present, it renders the remainder insignificant . . . and the addition of a second name may render the former descriptive, as ‘Torr’s Pills, made by Kirkus,’” citing *Singleton v. Bolton*); see also C.A. Bucknam, *Individuality in Trade Devices*, 41 CENT. L.J. 429, 429 (1895).

no report of this case, even in newspapers, so what we know is purely based on the Mansfield notebooks.<sup>135</sup> The plaintiff was Benjamin Godfrey, a vendor of “Godfrey’s Cordial” (which had been the subject of litigation in the early 1730s).<sup>136</sup> The evidence was that Benjamin Godfrey had possessed the medicine since his uncle had died, though the witnesses differed over whether that was nine or eleven years previously.<sup>137</sup> The defendant John Ellison, about whom even less seems to be known,<sup>138</sup> was accused of “Counterfeiting & Selling a Medicine in Imitation of a Cordial Made & Sold by Plaintiff, Corked up in Bottles Resembling Plaintiff’s . . . Well Knowing the Same Were Not Prepared &ca. by Plaintiff.”<sup>139</sup> One witness said he had bought a bottle and sold it, on the assurance by the Defendant that it was “Godfrey’s Cordial.”<sup>140</sup> Nevertheless, Mansfield found for the Defendant.<sup>141</sup> The reasons are not clear. It may be that the evidence of deception was too insubstantial, or perhaps that “Godfrey’s Cordial” was regarded as too descriptive to be a basis for an action. If the latter is the reason, it may lend some support to the view that Singleton’s case failed because the Court viewed *Dr. Johnson’s Yellow Ointment* as a descriptive or generic designation.

However, even if descriptiveness offers a plausible explanation for *Godfrey v. Ellison*, I am unconvinced of it as an explanation of *Singleton v. Bolton*. One difficulty is that the initial plea alleged that Bolton had made up the ointment and placed it in pots bearing Singleton’s name. In particular it stated that Bolton:

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<sup>135</sup> OLDHAM, *supra* note 66, at 742.

<sup>136</sup> *Thomas How v. Benjamin Godfrey*, UNIVERSAL SPECTATOR & WKLY. J. (London), July 4, 1730, at 2 (reporting How’s successful libel action against Godfrey and describing how the recipe for “Godfrey’s Cordial” came to him from Thomas Godfrey of Hunsden). Two further actions are reported: one, very briefly, suggesting that Godfrey succeeded, LONDON EVENING POST, Nov. 25–27, 1731, at 2, and other reports of How being awarded £25 damages and costs in a case before Lord Eyre C.J. DAILY COURANT (London), July 1, 1732, at 2; DAILY POST (London), July 1, 1732, at 2; UNIVERSAL SPECTATOR & WKLY. J. (London), July 8, 1732, at 2.

<sup>137</sup> OLDHAM, *supra* note 66, at 742 (giving evidence of Thomas Godfrey).

<sup>138</sup> He may be the Ellison advertised as a bankrupt in 1774–1775 and there is some likelihood that he was the same Ellison who later advertised mineral water. See LONDON GAZETTE, June 30, 1778, at 2.

<sup>139</sup> OLDHAM, *supra* note 66, at 742.

<sup>140</sup> *Id.* (summarizing evidence of David Beard).

<sup>141</sup> *Id.*; see also *Godfrey v. Ellison*, (June 13, 1770) (Eng.) (TNA at KB 139/99, fol. 29b, No. 50) (recording the non-suit and the award of costs of £22 10 sh. to the defendant, and indicating that Godfrey’s attorney was Ratson and Ellison’s was White).

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Wrongfully Falsely and Fraudulently exposed to sale and vended sold and disposed of to divers Persons *requiring the said Ointment so prepared mixed compounded and sold by the said William . . . great Quantities of a certain other Ointment resembling the said Ointment so prepared mixed and compounded and sold by the said William . . . as and for the said Ointment so prepared mixed and compounded and sold by the said William.*<sup>142</sup>

The plea is clearly alleging the substance was not merely sold as *Dr. Johnson's famous Yellow Ointment* but as that ointment *as compounded by Singleton*.

Nevertheless, it is conceivable that at the trial, Bolton was able to adduce evidence that undermined that claim. He might have been able to produce the gallipots and show that they did not bear Singleton's name. It is possible then that the motion for a new trial was based on the claim that even without the direct and explicit reference to Singleton, Bolton should be held liable. We are speculating here, of course, but the reframing of the claim in this way would go a long way to explain Lord Mansfield's reported remark. Even so there is nothing in the background to the case to suggest that *Dr. Johnson's famous Yellow Ointment* was perceived as a description of a product, rather than a product made under the control of a succession of connected manufacturers (operating for decades from the same location in Lambeth Butts). Indeed, it seems to be a reasonable inference from Mansfield's notebooks (as set out earlier) that no evidence was tendered on the way in which "Dr. Johnson's Yellow Ointment" was understood, and the clerk's summary of the plea suggests that the claim was that the ointment was sold "as Singleton's."

Moreover, the broader context indicates that Singleton was the primary vendor of the ointment. This is not a situation where the newspapers were full of offerings from a number of manufacturers for *Dr. Johnson's famous Yellow Ointment*. Indeed, nearly all the advertising I have found for *Dr. Johnson's famous Yellow Ointment* clearly emanates from George Hinde, the daughter of William Hinde and wife of Thomas Singleton, Thomas Singleton, or William Singleton himself.<sup>143</sup>

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<sup>142</sup> TNA at KB 122/485, roll number 1051, *supra* note 79.

<sup>143</sup> There are two isolated exceptions. *At the Medicinal Warehouse*, PENNY LONDON POST OR MORNING ADVERTISER, Aug. 21–24, 1747, at 4 ("Johnson's Yellow Ointment, long famous for curing Pimples, Redness, Freckles, Carbuncles, Tettors, Ring worms."); *At the Spire and Dove*, WKLY. J. OR SATURDAY'S POST (London), Feb. 28, 1719, at 79. It is not, however, clear whether these are vendors authorized by Hinde or Singleton, or persons they would have regarded as counterfeiters.

Contrast, in this respect, Swinton's successful action in *Swinton v. Claphamson*, the subject matter of which, "Daffy's Elixir," supposedly originated with Anthony Daffy and had in fact been made by a number of different parties, some related and some not, in the seventy plus years between the death of its original manufacturer, Anthony Daffy, and Swinton's claim.<sup>144</sup> Although there were some differences in the circumstances of the Swinton case, most notably Claphamson's placing of the two ball sign outside his shop, nothing suggests liability depended on that rather than the representation that what was being sold was "true Daffy's Elixir."

The *Singleton* case simply does not have a feel of "genericism."<sup>145</sup> As a matter of fact, Singleton *did* have exclusive use of the recipe on which the ointment was based. It would be strange indeed if Lord Mansfield was suggesting that, as a matter of law, the original Dr. Johnson could prevent the sale by others of yellow ointment as *Dr. Johnson's famous Yellow Ointment*, but Singleton, the sole vendor thereof, could not. Moreover, whatever the reporter may have understood, the "counterfeit bill" in the Singleton archive actually indicated that "Thomas Singleton" was the manufacturer, so it seems that Bolton was (or at least had been) selling the *Dr. Johnson's famous Yellow Ointment* that he was vending, as that of Singleton's. In any case, the litigation appears to have turned on a point of law rather than evidence, implying that we must look elsewhere to explain the decision.

### C. Quack Medicine

The third possible interpretation offered in the nineteenth century commentaries was that Singleton's ointment was regarded as a "quack" remedy and the Court would not offer its protection to such things. Expressions of anxiety about the increasing prevalence and damaging effects of quack medicines extended back to the sixteenth and seventeenth century.<sup>146</sup> Indeed, in some respects, concern with

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<sup>144</sup> See Wallis & Haycock, *supra* note 18, at 1, 11, 27-29.

<sup>145</sup> It might be argued that the strongest support for this interpretation can be found in the fact that Singleton later dropped the reference to "Dr. Johnson" and instead referred to the product as "Singleton's Yellow/Golden Ointment." Evidence of quite when this occurred is sparse, and certainly the reference to "Dr. Johnson" continues to be present in the Singleton archive. See *Green v. Folgham*, (1823) 57 Eng. Rep. 159, 159; 1 Sim. & St. 398, 398 (Ch.) (referring to "Dr. Johnson's Ointment for the Eyes"). See also Clark, *supra* note 42, at 372 (referring to an advertisement for "The genuine Dr. Johnson's Golden Ointment, prepared by S. Green . . .").

<sup>146</sup> See L.R.C. Agnew, *Quackery*, in *MEDICINE IN SEVENTEENTH CENTURY ENGLAND*

“quackery” was the rationale for the establishment of the Society of Apothecaries in 1617. During the 1730s, the *Gentleman’s Magazine* contained a series of articles demonstrating continuing criticism of quackery.<sup>147</sup> In the early nineteenth century, Charles Cowan railed against quack medicines:

The Quackery of the present day is perhaps distinguished by a more artful plausibility, a more insidious appearance of candour, a greater pretension to science, and by being addressed to the credulity rather than to the superstition of mankind; but its characteristic features are still essentially the same, its evils are rather multiplied than diminished and its power of mischief and of successful and rapid diffusion incalculably augmented.<sup>148</sup>

He drew particular attention to the role of advertising. He said it formed:

[A] very leading and important feature of modern quackery. Advertising is the main-spring of empirical success, and it is only necessary to be in possession of sufficient funds for the purpose to ensure the sale of any remedy whatever. Thousands are occasionally risked in giving publicity to a nostrum, and the returns are in proportion to the courage of the speculator, his happy adaptation of his remedy to what he knows to be prevalent diseases and popular impressions, and to his more or less indifference to truth.<sup>149</sup>

Concern with quacks found legislative expression in the very year in which *Singleton v. Bolton* came before the courts. In July of 1783, Parliament passed “*An Act for granting to His Majesty a Stamp Duty on Licences to be taken out by certain Persons uttering or vending Medicines; and certain Stamp Duties on all Medicines sold under such Licences, or under the Authority of His Majesty’s Letters patent.*”<sup>150</sup> The Act required certain medicine sellers to obtain a license for twenty shillings, and that stamp duty of 3d be paid on every “Box, Packet, Bottle or Phial or

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313, 315 (Allen G. Debus ed., 1974).

<sup>147</sup> See Democritus, *Of Quack Doctors*, 5 GENTLEMAN’S MAG. 10, 10-11 (1735); Philomathemos, *The Alarming Increase of Quack Medicines Deprecated*, 86 GENTLEMAN’S MAG. 1041, 1041-43 (1799).

<sup>148</sup> CHARLES COWAN, *THE DANGER, IRRATIONALITY AND EVILS OF MEDICAL QUACKERY* 3-4 (1839).

<sup>149</sup> *Id.*

<sup>150</sup> Medicine Stamp Act, 1783, 23 Geo. 3, c. 62 (U.K.).

other Inclosure of any Medicine” sold for under two shillings and six pence by such vendors “or by any Person or Persons under the Authority of His Majesty’s Letters Patent.” The Act, which had been described by Lord John Cavendish when introducing the measure as explicitly targeted at “quacks” and “quack medicines,”<sup>151</sup> was rather narrowly circumscribed for that purpose.<sup>152</sup> To achieve that goal more effectively, the Act was repealed and replaced two years later,<sup>153</sup> and the 1785 Act was in turn repealed and replaced in 1802.<sup>154</sup> The latter Act covered:

[A]ny drugs, herbs, pills, waters, essences, tinctures, powders or other preparation or composition whatsoever, used or applied, or to be used or applied externally or internally, as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in any wise affecting the human body.<sup>155</sup>

In order to avoid any doubts as to what fell within those terms, section 19 declared that the articles “mentioned, named and enumerated” in the Schedule to the Act were within the scope of the Act. That list includes “Singleton’s Golden Ointment and Eye Salve.”<sup>156</sup>

Did these sentiments affect the legal treatment of names used to advertise and sell such remedies? There is certainly a sense in the case law of Lord Chancellor Eldon sitting in Chancery that the nature of the subject matter was a concern, causing him a reluctance to offer protection at least in cases where the basis of the claim was ownership of the “secret” to the remedy. In *Williams v. Williams*, dissolving an injunction that had been granted against the defendant to prevent him from disclosing the recipe of the plaintiff’s eye medicine, Lord Eldon

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<sup>151</sup> See 15 PARL. HIST. ENG., H.L. (3d sess.) (1783) 71 (U.K.). A report in the Westminster Magazine relates that “[w]hen his Lordship mentioned his intention of taxing Quacks, the House burst into a roar of laughter, which continued a considerable time.” WESTMINSTER MAG., Oct. 1783, at 538-39.

<sup>152</sup> For criticisms, albeit not from a disinterested source (the author was a chemist who sold “anti-scorbutic drops”), see FRANCIS SPILSBURY, DISCURSORY THOUGHTS, &C: DISPUTING THE CONSTRUCTIONS OF HIS MAJESTY’S HON. COMMISSIONERS AND CROWN LAWYERS, RELATIVE TO THE MEDICINE AND HORSE ACTS 4 (1785) (finding that only five medicines would be caught by the strict terms of the Act); FRANCIS SPILSBURY, THE POWER OF GOLD DISPLAYED 1 (1785).

<sup>153</sup> Medicine Stamp Act, 1785, 25 Geo. 3, c. 79 (U.K.).

<sup>154</sup> Medicine Stamp Act, 1802, 42 Geo. 3, c. 56 (U.K.). Further details of the history of taxation of medicines is provided in SELECT COMMITTEE ON MEDICINE STAMP DUTIES, REPORT, 1935-6, H.C., at 391-93 (U.K.).

<sup>155</sup> Medicine Stamp Act, 1802, 42 Geo. 3, c. 56, § 2 (U.K.).

<sup>156</sup> *Id.* § 2, sch. 1.



began by saying he did not think that “the Court ought to struggle to protect this sort of secrets [sic] in medicine.”<sup>157</sup> And in *Abernethy v. Hutchison*, a case in which an injunction was awarded preventing publication of Abernethy’s lectures on surgery in the newly founded medical newspaper, *The Lancet*, Eldon explained that cases in which relief had been refused to prevent the disclosure of secrets relating to medicines had “proceeded upon the utility of the medicines.”<sup>158</sup> Lord Eldon, at least, seems to have been prepared to withdraw protection of Chancery from remedies of doubtful use to society. Indeed, he seems to have taken a similar view of *Dr. Johnson’s Yellow Ointment* when litigation as to its ownership came before him in 1823 in *Green v. Folgham*.<sup>159</sup> There he recommended to the parties that they use an arbitrator, so as to have their own Lord Chancellor, indicating that the Chancery itself would not rule on such a matter.<sup>160</sup>

Whatever the views of Lord Eldon, or the approach of the Court of Chancery more generally, the status of the subject matter as a “quack medicine” seems to have not been regarded as a material factor in the Common Law courts. This is clear from at least three earlier cases that were decided in Lord Mansfield’s court. Indeed, we have already noted that while the action brought by Godfrey against Ellison failed, in *Swinton v. Claphamson*, the Court awarded damages in relation to the defendant’s selling of what purported to be “Daffy’s *Elixir Salutis*.”<sup>161</sup> Moreover, in two other cases concerning medical nostrums, Lord Mansfield’s court found in favour of the claimant. Both cases were

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<sup>157</sup> *Williams v. Williams*, (1817) 36 Eng. Rep. 61, 62; 3 Mer. 157, 157-60 (Ch.).

<sup>158</sup> *Abernethy v. The Lancet*, LANCET (London), June 25, 1825, at 378; see also SEBASTIAN, *supra* note 71, at 316 (“[A] quack medicine, or an article intended to deceive the public, the Court will not struggle to protect the secret or to punish those who invade it.”); JOHN HERBERT SLATER, *THE LAW RELATING TO COPYRIGHT AND TRADE MARKS, TREATED MORE PARTICULARLY WITH REFERENCE TO INFRINGEMENT* 290 (1884). In the context of copyright, Lord Eldon L.C. developed rules that meant that immoral works were unprotected. See ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* 68 (2010).

<sup>159</sup> See *Green v. Folgham*, (1823) 57 Eng. Rep. 159, 162; 1 Sim. & St. 398, 405 (Ch.).

<sup>160</sup> Remarkably, only the Vice-Chancellor’s decision was reported. The details of Eldon’s ruling can be found at LMA at B/SIN/10. Case of Letitia Mary Folgham, *supra* note 34 (“The Lord Chancellor stated it broadly to be his Opinion that in the administration of a Property of this nature a Court of Equity had no jurisdiction to interfere but he threw out an intimation that he thought it was a Matter which the Family should settle if they possibly could among themselves and become as he termed it their own Chancellor.” A side note observes, “We are not aware whether this application has been reported if it has the remarks of the Lord Chancellor are exceedingly important.”).

<sup>161</sup> See *supra* text accompanying notes 115-116.

brought by Thomas Greenough, an apothecary in Ludgate Hill, just to the west of St. Pauls, who had been in operation since completing his apprenticeship in 1744.<sup>162</sup> Interestingly, for an apothecary starting out he had obtained a patent in that very year, 1744, for a tincture for preserving teeth.<sup>163</sup> Like Robert James, who patented “Dr. James’s Fever Powder” in the 1740s, Greenough distributed this tincture through the publisher, John Newbery.<sup>164</sup> Over subsequent decades, he developed or acquired a recipe for a cure for stomach disorders which he patented in 1757 and “Samaritan Water,” a supposed cure for bruises, strains, wounds, burns, ulcers, and sores — a “universal balsamick” — which he patented in 1779.<sup>165</sup> Greenough was a very successful businessman and by the 1790s had taken up residence in Bedford Square and was one of the Governors of Christs Hospital.<sup>166</sup>

Both cases related to Greenough’s unpatented product “Pectoral Lozenge from Balsam of Tolu” for treating coughs, a medicine based on the South American tree Tolu Balsamum (aka *Myroxylon toluiferum*).<sup>167</sup> Greenough had no patent over the product but had been advertising this for sale at least from 1765.<sup>168</sup> The first case is

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<sup>162</sup> Thomas was the son of Daniel Greenough, Shoreditch in Middlesex, and was apprenticed to John Winder, of St Paul’s Churchyard (and later Paternoster Row), February 3, 1735–1736. Thomas Greenough is described as living at Snow Hill (at least until 1749) between Smithfield and Holborn. Greenough had two apprentices of his own, William Radley from March 7, 1748–1749, and Thomas Gisborne, May 4, 1756, though he was turned over on August 2, 1763, to Harry Norwood Trye. See 42 CLIFF WEBB, LONDON LIVERY COMPANY APPRENTICESHIP REGISTERS, SOCIETY OF APOTHECARIES 1670–1800 WITH MASONS COMPANY 1619–1639 32, 66 (2006); see also Will of Thomas Greenough (Dec. 18, 1794) (TNA at PROB 11/1253/137). Greenough was the grandfather of the nineteenth century geologist, George Bellas Greenough (1778–1855).

<sup>163</sup> When patents came to be indexed by Bennett Woodcroft in the middle of the century, the tincture was number 599. BENNETT WOODCROFT, SUBJECT MATTER INDEX OF PATENT INVENTIONS FROM MARCH 2, 1617, TO OCTOBER 1, 1852, at 1 (1857). For background to the patent grant, see Report of Dudley Ryder on the Petition of Thomas Greenough, Apothecary, for a Patent for His Tincture for Cleaning Teeth and for Curing Tooth-ache (Jan. 19, 1744) (TNA at SP 36/63, fol. 23).

<sup>164</sup> Indeed Newbery and Greenough made a joint deposition in support of James’s rights to the Fever Powder when those rights were put in issue by Walter Baker. See ANSWER TO A LATE SCURRILOUS PAMPHLET PUBLISHED BY ONE BAKER AND HIS ACCOMPLICES RESPECTING DR. JAMES’S POWDER 40-42 (c. 1754).

<sup>165</sup> WOODCROFT, *supra* note 163, at 413-414, 421 (No. 716 cure for stomach disorders; No. 1209 for Samaritan Water).

<sup>166</sup> His death is reported in the GEN. EVENING POST (London), Dec. 2–4, 1794, at 3, and the MORNING CHRON. (London), Dec. 3, 1794, at 9.

<sup>167</sup> Apparently the resin is still used in cough syrup.

<sup>168</sup> See, e.g., *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, PUB. LEDGER (London), Dec. 31, 1765, at 1 (advertising Pectoral Lozenges of Tolu). Greenough

*Greenough v. Dalmahoy*, in 1769, brought against Alexander Dalmahoy,<sup>169</sup> who was also an apothecary,<sup>170</sup> receiving his freedom to trade as a member of the guild only two years after Greenough in 1746.<sup>171</sup> Dalmahoy advertised a range of products including plate powder, used in cleaning silver, and claimed to have links to the royal family, advertising himself as “the chemist to her Majesty.”<sup>172</sup> Dalmahoy was accused of counterfeiting “Pectoral Lozenges from Balsam of Tolu.” As he operated in Greenough’s neighborhood, at “Glauber’s Head” in Ludgate Hill, his activities would not have been difficult to detect. The case was tried in 1769,<sup>173</sup> before a special jury (that is, a jury formed of experts) under the supervision of Lord Mansfield.<sup>174</sup> The evidence, as recorded, indicated that Greenough had

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handed on the business to R. Haywood, a chemist, who appears to have bought Greenough’s business at 10 Ludgate Hill some time in 1786.

<sup>169</sup> Alexander Dalmahoy, son of the Southwark surgeon, William Dalmahoy, lived from 1723–1781. See *The Curious Smelling-Bottle Called Le Sel Poignant D’Angleterre*, LONDON COURANT & WESTMINSTER CHRON., July 20, 1780, at 4. Other Dalmahoy products included Eau de Menthe de Dalmahoy (Dalmahoy’s Cordial Peppermint Water). Dalmahoy is discussed in G.D. Hopkinson, *Alexander Dalmahoy: Chemist to Her Majesty*, 14 PHARMACEUTICAL HISTORIAN 8, 8 (1984), who claims that he was “one of the most significant figures in the history of the wholesale drug trade and the early development of the pharmaceutical industry,” but without offering much concrete evidence to justify this claim. Dalmahoy gave up his operations in 1780 and retired to Higham Hill, Essex, where he died on October 10, 1781. See Will of Alexander Dalmahoy of Ludgate Hill, City of London (Nov. 20, 1781) (TNA at PROB 11/1083/372).

<sup>170</sup> The newspaper report of the 1769 case explains that it was against “an eminent Chymist of Ludgate-Hill” — the defendant is not named — for having “counterfeited” the Lozenges. See *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, MORNING CHRON. & LONDON ADVERTISER, June 15, 1772, at 4.

<sup>171</sup> See SOCIETY OF APOTHECARIES, LONDON, A CATALOGUE OF THE SEVERAL MEMBERS OF THE SOCIETY OF APOTHECARIES, LONDON, THIS PRESENT SECOND OF SEPTEMBER, 1746, at 1 (1746). His Master was Francis Dalby of Ludgate Hill.

<sup>172</sup> Dalmahoy, of Ludgate Hill, describes himself as chemist to her majesty in *Plate Powder*, MORNING CHRON. & LONDON ADVERTISER, June 21, 1780, where he advertises “Plate Powders” for cleaning silver plate. Apparently, a lineage could be traced from Dalmahoy to the British Drug Houses Ltd. See also ALEXANDER DALMAHOY, DIRECTIONS FOR EXHIBITING THE MEDICINES CONTAINED IN THE CHESTS PREPARED BY DALMAHOY, CHEMIST TO HER MAJESTY, LONDON (n.d.).

<sup>173</sup> *Greenough v. Dalmahoy*, (Dec. 9, 1769) (Eng.) (TNA at KB 122/356, roll 270). The attorneys are listed (in TNA at KB 139/99, fol. 3b, No. 35), as Jonathan Price (for Greenough) and James Marye, of Dove Court, Lombard St (admitted 1735) (for Dalmahoy). See TNA at KB 172/1, fol. 184.

<sup>174</sup> See James Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 149 (1987); James Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 164 (1983) (discussing Mansfield’s use of the special jury); see also OLDHAM, *supra* note 66, at 95.

a substantial trade, selling 8000 lozenges a year, and that the defendant had sold lozenges to one of the witnesses as “Greenough’s.”<sup>175</sup> No details of the basis on which the case was put, nor Mansfield’s instructions to the jury survive. All we know is that the jury found for Greenough, and awarded £50 damages (and, with cost of £45, a total award of £95).<sup>176</sup> The newspaper report adds, “It is hoped that this will prevent such gross impositions for the future, which, before the Jury withdrew, the plaintiff declared in court was his motive for bringing the action and not the measure of damages.”<sup>177</sup> Soon after, Greenough referred to the action in his subsequent advertising,<sup>178</sup> usually identifying the culprit mostly as an “eminent chemist” but occasionally referring to him by name (which the newspaper reports had not) as Alexander Dalmahoy.<sup>179</sup> Dalmahoy survived, continuing to operate in the same place into the 1780s.<sup>180</sup>

Thomas Greenough was still referring to the successful action against Dalmahoy when, eight years later, he took action again.<sup>181</sup> This time the case was brought against a “chymist of Oxford Street” left unidentified in some newspaper reports, but referred to as George Lambertson in another.<sup>182</sup> Lambertson appears to have been an apprentice to William Faber in Leeds,<sup>183</sup> so was probably a newcomer to the London scene. The case was again tried before a special jury.<sup>184</sup>

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<sup>175</sup> OLDHAM, *supra* note 66, at 741 (providing evidence of Easthollows).

<sup>176</sup> TNA at KB 139/99, fol. 3b, No. 35; OLDHAM, *supra* note 66, at 741 n.2.

<sup>177</sup> LONDON CHRON., Dec. 12–14, 1769, at 576; *see also* PUB. ADVERTISER, Dec. 13, 1769, at 1.

<sup>178</sup> *See, e.g., For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, LLOYD’S EVENING POST (London), Jan. 1, 1770, at 3 (stating that other prosecutions were under way); *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, PUB. ADVERTISER (London), Feb. 20, 1770, at 3 (referring to successful legal action).

<sup>179</sup> *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, PUB. REGISTER OR THE FREEMAN’S J. (London), Nov. 29–Dec. 1, 1770, at 3.

<sup>180</sup> *See The Curious Smelling-Bottle Called Le Sel Poignant D’Angleterre*, LONDON COURANT & WESTMINSTER CHRON., Mar. 22, 1781, at 4. According to Hopkinson, *supra* note 169, at 11, his business passed to William Stock and thence to James White and ultimately British Drug Houses Ltd.

<sup>181</sup> Indeed, Greenough was still referring to his legal victory from December 1769 in *For Coughs, Hoarseness, Etc. Pectoral Lozenges of Tolu*, LONDON EVENING POST, Feb. 5–8, 1778, at 1. Indeed, an advertisement in 1780 states “a Person living very near to him has been convicted in the Court of King’s Bench of selling a counterfeit sort.” ST. JAMES CHRON. OR BRIT. EVENING POST (London), Nov. 2–4, 1780, at 1.

<sup>182</sup> The defendant is mentioned in the report in the ST. JAMES CHRON. OR BRIT. EVENING POST (London), Dec. 23, 1777, at 1.

<sup>183</sup> WALLIS & WALLIS, *supra* note 124, at 352.

<sup>184</sup> The pleas are at TNA at KB 122/416, roll 200; The notes of evidence are transcribed in OLDHAM, *supra* note 66, at 746. The attorneys representing the parties

The evidence was that Greenough had a very substantial trade, his shopman suggesting to the value of £30,000 per year, and that various witnesses had bought lozenges from the defendant, asking for “Greenough’s” at two shillings per dozen.<sup>185</sup> The defendant’s witnesses suggested that he bought the stock innocently from a “walking druggist” named Savage, but had since stopped dealing with him and thereafter stopped selling the lozenges as the plaintiff’s. This appears to modern eyes to be a plea of innocence.<sup>186</sup> Again, we do not know how the legal arguments were put, but the jury found for the plaintiff ordering £20 damages and costs of £37.<sup>187</sup> The reports (which appear in eight surviving papers) are in virtually identical terms and state that “the proofs” duly sustained the charge that the defendant’s lozenges were “entirely false and counterfeit,” and that the “Language of the learned Judge on this Occasion was so very severe against every Imposition of this Nature, that it will no Doubt have the Effect of checking such injurious Practices in future.”<sup>188</sup>

These two cases,<sup>189</sup> when viewed along with *Swinton v. Claphamson*, seem clearly to indicate that the common law courts, at least those of

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were Stirling, for Greenough, and Ramsdon (possibly Johns Ramsdon of Halifax, admitted in 1758), for Lambertson. See TNA at KB 172/1, fol. 235; Greenough v. Lambertson, (Dec. 18, 1777) (Eng.) (TNA at KB 139/100, fol. 35b, No. 36).

<sup>185</sup> OLDHAM, *supra* note 66, at 746.

<sup>186</sup> Later case law would suggest that while an action at law required a showing of intent to deceive, an action in equity could be maintained against a trader who innocently adopted a deceptive mark. *Millington v. Fox*, (1838) 4 Eng. Rep. 956 (Ch.D.) 956, 961; 3 My. & Cr. 338, 339, 352.

<sup>187</sup> Greenough v. Lambertson, (Dec. 18, 1777) (Eng.) (TNA at KB 139/100, fol. 35b, No. 36) (recording costs of £37, damages in total of £57).

<sup>188</sup> GEN. EVENING POST (London), Dec. 20, 1777, at 4; DAILY ADVERTISER (London), Dec. 23, 1777, at 1; GAZETTEER & NEW DAILY ADVERTISER (London), Dec. 23, 1777, at 3; LONDON EVENING POST, Dec. 23, 1777, at 4; MORNING CHRON. & LONDON ADVERTISER, Dec. 23, 1777, at 2; MORNING POST & DAILY ADVERTISER (London), Dec. 23, 1777, at 2; PUB. ADVERTISER (London), Dec. 23, 1777, at 6.

<sup>189</sup> On February 14, 1783, Greenough won a third action in King’s Bench against Richard Staveley, an “eminent druggist” from Fenchurch Street, and was awarded £50 damages. MORNING HERALD & DAILY ADVERTISER (London), Feb. 20, 1783, at 3; GEN. EVENING POST (London), Feb. 22–25, 1783, at 4 (incorrectly referring to the defendant as “John Staveley”). For the order, see TNA at KB 139/101, fol. 44a, No. 90 (recording costs of £22, and thus damages in total of £72), and identifying Greenough’s attorney as Nash (possibly Edmond Nash of Staple’s Inn). BROWNE’S GENERAL LAW LIST 79 (London, 10th ed. 1790). The judgment is indexed in TNA at KB 168/150 (referring to “60”), but I have not been able to locate the plea roll. It is unclear whether Staveley was represented. Richard Staveley, (1731–1798), described himself in his will as a druggist of Fenchurch St. and was later to be adjudged bankrupt in 1796. See, e.g., DAILY ADVERTISER (London), Dec. 21, 1796, at 4 (advertisement for auction of Staveley’s property, including the thirty-five year lease of the Fenchurch St. premises,

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Lord Mansfield, were not concerned about the fact that the claims related to the names of medicines that might have been thought of as quack remedies. In fact, his reported comments in the *Lambertson* case make it clear that he hoped the severity of the remedy would deter future incidents of “passing off.” Might other intervening events have prompted a change of heart? Perhaps most notoriously, during the 1770s, the author Oliver Goldsmith was reputed to have died from taking “Dr. James’s Fever Powders,”<sup>190</sup> and the Medicine Stamp Duties had been enacted. But had this been the basis of Lord Mansfield’s rejection of Singleton’s claim, it is difficult to imagine it could have gone unstated and unreported.

#### D. First Sale

A fourth possible explanation for the outcome in *Singleton v. Bolton* is prompted by evidence in the Singleton archive rather than in the legal sources (the plea roll, Mansfield’s notebooks or Roscoe’s report in “Douglas”). This explanation lies not in the characteristics of the designation (some pre-cursor of genericism or some strange notion of descriptiveness), the trade itself, nor Singleton’s title to the mark, but in the nature of the specific defendant’s supposed wrong. The basis for this explanation can be found in an advertisement that Singleton had placed in the *Whitehall Evening Post* for December 31, 1782. Here Singleton had explained his complaint:

He is well-informed that a Person who resides Part of the Year in Clement’s Lane, Lombard-Street, puts an imposition on the Public, and most materially injures him; he believes he does not attempt to counterfeit or adulterate it (conscious of its great and superior Efficacy), but buys the Ointment of him, vends it at a very advanced price, and in the Bills which he gives along with it, expresses that he and he alone is the sole and only Proprietor. It is hoped he will drop his ungenerous Actions; but should he obstinately persevere in this injurious Conduct, Wm Singleton will think himself justified by every Motive of Justice and Self-Defence to publish his Name and other Particulars.<sup>191</sup>

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describing the premises in some detail). The surviving Mansfield notebooks did not cover the Hilary Term 1782–1783. See OLDHAM, *supra* note 66, at 163.

<sup>190</sup> This, and the trial of Jane Butterfield for the murder of William Scawen in 1775, for which she was found not guilty, prompted Spilsbury’s pamphlet, *Free Thoughts*. SPILSBURY, *FREE THOUGHTS*, *supra* note 109, at xviii.

<sup>191</sup> WHITEHALL EVENING POST (London), Dec. 31, 1782–Jan. 2, 1783, at 1.

Singleton then lists his retail outlets: “Mrs. Randall, under the Royal Exchange Gateway, Cornhill; Mrs. Pearson, opposite St. Dunstan’s Church, Fleet Street; Mr. Fetch, Breeches Maker, next Door to the Three Kings in Piccaddilly; Mr. Trapp, Printer, No 1, Paternoster Row; Mrs. Arnold, Great Eastcheap.”<sup>192</sup> Having listed some country-sellers, he then finishes the advertisement thus, “N.B. If sold at any other Place it is counterfeit and spurious.”<sup>193</sup>

To my mind, this offers a significant clue to what Singleton sought to achieve and why he lost. His claim was not that the Defendant was selling *its* goods as those of Singleton, but that it was selling Singleton’s goods themselves, and at a price he did not welcome. Singleton carefully amended his advertisement alerting the public to Bolton’s goods as “spurious” rather than “counterfeit”: “as many persons mistake Mr. Tutts shop particularly servants . . . And go to another next it called Bolton’s Medicinal Shop where spurious sort is sold by the said Bolton . . .”<sup>194</sup> Singleton wanted to control the distribution chain. Essentially, Bolton’s defense was that the goods he was selling were genuine goods — the product was *Dr. Johnson’s Yellow Ointment*. It was “Dr. Johnson’s Yellow Ointment” not because that described a product for which Bolton had the recipe, but because he had bought it, somehow, indirectly from Singleton.

This was a case of what European legal scholars today would call “exhaustion of rights” and American intellectual property lawyers would refer to as “the first sale doctrine.” Seen in this way, the key proposition in the reported judgment of Lord Mansfield was the first sentence: “[I]f the defendant had sold a medicine *of his own* under the plaintiff’s name or mark, that would be a fraud for which an action would lie.”<sup>195</sup> The case failed because Bolton, it seems, was selling a medicine of Singleton’s as made by Singleton!

There is, of course, nothing in the court record to support the suggestion that the case was one of first sale. Indeed, the content of Singleton’s plea rather weighs against the proposition that Singleton already appreciated that Bolton was selling genuine goods. For a start, if Singleton knew that Bolton was only selling genuine goods, why allege that Bolton was having the gallipots made up and then inserting a mixture that resembled Singleton’s own *Dr. Johnson’s famous Yellow*

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Double Folios, *supra* note 55 (draft notice concerning sale of counterfeit ointment at “Bolton’s Medicinal Shop”).

<sup>195</sup> *Singleton v. Bolton*, (1783) 99 Eng. Rep. 661, 661; 3 Doug. 293, 293 (K.B.) (emphasis added).

*Ointment*?<sup>196</sup> The answer may be that Singleton neither intended nor wished to create new law, but rather wanted to take the easiest course. The plea thus had necessarily to follow the standard form already developed.<sup>197</sup> Singleton was willing to take his chance on that form of

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<sup>196</sup> TNA at KB 122/485, roll number 1051, *supra* note 79.

<sup>197</sup> The plea roll in *Singleton v. Bolton* is very similar in structure and language to that for *Greenough v. Dalmahoy* (1769). See *Greenough v. Dalmahoy*, *supra* note 173. Both of these pleas are quite different to those in three cases decided by Lord Mansfield C.J. in 1777–1778 concerning false marking of watches with the mark CABRIER, which are in the form of pleas in actions for debt. The explanation for the differences is that these were actions brought by an informant, Amos Stocker, under a particular statutory regime dating from 1698. <An Act for the Exporting Watches, Sword-Hilts and other Manufactures of Silver>, 9 & 10 Will. 3, c. 28, § 2 (Eng.); *Stocker v. Margaret Russell*, (Feb. 1778) (TNA at KB 122/416, roll 88); *Stocker v. Richard Anderson*, (Dec. 3, 1777) (Eng.) (TNA at KB 122/416, roll 128); *Stocker v. Bradshaw*, (Feb. 16, 1778) (Eng.) (TNA at KB 122/418, roll 38). Cabrier was the name of a family of London watchmakers which had acquired a reputation during the eighteenth century (the hey-day of British watchmaking). Stocker, who had proved the will of Charles Cabrier II on his death in July 1776, Will of Charles Cabrier, Watchmaker of Saint Bennet Fink, City of London (July 17, 1776) (TNA at PROB 11/1021/223), was probably acting on behalf of Charles Cabrier III, who had been advertising widely for information about counterfeiters in April to June of 1777. See, e.g., DAILY ADVERTISER (London), Apr. 7, 1777, at 1 (showing where Cabrier complains about counterfeiters marking watches Cabreir, Cabrior, Cavrier).

All three actions appear to have been successful, with Stocker recovering £100 from Anderson and Bradshaw and considerable damages from Russell. See, e.g., GEN. EVENING POST (London), Dec. 4–Dec. 6, 1777, at 1 (reporting the *Stocker v. Anderson* case and describing the mischief of obtaining foreign watches and stamping them with the name of some eminent maker); GAZETEER & NEW DAILY ADVERTISER (London), Dec. 5, 1777, at 3 (same); PUB. ADVERTISER (London), Dec. 5, 1777, at 3 (“[A] remarkable Cause, the first of its Kind” and naming the parties as Cabrier and Anderson); LONDON CHRON., Dec. 4–6, 1777, at 550; GAZETEER & NEW DAILY ADVERTISER (London), Dec. 11, 1777, at 2 (stating that “the whole fraternity of . . . watchmakers have received a paralytic stroke,” but warning that “the tribe of informers” has already set to work and that many watchmakers will be put out of business); see also CHESTER CHRON., Dec. 12, 1777, at 1 (describing the award of damages as £100).

For *Stocker v. Russell*, see DAILY ADVERTISER (London), Feb. 18, 1778, at 1b (“[A] Cause against a Woman” in which “considerable Damages” were awarded). For *Stocker v. Bradshaw* (1778), the evidence given at the trial is transcribed in OLDHAM, *supra* note 66, at 748, and demonstrates that the defendant was marking watches as CABRIOR. The trial is reported in the GAZETEER & NEW DAILY ADVERTISER (London), Feb. 17, 1778, at 2-3, and describes Bradshaw’s counsel, also called Mansfield, as having argued “ignorance of the law” as a defense, which Lord Mansfield C.J. rejected. See also WESTMINSTER J. & LONDON POL. MISCELLANY, Feb. 21, 1778, at 4 (Stocker recovered £100); DAILY ADVERTISER (London), Feb. 18, 1778, at 1b. For a classic account of the watch industry, including practices of marking watches composed from parts made by others, see David Landes, *Watchmaking: A Case Study in Enterprise and Change*, 53 BUS. HIST. REV. 1, 11-12 (1979).



plea producing the result he was looking for. Singleton may have hoped that faced with the action, rather than defend it, Bolton would merely concede and desist. Alternatively (or additionally), Singleton may have thought that, from the nature of things, it would inevitably fall to Bolton to demonstrate that he was selling the genuine product (as originally made by Singleton), and that this would be difficult to achieve. That is, Singleton may have hoped to win the action by merely demonstrating that he, Singleton, was the recognized manufacturer and that Bolton, who was not one of his authorized vendors, was selling gallipots of the medicine bearing Singleton's name, without having to establish at all that Bolton was in fact selling illicit versions of his product.

If this explanation is correct,<sup>198</sup> it seems Singleton's aim was to control the retail trade in his own ointment. Why was he not happy just to secure a profit from the sales to the likes of Bolton, and so keen to secure control over who retailed his products? One answer might be found in the shifting nature of medical practice during this period, in particular the changing role of the apothecary, and the emergence of a new class of vendors of drugs, known as "chemists or druggists." As is widely known, at a formal level, medical practice was divided between three groups: physicians, surgeons, and apothecaries. Formally, physicians saw patients and diagnosed illness; their prescriptions were made up by apothecaries; and surgeons dealt with matters relating to bodily treatment — surgery. However, those three roles had become blurred — apothecaries increasingly saw patients and diagnosed them.<sup>199</sup> In fact they operated frequently as "general practitioners" with the physicians and surgeons much more akin to specialists.<sup>200</sup> But the apothecaries could not then charge for seeing

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<sup>198</sup> This explanation is difficult to square with some aspects of the report and Lord Mansfield's notebooks. For example, it might be asked why, on this reading, would Lord Mansfield have stated that "no evidence was given of the defendant having sold it as if prepared by the plaintiff" if it had indeed been prepared by the plaintiff in any event. One possible explanation is that Mansfield was trying to lay down a marker for future cases as to the sort of conduct that would entitle a plaintiff to relief, and to indicate that the approach taken in this case did not cast doubt on his earlier rulings.

<sup>199</sup> See *Coll. of Physicians v. Rose*, (1703) 2 Eng. Rep. 857, 858-59; 5 Brown 553, 553, 555 (H.L.) (holding apothecary who attended and prescribed medicine to sick butcher did not "practise physic" so as to breach the exclusive rights given under Royal Charter to the College of Physicians).

<sup>200</sup> See ALEXIPHARMACUS, *A GENERAL EXPOSITION OF THE PRESENT STATE OF THE MEDICAL PROFESSION IN THE METROPOLIS ESPECIALLY I* (1829) (stating that "[t]he care of the sick and preservation of the health of the community, generally speaking, has been intrusted [sic] to the Apothecary"); JOHN MASON GOOD, *THE HISTORY OF MEDICINE SO FAR AS IT RELATES TO THE PROFESSION OF THE APOTHECARY* 146-47 (1795) (stating

patients, the cost of their time and effort in effect being incorporated into charges for the medicines themselves.<sup>201</sup>

However, during the eighteenth century the apothecaries came to be challenged economically by a new class of operators, so-called “druggists and chemists.” These were merchants in chemical and drugs, who started to make and sell medicines and in some cases engage with patients.<sup>202</sup> Tensions emerged between these two groups as early as 1748,<sup>203</sup> and continued through to (and after) the passage of the Apothecaries Act 1815 (which conferred no greater powers than that which the Society of Apothecaries already possessed). One difficulty was that the supervisory powers of the Society of Apothecaries did not extend to chemists and druggists, who thus could get away with selling cheaper, bad quality medicines.<sup>204</sup> Another problem — and the one that really aggravated the apothecaries — was that they were losing business to manufacturers and vendors who did not incur the obligations and expenses associated with seeing patients.<sup>205</sup>

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apothecaries attend to 20 times as many patients as physicians); ROBERT MASTERS KERRISON, AN INQUIRY INTO THE PRESENT STATE OF THE MEDICAL PROFESSION IN ENGLAND 29, 41-42 (1814) (stating that the term apothecaries extends to those who prescribe as well as those that compound medicines); S.W.F. Holloway, *The Apothecaries' Act, 1815: A Reinterpretation*, 10 MED. HIST. 107, 107 (1966).

<sup>201</sup> Holloway, *supra* note 200, at 113.

<sup>202</sup> *Id.* at 108.

<sup>203</sup> See FRAUDS DETECTED: OR CONSIDERATIONS OFFERED TO THE PUBLIC; SHEWING THE NECESSITY OF SOME MORE EFFECTUAL PROVISION AGAINST DECEIT, DIFFERENCES, AND UNCERTAINTIES IN DRUGS 4-5 (1748). This pamphlet was answered in THE APOTHECARY DISPLAYED: OR AN ANSWER TO THE APOTHECARY'S PAMPHLET CALLED FRAUDS DETECTED IN DRUGS 4 (1748); see also AN ENQUIRY INTO THE DESIGNS OF THE LATE PETITION PRESENTED TO PARLIAMENT BY THE COMPANY OF APOTHECARIES 2-3 (1748).

<sup>204</sup> The Society of Apothecaries could control the quality of their membership (by requiring apprentices to understand Latin) as well as the medicines held by their own members, though enforcement seems to have been inconsistent. They also had powers to enter premises to search for decayed or corrupt drugs. See, e.g., SOCIETY OF APOTHECARIES, LONDON, AN ABSTRACT OF SUCH OF THE BY-LAWS OF THE SOCIETY OF APOTHECARIES, LONDON, AS CONCERN THE MEMBERS THEREOF IN GENERAL 10 (1795) (“[N]o Member of the said Society shall make any Medicine of faulty or defective Drugs or simples, upon Pain to forfeit Five Pounds for every such Offence.”).

<sup>205</sup> In 1793, some apothecaries formed the “Pharmaceutical Association” and began a campaign to gain control over the expanding trade of the chemists and druggists. The Association sponsored publication of (the surgeon) John Mason Good's treatise, GOOD, *supra* note 200, which is subtitled “The Origin of the Druggists, Their Gradual Encroachment on Compound Pharmacy, And the Evils to which the Public are from Thence Exposed.” Investigations by the Association revealed not only that chemists and druggists made up standard prescriptions in very different ways, but also that they tendered advice, usurping the place of the “regular practitioner.” The Association

If Singleton had been operating as an apothecary,<sup>206</sup> then he may have resented Bolton's action as one of this new class of druggists — and certainly there is no reason for us to think Bolton did anything other than sell the medicines he stocked at his warehouse. But I am not convinced that this background really helps to explain *Singleton v. Bolton*. To begin with, it is not clear that Singleton practiced as an apothecary, diagnosing patients and administering medicine as well as making up *Dr. Johnson's Yellow Ointment*. There is certainly nothing in the surviving company archives that hint at this. Rather, the case seemed simply to involve a manufacturer of a medicine and a retailer.

A second possibility is that Singleton was protecting the interests of the retailers themselves, or those persons carefully selected by him (perhaps for giving appropriate advice and guidance on use of the remedy). As we have already seen, Singleton did seem particularly concerned that consumers went to Bolton rather than Thomas Tutt, who had succeeded Mrs. Randall as the authorized distributor at the Royal Exchange.<sup>207</sup> In one advertisement, William Singleton noted that:

As many persons mistake Mr. Tutts shop particularly servants . . . . And go to another next it called Bolton's Medicinal Shop . . . all persons . . . are requested to observe that Mr. Tutt . . . is a little out of the general line of foot passage and is close adjoining to the Great Gates leading unto the Royal Exchange.<sup>208</sup>

Singleton concluded, “the public in general are requested to take notice that Bolton near the Royal Exchange counterfeits Mr. Singleton's Ointments to the prejudice of the public in general and that . . . Mr. Tutt is the only Vendor near that place.”<sup>209</sup> The Royal

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petitioned Parliament, hoping to have recognized the principle that only apothecaries were to be entitled to sell pharmaceutical preparations, but in the short term had no success. See THOMAS CHAMPNEY, *MEDICAL AND CHIRURGICAL REFORM*, at iv (1797).

<sup>206</sup> He was not in the Society of Apothecaries, but there is a “William Singleton” listed as a member of the College of Surgeons, and many surgeons also practiced as general practitioners.

<sup>207</sup> Tutt may well have inherited the business from his sister, as the shop is frequently referred to as “formerly Randalls.” When Tutt died in 1801, he left his estate on trust for his son, also called Thomas Tutt, though with annuities to be paid to his niece Sarah Randall. Will of Thomas Tutt, of the Royal Exchange (Dec. 8, 1801) (TNA at PROB 11/1367/93); Will of Thomas Tutt, of the Royal Exchange and Dealer in Medicines of Old Jewry London (Apr. 2, 1801) (TNA at PROB 11/1442/12).

<sup>208</sup> Double Folios, *supra* note 55 (draft notice concerning sale of counterfeit ointment at “Bolton's Medicinal Shop”).

<sup>209</sup> *Id.*

Exchange was a key outlet for Singleton,<sup>210</sup> and Tutt was Singleton's second best seller in terms of quantity: in 1791 he sold sixty-nine dozen units of the ointment — £46 worth out of a total that year of £210.<sup>211</sup> But it seems unlikely that Singleton would expend significant sums on litigation purely to protect Tutt's sales, even if he had carefully selected Tutt as a distributor. Moreover, the archival records of Singleton, particularly correspondence with persons offering to sell *Dr. Johnson's Yellow Ointment*, do not suggest that there was any careful selection in play. Singleton appears to have offered similar terms to all, requiring payment in advance (though occasionally offering discounts to his better customers).<sup>212</sup>

The third, and most plausible, explanation is that control of distribution was key to preventing the emergence of real counterfeits that would undermine Singleton's market. We have already seen how the advertisements that Singleton used (as with those of all other medicine advertisers) identified authorized outlets where the genuine goods could be found. In the same way as communicating what the real thing looked like, or how it tasted, or what the immediate reaction might be, so that consumers could differentiate between genuine and "counterfeit," so too the identification of retail outlets was crucial to ensuring the customers got what they were seeking. Given that trade designations and the appearance of the product and its packaging (which today trademark lawyers call "get up") could easily be copied, controlling distribution channels was an important way to ensure that the customers who wanted *Dr. Johnson's Yellow Ointment* as made by Singleton got the real thing. If re-selling by others was to be permitted,

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<sup>210</sup> Michael Harris, *Exchanging Information: Print and Business at the Royal Exchange in the Late Seventeenth Century*, in *THE ROYAL EXCHANGE* 188, 188 (Ann Loreille Saunders ed., 1991) (Royal Exchange was "surrounded by some of [London's] busiest and most commercially active thoroughfares"); *id.* at 194 (stating that for medicine vendors "an outlet at the Exchange was invariably included").

<sup>211</sup> Folio Containing Summary of Sales, *supra* note 46.

<sup>212</sup> Letter from William Singleton to Mr. Smith, Bookseller, *supra* note 9; Letter from Edward Greenly, Wyebridge Street, Hereford, Vendor of Patent Medicines, to William Singleton (Feb. 14, 1798) (LMA at B/SIN/47) (asking for "a Few Potts . . . for Trial" and "Some Hand Bills . . . Inserting My Name as Your Vendor Here"); Letter from William Singleton to Edward Greenly, Wyebridge Street, Hereford (Feb. 19, 1798) (LMA at B/SIN/48) (agreeing to insert his name as vendor and stating system of order and delivery); Letter from William Swiney, 21 Pall Mall, to William Singleton (Apr. 24, 1798) (LMA at B/SIN/49) (asking to be inserted as vendor); Letter from Shaw and Edwards, 66 St. Paul's Churchyard, to William Singleton (Mar. 28, 1803) (LMA at B/SIN/55) (requesting a gross of pots); Letter from William Singleton to Shaw and Edwards (Mar. 29, 1803) (LMA at B/SIN/56) (discussing above customer and proposing terms).

those signals would be (as modern trademark lawyers might say) blurred. In effect, in a market where customers were concerned with obtaining precisely what they wanted, controlling the identity of the vendor functioned like a trademark for the goods. As his advert said, “\*†\* Beware of counterfeits. If sold at any other Shop near the Change Gate, except Mrs. Randall’s, it is not the Ointment prepared by Wm Singleton.”

#### CONCLUSION

As we have seen, *Singleton v. Bolton* was not the first common law trademark case. Nevertheless, the decision is not without interest both as an historical matter and because of the way it resonates with concerns of traders today. If the fourth explanation offered here is correct, as a historical matter, *Singleton v. Bolton* may well be the first time that the “first sale” doctrine determined the outcome of a trademark case. More interesting, perhaps, is the manner in which the *Singleton* case sheds light on the interests of traders in controlling distribution chains. Singleton, it seems, wanted to prevent the operation of parallel trade or secondary markets, so as to reinforce the importance of the authorized outlets through which his ointment sold. Singleton’s goal was to ensure that consumers knew that the authorized outlets were the only places where genuine goods could be obtained. Lord Mansfield’s decision seemed to curtail Singleton’s strategy, though not with any obvious detriment to his business, which went on to flourish.<sup>213</sup>

Today, such control is particularly valued in the context of luxury goods, such as Louis Vuitton bags, Cartier watches or Dior couture, where brand owners want to preserve the image of the goods by ensuring they are distributed only through selected outlets that present the goods in an appropriate manner so as to maintain an aura of luxury. It is as yet unclear whether, and if so the extent to which, courts today will conclude that a brand owner’s interest in controlling the “aura” of their branded goods will justify restrictions on the further circulation of those goods.<sup>214</sup> If the understanding of *Singleton*

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<sup>213</sup> Double Folios, *supra* note 56 (account books); Folio Containing Summary of Sales, *supra* note 46 (same); Folio Headed “A More Exact Amount of the Dozen of Ointment Sold From Ointment Book” (n.d.) (LMA at B/SIN/38) (same); List of Annual Gross Receipts (1828–1890) (LMA at B/SIN/63) (same).

<sup>214</sup> Compare Case C-337/95, *Parfums Christian Dior SA v. Evora BV*, [1997] E.C.R. I-6013 (establishing flexible rules in Europe to allow advertising the resale of Christian Dior products by Evora chain of chemist shops), with Case C-59/08, *COPAD SA v. Christian Dior Couture SA*, [2009] E.C.R. I-3421 ¶¶ 3, 37 (finding that a

*v. Bolton* proposed in this Article is correct, it seems unlikely that Lord Mansfield would have been sympathetic to the arguments of luxury brand owners.

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licensee who distributed luxury goods in Europe in breach of the terms of a selective distribution agreement might be liable for trademark infringement if such distribution “damages the allure and prestigious image which bestows on them an aura of luxury” and further resale might be prohibitable if it “damages the reputation of the trade mark”).