

**Livingston & Gilchrist v. The Maryland  
Insurance Co. (1813): A Testament to  
Judicial Flexibility**

**By Kathleen Lord Fallon**

# Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

**Title:**

*Livingston & Gilchrist v. The Maryland Insurance Co.* (1813): A Testament to Judicial Flexibility

**Author:**

Kathleen Lord Fallon

**Document type:**

Article

**Publication Date:**

December 1, 2014

**Keywords:**

Brockholst Livingston, John Marshall, marine insurance

**Abstract:**

Barely a month before Justice Brockholst Livingston joined the Supreme Court of the United States, a ship he commissioned with a cargo of \$50,000, was captured by the British and condemned. The circumstances of the vessel's voyage led to its capture; she sailed as an American merchant ship under a Spanish license with an American crew. When seized as a prize, the British found papers showing conflicting information concealed amongst the crew belongings. Justice Livingston tried to recoup his losses through an insurance policy with the Maryland Insurance Company, but was denied on the grounds that the voyage had been insured under false pretense. Justice Livingston sued in the Circuit Court for the District of Maryland and lost. On appeal, the Supreme Court reversed and found for Livingston. While the circumstances of voyage were questionable, the motivations behind the decision of the court were equally suspect.

**Disciplines:**

Law, Maritime History, Supreme Court History

# Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

## I. Introduction

Years before the Honorable Justice Henry Brockholst Livingston joined the esteemed ranks of the United States Supreme Court, he took part in a venture to invest in a cargo ship bound for South America. Livingston developed a clever workaround with a Spanish merchant to avoid the inconveniences of an American ship illegally trading in Spanish colonies. The voyage was almost success, but the British captured the ship and a British court of admiralty had it condemned. Livingston and his cohorts called on their insurance policy with the Maryland Insurance Company, only to be rebuffed. Livingston took the case to the courts and, surprisingly, won. Livingston's case is emblematic of the politics of the day, and provides historians of maritime history with a chronicle rich in intrigue, honor, and good old-fashioned nepotism.

## II. Marine Insurance

The Phoenicians employed the earliest known insurance policies circa 1200 B.C., though the practice of insuring valuables against loss is likely much older.<sup>1</sup> Over millennia, insurance developed alongside the maritime industries, growing increasingly complex with the social and economic dynamics of society. As the use of insurance propagated, so did disagreements over coverage. By the mid sixteenth century, English courts were hearing disputes over marine insurance in courts of admiralty.<sup>2</sup> By the mid-1700s, insurance law integrated with common law. Insurance companies, like Lloyd's of London, allowed private individuals to ensure vessels and cargo with unlimited liability.<sup>3</sup> English common law courts recognized that disputes over marine

---

<sup>1</sup> W.R. Vance, *The Early History of Insurance Law*, 8 Colum. L. Rev. 1, 1-17 (1908).

<sup>2</sup> *Id.*

<sup>3</sup> Christopher Kensington, *Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis*, 67 J. Econ. Hist. 379, 379-396 (2007).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

insurance had strong ties to merchant customs and tried to balance the culture of the maritime industry with the need for expedient justice.<sup>4</sup>

Marine insurance creates an agreement between the parties to indemnify against injury to a ship, cargo, or profits involved in a particular voyage or for a specific vessel. It was usually memorialized a detailed contract, enforceable by the courts. In the United States, early marine insurance straddled state and federal laws. The Constitution directs all issues of admiralty and maritime to federal courts,<sup>5</sup> thus relegating all issues of marine insurance to the same. By the early 1800s, millions of dollars traversed the oceans in the form of goods packed tightly into the dark holds of tall ships. Trans-ocean shipping was a precarious business; ships were lost to the elements, cargos spoiled, and privateers and pirates prowled. To protect themselves and their wares, merchants and investors depended on marine insurance policies. Correspondingly, many merchants, sailors, investors and insurers found themselves in federal courts when the insurance companies failed to perform.

In the United States, merchants and investors spurned the British model of private liability insurance, opting for local, joint-stock operations.<sup>6</sup> The first American marine insurance company was the Insurance Company of North America, formed in Philadelphia in 1792.<sup>7</sup> Soon, insurance companies were established in port cities around the United States.

---

<sup>4</sup> W.R. Vance, *The Early History of Insurance Law*, 8 Colum. L. Rev. 1, 1-17 (1908).

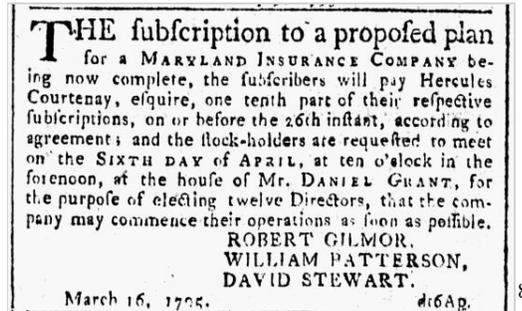
<sup>5</sup> U.S. CONST. art III, § 2, cl. 1.

<sup>6</sup> Kensington, *supra* note 3.

<sup>7</sup> *Id.*

# Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

Kathleen Lord Fallon



One such insurance company was the Maryland Insurance Company. The General Assembly of Maryland incorporated the Maryland Insurance Company in 1795.<sup>9</sup> The Maryland Insurance Co.'s capital stock was valued at \$300,000<sup>10</sup>, a hefty sum for the times. John Hollins, an English immigrant and merchant, was involved in the operation of the Maryland Insurance Company from the outset and led the company from 1802 until his death, in 1827.<sup>11</sup> Hollins was a shrewd businessman and had extensive experience in the maritime industry and trade. His experience was reflected in the Maryland Insurance Company's precise insurance agreements and rapacious defense of his business when challenged.

### III. The Case – *Livingston & Gilchrist, et. al. v. The Maryland Insurance Co.*<sup>12</sup>

#### a. The Facts

In 1804, a Spanish merchant, entered into a contract with an American to transport goods to South America and back to the United States. The merchant, Julian Hernandez Baruso, was a Spanish subject and possessed a license to trade in the Spanish colonies. Baruso lived in New York, but retained his ability to trade in South America through his license, a lucrative occupation. American merchants were not permitted to trade in the Spanish colonies at the time;

<sup>8</sup> FED. INTEL. & BALTIMORE DLY. GAZ., March 18, 1795.

<sup>9</sup> Act of 1795, ch.59

<sup>10</sup> John C. Kayser & Co., *Commercial Directory* 69 (1828).

<sup>11</sup> *Thomas Jefferson to John Hollins, 5 February 1810*, Founders Online (Nov.1, 2014), <http://founders.archives.gov/documents/Jefferson/03-02-02-0158>.

<sup>12</sup> 11 U.S. 506 (1813).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

trade with the Spanish colonies could only take place under a Spanish license, with a Spanish name.<sup>13</sup>

Baruso's contracted to ship goods was with Anthony Carroll, a prominent Maryland businessman, though Carroll died before the contract could be executed. Carroll had bound Brockholst Henry Livingston as surety to the contract, and Livingston stepped in to make the arrangements for the adventure. In January 1805, Livingston and Baruso entered into a new contract for the same venture. The contract held the following stipulations ("B." is Baruso, "L." is Livingston):

"1. In consideration, &c., he agrees to the following partnership with the said B. L. in virtue of which he transfers to the said firm, all his powers, &c., (under the license) of sending an American vessel belonging to the said L. or chartered, in which vessel shall be embarked goods to the amount of \$50,000, the funds and vessel to be furnished and advanced by said I.

2. Baruso to obtain the necessary papers from the Spanish consul and B. L. to pay the duties. Baruso answerable for detention or confiscation by the Spanish government or vessels on account of any defect of right to send under said license, &c.

3. L. agrees in four months to embark the goods on board a vessel to Lima to proceed thither and to return to the United States with a cargo.

4. L. to choose the supercargo and instruct him; and as the adventure will appear on the face of the papers to belong to B. he shall give the supercargo a power, and recognize him the master of

---

<sup>13</sup> GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 197 (1912).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

the cargo, so that the consignees at Lima shall follow literally his orders. The consignees, who were partners of B., to receive a commission.

5. The consignees, who were partners of B., to receive a commission.

6. The said L. and B. agree to divide equally and part and part alike the profits of the adventure.

L. to have commissions on sale.

7. Optional in L. to sell in United States, or convey the return cargo to Europe. If he sells in the United States, B. may take out, at the price of sales, as much as will be equal to his rights.

8. If L. sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss B. to claim nothing, as his share in the profits only accrues on the safe return of the vessel to the United States. Optional with L. to insure or not. L. not to be allowed for risk, if no insurance, more than 15 percent. No insurance to be on the risks of the Spanish government.

10. If any loss accrues from causes not stipulated, B. to lose only his privilege. If loss on sale of return cargo, B. to sustain half.”<sup>14</sup>

With the new contract in place, Livingston chartered the ship *Herkimer* from New York. When Baruso originally contracted with Carroll, Spain and Great Britain had been at peace and Baruso’s Spanish nationality rendered him neutral. Unfortunately, in January 1805, as the new contract between Baruso and Livingston was drawn up, Spain and Britain went to war. Baruso’s

---

<sup>14</sup> 11 U.S. 506 (1813).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

license remained legitimate under the Spanish crown, but now he was a liability as a belligerent to the British. The United States remained neutral.

Determined to proceed with the adventure, regardless of the state of world politics, Livingston invited investment from his cohorts, Robert Gilchrist, James Baxter, and Edward Griswold. The group jointly purchased the goods to be shipped to South America and the *Herkimer* set sail on May 12, 1805. After a successful voyage to Lima, Peru, the *Herkimer*'s cargo was off-loaded and sold. The ship then ventured north to Guayaquil, a river city in modern day Ecuador, and loaded cargo for the return trip to the United States.

While in Guayaquil, Robert Gilchrist wrote to Alexander Webster & Co., a Baltimore merchant, ordering insurance on the remainder of *Herkimer*'s voyage. The insurance requested was for the cargo alone, strictly to insure against loss by capture and “free from all loss on account of seizure for illicit or prohibited trade.”<sup>15</sup> The *Herkimer* was otherwise insured against other at-sea risks. Gilchrist noted in his letter that, while he made the request on behalf of Livingston, Baxter, and himself, Livingston thought the likelihood of needing insurance against capture was so remote, he expressly advised against it. Gilchrist also noted that Livingston, Baxter, Griswold, and he were “native Americans.” Alexander Webster & Co. presented Gilchrist's letter to the Maryland Insurance Company, along with a letter about the nature of the voyage, and insurance was made at \$40,000 at ten percent. John Hollins signed the insurance policy for the Maryland Insurance Company.

---

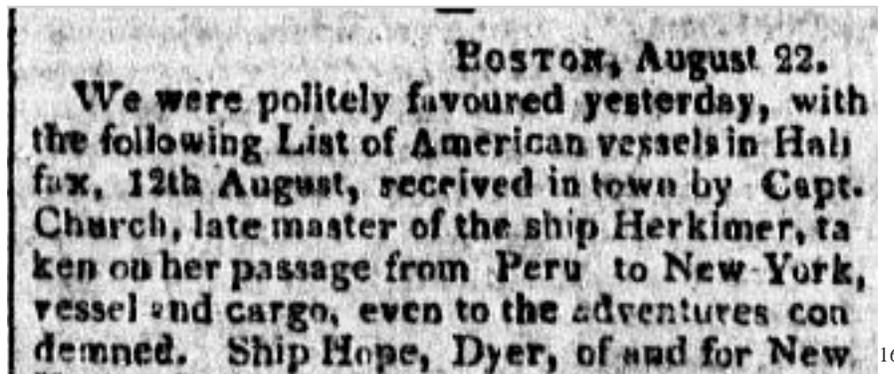
<sup>15</sup> *Id.*

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

As *Herkimer* rounded Cape Horn, James Baxter, supercargo and part owner of *Herkimer*, gave the third mate a small bundle of papers and ordered him to put them in his trunk. Baxter told the mate that some of the papers were in Spanish and if privateers boarded them, the vessel might be detained. The mate dutifully put the papers into his trunk.



16

As *Herkimer* approached New York, *H.M.S. Leander*, an infamous British 50-gun fourth rate, captured *Herkimer* off Sandy Hook, New Jersey.<sup>17</sup> The mate with the secreted papers was taken to *H.M.S. Leander* and questioned. He gave permission for his trunk to be searched. Upon discovering the papers, *H.M.S. Leander* found contradicting evidence; the papers showed that the cargo belonged to Baruso, but others showed that it was Livingston, Gilchrist, Baxter, and Griswold's. Baxter told the *H.M.S. Leander* the nature of the voyage and explained that the cargo belonged to the Americans, not Baruso. Further, Baxter denied any knowledge of the Spanish

---

<sup>16</sup> N.Y. HERALD, Aug. 27, 1806.

<sup>17</sup> *H.M.S. Leander* was notorious in American waters. In 1806, the *H.M.S. Leander* fired a warning shot at the American merchant vessel *Richard*. Though stories as to the means of death differ, a seaman aboard the *Richard* died as a result of the shot. When the *Richard* reached New York, the seaman's lifeless body was paraded through the streets. The *H.M.S. Leander* had also moored in New York, and several of the officers were arrested. The British ship was ordered to quit American waters and never return. The captain of *H.M.S. Leander* was later acquitted of wrongdoing at courts-martial. [ROBERT MALCOMSON, *THE A TO Z OF THE WAR OF 1812* 285 (Jon Woronoff, Scarecrow Press, Inc.) (2006).]

## **Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility**

---

Kathleen Lord Fallon

papers. *Herkimer* was subsequently taken into Halifax, Nova Scotia. On August 12, 1806, *Herkimer* and her cargo were condemned on the grounds that the *Herkimer* was a belligerent, based on Baruso's ownership, and that the concealment of the papers. When Livingston and his cohorts approached the Maryland Insurance Company to recover their losses, the Maryland Insurance Company denied their request.

### **b. Procedural Posture**

Livingston, Gilchrist, Baxter, and Griswold sued the Maryland Insurance Company in the Federal Circuit Court for the district of Maryland. The jury in the circuit court found for the Maryland Insurance Company. Livingston, Gilchrist, Baxter, and Griswold appealed, and the United States Supreme Court heard case in February 1813. Chief Justice Marshall led the Court. The Associate Justices present were Gabriel Duval, William Johnson, Joseph Story, and Bushrod Washington. Justice Thomas Todd did not take part in the case. Justice Brockholst Livingston, the namesake of the case, recused himself. On March 15, 1813, the Supreme Court reversed the Circuit Court for Maryland's decision.

### **c. Parties**

Robert Goodloe Harper represented the Plaintiffs, Livingston, Gilchrist, Baxter, and Griswold. Brockholst Livingston was the son of a prominent New York family that supported the American Revolution from its outset. Livingston went to university with James Madison and later joined the Continental Army, promoting to the rank of Lieutenant Colonel. He served on a diplomatic mission to Spain, working as a secretary to his brother-in-law John Jay. Following the war, Livingston returned to New York and took up politics and law. Livingston served on the

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

New York Supreme Court and wrote 149 opinions including the dissent in *Pierson v. Post* (1805).<sup>18</sup> Livingston was nominated to serve on the United States Supreme Court by Thomas Jefferson in 1806. He served on the Supreme Court for sixteen years, until his death in 1823.<sup>19</sup> During his tenure on the Supreme Court, he wrote few opinions, though his perspective was much valued by his colleagues.

William Pinkney represented the Maryland Insurance Company.

### d. Arguments

There were twenty-two bills of exception to the Circuit Court's decision. The Supreme Court addressed only the Plaintiffs' bills of exception in the decision. First, the Plaintiffs requested the Court instruct the jury that the letter ordering insurance was not a representation. Second, the Plaintiffs requested a jury instruction that the mate's concealing of the papers had not affect on the Plaintiffs' right to recover. Third, the Plaintiffs asked for an instruction that Baruso should have been considered a non-belligerent based on his residency in New York. Fourth, the Plaintiffs disagreed with a jury instruction naming Baruso a joint owner in the cargo. Fifth, the Plaintiffs disagreed with the jury instruction given that, if the jury found that the papers increased the risk of the venture and said papers were not made known to the Defendant, Plaintiffs were not entitled to recover.

Sixth, the Plaintiffs disagreed with a jury instruction the lower court refused to give stating that the Defendants were aware *Herkimer* sailed and traded under a Spanish license.

---

<sup>18</sup> (Henry) Brockholst Livingston, NY COURTS (November 19, 2014), <http://www.nycourts.gov/history/legal-history-new-york/luminaries-supreme-court/livingston-brockholst.html>.

<sup>19</sup> *Brockholst Livingston*, OYEZ (November 19, 2014), [http://www.oyez.org/justices/brockholst\\_livingston](http://www.oyez.org/justices/brockholst_livingston)

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

Seventh, the Plaintiffs disagreed with the lower court's refusal of parol evidence to prove custom or course of trade. Eighth, the Plaintiffs addressed a question of abandonment that they felt should have been left exclusively to the jury but was decided under direction of the court. Ninth, the Plaintiffs disagreed with the jury instruction that insurers are not liable for any increase of risk as the result of the insured to avoid seizure and confiscation under Spanish law. Tenth, the lower Court refused to give the Plaintiffs' instruction that risk was not increased when the insured acted in the court and usage of trade. Finally, the Plaintiffs appealed the lower Court's decision to refuse to instruct the jury that the increase of risk is based on the danger of rightful capture or condemnation under the law of nations.

On the first issue, Robert Goodloe Harper argued for the Plaintiffs that Gilchrist's letter to Webster & Co. was not an affirmation that all the owners in the cargo were American. Next, Harper argued that it was immaterial that Baxter gave the mate the papers; it did not amount to concealment, rather Baxter wanted the papers in a less likely to be searched location. It was not a violation of neutrality. Harper argued that Baruso was not a belligerent because he was domiciled in the United States and that his neutrality was not inconsistent with his privilege as a Spanish subject. The Spanish government still considered Baruso a subject, but to the British, he was an American merchant. Harper objected to the lower Court's use of the jury to decide matters of law, specifically in deciding whether or not Spanish law prohibited the *Herkimer's* trade. Harper rested his case noting that Baruso had no interest in the ship, and yet the *Herkimer* and her cargo were condemned, based on his nationality.

William Pinkney answered Harper's claims by first acknowledging that Gilchrist's letter did not deny that anyone else had an interest in the cargo, but it certainly implied that. Pinkney

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

acknowledged that concealment of papers is not per se grounds for confiscation, but Gilchrist did not conceal innocent papers, but rather he concealed papers proving the property on *Herkimer* to be that of a belligerent. Pinkney attributed this act to bring the whole adventure into suspicion and he would not blame a prize court for convicting on those grounds. Pinkney argued that it is not residence alone that provides one with a national commercial character; other factors include intent, the type of business being conducted, and the degree of permanency of the residence. Pinkney ultimately charged that everything done aboard the *Herkimer* was intended to protect the ship from confiscation by the Spanish for conducting illicit trade, resulting in an increased risk from the British. Regardless, Pinkney noted the unwilling and unwitting Defendants held the real risk.

### e. **Opinion**

Justice Marshall wrote the opinion for the Court, calling the case perplexed and intricate. He condensed his opinion to address the issues he found most salient. Justice Marshall, and the rest of the court, ultimately found that Baruso was a Spanish citizen *and* American merchant, trading on a Spanish license in Spanish provinces and the United States. The Court determined that the Maryland Insurance Company should have known that a vessel they insured would take, and use, whatever papers would keep them out of trouble with other nations.

Justice Marshall wrote that Gilchrist's letter ought not to be construed as a representation. The Court ruled that concealment of the papers could not impact the Plaintiffs' right to recover. Justice Marshall determined that Baruso could be considered an American merchant. Justice Marshall found that the lower Court erred in refusing to say that the Defendants knew that *Herkimer* sailed with a Spanish license. It was also an error for the Circuit Court to direct the

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

jury that underwriters do not have to take into account usage of trade. Accordingly, keeping papers that could help avoid seizure and confiscation by the Spanish as a part of usage of trade did not negate the insurance policy. The Circuit Court's ruling was reversed and remanded; a *venire facias de novo* was ordered. Justice Story concurred with Justice Marshall's ruling, but pointed out several areas in which his logic differed. Justice Story noted that the court's ruling essentially declared that the character of trade determined nationality, and not residency.

### IV. Judicial Backscratching

*Livingston & Gilchrist v. Maryland Insurance Co.* is occasionally recalled for the nuances of the ruling, specifically to describe the duty of insurers to seek an explanation of an ambiguous representation.<sup>20</sup> It may also serve as an illustration of judicial partiality to a fellow justice. Justice Livingston joined the Supreme Court of the United States barely a month after *Herkimer* was condemned in Halifax. Though Justice Livingston was a wealthy man by his own right, the loss of his share in the \$50,000 of cargo was sure to smart. News of Herkimer's capture and subsequent condemnation was splashed across national newspaper; it is utterly improbable that Justice Livingston's fellows on the bench were unaware of his predicament.

This fact bore out in the *Livingston* decision. The decision in *Livingston* was a complete reversal of Justice Marshall's previous decision on citizenship in *M'Ilvaine v. Coxe's Lessee* (1805). In *M'Ilvaine*, Justice Marshall ruled that a British loyalist during the Revolutionary War became a *de facto* American citizen because he was present in the United States for a period of time, thus giving inferred consent to become an American when the nation declared

---

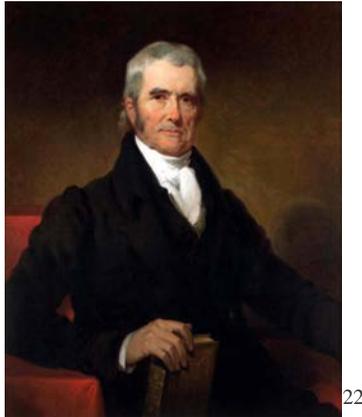
<sup>20</sup> JOHN DUER, A LECTURE ON THE LAW OF REPRESENTATION IN MARINE INSURANCE 8 (John S. Voorhies) (1844).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

independent.<sup>21</sup> Baruso was present in the United States for a time as well, yet Justice Marshall found that Baruso retained his Spanish citizenship all the while. Conveniently, this determination allowed Baruso's use of his Spanish license trade in the Spanish colonies.



Had Justice Marshall applied his ruling in *M'Ilvaine* to *Livingston*, Baruso's use of the Spanish papers would have made the whole adventure illegal in the United States, as well as in Spain. Interestingly, some scholars have speculated that in *M'Ilvaine*, the loyalist's Anglo-Saxon background likely contributed to the decision,<sup>23</sup> as Justice Marshall may have been less willing to assign American citizenship to someone of a noticeably different ethnicity. There are no clues to indicate Baruso's racial underpinnings, though it is safe to assume his race was not a barrier to his employment with the likes of Justice Livingston and Anthony Carroll.

Justice Marshall's decision to rule in favor of Livingston and his cohorts, though not surprising, was telling of the alliances between the justices. At the time, it was not entirely uncommon for the justices to rule in favor of each others' interest. Justice Story decided a land ownership case from 1796 in favor of Justice Marshall and his family in *Hunter v. Fairfax's*

---

<sup>21</sup> 8 U.S. 209 (1808).

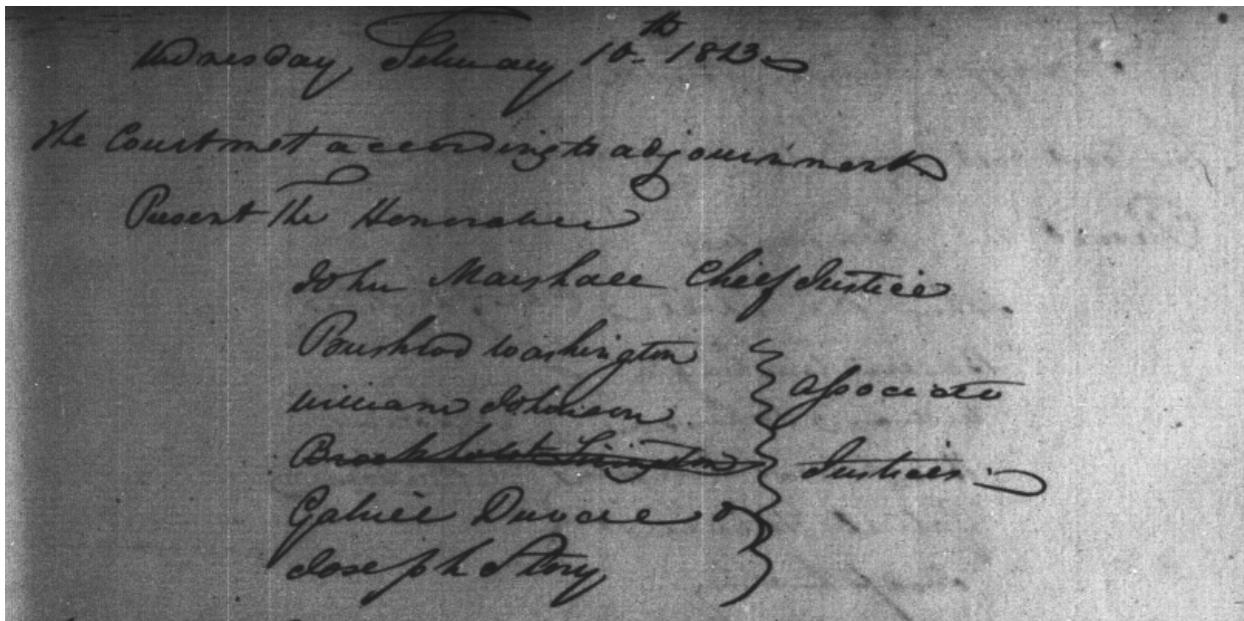
<sup>22</sup> John Marshall by Henry Inman

<sup>23</sup> Elizabeth F. Cohen, *Citizenship and the Law of Time in the United States*, 8 DUKE J. CONST. L. & PUB. POL. 53, 59-62 (2009)(discussing *Coxe*).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

Kathleen Lord Fallon

*Devisee*.<sup>24</sup> Several other cases involving the Justices and their families and close friends received beneficial rulings, though charges of ethical lapses were rarely levied. The Justices involved directly in the cases always bowed out, and in the case of *Livingston*, he was referred to mostly as “B. Livingston” in court documents, despite the other members involved being addressed by their full names. On at least one occasion during the Supreme Court hearings, Justice Livingston was listed as being present, though his name was redacted.



Chief Justice Marshall and Justice Livingston shared a close relationship during their time together on the court. Justices Livingston and Marshall held similar political views; Justice Livingston was quick to follow Chief Justice Marshall’s lead on cases.<sup>25</sup> Justice Livingston dissented only eight times during his term on the Supreme Court.<sup>26</sup> Livingston had invested

<sup>24</sup> 11 U.S. 603 (1813)

<sup>25</sup> *Brockholst Livingston*, JRank.org (November 19, 2014)

<http://law.jrank.org/pages/8333/Livingston-Henry-Brockholst.html>.

<sup>26</sup> TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 55-58 (Nicole Bowen ed., Facts On File, Inc. 2001).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

heavily in the *Herkimer*, and the loss was surely costly. Given the paltry contributions the case ultimately made to American jurisprudence, it is possible Chief Justice Marshall conducted his own risk assessment and decided that furthering Justice Livingston's interest was worth inconsistencies in his rulings. Whether motivated by politics or friendship, judicially questionable maneuvers like that in *Livingston* were clearly *de riguer* in the Supreme Court at the time.

### V. Conclusion

The case of *Livingston & Gilchrist v. Maryland Insurance Company* is best assessed by what happened in the periphery of the case than the legal advancements made within. The episode provides fascinating insight into the politics, economics, and social structure of the day. Each segment the story of *Herkimer* reveals intricate relationships between a ship and her crew, Supreme Court Justices, and even nations. In January 1808, the Court of Vice Admiralty in Halifax addressed the final issues of the sale of *Herkimer* and her cargo. The cargo was valued at £40,896, and the ship and her cargo of bark, copper, and cocoa were sold at public auction to Andrew Belcher, Esq. for a tidy £41,671.<sup>27</sup> It is unclear if he ever paid up.

Ultimately, Justice Livingston's case against the Maryland Insurance Company faded into obscurity. Newspapers did not carry stories about Justice Livingston's big win or the crushing loss to the Maryland Insurance Company. It is far more likely that the benefits of the outcome of *Livingston* were humbly appreciated and reciprocated on the bench, between some of early America's most influential legal minds.

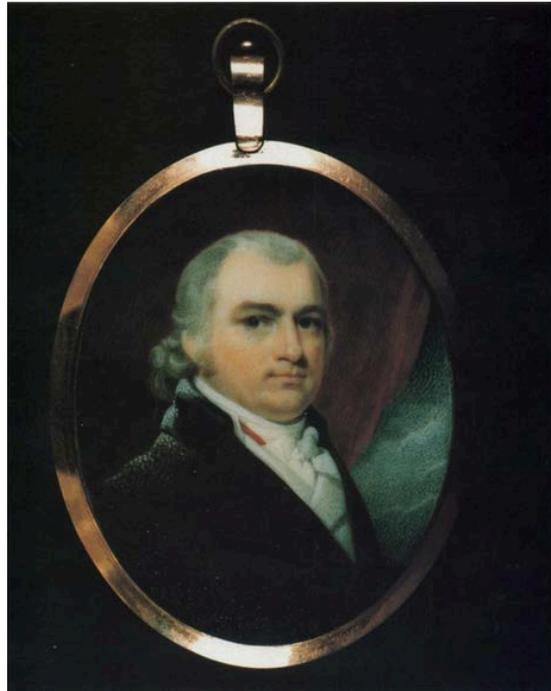
---

<sup>27</sup> John Elihu Hall, *Halifax – Court of Vice Admiralty*, 2 AM. L. J. & MISC. REPERTORY 133, (1809).

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

Kathleen Lord Fallon

### ADDENDUM



28

**Robert Goodloe Harper**

Robert Goodloe Harper was born to a cabinetmaker near Fredericksburg, Virginia in 1765.<sup>29</sup> As a child, Harper, his parents, and his eight sisters moved to North Carolina. At the outset of the American Revolution, Harper volunteered in the militia under General Nathaniel Green but his father wanted him to be educated. In 1784, Harper went to what is now Princeton University and graduated in 1785.<sup>30</sup> During his time at Princeton, Harper seldom kept in touch

---

<sup>28</sup> Eric Robert Papenfuss, *The Evils of Necessity: Robert Goodloe Harper and the Moral Dilemma of Slavery*, 87 AM. PHIL. SOC.1, (1997).

<sup>29</sup> *Harper, Robert Goodloe*, HISTORY, ART & ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES (Nov. 19, 2014), <http://history.house.gov/People/Listing/H/HARPER,-Robert-Goodloe-%28H000225%29/>.

<sup>30</sup> *Id.*

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

with his family still in North Carolina.<sup>31</sup> His feud with his family was due in part to his desire to break away from their devout lifestyle as well as their support for slavery.<sup>32</sup> Harper then moved to South Carolina where he undertook the study of law. In 1786, he was admitted to the South Carolina bar.<sup>33</sup>

Harper began to engage in local politics and in short order was elected to the Third and Fourth Congress.<sup>34</sup> During his time in Congress, his political affiliations shifted, though Harper viewed himself as an independent.<sup>35</sup> Harper served on the Fifth and Sixth Congresses.<sup>36</sup> In 1799, disillusioned with the political fracas, Harper decided to return to the law, and move to Baltimore. While working in Baltimore, Harper became friendly with the influential Carroll family, marrying Catherine Carroll in 1801.<sup>37</sup> Harper and Carroll had seven children, though only two lived past childhood.<sup>38</sup>

Harper's political leanings did not fully wane during his absence from Congress. In 1812, Harper was instrumental in inciting a mob in Baltimore. Harper acted as defense counsel for a man charged with murder during the mob.<sup>39</sup> Though Harper favored peace with the British, he served as a major general during the War of 1812, somehow finding the time to represent the

---

<sup>31</sup> Papenfuse, *supra* note 28.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Supra* note 28.

<sup>35</sup> *Harper-Pennington Papers, 1701-1899, MS. 431*, MARYLAND HISTORICAL SOCIETY (Nov. 20, 2014), <http://www.mdhs.org/findingaid/harper-pennington-papers-1701-1899-ms-431>.

<sup>36</sup> *Supra* note 28.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Supra* note 34.

## Livingston & Gilchrist v. The Maryland Insurance Co. (1813): A Testament to Judicial Flexibility

---

Kathleen Lord Fallon

Livingston party in the process. In 1814, Harper published a book of his speeches on political and forensic subject.<sup>40</sup>

Justice Livingston and Harper had much in common including their Federalist political leanings and their Alma matter. The men had crossed paths prior to Justice Livingston's case being heard in the Supreme Court in 1813. In a 1797 speech to Congress on French encroachment, Harper called out Justice Livingston for exaggerating the degree to which British impressed American seamen. Whatever their disagreements, Harper's arguments served him well in *Livingston*. However, Harper argued amongst friends in *Livingston*; this case was not the first time Harper been in a courtroom with Chief Justice Marshall. Harper was counsel for Justice Samuel Chase during his impeachment trial for voicing his Federalist views, views shared by Marshall, and Livingston.<sup>41</sup> Justice Marshall was a witness for the defense in Justice Chase's case, though he only answered two questions on direct examination.

Harper was elected to the Senate for Maryland in 1815, but served for only a year. He went to Europe on tour for two years and returned to Baltimore in 1824 for Lafayette's visit. Harper died in 1825 in Baltimore and is buried in Greenmount Cemetery.<sup>42</sup>

---

<sup>40</sup> ROBERT G. HARPER, CONSISTING OF SPEECHES ON POLITICAL AND FORENSIC SUBJECTS; WITH THE ANSWER DRAWN UP BY HIM TO THE ARTICLES OF IMPEACHMENT AGAINST JUDGE CHASE, AND SUNDRY POLITICAL TRACTS, (O.H. Nelson) (1814).

<sup>41</sup> R.W. Carrington, The Impeachment Trial of Samuel Chase 9 VA. L. REV. 485, 485-490 (1923).

<sup>42</sup> HARPER, Robert Goodloe, (1765-1825), BIOGRAPHICAL DIRECTOR OF THE UNITED STATES CONGRESS (November 30, 2014), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000225>.