THE COURT
Legacy

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Michigan and the Fugitive Slave Acts

By David G. Chardavoyne

During the second quarter of the 19th century, the attitude of Michigan's white population towards slavery, slaves, and black people in general was complex. On one hand, territorial and state laws barred fugitive slaves from living in Michigan and required free blacks to register and post a $500 bond;[1] prohibited blacks from voting;[2] and barred inter-racial marriages.[3] Few white Michiganders considered blacks to be their equals, and a majority agreed that the existence of slavery in southern states was tolerable in order to preserve the Union.[4] On the other hand, by the 1830s a majority of the population had strong New England roots, found slavery morally objectionable, and chafed at the power of the slave states.[5] During this period, Michigan experienced several incidents in which residents, white, free black, and fugitive slaves themselves, undertook, at the risk of their lives and their fortunes, to impede and prevent the recapture of fugitive slaves by their owners. Some of those events are forgotten today, others are barely remembered, and one, the Crosswhite raid in Marshall, has attained mythical stature. This article attempts to shed some light on some of those episodes of popular resistance and the role of Michigan's federal courts in enforcing the unpopular laws on fugitive slaves.

Underground railroad routes through Indiana and Michigan in 1848

The Elliott/Heward Incident

The first reported incident in Michigan involving resistance to the return of fugitive slaves is anomalous because it occurred in 1807 and because it involved slaves who fled from Canada rather than from American slave states. It is, nevertheless, worth reporting because it demonstrates both that anti-slavery sentiment existed in Michigan then and that, like later episodes, its meaning is blurred by partisan emotions unrelated to slavery.

When Congress created the Michigan Territory in 1805, slavery was common on both sides of the Detroit River. In October 1807, territorial attorney general Elijah Brush reluctantly began proceedings in the Supreme Court of the Territory of Michigan to return nine fugitive slaves to Matthew Elliott and Richard Pattinson, former residents of Michigan now citizens of Amherstburg in Upper Canada.[6] Upon hearing of Brush's petition, several Detroiters swore that they would prevent, by violence if necessary, any slave's forced return to Canada. One of those citizens, Richard Smyth, a Detroit tavern keeper, hatter, and justice of the peace, "swore very bitterly that [the slaves] should not be restored to their master, and that he would kill any person who should come to his house to take them, or should attempt to arrest them, and to carry them across the river."[7]

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Smyth and his fellows made plans to tar and feather Elliott if he appeared in Detroit, and Smyth warned that "they were willing to support the Constitution, but if the Court decided that the slaves of Mr. Elliott should be restored, the Court should be tarred and feathered" as well.[8]

On October 19, 1807, James Heward, the overseer at Elliott's plantation,[9] crossed to Detroit in order to testify for his employer the next morning. Like Elliott and Pattinson, Heward was a former resident of Michigan who chose to move to Canada when the United States took possession of Detroit in 1796. Bitter feelings between those who stayed in Michigan and those who left lingered independent of any question about slavery, and Heward should have been on his guard. Instead, early that evening, Heward, already somewhat intoxicated, insisted on visiting Smyth's tavern "to get a drink of grog." After a few drinks, Heward started to quarrel with the other occupants of the bar. One of the patrons called Heward "a British rascal" and "threatened to pull off his wig," while another man "pulled off his coat and threatened to fight Mr. Heward." By now thoroughly drunk, Heward denounced the Americans in the tavern as "a damned rascally set of beggars" and staggered into the alley. In the dark, a several men seized him, beat him, confiscated his wig, and applied tar and feathers to his hat and head.[10] Heward was escorted back to his lodging where he hid out for the next day and then returned to Canada.

Augustus Brevoort Woodward

Although Heward did not testify, the hearing went forward on October 20 before Augustus Brevoort Woodward, Chief Judge of the Michigan Supreme Court and the court's only judge in residence that term. On October 23, Woodward ruled that Elliott and Pattinson had no legal right to recover their slaves. Woodward explained that the common law recognized no inherent right to recover slaves, that the recapture provision in the Northwest Ordinance applied only to slaves fleeing from another state of the Union, and that the petitioners, by choosing to relocate to Canada in 1796, had abandoned any protection for their "property" afforded by the Jay Treaty between the United States and Great Britain.[11]

The men who assaulted Heward and threatened Elliott and Judge Woodward were not punished. Woodward ordered Smyth, and four other men to show cause why they should not be held in contempt for trying to prevent Elliott from attending court, but nothing seems to have come of it.[12] Similarly, a grand jury indicted several men for riot, assault, and battery for the attack on Heward, but two weeks later attorney general Brush announced that he was unwilling to prosecute and withdrew the indictments. Although Brush and Woodward denounced the assault as dishonoring American justice, it seems that maintaining local harmony was more important than punishing an attack on a former neighbor who was now a "British rascal."

The Hudnell and Blackburn Incidents

There was one other consequence of this matter: Canadian courts, in retaliation, refused to return fugitive American slaves, and slaves on both sides of the border, and, eventually, slaves in the southern states, realized that freedom was just a river-crossing away. Although the term Underground Railroad was not coined until decades later, by the 1820s Detroit, with fewer than 2,000 residents, became a destination for dozens of slaves escaping from the South as well as for free blacks seeking a better life. The next two incidents, occurring in 1828 and 1833, involved the rescue of fugitive slaves by, almost entirely, those free and fugitive blacks who now lived in Detroit and across the river in Sandwich, Upper Canada.

In December 1828, Ezekiel K. Hudnell of Kentucky appeared in Wayne County Court and proved his right to possession of four escaped slaves who had escaped to Detroit "in consequence of the aid afforded them by the citizens of Ohio and Michigan." According to Wayne County Sheriff Thomas C. Sheldon, "there existed great excitement in Detroit in consequence of the arrest of said slaves, which excitement had extended itself to the Canada shore opposite, where great numbers of runaway slaves had collected and armed themselves for the purpose of boarding the vessel and rescuing the slaves of said Hudnell." Sheldon noted that "to my certain knowledge large rewards, were offered to any person or persons who would set at liberty said slaves."

On December 15, 1828, Hudnell received a certificate attesting to his right to return the slaves to Kentucky, but Hudnell's local attorney, Henry Cole, recommended that he have the territorial governor confirm the certificate in writing. Because Governor Lewis Cass was absent from the territory, Sheldon delivered the papers to James Witherell who, as territorial secretary,

The Fugitive Slave Acts

All of the thirteen British colonies that became the United States allowed slavery, and the return of fugitive slaves between colonies was a matter of comity and discretion rather than morality or sectional politics. After the Revolution, slavery became a source of tension between the northern and southern states. As the number of slaves in the north dwindled, Pennsylvania abolished slavery by statute in 1780, and the Supreme Court of Massachusetts did the same by judicial decree in 1783. Delegates from slave holding states in both in the Continental Congress and the Constitutional Convention felt sufficiently uncertain that they obtained specific guarantees of their citizens' ability to recover fugitive slaves where slavery itself was no longer legal.

In July 1787, Congress enacted the Northwest Ordinance which, although it banned slavery in the Northwest, also guaranteed that slaves fleeing there from one of the original states "may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." A month later, on August 29, 1787, the Constitutional Convention, apparently without debate, added a clause to article IV that guaranteed slave owners the right to recapture their slaves anywhere in the nation: "No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Neither the Northwest Ordinance nor the Constitution provided a procedure for returning slaves, and it was not until 1793, after some slave chasers encountered opposition, that Congress passed the first Fugitive Slave Act. Under that act, a slave owner (or his agent) was entitled to capture the fugitive and bring him before a federal judge or before a magistrate of the state where the slave was captured. When the owner proved that the fugitive was a slave under the laws of the state which the fugitive had fled, the judge or magistrate was required to issue the owner a warrant to return the slave home. Any person impeding recovery or harboring a fugitive was liable to pay the owner $500.

In the late 1840s, members of Congress from southern states began to complain that physical resistence and judicial interference in northern states had rendered the procedures and penalties of the 1793 Act totally inadequate. In northern minds, though, this was a minor issue compared to the long-festering conflict over whether slavery would be extended into the territories west of the Mississippi River. Under the Missouri Compromise of 1820, Congress allowed Missouri to enter the Union with no restrictions on slavery but barred slavery in the rest of the Louisiana Purchase north of latitude 36°30′ North (the southern boundary of Missouri). The annexation of Mexican territory in 1848 disrupted the balance between slave and free states, particularly when, in 1849, California petitioned to enter the Union as a free state. In 1850, Congress again reached a compromise by granting California's petition, allowing residents of the Utah and New Mexico Territories to decide whether they would allow slavery, barring slavery in the District of Columbia, and strengthening the fugitive slave laws.

The Fugitive Slave Act of 1850 commanded "all good citizens" to assist in capturing fugitive slaves while imposing on any person impeding a capture a fine of up to $1,000 and or six months in prison, as well as civil liability to the owner of $1,000 per lost slave. The act also allowed slave owners to establish their ownership of an alleged fugitive by submitting an affidavit to the court, instead of appearing in person, while the fugitive was not allowed to testify on his own behalf. The result of the Fugitive slave Act of 1850, like other apparent southern legislative victories of the era, was to increase resistance to slavery in the north, and particularly to returning fugitive slaves, as people who were previously unconcerned felt morally compelled to act to prevent returning slaves to their masters. ■

was acting governor in Cass's absence. Witherell did not sign the papers that day, and on December 16 Hudnell decided to return to Kentucky without Witherell's certificate. That night, Hudnell and an assistant took the slaves to an island in the Detroit River, eighteen miles below the city, where they hoped to board ship in secret. But, as the slave catchers played dice, they were set upon by unknown black men and, in the general confusion, the slaves escaped to Canada.

It is not clear why James Witherell did not sign Hudnell's certificate. Witherell, a crusty old Vermonter, and a veteran of several battles in the Revolutionary War, may have deliberately delayed Hudnell's departure to allow the rescue to be organized. Or it may be that Hudnell was too impatient and that Witherell would have signed the certificates willingly in due time. What is clear is that Witherell's political opponents used this episode to convince President Andrew Jackson not to renew Witherell's appointment as secretary in 1830.[13]

In June 1833, another violent rescue of fugitive slaves had tragic consequences.[14] A gang of Kentucky slave hunters arrested Thornton and Ruth Blackburn, escaped slaves who had built a new life for themselves in Detroit since their arrival in 1831. Detroit's black community, convinced that the Blackburns had not received a fair hearing in Wayne County Court, threatened a rescue. Sheriff John M. Wilson locked the Blackburns in the Wayne County Jail and hoped that tempers would cool. Instead, on Sunday, June 16, a large group of black men from Detroit and Canada, armed with clubs, gathered outside the jail. They dispersed when the last steamboat for the day left Detroit, but while the sheriff was distracted by the crowd, Mrs. Blackburn escaped by switching clothes with a visitor, Mrs. George French, and walking out of the jail.

The slave catchers planned to leave Detroit with Mr. Blackburn on the steamship *Ohio* which was docked at the town wharf. On Monday, June 17, a crowd gathered around the jail again and seized a cart that drove up to the jail door. When Sheriff Wilson went out to disperse the crowd, he was attacked with stones and clubs which fractured his skull and knocked out several of his teeth. The crowd entered the jail and rushed Mr. Blackburn away to Canada.

Although some white Detroiters may have cheered the Blackburns's escape, most of the white community on both sides of the river was terrified by the violence. Canadian authorities arrested Mr. and Mrs. Blackburn, although they were later freed. The Canadians also arrested several black men allegedly involved in assaulting Sheriff Wilson, but they too were later released, supposedly at the request of Detroit's city attorney, Alexander D. Frazer.[15] In Detroit, authorities arrested thirty black men supposed to have been involved in the fracas, and the Common Council established a City Guard. There were suspicious fires at the jail, citizens urged stricter enforcement of the laws restricting blacks, and the Secretary of War sent a company of federal troops to Detroit.[16]

As time passed, however, the tension ebbed and, in the end, Detroit returned to normal. Mr. and Mrs. Blackburn thrived in Canada. By 1870, they were reported to be wealthy citizens of Toronto. Sheriff Wilson was not so fortunate. He was in critical condition for several days, and he never truly recovered from his injuries, dying within a year.

The Kentucky Raids on Calhoun and Cass Counties

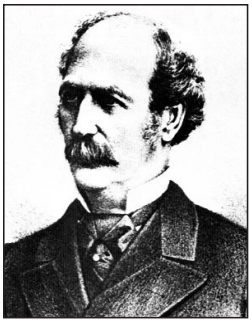
Attacks on slave chasers in Detroit before 1847 caused considerable commotion locally, but they were virtually unknown outside of Michigan. During 1847 and 1848, however, three raids by slave chasers from Kentucky on black communities in southwestern Michigan captured the interest and indignation of Americans north and south. Although the raids and the resulting trials are usually discussed as discrete incidents, they overlap in time, and I have chosen to relate them in chronological order, the way the participants experienced them.


Adam Crosswhite

In 1843, slaves Adam and Sarah Crosswhite learned that their owner, Francis Giltner of Carroll County, Kentucky, was going to break up their family by selling some of them. Mr. and Mrs. Crosswhite fled north with their four children along the Underground Railroad, settling in Marshall, Calhoun County, Michigan, a prosperous town of 700 people, including about 50 blacks, both escaped slaves and free families. Marshall was a stronghold of anti-slavery activity including two anti-slavery newspapers and organizers for the new Free Soil Party which opposed the spread of slavery to the western territories. The Crosswhite family thrived in Marshall,

buying their home in Marshall's black neighborhood on the edge of town, sending their children to the public school, and adding a fifth child to the family.[17]

Three years later, Francis Giltner hired his nephew, Kentucky lawyer Francis Troutman, to track down the Crosswhite family and return them. Troutman followed their trail to Marshall where he posed as school teacher to gather information and hired Calhoun County Deputy Sheriff Harvey W. Dixon (or Dickson) to confirm the location of the Crosswhite home. At dawn on Wednesday, January 26, 1847, Troutman, Francis Giltner's son David, and two other Kentuckians, Franklin Ford and John S. Lee, broke into the Crosswhite home. Neighbors reacted quickly, and before the raiders could leave they were surrounded by dozens of black men, some of them armed, including Charles Bergen, Planter Morse, James Smith, and William Parker. Word of the raid spread to the rest of Marshall, and within a short time the crowd outside the Crosswhite home had grown to between 150 and 300 people, both black and white. Banker Charles T. Gorham and other town leaders such as George Ingersoll, Jarvis Hurd, Dr. Oliver Cromwell Comstock Jr., Asa B. Cook, and John M. Easterly confronted Troutman and then conducted an impromptu debate on the morality and legality of the situation. During this time the Kentuckians held their ground peacefully, although with weapons drawn, asserting their legal right to arrest the Crosswhites (excluding their youngest child) and to take them before a magistrate.



Charles T. Gorham

After several hours, Mr. Crosswhite charged Troutman and his associates with assault, battery, and housebreaking. Deputy Sheriff Dixon had accompanied the Kentuckians to the Crosswhite home, but he now saw that the tables were turned. He arrested the four raiders and took them before Justice of the Peace Randall Hobart. During the next two days, Justice Hobart kept the Kentuckians busy in court while George Ingersoll and Asa Cook escorted the Crosswhites to Detroit by train and then across the river to freedom (Mr. Crosswhite insisted on paying the rail fares for the whole group). With the Crosswhite family safe, Hobart fined Troutman $100 for housebreaking. One of his associates who had pointed a gun at a Marshall resident was arraigned for assault with intent to kill and released on a bond of $100.[18] Learning that the Crosswhites were in Canada, Troutman and his raiders returned to Kentucky empty-handed and in high dudgeon, while the *Marshall Statesman* exulted that: "The time has passed when the slaveholder can, in the face and eyes of freemen, carry off human beings into Slavery, after they have once gained the protection of laws, which guarantee to every one living under them 'the enjoyment of life, liberty, and the pursuit of happiness.'"[19]

Back in Kentucky, Troutman held a meeting of his neighbors to demand action from the Kentucky Legislature. On March 1, 1847, that legislature approved a resolution deploring the "outrages committed upon the rights and citizens of the State of Kentucky" in Marshall and warning that continued disregard of slave owners' property rights must, if repeated, "terminate in breaking up and destroying the peace and harmony" among the states.[20] The resolution called on the Michigan Legislature to act "for the purpose of enabling the citizens of Kentucky to reclaim their runaway and fugitive slaves to the State of Michigan," and directed Kentucky's representatives in Congress to push for stronger fugitive-slave legislation that would impose "the severest penalty for their violation that the Constitution of the United States will tolerate."

In August 1847, seven months after the Marshall raid, and as the Kentucky Legislature's resolution was wending its way to Washington, another party of Kentucky slave hunters arrived in Michigan.[21] During the 1840s, Calvin and Porter Townships, in Michigan's Cass County, became known as a haven for blacks, both free and escaped slaves,[22] who had been attracted by the willingness of local Quakers, many of whom had left the south to avoid living in a slave society, to help them begin a new life. In Cass County, blacks "were allowed to purchase [real] property," and in court they had "the right to an attorney, the right to testify in court against white offenders, the right to bail, the right to make use of the writ of habeas corpus, the right to sue or be sued, and the right to trial by jury."[23]

Like their Carroll County neighbors, slave owners in Kentucky's Boone County sent a spy to Michigan, posing as an abolitionist law student, to collected information on runaway slaves living in Cass County. In early August 1847, a party of thirteen slave hunters, led by Boone County Sheriff John L. Graves, rode into Battle Creek where they naively expected to set up their headquarters. They did not plan for the reaction of the citizens of that strongly anti-slavery town who,

led by newspaper editor (and agent for the Underground Railroad) Erastus Hussey, forced the raiders back across the border and into Indiana. Undeterred, on August 16 Graves led his men back into Cass County, heavily armed and with a wagon to carry captured slaves. After halting to wait for dark about two miles south of Shavehead Lake, near the southeast corner of Calvin Township, Graves sent two groups to strike simultaneously at the farms of Stephen Bogue and Zachariah Shugart, Quakers known to be "conductors" for the Underground Railroad. They would then to join a third squad in attacking the farm of a third Quaker, Josiah Osborn. They would then march their captives to Odell's Mill, south of Vandalia, Michigan, and make their escape to Indiana before anybody could raise the alarm.

As the Kentuckians descended on the Bogue, Shugart, and Osborn farms, the raid seemed to be going according to plan as they seized ten former slaves. In fact, though, their operation was already unraveling. Unknown to the Kentuckians, some of their prey managed to avoid capture, and, joined by members of the Osborn and Bogue families, they raised the alarm. One posse of white and black residents discovered the raiders' wagon and sank it in Birch Lake, while another surprised and captured one of the raiding parties. The rest of the raiders arrived at Odell's Mill at dawn to find themselves surrounded by between 200 and 300 armed residents, black and white, who had, by chance, chosen the mill to secure the captured raiders.

The Quakers in the crowd, hoping to avoid violence between their neighbors and the Kentuckians, convinced the raiders to surrender themselves and their captives to the court in Cassopolis, the county seat. As the two sides marched back to Cassopolis, a telegram went out to Niles, Michigan, summoning two prominent abolitionist lawyers, E. S. Smith and James Sullivan, to represent the former slaves. Learning that Cass County's Circuit Court Commissioner was out of town, they brought Berrien County Commissioner Ebenezer McIlvain who was, unknown to the men from Kentucky, an agent for the Underground Railroad.

Once in Cassopolis, the Kentuckians were served with a writ of habeas corpus and were indicted for kidnapping, assault, and battery. On August 20 at the Cassopolis court house, local attorney George B. Tanner argued that the raiders had acted within the law and that local officials, instead of impeding slave catchers, had a duty to assist them. Although Tanner was absolutely correct as to the law, he was also realistic and advised his clients that the fugitives would not be returning to Kentucky with them. McIlvain listened to Tanner and to the fugitives' attorneys and ruled against the raiders on the technicality that they had failed to present a certified copy of the Kentucky statutes on slavery. McIlvain ordered the release of the ten fugitives, and Zachariah Shugart immediately escorted them to Canada with a large party of other runaway slaves.

Like the Troutman party, Sheriff Graves and his men returned empty-handed to Kentucky where newspapers exploded with indignation at "the Cassopolis Outrage."[24] A few months later, the Kentucky resolution triggered by the Marshall incident made its way to Washington. On December 20, 1847, Kentucky's junior U.S. Senator, Joseph R. Underwood, submitted the resolution to the Senate which referred it to the Committee on the Judiciary.[25] On May 3, 1848, the Senate Committee on the Judiciary, chaired by Senator Andrew Pickens Butler of South Carolina, published its report on the Kentucky resolution. The report, which included the Kentucky resolution and Troutman's account of the Marshall incident, expressed "the fearful truth that the laws now in force are inadequate to remedy the evil; or that the non-slaveholding States will not recognize or enforce them according to the obligation which it was intended they would impose on the parties to the federal compact."[26] The report urged the Senate to enact a bill offered by Butler increasing penalties for hindering recapture of a fugitive slave and requiring all federal officers to assist owners recapture fugitive slaves. Although Butler's bill did not come to a vote in 1848, a very similar bill that Butler introduced in 1850 become the infamous Fugitive Slave Act of 1850.

In December 1847, while Senator Underwood was arguing in the Senate that the 1793 Fugitive Slave Act was a dead letter, incapable of being enforced, Francis Troutman and David Giltner returned to Michigan to test that assertion by bringing a civil suit in the United States Circuit Court for the District of Michigan for $2,752, the alleged value of the Crosswhite family as slaves. Represented by Abner Pratt, a future judge of the Michigan Supreme Court, and John Norvell, a former U.S. Senator and current U.S. Attorney for Michigan,


Abner Pratt

Dr. Oliver Cromwell Comstock Jr.

Giltner sued twelve residents of Marshall, although that number shrank to seven by the time trial began: three white men who led the "town-hall meeting" outside the Crosswhite home – Charles T. Gorham, Dr. Oliver Cromwell Comstock Jr., and Jarvis Hurd – and four black men who prevented the raiders from leaving before help could arrive – Charles Bergen, Planter Morse, James Smith, and William Parker.[27] The defendants retained a team of equally redoubtable Michigan attorneys led by future U.S. Circuit Judge Halmor H. Emmons and including Calhoun County Prosecutor Hovey K. Clarke and prominent Detroit attorneys Theodore Romeyn, James F. Joy, and Henry H. Wells.

Justice John McLean

Trial began on June 1, 1848, in the U.S. Courthouse in Detroit, on the southwest corner of Jefferson Avenue and Griswold Street. Presiding was United States Supreme Court Justice John McLean, sitting as a judge of the Circuit Court. Then 62 years old, Justice McLean was born in New Jersey but raised in the west, principally in Ohio. Originally a Democrat and appointed to the Supreme Court by President Andrew Jackson, his abhorrence of slavery led him to the Whigs, then the Free Soil Party, and ultimately the Republicans. In 1857, he was one of two justices to dissent from the Supreme Court's infamous *Dred Scott* decision.[28] While he presided over the *Giltner* trial during the summer of 1848, McLean was actively seeking the Whig nomination for President.

McLean demonstrated his distaste for the fugitive slave laws in 1842 in *Prigg v. Commonwealth of Pennsylvania,*[29] where he argued, in dissent, for the constitutionality of state laws that gave persons alleged to be fugitive slaves procedural rights not provided by federal law. He also believed, however, that he had a duty to uphold the law as written, whatever his own beliefs, and that the people had a duty to obey the law, whatever their beliefs. In 1843, in his charge to an Ohio jury trying a claim for damages for harboring fugitive slaves, McLean rejected any defense based on a "higher law":

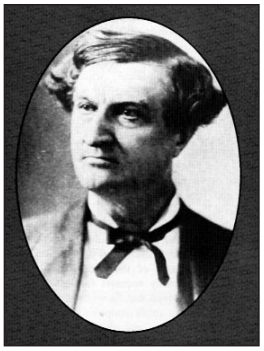
> In the course of this discussion much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law. Paul acted in all good conscience, when he consented to the death of the first martyr; and, also, when he bore letters to Damascus, authorizing him to bring bound to Jerusalem all who called upon the name of Jesus. I have read to you the constitution and the act of congress. These bear the impress of the nation. The principles which they lay down and enforce have been sanctioned in the most solemn form known in our government. We are bound to sustain them. They form the only guides in the administration of justice in this case. I charge you, gentlemen, to guard yourselves against any improper influence.[30]

Justice McLean's obedience to the law was well known, and the Marshall defendants, or at least their attorneys, should not have been surprised when, after the parties presented some thirty witnesses, he demonstrated it in his charge to the jury.[31] First, as was the custom then, he reviewed and commented on the testimony in great detail, leaving the jurors in no doubt that Giltner had proved all of the elements of his case. Turning to the law, he first reminded the jurors that: "This, gentlemen, is an important case. It involves great principles, on which in a great degree depend the harmony of the states, and the prosperity of our common country. The case has acquired great notoriety by the action of the Kentucky legislature, and of the senate of the United States. It is the first one of the kind which has been prosecuted in this state." Justice McLean then admonished the jurors to decide based on the law, not on their consciences:

> In the law is found the only safe rule by which controversies between man and man can be decided. In no supposable case, has a juror a right to substitute his own views, and disregard established principles of law. A well instructed conscience is a proper guide for individual action; but when we are called upon to act upon the interests of others, we violate our oaths, and show ourselves unworthy of so important a trust, when we adopt, as a rule of action, our own convictions of what the law should be, rather than what it is.

Despite the eloquence of those words, at least one juror disregarded them. In his report of the case, Justice McLean noted that: "The jury, after being out all night, returned at the opening of the court next morning, and declared they could not agree, and they were discharged."

Marshall erupted in joy, but Troutman and the Giltners were persistent. In November 1848 the parties reconvened in Detroit for a second trial in late November 1848, this time before U.S. District Judge Ross Wilkins in his capacity as a judge of the U.S. Circuit Court. The second trial began shortly after the close presidential election between Michigan's Lewis Cass and General Zachary Taylor. Local loyalty to Cass, who supported slave owners' rights, and anger at the new Free Soil Party, whose 300,000 votes probably cost Cass the election, may explain why the second jury awarded Frank Giltner $1,926 in damages plus costs. Wealthy Detroit wholesale merchant Zachariah Chandler, a future U.S. Senator and Secretary of the Interior, began a subscription to pay most of the judgment,[32] but this successful use of the Fugitive Slave Act of 1793 encouraged imitation. In January 1849, Sheriff John L. Graves, Milton W. Graves, Thornton Timberlake, and Charles Scott filed several suits for damages in federal court in Detroit against the men they blamed for their loss: Magistrate Ebenezer McIlvain; Ellison, Jefferson and Josiah Osborn; Ishmael Lee; Zachariah Shugart; William Jones; David T. Nicholson; and Stephen Bogue.


Zachariah Chandler

In September 1849, while those cases were awaiting trial, John Norris of Boone County, Kentucky, conducted a second raid on Cass County. On the night of September 27, Norris and eight associates broke into the cabin of David Powell and his family who had escaped from Norris two years before. David Powell and one of his sons were not there, but the raiders gathered up the rest of his family and set out towards Indiana, leaving behind a guard over a group of free black men and women who had been visiting the Powell home. By the next day, the raiders were suddenly surrounded near South Bend by an Indiana posse. Norris, more aggressive than earlier raiders, threatened to shoot his way free, but, after several tense moments, he agreed to return to South Bend to have his title to the Powell family confirmed in court.

When the people of Cass County learned of the Powells's abduction, several posses took off in pursuit and arrived in South Bend on September 29 and 30. By the time of the hearing, the main street of town teemed with hundreds of would-be rescuers, armed and unarmed, black and white. When the Powells were brought into court, Norris ordered his men to unholster their pistols and seize the fugitives. After a several more tense moments, the judge convinced the Kentuckians to put down their arms and surrender. The judge then freed the Powells on a writ of habeas corpus, and a large force of rescuers immediately escorted them back to Cass County. With the rest of their family, they were taken to Detroit and across the river to safety and freedom.

About three months later, on December 21, 1849, Norris filed suit, in the U.S. Circuit Court for the District of Indiana, against the Indiana men who had arrested him. Trial took place in May 1850, before Justice McLean, who instructed the jury with the same respect for the law that he had used in *Vanzant* and in *Giltner*.[33] The Indiana jury abided by his instructions and returned a verdict for Norris in the amount of $2,850.00.

On December 18, 1850, seven months after the Indiana verdict, the first trial of the cases filed after the first Cass County raid, Timberlake v. Osborn, began in Detroit before Judge Wilkins. Slave owner and raider Thornton Timberlake sued Josiah Osborn and his sons Jefferson and Ellison Osborn; David T. Nicholson; Ishmael Lee; William Jones; and Commissioner Ebenezer McIlvain. Timberlake, like Francis Giltner, was represented by Abner Pratt while defendants' counsel included Detroit attorney Jacob Merritt Howard, an abolitionist and former member of Congress (1841-43). In 1854, he would help found the Republican Party, and as a U.S. Senator during the Civil War, he would draft the Thirteenth Amendment abolishing slavery.


Jacob Merritt Howard

Timberlake sought $2,000 for the loss of five slaves, Jonathon, Nancy, Mary, Robert, and Gabriel. The jury heard depositions given by witnesses from Kentucky and testimony from about thirty witnesses. On January 7, 1851, Judge Wilkins instructed the jury. According to E. S. Smith, who represented the slaves in court in Cassopolis, Wilkins told the jury that the people of Cass County did not act as a mob, did not riot, did not violate the Constitution, and did not endanger the Union.[34] Judge Wilkins also impressed on the jurors that Timberlake had acted within the law, even if he used force to recover his slaves. In his trial notes Howard quoted Wilkins's admonition that

"The master cannot commit an assault in the recapture of his slaves," and Howard complained that "This savage remark is repeated with emphasis."[35] Although no verbatim record remains of Judge Wilkins' charge in this case, Howard's notes indicate that it was in the same spirit as his charge to a grand jury in May 1851 in which he warned that the fugitive slave laws "WILL be enforced in this Judicial District":

> Our government is based upon public opinion. Its legal enactments are the expressed will of the people. If experience proves the justice, or the inexpediency of legislation, the will which ordained can also repeal; but until that repeal occurs, the law must be regarded as supreme, binding upon the conscience of all and commanding the support of all who know that the civil power is *ordained of God,* and that they who resist, resisteth His ordinance, and will receive His condemnation. The obligation to support the Constitution is THE AMERICAN OATH OF ALLEGIANCE and coextensive with American citizenship.[36]

The *Timberlake* jury retired to consider its verdict. On January 8, the jurors reported that they could not agree, and Judge Wilkins declared a mistrial.[37] Later that day, one juror told Howard that the jurors were split on believing the plaintiff's evidence but that they had difficulty accepting the defendants' explanations as well.[38]

Like Francis Troutman, however, Thornton Timberlake pursued a retrial which was scheduled to begin in December 1851. The defendants had incurred heavy attorney fees, about $2,200 in total, during the first trial,[39] and they faced similar fees for the second trial in addition to the possibility of an unfavorable judgment. Although their chances of success were increased by the indictment of plaintiff's chief witness, Jonathon Crews, for perjury, many of the defendants decided not to present a defense in a second trial. Faced with the possibility of bearing the cost of a second trial alone, David T. Nicholson and Ishmael Lee decided to settle by paying Abner Pratt $1,000 plus costs, estimated at $300 to $500, in return for a dismissal of the case as to all of the defendants.[40] Local legend in Cass County insists that the defendants all contributed to the settlement, at a great financial sacrifice. In February 1852, however, a Kentucky newspaper published a letter by Nicholson (possibly reprinted from a Michigan paper) complaining that only he and Lee had paid while the other defendants had refused to contribute.[41]

Aftermath

In September 1850, Congress amended the Fugitive Slave to make it easier for slave owners to recover runaways and to provide stricter penalties for interfering with recapture.[42] Like so many other apparent victories of the slave states in the 1850s, such as the Kansas-Nebraska Act of 1854,[43] the *Dred Scott* decision, and the crushing of John Brown's raid on Harper's Ferry, the Fugitive Slave Act of 1850 proved, in fact, to be a key factor in hardening the resolve of the non-slave states. In that historical flood tide, the incidents in Marshall and in Cass County were minor factors, yet it is undeniable that they had some effect. The South used them, and particularly the Crosswhite case, as examples of northern intransigence and as excuses for enacting stricter fugitive slave laws, while in Michigan and elsewhere in the non-slave states they became symbols of the possibilities of moral resistance to slavery by private citizens, "practical abolitionism."[44] ■

End Notes

1. "An Act to regulate Blacks and Mulattoes, and to punish the Kidnapping of such persons," *Laws of the Territory of Michigan,* II: 634 (April 13, 1827). See David M. Katzman, *Before the Ghetto: Black Detroit in the Nineteenth Century* (Urbana, IL: University of Illinois Press, 1973).
2. *Constitution of the State of Michigan* (1835), Art. II, § 1 (limiting the franchise to white, male citizens above the age of twenty-one who had lived in the state for six months).
3. *Revised Statutes of Michigan* (1846), tit. XX, ch. 83, § 6 ("No white person shall intermarry with a negro . . .").
4. This was certainly the attitude of Michigan's most prominent citizen, Lewis Cass. Cass, a territorial governor, U.S. Senator, Secretary of War, and Democratic candidate for President, owned at least one slave. Willard Carl Klunder, *Lewis Cass and the Politics of Moderation* (Kent, OH: Kent State University Press, 1996), 46-47, 168-70.
5. See Arthur Raymond Kooker, "The Antislavery Movement in Michigan, 1796-1840," (Ph.D. diss., University of Michigan, 1941).
6. *Transactions of the Supreme Court of Michigan,* William W. Blume, ed., 6 vols. (Ann Arbor: University of Michigan Press, 1935-1940), II:156 (hereafter TSCM).
7. *Id.,* 219.
8. *Id.,* 216.
9. Plantation farming, cultivating a large area with many slaves providing all of the labor, had never been successful in the north, but Elliott was determined to make it work.
10. *TSCM,* II:212-15.

11. *Id.,* I: 414-18.
12. *Id.,* Cases 90, 91, 147, 148, 149, and 164.
13. *Territorial Papers of the United States,* Clarence E. Carter, ed., 26 vols. (Washington, D.C.: General Printing Office, 1934-662), XI:1237-1242; Id., XII:29-34, 127-132, 166-169.
14. Except as noted, this account is derived from Katzman, *supra,* 8-12.
15. *Journal of the Proceedings of the Common Council of the City of Detroit* (n.p., n.d.), 245 (July 24, 1833), 246 (August 1, 1833).
16. *Id.,* 245 (July 25, 1833).
17. Except as noted, this account is derived from John H. Yzenbaard, "The Crosswhite Case," *Michigan History* 53 (No. 2, Summer 1969): 131; John C. Sherwood, "One Flame in the Inferno: The Legend of Marshall's 'Crosswhite Affair,' " *Michigan History* 73 (March/April 1989): 40; and Justice John McLean's charge to the jury in *Giltner v. Gorham,* 10 F. Cas. 424 (C.C. Mich., 1848).
18. *Marshall Statesman,* February 1, 1847.
19. *Id.*
20. The Kentucky resolution is reprinted (with Francis Troutman's affidavit) in U.S. Senate Report No. 143, 30th Cong., 1st Sess. (1848).
21. Except as noted, this account is derived from Howard S. Rogers, *History of Cass County* (Cassopolis, MI 1875), 131-42; Benjamin C. Wilson, "Kentucky Kidnappers, Fugitives, and Abolitionists in Antebellum Cass County, Michigan," *Michigan History* 60 (no. 4, Winter 1976): 339; and Debian Marty, "The Kentucky Raid: Lessons from Practical Abolitionism," (paper presented at the Borderlands III Underground Railroad Conference, September 16-18, 2004).
22. Most of the black families in Cass County in the 1840s had been free for generations and had emigrated from Virginia and North Carolina as restrictions on free blacks in those states became intolerable. Roma Jones Stewart, "The Migration of a Free People," *Michigan History* 71 (January-February 1987): 34.
23. Wilson, *supra,* 340-41.
24. *E.g., Licking Valley (Covington, Kentucky) Register,* October 22, 1847.
25. Congressional Globe, 30th Cong., 1st Sess., p. 51 (12/20/1847). In his remarks, Senator Underwood referred to an incident in Detroit during the summer of 1847 in which a Missouri resident named Duncan was abused while trying to recapture a slave. It seems likely that this is the same incident recounted in 1886 by William Lambert, a leader in Detroit's black community (*Detroit Tribune,* January 17, 1886). According to Lambert, a man named Dun came to Detroit seeking "fugitive from labor" Robert Cromwell who had lived in Michigan since 1840. Dun tricked Cromwell into entering the U.S. Courthouse where Dun hoped to arrest him quietly and rush him before U.S. District Judge Ross Wilkins. When Dun blocked the door, Cromwell ran for a window and shouted for help. Lambert, with several other men, black and white, entered the courthouse, rescued Cromwell, and escorted him across the river. Meanwhile, Dun was surrounded by an angry crowd and had to take refuge in a private residence. At the urging of Lambert and other black residents, Dun was charged with violating Michigan's law that made it a felony "to inveigle or kidnap any fugitive slave to return him to slavery." (*1846 Revised Statutes of Michigan,* ch. 153, § 25). Because he refused bail, Dun (or Duncan) stayed in the county jail for several months.
26. U.S. Senate Report No. 143, 30th Cong., 1st Sess. (1848), p. 5.
27. Because Gorham was first on the list of defendants, the case is known as *Giltner v. Gorham.*
28. *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).
29. 41 U.S. (16 Pet.) 539 (1842).
30. *Jones v. Vanzandt,* 13 F. Cas. 1040 (C.C. Ohio, 1843), *aff'd sub nom. Jones v. Van Zandt,* 46 U.S. 215 (1847)..
31. *Giltner v. Gorham,* 10 F. Cas. 424 (C.C. Mich., 1848).
32. Rogers, *supra* states that Chandler organized and contributed to the fund. Later accounts state that Chandler paid the entire judgment.
33. *Norris v. Newton,* 18 F. Cas. 322 (C.C. Ind., 1850).
34. E. S. Smith to Jacob M. Howard, August 23, 1851, Folder, "Kentucky Slaveowners v. Michigan Quakers," Box 7, Jacob M. Howard Papers, Burton Historical Collection, Detroit Public Library.
35. "Charge of the court," January 7, 1851, Folder, "Kentucky Slaveowners v. Michigan Quakers," Box 7, Jacob M. Howard Papers, Burton Historical Collection, Detroit Public Library.
36. *Detroit Free Press,* May 31, 1851. The grand jury matter involved a claim by a Tennessee slave owner, John Chester, that a U.S. Marshal had telegraphed a warning to the Underground Railroad and then delayed serving a warrant to allow Chester's slaves to flee to Canada. Despite an aggressive effort by U.S. Attorney George C. Bates (see George C. Bates to Daniel Webster, March 12, 1851, *Millard Fillmore Papers* (Buffalo, NY: Buffalo Historical Society, 1907), I: 343), the grand jury refused to indict, finding that any telegram had been sent by a free black man and had, in any case, arrived after Chester's slaves were already in Canada. *Detroit Free Press,* June 5, 1851. Although Judge Wilkins' charge did not result in an indictment, U.S. Senator Lewis Cass, a former governor of the Territory of Michigan, wrote to congratulate Wilkins on his charge, noting that it "cannot but be highly appreciated by every lover of the Union and the Constitution." Lewis Cass to Ross Wilkins, June 5, 1851, Lewis Cass Papers, Burton Historical Collection, Detroit Public Library.
37. Docket, *Thornton Timberlake v. Josiah Osborn,* Case No. 2077, Record Group 21, Records of the District Courts of the United States, National Archives and Records Administration, Great Lakes Region, Chicago.
38. "Memo," January 8, 1851, Folder, "Kentucky Slaveowners v. Michigan Quakers," Box 7, Jacob M. Howard Papers, Burton Historical Collection, Detroit Public Library.
39. *Covington (Kentucky) Journal,* February 22, 1852.

40. Stipulation to Dismiss, December 3, 1851, Folder, "Kentucky Slaveowners v. Michigan Quakers," Box 7, Jacob M. Howard Papers, Burton Historical Collection, Detroit Public Library; *Covington (Kentucky) Journal*, February 22, 1852. The stipulation does not state the settlement amount; the figure given here is from Nicholson's letter in the *Journal.*

41. *Covington (Kentucky) Journal*, February 22, 1852. A subscription petition circulated by Jefferson Osborn, often cited as evidence that other defendants participated in the settlement, is suspect because of its 1851 date – it relates to the attorney fees from the first trial instead of the settlement. Jefferson Osborn, "Subscription List," 1851, Osborn Papers, Bentley Historical Library, University of Michigan. Another unexplained aspect of the financial impact of these cases on the defendants is that, on February 10, 1852, Judge Wilkins dismissed two of the lawsuits, against Josiah Osborn and Stephen Bogue, in both cases "with costs against plaintiff." Dockets, *Thornton Timberlake v. Josiah Osborn*, Case No. 2079, and *John L. Graves v. Stephen Bogue*, Case No. 2080, Record Group 21, Records of the District Courts of the United States, National Archives and Records Administration, Great Lakes Region, Chicago. Among the Jacob Howard Papers is a bill of costs by Stephen Bogue asking for $1,092.50 for the attendance of 33 witnesses during the trial, but the disposition of that bill of costs has not yet been determined.

42. "An Act to amend, and supplementary to, the Act entitled 'An Act respecting fugitives from justice, and persons escaping from the service of their masters,' approved February 12th, one thousand seven hundred and ninety-three," *U.S. Statutes at Large*, IX: 462 (September 18, 1850).

43. "An Act to organize the Territories of Nebraska and Kansas," *United States Statutes at Large*, 10: 277 (May 30, 1854). In January 1855 Michigan's Legislature denounced the Act as "a violation of a mutual covenant between the free States and the slave-holding States of the Union, justified by no necessity, present or prospective, injurious to the rights of |the former, tending to interrupt the internal harmony of the country, and to frustrate the well known purpose of the framers of the constitution, who, by gradual legislation designed ultimately to put an end to slavery." The Legislature also called on Congress to ban slavery in all of the "Territories of the United States." A few weeks later, the legislature reacted further by passing "personal protection" laws which gave local officials a (dubious) legal authority with which to resist and delay handing over people alleged to be runaway slaves. The protective measures included requiring local prosecutors to "use all lawful means to protect and defend" persons arrested as fugitive slaves; guaranteeing such persons writs of habeas corpus, trial by jury, and appeals from any adverse decision; forbidding their detention in any jail in Michigan; and requiring live testimony of two witnesses to prove that the person was a slave. "An Act to protect the rights and liberties of the inhabitants of the State," 1855 Mich. Pub. Acts No. 162 (February 13, 1855); "An Act to prohibit the use of the common jails and other public buildings in the several counties for the detention of persons claimed as fugitive slaves," *id.*, No. 163 (February 13, 1855).

44. See Marty, *supra*, for a discussion of the history and strength of this concept.

Slavery in Michigan

Slavery had long been a fact of life in the Old Northwest when Congress created the Michigan Territory in 1805. Before the arrival of Europeans, Native Americans enslaved defeated enemies and, later, colonists of New France at Detroit or Michilimackinac used slaves, both black and native (called "Panis") to ease their chronic labor shortage, a practice which the government in Paris legalized by decree in 1709. By 1760, sixty-two slaves lived in Detroit under the French flag, although most families did not own any slaves, and only two families owned more than three. When France surrendered Canada to Great Britain, the new rulers guaranteed that "the Negroes and Panis of both sexes, shall remain, in their quality of slaves, in the possession of the French Canadians to whom they belong." By 1783, the year Great Britain formally ceded Michigan and the rest of the Northwest to the United States, 180 slaves lived in Detroit. In 1796, when the United States finally took physical possession of Detroit, the slave population had increased to about 300.

The Northwest Ordinance, enacted in July 1787 by the Confederation Congress to organize a government in the Northwest, banned slavery ("There shall be neither slavery nor involuntary servitude in the said territory"), but did not free any slaves in Michigan. The Jay Treaty of 1795, in which the British agreed to evacuate the Northwest, guaranteed that "settlers and trappers" who decided to remain in the Northwest Territory "shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein." Slave owners argued, and most Michigan residents seemed to agree, that "property of every kind" included slaves, while opponents of slavery pointed out that, even under Canadian law, slave owners' rights were limited. In 1793, after Britain ceded the Northwest to the United States but before the Americans could take possession, the provincial parliament of Upper Canada passed a law for the gradual abolition of slavery in Canada by providing that any child born to a slave mother after May 31, 1793, would be free on his or her twenty-fifth birthday.

In September 1807, the status of slavery in Michigan came before Chief Judge Augustus Brevoort Woodward of the Supreme Court of the Territory of Michigan. Detroit attorney (and territorial attorney general) Elijah Brush filed a petition to declare free four slaves (Elizabeth Denison and her brothers, James, Scipio, and Peter Jr.) held by one Catherine Tucker near Detroit. After a hearing, Judge Woodward ruled that: (1) Slaves living on May 31, 1793, and in the possession of settlers in the Michigan Territory on July 11, 1796, were slaves for life; (2) children of such slaves born between May 31, 1793 and July 11, 1796 remained slaves until their twenty-fifth birthday and were then free; and (3) children of such children of slaves, and any person born after July 11, 1796, were free from birth.

In his opinion, Judge Woodward remarked that this result "brings the existence of Slavery in the territory of Michigan to as early and to as favorable a Close as perhaps the imperfections necessarily attached to all human measures will allow to be expected." In fact, the 1830 U.S. Census found that there was still one slave living in what is now the State of Michigan. In 1835, in the first article adopted for its first state constitution, Michigan abolished slavery for good. ■

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