

**In Re: Booth**  
3 Wis. 1 (1854)

*What has become known as the Booth case is actually a series of decisions from the Wisconsin Supreme Court beginning in 1854 and one from the U.S. Supreme Court, Ableman v. Booth, 62 U.S. 514 (1859), leading to a final published decision by the Wisconsin Supreme Court in Ableman v. Booth, 11 Wis. 501 (1859). These decisions reflect Wisconsin's attempted nullification of the federal fugitive slave law, the expansion of the state's rights movement and Wisconsin's defiance of federal judicial authority. The Wisconsin Supreme Court in Booth unanimously declared the Fugitive Slave Act (which required northern states to return runaway slaves to their masters) unconstitutional. The U.S. Supreme Court overturned that decision but the Wisconsin Supreme Court refused to file the U.S. Court's mandate upholding the fugitive slave law. That mandate has never been filed.*

When the U.S. Constitution was drafted, slavery existed in this country. Article IV, Section 2 provided that:

No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Based on this provision, Congress in 1793 passed a law that gave slave owners the power to have a runaway slave arrested in any state and returned.

The law remained intact until 1850, by which time the moral sentiment of the North against slavery had become aroused; the Liberty Party had been organized, the underground railroad had flourished and many northern men and women refused to act as slave catchers or assist in perpetuating slavery.

Because of the increasing difficulty the slave holders faced in reclaiming runaway slaves, Congress passed the Fugitive Slave Act of 1850. The law placed the mechanism for capturing runaway slaves in the hands of federal officers. It provided that these cases would be heard by a federal judge or court commissioner and allowed the slave owner to prove the debt owed by the slave but precluded testimony from the fugitive entirely. The new law also increased the penalties for resistance and for concealment of fugitives.

Although it was intended as a compromise, the new law actually fueled the flames of anti-slavery sentiment and from 1854 to 1861, Wisconsin politics was dominated by the question of whether the state had to defer to the federal government's efforts to enforce the Fugitive Slave Act.

In the spring of 1852, a slave named Joshua Glover escaped from a Missouri plantation and made his way to Racine, where he found work at a sawmill. Two years later, his owner, Bennami Garland, tracked him down and had him apprehended by federal marshals under the Fugitive Slave Act. Glover was held in the Milwaukee County Jail pending a hearing.

When Sherman M. Booth, editor of the Milwaukee abolitionist newspaper, *The Free Democrat*, heard of the capture, he is said to have mounted his horse and galloped through the streets of Milwaukee shouting: "Freemen! To the rescue! Slave catchers are in our midst! Be at the courthouse at 2:00!" Booth's lawyers then persuaded a Milwaukee County Court judge to issue a writ of *habeas corpus* (a judicial order freeing Booth) directing the U.S. marshal to bring Glover before the county judge and justify his detention.

Before the hearing could take place, Booth appointed a committee to prevent the “kidnapping” of Glover by the federal authorities. After Booth made a fiery speech, a mob led by one of the other committeemen, John Rycraft, battered down the jail doors, freed Glover and spirited him away to Canada.

The federal authorities charged Booth with assisting Glover’s escape. Booth was released on bail but two months later, at his own request, he was delivered to the U.S. Marshal. Booth’s surrender was calculated to bring a test case in the state courts challenging the constitutionality of the fugitive slave law. On the day after the surrender, Booth’s attorney, Byron Paine (later a justice of the Wisconsin Supreme Court), successfully applied to Wisconsin Supreme Court Justice Abram D. Smith for a writ of *habeas corpus*.

At that hearing, Smith asked the parties to address the constitutionality of the fugitive slave law. Paine, citing Thomas Jefferson’s writings, said states have the right to impose their authority when their sovereign rights are violated by the federal government. Paine argued that Congress had no authority to make laws based on the fugitive slave clause of the Constitution and that the Act of 1850 was unconstitutional because it denied a trial by jury and vested judicial powers in court commissioners.

On June 7, 1854, Smith ordered that Booth be released, finding the warrant of commitment defective and the fugitive slave law unconstitutional.

When U.S. Attorney General Kaleb Kushing in Washington D.C. was informed of Booth’s release, he directed U.S. Attorney Sharpstein to petition the Wisconsin Supreme Court for a review. With the approval of President Franklin Pierce, Sharpstein retained an eminent Wisconsin lawyer, Edward G. Ryan (later to become Chief Justice of the Wisconsin Supreme Court), to assist him in the argument before the full state court and also to help prosecute Booth and Glover’s other rescuers in federal court. (Many years later, in a eulogy for Paine, Ryan recalled this case:

The first opportunity I had of forming an estimate of his high ability, was in the famous case under the fugitive slave act, in 1854 and 1855. He was employed for the defendant; I, for the United States. We both brought to the case, not only ordinary professional zeal, but all the prejudices of all our lives. He was a frank and manly abolitionist. I was as decidedly what was called pro-slavery. We were both thoroughly in earnest...I thought him a fanatic. He probably thought me one. Possibly we both were.

When Ableman v. Booth was heard before the full Wisconsin Supreme Court in late June 1854, Paine (Booth’s attorney) made substantially the same arguments he had made before Smith. Sharpstein and Ryan, on the other hand, argued that federal judges – and not the Wisconsin Supreme Court -- had the ultimate say in cases involving the federal Constitution and laws. They also said federal and state courts have no power to discharge each other’s prisoners upon *habeas corpus* and insisted that the acts of the federal court commissioners were acts of the federal court and that the jurisdiction of the federal court could not be ousted. Sharpstein asserted that Booth’s writ of commitment contained “mere formal inaccuracies” which did not entitle Booth to be freed; Sharpstein also vigorously defended the constitutionality of the fugitive slave laws of 1793 and 1850.

Finding the writ of commitment defective because it did not precisely state that Booth had aided a “fugitive from labor,” the Wisconsin Supreme Court on July 19, 1854, unanimously affirmed Smith’s earlier decision releasing Booth. In separate opinions, Chief Justice Edward V. Whiton and Smith declared the 1850 law unconstitutional while Justice Samuel Crawford,

although finding Booth's writ of commitment to be invalid, concluded the fugitive slave law was constitutional.\*

The U.S. Federal District Court convened in Milwaukee and a grand jury returned indictments against both Booth and Ryecraft for aiding, assisting and abetting the escape of Glover. Booth again applied to the Wisconsin Supreme Court for a writ of *habeas corpus*. This time, however, the Wisconsin Supreme Court unanimously denied the writ on the grounds that the federal court now had jurisdiction and the state could not interfere with that process before a judgment was rendered in the federal court.\*\* The Court applied the familiar rule of comity which provides that when jurisdiction of a matter has been acquired by one court, another court will not interfere.

Both Booth and Ryecraft were then tried in federal court, found guilty, sentenced to short terms of imprisonment and ordered to pay fines of \$1,000. The Wisconsin Supreme Court then issued writs of *habeas corpus* after the court concluded that it could address the question of the jurisdiction of the federal court and could release the prisoners, even when the federal court had tried the case.

In the meantime, U.S. Attorney General Kushing had decided to appeal the Wisconsin decisions to the U.S. Supreme Court. Two writs of error were subsequently issued by U.S. Supreme Court Chief Justice Roger Taney directing the clerk of the Wisconsin Supreme Court to send the records in both the 1854 case (Ableman v. Booth) and the 1855 case (In Re: Booth and Ryecraft). The first writ of error was sent without objection; however, when the second writ was issued and served in June 1855, the justices of the Wisconsin Supreme Court directed the clerk not to send it. The Wisconsin justices asserted that no writ of error could run from the U.S. Supreme Court to the supreme court of a state, and that the federal Judiciary Act of 1789 which authorized this was unconstitutional.

The Court's action in refusing to make a return to the writ of error issued by the U.S. Supreme Court was tantamount to judicial nullification of part of the 1789 federal act which by that time had served as the basis for federal review of almost 200 cases. This refusal to make a return to the writ of error was also inconsistent with the Wisconsin Supreme Court's action in 1854 when it had agreed to a writ of error in the Ableman v. Booth case; it was also inconsistent with Wisconsin Supreme Court Chief Justice Whiton's acknowledgment in his original opinion that the decisions of the U.S. Supreme Court were final and conclusive upon all state courts.

The Wisconsin Supreme Court's refusal to comply with the order of the U.S. Supreme Court delayed the U.S. court's consideration of the case, but did not prevent it. When it became apparent that no official copy of the writ of error would be sent, the U.S. Supreme Court ordered that a certified copy obtained by Jeremiah S. Black, the new U.S. attorney general, would be sufficient. The two cases were then argued together before the U.S. Supreme Court in January 1859.

Black argued the case for the United States but no counsel appeared on the other side. However, Booth had sent to the U.S. Supreme Court a pamphlet containing a copy of the argument Byron Paine had made in the Wisconsin Supreme Court, along with copies of the opinions issued by the Wisconsin Supreme Court in the Booth matter.

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\* Crawford took the unpopular position that the laws of the United States and the judgments of the federal courts within their proper jurisdiction were supreme and could not be set aside by state courts. His opinion in the Booth case contributed significantly to his defeat when he ran for reelection to the Wisconsin Supreme Court in April 1855; his successful opponent in that election was Orsamus Cole).

\*\* Ex parte Booth, 3 Wis. 134 (1854)

On March 7, 1859, Chief Justice Taney, speaking for a unanimous U.S. Supreme Court, reversed both Wisconsin decisions.<sup>\*\*\*</sup> Taney vigorously insisted on the constitutionality and necessity of the U.S. Supreme Court's appellate jurisdiction; his opinion for the U.S. Supreme Court denied the power of state judges and courts to interfere by *habeas corpus* before or after trial to take control of a federal case. In addition, the U.S. Supreme Court pronounced the Fugitive Slave Act constitutional. Chief Justice Taney further explained that if a state should attempt to free a federal prisoner in the custody of the U.S. marshal, "it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."

Angered by that opinion and unwilling to accept the logic of Chief Justice Taney who had written the infamous Dred Scott case, the Wisconsin Legislature passed a series of resolutions denouncing the actions of the U.S. Supreme Court as "an arbitrary act of power ... without authority, void and of no force," and urging "positive defiance" by the states as the "rightful remedy."

Only a month after the U.S. Supreme Court issued its opinion in the Booth matter, Byron Paine was elected to succeed Smith on the Wisconsin Supreme Court. That election was seen as a referendum on the state's rights position that Paine advocated in his representation of Booth and an approval by the state electorate of the idea that the state could and should nullify and defy a law of the United States--even one which the federal courts had pronounced constitutional and valid--provided such law was thought by the courts of the state to be unconstitutional.

Coincidentally, only a short time after that election, on April 12, 1859, Chief Justice Whiton died. Governor Alexander William Randall appointed Luther S. Dixon, 34, to fill the vacancy. Thus, Byron Paine, who was then only 32, and Dixon took seats upon the Wisconsin Supreme Court on the same day.

The two new Wisconsin Supreme Court justices, along with Justice Orsamus Cole, were soon confronted with a request to file the U.S. Supreme Court's mandates reversing the judgments and dismissals in the Booth cases. Paine recused himself because he had been Booth's lawyer. Thus, the issue of determining whether the U.S. Supreme Court's mandates in the Booth case should be filed in this state fell to Dixon and Cole.

Cole, reaffirming his earlier view that the federal court had no power to review the judgments of the state Supreme Court, voted not to file the mandates in the Booth cases. That meant that the mandates would not be filed no matter how Dixon voted because even if Dixon thought the mandates should be filed, there would be an equal division of the two justices participating and consequently, no action could be taken. However, Dixon voted to file the U.S. Supreme Court mandates and issued a formal opinion explaining his reasoning.<sup>\*\*\*\*</sup> Although he personally agreed that the Fugitive Slave Act was unconstitutional, Dixon admonished the state's rights advocates not to cripple the rule of law to strike down slavery. He exposed the flaw of the state's rights position when he wrote:

[The state's rights position] would place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire union, and to break down and destroy at pleasure every barrier created and right given by the constitution ... [even] if it be granted that both Congress and the Supreme Court have improperly discharged the high trusts reposed in them by the American people, it has no tendency to prove or disprove the existence of this power.

Ableman v. Booth, 11 Wis. at 513.

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<sup>\*\*\*</sup> Ableman v. Booth and U.S. v. Booth, 21 How. 506 (1859)

<sup>\*\*\*\*</sup> Ableman v. Booth, 11 Wis. 501 (1859)

By issuing that opinion, Dixon guaranteed a difficult re-election for himself. State's rights advocates nominated Andrew Scott Sloan (who later became the Wisconsin's attorney general) to run against Dixon. Dixon won the April 1860 election by a margin of just 395 votes.

In the meantime, Booth had neither paid his fine nor served the jail time imposed following his convictions in federal court. D.A.J. Upham, the U.S. Attorney in Milwaukee who had replaced Sharpstein under the new presidential administration, filed a motion in federal court in Milwaukee asking that Booth be re-arrested. He was placed in federal custody in Milwaukee on March 1, 1860. Another petition for *habeas corpus* was filed in the Wisconsin Supreme Court, but an evenly divided court refused to grant it.\*\*\*\*\* Booth's short term of imprisonment thereafter expired but he remained confined in the federal custom house in Milwaukee because he refused to pay his fines. Requests that his fines be remitted or that he be pardoned were rejected by President James Buchanan and U.S. Attorney General Black.

On August 1, 1860 several armed men forcibly rescued Booth from the federal custom house in Milwaukee and took him to Waupun where State Prison Commissioner Hans Heg (a Civil War hero whose statue stands at one entrance to the state Capitol) gave him protection. Booth continued to speak at numerous political meetings in the area. Finally, on October 8, 1860, Booth was recaptured by federal marshals at a meeting at Berlin, Wisconsin, and taken back to the custom house in Milwaukee.

After Abraham Lincoln's election, but before the inauguration, Booth again applied to Buchanan for a pardon. This request was vigorously opposed by U.S. Attorney General Black who asserted "the fact that in all this criminal folly and insolence, he [Booth] has been aided, comforted and abetted by a state court and by other lawless persons who pretend to justify him, makes the vindication of the law in this particular case absolutely necessary by way of example."

In his fourth annual message to Congress on December 3, 1860, Buchanan stated that the universal judicial acceptance of the constitutionality of the Fugitive Slave Act of 1850 was marred only by the defection of the Wisconsin Supreme Court. That decision, he said, "has not only been reversed by the proper appellate tribunal, but has met with such universal reprobation that there can no longer be danger from it as a precedent."

On the day before Abraham Lincoln's inauguration, Buchanan pardoned Booth. \*

- Sources utilized in this report are Winslow, The Story of a Great Court (1912). Beitzinger, "Federal Law Enforcement and the Booth Cases," 41 Marquette Law Review 7 (1957). Ranney, "Molders and Shapers of Wisconsin Law," Wisconsin Lawyer, March, 1993.

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\*\*\*\*\* Ableman v. Booth, 11 Wis. 517 (1859) at 555-558.