

Gillespie v. Palmer and others

28 Wis. 544 (1866)

The decision of the Wisconsin Supreme Court in Gillespie extended to black men the right to vote. This decision came about in an unusual way and made Wisconsin one of the first states to grant black suffrage. The question had been put on a referendum, which had passed, but election inspectors attempted to keep black people from voting by arguing that the vote had been misconstrued. A unanimous Court held that the vote was valid, reversing the Milwaukee County Circuit Court. The majority opinion was written by Justice Jason Downer. A concurring opinion came from Chief Justice Luther S. Dixon. Justice Orsamus Cole wrote a one-paragraph statement agreeing with both Downer and Dixon.

The issue before the Court was whether a vote in a November 1849 general election truly extended the right of suffrage to “persons of African descent” by amending Article III, Section 1 of the Wisconsin Constitution.* The Legislature in 1849 passed a law allowing black men to vote; however, the law was only valid if voters supported it on a referendum. Voters approved the question of extending the vote to blacks by 5,265 in favor to 4,075 opposed. Since the question was approved by less than half of all votes cast, however, it was widely considered that the law had failed.

To illustrate how this worked: The Wisconsin Constitution mandated that any single issue on the ballot in a general election must be approved by a majority of *all votes cast* in that election. In other words, if 100 people voted in the election, 51 would have to vote to extend the franchise to blacks. This question had been approved by a majority of votes cast *on this specific issue*, but not by a majority of all votes cast in the election. To continue the example of the 100 voters, perhaps just 60 of them answered the question on extending the vote to blacks. If the vote were 31 to 29, Gillespie would argue that blacks won the right to vote, while Palmer and the other election inspectors would argue that the question failed by not receiving at least 51 votes.

Ezekiel Gillespie, one of the leaders of Milwaukee’s black community, attempted to force the issue into the courts by trying to register to vote in the November 1865 general election. As he had expected, election inspectors (Palmer and others) turned him away.

Gillespie, through his attorney, Byron Paine (a well-known abolitionist who had been a justice of the Wisconsin Supreme Court from 1859 to 1864 and re-joined the Court in 1867), argued that the election inspectors “wrongfully and illegally refused to receive the plaintiff’s vote, or to deposit the same in the ballot box, for the sole reason that he was a person of African descent.”

In his opinion, Justice Downer said it was obvious that the framers intended that the vote be counted on each separate issue:

To declare a measure or law adopted or defeated – not by the number of votes cast directly for or against it, but by the number cast for and against some other measure, or for the candidates for some office or offices not connected with the measure itself, would not only be out of the ordinary course of legislation, but, so far as we know, a thing unknown in the history of constitutional law. It would be saying that the vote of every person who voted for any candidate

* This mandated that the only qualified voters were white males, over the age of 21, residents of the state for one year preceding any election, citizens of the United States or people who had declared an intention to become citizens “and also certain persons of Indian blood.”

for any office at such election, and did not vote on the suffrage question, should be a vote against the extension of suffrage.

Further, the Court found that black men had had the right to vote in Wisconsin for 17 years. It was a decisive, if belated, victory.**

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**From articles by Joseph A. Ranney