

Attorney General ex rel. Bashford v. Barstow
4 Wis. 567 (1856)

This case established the independence of the Wisconsin Supreme Court (which was then in its infancy) and also established the important principle that the Court has the final say as to what the law is in Wisconsin. In a unanimous opinion, a three-justice panel entered a judgment removing an incumbent governor from office. Chief Justice Edward V. Whiton wrote the opinion with Justice Abram D. Smith concurring.

The attorney general filed suit seeking to remove William Barstow, the Democratic incumbent from Waukesha, from the office of governor. Although Barstow had been certified by the board of canvassers as the winner (by a 157-vote margin) of the 1855 election, it was later discovered that his victory was the result of fraudulent returns from nonexistent precincts in Wisconsin's sparsely populated north. The attorney general asserted that Coles Bashford, the Republican challenger and a former state senator, had in fact won the election and that he, not Barstow, was entitled to hold the office of governor.

Barstow claimed that the result of the canvass was conclusive and that the Supreme Court did not have the authority to remove him from office. Military units from areas where Barstow had strong support accompanied him to Madison for his inauguration and stayed on, prepared to fight for him if necessary.*

Barstow argued that the executive, legislative and judicial branches of government were coordinate branches and that each was the final judge of the election and qualification of only its own members. The Supreme Court disagreed, saying under Wisconsin's Constitution and laws, it was the election to an office and not the canvass of the votes that determined the right to the office. The Court also held that it had the same power to remove a person who had unlawfully intruded into the office of governor as it had in case of intrusion into any other office.

Barstow also argued that the Supreme Court could not entertain a proceeding to remove a sitting governor from office because such an action was without precedent. The Court rejected this argument, saying, "Cases frequently arise from which no precise precedent can be found" and "[n]ever before was a cause defended, or the jurisdiction of a court denied, on the ground that the counsel had been unable to find any case exactly like it."

The concurrence urged the Court to look to the Wisconsin Constitution for guidance:

I have felt bound to sustain that fundamental law – the constitution of the state, according to its true intent and meaning. That is the great charter of our rights, to which the humblest may at all times appeal, and to which the highest *must* at all times submit [emphasis added].

Let us then look to that constitution, adopted by the people of Wisconsin, and endeavor to ascertain its true intent and meaning.... [L]et it be remarked, that our conclusions must be guided and determined, not by theories of speculators upon the science of government, not by the opinion of jurists of other states reasoning upon philosophical abstractions or political postulates, but by the plain, simple, but authoritative and mandatory provisions of our own constitution. We made it ourselves. We are bound to abide by it, until altered, amended or annulled....

The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs – let us construe, and stand by ours.

* From articles by Joseph A. Ranney.

The Court concluded that it did have jurisdiction to act in the matter. It further found that Bashford was the duly elected governor of the state and entered a judgment removing Barstow from office. When the court stood up to Barstow, his supporters began to fall away and Bashford took office without incident.