Willson, Samuel M vs. Berkstriper, William et al; B69 Morgan Co. #1 Dis 28814

10?/4

.Writ of prohibition - W is circuit judge R is country judge who issued mandamus ordering W to say
B 885; W says R doesn't have authority
·dismissed - county can issue mandamus's for circuit

State of Missouri, ss

To William Berkstresser and Theron M. Rice, Greeting:

Whereas at a Term of the Supreme Court of the State aforesaid, begun and held in the City of Jefferson, on the First Monday of July A.D. 1869 and on the Third day of the Term, it being Wednesday the 7th day of the Month;

It was ordered by our said Supreme Court that a rule thereof be entered, requiring you the said William Berkstresser and Theron M. Rice, as Judge of the First Judicial Circuit of the State aforesaid, to show cause if any you have, to our said Supreme Court at the next Term thereof why the writ of prohibition absolute of said Court should not be granted and issued to restrain you and prevent you the said William Berkstresser from pursuing and you the said Theron M. Rice from entertaining any plea in a cause in said First Judicial Circuit Court instituted, to compel, by peremptory mandamus of said Circuit Court, the County Court of Morgan County, to enter judgment against the said Morgan County, in behalf of said William Berkstresser for damages from the change of a certain road in said Morgan County, and to draw a warrant on the Treasurer of said County, therefor,

Now therefore this is to command you

and each of you, that all excuses and delays set aside, You and each of you be and appear before the judges of our said Supreme Court at their Court room in the City of Jefferson on Monday the 10th day of January 1870. at 10 o'clock in the morning, and show cause if any you have why said prohibition absolute should not be granted and issued as by said rule aforesaid required, and hereof fail not

Witness my hand N. G Burch Clerk of our said Supreme Court, with the seal of said Court hereto affixed at Office in the City of Jefferson this 11th day of October 1869.

N. G Burch
Clerk.

State of Missouri }
County of Morgan }

I. B. F Lutman Sheriff within and for the County and State aforesaid do hereby certify that I served the within petition and writ by delivering a duly certified of each, of the within petition and writ to Wm Berkstresser one of the within named Defendants at the county and State aforesaid this 29th day of October 1869

B F Lutman Shff
Morgan County Mo

In the Supreme Court of
Missouri June 1869

Samuel M. Willson } Plaintiff
against
William Berkstresser } Application for writ
Thiron M. Rice } of Prohibition
Defendants

Now at this day comes Samuel M. Willson and states to the Court here that he now is, and for a long period of time has been Presiding Justice of the County Court of Morgan County State of Missouri — That on or about the day of March 1869 and during the March Term 1869 of the Circuit Court of Morgan County a petition in the nature of a Petition for a Mandamus against the County Court of Morgan County, wherein and whereby the said Morgan Circuit Court was prayed to issue its writ of Mandamus to the Defendant therein named commanding it to enter judgment in favor of said William Berkstresser and against Morgan County, in a certain cause pending in the said County Court — and also to issue a Warrant on the County Treasurer in satisfaction thereof or to return to said Circuit Court sufficient reason why the same should not be done

See Exemplification Circuit Court Record

over

And this Petitioner further shows that afterwards. to wit. on or about the day of May 1869 and during the March adjourned Term 1869 of said Morgan Circuit Court after the issuing of an alternative writ of Mandamus according to the prayer of said petition. and the return of said Morgan, County Court thereto - upon the Motion of said William Berkshipser. and on hearing and considering the matter the Honorable D. Q. Gale officiating as Judge of the said March adjourned Term of the said Morgan Circuit Court made an order in the nature of a peremptory writ of Mandamus. against the said Morgan, County Court. whereby the said County Court. was ordered to enter Judgement in favor of William Berkshipe and against said Morgan County. and also to issue their warrant upon the Treasurer of Morgan County in satisfaction thereof -

This Petitioner further shows. that said action so pending in the County Court of Morgan County. was an action for the assessment of damages to said Wm Berkshipser and against Morgan County. upon a petition of James

See Exemplification County Court Record Sep. Acts 1868 Pg 158. §§ 56.

57. 58. 63. 64.

K. Estes and others. praying for a change of the Versailles and George town road —

And this Petitioner suggests that all the said proceedings of the said Morgan Circuit Court are against the laws of the state of Missouri to the manifest damage prejudice and grievance of him the said Petitioner should the same be enforced — and also to the damage of the people and inhabitants of said Morgan County — That by the laws of this State. the judgement of the County Court in accepting or rejecting the report of the County Road Commissioners in all cases of Petitions for change of road is and shall be conclusive. and the said County Court is the exclusive tribunal within and for the County of Morgan aforesaid. to order and determine the establishing and vacating of public roads — and the said Circuit Court has no jurisdiction in law to compel the said County Court to enter or enforce any other or different judgement than that of the said County Court upon the report of the County Road Commissioners; That by the laws of this State the said County Court is not required to pay the damages assessed until the same shall first be paid into the County Treasury by the petitioners for such road. and this petitioner avers that such payment has not been made by said road petitioners. and that

See Sess Act 1868 Pg 158 § 63

See Sess. Acts 1868 Pg 160. § 2

See Sess Act 1868 Pg 157 § 52

in ordering and requiring said County Court to draw their warrant upon the County Treasury of said County in favor of said Wm Berkstresser as aforesaid the said Circuit Court was proceeding in a matter over which it has no jurisdiction and is therein transgressing the bounds of its lawful jurisdiction. This Petitioner further states that the defendant William Berkstresser who is party Plaintiff in the said cause pending in the Morgan Circuit Court and the Honorable Theron M. Rice Judge of the First Judicial Circuit of this State, are proceeding in said Cause in respect of a matter over which the said Circuit Court has no jurisdiction, and are therein transgressing the bounds of the lawful jurisdiction of said Court.

Wherefore your Petitioner prays the remedy of the People's writ of Prohibition to the said William Berkstresser and Theron M. Rice, to be directed, to prohibit them from proceeding and holding the pleas aforesaid, the premises aforesaid any wise concerning further before the said Circuit Court: And the said Petitioner herewith exhibits to this Court an exemplification under the seal of the said Circuit Court and hand of the Clerk thereof of the records and proceedings had in the said Court in the said Cause in establishment of the matters stated in this Petition.

W. M. Jackson
County Attorney
For Morgan County Missouri

State of Missouri
County of Morgan } ss

Saml M. Willson being duly sworn on his oath says the matters and things as stated in the foregoing Petition he believes to be true—

S. M. Willson

Sworn to and Subscribed before me this 5th day of July 1869

Witness my hand and Notarial Seal.

H. M. Jackson
Notary Public

H. M. JACKSON NOTARY PUBLIC MORGAN COUNTY

State the said County Court ...

I acknowledge service of the within writ & documents upon me this 16th day of October at Versailles Mo.

J. M. Rice

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Samuel M. Willson

Jos Wm Berstrepper & Theron M Rice

Petition for a writ of Prohibition

Original

Filed July 7th 1869 — Burch Clerk

Shff Fee $1.00

H. B. Oldham
Atty General for Petitioner

Petition for Change of Versailles & Georgetown Road -

To the Honorable County Court of Morgan County Missouri

The undersigned Householders of Moreau and Haw Creek Townships Morgan County Missouri, respectfully petition your Honorable court to change the State road leading from Versailles to Georgetown, as follows, commencing at or near where said road crosses the first branch of Moreau Creek thence to Marples lane -

Signed

G. W. Sanford	W. T. Lyles
A. J. Huffman	Lee Ashworth
J. J. Morris	Jas Howey
J. D. Murray	S. H. Boyd
H. W. Thoss	A. Hetzler
Thos Moore	J. W. Anthony
John W. Rains	A. Wilcoxon
Conrad Friedly	Henderson Marple
Saml. Lutman	A. A. Marple
Thos Ramsey	D. E. Marple
John Lutman	J. M. Lutman
Daniel Lutman	Daniel Lutman
Samuel R Lutman	S. S. Robinson

James Lumley
Isaac Slocum
Jas K Estes
A. J. Ball
Johathan C. Todd
Davis Todd
J. G. Todd
R. C. Ball
W. H. Goddard
P R Burns

S B Cheshire
J S Ball
Isaac Shimp
Jas. McNair
M. H McCombs
Hugh Lynch Sr
J. P. Rose
J. E. Ball
A. J. Cooper

Which Petition was Filed in the County Court of Morgan County - Aug 5th 1867 —

In the County Court of Morgan
County May Term 1868 –
Present Hon Saml M Wilson Judge
" Wm V. Parks "
" Peter Haas "
W. A. Mills Clerk
G. N. Painter Sheff –

Amongst others were had the following proceedings to wit –

"Now at this day comes Saml R. Lutman and makes the following report as Road Commissioner on road survey on Georgetown road commencing at the south end of Henderson Maples lane in Sec 23. Town 43. Range 18. and running to the center of the South side of S W 1/4 of said Section. thence east to the corners of Sects 23. 24 – 25 & 26. Thence South to the corner of Sections 25. 26. 35 & 36. Thence East 1/4 mile thence South 1/2 mile. thence east near 1/2 mile thence N E 1/4 mile thence S E 1/4 mile intersecting the old Georgetown Road at the west end of the land on the line between P. R. Burns and Jas P Ross land – all the road in Township 43 Range 18. I as commissioner favorable to the survey made and recommend the Court to make the change of road as above

surveyed and described. that the right of way has been obtained from all the parties through whose land the same runs except Wm Berkstresser and he refuses to give the right of way and his damage is assessed at 5 00 dollars. which report is by the Court accepted—

except that the Court require the Petitioners to pay all damage incurred in obtaining said road — and proof having been made to the satisfaction of the Court that. that 5 00 dollars the amount assessed in favor of Wm Berkstresser for damage has been tendered to him in good and lawful money—

The Court hereby orders that the judgement of right of way be taken for said road against the land of Wm Berkstresser on the line between section 25 & 26 in Township 43 Range 18 in Morgan County Missouri said right of way to be 40 feet wide. and it having been established by the Court that the land through which said road runs is wild and unimproved lands the road overseer of said road is hereby ordered to take immediate possession of the same. open out and keep in repair the same 40 feet wide as the law directs

In the County Court of Morgan County, November Term 1867 —

Present Hon Saml M Wilson Judge
" Wm V. Parks "
" Peter Haas "

W A Mills Clerk
G W Painter Sheriff —

Amongst others were had the following proceedings to wit.

Ordered by the Court that the Road leading from Versailles to Georgetown the Change thereof as prayed for commencing near where said road crosses the first branch of the Moreau creek and ending at Henderson Maples lane be by the road commissioner viewed located and the right of way taken and the costs of the same ascertained — and make report of the same at the next regular term of this Court. which cost shall be paid by petitioners

In the County Court of Morgan County — Nov. Term 1868

Present. Hon Saml M. Wilson Judge
" Wm V. Parks "
" Peter Haas "

W. A. Mills Clerk
G. W. Painter Sheriff

A. Mills Clerk of the County Court within and for the County and State above named do hereby certify that the above and foregoing is a full true and [illegible] in the establishment of the Cause wherein Wm Berkstresser was Plaintiff and the County Court of Morgan County was Defendant - upon a petition for Mandamus -

In witness whereof I have hereto set my hand and affixed the seal of said Court at office in Versailles Mo. this 1st day of July 1869

Wm A. Mills
Clerk

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Saml M. Willson

Vs } Prohibition

Wm Berkshepper &
Theron M. Rice

Exemplification
of Records of
Circuit Court
Morgan County

Feb 5 Jany 1878
Burch
Clk

4

Samuel M. Willson
Against
William Berkstresser &
Theron M. Rice

Supreme Court
of Missouri -
Term - 1869 -

Plaintiffs Brief -

The office of Prohibition is to prevent Courts from going beyond their jurisdiction in the exercise of Judicial power. 3 Black Com 112 113. Thomas v. Mead 36 Mo. 232 State ex Rel. West et als v Clark Co. Ct et als 41 Mo 44 - Vitt v Owens et al 42 Mo 512

Admitting that the Petition of Estes et al. to the County Court was a petition for a new road, which is denied, then the judgement in the County Court upon the assessment of damages by a jury should be against the petitions for the road and not against the County - and the Circuit Court had no jurisdiction to require the County Court to enter judgement against the County - Acts 1868 Pg 157. § 53 - The Circuit Court still farther exceeded its jurisdic-

tion in ordering the Co. Ct. to issue its warrant on the County Treasury in satisfaction of such judgement before the Road petitioners had first paid the amount into the County Treasury same at. 852 -

The payment out of the County Treasury, of damages arising from location of new roads, comes within the administrative and ministerial functions of the County Court and not the judicial branch of their jurisdiction, and the Circuit Court has no jurisdiction over the Co Ct. in reference thereto - Acts 1868 Pg 157. 852.

The petition of Estes et al to the Co. Ct. was a petition for a change of road. and the Co. Ct. did not order the Road Commissioner to assess damages (see exemplification of County Court record) - and all of the proceedings of the Co. Ct. in allowing damages to be assessed by the jury were unauthorized by law and the circuit Court has no jurisdiction to compel the

Co. Ct. to proceed in a matter wherein the Co Ct has no authority — acts 1868. Pg 158. § 58. 63 — State v. Metzger 26 Mo. 65 and cases therein cited —

The judgment of the Co Ct upon the report of the Road Commissioner was conclusive — ibid —

The Co. Ct. had no authority to order the payment out of the Co. Treasury of damages arising from the change of an established road. Act 1868. Pg 158. § 58.

The spirit of the law is that when roads have been once established at the expense of the public fund, all the expenses of subsequent changes made in interest of individuals must be paid by the persons interested in the change.

The jurisdiction of the Circuit Court may be inquired into at any time N & St J R R v. Mahaney 42 Mo. 467, The whole subject of establishing, changing and vacating public roads is placed under the exclusive jurisdiction of the County Court, and a mandamus will not lie from the Circuit Court, (County Court v Round Prairie Township

No 4 In Supreme Ct Jan Term 1870

Saml. M. Willson

vs

Wm Berkstresser

Theron M Rice

Plffs Brief

Filed Jany 10 70

Burch

Clk

Johnson & Bridge

Attys for Petitioner

10 Mo 679; Vitz v Owens et al 42 Mo 514,

Petition for mandamus

To the Honorable the Judge of the Circuit Court for Morgan County State of Missouri. March Term 1869 The Petition of Wm Berkstresser is respectfully submitted. Your petitioner states. on the 6th day of November 1868. in an action Brought against the County of Morgan in the County Court of said County, under the provision of the act to provide for the opening and repairing of roads &c - Approved March 23d 1868 in which your Petitioner was plaintiff and County of Morgan defendant. Your Petitioner after due trial obtained the verdict of the Jury in the case in his favor which assessed his damages in accordance with section 53 of the said act at eighty five dollars - for which sum the said County Court now refuse and have hitherto refused to enter judgement and issue their warrant on the County Treasurer as by law they are required though your Petitioner has made demand therefor

Your Petitioner therefore prays that a writ of Mandamus issue to the said County Court. Commanding them to enter

judgement in conformity with the verdict in said case and issue their warrant on the County Treasurer in satisfaction thereof, or return to this Court sufficient reason why the same should not be done - And your petitioner as in duty bound will ever pray -

Signed William Berkstresser

Sworn to and subscribed before me this 6th day of Feby AD 1869 -

W A Mills Clerk of Circuit Court of Morgan County

Copy of Alternative writ of Mandamus

Morgan County ss

The State of Missouri to the County Court of Morgan County in the following entitled cause

William Berkstresser } Plaintiff

vs

The County ~~Court~~ of Morgan ~~County~~ to the use of James H Estes et al Petitioners for Change of Georgetown Road } Dfts

Which was tried before your Honorable Court at its

November Term 1868 on the 6th day
of said Month. wherein the Jury
therein empannelled found a verdict
for the Plaintiff William Bernstein
assessing his damage at Eighty five
Dollars - You are hereby
commanded to enter judgement
in conformity therewith and with
the verdict therein recorded
and issue warrant in satisfaction
thereof or return to the Honorable
the Judge of the Circuit Court
of said County of Morgan on
the 1st day of its adjourned term
commencing on the 3d Monday in
May 1869 - Sufficient reason
why the same should not be done

Witness William A. Mills
Clerk of said Court with
the seal of said office
hereto affixed at office
the 6th day of April 1869
W A Mills Clerk

Seal

The following is the Return of Defendant to Alternative writ of Mandamus —

In the Morgan County Circuit Court. May adjourned Term 1869

William Berkstresser } Plff
against Mandamus
The County Court of Morgan County } Dft

For answer and return to the Alternative writ of Mandamus. issued in the above cause and to the Petition of Plaintiff - Defendant admits that the facts stated in the Petition are true. and avers that the said cause tried before this defendant at the November Term of said County Court - was for the purpose of assessing damages to said Berkstresser for locating a road upon the land of said Berkstresser. that said road was located upon the land of said Berkstresser by reason of a petition by James K. Estes and others for a change of the Versailles and Georgetown Road. after a

report of the Road Commissioner within and for said County of Morgan which report was accepted by said defendant. Defendant for further answer states that the proceedings of said road commissioner in assessing damages and of this defendant in affirming and accepting so much of the report of said commissioner as refers to the damages assessed to said Barbee was irregular illegal and unauthorized by law. and further that all the proceedings before this Defendant on the said 6th day of November 1868 in allowing an assessment of damages by a jury under the 53d section of the road law passed by the Genal assembly of the state of Missouri and approved March 23d 1868. was irregular. illegal and unauthorized by law. and avers that said section 53 of said road law only applies to the application for and location of new roads and also avers that under the 63d Section of said Road law the action of the County Court (the Defendant herein. in accepting or rejecting

the report of said Road Commissioner is conclusive in the premises Defendant further avers that as County Court of said County of Morgan it is only authorized to permit roads to be changed upon the land and at the expense of persons consenting thereto in writing. as appears by section 66 of said Road Law and further that said County Court has never made any order vacating the former road or so much thereof as lies between the different points of intersection. for the reason that said Court has never had satisfactory evidence that such changed road was open in good ~~repair~~ condition. That said County Court is unwilling to vacate said former road. until every expense connected with the change of such road (as prayed for by said James M. Estes and others as petitioners) shall have been fully paid by such petitioners - and avers that they are informed and believe that if said County Court should order the payment to said Berkeley of the damages claimed by him. it has

power in law to compel such petitioners to pay into the Treasury of Morgan County the damages claimed by said Berkebiser or any sum of money exceeding the costs attending the change of such road. And Defendant is further informed and believes that if the said sum of eight five dollars damages as claimed by said Berkebiser should be paid to said Berkebiser. That this Defendant the said County Court of Morgan County would still be unable to establish said road upon the land of said Berkebiser for the reason that said Berkebiser has not consented to the establishment of said road in writing.

This Defendant is further informed and believes that no action of this Defendant. the said County Court and no order of record can force or take from said Wm Berkebiser the land or right of way for said road and that such right of way can only be secured by the said James E Estes and others petitioners for said road

obtaining the consent of said Wm Berkheiser thereto in writing, and for this reason defendant avers that said Berkheiser is not damaged and cannot be damaged by reason of any action of this defendant. — This defendant further states, that as such County Court it is informed and believes that said Wm Berkheiser the Plaintiff herein is a joint owner and occupier of said land, with one Daniel Berkheiser and defendant avers that said Daniel Berkheiser could object to and prevent the use and occupation of ~~said land~~ for road purposes and could prevent the opening of such road across said land for the reason that said Daniel Berkheiser has not consented to such change of said road, and the location of the same upon said land, in writing, and for this reason the said ~~Defendant the County Court~~ of Morgan County, avers that it is utterly powerless to compel the said Daniel Berkheiser, to grant a right of way for said road

and that therefore the entering of the Judgement by the said County Court and the payment of the same out of the Treasury of said Morgan County to said Wm Berkstresser would not enable the said County Court to enforce and compel the change the said road or to use and occupy the land of said Berkstresser for road purposes — The said County Court the Defendant herein further avers that it is informed and believes that all the proceedings in the said County Court concerning the assessment of damages to said Wm Berkstresser, were unauthorized, irregular, illegal and void in law and that it was and is the duty of the petitioners for the change of said road to obtain the written consent of all persons upon whose land said road is sought to be established, and that without such written consent it is impossible for said County Court to change any established road upon

the land of any person. That said
Wm Berkstresser has refused to
give his written consent to such
change of said road. That said David
Berkstresser is jointly interested
in said land with said Wm Berk=
stresser - That said Daniel
Berkstresser has refused to give
his written consent to such change
of said road. That being so informed
and of such belief the said County
Court declined to enter judge=
ment in said cause & to do
or perform any other matter or
thing connected with or concerning
said road until said James
K. Ebis and others shall make
satisfactory proof to said County
Court that said Road as sought
to be established, is opened and in
good condition - Wherefor the
said County Court having shown
sufficient reason why such
judgement should not be rendered
or warrant issued on satisfaction
thereof, pray to be discharged
with costs -

S. M. Wilson

W. V. Parks
H. Pafen
Composing the
County Court of
Morgan County
by H. M. Jackson
atty

Answer to Defts Return

In the Morgan County
Circuit Court, Adjourned
Term May 1869

William Berkstresser
vs
County Court of Morgan County } Mandamus

Plaintiff for answer to return of defendant to the writ of Conditional Mandamus issued to them in the above entitled cause denies that the petition of Jas K Estes et al. in the matter of the Versailles & George-town road, as set forth in said return, was in fact or law a petition for change of road but was in substance and intention

an application for a new road
and that the proceedings
thereunder were regular, legal
and authorized

signed Walter S Johnston
Attorney for Petitioners

In the Morgan County Circuit Court. March adjourned Term May 1869 —

Present. Hon. D. D. Gale Circuit Judge of the 9th Judicial Circuit of Mo. at the request of Hon. T. M. Rice Circuit Judge of this the 1st Judicial Circuit of Mo. presiding and J. N. Moore Circuit Attorney Wm A. Mills Clerk and B. F. Lehman Sheriff —

Amongst others were had the following proceedings to wit

William Berkstresser } Plaintiff
vs } Mandamus
The County Court of }
Morgan Co Mo } Defendant

And now at this day comes the Plaintiff in the above entitled cause by his Attorney and also the Defendants by their attorney and this cause coming on to be heard upon the return of the Defendants to the writ of Conditional Mandamus and answer of the Plaintiffs thereto and after being fully argued and understood by the Court it appears to the Court that no sufficient reason has been shown by the Court why

why the Defendants should not enter
judgment in the case of Wm Berkstresser
against Morgan County to the use of
James R. Estes et al on the records
of said Defendant as of the Nov
Term 1868. in accordance with the
verdict of the Jury therein rendered
and issue their warrant on the
County Treasurer in satisfaction
thereof. And it is therefore ordered
adjudged and decreed that a
peremptory writ of Mandamus issue
to Defendants commanding them
to enter judgment in the said
cause for the sum of Eighty four
Dollars and issue their warrant
on the County Treasurer payable
to Wm Berkstresser in satisfaction
thereof —

State of Missouri }
County of Morgan } ss

I William A
Mills Clerk of the Circuit
Court within and for the
County and State aforesaid
named do hereby certify

that the above and foregoing is a true and complete exemplification and copy of the proceedings and records had in said Circuit Court [illegible] Petition filed by James K Edis et al in said Court praying for a change of the Versailles and Georgetown road & and exemplification of records and papers in said cause, as appears of record in my office —

In testimony whereof I Wm A. Mills Clerk of said Court have hereto set my hand and affixed the seal of said Court at office in Versailles in said County this 1st day of July 1869

W A Mills
Clerk

4

Saml. M. Wilson
vs
Prohibition
Wm Berkheiser
& Thos M. Rice

Exemplification
of Records of
County Court of
Morgan County

Filed January 10th 1876
Burch
Clk

In the Supreme Court of
The State of Missouri Sam'y
Term 1870

Saml M Willson
v
Wm Berkstreper &
Thos M Rice } Prohibition

Opinion of the Court

The plaintiff as president Judge of the County Court of Morgan County sued out an alternative writ of Prohibition returnable at this Term, & in his petition charges that the said Rice as Circuit Judge of said County, at the suit of said Berkstreper, had issued his writ of Mandamus against the justices of said County Court commanding them to ~~pay~~ allow the said Berkstreper the sum of $85. ~~out of County treasury~~ & draw a warrant for the amount upon the County treasurer. It appears that Certain parties had presented to the County Court a road petition, of which the following is a copy. "The undersigned householders of Moreau & Haw Creek townships Morgan County Missouri respectfully petition your Honorable Court to change the State road leading from Versailles to Georgetown, as follows, commencing at or near where said road crosses the first branch of Moreau Creek thence to Marples Lane" No papers were filed with the petition, but the County Court made an order upon the road Commissioner to view & locate the road, take the right of way, ascertain the costs & report at the next term of the Court. The Commissioner accordingly ~~reported the location of the new road~~, recommended

the change, reported the survey of the new road, & that all the persons whose land it crossed had released the right of way except Wm Berkstresser to whom he assessed $5. as his damage. The Court accepted the report, ordered the petitioners to pay the damages, & upon proof that the $5. had been tendered, ordered the road to be opened & the overseer to take immediate possession. The record shows that at the next Term a jury trial was had in the County Court by consent, & that said Berkstresser obtained a verdict of $85. for the right of way over his land & it does not appear that any further proceedings were had in the County Court.

In February 1869 defendant Berkstresser sued out of the Circuit Court the alternative writ of Mandamus above spoken of which was made preventory at the May Term. The plaintiff asks for the writ of prohibition upon the ground that the Circuit Court exceeded its jurisdiction in its mandamus proceedings & in their manifest Error. It is very clear that the proceedings in the County Court to change the road, or for a new road did not comply with the law. It is difficult to tell under which provisions of the Statute the petitioners acted. They say that they wish a change in the road & if that is their object they could only apply for the change under the provisions of Sections 56, 57 & 58, ~~of the act of 1868. page 158.~~ Wagners Statutes p. 1229 But they have not complied with these sections, for it is not the petition of a person wishing to cultivate his land. No notice appears, & there is no written consent from the persons upon whom he would turn the road. They are equally unfortunate if their object be a new road under the provisions of Sections 49 &c ~~of the same act~~ page 1228 for in addition to the want of notice, the width of the road is not fixed, the petition does not specify the "intermediate points on the road," nor was there any assessment of damage by a jury until after

all the proceedings were determined. It was the duty of Berkshire, if dissatisfied with the award of the commissioner, to demand at once, under the provisions of Sec 53, a hearing of his claim before a jury & before any action of the Court upon the report of the commissioner. The assessment at the next term, after final action, was altogether irregular, & created no debt. Had the matter been continued & the final action of the Court postponed until after the question of damage had been submitted to a jury, the court then had the power to say upon what conditions the road should be opened, or whether opened at all. In opening it they must see that these damages are in some way provided for. ~~these damages~~ either that they be paid into the County treasury by the petitioners, or that the County itself ~~shall~~ assume them. But no such continuance was had & the $85 verdict is coram non judice.

It is also clear that the action of the circuit court ~~complained of~~ was erroneous, but it is not so clear that the plaintiff is entitled to his writ of prohibition. If the court ~~to which it is~~ whose action is complained of, acts within its jurisdiction but simply commits an error, the writ will not lie. It is not to be confounded with a writ of error or of certiorari, & must not be permitted to take their place. Had then the Circuit Court jurisdiction over the County Court by mandamus in the matter of paying the damages assessed for the right of way upon a public road? If it had such jurisdiction, it does not matter, so far as this case ~~was~~ is concerned, whether it has been lawfully or erroneously exercised. The County Court has the sole right of saying whether a road shall be opened, changed or vacated, & the Circuit Court cannot control its discretion in the matter. If a new road is to be opened, it has also the right of saying whether the damages if any shall be paid by the petitioners or by the County. If the court decides that the petitioners shall pay them, it ought not to order the road to be opened

until the money is deposited. If it determine that the County shall pay them, the appropriation should be made before the road is opened. The County has clearly no right to open the road until one or the other is done. But in either case, if the money is deposited by the petitioners or if the Court decide that the County pay the damages assessed, it becomes the clear ministerial duty ~~of~~ to issue a warrant upon the treasury for the amount; and if the Court refuses to issue such warrant, it should be compelled to do so by mandamus. It follows then that ~~in a proper case~~ Circuit Courts have jurisdiction by Mandamus in the matter of payment of damages assessed to the person through whose land a road passes, & in a proper case may lawfully issue the writ. ~~It also follows that~~ Such jurisdiction being ~~granted~~ conceded, it clearly follows that a writ of prohibition will not issue to prevent its erroneous exercise; Some other remedy must be resorted to. The writ is dismissed - The other judges concur

P. V. Bliss

Saml M. Willson
v
Wm Berkstresser et al

Writ of prohibition

Opinion of the Court
Bliss

Filed Jany 17th 70
N. C. Burch
Clerk

Writ dismissed

ddd-1617