

damage resulted from the high water. The jury found that the cyclone was the predominating, efficient cause. The defendant produced no testimony by which, if there was any water damage, it could be discriminated and separated from the wind damage. The case, therefore, came within the rule that, when the damage from each cause cannot be distinguished, then the party responsible for the damage caused by the predominating, efficient cause is liable for the whole loss.

Finding no error in the rulings of the court, the judgment is affirmed.

AMERICAN FIRE INS. CO. v. CHARLESTON BRIDGE CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 98.

In Error to the Circuit Court of the United States for the District of South Carolina.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

PER CURIAM. This is an action at law by the Charleston Bridge Company against the American Fire Insurance Company to recover for damage alleged to have been caused to the plaintiff's bridge by the cyclone of August 27, 1893. The policy was similar in terms to that sued on in case No. 97, October term, 1894 (Phenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628), in which the judgment has been affirmed. The case was removed under similar circumstances from the state court, and was submitted to the same jury, upon the same evidence, and with similar instructions and rulings. For the reasons stated in No. 97, the judgment is affirmed.

MUHLENBERG COUNTY v. DYER et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 261.

MANDAMUS—MODE OF REVIEW.

An application for a writ of mandamus, being a proceeding at common law, can be reviewed in the circuit court of appeals only by writ of error, not by appeal.

Appeal from the Circuit Court of the United States for the District of Kentucky.

E. Dudley Walker, for appellants.

Azro Dyer, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal from a judgment of the circuit court of the United States for the district of Kentucky, awarding a peremptory writ of mandamus. The writ ran against D. J. Fleming and others, members of the funding board of Muhlenberg county, and required them to make and enter an order on their records directing Louis Reno, treasurer of Muhlenberg county, to

pay \$9,970.48, the amount admitted by him to be in his hands, less \$1,000 for expenses, to the relators below, Dyer and Gillett, as a credit upon the amount due to them on a judgment recovered by them in the same court against Muhlenberg county on certain bonds issued by the county, and held and owned by them. A motion is now made to dismiss the appeal on the ground that this court does not acquire jurisdiction to review a judgment of the circuit court, in mandamus, by appeal.

Section 11 of the act establishing this court provides "that all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals." The same rules which govern the supreme court, therefore, in taking jurisdiction of an appeal or writ of error, obtain in this court. In *Ward v. Gregory*, 7 Pet. 633, it was sought, in the supreme court, to review a decision of the court of appeals for the territory of Florida, in mandamus, by appeal. "The court ordered the appeal to be dismissed, the proceedings by mandamus being at common law, and therefore the cases should have been brought up by writs of error." The same rule is laid down in *Insurace Co. v. Wheelwright*, 7 Wheat. 534, and in *U. S. v. Addison*, 22 How. 174-185. It is well settled that cases at law can be brought to the supreme court, and therefore to this court, only by writ of error. *Sarchet v. U. S.*, 12 Pet. 143; *Bevins v. Ramsey*, 11 How. 185; *Burrows v. The Marshall*, 15 Wall. 682; *Stringfellow v. Cain*, 99 U. S. 610; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *Hecht v. Boughton*, Id. 235; *Woolf v. Hamilton*, 108 U. S. 15, 1 Sup. Ct. 139; *U. S. v. Hailey*, 118 U. S. 233, 6 Sup. Ct. 1049. On the other hand, cases in equity must come here by appeal. *Walker v. Dreville*, 12 Wall. 440; *McCollum v. Eager*, 2 How. 61; *Hayes v. Fischer*, 102 U. S. 121; *Blease v. Garlington*, 92 U. S. 1. In this case the record shows that the defendants below prayed an appeal, and that the same was allowed by the court, and that a citation issued to the plaintiffs below to appear at a session of this court, pursuant to such appeal, and to show cause, if any there be, why the decree rendered, in the said appeal mentioned, should not be corrected. It is true that the supersedeas bond which was given recites that the defendants below have presented a writ of error to the United States circuit court of appeals for the Sixth circuit to reverse the judgment rendered in the suit, and the condition of the bond is that the defendants shall prosecute their said writ of error to effect, and answer all damages and costs; but the wording of the bond cannot supply the absence of a writ of error, which, under the law, issues out of this court either by the clerk of this court or by the clerk of the circuit court. All the proceedings taken were expressly for an appeal, and give this court no jurisdiction to consider the cause, for the reasons above stated. The appeal is therefore dismissed, at the costs of the appellants.

BROWN et al. v. CRANBERRY IRON & COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 87.

WRIT OF ERROR—TO WHAT JUDGMENT LIES.

B. brought a suit in equity against the C. Co. for partition of certain lands. The C. Co. answered, denying B.'s title, and the court stayed proceedings in the partition suit, and gave leave to plaintiff to bring an action at law, which he did, in the ordinary form for the recovery of land, the C. Co. setting up in defense that B. was estopped to claim the land both by deed and by acts in pais. Upon the trial, before the same judge by whom the partition suit had been stayed, the question of estoppel by deed was reserved from the jury, and, in submitting the question of estoppel in pais, the judge stated that he could, as chancellor, have heard the evidence, and decided the whole controversy himself, but preferred to get the assistance of the jury. The jury found for the defendant, and judgment was entered upon the finding, to which exception was taken, and a writ of error allowed. The judge afterwards passed upon the issue of estoppel by deed in favor of the defendant, but no judgment was entered on that issue. *Held*, that the proceedings were anomalous, but, treating them as an action at law, the judgment upon which the writ of error was allowed was not final, since a decision upon both issues, of estoppel by deed and estoppel in pais, was necessary to a final decision of the action; and, if exception were taken to a judgment upon the former issue, as decided by the judge, the judgment upon the present writ would not end the case, and that, accordingly, such writ could not be entertained. Morris, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action at law by J. Evans Brown and William B. Carter against the Cranberry Iron & Coal Company to recover an undivided interest in certain lands, brought pursuant to leave given in a partition suit between the same parties. One issue was decided by the court without a jury. 59 Fed. 434. Upon another issue, judgment was entered, on the verdict of a jury, in favor of defendant. Plaintiffs bring error.

This case is somewhat peculiar in its character. Certain persons, Hoke, Sumner, and Hutchinson, had become the owners of a tract of land in North Carolina, known as the "Cranberry Iron Ore Bank." They offered it for sale in 1866 or 1867 to parties in New York. Before negotiations for the purchase were concluded, it was discovered that J. Evans Brown, one of the parties in this case, and A. C. Avery, as executor of Isaac T. Avery, claimed an interest in the minerals in the land. As the proposed purchasers were buying the land chiefly for the minerals in it, this claim induced them to break off negotiations. Thereupon Hoke, Sumner, and Hutchinson opened negotiations with Brown and Avery looking to the extinguishment of their claim, so that they could renew their negotiations with the persons in New York, and offer to them a perfect title. The claim set up by Brown and Avery was this: That Brown and Avery's testator had owned the minerals in this tract of land as tenants in common; that, by his deed, the testator, Avery, had released to Brown all his interest in the minerals in that part of the tract of land lying to the east of a road or path running through the land in a general direction north and south, so that Brown owned an undivided half of all the minerals in the land on the west of that road or path, Avery owning the other undivided half, and Brown was sole owner of all the minerals to the east of that road or path. This deed was not on record at the time of the negotiation. There was on record a deed between Brown and Avery, the recital of which