

## HURST v. HOLLINGSWORTH.

Where a party sued out a writ of error, and obtained the allowance of an appeal, and duly filed a transcript of the record here, the court will not, on motion, dismiss the cause, but, when it comes on to be heard, will determine whether it is properly here by appeal or by writ of error, and proceed accordingly.

ON motion.

*Mr. W. P. Ballinger* for Hurst.

*Mr. James Lowndes, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Hurst, the plaintiff below, being in doubt whether his case was one to be brought here by appeal or by writ of error, took the precaution of suing out a writ of error, and also of obtaining the allowance of an appeal. At the proper time he filed a transcript of the record, and the cause was docketed by the clerk as upon a writ of error; thereupon the defendant moved to docket and dismiss the appeal. Hurst now appears and asks leave to docket his appeal. The defendant does not object to this, but, treating it as an election for Hurst to proceed here upon the appeal, moves to dismiss the writ of error.

These motions are all denied. There was but one action in the court below, and there is but one record. When the transcript of that record was brought here by Hurst, his cause was docketed. It is not necessary to enter it twice, because, out of abundant caution and to guard against a possible chance of dismissal, he has brought it here in two ways. He has but one cause; and, when we come to examine it, we will determine whether it is properly here by appeal or by writ of error, and will proceed accordingly.

*Motions denied.*