

Cases Omitted in the Reports.

MR. CHIEF JUSTICE CHASE delivered the opinion of the court. The record shows no allowance of appeal in the court below, and this is usually a sufficient ground for dismissal.

But it appears from affidavits, that an appeal was in fact prayed and allowed; and that the condition of the record is due to the omission of the clerk below to make the proper entry.

Under these circumstances we think that neither the motion of *Mr. Carpenter* to dismiss, nor the motion of *Mr. Irvin* for a *certiorari*, should be allowed.

We cannot dismiss for the want of an allowance of an appeal, when it is satisfactorily shown by the affidavits that an appeal was actually allowed, without giving the appellant the opportunity to make record proof of the fact. Nor can we allow a *certiorari*, when it appears that nothing is omitted from the record which is of record in the court below.

The cause will be passed until the second Monday of October, that the counsel for the appellant may move upon proper showing for an entry, *nunc pro tunc*, of the prayer and necessary allowance of appeal, in the Circuit Court.

If such an entry shall be made by direction of the Circuit Court, the motion for *certiorari* may be hereafter renewed. *So ordered.*

Mr. B. R. Curtis and *Mr. S. A. Irvin* for appellant. *Mr. M. H. Carpenter*, *Mr. S. A. Goodwin* and *Mr. E. C. Larned* for appellee.

LYNCH v. DE BERNAL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 305. December Term, 1868.—Decided November 5, 1869.

A motion to dismiss for want of jurisdiction is denied because it involves looking into the merits.

MOTION TO DISMISS. The case is stated in the opinion.

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

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy.

The motion to dismiss for want of jurisdiction will, therefore, be denied; but may be argued upon the hearing of the cause. See 9 Wall. 315. *Denied.*

Mr. E. L. Goold and *Mr. Frederick Billings* for the motion. *Mr. George H. Williams* and *Mr. J. Hubley Ashton* opposing.