that the matters in litigation upon the appeal have been settled; but avers, on the contrary, that the appeal is prosecuted in good faith and for the determination of a real controversy.

Taking all the affidavits together, in connection with the circumstance that no appearance has been entered in this court for the appellees, we are of the opinion that enough is shown to warrant a rule against the appellant, to show cause why the appeal should not be dismissed.

In the case of *Lord* v. *Veazie*, 8 How. 251, 254, in this court, an appeal was dismissed upon motion, the court being satisfied, by the affidavit produced, that the suit was fictitious and collusive; and the same course was pursued upon similar showings in *Cleveland* v. *Chamberlain*, 1 Black, 419, 425. *Fletcher* v. *Peck*, 6 Cranch, 87, 147, *per* Johnson, J., dissenting.

In these cases no doubt was left in the judgment of the court, that the suits were in fact what the affidavits in support of the motion to dismiss alleged them to be.

In this case, we do not think it proper to go at present to the extent of dismissal.

We think, indeed, that it would be the better practice in cases similar to this, to move in the first instance upon affidavits for a rule to show cause why the suit should not be dismissed.

That rule will now be awarded returnable the 9th day of April next, and leave is given to both parties to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it. *Rule granted.*

Mr. B. F. Butler for intervenor. *Mr. T. A. Jenckes* for appellant. *Mr. Leonard Myers* for appellees.

CHICAGO *v.* BIGELOW.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 183. December Term, 1868. — Decided April 12, 1869.

The record showing no allowance of appeal below, and it appearing by affidavits that an appeal was actually allowed of which the clerk omitted to make entry, this court refused a *certiorari* to bring up the record; and the case was passed to enable appellant's counsel to move in the Circuit Court for an entry *nunc pro tunc* of the prayer and allowance.

THE case is stated in the opinion.

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.