waived his right, by not returning his ticket, and by receiving the prize he had drawn.

The case of *Schinotti* v. *Bumstead and others*, 6 T. R. 646, was an action brought by the holder of a ticket, claiming a prize alotted in the scheme to that which should be last drawn in the lottery. The number of one ticket had not been put into the wheel; and the demand made by the owner of the ticket which was last actually drawn, was resisted, on the ground that the ticket not yet drawn, for which a correspondent blank remained in the wheel, must be the last. Lord KENYON said, that as the plaintiff's ticket was the last *405] drawn, he is entitled to the prize; the *only competitor with him was the owner of a ticket which never was drawn, and that person has no claim to it whatever. So far as respects the omission to put the number of one ticket into the wheel, this case bears an exact resemblance to *Madison et al.* v. *Vaughan*, and is, perhaps, stronger than the case under consideration. The omission of a ticket is, at least, as irregular and as important, as the omission of a blank, and yet, in *Schinotti* v. *Bumstead and others*, no suggestion was made against the validity of the drawing

Upon these authorities, and upon the reason and substantial justice of the case, this court is of opinion, that the lottery in the special verdict mentioned, has been legally drawn, and that the defendant became liable to the plaintiffs, sixty days after it was concluded, for the sum of $10,000. The judgment, therefore, in favor of the defendant, must be reversed. But the pleadings are too defective to sustain a judgment on this verdict for the plaintiffs. The verdict, therefore, and the pleadings, up to the declaration, must be set aside, and the cause remanded to the circuit court, that further proceedings may be had therein according to law.

Judgment reversed, and a *venire facias de novo* awarded.[1]

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*406] *CORPORATION OF WASHINGTON, for the use of McCUE and others, *v.* MOSES YOUNG.

Lottery.

Where the manager of a lottery, drawn in pursuance of an ordinance of the corporation of the city of Washington, gave a bond to the corporation, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance;" *held*, that the person entitled to a prize-ticket had no right to bring a suit for the prize against the manager, upon his bond, in the name of the corporation, without their consent.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by the same counsel with the preceding.

March 18th, 1825. MARSHALL, Ch. J., delivered the opinion of the court.—The defendant was the manager of a lottery, drawn in pursuance of an ordinance of the corporation of Washington, and gave his bond to the corporation in the penalty of $10,000, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance." The declaration was on the penalty of the bond; after *oyer* of which, and of the

[1] See 2 Cr. C. C. 632.

condition, the defendant pleaded *non damnificatus*, upon which there was issue, with leave to give the special matter in evidence on both sides. A jury was impannelled, who found the special verdict stated in the preceding case of *Brent et al.* v. *Davis*, *with this additional circumstance, which, having no connection with that case, was not stated in it. The [*407 ticket No. 1037, drew a prize of $10,000. It had been sold in quarter shares to several persons, but had remained in possession of the said Gideon Davis, who gave to each purchaser a certificate specifying the interest he held in the ticket. After the drawing was completed, but before the institution of this suit, Gideon Davis delivered the said ticket, No. 1037, to the managers, towards securing and paying of the moneys stipulated to be paid by him under his contract for the purchase of the lottery. This suit is instituted for the benefit of the purchasers of the ticket No. 1037, without the consent of the corporation. The judgment of the court was in favor of the defendant, and the plaintiffs have sued out a writ of error to bring the cause into this court.

The first inquiry is, into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation, without its consent. Their counsel insists, that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. In support of this proposition, he has cited the case of *McMechen* v. *Mayor and City Council of Baltimore* (3 Har. & Johns. 534), decided in the court of appeals of Maryland, in the year 1806. That was a writ of error to a judgment confessed in the general court, in an action brought by the corporation on a bond given by Thomas Yates and Archibald *Campbell, with their [*408 sureties, conditioned for the performance of their duty as auctioneers. The court determined, that the suit was to be considered as brought by authority of the corporation, although no warrant of attorney was shown; and that the confession was an admission of the right to recover the penalty of the bond; whether in their own right, or for the use of another, was immaterial. The opinion was also expressed, as stated by the reporters in a note, that every person whose money was withheld by the auctioneers, had a right to apply to the city council, to direct a suit to be instituted on the bond; and the corporation could not, consistently with their duty under the ordinance, refuse such application, and might be enjoined by suit in chancery to allow the person to use their name to prosecute his claim. Had this been the direct judgment of the court, it could not have sustained the pretensions of the proprietors of this ticket, to maintain this suit, under the circumstances which attend it. They have undoubtedly "a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application," if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize-ticket had an interest in this bond, the proprietors of every other prize-ticket had the same interest; *and it could not be in the power [*409 of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs, against their own will. No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given

by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment. The declaration of the judge in the case cited from Harris & Johnson, that a court of chancery might enjoin the obligees to allow the injured person to use their names in that particular case, is evidence of the opinion, that he could not sue at his own will. We think, then, that this case is no authority for the power claimed by the proprietors of ticket No. 1037; and we think, upon general principles, they had no right to institute this suit without the consent of the corporation.

But, we think also, that the corporation itself must be considered as the real plaintiff, and that its right to prosecute the suit cannot be affected by the allegation that it is brought for the benefit of others. It has been determined in this court, that the warrant of attorney need not be spread on the record, to enable counsel to appear for a corporation; and if the dismissal of the suit be not ordered, the consent of the corporation will be
*410] presumed, after verdict.(*a*) If, in its progress, the *court shall perceive that it is brought without authority, the proper course would seem to be, to dismiss it; not to render judgment for the defendant, which might, where no special breach is assigned, bar any other action.

The proprietors of the ticket No. 1037 have shown no right to sue on this bond. Their remedy is certainly directly against Gideon Davis; and in the event of his insolvency, it may be against the managers. But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used. The judgment of the circuit court, therefore, must be reversed; but as the pleadings are so incomplete as not to show what judgment ought to be entered, the proceedings are set aside up to the declaration, and the cause remanded to the circuit court, to be further proceeded in according to law.

Judgment reversed accordingly.

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*411] *JANNEY *v.* COLUMBIAN INSURANCE COMPANY.

Marine insurance.—Seaworthiness.

Under a policy containing the following clause: "It is declared and understood, that if the above-mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof," a survey by the master and wardens of the port of New Orleans, which was obtained at the instance of the master, who was also a part-owner, and was transmitted by him to the other part-owner, and by the latter laid before the underwriters, as proof of the loss, stated that the wardens, "ordered one streak of plank, fore and aft, to be taken out, about three feet below the bends on the starboard side; and found the timber and bottom plank so much decayed, that we were unanimously of opinion, her repairs would cost more than she would be worth afterwards, and that it would be for the interest of all concerned she should be condemned as unworthy of repair, on that ground: we did, therefore, condemn her as not seaworthy, and as unworthy of repair; and therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction,

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(*a*) See Osborn *v.* United States Bank, 9 Wheat. 738, 829.