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.

Janney v. Columbian Ins. Co.

for the account of the insurers thereof or whomsoever the same may concern:" It was *held*, that the survey was conclusive evidence, under the clause, to discharge the insurers from their liability for the loss.

Quære? How far the state legislatures may authorize the condemnation of vessels as unseaworthy, by tribunals or boards constituted under state authority, in the absence of any general regulation made by congress, under its power of regulating commerce, or as a branch of the admiralty jurisdiction?

However this may be, the above condemnation not being specially authorized by any law of the state of Louisiana, it would not have been considered as conclusive evidence, within the clause, had not the condemnation been obtained by the master, as the agent of the owners, and afterwards adopted by them, as proof of the facts stated therein.

*Error to the Circuit Court for the District of Columbia. This [*412 was an action brought in the court below by the plaintiff in error, Janney, against the defendants in error, the Columbian Insurance Company, on a policy of insurance on the brig Hunter, Grinnolds, lost or not lost, from Alexandria to Norfolk and New Orleans; in which policy there was 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." On the first trial of the cause, the jury, not agreeing on a verdict, was discharged; and, on the second trial, a verdict was found for the defendants, under an instruction from the court to the following effect, as stated in the bill of exceptions:

And the plaintiff offered to prove, by parol evidence, that at the time that the said brig Hunter sailed from the port of Alexandria, upon her voyage aforesaid, and at the time she was surveyed and condemned at New Orleans as herein after mentioned, she was sound, and that the repairs of vessels, and materials of ship-building, at that place, were very high; and that the prices there would have amounted to two or three times as much as the prices would have amounted to, in the port of Alexandria; and that the repairs of the said vessel, arising from the injuries which she *had [*413 sustained in her voyage to New Orleans, would not have amounted to less, in that place, than $2000, independent of the detention of the vessel, and the other necessary expenses of the voyage. But the defendants produced, and read in evidence to the jury, a regular survey, called upon the state and condition of the vessel, on her arrival at New Orleans, by the said Capt. Grinnolds, master and part-owner; and by him transmitted to the plaintiff, to be laid before the insurance office, as evidence of loss; and actually laid before such office by the plaintiff accordingly; and at the former trial, read on the part of the plaintiff, in evidence to the jury, in the words following:

"Port-Wardens' Office, New Orleans, 13th January 1819.

"We, the subscribers, the wardens of this port, having been thereto required by Capt. Grinnolds, did repair on board the brig Hunter, commanded by him, and lately arrived from Norfolk, and, assisted by A. Seguin, carpenter, surveyed her condition. Found twenty-five feet of quarter-rail, and seventy-five feet of waist boards, and the boat's davit, carried away; the oakum of the break of the quarter-deck started, and also the strings and drifts; the cambouse-stove, and its house, carried away; the vessel was reported to have leaked much at sea. All which, therefore,

according to the powers vested by law in the *master and wardens of this port, we do hereby certify.

(Signed) James Rinker,
E. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
George Pollock, Warden and Secretary."

"Port-Wardens' Office, New Orleans, 24th February 1819.

"We, the subscribers, wardens of this port, having been thereunto required by Captain Grinnolds to inspect the condition of the brig Hunter, commanded by said Captain Grinnolds, from Norfolk, did repair to the ship-yards, and assisted by Andrew Seguin and Robert Fell, ship-carpenters, and for the greater satisfaction of said master, by Captain Wayne of the ship Ariadne, and Captain Williams of the brig Maryland, surveyed her condition. We ordered one streak of the plank, fore and aft, to be taken out, about three feet below the bends, on the starboard side, and found the timbers 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
*415] order and direct the aforesaid damaged brig to be sold at *public auction, for account of the insurers thereof, or whomsoever the same may concern.

(Signed) James Rinker,
E. Marchand,
J. M. Cartande."

"Port-Wardens' Office, New Orleans, 22d March 1819.

"We, the subscribers, wardens of this port, do hereby certify, to whom it may concern, that the goods mentioned in the annexed account of sales, were sold at public auction, by our order, in our presence, by Dutillet & Sagony, commissioned auctioneers, after having been advertised in due form of law; and that the said account of sales is, in all respects, just and true. In testimony whereof, we have countersigned the said account, and now grant this certificate as the law directs.

(Signed) Em. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
George Pollock, Warden and Secretary."

Whereupon, the defendants prayed the opinion of the court, and their instruction to the jury, that the said survey is conclusive evidence that the said vessel was condemned for being unsound or rotten; and that it is not competent for the plaintiff to produce evidence inconsistent with said survey, to prove that the said vessel was, in fact, sound, at the time of such
*416] survey; and that, upon such evidence, the plaintiff is not entitled *to recover under the policy given in evidence in this case; and the

court so accordingly instructed the jury, and refused to suffer the said evidence to be given to the jury.

A verdict and judgment thereon having been rendered for the defendants, the cause was brought by writ of error to this court; and was argued (February 25th) by *Swann* for the plaintiff, and by *Jones*, for the defendants.

March 15th, 1825. JOHNSON, Justice, delivered the opinion of the court. —This case varies somewhat in form, but nothing in principle, from the case of *Dorr* v. *Pacific Insurance Co.*, 7 Wheat. 582. The material point of distinction is this; in that case, the discharge of the underwriters was made to depend on a regular survey alone; the stipulation was, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten," the policy should be discharged. And hence, although a condemnation in the vice-admiralty court of the Bahamas was produced in evidence in that cause, the court makes no other use of it, than as the means of authenticating the survey upon which the decree was made.

The terms of the present stipulation are these: "If the above-mentioned brig, after a regular survey should be condemned for being unsound or rotten," the insurers are to be discharged. From which, it is obvious, that both a regular survey and a condemnation are in contemplation *of the parties. And the question is, whether the bill of exceptions makes [*417 out the *casus fœderis*. This gives rise to the questions: Was the survey regular? was the condemnation conformable to the contract? and does the one or the other bring the case within the terms of the stipulation?

With regard to the survey, the case is a very clear one. The laws of Louisiana contain ample and judicious provisions on this subject. The master and wardens of the port of Orleans are vested with various powers, and required to keep an office, and a book of record open to all the world; they possess, in fact, some of the attributes of a municipal court. With regard to damaged vessels, and vessels deemed unfit to proceed to sea, they, or any two of them, with one or more skilful carpenters, are constituted surveyors; and the laws enjoin, "that they shall, upon every such survey, certify under their hands, how the vessels so surveyed appeared to them, and shall cause entries to be made in a book to be kept for that purpose in their office." A survey, therefore, made by them, pursuant to this law, and at the call of the captain of this vessel, was emphatically a regular survey.

The difficulty in the cause arises upon the next member of the clause under consideration, to wit, that which requires a condemnation. The certificate of the survey purports, that there was, in fact, a condemnation of the vessel; but there is nothing in the laws of Louisiana which vests the power expressly in the master and wardens of the port to condemn a vessel as unfit for sea or *unworthy of repair. As to damaged merchandise, [*418 the power is expressly given; but as to ships, it appears to be exercised as incidental to the surveying power. In other parts of the world, it is very generally exercised as an incident to the admiralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the United States. These considerations are only thrown out to

preclude the supposition that the court has not had them in mind whilst considering this subject. We do not mean to intimate, that the power is one which cannot be exercised under municipal regulations. On the contrary, there are many reasons for maintaining that it may be so exercised, until congress may think proper to establish some general rule upon the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction. If, therefore, there had been express provision on the subject in the laws of Louisiana, or it had been shown to be recognised as a power known and habitually exercised in that court, as an incident to the surveying power, we should have felt no difficulty on this point. As it is, we must place our opinion on another ground, one, however, which is also noticed in *Dorr's Case.* It is this, that the condemnation, such as it is, was obtained through the instrumentality of the master, who, as such, represented his employers, and who was, in fact, in this instance, also a part-owner. In this condemnation he acquiesced, broke up the voyage, and sold the vessel ; and
*419] the certificates now before *this court were transmitted to the underwriters, and actually, in a former trial between the same parties, made evidence, to prove the fact which they ascertain. It is then too late for the plaintiffs to dispute the validity or verity of the act of condemnation. They have recognised the jurisdiction of the tribunal they appealed to, to obtain the survey, as sufficient also to make the condemnation, and must be held to abide by it as such. All further and other investigation in a more competent tribunal, if there was such, was rendered impossible by their act.

It only remains, then, to determine, whether the facts ascertained by the survey are such as bring the case within the terms of the stipulation. We are of opinion, they are. It would be difficult to find a shade of difference in this respect, between the present case and that of *Dorr.* The terms of this certificate are, "we found the timbers and bottom plank so much decayed, that we are 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 repairs, on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repairs." Now, it cannot be questioned, that the ground of condemnation here stated does not stand single and unconnected with the estimated cost of repairs. But does this vary the case? We are of opinion, it does not, since the condemnation of a vessel, on account of decay, can
*420] *never, in its nature, stand single and unconnected with the expense of repairs. It is the common place to which the question of condemnation must always have reference. It is hardly possible to conceive a case, where a survey would be called, in which a vessel might not be repaired or renovated, and still leave enough of the hull to maintain her identity. A state of hopeless and absolute decay, therefore, is never in the contemplation of the contract. And whether expressed or not, the consideration, whether the value, when repaired, would exceed the expense, invariably enters into the decision of surveyors, upon a question of seaworthiness. As, then, her being decayed, so as to be unworthy of repairs, is equivalent to, and in fact the technical meaning of unseaworthiness, we are of opinion, that the certificate brings the case within the words of the stipulation. It

follows, that the court were correct in refusing the evidence offered by the plaintiff.

Judgment affirmed.

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*Sixty Pipes of Brandy : Kennedy & Maitland, Claimants. [*421

Forfeiture.

Under the duty act of 1799, c. 126, § 43, it is no cause of forfeiture, that the casks, which are marked and accompanied with the certificates required by the act, contain distilled spirits, which have not been imported into the United States, or a mixture of domestic with foreign spirits ; the object of the act being the security of the revenue, without interfering with those mercantile devices which look only to individual profit, without defrauding the government.

Appeal from the Circuit Court of Massachusetts.

March 14th, 1825. This cause was argued by *Emmet*, for the appellants and claimants ; and by *Webster*, for the respondents.

March 18th. Johnson, Justice, delivered the opinion of the court.— The libel in this case contains two allegations, and the amended or supplemental libel contains a third. The first is, that these sixty pipes of brandy were imported from abroad, and landed in the port of Boston, without a permit. The second, that they were not accompanied with the marks and certificates required by law. And the third, *that they were imported from abroad, and landed in the port of New York, without a permit. [*422 To the first and third of these allegations, the record furnishes no evidence, nor, in fact, is it contended, that the article seized is to be visited by the penalties inflicted for those offences, otherwise than as an incident to the cause of forfeiture contained in the second allegation.

The passage of the law on which the libellants claim the forfeiture, is in these words : " and if any casks, &c., containing distilled spirits, &c., which, by the foregoing provisions, ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence, that the same are liable to forfeiture, and it shall be lawful for any officer of the customs, or of inspection, to seize them as forfeited ; and if, upon the trial, in consequence of such seizure, the owner or claimant of the spirits, &c., seized, shall not prove that they were imported into the United States according to law, and the duties thereupon paid or secured, they shall be adjudged to be forfeited."

The fact that these casks were accompanied with certificates, is not questioned, nor that the certificates accompanying them were those which issued from the custom-house upon those identical casks. But it is contended, that the identity of the spirits is destroyed by a large admixture of other spirits; and that, by the true construction of the law, such a change falsifies the certificate, and the casks are no longer, in the sense of *the law, " accompanied by certificates." And further, that such a change [*423 justified the seizure, and wherever the seizure is just, the *onus probandi* is thrown upon the claimant, and he is held to comply strictly with the words of the law, and prove the spirits which they contain to have been " imported according to law, and the duties thereon paid, or secured to be paid."

That such a construction of the law is carrying its penal effects beyond