the district courts of Virginia." There has never been a doubt, but that the district courts of Virginia had jurisdiction, in cases in which the bank was plaintiff, and was bound, if requested, to compel the defendant to go to trial at the return-term. The clause in the charter of the bank is an exception to the general law upon the subject of judicial proceedings; but the exception is equally valid with the general rule.

Jones, in reply.—The bank has not brought the case within the act. The writ is not returnable until the return-day, and the return-day is not until after the rising of the *court; so that the bank is not entitled to a trial, until the second term after issuing the writ. The writ is returnable to the next court; but the officer has the whole term to return it in, and may delay it until the very last moment of the session. [*49

March 10th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The writ being returnable to the court, is returnable the first day of the court. It was known to the legislature of Virginia, that the appearance-day for all process was the day after the term. When, therefore, they directed that a trial should be had at the return-term, they must have intended that this case should be an exception to the genera rule.

Judgment affirmed.

YEATON *v.* BANK OF ALEXANDRIA.

Promissory notes.

The Bank of Alexandria may maintain an action against the indorser of a promissory note, made negotiable in that bank, without first suing the maker, or proving him insolvent, although the indorsement was for the accommodation of the maker, and notwithstanding that, in Virginia, the implied contract of the indorser of a promissory note, by the general understanding of the country, is, that he will pay the debt, if, by due diligence, it cannot be obtained from the maker.

Perhaps, the undertaking of the indorser of a note to a bank may be different.[1]

It is no objection, that the indorsement was for the accommodation of the maker. The consideration moving from the bank to the maker of the note, on the credit of the indorser, charges both the maker and indorser.

Bank of Alexandria *v.* Yeaton, 1 Cr. C. C. 458, affirmed.

ERROR to the Circuit Court of the district of Columbia, in an action of *assumpsit*, brought by the defendants in error, against the plaintiff in error, as indorser of a promissory note for the accommodation of R. Young, the maker.

The declaration contained two counts. One upon the indorsement of the note, in the usual form, and without any averment of the insolvency of the maker, or of any steps taken to enforce payment from him. The other was for money had and received.

The same questions arose in this case as in the preceding case of *Young* v. *Bank of Alexandria*, but the only question argued in this court, was, whether an indorser of a promissory note to the Bank *of Alexandria, for the accommodation of the maker, was liable in an action by the [*50

[1] See Renner *v.* Bank of Columbia, 9 Wheat. 581.

bank, until after a suit, judgment and execution against the maker had proved fruitless, or the maker was otherwise proved to be insolvent.

Upon the opening of the point, MARSHALL, Ch. J., observed, that it had been decided by this court in the cases of *French* v. *Bank of Columbia* (4 Cr. 141), and *Violett* v. *Patton* (*post*, p. 142), that the circumstance of its being for the accommodation of the maker, makes no difference. The indorser is as much liable as if he had himself received the money.

Youngs, for the plaintiff in error.—The general law of Virginia, upon the subject of promissory notes, is, that the indorser is not liable, until a suit has been brought against the maker, and judgment recovered; and the execution has proved fruitless, or the maker is otherwise proved to be insolvent. If there be any exception in favor of the bank, it must be a privilege granted by its charter. The only words under which such a privilege can be supposed to exist are these: "And whereas, it is absolutely necessary, that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that when any person or persons indebted to the said bank, on bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, shall refuse or neglect to make payment, at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return-day of such writ, the court shall" order the proceedings to be made up, and the cause tried at the first court.

*51] *But according to this act, the person to be sued must be a person indebted to the bank by indorsement; and under the general law of Virginia, no person is indebted by indorsement of a note, until the maker be insolvent, or the plaintiff shall have failed to obtain payment from the maker by suit, judgment and execution.

Swann, contrà, admitted the general law of Virginia respecting promissory notes to be as stated, but contended, that by the words of the act of incorporation, an indorser of a note is to be considered as indebted to the bank, upon failure to pay the note when it becomes due. The preamble shows that punctuality in payment was the object in view; which would be entirely defeated, if the bank could not compel payment from an indorser, until they had pursued the maker through all the tedious delays of the law. If the note be not paid, when it becomes due, the act calls the indorser a defaulter, and directs judgment to be entered up against him, at the first court thereafter.

March 10th, 1809. MARSHALL, Ch. J., delivered the opinion of the court as follows, viz:—The question in this case is, whether the indorser of a note, negotiable in the bank of Alexandria, if such indorsement be for accommodation, may be sued by the bank, before a suit shall be instituted against the maker, if the maker be solvent.

In Virginia, the indorser of a promissory note was not, when the town of Alexandria was separated from that state, liable to the holder by any express statute. He was only liable under the implied contract created by his

indorsement. This implied contract, by the general understanding of the country, was, that he would pay the debt, if, by due diligence, it could not be obtained from the maker. This condition, however, was not expressed. *Yet, it was just, because it was consistent with general usage, and therefore, was the real understanding with which such an indorsement was made and received. [*52

But in banks, this is probably not the usage; and if it be not, then the same reason does not exist for annexing such a condition to the contract created by indorsement. If banks are understood to receive notes made negotiable with them, as subject to the law which governs inland bills of exchange, then it would seem reasonable, in the case of notes actually negotiated with them, to imply, from the act of indorsement, an undertaking conformable to that usage. If, then, the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say, that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties.[1]

But the incorporating act removes any doubt which might otherwise exist on this point. The 20th section of that act declares, "that whenever any person or persons, indebted to the said bank, on bonds, bills or notes, given or indorsed by them, with an express consent, in writing, that they may be negotiable at the said bank, and shall refuse or neglect to make payment, at the time the same may become due, and a suit shall thereupon be commenced, &c., judgment is to be rendered in a summary manner.

A person, then, may become indebted to the bank on a note indorsed by him, as well as on a note made by him; and the question is, when does he become indebted? The act appears to answer this question, in the succeeding member of the sentence. The words are, "and shall refuse or neglect to make payment at the time the same may become due." To what antecedent does the word "same" refer? Most obviously, to the words "bond, bill or note." When the bond, bill or note becomes *due, the maker or indorser, who shall refuse or neglect to make payment, is within the description of the act. No man can be said to refuse or neglect to make payment, before the money is demandable from him, and until then, no action can be brought. But the law proceeds to say, "and a suit shall thereupon be commenced." The word "thereupon" must refer to the note, or to the circumstances previously stated. Give it the one meaning or the other, and the law obviously contemplates a suit against the maker or indorser, on his refusing or neglecting to pay such note, when it shall become due. The act then proceeds to say, that, when this suit shall be so commenced, the court shall render judgment thereon, in a summary way. [*53

It is alleged, that the preceding part of the section is all recital, and cannot, therefore, be construed to give a right to sue, where that right did not before exist: that the enacting clause gives no remedy, where one did not before exist; but substitutes a summary mode of proceeding, for that more tedious action which the previous laws had given.

It is true, that the first part of this section is recital; but it describes the precise case in which judgment shall be rendered in a summary way.

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[1] Renner *v.* Bank of Columbia, 9 Wheat. 572.

That precise case is, where a person indebted, by making or indorsing a note negotiable and negotiated in the bank, shall refuse or neglect to make payment thereof, when such note shall become due. The time when he becomes indebted is declared to be, when the note becomes due.

It is alleged, that an accommodation indorser cannot then become indebted. This distinction was completely overruled in the case of *Violett* v. *Patton*. The consideration moving from the bank to the maker of the note, on the credit of the indorser, charges both the maker and the indorser. The indorser is, in this respect, as liable, both in reason and in law, to the claim of the bank, as if he had placed his name on the face instead of the back of the note.

Judgment affirmed, with costs.

*54] *JOHNSON, J.—Both the questions (*a*) argued in this case, arise out of the act of Virginia incorporating the Bank of Alexandria.

On the point of the summary jurisdiction, I concur with my brethren, and think this opinion perfectly consistent with the decision, at the last term, relative to the right of appeal. I remember, that my opinion in that case was founded on the idea, that the provisions of that act, relative to the summary recovery of debts, was entirely a judicial regulation. That the judicial power was inalienable from the sovereignty of a country, and must, therefore, in all its modifications, remain subject to the will of succeeding legislatures. That it was, in fact, a subject in which a peculiar, indefeasible right could not be vested in an individual. I thought it, therefore, from its nature, unaffected by the clause of the act of acceptance, reserving to the bank its corporate rights, and of course, affected by the law which gives an appeal, generally, from the courts of this district to the supreme court, above a certain amount. I have no doubt of the power of congress to deprive them also of their summary remedy ; but it has not yet legislated to that effect.

On the other question, I entertain a very strong opinion in opposition to that of the court. The doctrine has been repeatedly sanctioned in this court, that, in the state of Virginia, the holder of a promissory note cannot recover against an indorser, without proving the insolvency of the drawer. But it is contended, that the act incorporating this bank, has placed the notes negotiable therein on a different footing ; and that an indorser of such a note may be sued, as soon as it is dishonored, without any evidence of the insolvency of the maker. The following are the words of the clause, so far

*55] as they are material to this case : "And whereas, it is *absolutely necessary, that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that whenever any person or persons indebted to the said bank, on bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, and shall refuse or neglect to make payment, at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned and executed, or a copy left at the usual place of residence of such defaulter, at

(*a*) This case was argued in connection with that of Young *v.* Bank of Alexandria, *ante*, p. 45, as one case. This opinion, therefore, applies to both cases.

least ten days before the return-day of such writ, the court shall," &c. It then goes on and enacts, that, in such case, "the court shall order the proceedings to be made up, and the cause tried at the first court."

This bare recital or preamble, without one enacting word, is what is supposed to have effected this important change in the law of Virginia, relative to the liability of an indorser. Much stress was laid, in the argument, upon the use of the word "indebted," as applied to the indorser, the words, "negotiable at the said bank," and words which suppose the commencement of a suit, as soon as a note "becomes due." I positively deny the correctness of maintaining any repeal or alteration in the principle of a law, upon an implication drawn from a mere preamble or recital to an act. Enacting words will undoubtedly often produce a repeal by implication, but a recital or preamble sets forth merely the motives or inducements of the legislator, and, whether founded in error or truth, serves no other purpose than to justify him to those for whom he is legislating, or, at times, to assist in developing the meaning of doubtful enacting words. Admit the principle, that a preamble may have the effect of enacting words, and there is no necessity for dilating on the inextricable absurdities in which a court may be involved. In the case before us, it is possible, that the legislature may have supposed, that the law of Virginia would sanction an immediate suit against the indorser, without evidence of the maker's insolvency; *but their courts of justice have decided otherwise; and it would be singular, [*56
if an erroneous opinion, entertained by that body, should have all the effects of a law passed by it.

But there is not a word contained in this preamble which may not be fully satisfied, without producing any necessary implication against the general law of Virginia, relative to the liability of the indorser. When the legislature speaks of a person indebted by indorsement, it can only be understood to speak of one indebted according to the legal liability of an indorser; which is only, by the laws of Virginia, in case of the insolvency of the maker. When it speaks of a consent in writing, that it may be negotiable at the said bank, it can only mean what it expresses; and intends it for the purpose of subjecting the individual to the summary recovery given in such a case; for, as to his general liability as indorser, such a consent was in no wise necessary; that liability existed in its full extent, without it. And as to the supposition of the indorser's liability to be sued, when the note becomes due, this also is strictly and literally true, if the maker should then be insolvent, or (I suppose) if he should become so, at any time before the trial of the issue.

Upon the whole, therefore, it appears to me, that there is no possible difference between the liability of an indorser, generally, and an indorser of a note negotiable in the bank of Alexandria; that the legislature intended to make no distinction; and if it had expressly declared such to be its intent, no such change would have been produced, without following up that intention with sufficient enacting words; but that, in fact, its sole object was to do that which it professes to intend, and alone has effected, viz., to give a summary remedy against all persons becoming indebted to that bank, whenever their legal liability is incurred. In fact, it may, with the utmost correctness, *be affirmed of an indorser, that he is indebted, and that he may be sued, when the note becomes due, without at all interfering [*57

with the laws of Virginia on this subject: for a thing may be *debitum in præsenti*, and yet no cause of action exist against him; he may lie under a present obligation to pay a sum of money, upon some contingency or future event. And with regard to his liability to be sued, when the note becomes due, it may be very correctly affirmed, that it is not due from him, until the insolvency of the maker can be shown. As to the maker, the note is due, when it is made payable; but the principles of the Virginia law add a contingency to the liability of the indorser, so that, in fact, his undertaking is collateral and contingent, and the amount is not legally due from him, until after the day of payment, and provided the maker should prove insolvent.

Hope Insurance Company of Providence *v.* Boardman *et al.*

Citizenship of corporation.

A corporation aggregate cannot be a citizen; and can only litigate in the courts of the United States, in consequence of the character of the individuals who compose the body politic; which character must appear, by proper averments, upon the record.[1]

Error to the Circuit Court for the district of Rhode Island, in an action upon a policy of insurance. The only question decided in this court was that relative to the jurisdiction of the courts of the United States.

The parties were described in the declaration as follows: "William Henderson Boardman and Pascal Paoli Pope, both of Boston, in the district of Massachusetts, merchants and citizens of the state of Massachusetts, complain of the Hope Insurance Company of Providence, a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantations, and established at Providence in said district." *The question of jurisdiction was not made in the court below.

*58]

Ingersoll, for the plaintiffs in error, contended, that the jurisdiction must appear upon the face of the proceedings, according to the decision in the case of *Bingham* v. *Cabot*, 3 Dall. 382. And that it does not appear upon this record, that the parties are citizens of different states; a corporation aggregate cannot be a citizen of any state; and here is no averment of citizenship of the individuals who compose the corporation.

Adams, contrà.—The whole argument against us depends upon the single case of *Bingham* v. *Cabot;* for although in other cases the same point has been decided, yet the subsequent decisions are all founded upon that case. The effect of that decision has been, to exclude many cases upon nice questions of pleading, which would otherwise have been clearly within the jurisdiction of the courts of the United States. No exception was taken to the jurisdiction, in the court below; and this court would not willingly turn us out of court, after encountering all the risk, expense, delay and labor of

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[1] This and its cognate cases have been since in part overruled. It is now held, that a corporation is to be deemed a citizen of the state, by whose laws it was created, for the purposes of federal jurisdiction. Louisville, Cincinatti and Charleston Railroad Co. *v.* Letson, 2 How. 497; Marshall *v.* Baltimore and Ohio Railroad Co., 16 Id. 314; Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black 286; Paul *v.* Virginia, 8 Wall. 177; Chicago and Northwestern Railway Co. *v.* Whitton's Administrator, 13 Id. 270. And no averment to the contrary is admissible, to defeat the jurisdiction. Ohio and Mississippi Railroad Co. *v.* Wheeler, *ut supra.*