5 Cranch 138; *Ogden* v. *Saunders*, 12 Wheat. 266; and *Satterlee* v. *Matthewson*, 2 Pet. 380, fully recognise this doctrine.

In the next place, does the act of 1826 violate the obligation of any contract? In our judgment, it certainly does not, either in its terms or its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment *of the deeds by which they have sought to transfer their title. So far, then, as it [*111 has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. This point is so fully settled by the case of *Satterlee* v. *Matthewson*, 2 Pet. 380, that it is wholly unnecessary to go over the reasoning upon which it is founded.

Upon the whole, it is the unanimous opinion of the court, there is no error in the judgment of the supreme court of Pennsylvania, so far as it is subject to the revision of this court, and therefore, it is affirmed with costs.

This cause came on to be heard, on the transcript of the record from the supreme court of the commonwealth of Pennsylvania, for the Lancaster district, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby affirmed, with costs.

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*James Brown, Plaintiff in error, *v.* Richard R. Keene. [*112

Averment of citizenship.

A petition filed in the district court of Louisiana, averred, that the plaintiff, Richard Raynal Keene, was a citizen of the state of Maryland, and that James Brown, the defendant, was a resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles.

The decisions of this court require, that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends; it is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."

The cases of Bingham *v.* Cabot, 3 Dall. 382; Abercrombie *v.* Dupuis, 1 Cranch 343; Wood *v* Wagnon. 2 Ibid. 9; Capron *v.* Van Noorden, Ibid 126; cited.

Error to the District Court for the Eastern District of Louisiana. In the district court, the defendant in error, Richard R. Keene, filed a petition in which he stated himself to be a citizen of the state of Maryland, against James Brown, a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles, in the district aforesaid, claiming damages for an alleged non-performance of a contract relating to the conveyance of a lot of ground, part of the batture at New Orleans.

To this petition, Mr. Brown filed an answer, by his attorney, Isaac T. Preston, Esq., in which he objected to the jurisdiction of the district court, on the ground, that the plaintiff, as well as the respondent, was a citizen of the state of Louisiana. The answer then proceeded to deny all the material allegations in the petition. The district court made a decree in favor of the petitioner; from which the respondent prosecuted a writ of error to this court.

*113] *The case was argued on the question of jurisdiction, and on the merits, by *Clay*, for the plaintiff in error; and by *Brent*, for the defendant. As no point was decided but that which was presented on the question of jurisdiction, the arguments of counsel on the other points are omitted.

Clay, upon the question of jurisdiction, argued, that it did not exist, on account of the character of the parties. The petition states Keene to be a citizen of Maryland, and James Brown to be a citizen or resident of Louisiana; the fact ought not to have been stated in the alternative. The constitution limits the jurisdiction, in this respect, to a controversy between citizens of different states; and that must be shown; nothing can supply the want of that relative attitude of the litigants. Suppose, Keene had simply alleged himself to be a resident of the state of Maryland, and had brought his suit against Brown, a resident of Louisiana; the jurisdiction could not have been maintained, because residence and citizenship are not synonymous. If he had stated himself a citizen or resident of Maryland, and brought the suit against Brown as a citizen or resident of Louisiana; the jurisdiction could not be sustained. It must appear, positively, to the court, that the parties stand to each other in the relation required by the constitution.

Nor is this defect cured by Brown's answer to the petition. It is true, he there states himself to be a citizen of Louisiana; but he also states Keene to be a citizen of Louisiana. The whole of the answer, in this particular, is to be taken as true, or no part of it can be relied on; and, if received as true, the court had no jurisdiction, because both parties were citizens of the same state.

If residence and citizenship mean the same thing, there is abundant proof on the record, that Keene is a citizen of Louisiana. The deed from him to the Browns, dated on the 21st of August, styles him "of the city of New Orleans," that deed is a part of his petition. He is again so styled, in a deed to the Browns, of the 28th September 1807. And in his petition,

*114] filed near twenty-three years after, in March 1830, he *describes himself "Richard Raynal Keene, a resident of the city of New Orleans."

The rule made in the inferior court, requiring an oath to the plea to the jurisdiction, is beyond the authority of such a court. Could a prosecution for perjury be sustained on such an oath, if falsely made? Nor does the rule of court apply to such a case as this. The defect of jurisdiction is apparent on the record. Mr. Brown is stated to be a citizen or resident of Louisiana: residence is not citizenship. The allegation is in the alternative, which admits the difference; and there is not, therefore, a distinct allegation of citizenship.

Brent, in reply, contended, that, in his answer, Mr. Brown admitted that he was a citizen of Louisiana. The answer says, "that the plaintiff, as well as the the respondent, is a citizen of Louisiana." This is sufficient to maintain the jurisdiction; and the plaintiff in error cannot contradict this admission, and, by an objection only technical, take the case from the power of this court over it. The objection to the jurisdiction should have been sustained by the affidavit of the plaintiff in error. This is required by a rule, made in 1830, by the district court of the United States for the eastern district of Louisiana; and no such affidavit was made. It is said, that this rule of court does not operate, because the judiciary act does not require an affidavit. To this it is answered, that no rules of practice are prescribed by the act of congress, and courts have full authority to establish such as they consider proper and necessary. This rule was made to prevent a dilatory plea, and was such as the court had a full right to make. As to the objection, that the allegation is in the alternative, this does not affect its sufficiency. Connected with the statement, that the plaintiff in error was domiciled in the parish of St. Charles, enough is shown, to sustain the proceedings. But if these are not sufficient, the defendant in the district court, by appearing to and answering the petition, has waived the objection.

MARSHALL, Ch. J., delivered the opinion of the court.—*This appeal is from a decree of the court of the United States for the district of Louisiana. [*115

The first error assigned in the proceedings is, that the petition, which, in the practice of Louisiana, is substituted for a declaration, does not show, with sufficient certainty, that the parties were within the jurisdiction of the court. If this objection be well founded, it is undoubtedly fatal.

The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the state of Maryland; and that James Brown, the defendant, is a citizen or resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either. The additional words of description, "holding his fixed and permanent domicil in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the court is sufficiently shown by these averments.

The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state." The decisions of this court require, that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments.

In *Bingham* v. *Cabot*, 3 Dall. 382, the court held clearly, that it was necessary to set forth the citizenship (or alienage, when a foreigner was concerned) of the respective parties, in order to bring the case within

the jurisdiction of the court, and that the record was, in that respect, defective. In *Abercrombie* v. *Dupuis*, 1 Cranch 343, the plaintiffs below
*116] averred, "that they do severally reside without *the limits of the district of Georgia, to wit, in the state of Kentucky." The defendant was called "Charles Abercrombie, of the district of Georgia, aforesaid." The judgment in favor of the plaintiff below was reversed, on the authority of the case of *Bingham* v. *Cabot*. In *Wood* v. *Wagnon*, 2 Cranch 9, the judgment in favor of the plaintiff below was reversed, because his petition did not show the jurisdiction of the court. It stated the plaintiff to be a citizen of the state of Pennsylvania, and James Wood, the defendant, to be "of Georgia, aforesaid." *Capron* v. *Van Noorden*, 2 Cranch 126, was reversed, because the declaration did not state the citizenship or alienage of the plaintiff in the circuit court. The same principle has been constantly recognised in this court.

The answer of James Brown asserts, that both plaintiff and defendant are citizens of the state of Louisiana. Without indicating any opinion on the question, whether any admission in the plea can cure an insufficient allegation of jurisdiction in the declaration, we are all of opinion, that this answer does not cure the defect of the petition. If the averment of the answer may be looked into, the whole averment must be taken together. It is, that both plaintiff and defendant are citizens of Louisiana.

The decree of the court for the district of Louisiana is to be reversed, that court not having jurisdiction; and the appeal to be dismissed. The cross-appeal, *Keene* v. *Brown*, is to be dismissed, the court having no jurisdiction.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said district court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the judgment of the said district court entertaining said jurisdiction: whereupon, it is ordered and adjudged by
*117] this court, that the judgment of *the said district court be and the same is hereby reversed, and that this writ of error be and the same is hereby dismissed, for the want of jurisdiction. All of which is hereby ordered to be certified to the said district court, under the seal of this court.

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*118] *George Briscoe and others, Plaintiffs in error, *v.* The Commonwealth Bank of the State of Kentucky.

The Mayor, Aldermen and Commonalty of the City of New York, Plaintiffs, *v.* George Miln.

Practice.

In cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court, to deliver any judgment, except in cases of absolute necessity.

Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that the cases shall be re-argued at the next term.