

Case No. 6,505.

HILLIARD v. BREVOORT.

{4 McLean, 24.}¹

Circuit Court, D. Michigan.

June Term, 1845.

EQUITY PLEADING—AVERMENT OF CITIZENSHIP—EXCEPTIONS.

1. A want of an averment of citizenship if not made in a bill or declaration, or where it is falsely alleged, should be taken advantage of by pleading.
2. Unless such an averment be contradicted, it need not be proved on the trial or hearing.
3. Where the exception is taken, the court will permit an amendment.

In equity.

Barstow & Lockwood, for plaintiff.

Vandyke & Harrington, for defendant.

OPINION of THE COURT. This is a bill in chancery, to which a demurrer is filed, on the ground that there is no positive averment in the bill that the plaintiff is a citizen of the state of Ohio. The averment of citizenship, it is contended, must be clear and positive, as on that depends the jurisdiction of the court. [Thatcher v. Powell] 6 Wheat. [19 U. S.] 119. If this averment be doubtful, it can not be held sufficient. If the averment be a mere residence, and not a citizenship, it will not be within the law. But this averment need never be proved, unless it be denied in the plea and answer. If the citizenship be improperly or falsely alleged, the defendant must reply to it if he wish to controvert the fact averred. At one time, it was held by a circuit court of the United States that the fact of citizenship must be proved on the general issue, but this has long since been overruled, and the law is now settled as above stated. The court will permit an amendment, as a matter of course, of a defect of the kind alleged; but in the present bill, we think the averment is certain, and within the law. The demurrer is overruled.

¹ [Reported by Hon. John McLean, Circuit Justice.