LECTURE V.

APPEARANCE OF DEFENDANT, ETC.

The defendant having been personally served with process must cause his appearance to be entered in the common order book within the time prescribed by the rules and serve a notice of such appearance upon complainant, if he would prevent his default being entered and an order made taking the bill as confessed.

1 Barb. Ch. Pr. 78; Jennison Ch. Pr. 40; Mich. Rules 11, 14; U. S. Rules 17, 18.

The defendant having appeared, if the occasion exists, may except to the bill on the ground that it contains impertinent or scandalous matter, and in the United States Court if it is made unnecessarily prolix by recitals of matters not pertinent or relevant to the real cause of action, or by needless repetitions.

Upon exceptions of this nature being filed they may be referred to a master. If the master or the court find that the exceptions are well taken, the objectional matter will be expunged at the expense of complainant, and he may be adjudged to pay all the defendant's costs up to that time.

U. S. Rules 25, 26, 27; Mich. Rules 30, 31, 32, 33, 34.

Impertinences are wholly irrelevant or unnecessary allegations and statements, and they have been described to be "when the records of the court are stuffed with long recitals, or with long digressions of

matters of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a deed is unnecessarily set forth *in haec verba*." The test as to whether a particular allegation is or is not impertinent is this, is it material? If it is not material it is impertinent, but its immateriality must clearly appear. If the court is in doubt, the matter will not be stricken out as impertinent.

Rickards v. Attorney-Genl. 12 Cl. and Fl. 30; Railroad v. Stewart, 4 C. E. Green 343; Whaley v. Norton, 1 Vern. 483; Clark v. Periam, 2 Atk. 333, 337; Woods v. Morrell, 1 Johns. Ch. 103.

Scandal is an irrelevant allegation of some matter which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with the commission of a crime not necessary to be shown in the cause; in short, any unnecessary allegation bearing cruelly upon the moral character of an individual. Nothing is scandalous, however, which is relevant. A man may be called a thief when that fact is pertinent to the issue involved.

Fisher v. Owen, 8 Ch. Div. 645; Gleaves v. Morrow, 2 Tenn. Ch. 592; Goodrich v. Rodney, 1 Min. 195; Desplaces v. Goris, 1 Edw. Ch. 350.

The objection to the bill for impertinence must be taken before answering or submitting to answer, i. e., obtaining an extension of time within which to answer.

Anon, 2 Vesey Sen., 630; Ferrar v. Ferrar, 1 Dick. 173; Anon, 5 Vesey Jr., 656; Jones v. Spencer, 2 Tenn. Ch. 776.

But an objection for scandal may be taken after answer. The reason for the distinction is that impertinence involves merely a question of costs, while

scandal is regarded as an indignity to the court. Same authorities.

And the objection to the bill for scandal may be made by one not a party to the suit.

Coffin v. Cooper, 6 Ves., 513; Williams v. Douglas, 5 Beav., 82, 85.

No pleading may contain impertinent or scandalous matter, and if it does it may be excepted to for that reason.

Mich. Ch. Rules, 18, 30.

DISCLAIMER.

If the defendant has no interest whatever in the subject-matter of the suit, and never had any, or claimed to have had any, he may answer by disclaiming all interest in the proceedings. A simple disclaimer, however, is seldom sufficient, except in those cases where the defendant has been made a party by mistake. If, as a matter of fact, although the defendant may not, at the time the suit was commenced, have any interest in the subject-matter of the controversy, if he once had and has since parted with such interest, he may be called upon to disclose to whom he has assigned the interest, that the complainant may make the assignee a party defendant.

Spofford v. Manning, 2 Edw. Ch. 358; Elbsworth v. Curtis, 10 Paige 105.

A mere disclaimer is not sufficient if the defendant is charged with being a party to a fraud, or, if the allegations of the bill show that the defendant has so

entangled himself up with the whole transaction that the complainant was obliged to make him a party, for in such a case the complainant is entitled to an answer explaining the defendant's conduct.

Graham v. Cooper, 9 Sim. 93, 102; Glassington v. Thwaits, 2 Russ. 458.

If there is no objection to the bill on the ground that it contains impertinent or scandalous matter, and the defendant desires to interpose a defence, the next step for him to take will depend entirely upon the nature of his defence. For example, A may have filed a bill to enforce a contract made with B, by the terms of which B agreed to sell a certain parcel of land for a given sum to A. B's defence may be that the contract is void, not having been reduced to writing, and the fact that it was not reduced to writing may or may not appear upon the face of the bill, or B's defence may be that the contract is void on account of some fraud or imposition practiced by A whereby he was induced to execute the contract—or in other words, the defence may consist of:

1. Some objection to the case made by the bill which appears upon the face of the bill, showing that the complainant has no cause of action; or,

2. There may be some fact not appearing upon the face of the bill, and not going to the merits of the cause, which will prevent the court from taking cognizance of the cause; or,

3. The defence may go to the merits of the defendant's cause, the defendant claiming that upon all the

facts and circumstances that the plaintiff is not entitled to any relief.

The first two are called dilatory defences, because they merely postpone or at best prevent an investigation into the merits of the matters in controversy. The last is called a defence upon the merits, because it puts in issue the allegations upon which the complainant bases his right to relief, and the trial of the cause upon such an issue will result in a final disposition of the whole matter.

These several defences have each a particular form in which they are to be presented.

If the defence is based upon some matter which appears upon the face of the bill, it is by demurrer.

Insurance Co. v. Field, 2 Story 59.

If the defence rests upon some fact which does not appear upon the face of the bill, the defence is by plea, which brings to the attention of the court the fact relied upon.

Story Eq. Pl. § 437.

If the defence rests upon the actual merits of the defendant's case, the defence is by answer.

Story Eq. Pl. § 437.

DEMURRER.

A demurrer is the proper mode of defence, when the ground of defence is a defect in the frame of the bill or in the case made by it, or the matter contained it it.

Jones v. Earl of Strafford, 3 P. Wms. 79, 80; Mitford's Eq. 206.

The demurrer alleges in substance that if the matters contained in the bill were true they do not sustain the complainant's contention, or that, for some reason apparent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer, and it therefore demands the judgment of the court whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer applies.

Mitford's Eq. 86.

When it is clear, absolute and certain, that taking the charges made in the bill to be true the bill will be dismissed at the hearing, a demurrer will lie, but not if there is uncertainty in that regard.

Atterson v. Mair, 2 Ves. 94; S. C. 4 Bro. C. C. 270; Havenden v. Ld. Annesley, 2 Sch. & Lef. 607; Brooks v. Hewitt, 3 Ves. 253.

But while the demurrer assumes and confesses, for the purposes of the argument, that the allegations in the bill are true, the admission extends only to such matters as are well pleaded, matters of fact, and not matters of law, arguments and inferences, nor false allegations of fact of which the court is bound to take judicial notice. And when there are matters of fact pleaded which are repugnant to some other, that one is admitted, which is of least benefit to the pleader.

Looke v. Rolle, 3 Ves. 4-7; Campbell v. Mackay, My. & Cr. 603, 613; Wales v. Bank of Mich., Har. Ch. 308; Griffing v. Gibb,

2 Black U. S. 519; Roby v. Cossitt, 78 Ill. 638; Croft v. Thompson, 51 N. H. 536; 1 Greenl. Ev. §§ 4, 6.

A demurrer may be to the relief prayed, or to the discovery or to both. But the demurrer must not be both to discovery and relief if the complainant is entitled to either. If the demurrer is to the whole bill and the complainant is entitled to either discovery or relief it will be overruled.

Livingstone v. Story, 9 Peters 633; Wright v. Dame, 1 Met. 237–241; Holmes v. Holmes, 36 Vt. 525, 537; Laight v. Morgan, 1 Johns. Cas. 434.

Demurrer to the relief may be:

I. To the jurisdiction.

II. To the person.

III. To the matter of the bill, either in substance or form.

I. TO THE JURISDICTION.

Demurrers to the jurisdiction are (1) either on the ground that the case made by the bill does not fall within that of any class of causes over which the court assumes jurisdiction.

A discussion of the cases that fall under this head properly belongs to the subject of equity jurisdiction.

Stephenson v. Davis, 56 Me. 73, 74; Cookney v. Anderson, 31 Beav. 452; Cookney v. Anderson, 8 Jur. N. S. Part I 1220; Boston Water Power Co. v. Railroad, 16 Pick. 512.

The demurrer to the jurisdiction may be (2) on the ground that the subject-matter of the suit is within the jurisdiction of some other court.

If it appears from the bill that the complainant has

as effectual and complete a remedy at law as in equity the bill is demurrable.

Lynch v. Williard, 6 Johns. Ch. 342; Bank v. Lee, 11 Conn. 111; Hammond v. Messinger, 9 Sim. 327; Ohling v. Luitjens, 32 Ill. 23; Parry v. Owen, 3 Atk. 740; Kemp v. Prior, 7 Ves. 237.

II. TO THE PERSON.

If it appears on the face of the bill that the complainant cannot maintain the suit on account of some personal disability that objection can be taken by demurrer.