

chandise account, and no relief is asked because of the allegation of coercion of the wife. It might afford her a ground for relief, and she is made a defendant, as are her children; for what purpose it does not appear, unless to enable them to file a cross-bill to recover their alleged dower and homestead rights. But no relief is asked against them; they have not appeared, and no process has brought them here. The case must, therefore, be determined alone as between the plaintiff and the defendant, Fargason.

Mr. Spence, in treating of this and the kindred maxim that "he who asks equity must *do equity*," gives some curious illustrations of its application in ancient times, when the chancellor, as a condition precedent to giving the plaintiff relief, would require him to ask pardon of the defendant, to withdraw slanderous words, to be dutiful to his parent or uncle, and in one case to publicly on his knees ask forgiveness of the defendant; all required because of some depraved conduct by the plaintiff. But even in these cases the wrong redressed was to the defendant and not a third party, and Mr. Spence says they are cited, not as precedents, but curiosities of the law. 1 Spence Eq. Jur. 424, and note.

The cases cited by the learned counsel for the defendant all show that the plaintiff was seeking advantage of or relief from the bad conduct with which he was himself charged. *Creath v. Sims*, 5 How. 192; *Wheeler v. Sage*, 1 Wall. 527; *Bleakeley's Appeal*, 66 Pa. St. 191.

The case of *Wheeler v. Sage*, *supra*, so much relied on in argument, was a case where the plaintiffs had been disappointed in expected profits of a fraudulent transaction by the desertion of their confederate, whose greed induced him to take the whole for himself. Relief was refused, so far as the doctrine now under consideration was applied, because, to have given them relief would have been to sanction the nefarious transaction in the court. No such result will ensue in this case.

Demurrer overruled.

## MEYER, WEIS &amp; Co. v. GATEUS.

(Circuit Court, W. D. Tennessee. ———, 1880.)

**I. PRACTICE—SET-OFF—EFFECT OF DISMISSAL BY THE PLAINTIFF.—**

Where the defendant has filed a plea of set-off, if the plaintiff voluntarily dismisses his suit, as he may under the Tennessee statute, the defendant may elect to proceed on his plea of set-off in the capacity of plaintiff, and the cause will be tried as if he had brought an independent suit on his counter claim.

*George Gillham*, for defendant.

*L. Lehman*, for plaintiffs.

HAMMOND, D. J. At a former day of this term the plaintiffs dismissed their suit, and now the defendant, who had filed a plea of set-off, moves to re-instate the case upon the trial docket for the purpose of trying the issues made upon his plea of set-off. The Tennessee Code, in the chapter regulating the trial and its incidents, provides that "the plaintiff may, at any time before the jury retires, take a nonsuit, or dismiss his action, as to any one or more defendants; but, if the defendant has pleaded a set-off or counter claim, he may elect to proceed on such counter claim in the capacity of a plaintiff." T. & S. Code, 2964. The chapter on pleadings in civil actions, in the article on the plea of set-off, had provided that "if the debt or demand so offered to be set off exceed the amount of the plaintiff's demand, such excess being found by the jury, judgment shall be rendered against the plaintiff in favor of the defendant for such excess, and all costs." T. & S. Code, 2922.

In construing this latter section the supreme court of Tennessee has repeatedly determined that if the plaintiff fails in his action to establish his claim, so that the judgment is that the defendant owes the plaintiff nothing, the defendant can recover nothing on his set-off, because he is allowed a judgment for the *excess* only. And it has been held that the provisions of section 2964, above quoted, have not changed this rule of decision. Whether this be the correct construction of the statute or not, it is too well settled to be now disturbed by