

As a result of the foregoing cases, the following conclusions may be stated: In making a contract with a passenger for his transportation, a railway company may limit its liability, but, as a general rule, not for its negligence. Mere notice that the railway company will not be liable in certain named contingencies will not suffice to create a contract of limitation; there must be a clear, unequivocal assent on the part of the passenger. Such assent may be express or implied, but it will not be implied (1) where the notice is obscurely printed, or printed in a language which the passenger cannot understand; (2) where the nature of the transaction is not such as necessarily to charge the passenger or shipper with knowledge that the paper contains a contract; *e. g.*, the acceptance of a bill of lading would be a transaction carrying notice of a contract printed upon it, but the acceptance of a ticket with conditions printed on it would not be such a transaction; nor (3) would a contract be created where the circumstances attending the delivery of the ticket repel the idea that the acceptor had knowledge of, or in fact assented to, the contract printed thereupon.

Tested by these considerations, the decision of the principal case upon this point appears to be unquestionably sound. ADELBERT HAMILTON.

LAIRD v. CITY OF DE SOTO.¹

(Circuit Court, E. D. Missouri. May 8, 1885.)

1. MUNICIPAL CORPORATIONS—LIABILITY OF SUCCESSOR—INVALID REORGANIZATION.

An invalid reorganization of an incorporated town as a city cannot affect its corporate existence; and where the invalid reorganization is dissolved by a decree in *quo warranto* proceedings, and a valid city organization, composed of the same people and trustees, is created in the place of the town, the new organization becomes liable, as the successor of the town, upon its bonds.

2. SAME.

Where in such a case the city contains a trifle less land within its limits than the town, that fact does not affect its liability.

3. PRACTICE—MOTION FOR REHEARING.

Query, whether a motion for a rehearing of a motion for a new trial should be entertained.

Petition for a Rehearing of a Motion for a New Trial.

For opinion upon motion for a new trial, see 22 FED. REP. 421.

Mills & Flitcraft, for plaintiff.

Joseph A. Williams, for defendant.

MILLER, C. J. This motion for a rehearing of the motion for a new trial is a very unusual proceeding, and I have great doubt whether it ought to be entertained, even if the motion ought originally to have been granted; but looking over the case again, in the light of the pleas and agreed statement of facts, I am still of opinion that the defendant, the city of De Soto, is the lawful successor of the town of De Soto, which issued the bonds on which the judgment was rendered. The fact that the present city contains 400 acres less land in its lim-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

its than the former town, does not change the liability of the people who constitute that town, nor does the change from a town to a city, nor does the decree attempting to abrogate the city organized in 1877, destroy the obligations of the town of 1872. When these people became organized into a city which is now in existence, that city, as the successor of the town of 1872, is liable for the debts of the former.

The motion for a rehearing is overruled.

HOLCOMB v. HOLCOMB.

(Circuit Court, E. D. Michigan. May 25, 1885.)

PRACTICE—RIGHT TO DISCONTINUE ACTION—REFERENCE—SET-OFF—STATUTE OF LIMITATIONS.

Where defendant pleaded a set-off, and the case was referred, and the referee had reported a balance due to the defendant, and the statute of limitations had run against an original suit upon his claim, *held*, that the plaintiff had no right to discontinue the action.

On motion of defendant to set aside an order of discontinuance, and for judgment against the plaintiff on report of referee. Plaintiff's declaration was upon the common counts. Defendant pleaded the general issue and notice of set-off. The case was referred to a referee, and the referee found and reported that the plaintiff was indebted to the defendant in the sum of \$26,531.49. Notice of the filing of this report was given plaintiff as required by law, and no objections were filed, but plaintiff entered an *ex parte* order discontinuing the case.

De Forest Paine, for the motion.

George S. Hosmer, for plaintiff.

BROWN, J. The right of a plaintiff, in an ordinary action at law, to discontinue his suit at any time before verdict, upon the payment of costs, is beyond question, and is expressly recognized in the practice of the circuit courts of this state. Circuit court rule 26. Whether this right exists in cases where the defendant has filed a set-off, and claims an affirmative judgment in his favor, as by statute he is entitled to do, is an open question, and the authorities are in hopeless conflict. The principal cases are collated in *Merchants' Bank v. Schulenberg*, 19 N. W. Rep. 741, in which the justices of the supreme court of this state were equally divided in opinion. Without expressing a decided opinion upon the general subject, it is sufficient for the purposes of this case to hold that where a cause is referred to a referee, and the referee has found a balance due to the defendant, and the statute of limitations has run against an original suit upon his claim, (as it is conceded to have done in this case,) the plaintiff ought not to be permitted to discontinue without the assent of the de-