

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.

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HOLCOMB v. HOLCOMB.

(Circuit Court, E. D. Michigan. May 25, 1935.)

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-

fendant. Having provoked a conflict with defendant, and lulled him into the belief that he was willing to test his claim by way of set-off to his own demand, he should not be allowed, after a virtual defeat, to reap the fruits of a victory. The examination before the referee is a substantial trial of the action. Edw. Ref. c. 1, § 3. His report is equivalent to the verdict of a jury, (chapter 4, §§ 18-28,) and has the same effect by way of estoppel upon the parties. Chapter 27, § 10; Bigelow, Estop. c. 18. Now, the right to discontinue terminates with a verdict, and we think, by analogy, with the filing of the referee's report.

The motion is therefore granted.

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### HIGGINS and another v. McCREA.

(Circuit Court, N. D. Ohio, E. D. 1885.)

#### CHICAGO BOARD OF TRADE—RULE 26, § 6—CROSS-ACTION—CONTRACTS.

The cancellation by a broker of original contracts, without the substitution of others, as provided for by rule 26 of the Chicago board of trade, and without the previous knowledge or consent, or subsequent ratification, of the party for whom he is acting, will not be binding on such party, and he will be entitled to recover the "margin" advanced by him to the broker on the original contracts in a cross-action, in an action by the broker for the amount expended by him on such contracts.

#### At Law.

This case was tried to a jury at the April term, 1885, of above-named court, Hon. JOHN BAXTER, circuit judge, and Hon. MARTIN WELKER, district judge, presiding.

The plaintiffs claimed that they had expended, for and at defendant's request, \$31,644.31, for which they demanded a judgment. The evidence adduced in support of this claim showed that the plaintiffs were commission merchants and brokers, residing and doing business in the city of Chicago, and members of the Chicago board of trade; that the defendant authorized and requested them, in May, 1883, to buy large quantities of pork and lard for his account, to be delivered during the month of August, 1883. Pursuant to said order of defendant, the plaintiffs entered into several contracts in their firm name with other brokers, and members of said board of trade, for, and on defendant's account and risk, for August delivery, 3,000 barrels of pork and 2,000 tierces of lard, and duly notified him thereof. These contracts were made under the rules prescribed by the said board of trade. The evidence tended to show that the defendant was familiar with these rules, and tacitly consented to be bound by them.

The plaintiffs appeared as witnesses on the trial of the case and produced their books and exhibits, and it appeared, by their admis-