

the ground that it "is insufficient in law upon the face thereof"; and the cause has now been heard upon this demurrer. The reply stands as an answer to the cause of action stated in the counterclaim required to be verified, and the question here now is whether it is sufficient as such answer. The loan of money, and the statement of the account of it between the parties, implies personal transactions to the knowledge of the plaintiff. The answer does not deny the knowledge, nor set it forth, nor explain the want of it. It is well laid down in the Encyclopædia of Pleading and Practice, with reference to this kind of procedure, that:

"Although the denial of knowledge or information is an authorized form of denial, it is by no means absolute or universal. The true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him of answering in the qualified form allowed by the Code, and when he must positively admit or deny the allegations, is to inquire whether the facts alleged are presumptively within the defendant's knowledge. If they are, he cannot avail himself of this form of denial." 1 Enc. of Pl. & Prac. 811, and cases cited.

In this view this reply does not seem to be sufficient. This is said in argument to be merely such an objection to the verification of the reply as should have been made by a motion to dismiss, but the reply seems to lack the substance required in an answer to such a cause of action, and to be well met by the demurrer. Demurrer sustained.

BLUM et al. v. WIDDICOMB et al.

(Circuit Court, W. D. Michigan, S. D. November 9, 1898.)

PARTIES—SUIT TO RECOVER PENALTY—CONSTRUCTION OF STATUTE.

2 How. Ann. St. Mich. § 8429, providing that suits for penalties shall be brought in the name of the state, relates only to penalties proper, imposed as punishment for some act deemed to be an offense against the state, and does not apply to an action brought upon a provision of a statute creating a liability in favor of a private individual in excess of actual compensation, which is a remedial action, and may be brought by the individual entitled to the recovery, though the same statute imposes a penalty as a punishment for the same act in its character of an offense against the state.

This was an action brought to charge individually the directors of a corporation for a debt of the latter, grounded upon their failure to make proper annual reports to the secretary of state, as required by the statute of Michigan, which statute imposes a personal liability for such failure. On demurrer to declaration.

Cahill & Ostrander, for plaintiffs.
 Kingsley & Kleinhans, for Bonnell and Hackley.
 Butterfield & Keeney, for Putman and Barnhart.
 Fitzgerald & Barry, for defendant Morton.

SEVERENS, District Judge. I think the demurrer to the plaintiff's declaration in this case must be overruled. The essential ground on which the demurrer rests is the proposition, contended for by counsel for the defendants, that section 12 of Act No. 232

of the Public Acts of Michigan for 1885, which was enacted to provide such a remedy as the plaintiffs are now pursuing, is penal in its character. Upon the assumption of this proposition it is further contended: First, that the action, being for a penalty, should be brought in the name of the state, in accordance with the provisions of section 8429, How. Ann. St.; secondly, it is urged that the law of 1885, in force at the date when the supposed liability was incurred, has been repealed by subsequent statutes,—Act No. 164 of the Public Acts of 1895, and Act No. 250 of the Public Acts of 1887, which are amendments of the law of 1885. Hence it is contended that, the original statute being no longer in force, the right to sue for the penalty imposed by the former law is gone, in accordance with the doctrine applicable in that respect to penal actions. In my opinion, the error is in the fundamental proposition, which ignores the distinction between the various significations in which the word “penal” is employed in legal expression. In its primary sense it has reference to punishment, and, as applied to statutes, refers to such as impose punishment for offenses against the state. In another sense, the word has been employed to characterize statutes which afford a remedy to private parties, where the remedy is given in excess of the common law and exact compensation for the injury to be redressed. Such statutes are sometimes denominated penal, and are sometimes characterized as being in the nature of penal statutes. Sometimes, as in this case, the same statute has the double aspect of not only imposing a liability in favor of a private individual which is in excess of exact compensation, but also imposes a penalty proper, which is intended as a punishment for the act in its character of an offense against the state; but each provision is distinct in its nature, as much so as if in separate statutes. Proper attention to the above-stated distinction solves the questions which are involved. The particular provision of the statute on which the action is founded does not impose a penalty for an offense against the state, but gives a remedy to private persons who are supposed to have suffered injury from the wrongful act complained of. Section 8429, How. Ann. St., above referred to, provides that suits for penalties shall be brought in the name of the state, and relates only to penalties proper,—that is to say, such as are imposed for the purpose of punishing some act deemed to be an offense against the state. Actions brought upon the remedial provisions of a statute are properly brought in the name of the person injured. The recovery in such case is not to the state, nor for its benefit; in fact, the state has no concern with it. These considerations refute also the second ground of demurrer above stated. It is a matter of some doubt whether the original law should be treated as repealed by the amendments. The reasoning of Judge Montgomery in delivering the opinion of the supreme court in *Bank v. Peirson* (Mich.) 70 N. W. 901, makes it quite uncertain, to say the least, whether that court would hold that the latest amendments would effect a repeal of the old law. But it is not necessary, in my judgment, to determine whether the later acts repeal the original act or not, for, if the remedy is a private one, under the distinction above stated, the repeal

of the law after the liability had been incurred would not discharge the defendants from their liability. Without going more into detail, the conclusion is that the demurrer should be overruled. The defendants will have leave to plead, if they shall so elect.

BOARD OF COM'RS OF SEWARD COUNTY, KAN., v. AETNA LIFE
INS. CO.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1898.)

No. 1,054.

1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—REFUNDING BONDS.

Under the constitution and statutes of Kansas, which vest the board of commissioners of a county with the power to settle and allow claims against it, a recital in bonds issued by a county that they were issued by the county board in accordance with the provisions of a statute authorizing counties to refund their indebtedness is a representation that the debt refunded was just and valid; and, as against an innocent purchaser of such bonds in reliance upon this representation, the county is estopped from denying it for the purpose of defeating their collection.

2. SAME—LEGISLATIVE POWERS.

The power to borrow money, to incur indebtedness, to make contracts, and to issue bonds, on behalf of the people of the state, or on behalf of any political subdivision thereof, are all essentially legislative powers, which it is the province of the legislature to exercise itself, or to delegate to municipal or quasi municipal corporations, to be exercised free from every restriction not expressly imposed by the constitution of the state or the inalienable rights of man.

3. SAME—CONSTITUTIONAL PROVISIONS.

The provision of the constitution of Kansas prohibiting the contracting of any debt by the state, with certain exceptions, unless authorized by a direct vote of the electors, has no application to the debts of counties or municipalities.

4. SAME—POWER TO ISSUE REFUNDING BONDS.

The constitution of Kansas imposes no limitation upon the authority of the legislature to authorize the board of commissioners of a county to refund its indebtedness by the issuance of bonds, but, on the contrary, by providing that the legislature "may confer upon tribunals transacting the business of the several counties such power of local legislation and administration as it shall deem expedient," directly empowers it to authorize such action, which is not the creation of a new debt, but only a matter of fiscal administration.

5. SAME—NATURE OF INDEBTEDNESS REFUNDED.

County warrants are prima facie proof of the validity of the debts they evidence, and afford a legal basis for refunding bonds issued under Laws Kan. 1879, c. 50, authorizing counties to refund their "matured or maturing indebtedness of every kind and description whatever."

6. SAME—CONSTRUCTION OF STATUTES—SPECIAL ACT.

Laws Kan. 1879, c. 50, gave authority to all counties and other municipal subdivisions of the state to refund their indebtedness, without limitation of amount. By an amendment of such law March 9, 1891, it was provided that except for the refunding of outstanding bonds or matured coupons, or judgments thereon, no bonds should thereafter be issued under its provisions where the total bonded indebtedness would thereby exceed 5 per cent. of the assessment of the municipality. The bonded indebtedness alone of Seward county at that time exceeded such limit. By Laws 1893, c. 114, the board of commissioners of Seward county was authorized and empowered "to refund any and all outstand-