answered the bill; but whose citizenship is not made to appear in such a manner that the court can take jurisdiction of the case as to him.

Under these circumstances, the court is of opinion that instead of a decree dismissing the bill on the merits, it should have been dismissed without prejudice for want of jurisdiction. The case will be remanded to the court below with leave to plaintiffs to amend their bill generally, and if they shall fail to do this it shall be dismissed without prejudice. Butterworth is entitled to his costs in this court.

DECREE ACCORDINGLY.

MERCER COUNTY *v.* HACKET.

1. Where a county issues its bonds payable to bearer, and solemnly pledges the faith, credit and property of the county, under the authority of an act of Assembly, referred to on the face of the bonds by date, for their payment, and those bonds pass, *bonâ fide*, into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that the act of Assembly, referred to on the face of the bonds, authorized the county to issue the bonds only and subject to certain "restrictions, limitations, and conditions," which have not been formally complied with; nor that the bonds were sold at less than par, when the act authorizing their issue and referred to by date on the face of the instrument, declared that they should, "in no case," nor "under any pretence," be so sold.
2. Corporation bonds payable to bearer, have, in this day, the qualities of negotiable instruments. The corporate seal upon them does not change the case.
3. *Commissioners of Knox County* v. *Aspinwall* (21 Howard, 539), and *Woods* v. *Lawrence County* (1 Black, 386), affirmed. *Diamond* v. *Lawrence County* (37 Pennsylvania State, 358), denied.

By act of Assembly, passed in 1852, the legislature of Pennsylvania authorized the commissioners of Mercer County in that State to subscribe to the stock of the Pittsburg and Erie Railroad, which road, if built, would pass through their county and benefit it. The act, however, contained this proviso:

"*Provided*, that the subscription shall be made *subject to the following restrictions, limitations, and conditions, and in no other manner*

or way whatever, viz.: all such subscriptions shall be made by the county commissioners, and shall be made by them *after*, and *not before*, the amount of such subscription shall have been *designated, advised*, and recommended by a grand jury of said county; and such bonds *shall in no case*, or *under any pretence*, be sold, assigned, or transferred by the said Railroad Company *at less than the par value thereof: And provided, further*, that the acceptance of this act by the said company shall be deemed also an acceptance of the provisions of the act passed the 11th day of March, 1851, entitled An act fixing the gauges of railroads in the County of Erie."

Rightly or wrongly—with authority or without it—the bonds to the extent of several thousands of dollars were issued. The instruments were elegantly engraved, with such external indications as were calculated to arrest the eye, and through it to inspire confidence. They were signed by the commissioners of Mercer County, attested by their clerk, and authenticated by the county seal conspicuously put. At the head of the bonds it was announced that they were issued for stock in the Pittsburg and Erie Company, and were payable in twenty years from their date in the city of New York. The words in the obligatory part of the instrument were as follows:

"Know all men by these presents, that *the County of Mercer*, in the Commonwealth of Pennsylvania, is indebted to the Pittsburg and Erie Railroad Company in the full and just sum of one thousand dollars, which sum of money said *county agrees and promises to pay*, twenty years after the date hereof, to the said Pittsburg and Erie Railroad Company, *or bearer*, with interest, at the rate of six per centum per annum, payable semi-annually on the first Monday of January and July, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, upon the delivery of the coupons severally hereto annexed: *for which payments of principal and interest, well and truly to be made, the faith, credit and property of the said County of Mercer are hereby solemnly pledged, under the authority of an act of Assembly of this Commonwealth*, entitled A supplement to the act incorporating the Pittsburg and Erie Railroad Company, which said act was approved the 21st day of April, A. D. 1846, and which said supplement became a law on the 4th day of May, 1852."

Statement of the case.

A number of the bonds having got, *bonâ fide and for value paid*, into the possession of one Hacket, a citizen of New Hampshire, and the coupons,—themselves also payable to bearer,—being due and unpaid, he sued the County of Mercer upon them, in the Circuit Court for the Western District of Pennsylvania. Having put the bonds and coupons in evidence, the county now offered to prove that no *such* recommendation as was required by the act was made by the grand jury, but that the jury signed a paper, in which they state that they "would *recommend* the commissioners of Mercer County to subscribe to the capital stock of the company to such an amount, and *under such restrictions as may be required by the act of Assembly authorizing them to subscribe* stock to said road, to an amount not exceeding $150,000." The county proposed further to prove, that while by the provisions of the act the railroad company was required to accept "an act fixing the gauges of railroads in Erie County," before it should be entitled to the benefit of said act authorizing counties to subscribe to the capital stock of said company, the company, by a resolution of the stockholders, had *refused* to accept those provisions, and had declared it to be inexpedient to accept subscriptions made by counties. All this being offered for the purpose of showing that the commissioners of Mercer County acted illegally in making the subscription, and in issuing bonds in payment thereof; and that they issued the same without authority of law; so that the bonds are not binding upon the county. The county proposed to prove further, "that the bonds issued were paid out by the railroad company to contractors at about sixty-six and two-thirds cents on the dollar; all this for the purpose of showing that the bonds were procured from the County of Mercer by misrepresentation and fraud, and were not binding upon her, and after being thus obtained were disposed of at less than their par value, *in violation of the provisions of the act authorizing the county to subscribe and issue bonds;* and also for the purpose of showing want and failure of consideration."

The court below refused to let such evidence be given;

and the suit having accordingly gone against the county, the correctness of the ruling was the point now considered here.

Mr. Stewart for the county: If the bonds were not issued in accordance with the requirements of law, which authorized the commissioners to make a subscription and issue bonds in payment therefor, they are void. In *Mercer County* v. *The Railroad Company*,* where the subscription to this same road by this same county came in question, the Supreme Court of Pennsylvania decided that there was such a failure on the part of the grand jury to perform the duty imposed upon it by the act of the legislature, passed the 4th day of May, 1852, as rendered the act of the commissioners, in making the subscription and issuing the bonds, illegal. The court accordingly rescinded the subscription, and ordered the bonds in possession of the railroad company to be surrendered. In that case it is decided, that by a proper and necessary construction of the act all discretionary power was vested in the grand jury and withheld from the commissioners, and that the grand jury not having *designated, advised and recommended the amount to be subscribed*, the commissioners had no authority to make a subscription,—the performance of the duty enjoined upon the grand jury having been a prerequisite to vest authority in the commissioners. The act of Assembly requiring certain things as conditions precedent to the issue of the bonds, and of course to their validity, is specifically referred to by name and date in the face of the instruments. This is the same as if it was set out at length.

If the bonds were issued without legal authority, no subsequent transfer can render them valid. Even a note, strictly negotiable, made by an assumed agent who acts without authority, acquires no increased obligation upon the principal by passing from hand to hand. There was no authority proceeding from the principal to put it upon its

* 27 Pennsylvania State, 389.

course, and be it long or short, it imparts to it no increased virtue. The inquiry always addresses itself to every one, Is it the contract of the party whose name it bears? The responsibility of a correct reply to this inquiry is imposed upon every one who gives it currency.

Bonds were never recognized by the *lex mercatoria* as commercial paper. The distinction between specialties and simple promises is defined by the common law. The remedies for their enforcement have always been different, and these lines of distinction have never been obliterated by any general system of jurisprudence, in this or any other country, with which we have any juridical comity, either as to their nature or the means of enforcing them. The same equities which exist between the original parties remain and follow specialties into whatever hands they may go, without regard to supervening equities. In no State has this ancient and salutary rule of law become so fixed as in Pennsylvania. *Diamond* v. *Lawrence County** is a strong case, and almost in point. The bonds apparently were in the hands of *bonâ fide* holders for value. But the court adverts to the shocking frauds which had prevailed in obtaining the issue, and declared that the county was not bound for more than the railroad had received. The law of the place where the contract is made, and the obligation *there* assumed, govern its construction. Every one making a contract is presumed to make it with reference to its legal effect, whether direct or incidental, in the State where it is made; and if this court were to act on any other principle, our system, political and judicial alike, would be deranged.

Mr. Loomis for the bondholder: All the elegance of the engraver's art, all the plighted "faith, credit and property," of modern finance, all the strength and assurances of language, have here been used to allure the purchaser. Reference is made on the face of the bond to an act of Assembly—not to put him on his guard, lest the preliminary requisition may not

* 37 Pennsylvania State, 358.

have been complied with—but to *attract* him by evidence that the instrument is issued under the highest sanction. It had that effect, and the paper passed readily into the hands of a confiding holder in the distant State of New Hampshire, as a safe and secure investment. How *can* the county now, with the proceeds of the bond in its treasury—with riches which the railway will bring to its people in enjoyment—set up the defence it does, and proclaim to the nations, "Base is the slave who pays?"

The recommendation of the grand jury was sufficient to warrant the subscription. If it were not, the county is concluded by *Commissioners of Knox County* v. *Aspinwall*, decided in this court,* from denying the sufficiency. The act, no doubt, required the amount to be designated by the grand jury. But the jury signed a paper in which they stated that they "would recommend" the commissioners to subscribe "to such an amount and under such restrictions as may be required by the act of Assembly authorizing them to subscribe stock to said road to an amount not exceeding $150,000." This is a substantial compliance. Even if there were an irregularity in not designating the precise amount to be subscribed, no decided case renders the subscription void. This question was before the Supreme Court of Pennsylvania, in *Mercer County* v. *The Railroad Company*, and was left undecided; Woodward, J., concurring in the opinion given by Lewis, J., that a subscription made, without any designation by the grand jury, was without competent authority and therefore void, Lowrie, J., not concurring, Knox, J., dissenting, and Black, C. J., absent. This case is not an authority for anything. The controversy was between the county and the railroad company only. The court directed the bonds ($84,900), remaining in the possession of the company, to be surrendered to the county. The remaining $65,100 having been paid to Johnson & Co., on account of work under their contract, the court refused to take action in relation to *these* bonds, a portion of which was purchased and are now held by the plain-

* 21 Howard, 545.

tiff. It declares that it leaves undisturbed the question how far innocent holders of the bonds already negotiated might be protected. In the *County of Lawrence* v. *The Northwestern Railroad Company*,* a subscription made by the county to the stock of the Northwestern Railroad Company, was annulled and set aside, "*without prejudice, however, to any rights which third persons may have lawfully acquired as purchasers of the bonds issued on payment of the said stock.*" And this ground is tenable. It is that which the Federal court for the second circuit (Grier, J.) has always taken. It has said (i), that it could not understand on what ground the constitutionality of acts authorizing these subscriptions could be maintained. But that the State court had maintained it, and that this was enough; (ii), that though the courts might, from a variety of causes, *restrain* an issue not yet made, still when the bonds were once issued and in the hands of innocent holders for value, that the county was bound to pay them. The distinction is one entirely obvious.

The bonds in this case import upon their face a compliance with the law. According to *Commissioners of Knox County* v. *Aspinwall*, the purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of the power. The security was sold in a distant market. To require the purchaser to ascertain, at his peril, from an examination of the records of the county, whether facts authenticated by its proper officers and the seal of the county were true or not, would involve him in unreasonable trouble and expense, greatly impair the value and diminish the currency of such securities.

The act of Assembly did not require the company to accept the provisions of the gauge law at all. It simply declared in a proviso, "that the acceptance of this act (May 4th, 1852) by the said company shall be deemed also an acceptance of the provisions of the act fixing the gauge of railroads in the County of Erie." The acceptance was not made a condition precedent to the right to receive the benefit of the act autho-

* 32 Pennsylvania State, 152.

rizing counties to subscribe, but the acceptance of the act of 1852 involved an acceptance of the gauge law. The act of 1852 was accepted by the company's receiving the subscription of the county and the bonds issued in payment reciting a full compliance with the requirements of the law. This would have involved an acceptance of the provisions of the gauge law, had that law continued in force. It was, however, repealed before the construction of the railroad was commenced. A particular fact here requires to be stated: The report of *Mercer County* v. *The Railroad Company*, shows that I was of counsel for the company. On the trial of a subsequent cause against the company, I asserted that the case was decided upon a mistake of fact; the gauge law having been accepted by the company, evidence of which was before the court at the time the decision was made, and I read from the paper book before the court at the time of the decision, and furnished by the counsel of Mercer County, a resolution adopted at said meeting of stockholders, of the 24th of December, 1851, which proved what I asserted.* When that resolution was read, one of the judges, Mr. Justice James Thompson, who resided at Erie, where the meeting of stockholders was held, and who had a profoundly intimate knowledge both of the facts and the law of these cases, remarked, that there was no doubt about the acceptance of the gauge law. The remaining judges acquiesced in silence. And thus the only support upon which the decision in that case rested was withdrawn. That case, having been so decided, is not an authority for anything.

It is true that in *Diamond* v. *Lawrence County* the Supreme Court of Pennsylvania declared, "We have said, on several occasions, that we will not treat these bonds as negotiable securities." The court admits, however, that "*on this ground we stand alone. All the courts, English and American, are against us.*" No reader of modern law will question the truth of the

* The resolution was thus:

"*Resolved*, That the stockholders of the Pittsburg and Erie Railroad Company here convened, do hereby accept, and do hereby agree to be bound by the provisions of the act aforesaid, being an act fixing the gauge of railroads in the County of Erie, approved the 11th day of March, 1851."

sentences italicized.* But that case was exceptional. The community, in a state of intoxication about railroad subscriptions, had become wild. The voices of men of sense were not heard in an hour where madness ruled. The court determined to withstand this folly; the *ardor civium prava jubentium*. In taking a position, the judge, it is true, gives a "flash of his cimeter" sufficiently alarming. But he did not mean to place his court in opposition to *all* the tribunals which the world most respects; nor, construing his announcement in a reasonable way, does he do so. At the moment when the transfer of the bond in suit was made there was a bill in equity pending, to restrain the transfer of all bonds of that sort; and his chief reliance was on this fact.† *Bona fides* was scarce predicable in law of the transaction involved. And the language of the judge himself, in one part of his opinion, shows how little the dictum relied on by the other side entered into the grounds of the decree. It was but an answer to the argument, too much pressed at the bar, of what *some* courts in *other* States had done, and it meant no more than that the Supreme Court of Pennsylvania would not decree plain injustice upon the example of any or of all the courts of Christendom. After all, however, the court did not declare the bonds void. It allowed a recovery for what the railway company had actually received. The disrespect wrongly supposed to have been here expressed for precedent, and the apparent disregard of vested interests, de-

* See 1 American Leading Cases, note to Overton *v.* Tyler; 1 Smith's Leading Cases, note to Miller *v.* Race.

† "It is manifest from this statement," says Woodward, J., in giving that part of the opinion which is at p. 355, "that the bond now in suit was transferred by the company *in contempt of the authority of this court*. After the service of the subpœna in the equity suit, the company had no authority, under any pretence whatever, to part with a bond. . . . . Considering the extraordinary notoriety which attended the equity suit against the railroad company, we think the rule is applicable here without that limitation. And according to that rule, the suit was notice to all the world, of all the facts alleged in the pleadings; so that this plaintiff stands in no better situation for enforcing the bond against the county than the company themselves would stand." Diamond *v.* Lawrence County, 37 Pennsylvania State, 353.

stroyed with the profession everywhere the value of a case which, if the assumption of the court that *bona fides* did not exist was true, was itself rightly decided. The case was not well received in Pennsylvania when it was reported, and the clearer sense of the court is expressed in subsequent decisions, which, if *Diamond* v. *Lawrence County* decided what some have supposed, certainly overrule it. In the case of *The Commonwealth* v. *The City of Pittsburg*,* it was declared that "the holder of bonds, made payable to bearer, has a right to presume that they were issued and transferred in the mode agreed upon by the original parties; that he is not affected by any agreement between the obligor and obligee, that the latter should provide for the payment of the interest thereon." This case goes almost the length of that of *Commissioners of Knox County* v. *Aspinwall*, as to the presumptions that arise in favor of the holder of this species of paper.

Why shall such instruments not be regarded as having the qualities of negotiable paper? When issued by corporations, as they always are, they are necessarily under seal; but they do not from that fact alone become specialties. A corporation, if speaking or acting in form, can speak or act only by the medium of a seal. It is the way in which as an artificial person it acts, or expresses itself; as natural ones express themselves by handwriting simply.

Mr. Justice GRIER delivered the opinion of the court:

The bonds declare on their face that the faith, credit, and property of the county is solemnly pledged, under the authority of certain acts of Assembly, and that in *pursuance* of said act the bonds were signed by the commissioners of the county. They are on their face complete and perfect; exhibiting no defect in form or substance; and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds

* 34 Pennsylvania State, 496; and see Commonwealth *v.* Commissioners of Alleghany County, 37 Id., 237; Same *v.* Same, 32 Id., 218.

were not made "in pursuance of the acts of Assembly" authorizing them.

We have decided in the case of *Commissioners of Knox County* v. *Aspinwall*,* that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question.

The case of *Mercer County* v. *The Railroad*† has been cited as governing this case. But on examination it will be found not to contradict the doctrine we have just stated. That was a bill in equity, praying an injunction against the issuing of a portion of the bonds *not yet delivered over to the company*, or negotiated by them. It charged that the commissioners had not pursued the conditions, limitations, and restrictions of the act that authorized their issue; that, by the act, "all such subscriptions shall be made *after and not before* the amount of such subscriptions shall have been *designated, advised, and recommended by a grand jury*," whereas the grand jury only "*recommended* that the commissioners of Mercer County subscribe to the capital stock of the Pittsburg and Erie Railroad, to such amount and under such restrictions as may be required by the act of Assembly, by authorizing them to subscribe, *to an amount* not exceeding $150,000." The bill charged also most gross frauds perpetrated by the company, which fully justified the decree of the court, without resorting to the very ingenious and rather astute criticism of the phraseology of the grand jury. It is true they *recommend* only, and have not used the words "designate and advise" a subscription not to exceed $150,000. It would require no great latitude of construction to treat this, as the commissioners might justly do, as a

* 21 Howard, 545.

† 27 Pennsylvania State, 389.

substantial compliance with the act. But it would be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power, after they have sold the bonds, and they have passed (as is admitted in this case) into the hands of *bonâ fide* purchasers for value. It is proper to state that the construction given has the assent of only two of the judges of that learned court, so that it has not the force of precedent even if it applied to this case. But it is due also to them to say, that they intimate no opinion as to how far the reasons given for enjoining the further issue of the bonds ought to affect their validity in the hands of "innocent holders."

The proviso to the act authorizing the subscription declares, "that the acceptance of this act shall be deemed also an acceptance of the provisions of the act passed the eleventh day of May, 1851, entitled 'An act fixing the gauges of railroads in the County of Erie.'" Now it is very plain that the acceptance of the bonds authorized by this act, operated *per se* as an acceptance of the gauge law. It needed no resolution of the railroad corporation on their minutes. They were estopped by law after receipt of the bonds, until they were afterwards released by statute from the condition. But if that were not sufficient, it may be stated as a matter of history, that on the 24th of December, 1851, the stockholders passed a resolution "accepting and agreeing to be bound by the provisions of the act aforesaid, being an act fixing the gauge of railroads in Erie County." This fact, though overlooked in the case last mentioned, was afterwards brought to the notice of the same court, on the trial of a subsequent cause between the same parties. As any subsequent resolution of the railroad company refusing compliance with this condition annexed by statute to their acceptance of the county subscriptions would be fraudulent and void, the court did not err in refusing to admit the evidence offered, or to permit the defendants to prove that the recitals of their bonds were untrue.

2. Can evidence of the fraud practised by the railroad

company to whom these bonds were delivered, and by whom they were paid to *bonâ fide* holders for value, or the fact that they were negotiated at less than their par value, be received to defeat the recovery of the plaintiff below?

This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer.

That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court,* but of nearly every State in the Union, is well known and admitted.

But we have been referred to the case of *Diamond* v. *Lawrence County*,† for a single decision to the contrary. The learned judge who delivered the opinion of the court in that case says, "We will not treat these bonds as negotiable securities. *On this ground we stand alone. All the courts, Ameri-*

* White *v.* Vermont Railroad Co., 21 Howard, 575.

† 37 Pennsylvania State, 353.

can and English, are against us. We know the history of these municipal and county bonds, how the legislature, yielding to popular excitement about railroads, authorized their issue; how grand jurors and county commissioners and city officers were moulded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public, and what burdens of debt and taxation have resulted to the people,—a moneyed security was thrown upon the market by the paroxysm of the public mind," &c.

If this decision of that learned court was founded on the construction of the constitution or statute law of the State, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it. But we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment, especially if it be fortified by the decision of "all other English and American courts." These securities are not peculiar to Pennsylvania, or governed by its statutes or peculiar law.

Although we doubt not the facts stated as to the atrocious frauds which have been practised, in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad "speculators," are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of *bonâ fide* holders.

In the case of *Woods* v. *Lawrence County*,* as a corollary from the principles stated, we have decided, that in a suit brought on the coupons of these bonds by a *bonâ fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount, contrary to the provisions of their charter, which forbids the sale of them at less than their par value.

* 1 Black, 386.

Statement of the case.

As the evidence offered, and overruled by the court, could not have established a defence to the case made by the plaintiff below, the court did not err in refusing to receive it.

JUDGMENT AFFIRMED WITH COSTS.

BAYNE *v.* MORRIS.

1. Where an award made under submission by parties plaintiff and defendant to that effect, awards that one party shall pay to the other a certain sum on one day specified, another sum on another day specified, and that to secure the payments he shall give a bond in a penal sum, and the party against whom the award is made refuses to do any of the things awarded, an action of debt will lie against him even although the time when both sums of money were awarded to be paid has not yet arrived. The right of action is perfect on the party's refusal to give the bond.
2. The power of arbitrators is exhausted when they have once finally determined matters before them. Any second award is void.

BAYNE & MORRIS having differences with each other, agreed to refer them to arbitrators, who besides being authorized to determine the *amount to be paid*, were authorized to award *upon what terms, as to time and security*, the payment should be made. On the 23d of January, 1858, the arbitrators made an award, and on the 26th of the same month made *a second one*. Both were received in evidence on the trial below, although the pleadings were framed solely with reference to the last one. This adjudged that Morris should pay to Bayne one sum on the 28th of July, 1858; a second sum on the 20th of January, 1859; and a third sum on the 20th of January, 1860; and that to secure the payment of these sums he should give to Bayne a *bond* with penalty and surety. No bond being given, Bayne, on the 28th of January, 1858, *that is to say, before any of the sums awarded to be paid had fallen due*, sued Morris in an action of debt; the declaration setting forth, that "the defendant hath not given the said plaintiff the said bond for the security of the payments aforesaid, although often thereto requested; nor hath he paid the said money nor any part thereof, but the same to pay hath refused; whereby an action hath accrued to the said plaintiff to have