to the agreement, made his award, finding a balance in favor of defendants

5 Payment before action

6 That before action the debt, if any, was attached by four several orders, issued by judgment creditors of the plaintiff, and served on defendants before this action, in one of which actions leave was given to judgment creditor to proceed against defendants by writ

7 That the cause of action, if any, arose for and concerning a debt incurred and falling due during 1860, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed

Mr. Paterson, as to the last plea, cited *Scott* v. *The Corporation of Peterborough*, 19 U. C. Q. B. 469.

D. McMichael shewed cause

ROBINSON, C. J.—I allow the defendants leave to plead all the pleas with the exception of the last, and give leave to plaintiff to reply and demur to such of the pleas as he may see fit. I cannot allow the last plea in connection with the other pleas. I do not think that a plea of that kind should be allowed with pleas going to the merits. Where a contract is made by a municipal corporation with a person for the doing of any work for which a provision to raise money has been made by by-law, and the contractor in performance of the work under the contract does extra work, for which an action would lie on the common counts, but no action is brought till the year following that in which the work was done, the plea that no provision was made for extra work, though it might according to the facts be a good plea on the authority of *Scott* v. *The Corporation of Peterborough*, ought not, I think, to be allowed with other pleas going to the merits of the cause. I therefore decline to allow it with the other pleas mentioned in the abstract.

CARLISLE v. HOSHEL.

Plea in Abatement—Time—Setting aside.

Defendant executed in favour of Plaintiff a bond in the penal sum of £700, conditioned to pay £350 with interest, by instalments Plaintiff sued on this bond, and obtained a verdict for the penalty, 1s damages for detention, and £21 damages assessed on breaches assigned Afterverdict, defendant paid the damages and costs. Instead of entering judgment for the penalty as a security for future breaches, plaintiff commenced a second action to recover another instalment, and interest Defendant without intimating that he intended to plead in abatement, as a favour asked plaintiff for further time to plead, which was granted. Sixteen days after declaration defendant pleaded the pendency of the former action, and prayed judgment whether plaintiff ought a second time to implead him for the same cause of action, attaching to this plea an affidavit of its truth Plea set aside with costs, and plaintiff allowed to sign judgment by default, unless defendant should pay costs and plead within four days.

(March 22nd, 1861.)

Plaintiff in this cause obtained a summons to set aside a plea in abatement with costs, and that plaintiff should be at liberty to sign judgment as for want of a plea, because the plea was pleaded after four days had expired from declaration and notice to plead served, and also pleaded contrary to good faith and intended only to embarrass and delay.

The action was on a bond in the penalty of £700, conditioned to pay £350, with interest, by instalments.

Plaintiff sued on this bond, and in November, 1860, obtained a verdict at the last Niagara Assizes, for the penalty, and 1s. damages for detaining, and £21, the damages on the breach that had then accrued.

After verdict, defendant paid damages and costs.

Judgment was not entered, in order to stand for further breaches to be suggested, if any should occur. Instead of that, plaintiff brought this new action on the bond to recover an instalment and interest.

Defendant asked for leave to plead (not intimating that he intended to plead in abatement) which plaintiff gave him (several days) and then sixteen days after declaration served, defendant found out what the fact was as to the former action, that there was no judgment entered, but a verdict apparently not set aside, and he pleaded the facts truly, avering the identity of the £700 (the penalty sued for) as the cause of action in both suits, and concluded by praying judgment whether plaintiff ought a second time to implead him for the same cause of action, and he attached to this plea an affidavit of its truth. He did not in his plea pray judgment of the writ and declaration, nor conclude with prayer that the writ and declaration be quashed

James Paterson for plaintiff

D. McMichael for defendant

ROBINSON, C. J.—It would seem as if defendant's attorney had not decided in his own mind whether he was pleading in abatement or in bar, but he had no right at that late time to plead in abatement the pendency of another action If we look on this as a plea in abatement, though it neither commences nor concludes as such, nor expressly avers that the first suit is pending, then it must be set aside as being pleaded too late, and the Court would not now support it, by any *ex post facto* indulgence in extending the time, because after obtaining time to plead as an accommodation, the defendant should not have pleaded in abatement If he had asked the court for time, he would have been placed under the condition of pleading issuably

We can not look on this as a plea in bar, for it is clearly no bar, (*Harley v. Greenwood*, 5 B. & Al., 101.) the first suit having gone no further than verdict, by which the debt of £700 on this bond is clearly not extinguished.

The plea must be set aside with costs. Let judgment by default be entered, unless defendant shall pay costs, and plead within four days.

Summons absolute.

ELECTION CASES.

(*Reported by* ROBERT A HARRISON, Esq., *Barrister-at-Law.*)

(Before the Honorable WILLIAM HENRY DRAPER, C. B., Chief Justice of the Common Pleas.)

REGINA EX REL TILT v. CHEYNE.

Municipal Elections—Qualification of Candidates—Equitable estate

Where defendant in November, 1858, conveyed the real estate, which formed his qualification, to his father for a consideration of £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes, though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment "an equitable estate" within the meaning of sec. 70 of the Municipal Institutions Act.

(March 9, 1861.)

In November, 1858, the defendant conveyed the real estate which formed his qualification to his father for a consideration of £300, for which he took his father's notes payable at distant dates.

The defendant called as a witness, explained the motives for this transaction, and asserted *bona fides*.

In February, 1860, he purchased the property back, and returned to his father all the notes, not one or any part of which had been paid. The first of them fell due a year from its date, and soon after it was due this resale took place.

At the time of the resale, and some time before, one Silverthorne, a brother-in-law of defendant, occupied part of the house, and Defendant had a bedroom in it furnished by himself which he occupied, boarding with Silverthorne, and this continued after the resale. Subsequently the defendant leased a room in the house to an Orange Lodge.

He received a conveyance from his father on 3rd October, 1860, and in January following was elected a Councillor for Ward number two of the Township of Toronto.

His election was moved against by relator on the alleged ground of want of qualification.

Robert A. Harrison, for relator.

D. McMichael, for defendant.

DRAPER, C. J.—I assume the *bona fides* of the dealing between father and son, and I see nothing to warrant the conclusion that the resale and conveyance was a mere scheme to give the defendant an apparent qualification to be elected. There is no reason to suppose that defendant entertained the idea of being a candidate at any time before 3rd October, 1860.

Then considering that defendant was a vendor with no part of his purchase money paid, holding only notes for it, the moment the agreement for resale was made, and these notes were actually