ONTARIO REPORTS.

ELECTION CASE.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law.)*

REG. EX REL. FLATER v. VANVELSOR.

Municipal election—Qualification of candidate—Effect of incumbrances.

Held, that the fact of the property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification. [Chambers, March 16, 1870.—*Mr. Dalton.*]

It was alleged in the statement of the relator, that Daniel J. VanVelsor had not been duly elected, and had unjustly usurped the office of deputy Reeve in the said Township of Harwich in the County of Kent, under the pretence of an election held on Monday, the 3rd of January, 1870, and it was declared that he, the said relator, had an interest in the said election as a voter, and the following cause was alleged why the election of the said VanVelsor to the said office should be declared invalid and void, namely: That the said VanVelsor was not duly or legally elected or returned, in that he was not qualified, not having sufficient property qualification, he being assessed and rated as a freeholder on the last revised Assessment Roll of the Township, for certain lots, which were assessed and valued in the whole on the said Roll, at the sum of $470; and all the said lots were, at and before the said election, encumbered by a mortgage made by the said VanVelsor, to secure payment of $1125, and which was still unsatisfied and undischarged, and, also by a writ of *fieri facias* against the lands and tenements of the said VanVelsor and others, and which, at the time of the said election, remained for execution in the hands of the Sheriff of the County of Kent, having been delivered to him on 1st April, 1869, and these incumbrances were much more than the value of the said property.

A number of affidavits were filed on both sides, on which there was much discusssion, but the main facts necessary for the consideration of the case, and on which it turned, as found by Mr. Dalton, were as follows: That the defendant was assessed as above, at $470: that the mortgage spoken of was entirely paid before the election: that the above judgment was paid or assigned to the defendant since the election: that, at any rate, since November last, the defendant had in his possesslon goods liable to the execution to an amount greater than the amount of the judgment; but both the writ against goods and lands still remained in the sheriff's hands.

John Patterson, for the defendant, shewed cause. The defendant having paid the mortgage, that objection falls. The defendant has goods sufficient to cover the execution, and as the writ against goods must be satisfied first, the writ against lands is really no incumbrance.

O'Brien for the relator. The defendant has up to the present time pretended that these incumbrances were *bona fide* charges on his property, and it is only when it suits his purpose, that they are pretended to be paid or assigned; but the *fi. fa.* lands is in fact an incumbrance, even if there are goods to satisfy the claim, it binds his interest in the lands, though no sale can take place until the goods are exhausted. [Mr. Dalton—Can the fact of an incumbrance on the property, whereon it is sought to qualify, be taken into consderation here?] The statute is silent on the point, but it contemplates the necessity of the candidate having a property qualification: see 29–30 Vic. cap. 51 sec. 70; and in *Blakely* v. *Canavan*, 1 U. C. L. J. N. S., 188; it seems to be taken for granted that the incumbrances are to be deducted from the value as rated. There is, however, no express decision on this point.

MR. DALTON.—Substantially the defendant was qualified. Is he technically so under the statute?

At the time of the election the judgment and the writ against lands remained a charge. To satisfy that judgment the defendant had goods, sufficient in amount, and a writ upon the judgment against goods was in the hands of the sheriff.

The enactment as to qualification is sec. 70 29–30 Vic. cap. 51: "The persons qualified to be elected Mayors, Aldermen, Reeves, Deputy Reeves, and Councillors, or Police Trustees, are such residents of the municipality within which, or within two miles of which, the municipality or police village is situate, as are not disqualified under this Act, and have, at the time of the election, on their own right, or in the right of their wives, or proprietors, or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality, or police village, to at least the value following—(Then follow the amounts in different cases, and in this case to $400 freehold, or leasehold to $800.) "And the qualification of all persons where a qualification is required under this Act, may be of an estate either legal or equitable."

Now if the defendant's assessed qualifications of $470 is to be affected by the charge of the *fi. fa.* lands, that is, if the amount of the judgment is to be deducted from the assessed value in computing the amount, it would perhaps be difficult to decide that the possession of goods by the defendant could avoid that result. For though the goods must first be exhausted before the lands can be sold to satisfy the judgment, or even though the defendant had money in the bank for that purpose, still, if liens and encumbrances are to be taken into account, the *fi. fa.* lands, so long as the judgment is unsatisfied remain a lien—and it would perhaps require some express provisions to enable me to set first against that lien other countervailing assets, and thus to free the land.

But can charges of this nature be taken into account at all? I have looked for cases upon this point but find none—I find the point taken in argument, and in one case noticed in the judgment, but never that I can see decided.

The words of the statute are, "have at the time of the election in their own right, or in the right of their wives, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality &c." If the clause means such a thing, no word is said as to the *value beyond incumbrances*, or any thing at all of value, except the value as "rated" by the assessor. The facts necessary in strict grammatical construction are, that they