

erty on the River St. Lawrence, and by which the lessees "specially bind, pledge, mortgage and hypothecate" the beach so leased to them for securing the payment of the rent—constitutes an emphyteusis.

4. If an immovable charged with an unexpired term of 15 years of the lease above mentioned, be sold by the Sheriff without mention of such charge in the minutes of seizure, and if such charge diminishes the value of the property so much that it is to be presumed that the purchaser would not have bought had he been aware of it—the purchaser who is prevented by notification and protest on the part of the lessee from obtaining possession of the immovable during such unexpired term, may obtain the vacation of the Sheriff's sale under art. 714 C. C. P.

On the 3rd November, 1846, the defendant, Claude Lemieux leased a portion of the Windsor Cove property at Point Levis on the River St. Lawrence to James Tibbits and James McKenzie by a lease in the terms above mentioned for the space of 50 years. These *preneurs* subsequently became insolvent, and the unexpired term of the lease passed into different hands, the last purchaser being A.F.A. Knight, who bought the lessees' rights on May 20th, 1872. On November 4th, 1880, a writ of execution was issued out of the Superior Court at Montreal against the lands of the defendant, at the instance of the plaintiffs, under which the property above mentioned was seized and advertised to be sold by the Sheriff of Quebec, on the 22nd January, 1881, on which date it was put up for sale and adjudged to David Rattray the petitioner, for \$3,800. Shortly after this adjudication, Knight, who still occupied the property as lessee, served a protest and notification on Rattray, intimating that he (Knight) would retain possession of the property until the 3rd November, 1896, when the above lease would expire. Thereupon Rattray presented a petition to vacate the Sheriff's sale under Arts. 710 and 714, C. C. P., alleging that he would not have bought had he been aware of this lease, which diminished the value of the property by about \$2000.

The plaintiffs contested this petition on various grounds, but their principal contention was that the lease of 1846 did not constitute an emphyteusis, and was consequently purged by

the *décret*. They urged that the lease in question did not contain any stipulation that the *preneur* should improve the land, without which it could not be held to be an emphyteutic lease; and moreover that the lease did not show any of the distinguishing characteristics of an emphyteusis.

J. A. Bonin, for plaintiffs contesting, cited the following authorities;—C. C. L. C. 567, and Report of Commissioners on do. (3d Report, p. 408); Proudhon, Usufruit, No. 97, pp. 102 et seq.; Nouv. Denizart, Vol. 7, Vo. Emphytéose, p. 538, ss. 1 & 2; Proudhon, Domaine de Propriété, Vol. 2, Nos. 709 & 710; Guyot, Rep. Vol. 6, Vo. Emph. pp. 680 et seq.; Domat, Civ. 1, Tit. 4, sec. 10, Nos. 1 & 9; Argou, Vol. 2, pp. 246 & 249; Nouv. Denizart, Vol. 13, Vo. Emph. p. 280; Lebire & Carteret, Vo. Bail Emph. 2, pp. 453 et seq. § 11 & 15; and p. 456, § 27; Ferrière, Dict. Vol. 1, Vo. Emph. p. 570; Dunod, Prescription, p. 339; Duvergier, Louage, Vol. 3, No. 144, & note 1, p. 136; Laurent, VIII, No. 346; Troplong, Louage, p. 31; Dumoulin sur Paris, § 73, No. 22; Dalloz, 1853-1-145, 1857-1-326, 1861-1-444.

E. Lafleur, for petitioner, argued that as the lease was passed before the code came in force, art. 567 C. C. L. C. did not apply, and that before the code the stipulation of improving the property was not essential to the contract. The essential character of emphyteusis was the transfer of ownership, which was in the present lease implied by the hypothecation of the *fonds* in favour of the lessor. The following authorities were cited for petitioner:—Ancien Denizart, Vo. Emphytéose; Guyot, Répertoire, Vo. Emphytéose *sub. init.*; *id.*, *ibid.* p. 682, col. 1; Serres, Inst. du Droit Français, Liv. III, Tit. 25, § 3, p. 502; Ferrière, Dict. de Droit, Vo. Emphytéose, III; Vinnius, *Ad Inst.*, Lib. III, Tit. 25, 3; Boutaric, Traité des Droits Seigneuriaux, Ch. XIII, p. 424; *Id.*, *Ad Inst.*, Lib. III, Tit. 25, § 3, p. 486; Loyseau, Déguepissement, Liv. IV, Ch. 5, No. 6; Henrys (Ed. Bretonnier) T. I, p. 722, col. 2; Le Grand, Coutume du Baillage de Troyes, Tit. IV, art. 67, glose 1, No. 1 (p. 200, col. 1); Bcsquet, Dict. Raisonné des Domaines, Vo. Baux Emph., Vol. I, p. 290, col. 2; Nouv. Denizart, Vo. Emph. No. 3; Domat, Liv. I, Tit. 4, Sec. 10, Nos. 1, 2, 3 &c.; Duvergier, Vol. III, pp. 140-1; Rolland de Villargues, Dict. du Dr. Civil, Vol. IV, p. 227, Vo. Emph.;