1934 *Present :* **Macdonell C.J. and Drieberg J.**

PUNCHI APPUHAMY *v.* DHARMARATNE

283—D. C. Kurunegala, 14,736

Seizure—Return of writ—Death of judgment-debtor—Sale in execution—Validity of seizure—Mortgage action—Death of mortgagee—Sale of mortgaged property—Rights of purchaser—Equitable relief—Ordinance No. 21 of 1927, s. 11.

Where, on a writ issued in execution of a decree for money, the Fiscal seized property and returned the writ to Court as the charges for advertising the sale had not been paid, and where the Court reissued the writ on fresh stamps,—

Held, that the seizure already made remained effective and was not deprived of its validity by the return of the writ.

The purchaser of property sold in execution of a decree in a mortgage action to which the legal representative of a deceased mortgagor had not been made a party is entitled to equitable relief under section 11 of the Mortgage Ordinance, No. 21 of 1927, in an action brought by the heirs of the mortgagor to vindicate title to the land.

THE plaintiff instituted this action for a declaration of title to two allotments of land as the sole heir of his mother, Kiri Menika.

The defendants claimed a half share on Fiscal's transfer of February 16, 1927, granted as purchasers in execution of a money decree in D. C. Kurunegala, No. 9,849, entered by consent against Kiri Menika, Pinhamy (her husband), and Ranhamy. On February 20, 1924, application for writ was made and writ issued on February 21, 1924. The Fiscal seized a half share of the two lands on March 21, 1924, and returned the writ to Court as the advertising charges for the publication of the sale had not been paid. Meanwhile, Kiri Menika died on May 26, 1924. Thereafter the writ was reissued and a half share of the lands was sold to the defendants on August 11, 1926. It was contended that as Kiri Menika died before the writ was fully executed, his legal representative should have been made a respondent to the proceedings. The other half share was bought by the defendants on a conveyance of April 2, 1926, by the Commissioner appointed to carry out an order to sell issued in execution of a mortgage decree entered in D. C. Colombo, 12,833, against Kiri Menika, her husband Pinhamy, and Ranhamy. On the returnable day of summons to the plaint filed in the action, it was reported that Kiri Menika was dead. The other two defendants consented to judgment. Decree was entered in the action but no person was appointed to represent the estate of Kiri Menika before the property was sold to the defendants.

The learned District Judge gave judgment for the plaintiff.

Croos da Brera for defendants, appellant.—As regards half share of the land in dispute it was seized during the lifetime of the judgment-debtor, Kiri Menika. The property was therefore *in custodia legis.* No fresh seizure was necessary. The original seizure was never withdrawn (*Wijewardene v. Schubert*[1]; *Peria Carpen Chetty v. Sekappa Chetty*[2];

[1] *(1906) 10 N. L. R. 90.*

[2] *(1910) 2 Curr. L. R. 162.*

Andris Appu v. Kolande Asari[1]. It is not necessary to substitute the legal representative of the deceased debtor (*Goonetilleke v. Jayasekere*[2]) nor is a fresh seizure necessary when a writ is reissued. Even if there is a fresh seizure it will not affect the validity of the first seizure (*Perera v. Mudalali*[3]). The Fiscal's transfer therefore conveys good title to the defendants.

As regards the other half, although the defendant, Kiri Menika, was dead the subsequent appointment of a legal representative has retrospective effect. The plaintiff was present at the sale and did not claim or object. Minority will not prevent an estoppel from operating. In any event the defendants are entitled to ask under section 11 of the Mortgage Ordinance, 1927, for a hypothecary charge in respect of the purchase money. The payment of a mortgage is *utilis impensa* and a person who does this is entitled to compensation and the *jus retentionis*. *De Silva v. Shaik Ali*[4]; *Ukku v. Bodia*[5]; *Mohamado v. Silva*[6]; *Seadoris v. De Silva*[7]. It is inequitable that the defendants should be referred to a separate action.

Rajapakse for plaintiff, respondent.—Section 341 of the Code makes it imperative that the legal representative of the deceased judgment-debtor should be substituted before further proceedings are taken in execution of the decree. The authorities cited apply only where there has been a reissue of writ. The journal entry of May 8, 1925, shows that the judgment-creditor applied for a fresh issue of writ. A fresh seizure was therefore necessary. The old seizure must be taken to have abated.

In the mortgage action there was no valid decree as the defendant was dead at the time the decree was entered. The defendants should bring a fresh action regarding the hypothecary charge claimed by them. It is not competent to the Court to make any order in this case. The payment of a mortgage is not an improvement to property. The Roman-Dutch law allowed compensation only in respect of physical improvements. Counsel referred to the observations of Pereira J. in *Muttiah Chetty v. Letchimanen Chetty*[8].

Croos da Brera, in reply.

August 22, 1934. MACDONELL C.J.—

This is an appeal against a decree setting aside two separate sales to the defendants of certain two undivided half shares in a piece of land. The original owner was one Kiri Menika, who married Pinhamy, and whose son is the plaintiff-respondent in this case, a minor, suing by one Ranhamy, his guardian *ad litem*. These same three persons, Kiri Menika, Pinhamy, her husband, and Ranhamy were sued in D. C. Kurunegala, No. 9,849, a money case. It was filed on December 11, 1923, judgment was entered on January 21, 1924, and writ issued on February 21, 1924, under which writ there was a seizure of land owned by Kiri Menika on March 11, 1924, this being the important date in the case. The land so seized, a half interest, was sold under the writ on August 11, 1926, and there was a Fiscal's transfer of February 16, 1927, in favour of defendants,

[1] *(1916) 19 N. L. R. 225.*
[2] *(1931) 32 N. L. R. 227.*
[3] *(1926) 27 N. L. R. 483.*
[4] *(1895) 1 N. L. R. 228.*
[5] *(1902) 6 N. L. R. 45.*
[6] *(1906) 3 Bala. R. 248.*
[7] *(1914) 2 Matara Cases 127.*
[8] *(1913) 6 Bal. Notes of Cases 3.*

the present appellants. Meanwhile Kiri Menika herself had died on May 26, 1924. It will be observed, then, that she died after the seizure of March 11, 1924, but some two years before the sale in August, 1926. It was argued therefore for the plaintiff-respondent that the sale was bad.

The circumstances of the seizure are not as clear as could be wished. The relevant journal entries are as follows:—

February 21, 1924.—Writ issued with copy of decree.

June 6, 1924.—Fiscal sends writ unexecuted as the plaintiff failed to advance *Gazette* advertisement charges to publish the sale of the property.

May 8, 1925.—Proctors for plaintiff apply for an issue of writ against defendant's properties. Allowed on fresh stamps.

May 11, 1925.—Writ reissued on fresh stamps for August 11, 1925.

It was argued that in view of the Fiscal's return, namely, that he sent back the writ unexecuted, there was no seizure on the writ issued February 21, 1924. But this seems incorrect. The property seems to have been seized although the complete effect of the seizure could not result, since in the absence of stamps for advertising the sale no sale could take place, but there does seem to have been a seizure under the appropriate section 237. It was then argued to us that the seizure must be held to have been withdrawn as proved by the application on May 8, 1925, for "an issue of writ". But the entry on May 11, 1925, speaking of the "reissue" of the writ is against this contention. I repeat, the journal entries are not as clear on the point as could have been wished, but they seem to show that there was a seizure on February 21, 1924, and that that seizure continued and was not at any time "removed". The respondent then sought to rely on section 341, "If the judgment-debtor dies before the decree has been fully executed the holder of the decree may apply to the Court which passed it, by petition, to which the legal representative of the deceased should be made respondent, to execute the same against the legal representative of the deceased", and it was argued that as confessedly no such petition had been presented and as the legal representative of the deceased, Kiri Menika, had never been made a party to these proceedings, the seizure ceased to be effective and the sale of August 11, 1926, was of no effect. But this argument seems to overlook the effect of *Goonatileke v. Jayasekere* [1], a two-Judge decision. That decision which is binding on us is indistinguishable in its facts from that now before us. In that case there was a seizure under writ during the lifetime of the judgment-debtor but thereafter the Fiscal returned the writ unexecuted because advertisement charges had not been paid, so sale could not be effected. The writ was reissued during the lifetime of the judgment-debtor—here the reissue was after her death—and the sale took place, as in the present appeal, after the death of the judgment-debtor. *Goonatileke v. Jayasekere* (*supra*) is a direct deduction from an interpretation of section 341 given in *Omer v. Fernando* [2], which may there have been *obiter* but which is binding on us since the case in *32 N. L. R. 227 Patheruppillai v. Kandappen* [3] was relied on by the learned District Judge

[1] *32 N. L. R. 227.* [2] *16 N. L R. 135.*

[3] *16 N. L. R. 298.*

where it was held that when there has been seizure, writ returned to Court and reissued, and then after the death of the judgment-debtor a sale, such a sale is bad, but it conflicts with the decision in *32 N. L. R. 227*, and also with the three-Judge decision in *Perera v. Mudalali* [1], the effect of which is that a seizure once effected subsists unless it can be shown to have been removed.

It was very candidly conceded that if the seizure under the original writ of February 21, 1924, continued, then the plaintiff-respondent would be bound by the sale under that seizure of August 11, 1926. The journal entries seem to show, as has been said, that the sale was in consequence of the original seizure of February 21, 1924, that that seizure was never "removed", section 237, and that the writ issued on May 11, 1925, was a reissue of the original writ, and part therefore of the original and subsisting seizure. If that is so, then the decree appealed from so far as it affects the half of this property sold under the money decree in D. C. Kurunegala, 9,849, must be set aside and the appeal allowed with regard to that half of the property.

The facts with regard to the other half of the property in question are as follows:—There was a mortgage bond of February 8, 1923, executed by the same persons, Kiri Menika, her husband Pinhamy, and Ranhamy, which was put in suit by the mortgagees in D. C. Colombo, 12,833, an action instituted on July 21, 1924, at which date Kiri Menika was dead; she had died about two months before, on May 26, 1924. All parties seem to have overlooked this fact. Decree followed in this mortgage suit on September 9, 1924, and there was a sale by public auction of the remaining one half of this land on January 9, 1926. The defendants-appellants bought that property for Rs. 785 and thereafter received a transfer dated April 26, 1926. Now it is quite clear that this mortgage decree and consequent sale could not have affected Kiri Menika who was dead before the mortgage action was instituted. It therefore cannot affect the plaintiff-respondent, her minor child, who claims under her. The decree, therefore, so far as it says that the defendants, purchasers of this property on sale after the mortgage decree, cannot hold the property so bought and sold as against a claimant representing the interests of Kiri Menika, is perfectly correct. The defendants-appellants however stated in answer in this case that they had paid this sum of Rs. 785, and raised in the trial below the following issue:—"In the event of the sale held under D. C. Colombo, 12,833, being declared void, are the defendants entitled to a hypothecary charge over a half share of the land sold under the decree?" The answer to this in the decree appealed from is as follows:—"I do not think this issue arises in this case. It is an issue of which this Court can give no relief in the present action. The issue is raised in view of section 11 of Ordinance No. 21 of 1927. It is for the defendants to claim the benefit of this section at the proper time and in the proper action. I will only say that the judgment in this case is not to prejudice any such claim". With all respect I do not understand this decision. The issue does arise in this case, and was categorically formulated, and it is one upon which the Court can give relief in this case, and if the present judgment refusing the defendants relief on this issue were to

[1] *27 N. L. R. 483.*

pass unchallenged, I do not see how the defendants could again raise it on a later occasion, it would be *res judicata* against them. After argument on this matter it became clear that the defendants-appellants were entitled to relief. The position was this. The minor plaintiff-respondent asks to have this portion of his mother Kiri Menika's estate handed back to him nothwithstanding the conveyance of sale on April 26, 1926. What is this property of his mother's which he claims? The property which at the time of her death was subject to a mortgage. The original amount of that mortgage was considerably more than Rs. 785, but for simplicity's sake one may describe it as a mortgage of Rs. 785 because that was the total amount which the defendants on their purchase of April, 1926, paid. If the plaintiff-respondent is to receive back this land clear of mortgage to the extent of Rs. 785 he will be getting back, it seems to me, more than the person under whom he claims possessed or was entitled to. His claim, properly analysed, is to the piece of land encumbered to that extent. He asks that he should be given that piece of land unencumbered by that sum, but as I understood the argument for him, it was conceded that this was a claim which was not open to him to make. He who seeks equity must do equity, and to give back to the plaintiff-respondent this piece of land unencumbered, or to put it in another way, to deny to defendants their right to be compensated to the amount of the mortgage which they have paid off would, it seems to me, be a very plain infringement of that salutary rule. We have the authority of *Nicholas de Silva v. Shaik Ali* [1], to the effect that money advances to discharge a mortgage should be treated as an *utilis impensa*. Even if there is little or no direct authority in the Roman-Dutch authorities for this, still the right of a *bona fide* possessor evicted to be compensated for money expended on the property of the real owner is an undoubted right in Roman-Dutch law, and in principle should include the right to compensation for a mortgage discharged; indeed, it is difficult to state it so as not to include that right. The South African cases on the point are referred to in *Lee (3rd ed., pp. 443-444)*, some of them being in reports not available to us.

There is also the Mortgage Ordinance, No. 21 of 1927, to which reference has been made, section 11, sub-sections (1) and (2), of which read as follows:—

> 11. (1) On a sale of mortgaged land in a hypothecary action, every mortgage wholly or in part paid off out of the purchase money shall, unless a contrary intention is expressed in the conveyance to the purchaser, be deemed to be kept on foot for the protection of the purchaser and his successors in title against incumbrances, estates, and interests to which the mortgage in suit in the hypothecary action had priority, and the purchaser and his successors in title shall, accordingly, be entitled to a hypothecary charge on the purchase land for a sum (which shall not bear interest) equal to the amount of the purchase money or the amount of the mortgage money due under the mortgage so paid off at the date of the sale, whichever amount shall be the less, and having the same priority as had the mortgage so paid off at the date of the payment of the purchase money.

[1] 11 *N. L. R.* 998

(2) This section applies to sales effected before or after the commencement of this Ordinance, but shall not affect any title acquired for valuable consideration before the commencement of this Ordinance.

Here was a mortgage "in part paid off out of the purchase money". Then in the words of the section the mortgage "shall be deemed to be kept on foot for the protection of the purchaser and his successors in title against incumbrances, estates, and interests to which the mortgage in suit in the hypothecary action had priority". The mortgage in D. C. Colombo, 12,833, clearly had priority to the estate and interests of the minor plaintiff-respondent, for suppose there had been no such hypothecary action and suppose that the mother, Kiri Menika, had died possessed of this property, her son, the plaintiff-respondent, would have had to have taken it encumbered with the mortgage to which she was a party. Then in the words of the section, the person who had paid off part of the mortgage out of the purchase money, here the defendants-appellants, is "entitled to a hypothecary charge on the purchased land for a sum (which shall not bear interest) equal to the amount of the purchase money or the amount of the mortgage money due under the mortgage so paid off at the date of the sale, whichever amount shall be the less, and having the same priority as had the mortgage so paid off at the date of the payment of the purchase money", which in this case seems to have been April 26, 1926. The defendants-appellants seem undoubtedly entitled to a decree in the terms of the section just quoted, and the only difficulty is the form which that decree should take. A similar point seems to have come before Dalton and Akbar JJ., in *Girigoris v. Arnolis*[1], where, however, the amount claimable by the evicted purchaser was small, only Rs. 50. The order there made was that the parties claiming to set aside the transfer by sale were entitled to do so "subject, however, to the payment of Rs. 50 by them . . . . Defendants will pay Rs. 50 to the plaintiff".

For the appellants it was contended that the decree should take the form of giving them the right to retain this land until their charge on the same, Rs. 785 was paid. But I doubt that section 11 of Ordinance No. 21 of 1927 contemplates that course.

I would propose then the following order, on the whole appeal:—The decree, so far as it refers to the lands sold under the decree in D. C. Kurunegala, No. 9,849, and described in the schedule to the plaint in that action, should be set aside and that portion of the action against defendants should stand dismissed, and the decree so far as it affects the portion of land sold under the decree in D. C. Colombo, No. 12,833, should also be set aside and the following substituted for it:—It is ordered and decreed that the first plaintiff be declared entitled to a half share of the lands sold under the decree in D. C. Colombo, No. 12,833, and described in the schedule to the plaint in that action and to possession of the said half share, but that the defendant-appellants be entitled to the hypothecary charge on the said lands created by the bond sued on in D. C. Colombo, No. 12,833, for the sum of Rs. 785.

[1] *31 N. L. R. 481.*

The order in the decree awarding the plaintiff damages must be set aside. The proper course for plaintiff to have adopted was to have tendered the amount paid by the defendants for the land, before plaintiff brought action. The defendant-appellants having substantially succeeded should have their costs here and below.

DRIEBERG J.—

The plaintiff, who is a minor, brought this action for a declaration of title to two allotments of land which he claimed as the sole heir of his mother, Kiri Menika. The defendants claim title to the lands by purchase at two sales in execution against Kiri Menika. The question at issue is one of title only; the trial Judge found in favour of the plaintiff, and the defendants have appealed.

The defendants claim a half share on Fiscal's Transfer D 4 of February 16, 1927, granted to them as purchasers at a sale in execution of a money decree in D. C. Kurunegala, No. 9,849, entered by consent against Kiri Menika, her husband, and another. On February 20, 1924, application for writ was allowed and writ issued on March 21, 1924. The Fiscal seized a half share of these two lands on March 11, 1924, but on June 6, 1924, returned the writ to the Court "unexecuted", so it is recorded in the journal entry, as the execution-creditor had not paid in advance the cost of publishing the sale in the *Government Gazette*. It was wrong to describe the writ as unexecuted. Seizure, though a preliminary step to sale, is equally a step taken in execution of a decree. A Fiscal executes a writ for the recovery of money by demand on the executor-debtor, and if the demand is not complied with by seizure and, if necessary, by sale—section 226 of the Civil Procedure Code. The entry of June 6, 1924 should have been that the Fiscal returned the writ not fully executed. Kiri Menika died on May 26, 1924, after the seizure and before the return of the writ to Court on June 6; the proceedings continued without a legal representative of Kiri Menika being appointed. In view of the objection taken to the sale, it is necessary to state in detail the subsequent steps.

On May 8, 1925, the plaintiff applied for an issue of writ and this was allowed on the execution-creditor supplying fresh stamps. This was right, for the failure to proceed with the execution of the writ was due to the default of the execution-creditor and not to one of the causes stated in part 2 of schedule B of the Stamp Ordinance, No. 22 of 1909.

Writ was issued returnable on August 11, 1925. It is not possible without the record to know precisely the progress made in the execution of this writ. There was a claim to property seized, but some property was sold and Rs. 5 recovered. On August 19, 1925, the Fiscal returned the writ, reporting the sale I have referred to; of the other property seized on July 4 and 5, 1925, he said some were claimed and the sale stayed on order of Court. Whether the lands in question were seized again on July 4 and 5, 1925, we do not know. On February 18, 1926, writ was reissued on fresh stamps, returnable on May 20, 1926; there was a claim and on May 21, 1926, the Fiscal returned the writ unexecuted

as the sale was stayed by Court owing to the claim. On July 13, 1926, writ was reissued and a half share of these lands was sold on August 11, 1926, for Rs. 400 and bought by the defendants.

It is contended for the plaintiff that the case falls within section 341 of the Civil Procedure Code and that as the judgment-debtor, Kiri Menika, died before the decree was fully executed the execution-creditor should have applied to execute the decree against her legal representative making him a respondent to the application. The plaintiff contends that all proceedings in execution after the death of Kiri Menika are null and void and that title did not pass to the defendants under the Fiscal's transfer. This contention cannot succeed. It was held in *Goonetileke v. Jayasekere* [1], that section 341 has no application where property has been seized under a writ before the death of the execution-debtor and was under attachment at his death. The plaintiff sought to meet this by arguing that the seizure on March 11, 1924, terminated when the Fiscal returned the writ on June 6, 1924, and that the reissue of the writ with fresh stamps was a fresh mandate to the Fiscal, that the seizure under the first issue of writ had ceased to be effective, that a fresh seizure was necessary and as this would be after the death of Kiri Menika the appointment of a legal representative was necessary. But these are all matters on which there is clear authority. There are no such implications in the words " re-issue of writ on fresh stamps ". A writ may be issued as often as is necessary. Where it is reissued on fresh stamps it is not a new mandate vesting the Fiscal with a new authority, terminating his powers under the previous writ and depriving what was partly done under it of validity. A second or subsequent issue of writ has to bear stamps unless the previous writ was returned for one of the reasons stated in the Stamp Ordinance, but this is for purely fiscal purposes and the effect of the writ is the same whether it be issued without stamps or the Court directs that it should bear stamps.

That no fresh seizure was needed in this case is clear on the authority of *Andris Appu v. Kolande Asari* [2] (Full Bench). There the Fiscal had seized property but had not advertised it for sale; writ was reissued after the returnable day of the previous writ, and the property was sold. Wood Renton C.J. said: " The third question submitted to us is, ' whether a seizure effected under one writ can be availed of for the purpose of another writ, or a reissued writ, or a writ for the execution of which the time has been extended, or is a fresh seizure necessary in any or all of such cases '. This question is one of great difficulty. But I have, with considerable hesitation, come to the conclusion that the answer to it should be that a fresh seizure is not necessary in all cases. In the circumstances before us, the writ was not recalled or withdrawn in the ordinary sense of either of these terms, and there can be no ground for saying that it was abandoned ".

Even if there was a fresh seizure under a writ reissued subsequent to the writ on which the property was first seized, that would not affect the continuing validity of the first seizure, *Peria Carpen Chetty v. Sekappa Chetty.*[3] The case of *Patherupillai v. Kandappen* [4], relied on by the trial

[1] *(1931) 32 N. L. R. 227.*
[2] *(1916) 19 N. L. R. 225.*
[3] *(1910) 2 Curr. L. R. 162.*
[4] *(1913) 16 N. L. R. 293.*

Judge, is a judgment of a single Judge. These two cases were considered by the Full Bench in *Andris Appu v. Kolande Asari* (*supra*) and the decision in *Peria Carpen Chetty v. Sekappa Chetty* (*supra*), a judgment of two Judges was followed, see Wood Renton C.J. on page 227, and Sampayo J. on page 233.

The answer to the question how long a seizure remains effective is to be found in sections 238 and 239 of the Code. If the seizure is registered, any private alienation thereafter of the property by the execution-debtor is void as against all claims enforceable under the seizure, and this disability of the execution-debtor continues until the removal of the seizure. Section 239 provides for the Court withdrawing the seizure on the application of any person interested in the property, and this can be done if the amount of the decree, including all execution charges, is paid into Court or if satisfaction of the decree is otherwise made through the Court, or if the decree be reversed. The sale by the Fiscal on August 11, 1926, must be regarded as made under the seizure of March 11, 1924, and as the execution-debtor died when the property was under attachment on that seizure the execution-creditors were entitled to have the property sold without making the legal representative of the execution-debtor a party to the proceedings. The defendants have, therefore, title to this half share.

The other half share was bought by the defendants on a conveyance D 2 of April 2, 1926, by the Commissioner appointed to carry out an order to sell issued in execution of a mortgage decree entered in D. C. Colombo, No. 12,833, against Kiri Menika, her husband Pinhamy and Ranhamy. The plaint was filed on July 21, 1924, against these three persons, who were all parties to the bond, after the death of Kiri Menika. On the returnable day of summons, September 9, 1924, Pinhamy and Ranhamy appeared and consented to judgment. It was reported that Kiri Menika, the first defendant, was dead. The only further note in the journal is that writ was not to issue for two months, but apparently decree was entered and nearly a year later, on August 20, 1925, the plaintiff's proctor applied for execution of the decree by the issue of an order for the sale of the mortgaged property ; this was allowed, but before the returnable date the plaintiff's proctor moved for a notice on Pinhamy to show cause why he should not be appointed to represent the estate of Kiri Menika. Pinhamy was absent on notice being served, and the order appointing her legal representative was made absolute on November 2, 1925. So far as I can see, the property was sold on the order for sale issued on August 26, 1925. The mortgage decree was of no effect and did not bind the estate of Kiri Menika. In cases falling within the proviso to section 642 of the Civil Procedure Code, when the property mortgaged is under the value of Rs. 1,000, it is necessary to procure the appointment of a representative before the action is brought.

The defendants, therefore, have not acquired title to this half share. The defendants in their answer asked that the action be dismissed or, in the alternative, that they be declared entitled to a hypothecary charge over this half share for Rs. 805 ; this claim was for the relief granted by section 11 of the Mortgage Ordinance, No. 21 of 1927. The learned

District Judge did not give the defendants this relief as he was of opinion that it should be claimed in a separate action. I do not think this is right, and it appears to me that the defendants are entitled to ask for this relief in this action. The defendants, I think, are entitled to this relief under the Ordinance, apart from any rights which they may have if the discharge of the mortgage be regarded as an *utilis impensa.*

Set aside.