1935 *Present :* **Akbar S.P.J. and Koch J.**

ARUNACHALAM CHETTIAR *v.* RAMANATHAN CHETTIAR.

38—D. C. Colombo (Inty.), 1,284.

Mortgage Ordinance—Action on mortgage bond—Representation of estate of deceased mortgagor—Application for letters of administration likely to be delayed—Ordinance No. 21 of 1927, s. 7 (2) (b).

An order for representation of the estate of a deceased mortgagor may be made under section 7 (1) of the Mortgage Ordinance whether an application for letters of administration to the deceased's estate has been made or not.

The only point the Court has to consider under section 7 (2) (b) is whether there is likely to be undue delay in the grant of representation.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera (with him *D. W. Fernando*), for respondents, appellants.

Hayley, K.C. (with him *Nadarajah*), for petitioner, respondent.

Cur. adv. vult.

July 15, 1935. AKBAR S.P.J.—

One Ramanathan Chettiar owed a large sum of money to the petitioner on a mortgage bond dated December 23, 1929, and this Chettiar died on August 1, 1934, leaving the two appellants who are his two sons and two daughters as his heirs. The petitioner applied for an order under section 7 of the Mortgage Ordinance, No. 21 of 1927, appointing the two appellants to represent the estate of the deceased for the purpose of instituting a hypothecary action on the bond. In support of this petition the petitioner filed an affidavit dated December 21, 1934, in which he swore—

(*a*) that the appellants had to the best of his belief been sued as executors *de son tort* of the intestate estate of the deceased ;
(*b*) that the appellants were in possession of the estate and effects of the deceased and that they were appropriating the income to their own use ;
(*c*) that the appellants have no intention of administering the estate of the deceased and paying off his debts ; and
(*d*) that they were delaying the administration of the estate with the intention of appropriating the income to themselves, even though the income and produce of the mortgaged premises were also mortgaged to the petitioner.

Various objections were taken by the appellants to the application by a counter-petition, in which however, the appellants stated that steps were being taken to take out letters of administration to the estate of the deceased. Counsel who appeared for them, as far as I can see, only took one objection arising in this appeal under section 7 (2) (*b*), namely, that that sub-section only applied when an application for letters had been made. The learned District Judge held against the appellants. Mr. Perera for the appellants has pressed the same point

before us and has also urged another point to which I shall refer later. As regards the first objection I entertain no doubts whatsoever that section 7 (2) (*b*) will apply to any case whether an application for letters of administration has been made or not. The only point the Court has to decide is whether there is likely to be undue delay in the grant of the letters. Ordinance No. 21 of 1927 repeals section 642 of the Civil Procedure Code under which a mortgagee had to apply to Court to appoint an administrator of a deceased mortgagor's estate in every case where the mortgaged property exceeded Rs. 1,000 in value (as in this case). This entailed a great delay and it is clear to me that section 7 (2) (*b*) was meant to supply a speedier method by which a mortgagee could realize his debt if he was in a position to satisfy the Court that there was likely to be undue delay in the grant of letters. In this case the petitioner asserted that the appellants were executors *de son tort* and that they never meant to apply for letters. This assertion has not been traversed by the appellants either by affidavit or evidence. On the contrary they say in their petition that steps are being taken to take out letters. No such steps have been taken up to date. It seems to me idle to contend that section 7 (2 (*b*) only applies when there is likely to be undue delay in the grant of letters when an application has been made and does not apply when no application for letters has been made even when the petitioner can show that the persons who ought to take out letters never mean to do so.

The second objection taken by Mr. Perera was that the appellants were unwilling to be appointed representatives under section 7 of Ordinance No. 21 of 1927, and that therefore the Court had no power to appoint unwilling persons. He argued that section 7 was similar to Order XVI., rule 46, of the English rules, and he cited the case of *In re Curtis and Betts*[1] in which the Court of Chancery had appointed the executors of Curtis (solicitor) to represent the estate of Betts (solicitor) in a matter of taxation of the bill of costs of Curtis and Betts who had acted as solicitors for a client Stainbank. The Court of Appeal held that there had been a series of blunders and that if Betts was dead (of which there was some doubt) "it was wrong to appoint a person to represent the estate of a deceased person who was the only person liable and it was also wrong to appoint to represent an estate a person who was unwilling to act". When the Court of Chancery appointed the executors of Curtis to represent the estate of Betts, for the purpose of taxation, the former did not assent. Even if this authority applies to this case, there was no statement before the District Court that the appellants did not assent to be made representatives of the mortgagor's estate. On the other hand the petitioner had asserted that the appellants were in possession of the estate without taking out letters and that they did not mean to do so. The appellants in their petition did not traverse these assertions, but on the contrary stated that steps were being taken to apply for letters. Their dissent to be appointed to represent the mortgagor's estate is not to be found in their

[1] (*1887*) *Weekly Notes, p. 126.*

petition, nor in the argument of their counsel before the District Judge nor in their petition of appeal. The reason why a direct statement was not made by the appellants expressing their unwillingness is obvious. As they were in possession of the intestate's estate without administration, it was not possible for them to say they were unwilling because they were guilty of the offence set forth in section 543 of the Civil Procedure Code. Unwillingness expressed in clear terms as in the English case would be given effect to if the person called on to represent the estate was a total stranger who had nothing to do with the deceased's estate. This is the effect, as I understand it, of the English case. But when the person objecting has been intermeddling in the estate of the deceased and appropriating the income, I am not sure if the decision in the case cited would not have been different.

In my opinion the appeal fails and it must be dismissed with costs.

KOCH J.—I agree.

Appeal dismissed.