

941.92

12, 1963

No.....53

1961

Supreme Court of Ceylon,  
No. 260 (Final) of 1956.

District Court of Colombo,  
case No. 6970/P.

**IN HER MAJESTY'S PRIVY COUNCIL**

**ON AN APPEAL FROM**

**THE SUPREME COURT OF CEYLON**

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
19 JUN 1964  
25 RUSSELL SQUARE  
LONDON, W.C.1.

74076

BETWEEN

- 18. Hussaima, wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
- 19. Mrs. Huzair Sadiq of Colombo.
- 20. A. M. M. Nazick of Moor Road, Colombo, and
- 21. A. M. M. Marzook of Layards Road, Colombo.

(All substituted in place of 18th Defendant—Appellant.)

**DEFENDANTS — APPELLANTS**

AND

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya, Nittambuwa.

**PLAINTIFF - RESPONDENT**

- 1. A. L. Sithy Azeema *alias* Sithy Nafeesa, wife of M. I. M. Abdul Hanan of Maligawatte, and 14 others.

(1 to 9, 11 to 12, and 14 to 17.)  
22 to 24

**DEFENDANTS — RESPONDENTS**

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**RECORD OF PROCEEDINGS**

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Supreme Court of Ceylon,  
No. 260 (Final) of 1956.

No.....

District Court of Colombo,  
case No. 6970/P.

**IN HER MAJESTY'S PRIVY COUNCIL  
ON AN APPEAL FROM  
THE SUPREME COURT OF CEYLON**

**BETWEEN**

18. Hussaima, wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
19. Mrs. Huzair Sadiq of Colombo.
20. A. M. M. Nazick of Moor Road, Colombo, and
21. A. M. M. Marzook of Layards Road, Colombo.

(All substituted in place of 13th Defendant—Appellant.)

**DEFENDANTS — APPELLANTS**

**AND**

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya, Nittambuwa.

**PLAINTIFF - RESPONDENT**

1. A. L. Sithy Azeema *alias* Sithy Nafeesa, wife of M. I. M. Abdul Hanan of Maligawatte, and 14 others.

(1 to 9, 11 to 12, and 14 to 17.)

**DEFENDANTS — RESPONDENTS**

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**RECORD OF PROCEEDINGS**

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**JOURNAL ENTRIES**

**IN THE DISTRICT COURT OF COLOMBO**

A. L. Ummu Zaneera alias Shamsunnahar  
of Nittambuwa.

*Plaintiff.*

Vs.

No. 6970/P  
Class. V.  
10 Amount Rs. 75,000/-  
Nature. Partition  
Procedure. Regular.

A. L. Sithy Azeema alias Sithy Nafeesa and 12 others.

*Defendants.*

**JOURNAL**

(1) The 17th day of September 1953.

Mr. M. N. M. Salahudeen files appointment and Complaint together  
with Documents marked "A" being the Pedigree and "B" being  
20 the Abstract of Title together with lispensens in duplicate for registration.

- (i) Complaint accepted. Forward lispensens for registration and return before 18-11-53.
- (ii) The Plaintiff to deposit before 18-11-53 survey fees estimated at Rs. 120/-

(Intd.) .....

*Additional District Judge.*

21-9-53.

Summons issued with precept returnable the      day of      19 .

Lispensens sent for registration.

Paying in Voucher issued.

30

(Intd.) .....

21-9-53.

No. 1  
Journal  
Entries  
17-9-53 to  
1-12-60  
—continued.

- (2) 10-10-53  
The Registrar of Lands, Colombo, returns lispendens duly registered.  
File.  
(Intd.) .....  
12-10-53.
- (3) 18-11-53  
Mr. M. N. M. Salahudeen for Plaintiff. Kachcheri receipt for Rs. 120/-  
due.....filed. S. 6 & S. 12 complied with  
Issue Summons, Notice & Commission for 27/1.  
(Intd.) ..... 10  
A. D. J.
- (4) 19-xi-53  
Commission with copy of plaint issued to Mr. S. Rajendra,  
Surveyor, returnable 25-1-54.  
(Intd.) .....
- (5) 15-12-53  
Summons issued on 1—13 defendants W. P.  
Notice issued to Fiscal W. P.  
,, ,, to Village Headman, Pettah Ward.
- (6) 21-1-54 20  
As the parties are all Tamil speaking people, Mr. M. N. M. Salahu-  
deen, Proctor for Plaintiff moves to order the notice of action to  
be published in the Tamil paper "Veerakesari".  
Application allowed. Produce proof of publication on 27-1-54.  
(Intd.) .....  
A. D. J.
- (7) 27-1-54  
Mr. M. N. M. Salahudeen for Plaintiff.  
Notice to Fiscal—affixed.  
(a) Summons served on 1, 2, 13, 9, 10, 11, and 3rd defen- 30  
dant by personal service.

Proxy of 1 and 2 Defendants filed. Proxy of 13 Defendant filed. Proxy of 3 Defendant filed. Proxy of Zohara Umma filed. Proxy of A. T. M. Muhamed filed.....  
Not served on 4, 5, 6, 7, 8, 12 defendants.

No. 1  
Journal  
Entries  
17-9-53 to  
1-12-60  
—continued.

Reissue for 31/3 on others.  
Mr. M. H. Saheed file proxy of 9 and 10 defendants.

- (b) Return to commission due — filed.  
Commission 31/3.  
Proxy of.....filed.  
Answer 31/3.

10

(Intd.) .....  
A. D. J.

Commission filed with Plan No. 511, report, copy of filed notes, and memo of charges.

- 1. Verify and pay commission.
- 2. Secretary to specify the difference to be deposited on or before 31-3-54.

(8) 27-1-54

20

Amount in deposit	Rs.	120.00
Memo taxed at	Rs.	99.70
In excess	Rs.	<u>20.30</u>

Valuation fees 550/- at 1% to be considered after the final survey is made.

Sgd. (Illegibly)  
28-1-54.

(9) 29-1-54

Req. No. 38 for 99/70 entered in favour of Mr. S Rajendra, Surveyor.

(Intd.) .....  
Administrative Secretary.

30

(Intd). .....

Senior Asst. Secretary.

(10) 19-3-54

Summons issued on 4, 5, 6, 7, 8, and 12 defendants W. P.

(Intd.) .....

No. 1  
Journal  
Entries  
17-9-53 to  
1-12-60  
—continued.

(11) 24-3-54

Mr. N. M. Saheed Proctor for 9th & 10th defendants with notice to Proctor for Plaintiff files statement of claim of the 9th & 10th defendants.

File and mention on 31-3-54.

(Intd.) .....  
A. D. J.

(12) 31, March, 1954.

Mr. M. N. M. Salahudeen, for Plaintiff.

(a) SS not served on 4, 5, 6, 7, 8, and 12 defendants—they 10 are not known.

Reissue for plaintiff to point out 16/6.

(b) Statements due filed by Mr. K. Valayuthan for the 1st and 2nd defendants.

13 Defendants' Answer filed — 12 Defendant accepts share.....other answers 16/6.

(c) Consideration of Plan.

..... (Intd.) .....  
A. D. J. 20

(13) 23-5-54

Summons Issued on 4, 5, 6, 7, 8, and 12 defendants.

(14) 16-6-54

Mr. M. N. M. Salahudeen for Plaintiff.

(a) Summons not served on 4, 5, 6, 7, 8, and 12 Defendants — they are not known.

Re Issue for 1-9-54. Plaintiff to point out.

(b) Answers due — not filed.

11 Defendant accepts the share given in the plaint.

12 Defendant also accepts the share. 80

(c) consideration.

(Intd.) .....  
A. D. J,



(15) 3-7-54

Mr. K. Rasanathan Proctor for 4th to 8th defendants files his appointment as Proctor for 4th, 5th, 6th, 7th, and 8th, defendants moves to state that they accept the correctness of the shares given to them in the plaint.

File.

(Intd.) .....  
A. D. J.

(16) 3-7-54

10 Mr. M. N. M. Salahudeen, Proctor for Plaintiff files affidavit moves that substituted service be allowed against 4th, 5th, 6th, 7th, and 8th defendants. Allowed for 1-9-54. The said defendants to appear in court within 10 days of such service.

(Intd.) .....  
A. D. J.

Vide Journal Entry (15) not necessary.

(17) 1-9-54

20 Mr. M. N. M. Salahudeen for Plaintiff. Mr K. Rasanathan for 4, 5, 6, 7 and 8 defendants. Vide Journal Entry (16) summons not issued on 4, 5, 6, 7, and 8 defendants.

Mr. K. Rasanathan as Proctor for 4—8 defendants accepts the correctness of the shares as given in the plaint.

Trial 14. 2.

(Intd.) .....  
A. D. J.

(18) 16-11-54

As the original Plaint had got detached from the record, Proctor for plaintiff files a copy of same. File.

(Sgd.) .....  
Administrative Secretary.

80 (19) 7-2-55

Mr. Salahudeen Proctor for Plaintiff with notice to Proctor for 13th defendant files list of witnesses and documents and moves for summons.

- 1. Issue summons on witnesses 1, 4 and 5,
- 2. Re. 1 & 6, 3, obtain certified copies and move.

(Intd.) .....  
A. D. J.

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60  
—continued.

- (20) 10-2-55  
Summons tendered on I witness by Plaintiff. Comply with order at Journal Entry (19) 2.  
(Intd.) ..... 10
- (21) 14-2-55  
Mr. M. N. M. Salahudeen for Plaintiff.  
Mr. K. Velauthan for 1 and 2 defendants.  
Mr. K. Rasanathan for 4 — 8 defendants.  
Mr. N. M. Zaheed for 9 and 10 defendants.  
Mr. A. R. M. Razeen for 13 defendant. 10  
Vide Journal Entry (17) Trial. 2, 3, 6, 8, 9, 10, 11, and 12 Defendants present.  
Vide proceedings. Further hearing 31/3.  
(Intd.) .....  
A. D. J.  
Proceedings Filed.  
(Intd.) .....  
17/8.
- (22) 31-8-55  
Mr. M. N. M. Salahudeen for Plaintiff. 20  
Mr. K. Velauthan for 1 and 2 defendants.  
Mr. K. Rasanathan for 4 — 8 defendants.  
Mr. N. M. Zaheed for 9 and 10 defendants.  
Mr. A. R. M. Razeen for 13 defendant.  
Vide Journal Entry (21) Further hearing.  
2nd defendant Present. Others absent.  
This is a contested case.  
I am going on transfer.  
Trial de novo. 18/8.  
(Intd.) ..... 30  
A. D. J.
- (23) 20-7-55  
A. C. Rabia Umma 3 defendant moves with consent of her Proctor Mr. L. P. Perera to revoke the proxy granted to him.  
Let the signature of defendant be identified.  
(Intd.) .....  
A. D. J.
- (24) 4-8-55  
As counsel for 13 defendant Mr. E. R. S. R. Coomarasamy will not be able to appear on 18-8-55 on personal grounds, Proctor 40 for 13 defendant moves that a postponement of this case be granted and the case called to fix some other suitable date.

Proctor for Plaintiff and 9—10 defendants consent.  
Call 18/8.

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60  
—continued.

(Intd.) .....  
A. D. J.

(25) 18-8-55

Mr. M. N. M. Salahudeen for plaintiff.  
Mr. K. Velauthan for 1 and 2 defendants.  
Mr. Rasanathan for 4—8 defendants.  
Mr. N. M. Zaheed for 9 and 10 defendants.  
10 Mr. A. R. M. Razeen for 13 defendant.  
Mr. Weeramanthry instd. by Mr. Thassim for 11th defendant.  
Vide Journal Entry (24) Case called. Trial 24-1-56.

(Intd.) .....

(26) 24-1-56

Mr. M. N. M. Salahudeen for plaintiff.  
Mr. Velauthan for 1 and 2 defendants.  
Mr. K. Rasanathan for 4—8 defendants.  
Mr. N. M. Zaheed for 9 and 10 defendants.  
Mr. A. R. M. Razeen for 13 defendant.  
20 Mr. A. L. M. Thassim for 11 defendant.  
Vide Journal Entry (25) Trial.  
Vide proceedings.  
Judgment on 20-2-56.

(Intd.) .....  
D. J.

P1—P5 Filed.

(Intd.) .....  
1/2.

11D1 Filed.

30

(Intd.) .....  
24/1.

Proceedings filed.

(Intd.) .....  
3/2.

(27) 20-2-56

Mr. M. N. M. Salahudeen for plaintiff.  
Mr. K. Velauthan for 1 and 2 defendants.  
Mr. K. Rasanathan for 4 — 8 defendants.  
Mr. N. M. Zaheed for 9 and 10 defendants.  
40 Mr. A. R. M. Razeen for 13 defendant.  
Mr. A. L. M. Thassim for 11 defendant.  
Vide Journal Entry (26) Judgment.  
Judgment delivered in open Court.  
Decree for 21-3-56.

(Intd.) .....

(28) 23-2-56

With reference to the order for sale made in the above case,  
Proctor for plaintiff moves to appoint Charles H. Peiris, Auctioneer

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60  
—continued.

as Commissioner to carry out the sale.  
Note and file.

(Intd.) .....  
A. D. J.

(29) 2-3-56

Mr. A. R. M. Razeen, Proctor for 13th defendant appellant files  
Petition of appeal.  
File.

(Intd.) .....  
A. D. J. 10

(28) 2-3-56

Mr. A. R. M. Razeen, Proctor for 13th defendant Appellant states  
that the petition of appeal of the 13th defendant appellant presented  
by him on 2-3-56 against the Decree of this Court dated 20-2-56,  
having been received by Court Counsel on his behalf will on  
12-3-56 at 10-45 a.m. or soon thereafter move to tender Rs. 250/-  
by depositing same at the Colombo Kachcheri for any costs which  
may be incurred by him in appeal in the premises and will on the  
said day deposit in Court a sufficient sum of money in stamps  
to cover the expenses of serving notice of appeal on him. 20

Proctor for 1, 2, 9, 10, 11 and 12, Defendants Respondents take  
notice while notice of security is tendered to be served on the  
Proctor for Plaintiff, 4—8 and the unrepresented party the 3rd  
defendant.

1. Issue notice of Security on proctor for Plaintiff, 4—8  
and 3 Defendants Respondents for 12-3-56.
2. Issue Paying-in-Voucher for Rs. 250/-.

(Intd.) .....  
A. D. J.

Paying-in-voucher issued.

(Intd.) ..... 30  
12/3.

(29) 5-3-56

Notice of Security sent to Fiscal to be served on the Proctors for  
Plaintiff 4, 5, 6, 7 and 8 Respondents and the 3rd Respondent.

(Intd.) .....

(30) 8-3-56

Proctor for 13th defendant appellant files affidavit of the 13th  
Defendant Appellant and for reasons stated therein moves to  
allow substituted service of notice of tendering security, for costs 40  
in appeal on the proctor for plaintiff and on the 3rd defendant  
Respondent by affixing the same to outer doors of premises  
No. 38 New Chetty Street, Colombo and No. 10/95, Mahawatta,  
Negombo Road, Peliyagoda,

Allowed, Notice to be served on Proctor & Respondent by registered post also and file proof of posting for 12/3.

No. 1  
Journal  
Entries  
17-9-53 to  
1-12-60  
—continued.

(30a) 9-3-56

Notice of Security on Proctor for Plaintiff and 3rd Respondent as substituted service.

(Intd.) .....

(31) 12-3-56

Mr. M. N. M. Salahudeen for Plaintiff Respondent.  
Mr. K. Velauthan for 1 and 2 defendants respondents.  
Mr. K. Rasanathan for 4-8 defendants respondents.  
Mr. N. M. Zaheed for 9 and 10 defendants respondents.  
Mr. A. R. M. Razeen for 13 defendant appellants.  
Mr. A. L. M. Thassim for 11 defendant respondent.

10

Vide Journal Entry (28) Case called re security.  
Notice of security as substituted service on  
Proctor for plaintiff and 3rd Respondent. Notice of Security  
served on Proctor for 4-8 Respondents.

No return to substituted service. Mr. Coomaraswamy (instructed) for 13 defendant appellants. He points to Fiscal's return since received ..... Service on Proctor for Plaintiff and 3rd respondent.

20

Security as Rs. 250/- is accepted. Perfect Bond. Issue notice of appeal for 9-5-56.

(Intd.) .....

(32) 12-3-56

Mr. A. R. M. Razeen moves for a paying-in-voucher for Rs. 25/- for appeal briefs.

(Intd.) .....

Paying-in-Voucher issued.

30

(Intd.) .....  
12-3.

(33) 12-3-56

Mr. A. R. M. Razeen, Proctor for 13th defendant—appellant tenders Bond to prosecute, Kachcheri Receipts for Rs. 250/- and Rs. 25/- and notice of appeal.

Vide Journal Entry (31) Issue notice of appeal for 9-5-56.

(Intd.) .....  
Asst. Secretary.

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60  
—continued.

(34) 12-3-56

Notice of appeal sent to Fiscal W. P. to be served on Proctor for plaintiff 1 and 2, 4-8, 9, 10, 11, 12 and 3 defendants.

(Intd.) .....

(35) 9-5-56

Mr. A. R. M. Razeen for 13 Defendant Appellant.  
Mr. M. N. M. Salahudeen for plaintiff respondent.

Journal Entry (31) for other apperances.  
Notice of Appeal served on,

Mr. M. N. M. Salahudeen for plaintiff respondent. 10  
Mr. K. Velauthan for 1 and 2 defendants respondents.  
Mr. K. Rasanathan for 4 — 8 defendants respondents.  
Mr. N. M. Zaheed for 9 and 10 respondents.  
Mr. M. L. M. Thassim for 11 defendant respondent and on  
Mr. N. M. Zackiya.  
And on 3rd defendant respondent.

Forward Appeal.

(Intd.) .....  
A. D. J.

(36) 1-6-56

20

Proctor for Petitioner files petition and affidavit and moves that the prayer in petition be granted.  
Enter Order Nisi for 18-7-56.

(Intd.) .....  
A. D. J.

(37) 7-6-56

Mr. N. M. Zaheed files his appointment as proctor for (1) M. R. Zainudeen (2) M. Sharker Rizan (3) Mr. Noor Mushooda (4) Noor Zahira the Respondents and consent to their being substituted in place of the 10th deft deceased. 30

Proctor for petitioner received notice.  
Substitute heirs.

(Intd.) .....  
A. D. J.

(38) 18-7-56

Mr. A. R. M. Razeen for 13 Defendant Appellant.  
Vide Journal Entry (37) heirs of 10 Defendant dead substituted.

Forward Record to Supreme Court.

(Intd.) .....  
A. D. J. 40

21-10-56

Briefs posted to Proctors.

(Intd.) .....

(39) 21-9-57

The Registrar, Supreme Court returns record stating that the 13th Defendant Appellant is dead and steps may be taken to substitute the heirs as early as possible and to return the record.

1. Call case for 9-10-57 for steps with notice to parties.
2. Inform proctors accordingly.

10

(Intd.) .....  
A. D. J.

Proctors informed.

(Intd.) .....

(40) 9-10-57

Mr. Salahudeen for plaintiff.  
Case Called for steps vide Journal Entry of 21-9-57.  
Proctor for Plaintiff-petitioner files petition and affidavit for substitution of the heirs of the 13th defendant-deceased.  
Enter and issue Order Nisi for 20-11-1957.

20

(Intd.) .....  
A. D. J.

(41) 20-11-57

Mr. M. N. M. Salahudeen for plaintiff. Journal Entry (40) Order Nisi not yet entered and issued. Enter and issue Order Nisi now for 29-1-58 finally.

(Intd.) .....  
A. D. J.

(42) 22-11-57

30

Registrar Supreme Court invites attention to his letter No. APN of 20-9-57 and wishes to know the present position of this case. Inform Registrar Supreme Court that Order Nisi has been ordered for 29-1-58 finally.

(Intd.) .....  
A. D. J.

(43) 28-12-57

Proctor for Plaintiff files Order Nisi in the above case and moves for notice on the Respondents,

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60  
—continued.

Order Nisi entered of record. Notice respondents for 29-1-58.

(Intd.) .....  
A. D. J.

(44) 10-1-58

Order Nisi issued on 1—4 Respondents.

(Intd.) .....

(45) 29-1-58

Order Nisi served on 4 respondent.

A. M. M. Marzook is substituted in place of the 13th defendant,  
deceased. He is absent. 10

Not served on 1—3 Respondents.  
Reissue for 19-3-1958.

(Intd.) .....

(46) 14-2-58

Order Nisi extended returnable 19-3-58.

A. D. J.

(47) 14-2-58

Order Nisi reissued 1—3 respondents.

(Intd.) .....

(48) 1-3-58

20

Registrar Supreme Court invites attention to our letter of 29-11-57—  
Journal Entry (42) and requests to know the present position  
of this case.

Inform Registrar Supreme Court that notice of Order Nisi has  
been reissued on 1—3 respondents for 19-3-58.

(Intd.) .....  
A. D. J.

(49) 19-3-58

Mr. M. N. M. Salahudden for Plaintiff.

Order Nisi served on 1 and 2 respondents—resubstitution in place 30  
of 13 defendant, deceased.

- 1. Huzaima
  - 2. Mrs. Huzair Sadiq
- } Absent.

Not served on 3rd respondent.  
Reissue for 28. 5,

(Intd.) .....  
A. D. J.



(50) 7-4-58  
Order Nisi reissued on 3rd Respondent. (Intd.) .....

(51) 28-4-58  
Registrar Supreme Court invites attention to our letter of 4-3-58 and wishes to know the present position of this case.  
Inform Registrar, Supreme Court that notice of Order Nisi has been issued on 3rd respondent for 28-5-58.

(Intd.) .....  
A. D. J.

10 (52) 28-5-58

Order Nisi on 3rd Respondent on being pointed out served.

Affidavit on 6/8. (Intd.) .....

(53) 11-6-58 (Intd.) .....

Proctor for Plaintiff files affidavit from plaintiff's agent and as Order Nisi has been served on respondents moves that they be substituted in place of the 13th defendant, deceased, and the record forwarded to Supreme Court.

- 1. Substitute in place of 13th defendant, dead.
- 2. Forward record to Supreme Court.

(Intd.) .....  
A. D. J.

Substituted as 18—21 defendants.

(54) 20-2-60 (Intd.) .....

Registrar, Supreme Court returns record with Supreme Court judgment. Appeal is dismissed and the judgment of the District Judge be and the same is hereby affirmed subject to the variation that 1/9 share which originally belonged to N. Lahira and which devolved on 9 to 12 Defendants—Respondents will not be subject to the fidei commissum.

It is ordered and decreed that the proceeds of sale of the balance 8/9ths of the property be deposited in Court and would be subject to the fidei commissum.

And it is further ordered and decreed that the 18—21 substituted-Defendants Appellants do pay to the Plaintiff-Respondent, 4—8 Defendants-Respondents, 9th Defendant-Respondent, 10th substituted Defendant-Respondent and 12 Defendant-Respondent the taxed costs of this appeal,

40

No. 1  
Journal  
Entries  
17-9-58 to  
1-12-60.  
—continued.

Call on 9-3-60 for decree and Commission.

(Sgd.) .....  
A. D. J.  
22-2-60.

(55) 17-5-60

As Mr. M. N. M. Salahudeen, Proctor for Plaintiff in this case is dead, Mr. M. I. H. M. Sally, Proctor files his proxy on behalf of Plaintiff and moves that same be accepted.

Accept.

(Sgd.) ..... 10  
A. D. J.  
18-5-60.

(56) 17-5-60

Proctor for plaintiff moves that commission to sell be issued to Mr. W. D. Arnold, Commissioner, Colombo.

Allowed.

(Sgd.) .....  
A. D. J.  
18-5-60.

(57) 18-5-60

20

Proctor for plaintiff moves to file decree for sale and commission.

Decree entered of record.

(Sgd.) .....  
A. D. J.  
21-5-60.

(58) 30-5-60

Commission issued to Mr. W. D. Arnold returnable 31-8-60.

(Intd.) .....  
30-5-60.

(59) 1-6-60

30

Commissioner files conditions of sale, mode of advertisement and probable cost of same. He further files his valuation report of the property.

1. Conditions of sale, mode of advertisement approved.
2. Commissioner to give notice of valuation to proctors and parties for 15-6-60.
3. Call case on 15-6-60 for consideration of valuation.

(Sgd.) .....  
A. D. J.  
3-6-60, 40

(60) 9-6-60

Commissioner tenders notice of valuation served on Proctors for plaintiff, 1, 2, 4 to 8 defendants and 9th defendant. He further files Postal Receipts in proof of posting valuation reports to the parties unrepresented by Proctors and on Proctor for 11th defendant.

- 1. File.
- 2. Mention on 15-6-60.

(Sgd.) .....  
A. D. J.  
10-6-60.

<sup>10</sup>  
(61) 15-6-60

Mr. H. M. Sally for plaintiff. Case called on valuation. Proxy of 18—21 defendants filed by Mr. Razeen and objects.

Objections on 3/8.

(Sgd.) .....  
A. D. J.  
15-6-60.

(62) 3-8-60

Objections due—not filed.

<sup>20</sup> File on 10/8.

(Sgd.) .....  
A. D. J.  
3-8-60.

(63) 10-8-60

Mr. H. M. Sally for plaintiff—vide Journal Entry (62).

Objections due—not filed.

File on 12/10.

(Sgd.) .....  
A. D. J.  
10-8-60.

<sup>80</sup>  
(64) 12/22-8-60

Proctor for 18—21 defendants files objections and moves that the case be fixed for inquiry.

Proctor for Plaintiff consents.

- 1. File
- 2. Mention on 12-10-60.

(Intd.) .....  
A. D. J.  
22-8-60.

No. i  
Journal  
Entries  
17-9-58 to  
1-12-60.  
—continued.

(65) 6-9-60

Commissioner moves to tender to Court the Commission issued to him in this case.

File.

(Sgd.) .....  
A. D. J.  
15-9-60.

(66) 9-9-60

Proctor for Plaintiff moves that the returnable date of the Commission issued to Mr. W. D. Arnold be extended for a further 10 period of 3 months.

Extend and reissue commission returnable on 14-12-60.

(Sgd.) .....  
A. D. J.  
11-9-60.

(67) 15-9-60

Commission extended and reissued.

(Intd.) .....

(68) 21-9-60

4th to 8th defendants in this case move to revoke and cancel 20 the proxy granted to Mr. K. Rasanathan Proctor, S. C. Proctor not consented.

(68a) They also move to issue notice on the Proctor to show cause why this Proxy should not be revoked.

Let the signatures be identified.

(Sgd.) .....  
A. D. J.  
22-9-60.

(69) 12-10-60

Mr. H. M. Sally for Plaintiff. Vide Journal Entry (64) case called- 30 Inquiry 25-11-60.

(Sgd.) .....  
A. D. J.  
12-10-60.

(70) 14-10-60

4th to 8th defendants move to revoke the proxy granted by them to Mr. K. Rasanathan, Proctor.

Proctor has not consented.

Signatures of the Defendants indented.

Notice Mr. Rasanathan for 30-11-60.

No. 1  
Journal  
Entries  
17-9-53 to  
1-12-60.  
—continued.

- (Sgd.) .....  
A. D. J.  
14-10-60.
- (71) 14-10-60
- As Mr. K. Rasanathan has refused to sign the motion revoking his proxy, the defendants move to issue notice on Mr. Rasanathan to show cause why his Proxy should not be revoked. Signatures of the 4th to 8th defendants identified. Vide order at Journal Entry (70).
- 10 (Sgd.) .....  
A. D. J.  
14-10-60.
- (72) 2-11-60
- Notice issued on Mr. K. Rasanathan.
- (Intd.) .....
- (73) 25-11-60
- Mr. H. M. Sally for Plaintiff. Mr. A. R. M. Razeen for 18 to 21 defendants. Vide Journal Entry (69).
- 20 Inquiry.  
Vide proceedings.
- (Sgd.) .....  
A. D. J.  
25-11-60.
- (73a) Proceedings filed.
- (Intd.) .....  
1-12-60.
- (74) 30-11-60
- Notice served on Mr. K. Rasanathan. Journal Entry (70) vide motion filed. Objections on 1-2-61.
- 30 (Sgd.) .....  
30-11-60
- (75) 29-11-60
- Registrar Supreme Court calls for the original record in this case as Final leave to appeal to the Privy Council has been granted to the 18th to 21st Defendants—Appellants.
- Forward record.
- (Sgd.) .....  
A. D. J.
- 40 (76) 1-12-60
- Record sent to Registrar, Supreme Court.
- (Intd.) .....
-

## Plaint of the Plaintiff.

IN THE DISTRICT COURT OF COLOMBO.

A. L. Ummu Zaneera alias Shamsunnahal  
of Thihariya, Nittambuwa.

Plaintiff.

No. 6970

Class.

Nature.

Procedure.

Amount Rs. 75,000/-

10

Vs.

1. A. L. Sithy Azeema alias Sithy Nafeesa wife of M. I. M. Abdul Hanan of Maligawatta.
2. A. L. M. Ariff of Thihariya presently of No. 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatta, Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo. 20
5. M. M. Aynul Wadood.
6. M. N. Mohamed Fouze.
7. M. M. Abdul Majeed.
8. M. M. Mohamed Cassim in all of No. 289, Darley Road, Maradana, Colombo.
9. Z. H. Mohamed Nizar of No. 222, Galle Road, Bambalapitiya, Colombo.
- (Dead) 10. Z. H. Mohamed Reza of No. 2, Kansengton Garden, Bambalapitiya, Colombo.
11. A. T. A. Mohideen. 30
12. Puthri Zohara.
- (Dead) 13. A. R. Abdul Majeed of No. 478, Galle Road, Colombo.

Defendants.

- |                           |   |   |    |
|---------------------------|---|---|----|
| (Vide J. E. 37 of 7-6-59) | } | 14. M. R. Zainudeen.  |    |
|                           |   | 15. M. B. Rizen.  |    |
|                           |   | 16. M. R. Noor Mashooda.  |    |
| (Vide J. E. 53)           | } | 17. Noor Zahira. Substituted in place of 10 deft. deceased.               |    |
|                           |   | 18. Huzaima wife of Yoosuf Jallaleen, No. 478, Galle Road, Bambalapitiya. |    |
|                           |   | 19. Mrs. Huzair Sadiq.  | 40 |
|                           |   | 20. A. M. M. Nazick.  |    |
|                           |   | 21. A. M. M. Marzook.   |    |

18—21 defendants are substituted in place of the 13 defendant deceased.

On this 17th day of September, 1953.

No. 2  
Plaint of the  
Plaintiff.  
17-9-53.  
—continued.

The plaint of the Plaintiff abovenamed appearing by M. N. M. Salahudeen, her Proctor states as follows:—

1. The parties reside and the land and premises which are the subject matter of this action are situated at Colombo within the jurisdiction of this Court.

2. Under and by virtue of Deed No. 1082 dated the 3rd day of December 1869 attested by F. C. Loos of Colombo Notary Public, Ibrahim Lebbe Ahamado Lebbe was the owner and was seized and possessed of all that land and premises at one time bearing Assessment No. 50 and presently Nos. 88 and 90 situated at Prince Street in Pettah of Colombo and morefully described in the schedule hereto.

3. By a Deed bearing No. 260 dated the 16th July 1872 attested by J. W. Vendesstraaten of Colombo Notary Public, the said Ibrahim Lebbe Ahamado Lebbe Marikar gifted the said land and premises to his wife Muttu Natchia subject however to the condition "that the said Muttu Natchia shall not sell alienate mortgage or encumber the same or any part thereof or the issues rents and profits thereof or of any part thereof but shall possess and enjoy the same during her natural life and that after her death the same shall devolve on her children begotten by me the said I. L. Ahamado Lebbe Marikar share and share alike or if there be but one child by me begotten alive on such child and thereafter on the lawful issue of such children or child and so from generation to generation under the fidei commissum law of inheritance and further that the said premises or any part thereof shall not be liable for any debt or default of the said Muttu Natchia or of any person or persons lawfully claiming by from or under her and that in the event of dying without leaving any children by me begotten or their lawful issue surviving her "the premises" shall devolve on her heirs under the same condition and restriction provided however that she the said Muttu Natchia her begotten or the person or persons so lawfully claiming as aforesaid may transfer her or his or their interests in the said premises by way of gift or dowry to her his or their lawful heir or heirs but under the same conditions and restrictions as aforesaid.

4. The said Muttu Natchia died many years ago leaving as her heirs her three children namely Candumma, Ansa Umma, and Abdul Rahman each of whom became entitled to an undivided 1/3 share of the said premises in the said Schedule hereto.

5. The said Candumma died several years ago leaving four children, Ahad Mariam, Abdul Carder, and Rahmattumma of whom the said Ahad and Mariam died unmarried long ago and thereafter the said Abdul Carder Rahmattumma became entitled each to an undivided 1/6 share of the said premises.

No. 2  
Plaint of the  
Plaintiff.  
17-9-58.  
—continued.

6. The said Abdul Carder died on the 17th day of January 1916 leaving her children Rabia Umma the 3rd defendant Rameena Umma and Mohamed Enver who died in December 1934. Thus therefore the said Ramina Umma and Rabia the 3rd defendant became entitled each to a 1/12th share of the said premises.

7. The said Rahmattu Umma died about thirty years ago, leaving her surviving two children Umma Shifa and Zaneera Umma the 4th defendant who thus became entitled each to a 1/12th share of the said premises. 10

8. The said Umma Shifa being entitled to an undivided 1/12th share died several years ago leaving M. M. Aynul Wadood the 5th defendant, M. M. Mohamed Fouze the 6th defendant, M. M. Abdul Majeed the 7th defendant and M. M. Mohamed Cassim the 8th defendant who became entitled each to an 1/4th share.

9. The said Amsa Umma being entitled to an undivided 1/3rd share died about 50 years ago leaving her children Mohamed Nizer the 9th defendant, Mohamed Riza the 10th defendant and Mohamed Razeen who died leaving a child Noor Lahira who thus 20 became each to a 1/9th share.

10. The said Noor Lahira who was entitled to a 1/9th share died some years ago leaving as heirs her husband A. T. A. Mohideen the 11th defendant her mother the 12th defendant her two uncles the 9th and 10th defendants who became entitled under the Muslim law of inheritance the said husband to 1/2 of 1/9th i. e. 1/18th mother to 1/6th of 1/9th i. e. 1/45 and the said two uncles each to 1/45 share.

11. The said Abdul Rahiman being entitled to an undivided 1/3rd share died many years ago leaving him surviving a son Abdul 30 Majeed the 13th defendant who thus became entitled to the said 1/3rd share.

12. The said Ramina Umma referred to in paragraph 10 hereof being entitled as aforesaid to a 1/12th share died on the 18th November 1939 leaving three children Ummu Zaneera alias Shamasunnahar who is the Plaintiff in this case Sithy Azeema alias Ummu Nafeesa who is the 1st defendant and Mohamed Ariff the 2nd defendant. The Plaintiff the 1st and 2nd defendants have thus become entitled to each to an undivided 1/36 share absolutely and unfettered by the conditions in the said last will 40 as they are of the fifth generation.

13. The parties therefore are entitled to the said premises in the following shares:-

The Plaintiff to an undivided  $\frac{1}{36}$  or  $\frac{24}{864}$  Shares.  
The 1st defendant to an undivided  $\frac{1}{36}$  or  $\frac{24}{864}$  „



	The 2nd defendant	to an undivided	1/36	or	24/864	Shares.	No. 2 Plaint of the Plaintiff 17-9-53 —continued.
	The 3rd defendant	„ „	1/12	or	72/864	„	
	The 4th defendant	„ „	1/12	or	72/864	„	
	The 5th defendant	„ „	1/48	or	18/864	„	
	The 6th defendant	„ „	1/48	or	18/864	„	
	The 7th defendant	„ „	1/48	or	18/864	„	
	The 8th defendant	„ „	1/48	or	18/864	„	
	The 9th defendant	„ „	7/54	or	112/864	„	
	The 10th defendant	„ „	7/54	or	112/864	„	
10	The 11th defendant	„ „	1/18	or	48/864	„	
	The 12th defendant	„ „	1/54	or	16/864	„	
	The 13th defendant	„ „	1/3	or	288/864	„	

subject to the conditions (Fidei commissum) created by the said Deed No. 260 except as regards the Plaintiff 1, 2 and 3rd defendants and 11th and 12th defendants and as regards a 1/45th share of the 9th and 10th defendants.

14. The said premises are reasonably worth Rs. 75,000/-.

20 15. The parties to this action and their predecessors in title have been in the undisturbed and uninterrupted possession of the said premises for a period of over 10 years by a title adverse to and independent of that of all others and they therefore claim the benefit of prescriptive possession.

16. Common possession is inconvenient partition is impracticable and a sale therefore under the partition act is desirable.

30 Wherefore the Plaintiff prays:- That the Court be pleased.  
(1) To declare that the Plaintiff and the Defendants are entitled to the said premises in the shares set out in paragraph 13 above.  
(2) That property be directed to be sold in terms of the Partition Act and the proceeds brought into Court to be dealt with by Court. (3) For cost and for such other and further relief as to this Court shall seem meet.

(Sgd.) M. N. M. SALAHUDEEN,  
Proctor for Plaintiff.

#### THE SCHEDULE ABOVE REFERRED TO:-

40 All the house and garden at one time bearing Assessment No. 52 presently Nos. 88 and 90 situated in Prince Street in the Pettah of Colombo within the Municipality and District of Colombo Western Province and bounded on the North by the house of Paul Chetty East by the house of Mr. Wanterz on the South by the X Street (3rd Cross Street) and on the West by the house of Mr. Kern containing in extent forty-three one hundredth square perches (AO-RO-P11 34/100).

(Sgd.) M. N. M. SALAHUDEEN,  
Proctor for Plaintiff.

No. 2  
Plaint of the  
Plaintiff  
17-9-58  
—continued.

DOCUMENTS FILED WITH THE PLAINT

1. Pedigree marked Letter "A"
2. Abstract of Title marked Letter "B"

(Sgd.) M. N. M. Sulahudeen.

Proctor for Plaintiff.

DOCUMENTS RELIED ON BY THE PLAINTIFFS

Deeds and Documents referred to in the Plaintiff.

(Sgd.) M. N. M. Sulahudeen.

Proctor for Plaintiff.

True copy of Plaintiff in case No. 6970/P.

10

(Sgd.) M. N. M. Sulahudeen.

Proctor for Plaintiff.

---

No. 3.

No. 3  
Commission  
Issued to  
S. Rajendra.  
Licensed  
Surveyor  
19-11-58.

COMMISSION ISSUED TO S. RAJENDRA,  
LICENSED SURVEYOR.

COMMISSION

IN THE DISTRICT COURT OF COLOMBO.

A. L. Ummu Zaneera alias Shamsunnahar  
of Thihariya, Nittambuwa.

*Plaintiff.*

20

No. 6970/P.

Vs.

1. A. L. Sithy Azeema alias Sithy Nafeesa wife of M. I. M. Hanan of Maligawatta.
2. A. L. M. Ariff of Thihariya, presently of No. 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatta, Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo,

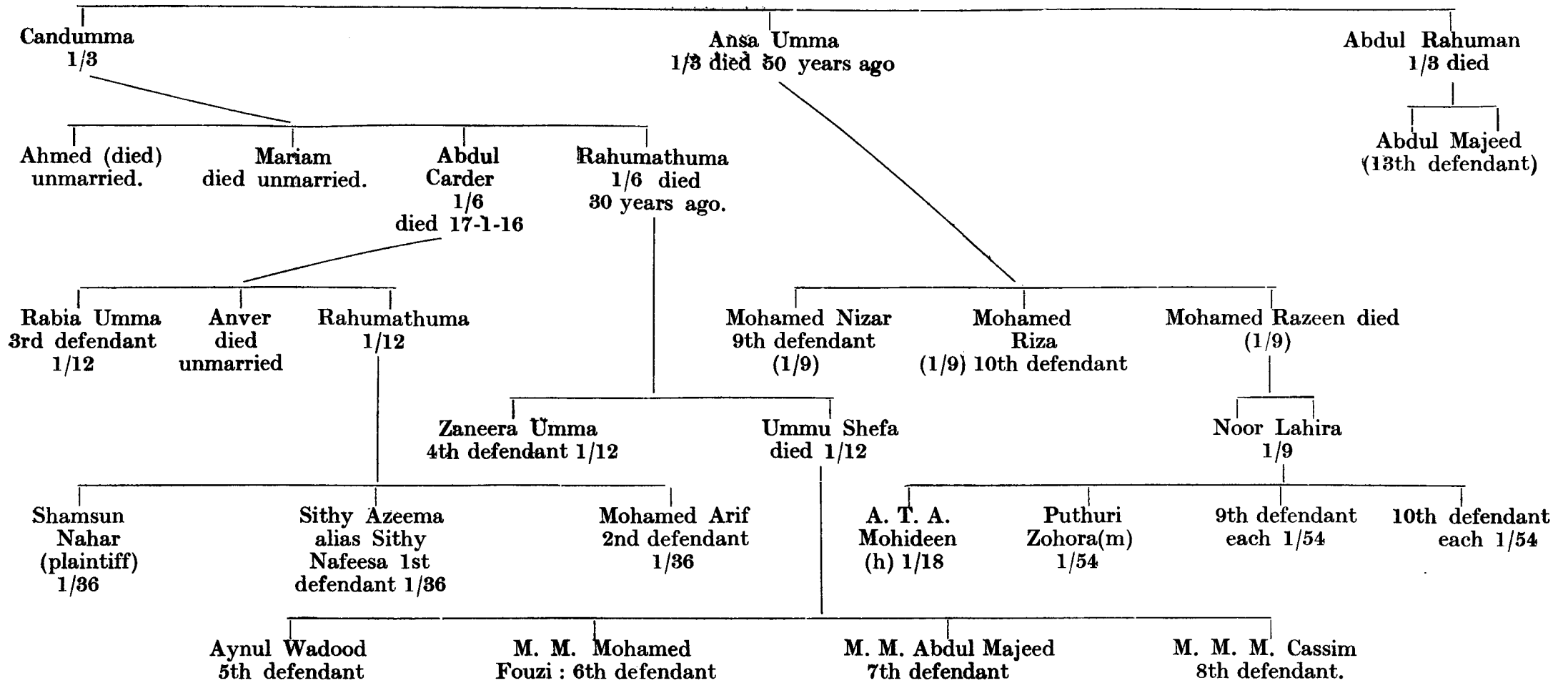
30

**PEDIGREE "A"**

All that house and garden bearing formally assessment No. 50 and presently No. 88 & 90 Prince Street, Pettah.

Ibrahim Lebbe Ahamado  
 Lebbe owner under Deed No. 1082 of 3-12-6-9-  
 F. C. Loos, N. P.  
 G <sup>200</sup> <sub>16-7-72</sub> J. W. Vanderstrehan N. P.

Muthu Natchia Subject to a fidei Commission in favour of her children from generation to generation share and share alike.



Colombo 9th day of September 1953.

(Sgd.) M. N. M. SALAHUDEEN,  
 Proctor for Plaintiff.

ABSTRACT OF TITLE MARKED " B "

Assessment No. 50 and presently Nos. 88 and 60, Prince Street, Pettah, Colombo.

No. and Date of	Nature	Notary	Grantor	Grantee	Premises	Whether whole or part	If Registered.	Original or copy
1082 8-12-69.	Transfer	F. C. Loos		Ibrahim Lebbe Ahamado Lebbe	All that House and garden at one time No.50, presently Nos. 88 & 90, Prince Street, Pettah, Colombo.	Whole	No.	Copy
260 16.7.72	Gift	J. W. Vendesstraaten	Ibrahim Lebbe Ahamado Lebbe	Muttu Natchia	-do-	-do-	-do-	-do-

Colombo 9th day of September, 1958.

(Sgd.) Mr. N. M. SALAHUDEEN,

Proctor for Plaintiff.

PLAN No. 511 AND FIELD NOTES.

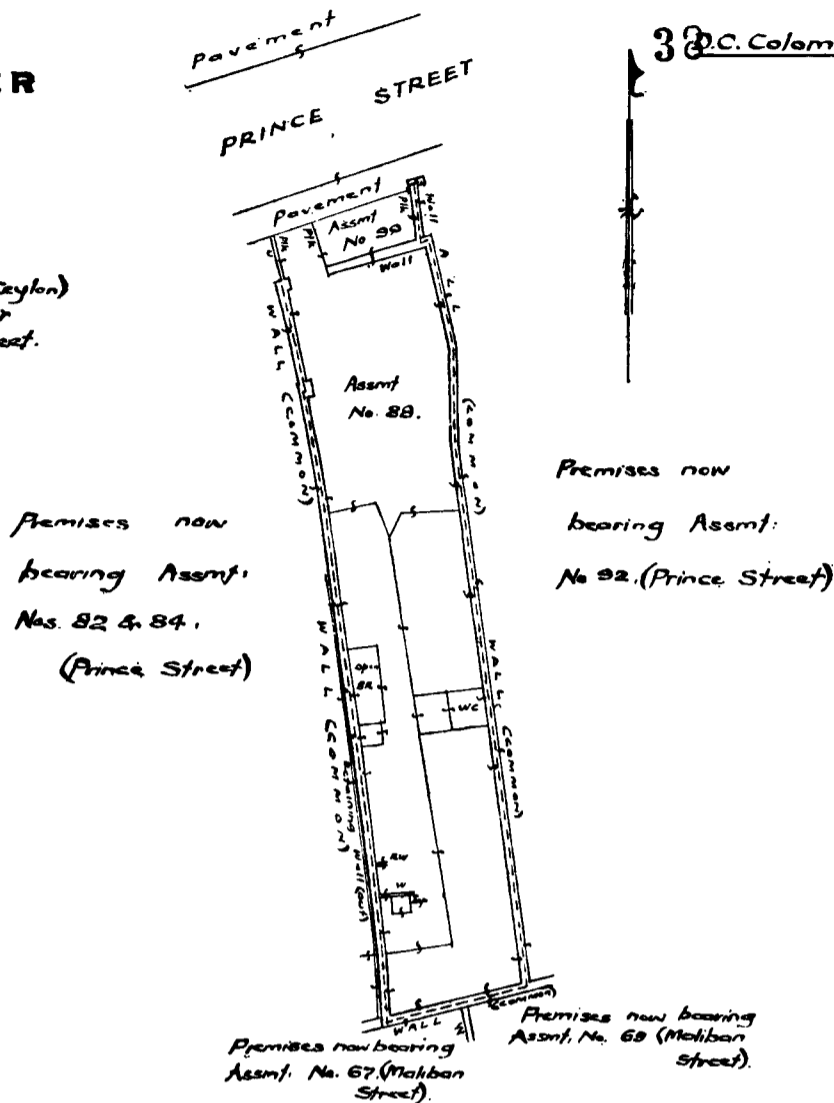
True Copy by:-

**A. F. SAMEER**  
LICENSED SURVEYOR AND  
LEVELLER  
COURT COMMISSIONER

S Rajendra A.S.I.(Ceylon)  
Licensed Surveyor  
99, Hultsdorf Street,  
Colombo.

D.C. Colombo Case No. 6970/PN  
**No. 511.**

No. 4  
Plan No. 511  
and  
Field Notes  
—10-1-54.



Reference.

- W : Wall
- Plk : Plank
- RW : Retaining Wall.
- BR : Bath Room.
- WC : Water Closet
- Assmt : Assessment.
- U : Indefinite

Scale of 1/2 Chain to an inch

**Plan**

of an allotment of land with the building standing thereon now bearing

Assessment Nos. 88 and 90 situated along Prince Street

at Pettah within the Municipality and District

of

**COLOMBO**

**Western Province**

Bounded as follows:-

On the North by Prince Street.

" " East by premises now bearing Assmt No 92, (Prince Street).

" " South by premises now bearing Assmt Nos 67 & 69 (Maliban Street).

" " West by premises now bearing Assmt Nos. 82 & 84 (Prince Street).

Containing in Extent  $\frac{A}{0} \frac{R}{0} \frac{P}{12.61}$

(Acre nil Roods nil Perches Twelve point six one)

Surveyed on the 6<sup>th</sup> day of January 1954.

sgd S. Rajendra

Commissioner & Licensed Surveyor.

99 Hultsdorf Street,  
Colombo. 10<sup>th</sup> January 1954.

"TRUE COPY"

*A. F. Sameer*

Hultsdorf, Colombo. 29<sup>th</sup> January 1961.

LICENSED SURVEYOR & LEVELLER  
COURT COMMISSIONER

PLAN No. 511 AND FIELD NOTES.

Premises bearing Assmt Nos. 67 & 69, Maliban Street

No. 4  
Plan No. 511  
and  
Field Notes.  
-10-1-54.

No. 511

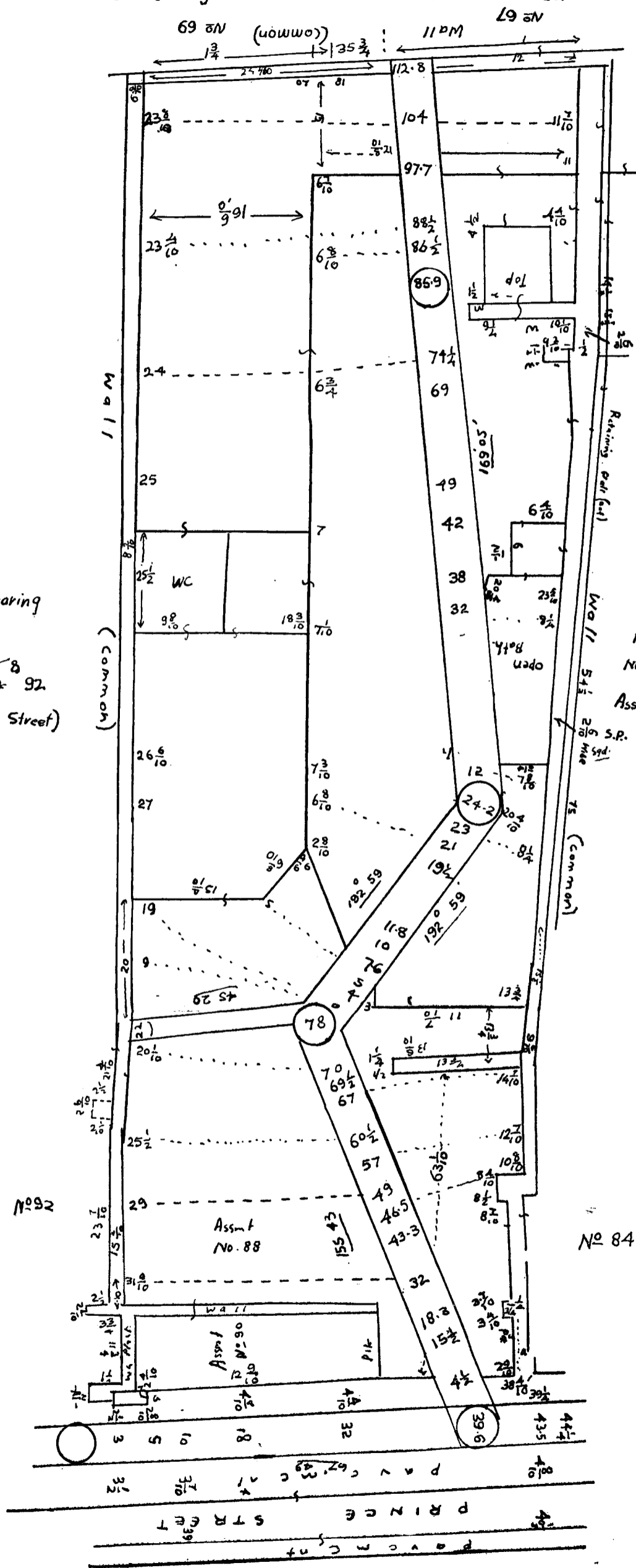
D.C. Colombo  
Case No.  
6970/P.N.

PLAN  
No 511

76

Premises  
now bearing  
Assmt  
No. 82 &  
84 92  
S.P. (Prince Street)

Premises  
Now bearing  
Assmt. No 82  
S.P. 92 & 84  
(Prince Street)



No. 92

Assmt  
No. 88

No 84

PRINCE STREET

PLAN No. 511

REFERENCE.

**W:** Wall  
**WC:** Water Closet  
**RN:** Retaining Wall  
**BR:** Bath Room

I hereby certify that the field notes appearing  
overleaf is a true Copy of my field notes. ✓

(Sgd.) **S. Rajendra,**  
*Surveyed on the 6th day of January 1954.*  
*Commissioner & Licensed Surveyor,*  
*99, Hultsdorf Street, Colombo.*

TRUE COPY

(Sgd.) **A. F. Sameer**  
*Licensed Surveyor & Leveller.*  
*Colombo 29th January, 1961.*

5. M. M. Aynul Wadood.
6. M. M. Mohamed Fouze.
7. M. M. Abdul Majeed.
8. M. M. Mohamed Cassim all of No. 289, Darley Road, Maradana, Colombo.
9. Z. H. Mohamed Nizar of No. 222, Galle Road, Bambalapitiya, Colombo.
10. Z. H. Mohamed Reza of No. 2, Kansengton Garden, Bambalapitiya, Colombo.
- 10 A. T. A. Mohideen
12. Puthri Zohara both of 28, 34th Lane, Wellawatte.
13. A. R. Abdul Majeed of No. 478, Galle Road, Bambalapitiya, Colombo.

*Defendants.*

To S. Rajendra,  
Licensed Surveyor,  
No. 99, Hulsdorf Street,  
Colombo-12.

Whereas an action has been instituted in this Court by the  
20 Plaintiff above-named against the defendants above-named for a  
partition or sale under the provision of the Partition Act. No. 16 of  
1951 of the land and premises fully described in the Schedule  
hereunder written.

And Whereas you are appointed Commissioner to prepare a Plan  
of the said and premises and to make your report verified by affidavit  
Complying the provision of section 18 of the said Act.

Know Ye these Presents Witness that you are Commissioner  
appointed as aforesaid are directed empowered and authorised to proceed  
to the land and premises and with due notice to the parties as required  
80 by the said Act Survey the land and premises, prepare a plan thereof  
and thereupon make your return to Court on or before the 25th day of  
January 1954. Complying with section 18 aforesaid and in terms of  
the provision of the said Partition Act. (Rs. 120.00 survey fees in deposit.)

The Schedule above referred to:— All that house and garden  
at one time bearing Assessment No. (50) presently Nos. 88 and 90 situ-  
ated in Prince Street, in the Pettah of Colombo within the Municipality  
and District of Colombo Western Province and bounded on the north  
by the House of Paulo Chetty East by the House of Mr. Wanterz on  
the South by the X Street (1st Cross Street), and on the West by the  
40 house of Mr. Kern containing in extent Eleven forty-three one  
hundredth square Perches (A0. R0. P11 (43/100).

By Order of Court,

(Sgd.) Illegibly,  
For 2 o/c Administrative Secretary.  
19-xi-53.



Report of S. Rajendra, Commissioner and  
Licensed Surveyor  
IN THE DISTRICT COURT OF COLOMBO

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

No. 6970/PN.

*Plaintiff.*

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M.I. M.  
Hanan of No. 48/22 Maligawatte and 12 others.

10

*Defendants.*

I, Supramaniam Rajendra, Licensed Surveyor of 99, Hultsdorf Street, Colombo, do hereby solemnly, sincerely and truly declare and affirm as follows :—

1. Pursuant to the commission issued to me in the above action, I issued notices to the parties in writing on the 27th day of November 1953, affixed a notice on the land, had tom-tom beaten thereon, proceeded to the land on the 6th day of January 1954 and surveyed it.

2. The 2nd defendant was present, the others were absent. The plaintiff was represented by her father one Mr. S. M. A. Ahmed of Thihariya, Nithambuwa. The 1st defendant was represented by her husband, Mr. M. I. M. Hanan of No. 84/22, Maligawatte Road, Colombo.

3. The boundaries were pointed out by the 2nd defendant and by Messrs. S. M. A. Ahmed and M. I. M. Hanan, which I surveyed and is depicted in plan No. 511 dated 10th January 1954 which is submitted herewith together with a copy of my field notes.

4. I beg to state that the entire premises is one building although two assessment numbers have been assigned to it. Number 90 is given to the first room only facing Prince Street, while the rest of the building is numbered 88. In the event the Court orders a sale of the land, it will not be possible to sell the land as two lots.

5. **Valuation.**—The land contains no cultivations. The assessed value of premises No. 88 is Rs. 1,500/- and No. 90 is Rs. 400/- per annum. Basing the value of the land on recent sales and its situation in a business centre, I value the premises bearing assessment Nos. 88 and 90, Prince Street at Rs. 55,000/-.

(Sgd.) S. RAJENDRA,  
*Commissioner and Licensed Surveyor.*

Signed and affirmed to at Colombo  
on this 27th day of January 1954.

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Before me.

Sgd. L. H. de KRETZER,  
*Commissioner for Oaths.*

Statement of Claim of 9 and 10 Defendants.  
IN THE DISTRICT COURT OF COLOMBO

No. 6  
Statement of  
Claim of 9 & 10  
Defendants.  
25-3-54.

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff.*

Vs.

No. 6970/P.

9. Z. H. M. Nizar,

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10. Z. H. M. Rizan and others all of Colombo.

*Defendants.*

This 25th day of March 1954.

The Statement of claim of the 9th and 10th defendants abovenamed appearing by N. M. ZAHEED and his Assistant M. HAMZA ZAHEED, their Proctors, states as follows :—

1. These defendants admit the averments in paragraphs 1, 2, 3, 4, 9, 14, 15 and 16 of the plaint.

2. These defendants are not aware of the averments in paragraphs 5, 6, 7, 8 and 12 of the Plaint.

20 3. Answering to paragraph 10 of the plaint these defendants state that Noor Lahira died without children whereupon they became entitled to an undivided one third (1/3) share of the said premises subject to the conditions set forth in paragraph 3 of the Plaint.

Wherefore these defendants pray :—

(a) that they be declared entitled to an undivided one third (1/3) share of the said premises subject to the aforesaid conditions;  
(b) that the said premises be sold and the proceeds divided among the plaintiff and the defendants ;

(c) for costs and

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(d) for such further and other relief in the premises as to the court shall seem meet.

(Sgd.) N. M. ZAHEED.  
*Proctor for 9th and 10th defendants.*

**Answer of 1 and 2 Defendants**  
**IN THE DISTRICT COURT OF COLOMBO**

A. L. Ummu Zaneera *alias* Shamsunnahar of  
 Thihariya, Nithambuwa.

No. 6970/P.

*Plaintiff.*

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa and others.

*Defendants.*

On this 27th day of March 1954.

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The answer of the 1st and 2nd defendants appearing by K. Velayuthan their Proctor states as follows :

1. These defendants admit the averments pleaded in the plaint.
2. These defendants also admit the shares allotted to these defendants in the plaint.

Wherefore these defendants pray.

- (a) That judgment be entered for the Plaintiff and these defendants as prayed for in the Plaint.
- (b) for cost and
- (c) for such other and further relief as to this court shall seem to meet.

(Sgd.) K. VELAYUTHAN.  
*Proctor for 1st and 2nd defendants.*

**Answer of 13th Defendant.****IN THE DISTRICT COURT OF COLOMBO**

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

No. 6970/P.

*Plaintiff.*

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa and others.

*Defendants.*

<sup>10</sup> On this 30th day of March 1954.

The answer of the 13th defendant abovenamed appearing by A. R. M. Razeen his Proctor states as follows :—

1. This defendant admits the averments in paragraphs 1, 2 and 14 of the plaint.

2. Save and except as hereinafter expressly admitted, this defendant denies all and singular the remaining averments in the plaint.

3. Answering paragraph 3 of the plaint, this defendant states that the said paragraph does not fully set out the relevant terms and conditions of the said deed No. 260.

<sup>20</sup> 4. Answering paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the plaint, this defendant :—

(a) admits the death of the persons mentioned therein and the identity of their heirs named therein, but

(b) denies the devolution of the shares in the property and premises, which are the subject matter of this action, as set out therein, and

(c) puts the plaintiff to the strict proof of the dates of the deaths of Rameena Umma, Ummu Shifa, Rahumath Umma and Noor Lahira referred to in the plaint, and the dates of the

<sup>30</sup>

5. Further answering this defendant states :—

No. 8  
 Answer of  
 13th Defendant  
 30-3-54  
 —continued.

- (a) that the said deed of gift No. 260 referred to in paragraph 3 of the plaint did not create any fidei commissary restriction at all, or in any event, any such restriction binding on any persons other than the said Muttu Natchia;
- (b) that the gift-over (if any) created by the said deed of gift No. 260 is void and of no effect, in as much as the said gift was not accepted by or in behalf of the fidei commissaries, or as required by law ;
- (c) that the said Muttu Natchia during her lifetime, as she lawfully might put this defendant in complete possession of the said property and premises, and this defendant has thereafter been in sole and exclusive, undisturbed and uninterrupted possession of the said property and premises by a title adverse to and independent of the parties to this action and of all others and has acquired a prescriptive title to the entirety of the said property and premises, or at least to the shares (if any) of the plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th, 11th and 12th defendants and the shares of the 9th and 10th defendants (if any) alleged to have been derived from the said Noor Lahira; 20
- (d) That this defendant has in any event acquired a prescriptive title to the entirety of the said property and premises as against the plaintiff and the other defendants :
- (e) that the parties being governed by the Muslim Law, the heirs of the several persons whose devolution of title is referred to in the plaint have not been correctly set out.

6. This defendant further states that he has spent a sum of Rs. 1,500/- in laying drainage to the said premises, and in the event of a partition being ordered, this defendant is entitled to compensation in respect of the cost of laying the said drainage. 30

7. As matters of law, this defendant states :—

- (a) that the plaintiff is not a co-owner of and has not title whatsoever to, the said property and premises and is accordingly, not entitled in law to file the present action.
- (b) that no fidei commissum which ensures to the benefit of the plaintiff is created by the said Deed No. 260 referred to in paragraph 3 of the plaint ;
- (c) that any fidei commissum purported to be created by the said Deed No. 260 is void and of no effect for want of acceptance by or on behalf of the fidei commissaries or as required by law. 40

Wherefore this defendant prays :—

No. 8  
Answer of  
13th Defendant.  
30-3-54.  
—continued.

- (a) that the plaintiff's action be dismissed,
- (b) that this defendant be declared entitled to the entirety of the said property and premises described in the schedule to the plaint, or to such shares as he is found to be entitled to therein in accordance with the averments in this answer,
- (c) that in the event of a partition or sale being ordered this defendant be declared entitled to a sum of Rs. 1,500 being cost of laying drainage to the said premises,
- 10 (d) for costs, and
- (e) for such other and further relief as to this Court shall seem meet.

(Sgd.) A. R. M. RAZEEN,  
*Pocctor for 13th defendant.*

*Settled by*  
Mr. E. R. S. R. Coomaraswamy,  
*Advocate*

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No. 9

**Affidavit of A. L. M. Ariff**

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**IN THE DISTRICT COURT OF COLOMBO**

No. 9  
Affidavit of  
A. L. M. Ariff.  
28-6-54.

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff.*

No. 6970/P.

Vs.

A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M.  
Abdul Hanan of Maligawatte, and others.

*Defendants.*

I, A. L. M. Ariff presently of No. 122 New Moor Street, Colombo being a Muslim do hereby solemnly sincerely and truly declare affirm and say as follows :—

1. I am a brother of the plaintiff and I attend to the service of summons in the above case.

No. 9  
Affidavit of  
A. L. M. Ariff.  
28-6-54.  
—continued.

2. The 4th, 5th, 6th, 7th and 8th defendants reside at premises No. 289 Darley Road, Maradana, Colombo. These defendants intervened in case No. 6674/P of this Court and they have given their address in their petition or Intervention as 289 Darley Road. They were served with summons in case No. 6725/P of this Court.

3. These defendants are aware of the above action and I asked the 6th defendant to cause a proxy to be filed in respect of all of them who are all living together or to receive the summons but they wilfully avoid service of summons and it is not possible to effect personal service.

4. I beg that the Court be pleased to order substituted service of 10 summons on them by affixing same to an out wall of premises No. 289 Darley Road, Maradana.

The foregoing affidavit having been read over by the affirmant hereto the same was signed and affirmed to at Colombo on this 28th day of June 1954.

} (Sgd.) A. L. M. ARIFF.

Before me. 20

(Sgd.) .....  
Commissioner of Oaths.

**No. 10**

**Issues Framed**

14-2-55

No. 10  
Issues Framed.

Defendants 2, 3, 6, 8, 9, 10, 11 and 12 present.

Mr. Adv. D. M. Weerasinghe with Adv. Ameen for Plaintiff instructed by Mr. Salahudeen.

Mr. Adv. C. G. Weeramanthry for 11th defendant instructed by Mr. Cassim. 30

Mr. E. R. S. C. Coomaraswamy with Mr. Daya Perera for 13th defendant instructed by Mr. Razeen.

Mr. K. Velanthan for 1st and 2nd defendants.

Mr. Adv. A. C. M. Uvais for 9th and 10th defendants instructed by Mr. Zaheed.

Mr. Adv. H. Rodrigo for 4th—8th defendants instructed by Mr. Rasanathan.

Mr. Coomaraswamy opens his case and states that he filed answer with regard to a certain deed. He admits that certain people were the children

of so and so. On the question of facts, if there is a fidei commissum, then there will be certain questions of age of the plaintiff. The question of fact is whether the 13th defendant has been in possession of the premises, and the question of improvements arises. He says that from the time of the person who donated, the possession was in 13th defendant's father and himself.

Mr. Weerasinghe admits that the 13th defendant's father has been in possession from prior to 1916, and that the 13th defendant came into possession in 1916.

10 Mr. Coomaraswamy states that on the question of compensation he claims Rs. 1,500.

Plaintiff concedes that the amount due to the 13th defendant is Rs. 1,000/-.

Mr. Coomaraswamy frames the following points of contest :

1. Did the deed of gift No. 260 of 16th July 1872 referred to in paragraph 3 of the plaint —

(a) create any fidei commissum restricting it, or

(b) in any event, create any such restriction binding on any person other than Muttu Natchia ?

20 2. Is the gift, if any, created by the said Deed No. 260 void and of no effect for want of acceptance by or on behalf of the fidei commissaries ?

3. (a) Did Muttu Natchia during her lifetime put the 13th defendant in occupation of the premises in suit ;

(b) Has 13th defendant been in exclusive possession of the premises thereafter and acquired a prescriptive title to the entirety or to the share of the plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th, 11th and 12th defendants and the share of the 9th and 10th defendants if any ?

4. Has 13th defendant in any event acquired prescriptive title  
30 to the entire property ?

5. (a) Are the parties governed by Muslim Law.

(b) If so, are the heirs of deceased persons and their shares not correctly set out in the plaint ?

6. (a) Is plaintiff a co-owner or has she any title to the property ?

(b) If not can she maintain this action.

7. Does deed No. 260 create any fidei commissum which ensures to the benefit of the plaintiff ?



No. 10  
Issues Framed.  
—continued.

8. If points 2, 3, 4, 5 or any of them be answered in the affirmative and or points 1, 6 and 7 or any of them be answered in the negative, can plaintiff maintain the present action.

Mr. Weerasinghe accepts the points of contest.

Mr. Weeramanthry states that the point at issue is whether the 11th defendant gets the share that has been allotted to him in the plaint, and frames the following point of contest :

9. Is the 11th defendant, entitled to the 1/18th share allotted to him in the plaint as against the 9th and 10th defendants ?

Mr. Uvais adds the following point of contest:

10

10. On the death of Lahira, does his share devolve on the 9th and 10th defendants only ?

Mr. Weeramanthry says that the point of contest framed by him may be dropped in view of what has been raised by counsel for the 9th and 10th defendants ?

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## No. 11

### Plaintiff's Evidence

#### Plaintiff's case

Mr. Weerasinghe calls :

**A. L. M. Ariff.**—32, Insurance Agent, 122, New Moor Street, Colombo.20

I am the 2nd defendant, a brother of the Plaintiff. The land sought to be partitioned is depicted in plan No. 511 dated 6th January 1954, filed of record and marked X. By deed No. 1082 of 3rd December 1869 marked P1, Ibrahim Lebbe Ahamado Lebbe became entitled to the premises sought to be partitioned. At that time it bore assessment No. 50 and now it bears assess- ment No. 88 and 90. Ibrahim Lebbe Ahamado Lebbe by deed No. 260 of 16th July 1872 marked P 2 gifted the said property to his wife Muttu Natchia, subject to the conditions therein mentioned.

Muttu Natchia died leaving her children by the said Ibrahim Lebbe Ahamado Lebbe-Candumma, Ansa Umma and Abdul Rahiman. Candumma 30 died leaving 4 children Ahamed, Abdul Cader, Mariam and Rahamathuma, of whom Ahamed and Mariam died unmarried leaving their shares over. Abdul Cader died somewhere in 1916 leaving 3 children, Rabia Umma the 3rd defendant, Rameena Umma my mother and Mohammed Anver. Mohammed Anver died somewhere in December 1934 without children.

No. 11  
Plaintiff's  
Evidence  
—  
Evidence of  
A. L. M. Ariff—  
Examination.

Rameena Umma died on 18th November 1939—I produce the death certificate marked P 3—leaving as her heirs 3 children—myself, Ummu Zaneera the plaintiff and Sithy Azeema the 1st defendant. I produce marked P 4 the birth certificate of the plaintiff which shows that she was born on 2nd June 1932. I also produce marked P 5 the birth certificate of Sithy Azeema my sister the 1st defendant born on the 30th January 1925. I have not been able to get my birth certificate but I was born in 1923.

No. 11  
Plaintiff's  
Evidence.  
—  
Evidence of  
A. L. M. Ariff—  
Examination.  
—continued.

Rahamathuma, one of the children of Candumma died leaving two children Umma Shifa and Zaneera Umma the 4th defendant Umma Shifa died leaving 4 children, Aynul Wadood the 5th defendant Mohammed Fouze the 6th defendant Abdul Majeed the 7th defendant and Mohammed Cassim the 8th defendant.

Ansa Umma the daughter of Muttu Natchia died leaving 3 children, Mohammed Nizer the 9th defendant Mohammed Riza the 10th defendant and Mohammed Razeen. Mohammed Razeen died leaving an only child Noor Lahira who died leaving her husband A. T. A. Mohideen the 11th defendant and her mother Puthri Zohara the 12th defendant and her paternal uncles Mohammed Nizar the 9th defendant and Mohammed Riza the 10th defendant.

20 The last child of Muttu Natchia, Abdul Rahiman, died leaving an only child Abdul Majeed the 13th defendant. All the defendants support the plaintiff except the 13th defendant.

Common ownership is impossible and I want a partition of the property. There is a building on the land. I state that this property cannot be partitioned and must be sold. The building is in common.

XXD (By Mr. Coomaraswamy)

I am married. I married in August 1954. Plaintiff is not married. 1st defendant married somewhere in 1949.

Evidence of  
A. L. M. Ariff—  
Cross Examination.

30 Q. You know who is occupying these premises?  
A. A. R. Abdul Majeed the 13th defendant is occupying these premises.

Q. Has he not rented it out to any body?  
A. He has rented it out and he is collecting the entire rent.

From the time I became aware of things he has been collecting the rent.

(Intd.) .....  
Additional District Judge.

Plaintiff's case closed reading in evidence P1—P5.

Plaintiff admits that from 1916 the 13th defendant collected the rents.

40 Further hearing 31/3.

(Intd.) .....  
Additional District Judge.

**Defendants' Evidence**

24th January 1956.

*D. C. 6970/P.*

Mr. D. M. Weerasinghe with Mr. Ameen for Plaintiff instructed.

Mr. N. M. Zaheed for 9th and 10th defendants.

Mr. C. G. Weeramantry for 11th and 12th defendants, instructed.

Mr. E. R. S. R. Coomaraswamy with Mr. Candappa for 13th defendant instructed.

2nd and 12th defendants are present. Other parties absent. 10

The parties agree that the evidence of the 2nd defendant, the brother of the plaintiff, recorded on 14-2-55 be read.

Mr. Zaheed for the 9th and 10th defendants now accept the position that on the death of Noor Lahira her interests devolved on her heirs, as set out in the 11th defendant's statement.

Mr. Weeramantry calls.

**A. T. M. Muhaideen.**—Affirmed 55. Attorney of Wahid Bros.

Evidence of  
A. T. M. Muhaideen—  
Examination.

I am the 11th defendant in this case. My wife was Noor Lahira, who was entitled to certain shares in this land. Noor Lahira was the daughter of Mohammed Razeen. She died in the year 1927. I have her death certificate, which I produce marked 11 D1. She died on 16th December, 1927. I have no children by her. Her heirs are myself and her mother the 12th defendant. Noor Lahira left two paternal uncles, the 9th and 10th defendants.

*XXD*—Nil.

(Intd.) .....

*D. J.*

24-1-56.

Mr. Weeramantry closes his case reading in evidence 11 D1. It is agreed that the mother should get 1/3rd, the 11th defendant 1/2, and the 80 balance should go to the two uncles.

Mr. Coomaraswamy states that he is not leading any oral evidence.

## No. 13

## Addresses to Court.

No. 13  
Addresses to  
Court.

Mr. Coomaraswamy addresses Court: *Vide* wording of the fidei commissum deed P 2. Reference to fidei commissum in the deed is vague, and it is not sufficient in this context. Unless the Court holds that there is an acceptance by and on behalf of the fidei commissary, there is no other evidence. If it is proved that it is not sufficient acceptance, then there is no fidei commissum. There is no fidei commissum for successive generations. There is no prohibition against alienation so far as the other children are  
10 concerned. Where prohibition has been imposed, it should be repeated. If it is not repeated, then there is no fidei commissum. There is no deed in favour of the 13th defendant. *Styne on Wills, 2nd, Edition, page 352. The report is in 1944 O.P.D. 249. 27, C.L.W. 49, passage at page 52. 54 N.L.R. 130, 2 N.L.R. 233, 48 N.L.R. 505.* Merely saying 'generation to generation' in the case of fidei commissum is a vague way of putting it.

Re acceptance: *53 N.L.R. 217, also at page 225 onwards.* If the Court holds that there was no acceptance, and therefore there was no fidei commissum, then the whole thing fails, and it will come under the Muslim Law. If there was a fidei commissum unicum and not a fidei  
20 commissum multiplex, then it can come down upon Muslim Law. In both cases, the 13th defendant will get half.

On the first day the case came up for trial, all the parties agreed to the admission made by Mr. Weerasinghe.

(Mr. Weerasinghe says that Mr. Coomaraswamy discussed the matter with him both in Court and outside Court.

Mr. Weeramantry says that this took place long ago and he cannot remember it, but he would accept it if Mr. Coomaraswamy says so.)

*Vide 46 N. L. R. 540-head note.*

Mr. Weeramantry addresses Court and says that his case is the same as  
30 that of the plaintiff, and that he is entitled to costs. He says the 11th and 12th defendants, his clients, would get their shares free of the fidei commissum as they are in the fourth degree of succession. He says he would associate himself with what Mr. Weerasinghe would submit.

*Mr. Weerasinghe addresses Court:* The case reported in *54 N.L.R. 130* is in appeal in the Privy Council. P 2 is a deed of gift given to Muttu Natchia. According to the terms of the deed, she could not do anything with the property; on her death it was to go to her children. If she had one child, it was to go to that child. If there were more than one, it was to go to their children from generation to generation. The plaintiff and the  
40 11th and 12th defendants will get their shares free of the fidei commissum. *Vide 16 N.L.R. 6, 9 S.C.C. 33, and 12 N.L.R. 1.* In this case the words 'from generation to generation' under the bond of fidei commissum makes it perfectly clear that all generations were to take it subject to that restriction created by the deed. The very use of the words 'fidei commissum' shows it.

No. 13  
Addresses to  
Court.  
—continued.

Re acceptance : It has been accepted only by Muttu Natchia ; it has not been accepted on behalf of the fidei commissaries. There is no evidence whether they were born or alive. This deed is clearly intended to benefit this family. It is intended to benefit the children of the donor. *Vide 52 N.L.R. 169. Also 47 N.L.R. 301.* Once Muttu Natchia accepted, there is sufficient acceptance. In the 53 N. L. R. case cited by Mr. Coomaraswamy, after the death of the donee the land was to devolve on her lawful issue. It is not contemplated that it should be in the interests of the family. If the Court holds that there is acceptance, and if there is a valid fidei commissum, the Roman Dutch Law would apply, and not the Muslim Law. Fidei Commissum is not a restriction contemplated by the Muslim Law. *Vide, 47, N.L.R. 19, and 43 N.L.R. 193.*

Re prescription : Plaintiff was born on 2-6-32 and the 1st defendant was born on 30-1-25. The 13th defendant could not have prescribed against the plaintiff or the 1st defendant. *Vide also P 3 the death certificate of the mother.* Even if the Court holds that there is no fidei commissum, the 10th defendant is a co-owner. His possession is referable to lawful title. He is entitled to possess. He is a co-heir. If Muttu Natchia sold the property to an outsider and he entered into possession of the whole property believing himself to be the owner, the position would be different. 20

A partition of this property is not practicable. Judgment on 20-2-56.

(Intd.) .....  
*District Judge.*  
24-1-56.

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No. 14

### Judgment of the District Court

#### JUDGMENT

D. C. 6970/P.

This is an action to partition an allotment of land bearing assessment Nos. 88 and 90 situate in Pettah, Colombo, and depicted in plan No. 511 dated 30 10th January, 1954, made by Mr. S. Rajendra on a commission issued to him in the case. Admittedly at one time one Ibrahim Lebbe Mohammodu Lebbe was the owner of this land. He by deed No. 260 of 16th July, 1872, gifted the land to his wife Muttu Natchia. The main dispute in this case is whether this deed created a valid fidei commissum, and if so whether the fidei commissum terminated with the death of the donee Muttu Natchia or continued to operate in favour of her decendants for the full period of four generations. Muttu Natchia died leaving three children, Candumma, Ansa Umma and Abdul Rahiman. The plaintiff is a great grand-daughter of Candumma, and the 13th defendant, who is the contesting defendant in this case, is the only 40 child of Abdul Rahiman. The material words in the deed of gift are the following :—

No. 14  
Judgment  
of the  
District  
Court.  
20-2-56.

“ that the said Muttu Natchia shall not sell, alienate, mortgage or encumber the same or any part thereof or the issues, rents and profits thereof, or of any part thereof, but shall possess and enjoy the same during her natural life, and that after her death the same shall devolve on her children begotten by me the said Ibrahim Lebbe Mohammadu Lebbe Marikkar share and share alike, or if there be but one child by me begotten alive on such child, and thereafter on the lawful issue of such children or such child and so from generation to generation under the fidei commissum law of inheritance.”

10 In this deed there is a concurrence of all the conditions which go to create a valid fidei commissum, viz. (1) the usual prohibition against alienation, (2) the expressed intention of the donee that the property shall devolve under the fidei commissum law of inheritance, (3) the designation of the fidei commissary as descendants from generation to generation. Mr. Coomaraswamy for the 13th defendant points out that only Muttu Natchia is restrained from alienating the property and that there is no such prohibition imposed on her descendants, and, therefore, he states, the fidei commissum binds only Muttu Natchia, and that her descendants inherit the property free of the fidei commissum. It is well settled law that  
20 a fidei commissum can be created without an express prohibition against alienation. Mr. Coomaraswamy’s argument if I understood it correctly, is that when once a prohibition against alienation is imposed by the donor on the fiduciary donee, a similar restraint against alienation must be imposed on the succeeding beneficiaries also to bind them. He has not referred me to any authority for this proposition, nor am I aware of any. A last will containing the following clause :—

30 “ That they shall not sell, mortgage or in any other manner alienate the house and premises but that the same shall be always held and possessed by them and their heirs in perpetuity under the bond of fidei commissum ”

was held to create a fidei commissum for the full period of four generations—*vide* Sellambaram *vs.* Perumal, 16, N.L.R. 6. In the Government Agent, Central Province *vs.* Silva, 24 N.L.R. 62 a deed of gift which prohibited the immediate donees from alienating the property provided that after their death it should devolve on their children, grand-children or their lawful heirs, and this deed was held to create a valid fidei commissum binding on the children and the grand-children of the donees. It would be seen that in both these cases, although there was a prohibition against alienation imposed on the immediate donee or donees, there was no restriction against  
40 alienation on the subsequent fiduciaries.

It was also argued that from “generation to generation” in this deed of gift is not a clear indication of the persons to be benefited. In *De Saram vs. Hadjiar*, 45 N.L.R. 265, Hearn J. drew attention to the absence of such words as from generation to generation in the last will considered in that case, implying thereby that if such words were found in that last will there would have been a clear indication of the beneficiaries. In my Judgment, there are all the requisites of a valid fidei commissum which operates for four generations in the deed of gift under consideration.

This gift had been accepted only by Muttu Natchia. It was submitted that in the absence of an acceptance of the gift by the fidei commissary or by anybody on their behalf, the children of Muttu Natchia inherited the land free of the fidei commissum. As a general rule the fidei commissum created by a deed *inter vivos* requires acceptance not only by the fiduciary but also by the fidei commissary to render the gift effective in the latter's favour. There is one exception to this general rule. Where a fiduciary donation is for the benefit of a family, the acceptance by the fiduciary donee is sufficient acceptance on behalf of the members of the family whether they were in *esse* or not. In *Mudaliyar Wijetunga vs. Rossie*, 47 N.L.R. 361, it was held that a gift by a mother to a daughter for life, and on her death to her children, involves the benefit to a family. In this case all the earlier cases have been considered. In *West vs. Abeywardene*, 53 N. L. R. 217, it was held that a deed of gift by the donor in favour of two of his daughters containing a clause prohibiting the donees from alienation, and proceeding to say that after the death of the donees the property should devolve on their lawful issues, did not constitute a fidei commissum in favour of the family. The Counsel for the 13th defendant relies on this decision. *Basnayake J.* in the course of his judgment in that case says :

20

“ From the foregoing it would appear that a fidei commissum such as that created by deed P 1B is not a fidei commissum in *favorem familiae*, for it is a gift to the immediate donees with a prohibition against alienation and after their death to their children who are left free to deal or dispose of the property in any manner they like. This is the kind of fidei commissum known as *unicum*. It is binding on only one person. He who follows first after the burdened heir or legatee can with impunity transfer the prohibited property to a stranger. ”

In the present case the fidei commissum is a continuing one. The decen-  
 dants of the donor were to hold the property from generation to generation. It is clear that the intention of the donor was to keep the property in the family. In my view, deed P 2 creates a fidei commissum in *favorem familiae*, and as such the acceptance of the gift by the immediate donee is sufficient acceptance on behalf of the members of the family, whether in *esse* or not. I hold that deed P 2 created a valid fidei commissum, and is operative for four generations.

On Muttu Natchia's death, the property devolved on her three children in equal shares burdened with the fidei commissum. Thus the 13th defendant's father Abdul Rahiman became entitled to a 1/3rd share subject  
 to the fidei commissum. The 13th defendant's contention was that his father became entitled to a half share according to the Muslim Law of inheritance. That may have been so but for the clear direction in the deed that the children of Muttu Natchia should get share and share a like.

The 13th defendant claims to have acquired title to the entire land by prescriptive possession. There is a building on this land covering its entire extent. It has been admitted by the plaintiff that Abdul Rahiman was in sole possession of this land, and the 13th defendant from 1916 after his

father's death. It has been held by the Supreme Court that prescription does not begin to run against a fidei commissary until the death of the fiduciary, and that the principle that prescription when it begins to run is not interrupted by the death of the donor, does not apply in such a case. Prescription starts to run against the fidei commissary only after the right to possess had accrued to him on the death of the fiduciary. If at the time of the death of the fiduciary the fidei commissary happened to be a minor, then also the running of prescription is interrupted. It is only after the minor had attained majority that prescription would run against him. Thus  
 10 with the accrual of the interest every fidei commissary heir, prescription starts anew. As was stated earlier, the plaintiff is a great grand-daughter of Candumma. Candumma died leaving four children, one of whom was Abdul Cader. Abdul Cader died leaving three children, of whom one was Rameena Umma. The plaintiff is a daughter of Rameena Umma. Rameena Umma died on 18th November, 1939. The plaintiff was born on 2nd June, 1932. At the time of her mother's death she was only seven years and five months old. The prescription, therefore, started to run against her when she attained her 21st year, and that would be on 2nd June, 1953.

A further period of ten years must elapse from that date for the 13th  
 20 defendant to claim the interests of the plaintiff on prescriptive possession. It must be held that the 13th defendant has not acquired title to the plaintiff's interests in the land by prescription. Besides the plaintiff, Rameena Umma left two other children, the 1st and 2nd defendants. The 1st defendant was born on 30th January, 1925—*vide* P 5. Prescription began to run against her from 30th January, 1946. The 2nd defendant's birth certificate has not been produced, but he says he was born in 1923. There is no evidence to contradict this. In the case of both the 1st and 2nd defendants, the 13th defendant has not acquired a title to their interests by prescriptive possession. In fact, the burden is on the 13th defendant to prove that he  
 30 had acquired a title by prescriptive possession to the interests of all the parties to this action, who are the descendants of Muttu Natchia. His prescriptive possession has been interrupted always with the death of a fiduciary. It is for him to produce the death certificates of the successive fiduciaries and the birth certificates of the several fidei commissary. Ansa Umma, one of the daughters of Muttu Natchia, died leaving three children, the 9th and 10th defendants and one Mohammed Razeen. Ansa Umma was a fiduciary. It is not known when she died. It is only after her death that the 13th defendant would start to possess adversely against the 9th and 10th Defendants and Mohammed Razeen. There is no evidence as to the  
 40 age of the 9th and 10th defendants. Similarly, in the case of all the other defendants it cannot be held that the 13th defendant acquired a prescriptive title to their interests. I hold that the 13th defendant has not acquired a prescriptive title to the interests of the plaintiff or any other defendants.

It remains to consider whether the share of any of the parties to this action has been freed from the burden of fidei commissum. According to the Roman Dutch Law, a fidei commissum created by a will or a deed *inter vivos*, unless there is a limitation, extends up to and including the fourth generation.



No. 14  
 Judgment of the  
 District Court  
 20-2-56  
 —continued.

“ As to the method of counting the generations, ‘ in Holland and Friesland the general opinion of the Commentators has been accepted . . . . . that it is not the first instituted or fiduciary heir who constitutes the first degree, and consequently only the fifth fidei commissary heir is able to exercise his free discretion in regard to the fidei commissary property ’ ”.

*Vide* the Roman Dutch Law of Fideicommissa by Nadaraja, page 133. If this method of computation be adopted, the shares of the plaintiff and the 1st and 2nd defendants are free of the fidei commissum. They are the fifth fidei commissary heirs. 10

Similarly the 5th, 6th, 7th and 8th defendants also get their shares unburdened by the fidei commissum, as they too are in the same degree of relationship to Muttu Natchia as the plaintiff.

Ansa Umma, as already stated, had three children, the 9th and 10th defendants and Mohammed Razeen. Mohammed Razeen died leaving a daughter Noor Laheera. Noor Laheera died without children. The 9th and 10th defendants, who were her uncles, filed answer claiming the entire share of Noor Laheera. The 11th defendant, the husband of Noor Laheera, disputed the claim of the 9th and 10th defendants. His position was that on Noor Laheera’s death her mother the 12th defendant would get a 1/3rd share of Noor Laheera’s interests, and the balance should come to him. At the trial the parties came to an agreement regarding this dispute, according to which Noor Laheera’s share would be divided as follows :

The 12th defendant, the mother, to get 1/3rd. The 11th defendant, the husband, to get 1/2, and the two uncles, the 9th and 10th defendants should get the balance 1/6th.

These heirs of Noor Laheera are also of the fifth generation, and they would also get their share free of the fidei commissum. All the other defendants still hold their shares subject to the fidei commissum.

The plaintiff has allotted shares to the parties according to the Roman- Dutch Law of inheritance. It is clear from the deed P 2 that the donor intended that the law of succession should be according to Roman-Dutch Law. The 13th defendant is not affected by the distribution of the property according to Roman Dutch Law. I accept the evidence of the 2nd defendant and allot shares to the parties as follows :—

Plaintiff	—	1/36	
1st Defendant	—	1/36	
2nd Defendant	—	1/36	
3rd Defendant	—	1/12	
4th Defendant	—	1/12	
5th Defendant	—	1/48	
6th Defendant	—	1/48	
7th Defendant	—	1/48	
8th Defendant	—	1/48	

9th Defendant	—	1/9 Plus 1/108
10th Defendant	—	1/9 plus 1/108
11th Defendant	—	1/18
12th Defendant	—	1/27
13th Defendant	—	1/3rd

No. 14  
Judgment of the  
District Court  
20-2-56  
—continued.

The interests allotted to the Plaintiff, 1st defendant, 2nd defendant, 5th defendant, 6th defendant, 7th defendant, 8th defendant, the 1/108 share allotted to the 9th defendant, the 1/108 share allotted to the 10th defendant, the 1/18th share allotted to the 11th defendant, and the 1/27th share allotted to the 12th defendant are free from fidei commissum. The interests allotted to the other defendants are still subject to the fidei commissum and the fidei commissum will attach to the proceeds of the sale.

It has been admitted that the 13th defendant had effected repairs to the building on the land, and it has been agreed that Rs. 1,000/- should be paid to him on account of those repairs. The building is allotted to all the parties according to their soil rights. Rs. 1,000/- to be paid to the 13th defendant out of the proceeds of the sale.

This land is in extent 12.61 perches. It is not possible to partition this land, I enter a decree for sale.

The major contest in the case was between the Plaintiff and the 13th defendant. The 13th defendant will pay Rs. 210/- as costs of contest to the plaintiff. Other costs pro-rata.

(Sgd.) .....  
District Judge.

20th February, 1956.

Judgment delivered in open Court.

(Sgd.) .....  
District Judge.  
20-2-56.

30

No. 15

Decree of the District Court

DECREE FOR SALE

IN THE DISTRICT COURT OF COLOMBO

No. 6970/P.

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nittambuwa.

*Plaintiff.*

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of 48/22 Maligawatte,

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No. 15  
Decree of the  
District Court  
20-2-56.

No. 15  
Decree of the  
District Court  
20-2-56  
—continued.

2. A. L. M. Ariff of Thihariya presently of 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatte, Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo.
5. M. M. Aynul Wadood,
6. M. M. Mohammed Fouze,
7. M. M. Abdul Majeed,
8. M. M. Mohammed Cassim all of No. 289, Darley Road, 10 Maradana, Colombo.
9. Z. H. Mohammed Nizar of No. 222, Galle Road, Bambalapitiya.
- (dead) 10. Z. H. Mohamed Reza of No. 2, Kensington Gardens, Bambalapitiya.
11. A. T. M. Mohideen of No. 28, 34th Lane, Wellawatte, Colombo.
12. Puthri Zohara of No. 109, Nawala Road, Rajagiriya.
- (dead) 13. A. R. Abdul Majeed of No. 478, Galle Road, Colombo.
14. M. R. Zainudeen, 20
15. M. S. Rizan,
16. M. R. Noor Mashooda,
17. Noor Zahira all of No. 2, Kensington Gardens, Bambalapitiya.  
(substituted in place of 10th defendant)
18. Hazaima wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
19. Mrs. Hazair Sadiq.
20. A. M. M. Nazick,
21. A. M. M. Marzook (18th to 21st defendants are substituted so in place of the 13th defendant).

*Defendants,*

This action coming on for disposal before G. C. T. A. de Silva Esquire, District Judge of Colombo, on the 14th day of February 1955, the 24th day of January 1956 and the 20th day of February 1956 in the presence of Mr. Advocate D. M. Weerasinghe with Mr. Advocate Ameen instructed by Mr. M. N. M. Salahudeen, Proctor on the part of the plaintiff, Mr. K. Velauthan, Proctor on the part of the 1st and 2nd defendants, Mr. Advocate H. Rodrigo instructed by Mr. K. Rasanathan, Proctor on the part of the 4th to 8th defendants, Mr. Advocate A. C. M. Uvais instructed by Mr. N. M. Zaheed, Proctor on the part of the 9th and 10th defendants, Mr. Advocate C. G. Weeramantry, instructed by Mr. A. L. M. Thassim, Proctor on the part of the 11th defendant, Mr. Advocate E. R. S. R. Coomaraswamy with Mr. Daya Perera instructed by Mr. A. R. M. Razeen, Proctor on the part of the 13th defendant.

No. 15  
Decree of the  
District Court  
20-2-56  
—continued.

It is hereby ordered and decreed that parties to this action are entitled to all that house and garden at one time bearing Assessment No. 52 presently Nos. 88 and 90 situated in Prince Street in the Pettah of Colombo within the Municipality and District of Colombo Western Province and bounded on the North by the house of Paul Chetty East by the house of Mr. Wanterz on the South by the X Street (3rd Cross Street) and on the West by the house of Mr. Kern containing in extent Eleven forty three one hundredth square perches (A0-R0-P11, 43/100), which said land is discribed as an allotment of land with the building standing thereon now bearing assessment Nos. 88 and 90 situated along Prince Street at Pettah within the Municipality and District of Colombo, Western Province, bounded on the North by Prince Street, East by premises now bearing Assessment No. 92 (Prince Street), South by premises now bearing Assessment Nos. 67 and 69 (Maliban Street,) West by premises bearing Assessment Nos. 82 and 84 (Prince Street), containing in extent twelve point six one perches (A0-R0-P-12.61) according to Plan No. 511 dated 10th January, 1954 made by S. Rajendra, Licensed Surveyor, and filed of record marked X in the following shares :

	Plaintiff to	—	1/36
	1st defendant	—	1/36
	2nd defendant	—	1/36
	3rd defendant	—	1/12
	4th defendant	—	1/12
	5th defendant	—	1/48
	6th defendant	—	1/48
	7th defendant	—	1/48
	8th defendant	—	1/48
40	9th defendant	—	1/9 plus 1/108
	10th defendant	—	1/9 plus 1/108
	11th defendant	—	1/18
	12th defendant	—	1/27
	13th defendant	—	1/3

the shares of the 3rd, 4th and 13th defendants, and the 1/9th share allotted to each of the 9th and 10th defendants, being subject to the fidei commissum created by deed No. 260 of 16th July, 1872.

No. 15  
Decree of the  
District Court  
20-2-56  
—continued.

It is hereby further ordered and decreed that the said land be sold in terms of the Partition Act No. 16 of 1951 that out of the proceeds of sale Rs. 1,000/- be paid to the 13th defendant on account of repairs to the building effected by him, and that the proceeds of sale be brought to court to abide the further orders of this court.

It is hereby further ordered and decreed that the 13th defendant do pay the plaintiff Rs. 210 as costs of contest to the plaintiff.

It is hereby further ordered and decreed that the other costs be borne by the parties pro rata.

(Sgd.) ..... 10  
*Additional District Judge.*  
24-5-60.

The 20th day of February 1956,

Drawn by me.

(Sgd.) .....  
*Proctor for Plaintiff.*

No. 16  
Petition of  
Appeal to the  
Supreme Court  
2-3-56.

**No. 16**

**Petition of Appeal to the Supreme Court**

**IN THE HON'BLE THE SUPREME COURT OF THE ISLAND  
OF CEYLON**

20

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff.*

D. C. Colombo No. 6970/P.

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of Maligawatte.
2. A. L. M. Ariff of Thihariya presently of No. 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatte, Negombo Road, 30 Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo.
5. M. M. Aynul Wadood.

6. M. M. Mohammed Fouze.
7. M. M. Abdul Majeed.
8. M. M. Mohammed Cassim all of No. 289, Darley Road, Maradana, Colombo.
9. Z. H. Mohammed Nizar of No. 222, Galle Road, Bambalapitiya, Colombo.
10. Z. H. Mohammed Reza of No. 2, Kensington Garden, Bambalapitiya, Colombo.
11. A. T. M. Mohideen.
- 10 12. Puthri Zohara.
13. A. R. Abdul Majeed of No. 478, Galle Road, Colombo.

*Defendants.*

A. R. Abdul Majeed of No. 478, Galle Road, Bambalapitiya, Colombo.

*13th Defendant-Appellant.*

Vs.

1. A. L. Umma Zaneera *alias* Shamsunnahar of Thihariya, Nithambuwa.

*Plaintiff-Respondent.*

- 20 2. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of Maligawatte.
3. A. L. M. Ariff of Thihariya presently of No. 29, Old Moor Street, Colombo.
4. Rabia Umma of No. 10/95, Mahawatte, Negombo Road, Peliyagoda.
5. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo.
6. M. M. Aynul Wadood.
7. M. M. Mohammed Fouze.
- 30 8. M. M. Abdul Majeed.
9. M. M. Mohammed Cassim all of No. 289, Darley Road, Colombo.

No. 16  
Petition of  
Appeal to the  
Supreme Court  
2-8-56  
—continued.

10. Z. H. Mohammed Nizar of No. 222, Galle Road, Bambalapitiya, Colombo.
11. Z. H. Mohammed Reza of No. 2, Kensington Garden, Bambalapitiya, Colombo.
12. A. T. M. Mohideen.
13. Puthri Zohara.

*Defendants-Respondents.*

On this 2nd day of March 1956.

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER  
JUDGES OF THE HONOURABLE THE SUPREME  
COURT OF THE DOMINION OF CEYLON.

10

The petition of appeal of the 13th defendant-Appellant abovenamed appearing by A. R. M. Razeen his Proctor states as follows :—

1. The Plaintiff-Respondent filed this action on 9th September 1953 to partition the land bearing assessment Nos. 88 and 90 Pettah, Colombo and shown in Plan No. 511 dated 10th January 1954.

2. The 13th Defendant-appellant filed his answer on the 30th March 1954, praying that the action be dismissed and that the appellant be declared entitled to the entirety of the said land or to certain shares, and for compensation in a sum of Rs. 1,500/- in the event of a partition or sale<sup>20</sup> being ordered.

3. At the trial, the following issues were framed :—

1. Did the deed of gift No. 260 of 16th July 1872 referred to in paragraph 3 of the plaint,

(a) create any fidei commissum restricting it, or

(b) in any event, create any such restriction binding on any person other than Muttu Natchia ?

2. Is the gift, if any, created by the said Deed No. 260 void and of no effect for want of acceptance by or on behalf of the fidei commissaries ?

30

3. (a) Did Muttu Natchia during her lifetime put the 13th defendant in occupation of the premises in suit ;

(b) Has 13th Defendant been in exclusive possession of the premises thereafter and acquired a prescriptive title to the entirety or to the share of the plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th, 11th and 12th defendants and the share of the 9th and 10th defendants, if any, ?.

4. Has 13th defendant in any event acquired prescriptive title to the entire property ?

5. (a) Are the parties governed by Muslim Law.

(b) If so, are the heirs of deceased persons and their shares not correctly set out in the plaint.

6. (a) Is plaintiff a co-owner or has she any title to the property ?

(b) If not can she maintain this action.

10 7. Does deed No. 260, create any fidei commissum which ensures to the benefit of the plaintiff ?

8. If points 2, 3, 4, 5 or any of them be answered in the affirmative and or points 1, 6 and 7 or any of them be answered in the negative, can plaintiff maintain the present action.

9. Is the 11th defendant entitled to the 1/18th share allotted to him in the plaint as against the 9th and 10th defendants ?

10. On the death of Lahira, does his share devolve on 9th and 10th defendants only ?

4. After trial, the learned District Judge delivered judgment on the 20th February 1956, entering a decree for sale of the entire land, and allotting 20 to the appellant only a one-third share of the land, and ordered the appellant to pay Rs. 210/- to the plaintiff-respondent as costs.

5. Feeling aggrieved by the said judgment the 13th defendant-appellant begs to appeal to Your Lordships Court on the following among other grounds, that may be urged by Counsel for the appellant at the hearing of the appeal :—

(a) the said judgment is wrong and contrary to law and evidence led in the case,

(b) the learned Judge, it is submitted, erred in law in holding that:- (i) there were all the requisites of a valid fidei commissum which operates for four generations in the deed of gift No. 260 of 16th July 1872 ;

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(ii) that the fidei commissum alleged to be created thereby was in favorem familiae and that therefore, acceptance by or on behalf of the fidei commissaries was not necessary ;

(iii) that the said fidei commissum was a continuing one.

(iv) that the Roman-Dutch Law applied to the devolution of the property from generation to generation.



No. 16  
Petition of  
Appeal to the  
Supreme Court  
2-8-56  
—continued.

- (v) that the fiduciary is excluded in computing generations.
- (c) It is submitted that the appellant has acquired title by prescription to the entire land, or at least to the shares of the defendants-respondents, who had admitted this fact in their answers.
- (d) It is submitted that the learned judge erred regarding the law relating to prescription in regard to fidei commissaries and minors, and the burden of proof on the appellant.

WHEREFORE the 13th defendant-appellant prays :—

- (a) that the said judgment dated 20th February 1956 be set aside, and for judgment as prayed for in his answer,
- (b) for costs in Your Lordships' Court and in the District Court,
- (c) for such other and further relief as to Your Lordships' Court shall seem meet.

(Sgd.) A. R. M. RAZEEN,  
*Proctor for 13th Defendant—Appellant.*

No. 17  
Affidavit of  
13th Defendant  
—3-56.

## No. 17

### Affidavit of 13th Defendant

#### IN THE DISTRICT COURT OF COLOMBO

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nittambuwa. 20

*Plaintiff.*

Vs.

No. 6970/P.

1. A. L. Aithy Aseena *alias* Sithy Nafeesa  
and others.

*Defendants.*

I, H. A. R. Abdul Majeed of No. 478, Galle Road, Colpetty, Colombo do hereby solemnly sincerely and truly declare and affirm as follows :—

1. I am the 13th defendant-appellant in this case. 30
2. I file petition of appeal from the judgment of this Court on the 2nd March 1956.

3. I issued notice of tendering security for costs in appeal for service on plaintiff's proctor and 3rd defendant and proctor for 4, 5, 6, 7, and 8 defendants.

No. 17  
Affidavit of  
13th Defendant  
—3-56  
—continued.

4. The notice on the plaintiff's proctor has not been served to date as he is said to be ill and the Fical's Officer is unable to meet him.

5. The 3rd defendant is a Muslim lady, and I am unable to effect personal service of the said notice. Her last known place of residence is No. 10/95, Mahawatta, Negombo Road, Peliyagoda.

6. Tendering of security for costs of appeal will be gone into on the 10 12th March 1956 and personal service of such notice I will not be able to effect before 12th instant.

7. I pray that the Court be pleased to allow substituted service of said notice by affixing the same to the outer door of premises No. 38, New Chetty Street, Colombo last known place of residence of Proctor for Plaintiff and No. 10/95, Mahawatta, Negombo Road, Peliyagoda the last known residence of 3rd defendant.

(Sgd.) H. A. R. A. Majeed.

Signed and affirmed to at Colombo on this.....day of March 1956.

20

Before me.

(Sgd.) .....  
Commissioner of Oaths.

No. 18

No. 18  
Affidavit of the  
Plaintiff  
29-5-56.

Affidavit of the Plaintiff

IN THE DISTRICT COURT OF COLOMBO

Ahamado Lebbe Ummu Zaneera *alias* Shamsunnahar of Thihariya.

*Plaintiff.*

No. 6970/P

80

Vs.

10. Z. H. Mohamed Rizan of Bambalapitiya and 12 others.

*Defendants.*

Ahamado Lebbe Ummu Zaneera *alias* Shamsunnahar of Thihariya.

*Petitioner.*

AND

No. 18  
Affidavit of the  
Plaintiff  
29-5-56  
—continued.

1. Mohamed Rizan Zainudeen.
2. Mohamed Shaker Rizan.
3. Mohamed Rizan Noor Mushooda and
4. Noor Zahira all of No. 2, Kensington Garden Bambalapatiya, Colombo.

*Respondents.*

I, Ahamado Lebbe Ummu Zaneera *alias* Shamsunnahar of Thihariya, being a Muslim do hereby solemnly sincerely and truly declare affirm and say as follows :—

10

1. I am the Plaintiff above-named.

2. The 10th Defendant above-named who is the 11th Respondent to the petition of appeal filed in the above case died on or about 10th April 1956 pending the appeal in the above case leaving as heirs three children the 1st, 2nd, 3rd respondents above-named who are all majors and the 4th Respondent the widow.

3. That for purposes of the above appeal and for all other purposes of the case it is necessary that the said 1st to 4th Respondents as such heirs should be substituted in place of the 10th defendant deceased.

The foregoing affidavit having been read over and explained to the affirmant and he appearing to understand the content thereof and hereto same was signed and affirmed to at Colombo on this 29th day of May 1956.

20

(Sgd.) A. L. U. ZANEERA.

Before me.

(Sgd.) .....

*Commissioner of Oaths.*

## Petition of the Plaintiff

## IN THE DISTRICT COURT OF COLOMBO

Ahamado Lebbe Ummu Zaneera *alias* shamsunnahar of  
Thihariya.

No. 6970/P

*Plaintiff.*

Vs.

10. Z. H. Mohamed Riza of Bambalapitiya and 12 others.

*Defendants.*

10

Ahamado Lebbe Ummu Zaneera *alias* Shamsunnahar  
of Thihariya.

*Petitioner.*

AND

1. Mohamed Rizan Zainudeen.
2. Mohamed Shaken Rizan.
3. Mohamed Rizan Noor Mushooda and,
4. Noor Zahira all of No. 2, Kensington Garden, Bambalapitiya, Colombo.

*Respondents.*

20 The 30th day of May 1956.

The Petition of the Petitioner above-named appearing by M. N. M. Salahudeen her Proctor states as follows :—

1. The Petitioner is the Plaintiff above-named.

2. The 10th defendant above-named (who is the 11th respondent to the Petition of appeal filed in the above case) died on or about 10th April 1956 pending the appeal in the above case leaving as heirs three children the 1st, 2nd and 3rd Respondents above-named who are all majors and the 4th Respondent the widow.

3. That for purposes of the above appeal and for all other purposes of  
30 the case it is necessary that the said 1st to 4th Respondents as such heirs should be substituted in place of the 10th defendant deceased.

Wherefore the petitioner prays (1) That the said 1st to 4th Respondents be substituted in the place of the 10th Defendant above-named and that they be added as parties defendants (2) For costs and for such other and further relief as to the Court shall seem meet.

(Sgd.) M. N. M. SALAHUDEEN,  
*Proctor for Petitioner.*

Petition of the Plaintiff

IN THE SUPREME COURT OF THE ISLAND OF CEYLON  
IN THE DISTRICT COURT OF COLOMBO

A. L. M. Ummu Zaneera *alias* Shamsunnahar  
of Thihariya, Nithambuwa.

S. C. 260  
No. 6970

*Plaintiff.*

Vs.

A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M.  
Abdul Hanan of Maligawatta and others.

10

*Defendants.*

AND

A. L. M. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff-Petitioner.*

Vs.

1. Huzaima wife of Yoosuf Jalladeen of No. 478, Galle Road, Bambalapitiya, Colombo.
2. Muffeeda wife of Huzair Sadiq of No. 478, Galle Road, 20 Bambalapitiya, Colombo.
3. A. M. M. Nazick of No. 30, Moor Road, Wellawatta, Colombo.
4. A. M. M. Marzook, Proctor of A. Y. Daniel and Son No. 20, Baillie Street, Fort, Colombo.

*Respondents.*

On this 9th day of September 1957.

The petition of the petitioner above-named appearing by M. N. M. Salahudeen her proctor states as follows :—

1. The petitioner is the plaintiff above-named.

80

2. The 13th defendant above-named (who is the appellant in the above case) died on or about the 4th day of August, 1957 pending the appeal in the above case leaving his four children the 1st, 2nd, 3rd and 4th Respondents above-named, who in terms of the Deed of gift No. 260 dated 16th June 1972 became entitled to the share of the deceased,

3. That for purposes of the above appeal and for all other purposes of the case it is necessary that the said 1st to 4th Respondents as such child should be substituted in place of the 13th Defendant deceased so that the appeal may be proceeded with.

No. 20  
Petition of  
the Plaintiff  
9-9-57  
—continued.

Wherefore the Petitioner prays (a) That the said 1st to 4th Respondents be substituted in place of the 13th Defendant above-named and that they be added as parties (b) for costs and for such other and further relief as to the Court shall seem meet.

(Sgd.) M. N. M. SALAHUDEEN.  
*Proctor for Plaintiff-Petitioner.*

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No. 21

**Affidavit of the Plaintiff**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON  
IN THE DISTRICT COURT OF COLOMBO

No. 21  
Affidavit of  
the Plaintiff  
9-9-57.

A. L. M. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

S. C. 260  
No. 6970/P

Vs.

*Plaintiff.*

A. L. M. Sithy Azeema *alias* Sithy Nafeesa, wife of  
M. I. M. Abdul Hanan of Maligawatta  
and others.

20

*Defendants.*

AND

A. L. M. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

Vs.

*Plaintiff-Petitioner.*

1. Huzaima wife of Yoosuf Jalladeen of No. 478, Galle Road, Bambalapitiya, Colombo.
2. Muffeeda wife of Huzair Sadiq of No. 478, Galle Road, Bambalapitiya, Colombo.
3. A. M. M. Nazick of No. 30, Moor Road, Wellawatte, Colombo.
4. A. M. M. Marzook, Proctor of A. Y. Daniel and Son No. 20, Baillie Street, Fort, Colombo.

30

*Respondents.*

No. 21  
Affidavit of  
the Plaintiff  
9-9-57  
—continued.

I, A. L. M. Ummu Zaneera *alias* Shamsunnahar of Thihariya, Nithambuwa, being a Muslim do hereby solemnly sincerely and truly declare affirm and say as follows :—

1. I am the Plaintiff-Petitioner above-named.
2. The 13th Defendant above-named (who is the Appellant in the above case) died on or about the 4th day of August, 1957 pending the appeal in the above case leaving his four children the 1st, 2nd, 3rd and 4th Respondents above-named, who in terms of the deed of gift No. 260 dated 16th June 1872 became entitled to the share of the deceased. 10
3. That for purposes of the above appeal and for all other purposes of the case it is necessary that the said 1st to 4th respondents as such children should be substituted in place of the 13th Defendant deceased so that the appeal may be proceeded with.

Signed and affirmed to at  
Colombo on this day 9th  
September, 1957. } (Sgd.) .....

Before me.

(Sgd.) ..... 20  
*Commissioner of Oaths.*

No. 22  
Order  
regarding  
Substitution  
in respect  
of 13th  
Defendant  
19-12-57.

No. 22

Order regarding substitution in respect of 13th Defendant

IN THE DISTRICT COURT OF COLOMBO

A. L. M. Ummu Zaneera *alias* Shamsunnahar  
of Thihariya, Nithambuwa.

*Plaintiff.*

Vs.

No. 6970/P.

80

A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M.  
Hanan of Maligawatta and others.

*Defendants.*

AND

A. L. M. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff-Petitioner.*

Vs.

1. Huzaima wife of Yoosuf Jalladeen of No. 478, Galle Road, Bambalapitiya, Colombo.
2. Mrs. Huzair Sadiq of No. 478, Galle Road, Bambalapitiya, Colombo.
3. A. M. M. Nazick of No. 80, Moor Road, Wellawatta, Colombo.
4. A.M.M. Marzook, Proctor of A. Y. Daniel and Son, No. 20, Baillie Street, Fort, Colombo.

No. 22  
 Order  
 regarding  
 Substitution  
 in respect  
 of 18th  
 Defendant  
 19-12-57  
 —continued.

10

*Respondents.*

This Action is coming on for disposal before A. L. S. Sirimanne Esquire, Additional District Judge, Colombo on the 9th day of October, 1957 in the presence of Mr. M. N. M. Salahudeen, on the part of the Plaintiff-Petitioner.

It is formally ordered that the 1st to 4th Respondents above-named are hereby substituted in place of the 18th Defendant deceased unless sufficient cause shown to the contrary on the 29th January, 1958.

Colombo 19th of December, 1957

(Sgd.) A. L. S. SIRIMANNE,

*Additional District Judge.*

6-1-58

20 Drawn by me,

(Sgd.) .....

*Proctor for Plaintiff.*

Order Nisi extended returnable 19-3-58

14-2-58.

(Sgd.) A. L. S. SIRIMANNE,

*Additional District Judge.*





No. 23  
Affidavit of  
M. M.  
Mohamed  
Cassim  
11-6-58.

Affidavit of M. M. Mohamed Cassim  
IN THE DISTRICT COURT OF COLOMBO

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff.*

No. 6970/P

Vs.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M.  
Abdul Hanan of Maligawatta and others.

*Defendants.* 10

2. A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya.

*Petitioner.*

Vs.

3. A. M. M. Nazick of N. 30, Moor Road, Wellawatta.

*Respondents.*

I, M. M. Mohamed Cassim of No. 289, Darley Road, Maradana,  
Colombo not being a Christian do hereby solemnly sincerely and truly affirm  
aver and declare as follows :—

1. I am the Plaintiff's agent.

2. On the 26th of May 1958 I accompanied Fiscal's Process Server 20  
W. P. Sirisena and pointed out to him the above-named respondent and the  
said Process Server served the order nisi on the said respondent on being  
pointed out by me at the above address.

Signed and affirmed to at  
Colombo on this 11th day } (Sgd.) M. M. M. CASSIM.  
of June 1958.

Before me,

(Sgd.) .....

*Commissioner of Oaths.*

\_\_\_\_\_

## Judgment of the Supreme Court

*S. C. 260/56**D. C. Colombo No. 6970/M**Present :* BASNAYAKE, C. J., DE SILVA, J., AND H. N. G. FERNANDO, J.*Counsel :* H. V. Perera, Q.C., with H. Ismail for 13th Substituted Defendant-Appellant.

M. S. M. Nazeem with M. T. M. Sivardeen for Plaintiff-Respondent.

10

S. Sharvananda with M. Shanmugalingam for 4th to 8th Defendants-Respondents.

H. W. Jayewardene, Q.C., with M. Rafeek and L. C. Seneviratne for 9th Defendant - Respondent and for 10th Substituted Defendant-Respondent.

H. Mohideen with S. M. Uvais for 12th Defendant-Respondent.

*Argued on :* September 24th and 25th, 1959.*Decided on :* December 11th, 1959.

BASNAYAKE, C. J.,

This is an action under the Partition Act, No. 16 of 1951, instituted on 17th September 1953. The main contest at the trial was whether deed No. 260 dated 16th July 1872 attested by J. W. Vanderstraaten created a *fidei commissum* which endured for four generations. The learned District Judge held that the deed created a *fidei commissum* and learned counsel for the 13th defendant-appellant, who may conveniently be referred to hereinafter as the appellant, does not challenge that finding. The appellant had also claimed that he was entitled to a decree in his favour under section 3 of the Prescription Ordinance as he had possessed the entire land since the year 1916,

The learned District Judge while in effect holding that the appellant had continuous and exclusive possession of the premises since 1916 rejected his claim for a decree in his favour under section 3 of the Prescription Ordinance on the ground that he had failed to prove that the proviso to section 3 and section 13 of the Ordinance did not apply to his claim. The decision that the burden of proving the exceptions rests on the appellant is canvassed in appeal. It is submitted that the learned District Judge has wrongly cast on the appellant the burden of proving matters which in law he is not bound to prove. The portion of the learned District Judge's judgment to which objection is taken runs as follows :—

10

“ In fact, the burden is on the 13th defendant to prove that he had acquired a title by prescriptive possession to the interests of all the parties to this action, who are the descendants of Muttu Natchia. *His prescriptive possession has been interrupted always with the death of a fiduciary. It is for him to produce the death certificates of the successive fiduciaries and the birth certificates of the several fidei commissarii.* Ansa Umma, one of the daughters of Muttu Natchia, died leaving three children, the 9th and 10th defendants and one Mohamed Razeen. Ansa Umma was a fiduciary. It is not known when she died. It is only after her death that the 13th defendant would start to possess adversely against the 9th and 10th defendants and Mohamed Razeen. There is no evidence as to the age of the 9th and 10th defendants. Similarly in the case of all the other defendants it cannot be held that the 13th defendant acquired a prescriptive title to their interests. I hold that the 13th defendant has not acquired a prescriptive title to the interests of the plaintiff or any other defendants. ”

The plaintiff and the other defendants claim the benefit of the proviso to section 3 and section 13. Those provisions read —

“ Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

“ 13. Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say —

- (a) infancy,
- (b) idiocy,
- (c) unsoundness of mind,
- (d) lunacy, or
- (e) absence beyond the seas,

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then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming

under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last named person, or from the termination of such disability, whichever first shall happen ; but no further time shall be allowed in respect of the disabilities of any other person :

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—continued.

10      “ Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant. ”

Learned counsel's contention that the learned District Judge has wrongly cast on the appellant the burden of proving the exception is sound. The rule of evidence is that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist. Those who assert that the period of ten years began to run as against them only after a certain date in view of the proviso to section 3 or section 13 must produce evidence of facts which bring their case within those provisions. Learned counsel's submission is supported by the decision of the Privy Council in the case of *Mohamedaly Adamjee v. Hadad Sadeen* (58 N.L.R. 217 at 227) to which he has referred us. In that case the Board made the following observations :—

“ Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years. ”

30      In the instant case except in regard to the plaintiff, and the 1st and 2nd defendants, the parties have produced no evidence which brings their claims within the proviso to section 3 or section 13. But it is contended on behalf of the 9th and 10th defendants-respondents that the appellant is a co-heir and that proof that he collected the entire rent since the year 1916 is insufficient to bring his case within section 3. It is therefore necessary to deal with that aspect of the case with which the learned District Judge has not dealt specially though an argument in regard to it appears to have been addressed to him.

40      It has been laid down by the Privy Council in the case of *Corea v. Appuhamy* (15 N.L.R. 65) that the possession of a co-owner is in law possession of the other co-owners ; that it is not possible for a co-owner to put an end to his possession *qua* co-owner by any secret intention in his mind ; that nothing short of ouster or something equivalent to ouster could bring about that result.

In the case of *Cadija Umma v. Don Manis* (40 N.L.R. 392 at 396) in dealing with the case of an agent's possession the Privy Council said —

“ Ouster apart, a man’s possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea’s* case. ”

It is therefore necessary first to understand what the Privy Council meant by the words “ his possession was in law the possession of his co-owners. ” What is the kind of possession contemplated by these words? Is it a possession in which the rights of the other co-owners are recognised or is it a possession in which they are not? For the answers to these questions we have to look to the English Law, as section 3 of the Prescription Ordinance is based on concepts of English and not on those of Roman-Dutch law.<sup>10</sup> The English law on the subject is nowhere better expressed than in *Doe v. Prosser* (1 Cowper 216—98 E. R. 1052 (1774)) wherein Lord Mansfield and Justice Acton have explained what is meant by adverse possession and ouster. The former explains the law thus :

“ So in the case of tenants in common ; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion ; because such possession is not adverse to the right of his companion, but in support of their common title ; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon<sup>20</sup> demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession ; such possession is adverse and ouster enough. ”

Justice Acton’s words are pithy and to the point. He says—

“ There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet<sup>30</sup> it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. ”

It would appear therefore that on the facts of the instant case the co-owners cannot claim the benefit of the appellant’s possession as he has possessed not on their behalf but for himself without giving them their share of the rent.

Next let me consider whether in the instant case there is evidence of “ ouster ” or “ something equivalent to ouster ”. The meaning of “ ouster ” an expression which is not discussed in our reports must first be ascertained. Now “ ouster ” is a concept of English law. It is defined thus in Sweet’s<sup>40</sup> Law Dictionary :

“ To oust a person from land is to take the possession from him so as to deprive him of the free-hold. An ouster may be either rightful or wrongful. A wrongful ouster is a disseisin. ”

According to Blackstone —

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“ Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession : for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real* ; ‘ a distinction which was formerly of the utmost importance, as the remedies for an ouster of the freehold were not only peculiar in their nature, but were confined in their use to that species of property ; while those which the law afforded for recovery of the possession of *chattels real* were totally inapplicable to all estates of freehold. We shall see afterwards how the action of ejectment has come to supply the place of nearly all these remedies ’ . ”

“ Ouster of the *freehold* then ‘ was, and in theory may still be ’ effected by one of the following methods : 1. Abatement ; 2. Intrusion ; 3. Disseisin ; 4. Discontinuance ; 5. Deforcement ’ ”. (Blackstone, Vol. III p. 176—Kerr’s edition 1862).

The last named is the form of ouster that applies to the case of co-owner who decides to keep out the other co-owners. Blackstone describes it thus— (*ibid*, p. 181).

“ The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer was now become unlawful, was that by deforcement. This, in its most extensive sense, is *nomen generalissimum* ; a much larger and more comprehensive expression than any of the former ; it then signifying the holding of any lands or tenements to which another person has a right. ”

Blackstone gives many examples of deforcement and the only one germane to the subject under discussion is the following—(*ibid*, p. 182).

“ Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other ; as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as co-parceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety ; this is also a deforcement. ”

In the instant case there is evidence of “ ouster ” in the sense stated in the passage from Blackstone last cited and the English cases I shall refer to later in this judgment. The appellant came into possession of the land in 1916 on the death of his father, who himself had been in possession of it, and has continued to take the entire rent from that day. The plaintiff and the 1st and 2nd defendants are the great-great-grand-children of the author of the *fidei-commissum*. Several generations of his descendants have been content to allow the appellant and his father to collect the entire

rent. There is no evidence that till the date of this action in September 1953 any one has even questioned the appellant's right to take the rent during these thirty-seven years.

Apart from actual ouster in the sense stated above English law recognises a presumption of ouster. The cases of *Doe v. Posser* (*supra*) and *Hornblower v. Read* (1 East 568) decide that ouster may be presumed in a case where uninterrupted possession for thirty-six years is established. In the former case Lord Mansfield stated —

“ It is very true that I told the Jury, they were warranted by the length of time in this case, to presume an adverse possession and 10 ouster by one of the tenants in common of his companion ; and I continue still of the same opinion—Some ambiguity seems to have arisen from the term ‘ actual ouster ’, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. ”

After enunciating the rule that the possession of one tenant in common, *eo nomine*, as a tenant in common, can never bar his companion ; because 20 such possession is not adverse to the right of his companion, but in support of their common title, Lord Mansfield adds —

“ . . . but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing. ” 80

Justice Acton in the same case puts the proposition thus :

“ Now in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not ? ”

Justice Willes in agreeing with Lord Mansfield and Justice Acton states —

“ The possession is a possession of 16 years above the 20 prescribed by the Statute of Limitations, without any claim, demand, 40 or interruption whatsoever ; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous

now to admit a claim to defeat such possession. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster."

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—continued.

In the latter case Lord Kenyon C. J. observes —

10 " I have no hesitation in saying where the line of adverse possession begins and where it ends. Prima facie the possession of one tenant in common is that of another : every case and dictum in the book is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. "

In this discussion it is important to bear in mind the words of Lord Mansfield quoted above that actual ouster is not some act accompanied by force. The expression is defined in Black's Law Dictionary thus :

20 " Actual ouster does not mean a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. "

The presumption of ouster referred to in the cases cited by me is one that a court may draw under section 114 of the Evidence Ordinance, which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.

30 The facts of the instant case fall within the ambit of Lord Kenyon's words. Here the appellant has been in possession and received the rent to his own use without accounting to the others and those others have acquiesced in it for such a length of time as will enable the court to presume under all the circumstances an actual ouster of the others more than ten years before the institution of this action.

Before I part with this judgment I wish to add that in counting the number of generations for the purpose of a *fidei commissum* which endures for four generations the person who has been expressly named and is the immediate donee is not taken into account. This is what Van Leeuwen says :

40 " It has been received as a general rule, that a *fidei commissum* of this or a similar kind in a case of doubt and when the prohibition is difficult to be understood, is not perpetual, but only extends to the fourth degree of succession, counting from him to whom after the death of the first heir the inheritance has come saddled with such a burden, up to the fourth degree beyond him inclusive, for the



person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so." (Censura Forensis, Part I, Book III, Ch. VII, S. 14, Ford's Translation, p. 92).

For the reasons stated above the appellant is entitled to a decree in his favour declaring him entitled to all the shares excluding those of the plaintiff and the 1st and 2nd defendants.

In regard to costs the appellant is entitled to the costs of the contested trial as against the plaintiff who alone resisted his claim. The other costs will be borne by the parties declared entitled to the land *pro rata*. The appellant would also be entitled to the costs of appeal payable by the 9th and 10th defendants.

(Sgd.) HEMA H. BASNAYAKE,  
*Chief Justice.*

DE SILVA, J.

The plaintiff instituted this action under the Partition Act, No. 16 of 1951 praying for a sale of the premises described in the schedule to the plaint. Admittedly the property in question belonged to one Ibrahim Lebbe Ahamado Lebbe. He by deed No. 260 dated the 16th July, 1872 (P 2) gifted it to his wife Muttu Natchia subject to certain conditions. The plaintiff and certain defendants contended that this deed created a valid *fideicommissum* in favour of the children and the remoter descendants of the donor and donee binding on four generations. Muttu Natchia and her husband died leaving two daughters and one son. The daughters were Candumma and Ansa Umma while the son was Abdul Rahaman. Abdul Majeed the 13th defendant is the only child of Abdul Rhaman. The plaintiff and the other defendants are the successors in title of the two daughters of Muttu Natchia. The 13th defendant took up the position that P 2 did not create a valid *fidei commissum*. He also averred in his answer that Muttu Natchia had "put him in complete possession" of the property and that thereafter he had been in sole and exclusive possession of it and had acquired a prescriptive title to the entire property or at least to the shares claimed by the plaintiff and 1,2,5,6,7,8, 11 and 12th defendants and the rights which the 9th and 10th defendants derived from one Noor Lahira the grand-child of Ansa Umma.

The learned District Judge held that P 2 created a valid *fidei commissum* which endured for four generations and rejected the claim of the 13th defendant based on prescription. He allotted shares according to the devolution of title as set out in the plaint and entered a decree for sale. This appeal is by the 13th defendant against the judgment and decree.

At the hearing of this appeal the finding of the learned District Judge that the deed P 2 created a valid *fidei commissum* binding on four generations was not challenged. The learned counsel for the appellant, however, contended that his client had established a prescriptive title to the half share which devolved on the 2 to 9th defendants and Noor Lahira. That is the main question for decision on this appeal.

At the trial the counsel for the Plaintiff made an admission regarding the possession of this land. It is recorded in the following terms. " Mr. Weerasinghe admits that the 13th defendant's father has been in possession from prior to 1916 ". The only persons who gave evidence were the 2nd defendant and the 11th defendant. The 13th defendant neither gave evidence nor called any witness on his own behalf. The 2nd defendant was called on behalf of his sister the plaintiff while the 11th defendant did not give any evidence whatsoever in regard to possession. However, it was elicited from the 2nd defendant in cross-examination that from the  
10 time he became aware of things the 13th defendant had been collecting the rent of this property. It is significant to observe that the age of the 2nd defendant when he gave evidence was 32. After the plaintiff's case was closed the following admission is also recorded. " Plaintiff admits that from 1916 the 13th defendant collected the rents. "

Thus the prescriptive title set up by the appellant rests solely on the two admissions I have quoted above and the statement of the 2nd defendant that from the time he came to know things the 13th defendant had been collecting the rent of the building which stands on this land which is 12.61 perches in extent. The plan P 1 reveals that practically the whole land is  
20 covered by this building. It is rather remarkable that although it was elicited from the 2nd defendant in cross-examination that the 13th defendant collected the rent yet no attempt was made to obtain any admission from him that the entire rent collected was also appropriated by the 13th defendant. I do not think for a moment that when the counsel for the plaintiff admitted that from the year 1916 the 13th defendant was in possession and before that the latter's father had been in possession he meant to concede that the possession they had was of the character contemplated by section 3 of the Prescriptive Ordinance. The word "possession" was obviously used by him in a loose and vague sense. Probably  
30 he meant merely physical possession and this is made clearer by the 2nd admission which only conceded that the 13th defendant collected the rent. If he admitted that these two persons had possession in the sense the word is used in that section there was no purpose in going on with the trial thereafter. From the evidence of the 2nd defendant and the two admissions referred to, one cannot reasonably say that anything more was conceded than that the 13th defendant let out the premises and collected the entire rent. There is no definite evidence as to what he did with the rent whether he appropriated the whole of it for himself, shared it with the other co-owners, spent it on the maintenance of the building or used it for charitable purposes.  
40 It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners. If the 13th defendant did not appropriate for himself the entire rent his claim to this property on a prescriptive title is quite untenable. The prescriptive title is set up on the basis that he appropriated the entire rent for himself.  
50 Assuming that he did so, although the evidence is insufficient for so holding,

is he entitled to succeed on the issue of prescription ?

As the deed P 2 created a valid *fidei commissum* the 13th defendant and the other descendants of Muttu Natchia and her husband would be co-owners of this property. In *Corea v. Iseris Appuhamy*<sup>1</sup>, the Privy Council recognized the principle " Possession is never considered adverse if it can be referred to a lawful title ". There is no doubt that in the instant case the 13th defendant entered into possession of the property in the character of a co-owner. In that case the Privy Council further held that, in law, the possession of one co-owner is also the possession of his co-owners, that it was not possible to put an end to that possession by any secret intention 10 in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession. An invitation by the counsel for the respondent to presume an ouster or something equivalent to an ouster from Iseris's long-continued possession was rejected by Their Lordships of the Privy Council in that case but the point was not fully considered.

In *Tillekeratne v. Bastian*<sup>2</sup>, a case decided by a Bench of three Judges, this Court held that it was open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner had since become adverse. Bertram C. J. who delivered the main judgment in that case referred to the 20 observations of Lord Mansfield in *Doe v. Prosser*<sup>3</sup>, and followed the principle enunciated therein. Lord Mansfield said in that case " But if, upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough . . . . . In this case no evidence whatever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgement of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion as I was at the trial that an undisturbed and quiet possession for such a length 80 of time is sufficient ground for the jury to presume an actual ouster....."

Whether the presumption of ouster is to be drawn or not depends on the circumstances of each case. In *Tillekeratne v. Bastian*<sup>2</sup>, there were three circumstances of great importance which justified this court in presuming an ouster. They were :—(1) Bastian whose share was in issue had not been recognized by the other members of his family as the lawful child of his father (2) Neither Bastian nor his vendee claimed a share of the plumbago dug from the land and (3) The share of this land purchased from Bastian was not included in the schedule of assets of the vendee when he became insolvent. There are no circumstances of such 40 importance in the instant case.

In regard to the observations of lord Mansfield referred to above I would venture to say that there is some risk in applying the principle enunciated by him indiscriminately to a set of similar circumstances existing in this country. Our land tenure is different from that prevailing in England and our laws of inheritance in respect of immovable property also differ from theirs. Common ownership of lands is rampant here whereas it is compara-



There is also no ostensible reason why the other co-owners should have meekly acquiesced if they became aware that the 13th defendant was setting up an independent title to the entire property.

In my view the evidence of possession by the 13th defendant is wholly insufficient to hold that he has acquired a prescriptive title to a share of any of the co-owners.

I am also inclined to the view that no occasion to draw a presumption of ouster arises where a co-owner relies only on his own exclusive possession, as in this case, in support of the prescriptive title he sets up. The 13th defendant relied on his possession alone according to the statement of claim 10 filed by him. Therefore he ought to know when he decided to assert a title to the property adverse to the interests of his co-owners. What is the overt act he did which brought to the notice of his co-owners that he was denying their rights to the property? Did he refuse to give their shares of the income? He did not say so. But the burden was on him to establish the prescriptive title. The presumption of ouster is drawn, in certain circumstances, when the exclusive possession has been so long-continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was in fact a denial of the rights of the other co-owners. The duration of exclusive possession 20 being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster. But in the instant case the party who claimed to have originated the adverse possession was alive at the time of the trial. He is no other than the 13th defendant himself. There was no necessity, therefore, to resort to a presumption of ouster. The 13th defendant's adverse possession, if any, was a 30 question of fact which he could and should have proved. He failed to do so. In *Tillekeratne v. Bastian*<sup>2</sup>, Bertram C. J. while dealing with the circumstances in which the presumption of ouster may be drawn stated "If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the property, it is artificial in the highest degree to say that such person and his predecessors in interest must 40 be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession". All the circumstances set out in this passage are not present in the exclusive possession attributed to the 13th defendant in this case. It is significant to note that the learned Chief Justice contemplates here a case where *a co-owner and his predecessors in interest* are concerned. I do not think that he would have been prepared to draw the presumption of ouster if the exclusive possession relied on was solely that of the co-owner who set up the prescriptive title. In such a 50

case ouster or something equivalent to ouster would have to be proved, as any other question of fact, by leading the necessary evidence.

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The presumption that possession is never considered adverse if it can be referred to a lawful title may sometimes be displaced by the counter-presumption of ouster in appropriate circumstances. However, this counter-presumption should not be reached lightly. It should be applied if and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time, in the distant past, the possession became adverse to the rights of the co-owners. Indeed, this is not such a case.

The appeal must therefore be dismissed. The judgment, however, needs variation on one point. The learned District Judge was of the view that the rights allotted to the plaintiff and certain defendants specified by him were free of the *fidei commissum*. That is not correct. Only the 1/9th share originally belonging to Noor Lahira and which devolved on 9th to 12th defendants will not be subject to the *fidei commissum*. As this *fidei commissum* endures for four generations it would be only the 5th generation of *fidei commissary* heirs who would inherit the property free of the *fidei commissum*. Therefore the proceeds of sale of the balance 8/9ths of the property should be deposited in Court and would be subject to the *fidei commissum*. The substituted defendants appellants will pay the costs of this appeal to the respondents.

(Sgd.) K. D. DE SILVA,  
*Puisne Justice.*

1. 15 N. L. R. 65.
2. 21 N. L. R. 12.
3. 1774, 1 Cowper 217.

H. N. G. FERNANDO, J.

It is common ground in this case that the land which is the subject of the action belonged originally to one Ibrahim Lebbe Ahamado Lebbe. By a deed No. 260 of 16th July 1872 he made a gift of that land to his wife Muttu Natchia subject to certain conditions. Muttu Natchia had three children; her son Abdul Rahuman was the father of the 13th defendant; her two daughters were the ancestors of the plaintiff and the other defendants. When the plaintiff instituted this action for the partition of the land on the basis that the deed P 2 created a *fidei commissum* in favour of the descendants of Muttu Natchia up to the fourth generation, the 13th defendant filed answer claiming that the deed P 2 of 1872 did not create a *fidei commissum* and also that the deed was void for want of acceptance on behalf of the persons designated as *fidei commissaries*. In addition the 13th defendant claimed that Muttu Natchia had placed him (the 13th defendant) in complete possession of the property and that he had acquired prescriptive title thereto as against all or some at least of the other parties to the action. The issues concerning the question whether the deed did create a valid *fidei commissum* and the question of due acceptance were answered in the lower Court against the 13th defendant, and the correctness of those answers has not been canvassed at the hearing of the appeal. On behalf however of the appellants, who are the heirs of the 13th defendant who died after the filing of the appeal, it has been strenuously argued that the appellants are entitled to a decree in their favour under section 3 of the Prescription Ordin-

ance in respect of the shares of certain of the defendants in the action. I have therefore to refer to the evidence concerning possession and to the conclusions reached by the District Judge on the issue of prescription.

At the commencement of the trial, the Counsel who appeared for the plaintiff is recorded as having admitted that "the 13th defendant's father had been in possession from prior to 1916 and that the 13th defendant came into possession in 1916". Thereafter the second defendant, a brother of the plaintiff, gave evidence. According to this evidence, the plaintiff, her sister the first defendant, and her brother the second defendant succeeded to interests in the property on the death of their mother in 1939 but were all 10 minors at that time. The second defendant, who was the eldest of the three was born in 1923, and would have attained majority only in 1944. The plaint having been filed in September 1953 it is clear that the 13th defendant cannot claim a decree under the Prescription Ordinance, in respect of the shares to which these three parties were entitled, and the District Judge so held. This finding is not now challenged.

In regard to the interests of certain other parties, there was no evidence which established clearly the time at which their interests accrued or their ages at that time. The learned District Judge however took the view that it was for the 13th defendant to prove the time of accrual of these interests:20 and to establish that the parties have been free of the disability of minority for over ten years prior to the institution of the action. On this ground he held that the 13th defendant, having failed to establish the necessary matters, was not entitled to a decree in respect of the interests of the parties concerned. He accordingly allotted to the 13th defendant only the one-third share which under the deed P 2 accrued to him as the only child of his father Abdul Rahaman and rejected his claim to the entirety of the property. It has been argued for the appellants that the District Judge wrongly placed on the 13th defendant the burden of showing when the inter-30 ests of these other parties accrued and of further establishing that they were free of the disability of minority referred to in section 13. It seems to me that this argument is entitled to succeed, and in the absence of evidence to the contrary, I will assume that neither the Proviso to section 3, nor the provisions of section 13 can be of avail to these parties.

The second defendant and the eleventh defendant were the only witnesses called at the trial, the second defendant being called on behalf of the plaintiff and the eleventh defendant on his own behalf. In his evidence-in-chief the second defendant gave no evidence whatsoever concerning possession of the property, but in cross-examination the following questions and answers were recorded :—

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Q. You know who is occupying these premises ?

A. A. R. Abdul Majeed the 13th defendant is occupying these premises.

Q. Has he not rented it out to anybody ?

- A. He has rented it out and he is collecting the entire rent. From the time I became aware of things he has been collecting the rent.

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The 11th defendant gave no evidence concerning possession and *the 13th defendant neither gave evidence himself nor called any witnesses.*

The learned District Judge did not expressly consider in his judgment the question whether the possession of the 13th defendant was of the character required by section 3 of the Ordinance. He has either assumed that his possession was of the requisite character, or else considered it unnecessary to deal with the question because he decided that in any event the claim of the 13th defendant had to fail on other grounds.

The arguments for the appellants have been firstly that the learned District Judge impliedly held, and in view of the admission of plaintiff's counsel could rightly hold, that the possession of the 13th defendant was of the nature contemplated in section 3, and secondly that such a conclusion was justified by the evidence which is reproduced above. As to the first argument, I am quite unable to accede to it. Even if the admission "that the 13th defendant's father had been in possession before 1916 and that the 13th defendant came into possession in 1916" can legitimately be construed to mean that the possession of the 13th defendant had been "undisturbed and uninterrupted" since 1916, it is inconceivable that the Counsel who appeared for the parties opposed to the 13th defendant did intend to concede to the latter the right to a decree under section 3. The admission, for what it was worth, was made at the commencement of the trial by Counsel appearing for the plaintiff, who could in no way be prejudiced by it, because he had been a minor and was in any event protected by section 13. No similar admission was made by Counsel representing the fourth to eighth defendants, or by Counsel representing the ninth and tenth defendants all of whom are *fidei commissaries* under the deed P 2. In fact at the stage of the addresses it was stated on behalf of the ninth and tenth defendants that, even if a *fidei commissum* had not been duly created, these defendants were in any event co-owners against whom the 13th defendant, who was not a stranger could not prescribe. In these circumstances, it is impossible to regard the admission by the plaintiff's Counsel as having involved a concession, binding on the other parties, that the character of the 13th defendant's possession had been of such a nature that the possession could be of avail against his *co-fidei commissaries* or co-owners.

I have therefore to consider the second argument for the appellants, namely that the evidence reproduced above was sufficient to entitle the 13th defendant to a decree against all those parties who had failed to bring themselves within the protection afforded either by the Proviso to section 3 or by section. Be it noted that this evidence was only to the effect that the 13th defendant let out the premises and had always *collected* the rents: there was no specific statement either that he had appropriated the rents exclusively for himself or that he had never given a share to any of the other *fideicommissary* heirs of Muttu Natchia,



But let me assume, although I cannot agree, that the only reasonable meaning of the evidence of the second defendant is that the 13th defendant, for nearly forty years from 1916, not only gathered the rents of the premises, but also appropriated them solely for himself without ever giving or conceding a share in the rents to any descendants of his two aunts. Upon this assumption, the 13th defendant undoubtedly had *undisturbed and uninterrupted possession* of the property in the sense contemplated by section 3 of the Prescription Ordinance for (in the language of the parenthesis in section 3) his possession was “unaccompanied by payment of rent, by the performance of any service or duty, or by any other act from which a right existing in any other person would fairly or naturally be inferred.” But a person is not entitled to a decree under section 3 by virtue of such possession alone: the section requires the proof of a second element, namely that the possession must be “*by a title adverse to or independent of that of the claimant or the plaintiff in such action*”. That this is a distinct and separate element was emphasised by Bertram C. J. in his judgment in *Tillekeratne vs. Bastian*<sup>1</sup>. Having referred to a view earlier prevailing that the parenthesis was intended to be an explanation of everything which the section required the possessor to establish, and having cited certain judgments and Thompson’s Institutes as endorsing that view, the learned Chief Justice, adopting an explanation earlier used by Wendt, J., pointed out that the *coup de grace* had been administered by the decision in *Corea vs. Appuhamy*<sup>2</sup>, to the theory that the words in the parenthesis were intended as a definition of “adverse title”. He then referred to the suggestion made in Pereira’s Laws of Ceylon that the parenthesis was intended to be explanatory of the expression “undisturbed and uninterrupted possession”—a suggestion which was expressly adopted by the Privy Council in *Corea’s* case (at page 77):—“The section explains what is meant by undisturbed and uninterrupted possession . . . . . Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, *the question remains, has he given proof, as he was bound to do, of adverse or independent title?*”

Having regard to my own unfamiliarity with a subject which has received much critical and learned consideration from the Bench and the Bar, and in connection with which Lord Mansfield had observed:—“the more we read, unless we are very careful to distinguish, the more we shall be confounded”, I must be pardoned if, in the course of my attempt to analyse the problem which possession by a co-owner presents, I emphasise too much that which should have been obvious. Firstly, section 3 imposes two requirements “undisturbed and uninterrupted possession” and “possession by a title adverse or independent”; secondly the question whether the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Council in *Corea’s*<sup>2</sup> case that a co-owner in possession can satisfy the second requirement in two different modes:—

- (a) by proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title; in fact Their Lordships, in *Corea’s* case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner;

(b) by proving that, although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been by an adverse or independent title.

Long-continued possession by itself is clearly not contemplated in either of these two modes of proving that the possession of a co-owner had been “by a title adverse or independent”. The appellants therefore obtained no assistance from the decision in *Corea’s* case. On the contrary I find it impos-  
10 sible to distinguish the facts of that case from the facts of the present one, and the decision operates strongly against the appellants. I have now to consider the so-called presumption of ouster which was referred to by the Privy Council in the judgment.

In *Tillekeratne vs. Bastian*<sup>1</sup>, Bertram C. J. adopted from *Smith’s Leading Cases*, the definition of adverse possession, *i.e.* “possession held in a manner incompatible with the claimant’s title”, and he observed that the question whether possession by a co-owner is adverse must be con-  
sidered in the light of three principles of law, the third of which is:—“that  
20 a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity”. Having thereafter referred to the English Law, and to early Ceylon cases, he went on to hold that there is a counter-principle which is part of the law of Ceylon and that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to *presume that possession originally that of a co-owner has since become adverse*. He later explained how this presumption should be applied:—“It is in short a question of fact, whenever long-continued exclusive possession is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be  
30 treated as though it had been proved that *that separate and exclusive possession had become adverse at some date* more than ten years before action was brought”. The words I have parenthesised indicate that this presumption is available in connection with the mode (b) of proving an adverse or independent title which I have elicited from the judgment in *Corea’s* case, namely in order to establish that although the entry had been *qua* co-owner, the possession had commenced at some later time to be upon an assertion of an adverse title. No such presumption would be available to counter the principle that a co-owner is presumed to *enter* by virtue of his lawful title. The presumption referred to by Bertram C. J. has since been usually referred to as the presumption of ouster.

40 The argument for the appellants has been that this presumption of ouster, applies in their case, that it is just and reasonable that the possession of the 13th defendant, having been exclusive and of long duration, should be regarded as having become adverse at some time after 1916. Let me first repeat the language employed by Bertram C. J. :—“it is open to a Court from lapse of time *in conjunction with the circumstances of the case . . . .*”; “whenever long continued possession is proved to have existed, whether it is not just and reasonable *in all the circumstances of the case . . . .*” Long-continued possession (for nearly 40 years) was established indisputably in the case of *Tillekeratne vs. Bastian*<sup>1</sup>, but that was not all—

Each of the three Judges thought it necessary, as indeed Bertram C. J.'s language rendered it necessary, to refer to circumstances quite distinct from the mere duration of possession, which induced them to apply the presumption :—

“ Though Babappu was the legitimate son of Allis, *he was not accorded this status by the family* ”;

“ It is a very significant fact that Tillekeratne, who purported to have acquired his (Babappu's) share in 1893, became insolvent in 1897, *and did not include this land in the schedule of his assets* ”.

“ It would moreover be *contrary to equity that a person possessing a doubtful status* in a family, who has lived apart from it for a generation in another locality *should be permitted* through the medium of a sale to a speculative purchaser to revive his obsolete pretensions, and *to assist those claiming through that purchaser to invade the family inheritances* ”.

(*per* Bertram C. J.)

“ Although he (Babappu) purported to sell to Tillekeratne in 1893, his vendee never possessed, nor was the land included in the inventory of his estate on his death in 1901, and *his (the vendee's) heirs made no attempt to assert any right until 1916* ”. 20

(*per* Shaw, J.)

“ Babappu appears not to have been really recognized as a legitimate son of Allis by the rest of the family. *He must have known that he was being intentionally excluded from possession* ”.

“ While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind or money ”.

(*per* de Sampayo, J.) 30

There were thus in that case several proved circumstances rendering it reasonable to presume that the possessors' title had become adverse to that of their co-owner: the co-owner's status in the family was doubtful and had not been accorded to him: valuable minerals had been appropriated for the sole benefit of the possessors: the co-owner must have known that he was being intentionally excluded from possession: the actual claimant was a vendee from the co-owner, but this vendee had himself neither possessed nor claimed his share for over ten years. Were not these cogent circumstances from which to infer that the possession had become adverse at some time ?

The passages which I have cited from the judgments in *Tillekeratne vs. Bastian*<sup>1</sup>, were preceded by certain observations which fall from Bertram C. J. (at pages 20 and 21) :—

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10 “ It is the reverse of reasonable to impute a character to a man’s possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners, that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provided a remedy for such a situation by means of counter-presumptions ”.

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Read out of their context, these observations may tend to support the view that adversity may be presumed from mere long-continued and exclusive possession. They emphasise the absurdity and artificiality which might prevail if there were no “ counter-presumption ”, but they do not constitute an enunciation of the principles governing the application of that presumption. They are only a preface or preamble, so to say, to the enunciation of principles which is to follow and which is contained in the passage I have earlier cited, and cannot be regarded as altering or extending the principles as so enunciated.

30 In *Hamidu Lebbe vs. Ganitha*<sup>3</sup>, one or two brothers had been in exclusive possession for nearly forty years. They had quarrelled, and the excluded brother had left the ancestral village. Dalton J., relying on the decision in *Tillekeratne vs. Bastian*<sup>3</sup>, was much inclined to presume from these circumstances that this brother must unsuccessfully have preferred a claim to his share, and that the possession would thereafter have been adverse. He felt however, that the Privy Council decisions in *Corea’s* case and in *Brito vs. Muttunayagam*<sup>4</sup>, (where a father had possessed his widow’s share after a quarrel with his children) did not permit him to presume adverse possession. Ennis J. observed that “ some definite facts would have to be proved ” from which one could infer a change in the character of the possessor’s intention with regard to the holding of the land. If the quarrel and the departure of the co-owner from the village did not constitute sufficiently definite facts from which this inference could be drawn, would it ever be reasonable to draw that inference where all that is proved (as is so in the present case) is long-continued possession ?

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There have been numerous subsequent decisions of this Court which have denied to co-owners in exclusive possession a decree under section 3 of the Prescription Ordinance, but it is sufficient for present purposes to summa-

rize their effect by reference to some of them. Exclusive possession for many years, coupled with the execution by the possessor of deeds inconsistent with the title of his co-owners, is insufficient in the absence of evidence that the co-owners knew of and acquiesced in the execution of the deeds. This proposition was accepted as settled law in *Umma Ham vs. Koch*<sup>5</sup>, which followed earlier decisions to the same effect:—*Careem vs. Ahamado*<sup>6</sup>, and *Sideris vs. Simon*<sup>7</sup>. The preparation of a Plan indicating that the possessor regarded himself as exclusively entitled to a specific portion of the common land and purporting to allot another specific portion to his co-owners, coupled with dealings by the possessor with his portion on the basis of sole ownership, does not justify a presumption of ouster in the absence of evidence that the co-owners acquiesced in the preparation of the plan of partition:—*Githohamy vs. Karanagoda*<sup>8</sup>. It is significant, that, in these and other cases, there was almost invariably reliance, even by unsuccessful possessors, upon some circumstance additional to the mere fact of long and undisturbed and uninterrupted possession, and that proof of some such additional circumstance has been regarded in our Courts as a *sine qua non* where a co-owner sought to invoke the presumption of ouster.

I am aware of one decision only which is seemingly contrary to the *cursus curiae* as just stated. There is language in the judgment of Canaka-ratne J. in *Subramaniam vs. Sivaraja et al*<sup>9</sup>, to indicate that the taking of profits exclusively and continuously for a very long period, and the acquiescence of co-tenants in the possessor's omission to account, would justify the presumption of an ouster. But there is no reference in the judgment to any earlier decision relative to prescription by co-owners, and the facts as stated in the judgment show that there had been no proof that the person in possession claimed title from the same source as did her adversaries. On the contrary the claims of title were mutually exclusive. I cannot regard this case as providing a relevant precedent, but even if it does there is at least one ground upon which it should be distinguished. While the possessor's name had continuously appeared in the assessment Register of the Sanitary Board as the owner of the property, and she alone had paid the rates, the alleged co-tenants had in some years placed their names also on the Register. The fact that they did so but nevertheless did not receive any of the profits from the possessor might have justified the inference that they had staked a claim to their share in the profits and had been rebuffed by the possessor. Even in that case therefore the possessor, if she was properly regarded as a co-owner, did rely upon a circumstance additional to the fact of long possession, as a ground on which the presumption of ouster might be drawn.

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That line of decisions, one of the more recent being *Fernando vs. Podi Nona*<sup>10</sup>, which recognize the principle that, where a stranger obtains a transfer of the entire land from one co-owner, his possession commences as adverse, is not relevant to the present discussion. "The possession of a stranger in itself indicates that his possession is adverse":—Leach C. J. in *Pillai vs. Rarother*<sup>11</sup>. When the title upon which the stranger enters into possession, though in law defective is based upon a transfer to him of the entire land, it is nevertheless a title adverse, inasmuch as it constitutes a denial of the rights of others. What such a stranger proves is an *entry* by a title adverse—the mode (*a*) of proof which I have eli-

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cited from the judgment in *Corea's* case, and not the mode (b) (*i.e.* of change in the character of the possession) which is required of a person who enters *qua* co-owner. Those decisions therefore throw no light on the question I am now considering.

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The judgment in the case of *Rajapakse vs. Hendrick Singho*<sup>12</sup>, though delivered on June 22, 1959, was not referred to during the argument of the present appeal, and I was unaware of it when the preceding part of this judgment was prepared. The facts in that case were, briefly, as follows :—The original owner had conveyed an undivided portion of the  
10 land to T by deeds executed in 1919 and 1920: T in 1921 transferred an undivided 11/19 share to his grand-son, who in turn sold the undivided interests in 1927 to G: the plaintiff purchased the interests of G in May 1953 and instituted a partition action in August of the same year. The defendants, who were descendants of the original owner and thus entitled to the shares outstanding after the transfers of 1919 and 1920, claimed that they had exclusively possessed the entire land from 1922 and had divided the produce among themselves and to the exclusion of the plaintiff's predecessors in title. The grand-son of T, who had been a predecessor of the plaintiff  
20 and had been the owner of the undivided interests for about six years, admitted at the trial that neither he nor his successor G had ever occupied the land, and that the defendants had lived on the land and enjoyed the produce to the exclusion of himself and G. It was held on these facts that there was overwhelming evidence upon which ouster could be presumed.

The plaintiff in that case claimed under T, *who was a purchaser* and not an heir of the original owner, and the plaintiff's predecessors were strangers to the family of the original owner. It is reasonable to assume that when a stranger purchases undivided interests in land, he does so as an investment and with the object of enjoying his due share of the fruits. If  
30 having purchased such an interest, a stranger does not assert his right to possession, but instead acquiesces in the exclusive appropriation of the entire produce by the members of the family of the original owner, it may be reasonable to presume from his unusual conduct that he either acknowledged the exclusive rights of the family or else failed in an effort to assert his own rights. Indeed this same feature, namely that the rights of the family were challenged only after a long period of acquiescence on the part of a stranger-purchaser, was one of the circumstances which induced this Court in  
40 *Tillekeratne vs. Bastian*<sup>1</sup>, to presume that there had been an ouster. If the *ratio decidendi* of the decision in *Rajapakse vs. Hendrick Singho* is that acquiescence, on the part of a purchaser of an undivided interest, in the exclusive possession of the entire land and the appropriation of its profits by the other co-owners, is a circumstance from which the adversity of the possession of the other co-owners can be inferred, then that decision may be in consonance with the *dicta* of Bertram C. J. and Ennis J. to which I have earlier referred. If that be the basis of the decision, it is easily distinguishable from the present case, where the title has throughout remained vested in the members of the same family.

Before concluding this judgment, it may be useful to add one observation concerning the presumption of ouster. Some of the presumptions mentioned in the Evidence Ordinance are arbitrary, in the sense that a Court is per-

mitted to presume the existence of facts, even though it may be uncertain that the facts did indeed exist. The presumption of legitimacy is a good example of such an arbitrary presumption : a Court may be compelled to regard the child of a wife as legitimate despite the availability of evidence, whether direct or in the form of admission, which can establish illegitimacy. The presumptions as to the regularity of official acts and the “ course of business ” are also examples, though less pointed, of something akin to a “ rule of thumb ”. In my view, however, the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tend to show, firstly the probability of an ouster, and secondly the difficulty 10 or impossibility of adducing proof of the ouster. If the circumstances justify the opinion that possession must have become adverse at some time, a Judge is not in reality presuming an ouster : he rather gives effect to his opinion despite the absence of the proof of ouster which a co-owner would ordinarily be required to adduce. This aspect of the matter was touched upon by Bertram C. J. in *Tillekeratne vs. Bastian*<sup>1</sup>, (at page 18).

The principle as stated in judgments of Bertram C. J. in *Tillekeratne vs. Bastian*<sup>1</sup>, and of Ennis J. in *Hamidu vs. Ganitha*<sup>3</sup>, that the inference of ouster can only be drawn in favour of a co-owner upon proof of circumstances additional to mere long possession, has been consis- 20 tently recognized and strictly applied. To draw that inference from mere duration of possession would be to disregard the very terms in which they stated the principle, and to ignore the requirement of an “ adverse or independent title ” prescribed in section 3. Moreover, if exclusive possession alone is to suffice, after what period will it be just and reasonable to presume ouster? There being nothing in the section to the contrary, a particular Judge may well be inclined to presume ouster from possession for a period of ten years : but if another Judge declines to do so unless the period is much longer, can it be said that one Judge is right and the other wrong? Will not such a situation be reminiscent of the days when 30 the principles of Equity were said to vary with the length of the Chancellor’s toe? The proposition we are invited to uphold is not only contrary to settled law ; it contains no criterion by the application of which consistency of judicial decisions can be reasonably expected.

Our Courts have constantly recognized the rule that undisturbed and uninterrupted possession by a co-owner does not suffice to entitle him to a decree unless there is proof of the ouster of the other co-owners. The decision in *Tillekeratne vs. Bastian*<sup>1</sup>, recognized an exception to that rule and permits adversity of possession to be presumed in the presence of circumstances additional to the fact of undisturbed and uninterrupted 40 possession for the requisite period. If the true effect of the exception is that the fact of such possession *simpliciter* establishes a title “ adverse or independent ”, what need is there for a co-owner to prove ouster and what scope remains for the operation of the rule? What need for a co-owner to prove anything more than is required of a trespasser?

I would hold for the reasons stated that the 18th defendant was entitled only to the one-third share which accrues to him under the deed which created the *fidei commissum*, and that he did not acquire any title by prescription to any other share. The judgment of the District Judge has

therefore to be affirmed, subject to the correction of one error therein. As stated in the judgment, it is only the fifth *fidei commissary* heir who holds the property free of the *fidei commissum*. It was common ground at the hearing of the appeal that none of the parties are of the fifth generation. Accordingly, the *fidei commissum* attaches to all the shares allotted in the judgment and to the proceeds of sale, except to the 1/9 share referred to by my brother de Silva. I agree with the order proposed by him.

No. 24  
Judgment  
of the  
Supreme  
Court  
11-12-59  
—continued.

(Sgd.) H. N. G. FERNANDO,  
*Puisne Justice.*

10

(1) 21 N. L. R. 12,  
(2) 15 N. L. R. 65,  
(3) 27 N. L. R. 33,  
(4) 20 N. L. R. 327,  
(5) 47 N. L. R. 107,  
(6) 5 C. L. Rec, 170,

(7) 46 N. L. R. 273,  
(8) 56 N. L. R. 250.  
(9) 46 N. L. R. 540.

20

(10) 56 N. L. R. 491.  
(11) 1 L. R. 23 Bomb. 137.  
(12) 61 N. L. R. 32.

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No. 25

Decree of the Supreme Court

*S. C. 260/56 (F)*

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF  
HER OTHER REALMS AND TERRITORIES, HEAD OF  
THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

30

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nithambuwa.

*Plaintiff.*

Vs.

A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul  
Hanan of Maligawatta and others.

*Defendants.*

(Dead) A. R. Abdul Majeed of No. 478, Galle Road, Bambalapitiya,  
Colombo.

*13th Defendant-Appellant.*

No. 25  
Decree  
of the  
Supreme  
Court  
11-12-59.



No. 25  
Decree  
of the  
Supreme  
Court  
11-12-59  
—continued.

Huzaima wife of Yoosuf Jalladeeb, 478, Galle Road,  
Bambalapitiya, and 3 others.

*18th, 19th, 20th and 21st Substituted-Defendants-Appellants.*

AGAINST

A. L. Ummu Zaneera *alias* Shamsunnahal of  
Thihariya, Nithambuwa.

*Plaintiff-Respondent.*

A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul  
Hanan of Maligawatte and others.

*Defendants-Respondents. 10*

*Action No. 6970/Partition.*

DISTRICT COURT OF COLOMBO

This cause coming on for hearing and determination on the 24th and 25th September and 11th December, 1959 and on this day, upon an appeal preferred by the 13th Defendant-Appellant before the Hon. Hema Henry Basnayake, Q. C., Chief Justice, the Hon. Kaludura Dhammikasiri de Silva and the Hon. Hugh Norman Gregory Fernando, Puisne Justices of this Court, in the presence of Counsel for the Substituted Defendants Appellants, Plaintiff-Respondent, 4th to 8th Defendants-Respondents, 9th Defendant-Respondent, 10th Substituted Defendant-Respondent, 20 12th Defendant-Respondent.

It is considered and adjudged that this appeal be and the same is hereby dismissed and the judgment of the District Judge be and the same is hereby affirmed subject to the variation that the 1/9th share which originally belonged to Noor Lahira and which devolved on 9th to 12th Defendants-Respondents will not be subject to the fidei commissum.

It is ordered and decreed that the proceeds of sale of the balance 8/9ths of the property be deposited in Court and would be subject to the fidei commissum.

And it is further ordered and decreed that the 18th to 21st Substituted 30 Defendants-Appellants do pay to the Plaintiff-Respondent, 4th to 8th Defendants-Respondents, 9th Defendant-Respondent, 10th Substituted-Defendant-Respondent and 12th Defendant-Respondent the taxed costs of this appeal.

Witness the Hon. Hema Henry Basnayake, Q. C., Chief Justice at Colombo, the 15th day of February, in the year One thousand Nine hundred and Sixty and of Our Reign the Ninth.

(Sgd.) P. KARTHIRAVELUPILLAI,  
*Deputy Registrar, S.C.*

**Application for Conditional Leave to Appeal to  
the Privy Council**

**IN THE SUPREME COURT OF THE ISLAND OF CEYLON**

*In the matter of an Application for Conditional Leave to  
Appeal under the provisions of the Appeals (Privy Council)  
Ordinance, Chapter 85 :*

No. 26  
Application  
for  
Conditional  
Leave to  
Appeal  
to the  
Privy  
Council  
7-1-60.

S. C. No. 260.  
D. C. Colombo.  
10 No. 6970/P.

18. Hussaima wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
19. Huzair Sadiq of Colombo.
20. A. M. M. Nazick of Moor Road, Colombo.
21. A. M. M. Marzook of Layards Road, Colombo.

(all substituted in place of 13th defendant-appellant).

*Defendants-Appellants.*

Vs.

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya,  
Nittambuwa.

20

*Plaintiff-Respondent.*

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of Maligawatte.
2. A. L. M. Ariff of No. 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatte, Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Colombo.
5. M. M. Aynul Wadood.
6. M. M. Mohamed Fouze.
7. M. M. Abdul Najeed.

30

No. 26  
Application  
for  
Conditional  
Leave to  
Appeal to  
the Privy  
Council  
7-1-60  
—continued.

8. M. M. Mohamed Cassim all of No. 289, Darley Road, Colombo.
9. Z. H. Mohamed Nizar of No. 222, Galle Road, Bambalapitiya.
11. A. T. M. Mohideen of No. 28, 34th Lane, Wellawatte, Colombo.
12. Puthri Zohara of No. 109, Nawala Road, Rajagiriya.
14. M. R. Zainudeen.
15. M. S. Rizan.
16. M. R. Noor Mashooda. 10
17. Noor Zahira all of No. 2, Kensington Gardens, Bambalapitiya (substituted in place of 10th defendant-deceased).

*Defendants-Respondents.*

To :

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER  
JUDGES OF THE SUPREME COURT OF THE  
ISLAND OF CEYLON :

On this 7th day of January 1960.

The Petition of the Petitioners the Appellants abovenamed appearing by A. R. M. Razeen, their Proctor sheweth as follows :— 20

1. That feeling aggrieved by the judgment and decree of this Honourable Court pronounced on the 11th day of December 1959 the appellants are desirous of appealing therefrom to Her Majesty the Queen in Council.

2. The said judgment is a final judgment and the matter in dispute on the appeal exceeds the value of Rs. 5,000/- and is also one that involves directly or indirectly a claim or question to or respecting property or a civil right amounting to or of the value of Rs. 75,000/-.

3. Due notice of intention to apply to this Honourable Court for conditional leave to appeal to Her Majesty in Council has been given to the respondents by me as is more fully set out in the affidavit hereto annexed.

WHEREFORE the Appellants pray on the grounds aforesaid for conditional leave to appeal against the said judgment of this Court dated 11th December 1959 to Her Majesty in Council.

(Sgd.) A. R. M. RAZEEN,  
*Proctor for Appellants.*

Settled by :—

HANAN ISMAIL ESQR.,  
*Advocate.*

## Commission to Sell

## IN THE DISTRICT COURT OF COLOMBO

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nittambuwa.

*Plaintiff.*

Vs.

No. 6970/P.

- 10 1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of 48/22, Maligawatte.
2. A. L. M. Ariff of Thihariya, presently of 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatte Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Maradana, Colombo.
5. M. M. Aynul Wadood.
6. M. M. Mohamed Fouze.
7. M. M. Abdul Majeed.
- 20 8. M. M. Mohamed Cassim all of No. 289, Darley Road, Maradana, Colombo.
9. Z. H. Mohamed Nizar of No. 222, Galle Road, Bambalapitiya.
10. Z. H. Mohamed Reza of No. 2, Kensington Gardens, Bambalapitiya.
11. A. T. H. Mohideen of No. 28, 34th Lane, Wellawatte, Colombo.
12. Puthri Zohara of No. 109, Nawala Road, Rajagiriya.
- (dead) 13. A. R. Abdul Majeed of No. 478, Galle Road, Colombo.
- 80 14. M. R. Zainudeen.
15. M. S. Rizan.
16. M. R. Noor Mashooda.
17. Noor Zahira all of No. 2, Kensington Gardens, Bambalapitiya (substituted in place of 10th defendant).
18. Hazaima wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
19. Mrs. Hazair Sadiq.

No. 27  
Commission  
to Sell  
30-5-60  
—continued.

20. A. M. M. Nazick.

21. A. M. M. Marzook (18th to 21st defendants are substituted in place of the 13th defendant).

*Defendants.*

To :

W. D. ARNOLD,  
COMMISSIONER,  
COLOMBO.

Whereas by a decree of this Court dated the 20th day of February 1956 as amended by the decree of the Supreme Court dated 15th February 1959<sup>10</sup> (copies of which are annexed hereto) the plaintiff and the defendants were declared entitled to the land and premises fully described in the said decrees.

And whereas it was further ordered that the said premises be sold under the Provisions of the Partition Act No. 16 of 1951 and the proceeds of the sale be brought into Court.

And whereas you are appointed Commissioner to carry out the sale of the said land and premises in accordance with the Provisions of the Partition Act No. 16 of 1951.

NOW KNOW YE AND THESE PRESENTS WITNESS that you are hereby authorised and directed to sell the said premises in conformity with the Provisions of Partition Act No. 16 of 1951 upon Conditions of Sale and mode of publication previously approved by this Court.

You will bring into Court the amount recovered by you at such sale within 48 hours of the sale and make your return to this Commission within a week of the date of sale and report to this Court what sum or sums and to what person or persons you have sold the said premises and what sum or sums have been recovered by you from the purchaser or purchasers thereof and produce with your return the perfected Conditions of Sale and make your return to this Court on or before the 31st day of August, 1960.

You should inform the Court the date of sale.

30

Given under my hand at Colombo on this 30th day of May 1960.

By order of Court.

(Sgd.)

ASSISTANT SECRETARY,  
*District Court, Colombo.*

*Drawn by me,*

Sgd.

*Proctor for Plaintiff.*

## No. 28

**Conditions of Sale, Mode of Advertisements and probable costs, and Valuation Report.**

VALUE Rs. 80,660·00

W. D. E. ABRAHAM & SON,  
Auctioneers & Brokers,  
253, Hultsdorf Street, Colombo.

No. 28  
Conditions  
of Sale,  
Mode of  
Advertise-  
ments and  
probable  
costs, and  
Valuation  
Report,  
31-5-60.

**CONDITIONS OF SALE**

Upon which WELMILLAGE DON ARNOLD Licensed Auctioneer  
10 of Colombo, carrying on business under the name style and firm of W. D. E.  
ABRAHAM & SONS, Auctioneers & Brokers under commission issued to  
me in D. C. Colombo case No. 6970/Partition will put up for sale by Public  
Auction at the spot on  
this day of One Thousand  
Nine Hundred and Sixty. After previous advertisement the property here-  
inafter described.

1. The highest bidder shall become the purchaser, should any dispute  
shall arise between two or more bidders as to their bids the property will  
be put up again at the previous undisputed bidding.

20 2. Bids of less than Rupees Two Hundred will not be accepted and  
no bidding shall be retracted.

3. The highest bidder, on being declared the purchaser, shall, immedi-  
ately after the sale, pay the full amount of the purchase where the same  
does not exceed One Hundred Rupees and where it exceeds that sum,  
he shall pay one-tenth of the purchase amount to the Auctioneer.

4. Immediately after the sale the purchaser shall also pay to the  
Auctioneer the cost of publishing this sale, the stamps for these conditions,  
the costs of drawing these conditions, the Notary's fees for attesting the  
same, the Auctioneer's travelling charges, valuation fee, clerk's fee.

30 5. Where the purchase amount exceeds One Hundred Rupees, the  
purchaser shall furnish two good and sufficient sureties, if required by the  
Auctioneer, who shall sign an agreement with him for the payment into court  
the balance money within thirty days from the date hereof and should that  
day fall on a public holiday or a Sunday, then on the first office day next  
following, when a transfer (the cost whereof the purchaser shall bear)  
will be executed in his favour.

40 6. Should the purchaser or his sureties fail or neglect to comply with  
these conditions all monies paid this day shall be forfeited, and the  
property shall be liable to be re-sold at their risk. They shall not be entitled  
to any advantages arising at such re-sale but shall be liable in respect of  
any deficiency between the original sale and the second sale.

No. 28  
Conditions  
of Sale,  
Mode of  
Advertise-  
ments and  
probable  
costs, and  
Valuation  
Report,  
31-5-60  
—continued.

7. No error or mistake in the description of the property shall vitiate, annual or affect the sale in any way.

8. The Auctioneer has the right to accept or reject the bid of any person without assigning his reasons therefor and he reserves to himself the right to bid once.

9. The Auctioneer does not warrant the title to the property.

10. The property will be first put up for sale at the appraise value fixed by me or by court and if there be no bidder it will be thereafter put up for sale at the claim and cost due in this case and if there be no bidders at such sale also then thereafter to the highest bidder. 10

### DESCRIPTION OF PROPERTY

All that house and garden at one time bearing Assessment No. 52 presently Nos. 88 and 90 situated at Prince Street in Pettah of Colombo within the Municipality and District of Colombo W.P. and bounded on the North by the house of Paul Chetty East by house of Mr. Wanters on the South by X Street (3rd Cross Street) and on the West by the house of Mr. Kern containing in extent eleven forty three one hundredths square perches (A O. R O. P 11, 43/100) which said land is described as an allotment of land with the buildings standing there now bearing Assessment Nos. 88 and 90 situated along Prince Street in Pettah within the Municipality and District of Colombo W. P. and bounded on the North by Prince Street East by premises now bearing Assessment No. 98 Prince Street South by premises now bearing Assessment Nos. 67 and 69 Maliban Street and West by premises bearing Assessment Nos. 82 and 84 Prince Street containing in extent Twelve point six one perches (A O. R O. P 12.61) according to plan No. 511 dated 10th January 1954 made by S. Rajendra Licensed Surveyor and filed of record marked X. 20

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W. D. E. ABRAHAM & SONS,  
Auctioneers & Brokers,  
253, Hulstsdorf Street,  
Colombo. 80

VALUE Rs. 80,660.00

### CONDITIONS OF SALE

---

Upon which WELMILLAGE DON ARNOLD Licensed Auctioneer of Colombo, carrying on business under the name style and firm of W. D. E. ABRAHAM & SONS, Auctioneers & Brokers under commission issued to me in D.C. Colombo case No. 6970/Partition will put up for sale by Public Auction at the spot among the co-owners on this day of this One Thousand Nine Hundred and Sixty. after previous advertisement the property hereinafter described. 40

1. The highest bidder shall become the purchaser, should any dispute shall arise between two or more bidders as to their bids the property will be put up again at the previous undisputed bidding.

2. Bids of less than Rupees Two Hundred will not be accepted and no bidding shall be retracted.

3. The highest bidder, on being declared the purchaser, shall, immediately after the sale, pay the full amount of the purchase where the same does not exceed One Hundred Rupees, and where it exceeds that sum, he shall pay one tenth of the purchase amount to the Auctioneer.

10 4. Immediately after the sale the purchaser shall also pay to the Auctioneer the cost of publishing this sale, the stamps for these conditions, the costs of drawing these conditions, the Notary's fees for attesting the same the Auctioneer's travelling charges, valuation fee, clerk's fee.

5. Where the purchase amount exceeds One Hundred Rupees, the purchaser shall furnish two good and sufficient sureties, if required by the Auctioneer, who shall sign an agreement with him for the payment into court the balance money within thirty days from date hereof and should that day fall on a public holiday or a Sunday, then on the first office day next follow-  
20 ing, when a transfer (the cost whereof the purchaser shall bear) will be executed in his favour.

6. Should the purchaser or his sureties fail or neglect to comply with these conditions all monies paid this day shall be forfeited, and the property shall be liable to be re-sold at their risk. They shall not be entitled to any advantages arising at such re-sale but shall be liable in respect of any deficiency between the original sale and the second sale.

7. No error or mistake in the description of the property shall vitiate, annual or affect the sale in any way.

8. The Auctioneer has the right to accept or reject the bid of any  
30 person without assigning his reasons therefor and he reserves to himself the right to bid once.

9. The Auctioneer does not warrant the title to the property.

10. The property will be first put up for sale at the appraise value fixed by me or by court and if there be no bidder it will be thereafter put up for sale at the claim and cost due in this case and if there be no bidders at such sale also then thereafter to the highest bidder.

#### DESCRIPTION OF PROPERTY

All that house and garden at one time bearing Assmt : No. 52 presently Nos. 88 and 90 situated at Prince Street in Pettah of Colombo within the  
40 Municipality and District of Colombo W.P. and bounded on the North by the house of Paul Chetty East by house of Mr. Wanters on the South by X



No. 28  
Conditions  
of Sale,  
Mode of  
Advertise-  
ments and  
probable  
costs, and  
Valuation  
Report,  
81-5-60  
—continued.

Street (3rd Cross Street) and on the West by the house of Mr. Kern containing in extent eleven forty three one hundredth square perches (A 0. R 0. P 11, 43/100) which said land is described as an allotment of land with the buildings standing thereon now bearing Assessment Nos. 88 and 90 situated along Prince Street in Pettah within the Municipality and District of Colombo W.P. bounded on the North by Prince Street East by premises now bearing Assessment No. 98 Prince Street South by premises now bearing Assessment Nos. 67 and 69 Maliban Street and West by premises bearing Assessment Nos. 82 and 84 Prince Street containing in extent Twelve point six one perches (A 0. R 0. P 12.61) according to plan No. 511 dated 10th January 1954 made by S. Rajendra licensed Surveyor and filed of record marked X.

W. D. ARNOLD,  
*Auctioneer.*

D. E. ABRAHAM & SONS,  
*Auctioneers & Brokers.*

253, Hultsdorf Street,  
Colombo.

.....19 .

*D.C. Colombo Case No. 6970/Partition*

**MODE OF ADVERTISEMENTS AND PROBABLE  
COST OF SAME**

Three insertions in the Ceylon Daily News	...	Rs.	190·00	20
One insertion in the Dinamina	...	Rs.	50·00	
One insertion in Janatha	... ..	Rs.	50·00	
Five insertions in Muslim Friend	... ..	Rs.	200·00	
Posters and handbills	... ..	Rs.	100·00	
Affixing and distributing	... ..	Rs.	10·00	
Basin Beater	... ..	Rs.	10·00	

(Sgd.) W. D. ARNOLD,  
*Commissioner.*

Colombo 31st May 1960.

**VALUATION REPORT  
IN THE DISTRICT COURT OF COLOMBO**

30

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Tihariya, Nittambuwa.

*Plaintiff.*

Vs.

No. 6970/Partition.

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M.  
Abdul Hanan of 48/22, Maligawatte and others.

*Defendants.*

With reference to the commission issued to me in the above case, I move to inform court that I inspected this day the property ordered to be sold for the purpose of valuing it.

This property is said to be A 0. R 0. P 12.61 in extent and is situated at Prince Street in a highly commercial area in Pettah Colombo. Premises bearing Assessment Nos. 88 and 90 comprised of one building that stand on this property. The building is about 70 to 80 years old and needs repair. These premises are served with electricity, water and drainage services.

Considering the present day very keen demand for commercial premises in Pettah area I am of opinion that a perch of land of this property is reasonably worth Rs. 6,000/- and I value the above property with everything thereon as follows :—

Land in extent 12.61 Perches at Rs. 6,000/- a perch ...	Rs.	75,660.00
Buildings thereon at ... ..	Rs.	5,000.00
<b>TOTAL VALUE</b> ...	Rs.	<u><u>80,660.00</u></u>

Colombo 31st May 1960.

(Sgd.) W. D. ARNOLD,  
*Commissioner.*

No. 28  
Conditions of  
Sale, Mode of  
Advertisements and  
probable  
costs, and  
Valuation  
Report  
31-5-60  
—continued.

**No. 29**

**Statement of Objections of 18-21 Defendants**

20 **IN THE DISTRICT COURT OF COLOMBO**

A. L. Ummu Zaneera *alias* Shamsunnahar of  
Thihariya, Nittambuwa.

*Plaintiff.*

*No. 6970/P.*

Vs.

18. Huzaima Yoosoof.
19. Mrs. Huzair Sadique.
20. A. M. M. Nazick and,
21. A. M. Maruzook,

*Defendants.*

No. 29  
Statement  
of Objections  
of 18-21  
Defendants  
10-8-60.

No. 29  
Statement of  
Objections of  
18-21  
Defendants  
10-8-60  
—continued.

On this 10th day of August 1960.

The statement of objections of the 18th to 21st defendants abovenamed appearing by their Proctor, A. R. M. Razeen is as follows :—

1. Execution of the decree of the Supreme Court in the above action at this stage is premature and prejudicial to these defendants.

2. The judgment of the Supreme Court is in appeal to the Privy Council in S. C. Application No. 2 of 1960.

3. Conditional leave to appeal to the Privy Council had already been allowed and the application for Final leave has been fixed for hearing on 2nd day of September 1960. 10

4. No application has been made to the Supreme Court for execution of the decree pending the appeal to the Privy Council.

5. The Plaintiff is therefore not entitled to have the execution of this decree.

Wherefore these defendants pray that this Court be pleased to stay execution of decree till the finding of the Privy Council, for costs and for such other and further relief as to this Court shall seem meet.

(Sgd.) A. R. M. RAZEEN,

*Proctor for 18th to 21st defendants.*

No. 30  
Decree  
Granting  
Conditional  
Leave to  
Appeal to  
the privy  
Council  
30-9-60.

No. 30

20

**Decree Granting Conditional Leave to Appeal to  
the Privy Council.**

*S. C. Application No. 2*

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF  
HER OTHER REALMS AND TERRITORIES, HEAD OF  
THE COMMONWEALTH.

**IN THE SUPREME COURT OF THE ISLAND OF CEYLON**

*In the matter of an application by the Defendants-Appellants  
dated 7th January, 1960 for Conditional Leave to Appeal to Her  
Majesty the Queen in Council against the judgment and decree of  
this Court dated 11th December, 1959 in S. C. 260/56 (Final)—  
D. C. Colombo case No. 6970/P.*

30

18. Hussaima, wife of Yoosuf Jallaldeen of No. 478, Galle Road,  
Bambalapitiya.

19. Huzair Sadiq of Colombo.  
 20. A. M. M. Nazick of Moor Road, Colombo.  
 21. A. M. M. Marzook of Layards Road, Colombo,  
 (all substituted in place of 18th defendant-appellant).

*Defendants-Appellants.*  
 PETITIONERS.

AGAINST

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya,  
 Nittambuwa.

*Plaintiff-Respondent.*  
 RESPONDENT.

A. L. Sithy Azeema *alias* Sithy Nafessa, wife of M. I. M.  
 Abdul Hanan of Maligawatte and 14 others.

*Defendants-Respondents.*  
 RESPONDENTS.

*Action No. 6970/P.*

DISTRICT COURT OF COLOMBO

This cause coming on for hearing and determination on the 30th day of September, 1960 before the Hon. Kaludura Dhammikasiri de Silva and the Hon. Thusew Samuel Fernando, Q.C., Puisne Justices of this Court, in the presence of Counsel for the 18th—21st Defendants-Appellants-Petitioners, Plaintiff-Respondent-Respondent, 8th and 11th Defendants-Respondents- Respondents.

It is considered and adjudged that this application be and the same is hereby allowed upon the condition that the applicant do within one month from this date :—

1. Deposit with the Registrar of the Supreme Court a sum of Rs. 3,000/- and hypothecate the same by bond or such other security as the Court in terms of Section 7 (1) of the Appellate Procedure (Privy Council) Order, 1921, shall on application made after due notice to the other side approve.

2. Deposit in terms of provisions of Section 8 (a) of the Appellate Procedure (Privy Council) Order, 1921, with the Registrar a sum of Rs. 300/- in respect of fees mentioned in Section 4 (b) and (c) of the Appeals (Privy Council) Ordinance (Chapter 85).

Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon, for an estimate of such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

Witness the Hon. Hema Henry Basnayake Q.C., Chief Justice at Colombo, the 8th day of October, in the year One thousand Nine hundred and Sixty and of Our Reign the Ninth.

Seal

(Sgd.) B. F. PERERA,  
 Deputy Registrar, S. C.

No. 30  
 Decree  
 Granting  
 Conditional  
 Leave to  
 Appeal to  
 the Privy  
 Council  
 30-9-60  
 —continued.

**Application For Final Leave to Appeal To The  
Privy Council**

**IN THE SUPREME COURT OF THE ISLAND OF CEYLON**

*In the matter of an Application for Leave to Appeal to Her  
Majesty in Council.*

18. Hussaima, wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya.
19. Mrs. Huzair Sadiq of Colombo.
20. A. M. M. Nazick of Moor Road, Colombo. 10
21. A. M. M. Marzook of Layards Road, Colombo.  
(All substituted in place of 13th Defendant-Appellant).

*Defendants-Appellants.*  
PETITIONERS.

S. C. 260/'56  
(Final)  
D. C. Colombo.  
Case No. 6970/P.

Vs.

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya, 20 Nittambuwa.

*Plaintiff-Respondent.*

1. A. L. Sithy Azeema *alias* Sithy Nafeesa wife of M. I. M. Abdul Hanan of Maligawatte.
2. A. L. M. Ariff of No. 29, Old Moor Street, Colombo.
3. Rabia Umma of No. 10/95, Mahawatte, Negombo Road, Peliyagoda.
4. Zaneera Umma of No. 289, Darley Road, Colombo.
5. M. M. Aynul Wadood.
6. M. M. Mohamed Fouze. 30
7. M. M. Abdul Majeed.
8. M. M. Mohamed Cassim all of No. 289, Darley Road, Colombo.

9. Z. H. Mohamed Nizar of No. 222, Galle Road, Bambalapitiya.
11. A. T. M. Mohideen of No. 28, 34th Lane, Wellawatte, Colombo.
12. Puthri Zohara of No. 109, Nawala Road, Rajagiriya.
14. M. R. Zainudeen.
15. M. S. Rizan.
16. M. R. Noor Mashooda.
17. Noor Zahira all of No. 2, Kensington Gardens, Bambalapitiya (substituted in place of 10th Defendant-deceased).

10

*Defendants-Respondents.*  
RESPONDENTS.

TO THE HONOURABLE THE CHIEF JUSTICE AND THE  
OTHER JUDGES OF THE SUPREME COURT OF  
THE ISLAND OF CEYLON.

On this 3rd/5th day of November, 1960.

THE PETITION of the Petitioners abovenamed appearing by their Proctor, ABDUL RAHEMAN MOHAMMED RAZEEN, states as follows :-

1. That the petitioners abovenamed on the 30th day of September, 20 1960, obtained Conditional Leave from this Honourable Court to appeal to Her Majesty the Queen in Council against the Judgment of this Court pronounced on the 11th day of December, 1959 ;

2. That the petitioners have in compliance with the conditions on which such leave was granted deposited a sum of Rupees Three thousand (Rs. 3,000/-) with the Registrar of the Supreme Court and hypothecated the said sum by bond on the 25th day of October, 1960, and have further deposited with the Registrar a sum of Rupees Three hundred (Rs. 300/-) in respect of the amounts and fees mentioned in Section 4 (2) (b) and (c) of the Appeals (Privy Council) Ordinance.

30

WHEREFORE THE PETITIONERS PRAY :—

- (a) that they be granted Final Leave to Appeal to Her Majesty the Queen in Council against the said Judgment of this Court, dated the 11th day of December, 1959 ;
- (b) for costs and for such other and further relief as to Your Lordships' Court shall seem meet.

(Sgd.) A. R. M. RAZEEN,  
Proctor for Petitioners.

No. 82  
Decree  
Granting  
Final Leave  
to Appeal to  
The Privy  
Council  
11-11-60.

No. 32

**Decree Granting Final Leave to Appeal to The Privy Council**

*S. C. Application No. 465.*

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF  
HER OTHER REALMS AND TERRITORIES, HEAD OF  
THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

*In the matter of an application dated 3rd/5th November, 1960, for  
Final Leave to Appeal to Her Majesty the Queen in Council by  
the Defendants-Appellants against the decree dated 11th December,  
1959.*

10

Hussaima, wife of Yoosuf Jallaldeen of No. 478, Galle Road, Bambalapitiya and three others.

(All substituted in place of 18th Defendant-Appellant).

*18th to 21st Defendants-Appellants.*  
PETITIONERS.

AGAINST

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya, Nittambuwa.

20

*Plaintiff-Respondent.*  
RESPONDENT.

A. L. Sithy Azeema *alias* Sithy Nafessa, wife of M. I. M. Abdul Hanan of Maligawatte and 14 others.

*Defendants-Respondents.*  
RESPONDENTS.

*Action No. 6970/P. (S. C. 260/'56)*

DISTRICT COURT OF COLOMBO

This cause coming on for hearing and determination on the 11th day of November, 1960 before the Hon. Miliani Claude Sansoni and the Hon. Hugh Norman Gregory Fernando, Puisne Justices of this Court, in the presence of Counsel for the 18th to 21st Defendants-Appellants-Petitioners.

It is considered and adjudged that the Application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed.

Witness the Hon. Edwin Herbert Theodore Gunasekara, Acting Chief Justice at Colombo, the 16th day of November, in the year One thousand Nine hundred and Sixty and of Our Reign the Ninth.

(Sgd.) B. F. PERERA.  
*Deputy Registrar, S.C. 40*

Seal

**Proceedings before the District Court***D.C. 6970/P.—25-11-60.***No. 33  
Proceedings  
before the  
District  
Court  
25-11-60.**

Mr. Advocate Nalin instructed by Mr. H. M. Sally for the plaintiff.

Mr. Advocate H. Ismail instructed by Mr. A. R. M. Razeen for 18-21st defendants.

Mr. Nalin moves that the decree for sale be executed. He concedes, however, that there is an appeal to the Privy Council from the order of the Supreme Court.

10 Mr. Ismail addresses Court. He submits that the decree should not be executed in view of the appeal that is pending. He also submits that the plaintiff should apply to the Supreme Court for execution of the decree.

**ORDER**

I am inclined to agree with the submissions made by Mr. Ismail. Further steps in this case based on the decree for sale should, in my opinion, await the decision of the Privy Council.

(Sgd.)

*Additional District Judge.*



P 1  
Deed  
No. 1082  
8-12-1868.

**PART II**

**P 1**

**Deed No. 1082**

*Application No. D 5288*  
*7-12-54*

*P 1*

**No. 1082**

Know all men That we Edwin Henry Mack and George Francis Mack of Colombo in consideration of Two Hundred and Sixty Pounds (£. 260) sterling paid to us by Ibrahim Lebbe Ahamado Lebbe Marcar of Colombo (the receipt whereof is hereby acknowledged) do hereby sell and assign unto the said Ibrahim Lebbe Ahamado Lebbe Marcar his heirs Executors, administrators and assigns. All that House and Ground situated in Prince Street in the Pettah of Colombo bounded on the North by the House of Sanloe Chetty on the East by the House of Mr. Wanterz on the South by the Prince Street and on the West by the House of Mr. Kern containing in extent eleven forty three one hundredth square perches according to the Title deed thereof No. 13320 dated the twenty-sixth day of October 1862 and attested by Mr. John Driberge Notary Public together with all deeds and writings relating thereto. To have and to Hold unto the said Ibrahim Lebbe Ahamado Lebbe Marcar his heirs executors administrators and assigns 20 for ever and we do hereby for ourselves our heirs executors and administrators covenant with the said Ibrahim Lebbe Ahamado Lebbe Marcar his heirs executors administrators and assigns that the said premises are free from any encumbrance and that we shall always warrant and defend the same unto him and them against any person whomsoever. In witness whereof we do set our hand and seal to three of the same tenor as these presents at Colombo aforesaid, on the third day of December in the year of our Lord One Thousand eight Hundred and sixty-eight.

*Witnesses :*

(Sgd.) *Illegible.*

(Sgd.) E. H. MACK.

30

(Sgd.) *Illegible.*

(Sgd.) FRANCIS MACK.

I, Fredrick Charles Loos of Colombo Notary Public do certify that the foregoing Deed having been read over by Edwin Henry Mack and George Francis Mack therein named in the presence of Mohideen Lebbe Seyed Meera Lebbe and Pakeer Bawa Meera Lebbe Markar both of Colombo the subscribing witnesses thereto both of whom are known to me the same was signed by them and by the said Witnesses and by me the said Notary in the presence of one another at Colombo on this third day of December A. D. 1868.

*Seal.*

(Sgd.) F. C. Loos, 40  
*Notary Public.*

I, R. M. D. Ranasinghe, Addl. Registrar of Lands Colombo, hereby certify that the foregoing is a true copy of a deed of conveyance made from the duplicate filed of record in this office and the same is granted on the application of Mr. M. N. M. Salahudeen.

Land Registry,  
Colombo, 8th December, 1954,

(Sgd.) R. M. D. RANASINGHE,  
*Addl. Registrar of Lands,*

## Deed No. 260

P 2

*Application No. L 4873*

## No. 260

To all to whom these presents shall come I, Ibrahim Lebbe Ahamado Lebbe Markar of New Moor Street in Colombo send Greetings.

Whereas in Consideration of my love and affection for wife Mutto Natchia I am desirous of making some X for her by giving and granting  
10 unto her amongst other X premises hereinafter mentioned and described under X conditions and restrictions hereinafter set forth.

Now know ye and these presents witness that the said Ibrahim Ahamado Lebbe Markar in consideration of the premi X do hereby give grant assign and set over by way of gift X solute and irrevocable unto her the said Mutto Natchia her heirs executors administrators and assigns but nevertheless subject to the provisions restrictions and conditions hereinafter contained the said premises which are of the value of two thousand six hundred Rupees (Rs. 2,600) and regd. under title A volume 10 folio 8 in Colombo to wit : all that house and ground situated in Prince street in  
20 the Pettah of Colombo bounded on the by the House of Paulo Chel X East by the House of Mr. Wanterz.

On the South by the X Street and on the West by the House of Mr. Kern containing in extent eleven forty three one hundred square perches according to the figure of survey dated 26th June 180 X authenticated by George Atkinson Surveyor General and attached to the title deeds here- unto annexed together with all deeds and writings relating to the same which said premises have been held and possessed by me the said X Lebbe Ahamado Lebbe Marcar under and by virtue of X annexed title deed  
30 No. 1082 bearing date the third day of December one thousand eight hundred and sixty X attested by Fredrick Charles Loos Notary Public. To have and to hold the said premises with all and singular appertenances thereto belonging unto her the said Mutto Natchia her heirs executors administrators and assigns forever subject to however to the following conditions and restrictions to wit :—

That she the said Mutto Natchia shall not sell alienate Mortgage or encumber the same or any part thereof or the issues rents and profits there- of or of any part thereof but shall possess and enjoy the same during her natural life and that after her death the same shall devolve on her children begotten by me the said Ibrahim Lebbe Ahamado Lebbe Markar share  
40 and share alike or if there be but one child by me together alive on such child and thereafter on the lawful issue of such children or child and so from generation to generation under the Fide Commission Law of Inheritance and further that the said X or any part thereof or the issues rents and profits thereof or of any part thereof shall not be liable for any debt X default of the said Mutto Natchia or of any person or persons lawfully claiming by from or under her and that the event of her dying without leaving any children X begotten or their lawful issues surviving her the XXXX shall devolve on her

P 2  
Deed  
No. 260  
16-7-1872  
—continued.

heirs under the same conditions and restrictions according to the Mohameden Law of Inheritance. Provided however that she the said Mutto Natchia her child or children by me begotten or the person or persons so lawfully claiming as aforesaid may transfer her, his or their interest in the said premises by way of Gift or Dowry to her, his or their lawful heir or heirs but under the same conditions and restrictions as aforesaid and I the said Ibrahim Lebbe Ahamado Lebbe Markar do hereby for myself my heirs executors and administrators covenant with the said Mutto Natchia her heirs executors and administrators and assigns that the said premises free from any encumbrances and that I shall and will always warrant and defend the same unto her and X against any person whomsoever.

In witness whereof the said Ibrahim Lebbe Ahamado Lebbe Markar do set my hand to three of the same tenor as these presents at Colombo this sixteenth day of July one thousand and eight hundred and seventy-two.

Witness :—

(Sgd.) in Tamil

(Sgd.) in Tamil.

(Sgd.) in Tamil

I thankfully accept the above gift Mark of X Mutto Natchia.

I, John William Vanderstraten of Colombo in the Island of Ceylon Notary Public by lawful authority duly admitted do hereby certify and attest that the foregoing instrument having been read over and explained by me unto Ibrahim Lebbe Ahamado Lebbe Maricar and Mutto Natchia therein named in the presence of Mera Meyna Maricar Ismail Lebbe Maricar and Samsive Lebbe Amido Lebbe both of Colombo the subscribing witnesses hereto both of whom are known to me the same was signed by the said Ibrahim Lebbe Ahamado Lebbe Maricar and Mutto Natchia and also by the said witnesses in my presence and in the presence of one another on the day Month and year aforesaid the duplicate bears stamp of the value of fifteen Rupees and the original a stamp of one Rupee.

*Seal*

Which I attest,

30

(Sgd.) J. W. Vanderstraten  
*Notary Public.*

I, M. S. Fernando, Addl. Registrar of Lands, Colombo, hereby certify that the foregoing is a true copy of a deed of gift made from the duplicate filed of accord in this office and the same is granted on the application of Mr. M. N. M. Salahudeen.

Land Registry, Colombo.  
16-12-52.

(Sgd.) M. S. Fernando,  
*Registrar of Lands.*

## Certificate of Birth of Sitti Adima.

Application No. 16023

Translation

P 5.

No. 8915

P 5  
Certificate  
of Birth  
of Sitti  
Admia  
3-1-53.

## CERTIFICATE OF BIRTH

Oyaboda Division in the District of Colombo Western Province.

- 
- |        |   |   |  |
|--------|---|---|--|
| 1.     | Date and place of Birth                       | : | Thirtieth day of January 1925<br>Thihariya.    |
| 2.     | Name  | : | Sitti Adima.                                   |
| 10 3.  | Whether male or female                        | : | Female.  |
| 4.     | Father's name and surname.                    | : | Alim Sahibo Ahamado Lebbe.                     |
| 5.     | Mother's name maiden name and<br>Nationality. | : | Abdul Cader Ramina Umma.<br>Ceylon Muslim.     |
| 6.     | Father's profession and Nationality           | : | Trading. Indian Muslim.                        |
| 7.     | Whether parents were married.                 | : | Yes. Married.                                  |
| 8.     | Informant's name, residence and<br>capacity.  | : | Alim Saibo Ahamado Lebbe<br>Thihariya. Father. |
| 9.     | Informant's signature.                        | : | (Sgd.) Illegibly.                              |
| 10.    | Date of registration.                         | : | Fourth day of February 1925.                   |
| 20 11. | Signature of Registrar.                       | : | (Sgd.) D. G. SIRIWARDENE.                      |
- 

I do hereby certify that the foregoing is a true copy of a birth registration entry filed of record in this Office.

(Sgd.)

*Assistant Provincial Registrar.  
Colombo District.*

Provincial Registrar's Office,

Colombo, 3rd January, 1953.

*Translated by me  
Sgd. R. S. Perera,  
Sworn Translator.*

P 8  
Certificate of  
Death of  
Abdul Cader  
Romina  
Umma  
8-11-53

100

P 3

**Certificate of Death of Abdul Cader Romina Umma.**

Translation

P 3

**CERTIFICATE OF DEATH**

**CEYLON**

**No. 6819**

**Oyaboda Division in Colombo District Western Province.**

- 
- |  |   |  |    |
|--|---|--|----|
| 1. Date and Place of death.  | : | 18th November 1939.<br>Hithgahawatta, Thihariya.   | 10 |
| 2. Full Name   | : | Abdul Cader Romina Umma.   |    |
| 3. Sex and Nationality.  | : | Female. Ceylon Muslim.   |    |
| 4. Age.  | : | Thirty-eight years.  |    |
| 5. Rank or occupation  | : | (Man) Trader.  |    |
| 6. Name of Parents. Father   | : | Muhammadu Yusuf Mudaliar<br>Abdul Cader.   |    |
| Mother.  | : | Idroos Lebbe Marikar Rahu-<br>man Umma.  |    |
| 7. Cause of death or place of burial<br>or cremation.                              | : | Convulsion at birth. Buried 20<br>at cemetery called Millagaha-<br>watte in Thihariya.                               |    |
| 8. Name and address of informant and<br>in what capacity information was<br>given. | : | Sehu Muhammadu Alim Saibu<br>Ahamadu Lebbe, Thihariya.<br>Closest relation who was close<br>by at the time of death. |    |
| 9. Signature of Informant.   | : | (Sgd.) Illegibly in English.   |    |
| 10. Date of registration.  | : | 12th December 1939.  | 80 |
| 11. Signature of Registrar.  | : | (Sgd.) D. C. Ranatunga.<br><i>Acting Registrar.</i>  |    |
- 

I do hereby certify that the foregoing is a true copy of a death registra-  
tion entry filed of record in this office.

(Sgd.) Illegibly,  
*Assistant Provincial Registrar.*

Provincial Registrar's Office,  
Colombo, 3rd November, 1953.

*Translated by me*  
Sgd. Illegibly,  
*Sworn Translator, D. C. Colombo.*  
4-11-1953.

**Certificate of Birth of Ummusanira.**

Translation

P 4.

**CERTIFICATE OF BIRTH IN CEYLON.**

No. 11595.

Oyaboda Division in Colombo District Western Province.

- 
- |       |   |   |  |
|-------|---|---|--|
| 1.    | Date and place of Birth   | : | 2nd June 1932. Thihariya.                                |
| 2.    | Name  | : | Ummusanira.  |
| 3.    | Sex   | : | Female.  |
| 10 4. | Father's Name, & surname.   | : | Sehu Mohammadu Alim Sahibu<br>Ahamadu.                   |
| 5.    | Mother's name, maiden name<br>and Nationality.                                  | - | Abdul Cader Ramina Umma.<br>Ceylon Muslim.               |
| 6.    | Father's rank or occupation<br>and Nationality.                                 | : | Trader.<br>Indian Muslim.                                |
| 7.    | Were parents married.   | : | Yes.   |
| 8.    | Name & Address of informant<br>and in what capacity informa-<br>tion was given. | : | Sehu Mohammadu Alim Sahibu<br>Ahamadu Thihariya, Father. |
| 20 9. | Signature of informant.   | : | (Sgd.) Illegibly.  |
| 10.   | Date of Registration.   | : | 6th July, 1932.  |
| 11.   | Signature of Registrar.   | : | (Sgd.) D. P. Siriwardana.                                |
| 12.   | If any name added or altered<br>after registration of birth.<br>That name.      | : | .....  |
| 12.   | Date of such addition or alte-<br>ration.                                       | : | .....  |
- 

I do hereby certify that the foregoing is a true copy of a birth registration entry filed of record in this office.

30

(Sgd.) Illegibly.  
*Assistant Provincial Registrar.*  
*Colombo District.*

Translated by me  
(Sgd.) Illegibly.  
*Sworn Translator, D. C. Colombo.*  
4-11-1953.

Provincial Registrar's Office,  
Colombo, 3rd November, 1953,

**Certificate of Death of Noor Lahira.**

*Application No. B. 3288.*

29-3-55

11 D 1.

**C E Y L O N**

**No. 7555**

**CERTIFICATE OF DEATH**

**Western Province, Colombo District, No. 2B, North Division.**

1. Date and Place of Death.	:	Sixteenth December, 1927. "Stella Cottage" 16th Lane, 10 Bambalapitiya.
2. Name in full.	:	Noor Lahira.
3. Sex and Race.	:	Female, Ceylon Moor.
4. Age.	:	Twenty years.
5. Rank or Profession.	:	Nil.
6. Names of Parents.	:	Father—Mohamed Razeen and Mother—Futhri Luhara Umma
7. Cause of Death, and Place of Burial or Cremation.	:	Phthisis. Dr. C. I. de Silva.
8. Name and Residence of Informant, and in what capacity he gives Infor- mation.	:	Yoosoof Ahamed Jamaldeen 20 "Lindenbug" Kanatte Road, Present at Death.
9. Informant's Signature.	:	(Sgd.) Y. A. Jamaldeen.
10. When Registered.	:	Sixteenth December, 1927.
11. Signature of Registrar.	:	(Sgd.) Verona F. Wirasekera L.M.S.

I do hereby certify that the foregoing is a true copy of a Death Registration entry filed of record in this office.

(Sgd.)

*Assistant Registrar-General.*

80

Registrar-General's Office,  
Colombo,  
29th March, 1955.

Supreme Court of Ceylon,  
No. 260 (Final) of 1956.

District Court of Colombo,  
case No. 6970/P.

*In Her Majesty's Privy Council  
on an Appeal from  
The Supreme Court of Ceylon*

**BETWEEN**

18. Hussaima, wife of Yoosuf Jallaldeen of No. 478,  
Galle Road, Bambalapitiya.
19. Mrs. Huzair Sadiq of Colombo.
20. A. M. M. Nazick of Moor Road, Colombo, and
21. A. M. M. Marzook of Layards Road, Colombo.

( All substituted in place of 18th Defendant—Appellant. )

**DEFENDANTS—APPELLANTS**

**AND**

A. L. Ummu Zaneera *alias* Shamsunnahar of Thihariya,  
Nittambuwa.

**PLAINTIFF—RESPONDENT**

1. A. L. Sithy Azeema *alias* Sithy Nafeesa, wife of  
M. I. M. Abdul Hanan of Maligawatte, and 14 others.

( 1 to 9, 11 to 12, and 14 to 17. )

*22 to 24*  
**DEFENDANTS—RESPONDENTS**

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**RECORD  
OF PROCEEDINGS**

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