1957   *Present :*   **H. N. G. Fernando, J., and Sinnetamby, J.**

B. H. M. FERDINANDS *et al.*, Appellants, *and* A. C. DE ALWIS *et al.*,
Respondents

S. C. 507—D. C. Colombo, 7,103/P

*Partition Act. No. 16 of 1951—Section 26 (2) (c) (e)—Interlocutory decree—A form of
entering it.*

> In a partition action, paragraphs (c) and (e) of section 26 of the Partition
> Act read together authorise the Court to allot one portion of a land to a party
> or a set of parties and to order the sale of another portion and the division of
> the proceeds of the sale among other parties alone or among them and some or
> all of the parties to whom the former portion is allotted.

APPEAL from a judgment of the District Court, Colombo.

A. C. Nadarajah, with *E. D. Cosme,* for the defendants-appellants.

H. A. Koattegoda, for the plaintiffs-respondents.

Cur. adv. vult.

May 30, 1957.   H. N. G. FERNANDO, J.—

We would not be disposed to interfere with the determination of the
learned District Judge in favour of sale rather than a partition of the
property which is the subject of this action but for the fact that the
appellants might in consequence be turned out of the house which they
have occupied for many years, and thus have to contend with the preva-
lent difficulty of finding a new place of residence. The learned Judge
has only rejected the possibility of a partition after careful consideration,
but the alternative of a decree both for partition and for sale had appa-
rently not been suggested to him. In our opinion paragraphs (c) and (e)
of section 26 of the new Partition Act read together authorise the Court
to allot one portion of a land to a party or a set of parties and to order the
sale of another portion and the division of the proceeds of the sale among
other parties alone or among them and some or all of the parties to whom
the former portion is allotted.

The evidence indicates that the appellants have occupied as a residence
the portion of the building which faces Stratford Avenue and that the
two boutiques facing Pamankade Lane have been let to two other persons
and thus establishes that occupation of the premises in the same manner

may be quite possible in the future.   The only point urged against this view on behalf of the respondent has been the evidence of the valuer that any building used for commercial purposes must have the amenities of a lavatory and bathroom.   But there is no evidence to show that such amenities are today available to the tenants of the two boutiques, and if occupation without those amenities is possible today, it may well be that the same position can continue in the future.   If so there would seem to be no objection to the allotment to the appellants jointly of the portion they now occupy as a residence and to the sale of the boutiques for the benefit of all the co-owners.

In view of the fact that this possibility has not been actually considered, we would set aside *pro forma* that part of the decree which orders a sale of the premises and remit the case to the District Judge to consider the alternative suggestion put forward at the appeal that the defendants be allotted the residential portion and that sale be ordered only in respect of the boutiques.   Separate valuations of both portions will, of course, be necessary before the learned Judge can decide whether the suggested alternative is feasible, and I do not imagine that the alternative can be adopted unless the interests of the appellants plus the compensation to which they are entitled is at least equal to the value of the residential portion.   The order we make should not be construed in any way to fetter the discretion of the trial Judge to accept or reject the proposed alternative and to take into account any possible prejudice to the plaintiffs which may result from a separate sale of the two boutiques and it would be open to the trial Judge again to order a sale of the entire premises. The costs of this appeal will abide the ultimate determination of the trial Judge.

SINNETAMBY J.—I agree.

Decree set aside pro forma.