Present : Ennis J. and De Sampayo J. 1917.

FERNANDO *v.* SHEWAKRAM.

84—D. C. Colombo, 46,719.

Fidei commissum—*How far affected by partition decree—Effect of partition decree entered up without proper investigation—Discovery of fresh evidence—New trial.*

A *fidei commissum* is not extinguished by a partition under Ordinance No. 10 of 1863; it remains attached to the property allotted in severalty to the fiduciary.

A decree in a partition action entered without investigation into title, as required by the Partition Ordinance, but upon mere consent of parties, does not have a conclusive effect as a decree under the Ordinance.

Section 40 of the Courts Ordinance, which gives the Supreme Court large powers to order a new trial or further proceedings, contemplates only cases in which the fresh evidence, discovered since the judgment, relates to the matters already in dispute between the parties and sufficiently raised in the pleadings, and does not apply to cases in which a defendant wishes to withdraw his defence and start an entirely different defence.

THE facts are set out in the judgment.

A. St. V. Jayewardene (with him *Bawa* and *Talaivasingham*), for defendant, appellant.

Samarawickreme, for plaintiff, respondent.

Cur. adv. vult.

September 21, 1917, DE SAMPAYO J.—

This is a contest for title to house No. 56, Chekku street. The plaintiffs, who are the children of one Anthony Migel Fernando, deceased, claim the property under the joint last will of their grandparents, Pasqual Fernando Anthony Pulle and Ana Selembram,

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on the footing that the said property was devised to Anthony Migel Fernando subject to a *fidei commissum* in favour of his issue. The defendant not only admitted, but stated affirmatively in his answer, that the property belonged to the joint estate of Pasqual Fernando Anthony Pulle and his wife Ana Selembram, and that under the provisions of their joint last will it devolved on Anthony Migel Fernando, but he disputed the existence of any *fidei commissum* under that will, and proceeded to state that in the partition action, No. 97,278 D. C. Colombo, between Anthony Migel Fernando and one Laity Ramanathan, for the partition of certain lands under the provisions of the Ordinance No. 10 of 1863, the said property was decreed to Anthony Migel Fernando, and a certificate of title was issued to him. He further pleaded a transfer of 1905 by Anthony Migel Fernando to Pahloomal Shewakram, under whom he claims. Thus, as the District Judge put it in his judgment, it was common ground between the parties that the entire land belonged to Pasqual Fernando Anthony Pulle and his wife Ana Selembram in community of property, and was devised by their joint will to Anthony Migel Fernando, and the issues tried were (1) whether the will created a valid *fidei commissum;* and (2) if so, whether the *fidei commissum* was wiped out by the decree in the action No. 97,278.

The District Judge has held, and there is no doubt whatever, that the will created a valid *fidei commissum* in favour of Anthony Migel Fernando's lawful issue. There is also good authority for the proposition that a *fidei commissum* is not extinguished by a partition, but that it remains attached to the property allotted in severalty to the fiduciary. See the judgment of the Privy Council in *Tilekeratne v. Abeyesekera*,[1] *Baby Nona v. Silva*,[2] *Abeyesundera v. Abeyesundera*.[3] I may add in this connection that the decree in action No. 97,278 was not entered after investigation into title as required by the Partition Ordinance, but upon mere consent of parties, and, in my opinion, such a decree cannot have a conclusive effect as a decree under the Ordinance. The defence, therefore, failed on the only questions raised as to title, and the District Judge by agreement of parties adjourned to a further date the consideration of a claim for compensation for improvements, which the defendant had set up in the alternative. This appeal was then filed, the petition of appeal only questioning the soundness of the District Judge's decision on the issue above mentioned. The same points were argued before us, but for the reasons above indicated the appeal as taken cannot succeed. Counsel for the defendant has, however, submitted an affidavit, and asked us to send the case back for a new trial. The affidavit is to the effect that the defendant has, since the trial and the appeal, discovered facts showing that the testators, Pasqual Fernando and Ana Selembram, were entitled only to a share

[1] *(1897) 3 N. L. R. 313.*

[2] *(1906) 9 N. L. R. 251.*

[3] *(1909) 12 N. L. R. 373.*

of the property, and that Ana Selembram had repudiated her part of the joint will. The circumstances of this alleged discovery are not stated, and, even if the application for a new trial were otherwise in order, the affidavit must be considered to be insufficient for the purpose. The facts are stated to have been found on reference to the testamentary case in which the will was proved. The will itself and the testamentary case were fully pleaded in the plaint. The partition action which the defendant himself pleaded would have disclosed the same facts. The defendant, therefore, had at the very commencement all the means of information which he could reasonably desire. The circumstances, I think, would not justify any order for further proceedings on the ground of discovery of fresh evidence not available at the trial. But the application is in reality not made for such a purpose, but for the purpose of abandoning the only defence put forward in the answer and at the trial and of setting up an entirely new defence. I do not think that the defendant is entitled to make an application for such a purpose. Section 40 of the Courts Ordinance undoubtedly gives this Court large powers to order a new trial or further proceedings, but it is clear to my mind that that section contemplates only cases in which fresh evidence, discovered since the judgment, relates to the matters already in dispute between the parties and specifically raised in the pleadings, and does not apply to cases in which a defendant wishes to withdraw his defence and start an entirely different defence. No precise authority to the contrary has been cited to us, and it seems to me that any such practice as that contended for would be not only opposed to principle, but highly inconvenient and prejudicial to the administration of justice. In my opinion the defendant's application ought not to be allowed.

I would dismiss the appeal, with costs.

ENNIS J.—I agree.

Appeal dismissed.