

sion on each proposition is the deliberate opinion of the majority and cannot be said to be *obiter* by any proper use of that term.

This was the view of the case taken by counsel for both of the parties. It was argued with ability and zeal by counsel for libellee, at the hearing and in his brief, that under this statute the court did not have the power to make the allowance in gross and it was argued with equal ability and zeal by counsel for the libellant that the court did possess this power. In view of these facts and the record it seems that this question ought to be decided.

The exceptions are sustained and the decree allowing temporary alimony and dividing the real estate is reversed and the cause remanded to the Circuit Court with direction to make to libellant such suitable allowance as the court shall deem just and reasonable and for such further proceedings, consistent with the foregoing opinion, as may be necessary.

G. A. Davis for libellant.

J. T. De Bolt for libellee.

OPINION OF PERRY, J.

I concur in the conclusion that the court below was without authority, whether derived from statute, from the alleged stipulation or consent of the parties or otherwise, to decree a division of the real estate owned by the libellee or the conveyance by the libellee to the libellant of a part of such real estate, and am of the opinion that for this reason the decree entered must be reversed and a new trial on the question of alimony ordered.

Upon the other questions discussed by the majority, to-wit, that of the jurisdiction of the lower court to decree in proceedings for divorce the payment by the husband to the wife of a sum of money in gross as alimony and that of the jurisdiction of such court to order the payment by the husband to the wife, for her support, of the sum of fifteen dollars per week until further order, I express no opinion, for the reason that the first of these questions does not arise and is not necessary to be decided and that it becomes unnecessary to decide the second in view of the conclusion reached on the other points and the decision to reverse the decree and to remand for a new trial.

The bill of exceptions contains a statement of seven exceptions. The seventh is merely a summary of all the others and presents no question not presented by the others. The second and fifth refer to the order for payment of counsel fees in the sum of three hundred dollars and were expressly abandoned by counsel for the appellant at the argument in this court. The first is to that portion of the decision wherein the court announces that an equal division of the property will be ordered, and the fourth to that portion of the decree wherein such division of the real estate and conveyance of one half of the same to the wife is ordered. The sole question presented by these two exceptions is whether or not the Circuit Court had authority in this case, by virtue of the statute or otherwise, to decree a division or conveyance of real estate. This question can be decided without deciding whether or not the payment of a sum of money in gross can be decreed. The questions are entirely separable and distinct and are in fact separately considered in the opinion of the majority. Whether or not an award can be made of a sum of money in gross is absolutely immaterial in a determination of the other question. It may be assumed for the purposes of argument either that the power exists or that it does not exist and yet the same conclusion will be reached that under our statute the court is without jurisdiction to decree a division or conveyance of the real estate. Further, the decree does not provide for or require the payment of a sum of money in gross; the Circuit Court did not attempt to exercise this alleged power.

The third exception is to that portion of the decision wherein the court stated that the libellee would be required to pay to the libellant, pending the division of the property, the sum of fifteen dollars per week for her support, and the sixth to that portion of the decree wherein such weekly payment is required to be made until further order. This provision was inserted in the decree clearly with reference to its other provisions and may or may not be found in the new decree to be hereafter entered.

The views expressed by the majority on these questions of the power to decree the payment of a sum of money in gross and of the power to require weekly payments pending a division of the real estate or until the further order of the court are, it seems to me, *obiter dicta*.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

OCTOBER TERM, 1901.

LUM SUNG, LO PAU and PONG CHONG, doing business as Yee Sing Tai Company v. MARION M. LUNING.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 12, 1901. DECIDED NOVEMBER 23, 1901.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Where a declaration describes the plaintiffs as the "Yee Sing Tai Company" and the proofs show the name of the firm to be "Yee Sing Tai", it is error for the trial court to disallow an amendment asked for so as to make the declaration conform to the proofs.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit wherein the plaintiff's claim of the defendant the sum of four hundred and seventy-five dollars, balance due under a certain contract in writing for the

erection of a dwelling-house. In the declaration the plaintiffs are named as Lum Sung, Lo Pau and Pong Chong, doing business as "Yee Sing Tai Company." Attached to the declaration and referred to therein, is a copy of the contract and in such copy the parties of the second part, builders, are described as "Yee Sing Tai." At the trial the plaintiffs offered in evidence the original contract, but, on objection by defendant's counsel, the court refused to admit the same on the ground that there was a variance between the allegation in the declaration and the proof as to the name of the partnership. The court also declined, on the ground of immateriality since the contract was not in evidence, to allow the following questions: "Will you please state whether Lum Sung, Lo Pau and Pong Chong are the parties in whose behalf this contract was signed under the name of Yee Sing Tai?" and, "You have brought suit here, Lum Sung, Lo Pau and Pong Chong have brought suit in this case under the name of Yee Sing Tai Company. Will you state whether or not Yee Sing Tai Company is the Yee Sing Tai named in that contract, and the name of which is signed in that contract?"

After the refusal to receive the contract in evidence, counsel for the plaintiff asked leave to amend the declaration by striking out the word "Company" so that the name of the plaintiff firm as therein stated would be, "Lum Sung, Lo Pau and Pong Chong, doing business as Yee Sing Tai." To this counsel for the defendant objected on the ground that the amendment would constitute a change in the parties to the action. The court disallowed the amendment on the ground thus stated in the objection. All of these rulings were duly excepted to and the case now comes to this court on these and other exceptions.

Whether or not there was a material variance between the declaration and the proofs in the name of the partnership, need not be decided. Assuming that there was such a variance, we are of the opinion that the court below erred in disallowing the amendment. The use of the word "Company" in the title of the partnership in the declaration was clearly a mistake, even though it was not so stated in argument by counsel for the plaintiff to the presiding judge. Section 1260 of the Civil Laws provides as follows: "Whenever a plaintiff in any action shall have mistaken the form of action suited to his claim, the court, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the court may, in furtherance of justice and on the like terms, allow any petition or other pleading to be amended in any matter of mere form, or by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." This is one of the amendments which the trial court was by the statute specifically authorized to allow, to-wit, a correction in the name of a party. It was not a change or substitution of parties. The power being thus conferred, it is the duty of the court to exercise it in a proper case. *Wood v. City of Philadelphia*, 27 Pa. St., 502, 503. See, also, *Porter v. Hilderbrand*, 14 Pa. St., 129, 134, and *Fery v. Pfeiffer*, 18 Wis., 535, 541. It may be that the matter of the allowance of amendments is largely within the discretion of the trial court. Even under this rule, however, where there is an abuse of discretion, the appellate court may reverse. In this case, we think there was an abuse of discretion. The furtherance of justice required, beyond question, the allowance of the amendment; no possible prejudice could result therefrom to the defendant.

It is contended in this court that the amendment could not properly have been made by striking out the word "Company" from the declaration. That such an amendment may be thus made, see *Martin v. Kerr*, 7 Haw. 350. Moreover, this was not the objection urged in the court below to the allowance of the amendment. The only ground then stated was, as set forth above, that the amendment would constitute a change in the parties to the action. No objection was made as to the form of the amendment. Under these circumstances, we think that the objection as to form cannot now be urged in this court.

The error was material and prejudicial. The exception is sustained and a new trial ordered.

J. A. Magoon and T. I. Dillon for plaintiffs.

F. W. Hankey for defendant.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

JUNE TERM, 1901.

WAILUKU SUGAR COMPANY v. HAWAIIAN COMMERCIAL AND SUGAR COMPANY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 18, 1901. DECIDED NOVEMBER 23, 1901.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Bill for an injunction against depositing earth, stone and other material in a stream so as to obstruct the flow of water therein, dismissed because the averments on which the prayer for relief was based were not clearly established by the evidence.

OPINION OF THE COURT BY PERRY, J.

This is a bill for an injunction. The essential averments of the bill are, in brief, that the complainant has the right to take water from the Wailuku stream on the Island of Maui and exercises such right by means of a ditch leading from the stream; that the complainant has an easement in the bed of the stream, to-wit, the right to have the waters of the stream flow freely and without interruption therein; that the respondent has constructed a wall of stone in the bed of and across the stream, at a certain point designated, thereby obstructing the flow of water

therein; that respondent has deposited a large amount of earth, stone and gravel in the bed of the stream, thereby obstructing the flow of water therein; that the stream is subject to periodical freshets of great force and intensity and that shortly before the institution of these proceedings such a freshet carried away the greater portion of the wall and of the earth, stone and gravel above mentioned and that the material thus swept away was deposited in sundry places within the river bed thereby obstructing the flow of water therein; and that the respondent threatens and intends to reconstruct the wall across the stream and to continue to deposit earth, stone and gravel in the bed of the stream. The prayer of the bill is that an injunction issue restraining the respondent "from building any wall or depositing any earth, stone or gravel in the bed of the Wailuku stream, or in any way hindering or obstructing the flow of water in said stream."

After answer and trial, a decree was entered, enjoining the respondent from building any wall or depositing any earth, stone or gravel in the bed of the stream, or from obstructing in any way the flow of water therein, "excepting only that permission is reserved to said defendant to build, if it so desires, a solid masonry wall resting on bed rock contiguous to the present bank of said stream where the same overflows at high water and parallel to the course of said stream for the sole purpose of preventing encroachments by said stream upon its said banks in time of freshet," and reserving to the complainant leave to move for an order requiring the removal of any earth, stone or gravel deposited in the stream after the commencement of the suit. From this decree the case comes on appeal to this court.

It is undisputed that the bed of the stream at the points referred to, subject only to an easement in the respondent consisting of the right to the free and uninterrupted flow of its waters therein, and perhaps to a similar easement in other proprietors, is the property of the respondent. At best, then, the complainant may properly ask for an order restraining only the erection of such structures or the making of such deposits of earth or other material, by the respondent, as will obstruct the flow of water in the stream to the detriment of the complainant.

Two causes of complaint are relied on. One is that the respondent erected a certain wall of stone and other material across the north branch of the stream. The wall, as appears from the evidence, was in fact so constructed; but the evidence also shows clearly, and it is undisputed, that shortly after its erection and before this suit was brought a freshet or freshets destroyed the wall and washed away most of the material of which it was composed, without thereby causing any injury whatever to the complainant in its ditches or otherwise, and further that the respondent does not threaten or intend to rebuild the wall or to build any other wall similarly situated across the stream. On this branch of the case no reason exists for an injunction.

The other cause of complaint is that the respondent has deposited on one side of the stream and parallel with the bank large quantities of stone, earth and other debris from a tunnel which is being excavated in the neighborhood and that such deposits, as they are now, obstruct the flow of water and, if washed away by freshets, will further obstruct such flow not only in the main stream but also in the complainant's ditches leading therefrom. The deposit thus complained of was, at the date of the trial below, about twenty feet in width at its widest part and about one hundred and twenty feet long. It seems to us that upon the evidence the finding is irresistible that this deposit does not obstruct the ordinary and accustomed flow of water in the stream or the supply thereof to which the complainant is entitled in its ditches. It is contended, however, that the material so deposited will be washed away from its present location by the first freshet to which the stream may be subject and that in such event the stream and more particularly the complainant's supply ditches will receive large quantities of the debris and that thus the flow of water will be interrupted to the complainant's detriment. It may be that the first or a later freshet will wash away the whole or a part of the material referred to, but, in view of the effectiveness with which the wall across the north branch is shown to have been carried down stream without causing any choking of the same or of the ditches or otherwise injuring the complainant, the finding would not, on the evidence now before us, be justified that there would be any choking of the ditches in case such material were washed away. In order to justify an injunction the danger apprehended and sought to be guarded against must be real and rest upon a substantial basis.

The contention is also presented that the maintenance of the debris in its present location will cause the direction of the current of the stream to change to some extent and the waters thereof to encroach on the complainant's land on the other side of the stream. This is not established by the evidence.

In our opinion, the decree appealed from should be reversed and the bill dismissed.

Kimney, Ballou & McClanahan for complainant.

A. S. Hartwell for respondent.

