

M. O.]

SWAINSON V. BARTLEY—IN RE BELL AND CODLING.

[D.C.]

REPORTS.

ONTARIO.

MASTER'S OFFICE.

SWAINSON V. BARTLEY.

Master's office—Decree manifestly erroneous and unjust—Master's duty—Practice.

Where a decree is manifestly erroneous and unjust, it is the duty of the Master to stay his hand, until the decree is extended or amended in accordance with the true state of the facts.

[Whitby, Oct. 25.—Mr. Dartnell.

The bill was filed to enforce payment of certain legacies which it was alleged were charged equally upon certain lands, of which defendants were devisees, each of one-half, and an account was directed of such legacies, as well as against the whole land, as of one defendant against the other. The bill was *pro confesso*, the solicitors for the defendants being under the impression that their defence could be raised in the Master's office.

On bringing in the decree, the testator's will showed that half the legacies were charged against the land of one defendant and half against the other.

The MASTER AT WHITBY.—I do not feel I should proceed with this reference. Swainson's will is now produced. From it, it appears that it has been incorrectly set out in the plaintiff's bill. If it had been truly set out no such decree as has been made would have been made. The bill alleges the legacies are charged upon all the lands, whereas one-half only are chargeable against the lands of each devisee. Under this aspect, clause 8 of the decree is manifestly incorrect and unjust. The decree generally makes one defendant liable for the default of the other. The defendant, Swainson, alleges he has fully paid the half of the legacies charged upon his lands, and contends he is not liable for his co-defendant's default, no matter whether he be in default or not. Defendant's solicitors say they did not move against the decree because they thought this defence could be raised before me. As the decree is framed I do not think it can. The decree should be vacated or amended, and one pronounced in accordance with the

facts as they now appear. I may add that the Master in Ordinary concurs in those views.

Both parties are in fault; the plaintiff in incorrectly setting out the contents of the bill, and the defendant in not answering, and so letting the clause issue in its present form. I think it is for the defendants to move in rectification, and therefore grant my warrant to proceed with the reference at the expiration of fourteen days, in order to enable them to have the true controversy between the parties properly brought before me.

DIVISION COURTS.

IN RE BELL AND CODLING.

Fence-Viewers' Act—Ditches and water-courses—Duties of fence-viewers—Want of outlet to drain—Jurisdiction—Insufficient description of premises.

[London—Oct. 20

This was an appeal from the award of the Fence-viewers of the Township of Plympton heard at the sittings of the Division Court at Wyoming, on 20th Oct. last. The award was as follows:

"We, the Fence-viewers of the Township of Plympton, County of Lambton, having been duly nominated to view and arbitrate between Mrs. M. Codling (owner of west half of Lot 27, Con. 15), and Mr. James Bell (owner of east half of Lot 26, Con. 15), upon a ditch required on the property of Mr. James Bell, which ditch is to be made and maintained on said property and having examined the premises and duly acted according to the Act respecting ditching water-courses, do award as follows: A ditch shall be made and maintained by the said parties, commencing at station O., at the boundary line of west half of Lot 27, Con. 15, and the east half of Lot 26, Con. 15, Mrs. M. Codling to commence at station 'O' on former award, and make ten rods of ditch west on lot east half of 26, Con. 15, size of ditch to be two and a half feet deep, and two feet bottom, and one to one foot slope. Mr. James Bell to commence at the end of the above named ten rods, and make a ditch the same size and continue it in a northwesterly direction to strike the old drain already made and continue in the old ditch to