

notice provided by the Ditches and Watercourses Act, R.S.O., c. 220, s. 5, as amended by 52 Vict., c. 49, s. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the municipal clerk with the notice provided for by such Act for the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who failed to attend.

*Held*, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises.

*Clute, Q.C.*, and *O'Rourke* for the plaintiff.

*Marsh, Q.C.*, for the defendants.

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### Practice.

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C.P. Div'l Court.]

[Jan. 6, 1894.]

#### ISLAND v. TOWNSHIP OF ANARANTH.

*Costs—Order of trial judge as to, under Rule 1170—Amending rule, application of, to cases already tried—Discretion of court.*

The Rule of the Supreme Court of Judicature for Ontario passed on 4th November, 1893, amending Rule 1170 by providing that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial, the trial judge, in his discretion, otherwise orders, does not apply to actions tried before it was passed.

And where the jury in an action of tort, tried before the passing of the new Rule, assessed the plaintiff's damages at \$100, and the trial judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale :

*Held*, that he had no power to so order unless "for good cause shown," within the meaning of Rule 1170, as it stood at the date of the trial.

The right to costs, or to set off costs, is a substantial right, and not a mere matter of procedure.

But, under Rule 1170, the court has the power to make such order as to costs as may seem just, irrespective of good cause ; and as in this case the awarding of so small a sum as \$100, assuming the plaintiff's right to recover, was almost perverse, and the plaintiff had a right to expect an award well beyond the jurisdiction of the County Court, the Divisional Court affirmed the trial judge's disposition of the costs.

*Stratford v. Sherwood*, 5 O.S. 169, at pp. 570-571, followed.

*Aylesworth, Q.C.*, and *W. L. Walsh* for the plaintiff.

*E. Myers* for the defendants.

Chy. Div'l Court.]

[Jan. 22.]

#### MCGILLIVRAY v. TOWN OF LINDSAY.

*Costs—Order of trial judge as to, under Rule 1170—Amending rule, application of, as to cases already tried—Discretion of court.*

In an action of tort, tried before the passing of the Rule of 4th November, 1893, amending Rule 1170, the jury assessed the plaintiff's damages at \$200,