

As to costs, the judge felt bound by the language of s. 427 of The Municipal Act, R.S.M. 1902, c. 116, to award them according to the result of the application, and, as that result was the quashing of the whole by-law for illegality, he could not withhold costs from the applicant.

Whitla and *Potts*, for applicant. *Mathers*, for Town of Gladstone.

Province of British Columbia.

SUPREME COURT.

Irving, J.]

[Aug. 8.

WEST KOOTENAY POWER CO. v. CITY OF NELSON.

Water Clauses Consolidation Act, 1897, R.S. B.C. 1897, c. 190 and c. 77. s. 2, B.C. Stats. 1899 and c. 44, 1900—Grants of water for power purposes to municipality and power company—Order in Council—Conflict of rights—Damage by municipality's undertakings—Onus of proof—Injunction—Costs.

Plaintiffs were a power company with certain rights on the Kootenay river. Defendants were a municipality, and were constructing above the plaintiffs' canal, an electric plant to supply electricity to the City of Nelson. The plan of their operations included the excavation of a quantity of rock. So much of this rock as they did not require for building purposes, they proposed to dump into a pool immediately below, while a portion of the rock would, of necessity, through blasting, be thrown into the river both above and below the falls. This undertaking was authorized by an Order in Council passed c. 44, of the Water Clauses Consolidation Act, 1900.

The plaintiffs alleged that the dumping of the rock would be injurious to them by damming up the river and reducing their head of water, that at high water a large quantity of rock will be carried down to the plant at the lower falls, thereby filling up the canal, injuring the machinery and lessening the supply of water there, and that their power site at the lower falls would be damaged by the deposit of rock and other material brought down at high water. The evidence established that the defendants were throwing the rock and other material excavated on the bank of the river in such a way that the toe of the embank-