IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kong v. Vancouver Chinese Baptist Church,* 2014 BCSC 1424

Date: 20140729
Docket: SS138455
Registry: Vancouver

Between:

Alfred Yiu Chuen Kong

Plaintiff

And:

Vancouver Chinese Baptist Church

Defendant

Corrected Judgment: The text of the judgment was corrected on the first page on August 1, 2014

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:	D. D. McWhinnie S. Tevlin (S/S)
Counsel for the Defendant:	J. L. Gartner K. Ferguson
Place and Date of Hearing:	Vancouver, B.C. July 22, 2014
Place and Date of Judgment:	Vancouver, B.C. July 29, 2014

INTRODUCTION

[1] The plaintiff, the Rev. Kong, claims damages for wrongful dismissal, arising out of the termination of his

position as Senior Pastor with the defendant Vancouver Chinese Baptist Church ("VCBC").

[2] On this application, the defendant applies by way of summary trial for an order dismissing the claim on the ground that this court lacks jurisdiction over the decision of a self-governing religious organization operating in accordance with its own rules. The court's jurisdiction in these circumstances, the defendant submits, is limited to determining whether the church's internal processes met the requirements of natural justice, and whether the decision was carried out in accordance with the organization's rules and the requirements of natural justice.

[3] The plaintiff maintains that he was, in law, an employee of the VCBC, and that in the circumstances, he is entitled like any other person to his civil rights under the common law of Canada, including reasonable notice of termination of employment based on the usual principles.

[4] For the reasons that follow, I have concluded that the application must be dismissed. The plaintiff is entitled to proceed with his claim.

BACKGROUND

[5] The VCBC is a church and a society under the *Society Act*, RSBC 1996, c 433. It has a formal membership of approximately 800 members, composed, according to its bylaws, of "professed, regenerated and baptized believers into the fellowship" who are "expected to lead exemplary [C]hristian lives".

[6] Its spiritual leader is the Senior Pastor who must be an ordained Baptist minister, and who possesses the necessary qualifications "as set forth by the Scriptures in 1 Timothy 3:1-7".

[7] The bylaws provide for the following duties:

> 3. Duties: The Senior Pastor is responsible for leading the Church to function as a New Testament church. He is the leader of the pastoral ministries of the Church. As such, he works with the Deacons, Church Officers and Church Staff:
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> a) to lead the church in performing its tasks,
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> b) to lead the church to engage in a fellowship of worship, witness, education, ministry and application,
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> c) to administer the ordinances,
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> d) to proclaim the gospel, and
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> e) to care for the church's members and other persons in the community.
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> 4. Calling: The Senior Pastor shall be chosen and called by the Church whenever a vacancy occurs. The election shall take place at a regular business meeting, an annual general meeting, or a special business meeting called for such a purpose.

[8] The Church Officers also include: Associate Pastors, who may be ordained or unordained ministers; Deacons, who are lay members with specific qualifications and perform a leadership role among the congregation; Directors, to carry out the legal functions of the church; and Department and Committee

Members.

[9] Of relevance to this matter, the committees include the Personnel Committee. Its purpose is to serve "as a confidential liaison between VCBC and its employed staff in the consultative and supportive fashion to develop, administer and represent VCBC in all personnel matters and policies". It reports to the Church membership, and Its responsibilities are set out in its terms of reference:

a) To encourage, nurture, and support pastoral, administrative staff, and custodian staff and their immediate family.

b) To define staff structure, plan for future staffing needs, and conduct searches.

c) To recommend decisions regarding the hiring, reassignment, and termination of personnel.

d) To work with the senior pastor in reviewing staff workload and performance, including assessing the effectiveness of ministry, conditions that may affect effectiveness of ministry, and relationship with church members.

e) To work with the Senior Pastor to build up each staff member's strengths, define ministry plans and job descriptions, identify professional development needs, and promote staff harmony.

f) To review and recommend salary budgets and individual salary adjustments, staff benefit plans and programs and to consult the finance committee on payroll administration matters.

g) Organize staff appreciation and social activities.

[10] In 2010, this committee was responsible for recruiting a new Senior Pastor. Among those considered was the plaintiff, then a minister in Hong Kong. On November 15, 2010, Ms. Kelly Chan, chair of the Personnel Committee, wrote the Rev. Kong on VCBC letterhead:

November 15, 2010

Rev. Kong, Yiu Chuen, Alfred,
[Address omitted]
Kowloon, Hong Kong

Dear Rev, Kong,

Re: Offer of Employment, Vancouver Chinese Baptist Church
Position: Senior Pastor of VCBC

Greetings in the name of our Lord and Saviour, Jesus Christ!

This is further to our previous communication, I like to inform you that the Church Members' Special Meeting was held on November 14, 2010. The decision was made to call you, Rev. Alfred Yiu Chuen Kong as our full-time **Senior Pastor of VCBC**, commencing January 1, 2011.

The employment is a covenant where a long-term service and relationship is intended. The first 12 months is an adjustment period in which both parties continue to determine suitability and seek validation. At the end of the first year, upon confirmation by both parties, the position becomes permanent.

These are the terms our Church would like to offer.

1. Salary: [amount omitted] gross per month (step E26 on the 2010 VCBC staff pay-scale).

2. Interim Settlement Allowance of [amount omitted] per month, for 12 months.

3. Airfare for Rev. Kong and Mrs. Kong to move from Hong Kong to Vancouver.

4. A one-time relocation allowance up to maximum of one month's worth of the salary amount, i.e. [amount omitted] for moving expenses based on receipts of actual expenditures.

5. Dental and extended health care plans per our current staff members' plans.

6. Canada Pension Plan and Employment Insurance benefits per federal government regulations.

7. Incidental benefits such as staff member education and book allowances.

8. Registered Retirement Savings Plan (RRSP) allowance on top of salary after one year's waiting period. RRSP premium is 5% of the first $24,000 of salary plus 3% of the balance.

9. After seven years of continuous service, a permanent full-time pastoral staff member may request up to four calendar months of paid study leave subject to the Personnel Committee's approval.

10. The church can assist in immigration/work permit issues, if required.

11. Holiday entitlement: vacation time is earned at the rate of 20 workdays (i.e. 160 hours) per year for salary scale E17 and up. The entitlement will be increase based on years of service. For details, please refer to salary scale 2010, Column E: Senior Pastor.

For additional details on employment related benefits, please refer to the enclosed VCBC Staff Handbook, dated April 13, 2010 (draft under revision).

The Church will try every effort to assist you to settle in Vancouver. If needed, the Senior Pastor Search Sub-Committee will arrange with you for a visit to Vancouver, prior to your starting date, for the purpose of searching for a place of residence. The expenses related to this trip will be included and covered under the one-time relocation allowance as mentioned under Terms #4 on the previous page.

You might also be aware of the Canadian income tax provisions that subject to the approval of Canada Revenue Agency (CRA), you may be eligible to claim a “clergy residence deduction" based on the expenses incurred on your accommodation during any taxation year. For more information, please visit the CRA website: http //www.cra-arc gc.ca/tax/individuals/topics/income-tax/return/completing/deductions/lines206-236/231/menu-e html.

If you find the terms of this employment offer acceptable to you. **please sign the enclosed copy of this letter and return it to us via mail with your original signature** at your earliest convenience. A return envelope is enclosed.

Should you have more questions, please feel free to contact me anytime.

Look forward to seeing you in January, 2010.

Blessings,

[Signed]

Kelly Chan
Chair, Personnel Committee
Vancouver Chinese Baptist Church

Encls:

> VCBC Staff Handbook, dated April 13, 2010 (draft under revision)
> VCBC Salary Scale 2010
> VCBC Ethical Conduct Policy. November 13, 2008
> Copy of this employment letter

[11] The VCBC Staff Handbook, a copy of which was enclosed with that letter, provided for a "covenant contract" for pastoral staff, as discussed in the letter:

> A new pastor shall commit to a minimum 1-year covenant contract period to determine mutual suitability. At the end of the covenant contract period, there will be automatic continuation of employment unless either the church or the individual staff terminates the employment.

[12] The Rev. Kong accepted the offer and commenced his ministry as Senior Pastor of the VCBC on January 1, 2011. By letter dated December 9, 2011, Ms. Chan, as chair of the Personnel Committee, wrote the plaintiff:

> Dear Rev. Kong:
>
> We are very pleased to confirm your permanent employment status as the Senior Pastor of Vancouver Chinese Baptist Church.
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> We are offering you a financial package of [amount omitted] monthly salary to cover your expenses to live in the greater Vancouver area. Furthermore, you are entitled to the full Employee Benefits set by the Vancouver Chinese Baptist Church.
> …

[13] Difficulties subsequently arose between the Rev. Kong and the church's two associate pastors. This conflict did not concern religious doctrine, but involved managerial and communication issues. The details are not otherwise relevant. The VCBC took a number of steps to attempt to resolve these difficulties.

[14] First, the Personnel Committee and the Deacons (the "big group") met in a joint meeting on December 16, 2012. They decided to form a "small group" consisting of two members of the Personnel Committee and two Deacons, which would meet with each of the pastors involved in the issues. The small group met with the three pastors individually over the next few days. The meetings were recorded, and each pastor was advised that the small group would make a report of the meetings to the big group.

[15] At its meeting with the Rev. Kong, the small group told him that the Personnel Committee had been considering performance appraisals for the future, to include the Senior Pastor. The object was to provide feedback and act as a sounding board for all staff including the Senior Pastor. The Rev. Kong did not think that any such performance appraisal should include him.

[16] A further meeting of the big group took place on December 30, 2012, and considered the written report prepared by the small group about its meetings with the pastors. It was agreed that performance evaluations of all the pastoral staff would be appropriate. It was also agreed that there should be a meeting where the pastoral staff could meet as a group to discuss their issues, to be attended also by some members of the Personnel

Committee and some Deacons (the "medium group").

[17] This reconciliation meeting took place on January 12, 2013. The Rev. Kong participated, and read some prepared comments.

[18] The medium group met on January 31, 2013, to consider what it happened at the January 12 meeting. They prepared a summary of observations for transmission to the big group that expressed concerns about the Rev. Kong, but which noted that the pastors were willing to try to work together. They recommended that the Personnel Committee should establish a monitoring system for the next three months to talk to each pastor individually "to see if the reconciliation really works and record all observations".

[19] The big group considered these observations on February 17, 2013. It concluded that the pastors needed to continue to work on their reconciliation, that the summary of observations would be placed into each pastor's confidential personnel file, and that a process of monitoring with regular reviews was to be undertaken and reviewed in three months. A monitoring process was developed.

[20] The Rev. Kong took exception to this. He declined to participate in further meetings or in the monitoring process. He disputed the authority of the Personnel Committee to dispense any discipline or non-discipline measures. He implored the "leaders" to cease and desist from false accusations and bullying through the "so-called restoration [reconciliation] sub-committee".

[21] On May 15, 2013, the two associate pastors resigned. This led to considerable concern among the membership.

[22] On June 8, 2013, a letter from the Rev. Kong was distributed by email to all members of the VCBC. This letter set out the plaintiff's concerns with what had taken place over the past several months.

[23] On June 9, 2013, on the motion of the full membership, a "leaders group" was established to review the suitability of the Rev. Kong to be the Senior Pastor, and to deliver their recommendations at a special members meeting.

[24] On June 11, 2013, the leaders group, consisting of some members of the Church Council (which would ordinarily include the Senior Pastor, but not on this occasion), the Personnel Committee, and the Deacons, met to continue the evaluation process, and in particular, "to focus on the review whether Rev. Kong is suitable to continue as the Senior Pastor of VCBC". They set out six areas to form the framework of the evaluation process. The result was a conclusion that he was "absolutely not suitable to continue to be the Senior Pastor".

[25] The process then was to communicate this to the Rev. Kong and allow him an opportunity to resign if he wished. If not, the matter would be brought before the full membership for discussion and decision.

[26] This was done on June 12, 2013, and the plaintiff indicated that he would give his answer on June 14.

Instead, the Rev. Kong delivered a note from his doctor on that date, stating that he would be "unable to work for the next three weeks due to medical illness". No other information was provided.

[27] On June 21, 2013, the church leaders (the Personnel Committee, Council, Deacons and the Directors) offered to arrange for a meeting between the Rev. Kong and the Personnel Committee for the purpose of considering any position the plaintiff wished to raise. It was proposed that this meeting take place on July 9, 2013, in advance of the full meeting of the membership scheduled for July 14, 2013, and after the sick leave of three weeks had expired, which would have been July 5.

[28] On July 4, 2013, the Rev. Kong provided another medical note indicating that his sick leave should extend for another three months. The church leaders decided nevertheless to proceed with the meeting of the full membership and invited the Rev. Kong to submit a written statement, read a statement on his own behalf, or send someone in his place if he were unable to attend.

[29] It was clear that the Rev. Kong did not trust this process, and he did not participate. I make no finding on the extent to which he was medically incapacitated from doing so. The nature of his illness remains unclear. In any event, the meeting proceeded without his participation, and after six hours of discussion, the membership voted to terminate his position as Senior Pastor.

[30] The Canadian National Baptist Convention recommends to member churches (of which the VCBC is one) that they provide one week's pay for each year of service to a departing pastor, and that the church should err on the side of generosity. The leaders took this advice into account and recommended for the members' approval that the Rev. Kong be provided with six months' pay following his termination at the end of the sick leave on October 3, 2013. The members duly approved the payment.

[31] On October 20, 2013, the Rev. Kong filed a complaint with the Human Rights Tribunal citing discrimination on the basis of age and mental disability, and then commenced this action on November 13, 2013, seeking damages for wrongful dismissal. The pastor of the West Coast Baptist Association proposed that the parties might resolve their dispute by submitting the matter for final binding determination to a tribunal of three members of the Canadian National Baptist convention. The leadership of the VCBC agreed with this proposal, but the Rev. Kong did not. He presently serves as Senior Pastor at the Mission Baptist Church in Vancouver.

DISCUSSION

[32] The VCBC submits that a church's removal of its spiritual leader is intrinsically ecclesiastical in nature. It follows, the church argues, that this is an ecclesiastical issue over which the court has no jurisdiction other than to ensure that the church has proceeded in accordance with the principles of natural justice.

[33] The plaintiff asserts that this a dispute concerning a contract of employment, governed by the common law.

[34] The parties agree that the law is unsettled.

[35] The case that the church submits is most on point is *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728, 344 DLR (4th) 332. This was a claim for constructive dismissal brought by a priest who had been disciplined and ultimately removed from office by the Diocese. Father Hart had been the subject of three decrees from the Archdiocese, first placing him on administrative leave, then suspending his faculties to exercise sacramental ministry, and finally removing him from office. Under canon law Father Hart could have appealed each of these three decrees but chose not to do so. He brought his action instead.

[36] The Archdiocese took the position that its relationship with Father Hart was ecclesiastical in nature and governed by canon law, so that the priest was required to seek redress not through the courts, but through the internal review process provided by canon law. The motions judge agreed, and so did the Ontario Court of Appeal.

[37] The evidence included affidavits from experts in canon law, all of whom had been cross-examined on their affidavits.

[38] On the question of jurisdiction, Mr. Justice Laskin, for the Court, said this:

> [17] As a general rule, the Superior Court of Justice has jurisdiction to adjudicate claims of wrongful dismissal and breach of an employment contract. But the general rule has exceptions. One well recognized exception is where the essential character of a dispute between an employer and an employee arises from the interpretation, application, administration, or violation of a collective agreement. Those disputes must be resolved by arbitration, not by an action in the court: see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
>
> [18] A second exception is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process. A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization: see *Levitts Kosher Foods v. Levin* (1999), 45 O.R. (3d) 486 (S.C.).
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> [19] The courts will interfere in the internal affairs of a self-governing organization in only two situations: where the organization's internal processes are unfair or do not meet the requirements of natural justice; or where the aggrieved party has exhausted the organization's internal processes. In the latter case, subject to any enabling statutory provision, the reviewing court will not consider the merits of the internal decision, but will determine only whether the decision was carried out in accordance with the organization's rules and the requirements of natural justice: see *Ukrainian Greek Orthodox of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Lakeside Colony of Hutterian Brothren v. Hofer*, [1992] 3 S.C.R. 165; *Mott-Trille v. Steed* (1996), 27 O.R. (3d) 486 (S.C.).
>
> [20] The Roman Catholic Church is a self-governing organization. Its canon law provides an internal review process for ecclesiastical disputes. The expert evidence before the motion judge showed that where an administrative decree may affect the rights of a party, canon law requires that the party be given notice, an opportunity to respond and an unbiased tribunal. Canon law also provides a broad range of remedies, including the substitution of a different decree, monetary

compensation and even a trial.

[21] The motion judge found that the internal review process under canon law meets the requirements of natural justice. Father Hart does not suggest otherwise. Was he then bound to follow the internal review process instead of suing in the Superior Court?

[22] The answer to that question turns on the nature of his dispute with the Archdiocese. The nature of the dispute is determined not by its legal characterization - as breach of an employment contract or a claim for constructive dismissal - but by the facts giving rise to it: see *Weber*, at p. 955.

[23] The facts show that at its core Father Hart's dispute with the Archdiocese is ecclesiastical in nature and subject to canon law. When he was appointed pastor, his appointment was expressly subject to canon law. The experts who testified on the motion agreed that the office of pastor is ecclesiastical. Canon law creates the office, provides for the office's duties and responsibilities, and describes the circumstances under which the office can be brought to an end. Under canon law of the church can remit the matter to the civil law but it has never remitted a pastor's removal from the office.

[24] Therefore, even though some aspects of Father Hart's dispute with the Archdiocese concern matters of property, for example his loss of lodging, as its essence this dispute is ecclesiastical. Redress must be sought through the internal review process established by Canon law for disputes of an ecclesiastical nature.

[39] The defendant submits that, as was the case with Father Hart, the Rev. Kong's office as Senior Pastor was ecclesiastical. He was the VCBC's spiritual leader. The concern that led to the termination of that position was whether he was properly able to fulfill that ecclesiastical role. The dispute, the defendant argues, was therefore ecclesiastical in its essence. In these circumstances, the defendant asserts, the court should limit its review to the question of whether the church followed processes that accorded with the principles of natural justice.

[40] The plaintiff points out that his appointment was not expressly subject to canon law, or to any church "law", but rather to the usual sort of policies and procedures consistent with a standard employment relationship. He cites Stacey R. Ball, *Canadian Employment Law*, looseleaf (Toronto: Canada Law Book, 2013) [citations omitted]:

> [3:10.1] …Some relationships appear resistant and immune to modern approaches. Although the relationship between the cleric and his church bishop will often easily fit into the traditional tests which establish an employment relationship, for archaic policy reasons, this relationship has been routinely found not to be an employment relationship because it is an "ecclesiastical" one, and thus will not attract vicarious liability or other obligations associated with employment. Often, the court will not find a contract of service exists because the parties have described the relationship as "spiritual" or "ecclesiastical" in nature, and it will therefore require the parties to be governed according to how the relationship is been described. It is respectfully submitted that this approach is suspect at best. As noted above, the courts have an obligation to look at the true character of the relationship, regardless of labels created by one or both of the parties, to determine if it is one of employment. To argue that there is no intention to form legal relations in these types of relationships ignores that many terms of the employment relationship are imposed by the court for modern policy reasons, regardless of intention. Very little in way of principle or policy prevents the

> courts from classifying "ministers" as employees when the existing common-law tests for employment are met, and affording these individuals the protection that employees enjoy in contemporary Canadian society. [Emphasis added.]
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> [3:20.12] …While the courts should not intrude into the realm of adjudicating church doctrine, policy dictates that when clergy are found to be employees at common law, they should normally be protected by the ordinary courts in the same manner "normal" employees are at common law. It is doubtful that all clergymen have equal bargaining power with their religious organizations, and many are extremely vulnerable compared to the resources of the organizations they provide service to. Unless the parties have expressly and legally contracted out of an employer's obligations at common law, the better view is that clergy should not be in a more vulnerable position than other employees in Canadian society.

[41] Thus, submits the plaintiff, as there was no contracting out of common-law obligations, the real issue is whether his relationship with the VCBC meets the common-law test for employment, the principal indicia being that of control.

[42] A similar approach was taken in a different context in *Ferguson v British Columbia Nurses Union*, 2005 BCSC 982.

[43] In that case, the plaintiff, a registered nurse and member of the defendant union, had been re-elected president for a two-year term. She resigned in the face of difficulties with members of the governing Council, and alleged that the union's conduct created an intolerable working situation that amounted to a fundamental breach of the employment agreement and constituted constructive dismissal. The union sought summary dismissal of the claim on the basis that the plaintiff was an elected officer, and not an employee.

[44] Mr. Justice Sigurdson dismissed the application, finding on the evidence that the substance of the relationship between the plaintiff and the defendant was one of employment, and that this was not precluded by the fact that she held an elected office. He noted that the union had a significant degree of control over her duties and that a complaint process existed that could result in her termination.

[45] In coming to this conclusion, Sigurdson J. followed the analytical process employed in a church context by Mr. Justice Macaulay in *B.M. v Mumford*, 2000 BCSC 1787, 84 BCLR (3d) 146. There, in a claim for damages for physical and sexual abuse against a clergyman and a bishop, the issue was whether the claim should be dismissed summarily against two of the defendants, being the Anglican Church of Canada and the General Synod of the Anglican Church of Canada, on the ground that they could not be vicariously liable as neither was the employer of the clergyman or the bishop.

[46] In allowing the application, Macaulay J. set out the criteria for determining whether an entity is an employer, noting that these stem primarily from employment law and:

> [23] …generally include whether the entity:
>
> 1) exercises direction and control over the employees;
> 2) bears the burden of remuneration;

3) imposes discipline;
4) hires the employees;
5) has authority to dismiss the employee; and,
6) is perceived to be the employer by the employees.

[24] The test is whether the alleged employer had the power of selecting, controlling and dismissing the alleged employee.

[47] In my view, this is the right approach. Just as the use of the words "employee" or "employment" is not determinative, as counsel acknowledge, I consider that the mere fact that the plaintiff is a clergyman claiming against a church also is not determinative.

[48] As Laskin J.A. pointed out in the *Hart* case, the nature of the dispute is determined by the facts giving rise to it.

[49] Here, I conclude that this dispute, properly considered, is one subject to employment law. Notwithstanding that the Rev. Kong was the church's senior pastor and spiritual leader, he was subject to the control of the "leaders" in terms of the manner in which he dealt with issues under his jurisdiction, and whether his performance was satisfactory. This is clear from the terms of reference of the Personnel Committee. When the "leaders" concluded the Rev. Kong's performance was not satisfactory, his position was terminated. Those "leaders", I find, met all of the criteria considered by Macaulay J. in the *Mumford* case. The relationship between the VCBC and the Rev. Kong was, I find, one of employment.

[50] This is not a case where the parties had agreed to abide by internal church law, or where there the rules of the organization provided an internal dispute resolution process as was the case in *Hart*. Neither, as I see it, is this a case where intervention by the court would deprive the religious organization of the right to interpret its own doctrine (*see Levitts Kosher Food*s at para 31). There is nothing, in short, that in my view should deprive the Rev. Kong of the protection that other employees enjoy in contemporary Canadian society.

[51] I say nothing about whether the Rev. Kong was treated fairly, or whether his claim will succeed on its merits. I do conclude that the court has jurisdiction to hear it.

[52] The application is accordingly dismissed. The Rev. Kong is entitled to his costs in the cause.

"GRAUER, J."