plaintiff's case that the plaintiff has made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence.

I respectfully adopt what fell from the lips of Thomson C.J. (as he then was) in *Simirah* v. *Chua Hock Lee & Anor.*[6]:

"...the question then arises what this court should do in view of the course taken at the trial by counsel for the defendants when he submitted that there was no case to answer.

It is a great pity that when this submission was made the advice of Goddard, L.J., (as he then was) in the case of *Purry* v. *Aluminium Corporation, Ltd.* 162 L.T.R. 236 was disregarded. His Lordship there observed that in cases of negligence if a judge is asked to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again (*Laurie* v. *Raglan Building Co. Ltd.* [1942] 1 K.B. 152, 154; *Yuill* v. *Yuill* [1945] P. 15; *Storey* v. *Storey* [1963] P. 63).

In the present case it is unfortunate that counsel who made the submission of no case to answer neglected to refresh the judge's memory on this point. It is equally unfortunate, and even more surprising, that counsel for the plaintiff should also have failed in this regard. In the circumstances I think we have no option so far as the second defendant is concerned but to order a new trial. In my view, for which I have stated my reasons, the submission of no case to answer should have failed and the position would then have had to be considered in the light of the following passage from the judgment of Lord Greene M.R. in the case of *Yuill* v. *Yuill, supra,* (at p. 18):—

'The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission'."

The appeal as against the 1st and 3rd respondents is therefore allowed with costs. Judgment for $1,132.20 should be entered against them with costs both here and below.

As far as the 2nd respondent is concerned, the company was the registered owner of the name plate. The 2nd respondent wrongfully withheld information as to its relationship with the crane driver. It was accordingly joined as a second defendant. The appeal against the 2nd respondent is dismissed, but I make no order as to costs here and below.

Order accordingly.

Solicitors: *Leong & Gay; Khattar, Wong & Partners; Donaldson & Burkinshaw.*

MALAYSIAN REPORTS

K.C. MATHEWS v. KUMPULAN GUTHRIE SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Chang Min Tat F.JJ.) November 19, 1980 & June 12, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1980]

Labour Law — Clerk appointed on probation — Probationary period extended — Notice that he would not be confirmed and giving one month's notice of termination — Claim for reinstatement or damages for wrongful termination of employment.

In this case the appellant had been appointed as a clerk on probation. As his work was not satisfactory, the probationary period was extended. Subsequently a notice was given to the appellant that he would not be confirmed and he was given one month's notice of termination. He brought an action for reinstatement or alternatively damages for wrongful termination of employment. The learned trial judge dismissed the claim and the appellant appealed. It was urged that (1) at the end of the first probationary period the appellant became confirmed in his appointment unless he was told that he was not confirmed or he would have to undergo a further period of probationary service; (2) the dismissal was bad as there had been no inquiry.

Held, dismissing the appeal: (1) no enquiry needed to be called for in the circumstances of the case. The appellant knew at all times how dissatisfied his employer was with him and the enquiry would have served no useful purpose;

(2) in this case it was clear that as no action had been taken by way of confirmation or by way of termination at the end of the first probationary period, the appellant continued to be in service as a probationer.

Case referred to:-

(1) *Express Newspapers Ltd.* v. *Labour Court & Anor.* A.I.R. 1964 S.C. 806.

FEDERAL COURT.

K. Chandra for the appellant.

W. Abraham for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): At the end of the argument we dismissed the appeal from the dismissal of the plaintiff's claim for reinstatement in his employment, alternatively, for damages for wrongful termination of employment. We now give our reasons.

The facts in this case were not greatly in dispute. By letter dated April 13, 1970, the appellant was appointed a second clerk on an estate belonging to the respondent. The letter of his appointment expressly provided that the appointment was for a probationary period of six months after which period consideration would be given to confirmation, the deciding factor being whether the employer was or was not satisfied with his work. The employment commenced on April 16 and the six months' period ended on October 15, 1970. An assessment was made of the appellant's work at about this time. In all aspects of his work his rating was poor, the only ray of sunshine being his knowledge of work which was rated fair. As for his personal qualities he was either fair or poor and he was only considered good in one respect and that was in his appearance. It was indicated in that report which was dated October 20, 1970, that his shortcomings had been told to him but he had made absolutely no attempt to improve

the quality of his work. There was no indication however that this letter was shown to him and there was no evidence that he was told that he would not be confirmed in his appointment. Fortunately, nothing turned on this at that time since he continued in his work. By letter of March 6, 1971 the respondent advised the appellant that it did not propose to confirm him in his appointment but offered him continuation of employment on a probationary basis until June 6, 1971, i.e. for a further three months. He accepted it as a second chance to prove himself. On June 7, 1971 the appellant received a notice that he would not be confirmed and that he was given one month's notice of termination from July 6.

The only difference between the parties appeared to be the proper assessment of the appellant's work. The appellant endeavoured to challenge the poor opinion of his employer by requesting a test but it was apparent to the employer, as it is to us, that an excellent performance in a test is no sure indication of proper application to one's duty.

Sir Joshua Reynolds in his discourse to the students of the Royal Academy on December 11, 1969, said,

"If you have great talents, industry will improve them; if you have but moderate abilities, industry will supply that deficiency."

He did not deal with the case in which lack of industry was allied to a lack of aptitude. The point in this case was that the appellant had, in the opinion of the respondent, shown neither industry nor talent in his work. On April 22, 1971, for instance, he was given a letter in which he was told that the standard of his work was still unsatisfactory. He had taken a long time over his duties and he had committed numerous careless clerical errors in the books dealt with by him.

The hearing of the High Court was very brief. Only the plaintiff gave evidence and all he complained of was that no notice was given to him at the end of the first probationary period that he was to continue as a probationer. He was briefly cross-examined. He called no other witness and the employer elected not to call any evidence on its part.

The appellant's counsel made two points. First, he said that at the end of the first probationary period the appellant became confirmed in his appointment unless he was told that either he was not confirmed or he would have to undergo a further period of probationary service. Secondly, he said that the dismissal was bad because there had been no enquiry. The learned trial judge in his judgment did not deal with the second point and it is not quite clear from the memorandum of appeal whether the appellant continued to rely on his complaint of breaches of natural justice. In our view, however, there is absolutely no point in this part of the submission. No enquiry needed to be called for in the circumstances of the case. There was evidence which the appellant could not and did not deny that in the course of his brief employment he had been told on several occasions of the unsatisfactory nature of his work, his lack of industry and initiative. His acceptance of a further period of probationary employment must be regarded as an acceptance of the condition that he had to prove his suitability for confirmed service. Unfortunately, his willingness was never translated into action. The appellant knew at all times how dissatisfied his employer was with him and he must have known, having regard to the terms of the letter of appointment, that he was running the risk of dismissal. All he had to do was to produce the work required of him. He never did. The enquiry that he now required would have served no useful purpose.

In so far as his claim of confirmed service was concerned, counsel for the respondent relied on the following passage from the judgment of Das Gupta J., in *Express Newspapers Ltd.* v. *Labour Court & Anor.*[1]:

"This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired — except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer."

With respect, we agree.

For these reasons we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *K. Chandra & Co.; Shearn Delamore & Co.*

MOK DENG CHEE v. YAP SEE HOI & ORS.

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) March 8 & June 28, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 91 of 1980]

Landlord and Tenant — House built on land belonging to another person — Ground rent paid to owner of land — Tenancy coupled with equity — Whether notice to quit valid — Whether tenancy coupled with equity can be determined by bare notice to quit.

In this case the respondents were the owners of a piece of land on which a house had been built by one Hong Kong who was a ground tenant at the ground rent of $1 a month. The house was sold to the appellant's father and after the death of his father the appellant became the owner of the land. He continued to pay the ground rent of $1 which was later raised to $2.50 per month. In 1975 the appellant without the respondent's consent demolished the old house and started to build a completely new house. Differences arose between the parties and a meeting was held to resolve the differences. It was agreed that the appellant should pay tea money of $1,500 and that a written agreement relating to the tenancy be signed. The appellant did not agree to the agreement drawn up by the respondents and the respondents thereupon served a notice to quit to the appellant "to quit and deliver up possession of the premises". The respondents then sued the appellant for possession. The learned Magistrate who heard the case give judgment in favour of the appellant