BARAKATHULLA

v.

HINNIAPPUHAMY

COURT OF APPEAL
RODRIGO, J. AND B.E. DE SILVA, J.
C.A. 48/74 (F) — D.C. MATARA 2828/L
30, 31 MARCH, 1, 8, APRIL AND 4 AND 6 MAY, 1982.

Landlord and tenant – Rent Restriction Act, Section 12A (1) — Ejectment on ground of wilful damage — Unauthorised alteration by tenant liable to demolition under Housing and Town Improvement Ordinance, Section 56 (2) — Repairs and alteration distinguished – Roman Dutch Law on damage by tenant.

The plaintiff became landlord of the premises Nos. 95 and 99 in 1968. His father-in-law had been the landlord before him. The tenant commenced his occupancy thirty years ago under the father-in-law of the plaintiff.

Neither the plaintiff nor his father-in-law had carried out any repairs to the premises. The defendant too had not applied to the Rent Board for relief.

The defendant acting on his own without the consent of the landlord and without the prior approval of the local authority carried out the following works:

a) He built a lean-to roof in asbestos to replace a tiled roof in part of the front of the premises No. 99.

b) He replaced the tiled roof of No. 95 with asbestos

c) He closed the well at the back of the house.

d) He incorporated a vacant piece of land that lay in front of the house by roofing it over, cementing the floor and building pillars on the half wall.

These works were in effect structural alterations and required the prior approval of the local authority under the Housing and Town Improvement Ordinance. The defendant did not obtain this approval and after the completion of these works the local authority refused to sanction them and demanded their demolition and had initiated action to prosecute the defendant.

The plaintiff instituted this action for ejectment of the tenant for wilful damage under Section 12A(1) of the Rent Restriction Act.

Held -

(1) The kind and degree of damage that the word in the statute can be interpreted to attract is the same as the kind and degree of damage described in the Roman Dutch Law.

(2) The damage caused to the premises by the tenant is not grave or malignant so much so that the premises can be restored to their former state with a minimum of damage.

Cases referred to:

(1) *A.C.T. Constructions Ltd. v. Customs and Excise Commissioners (1982) 1 AER 84 (H.L.)*
(2) *Senanayake v. Urban Council, Gampaha (1958) 60 NLR 127.*
(3) *Morcam v. Campbell-Johnson (1956) 1 Q.B. 106.*
(4) *A.C.T. Construction Ltd. v. Customs and Excise Commissioners (1981) 1 AER 324.*
(5) *Jayaratne v. Singalaxana (1958) 61 NLR 569.*
(6) *De Silva v. Abdul Karem 1 Law Recorder 65.*
(7) *Kasthuriratne v. Senanayake (1920) 22 NLR 372.*
(8) *Jalaldeen v. Albert (1957) 59 NLR 127.*
(9) *Dingiri Banda v. Gomez (1971) 74 NLR 187.*
(10) *Silva v. Obeysekera (1923) 24 NLR 97.*

APPEAL from judgment of the District Court of Matara

H.W. Jayewardene, Q.C., with *M.I.H.M. Sally* and *H. Siriwardena* for plaintiff-appellant.
C. Ranganathan, Q.C., with *N.R.M. Daluwatte, N. Reeza* and *K. Logasundaram* for defendant respondent

Cur adv vult.

June 8, 1982.

RODRIGO, J.

The plaintiff's action has been dismissed by the trial Judge. He sought ejectment of his tenant from the premises in suit. The ground of ejectment was wilful damage to the premises by the tenant and/or persons at his instigation or residing with him. The standard rent of the premises does not exceed Rs. 100/- a month. It is business premises. It is a permitted ground of ejectment under the Rent Restriction Act No. 29 of 48 as amended by Act No. 12 of 1966. The relevant section is s. 124(1). The ground of ejectment relied on is sub-s. (b) of this section. The whole of this section in so far as it is relevant to this appeal reads:-

"s.12A(1): Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies and the standard rent of which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where –

(a) .....
(b) .....
(c) .....
(d) wanton destruction or wilful damage to such premises has been caused by the tenant thereof or any other person at his instigation, or any other person residing in such premises.

The action was instituted at a time when this section was in operation and as I said under it. Eleven issues were adopted at the trial. The material issues and the answers thereto by the Trial Judge are:

(5) Did the defendant repeatedly request,
  (a) the plaintiff to effect necesssary repairs to the buildings, the subject matter of this action? – A. No
  (b) and did the plaintiff neglect to do so? – A. Yes.

(6) Did the defendant inform the plaintiff that he was intending to effect necessary repairs? – A. Yes

(7) Did the plaintiff have no objection to the defendant in doing so? – A. Yes.

(8) Did the defendant with the sanction of the Urban Council, Matara
  (a) effect repairs by fixing of asbestos cement sheets on a portion of the roof of premises Nos. 99 and 95? – A. No.

(b) erect five pillars in building No. 95 to strengthen the same and cement the premises No. 95? – A. No.

(9) Were the said improvements necessary in order to ensure the safety of the existing building and inmates?— A. Yes.

I will now set out the facts surrounding the action as had emerged in evidence. The plaintiff became the landlord only in January 1968, the action being instituted in November 1968. Prior to that for a period of 30 years his father-in-law Noohu Hadjiar was the landlord of the defendant. Noohu Hadjiar had sued the defendant twice for ejectment, each time unsuccessfully. So this is the third action that the defendant is facing as the tenant of the premises. But this is the first time he is being sued on this ground.

Neither landlord has effected any repairs to the premises during this long tenancy. If the premises needed repairs the tenant could have applied to the Rent Control Board for relief – s. 11 of the Rent Restriction Act. But the defendant did not do so. The trial Judge makes a finding of fact in answer to a specific issue (6) that the defendant had informed the plaintiff that he intended to effect necessary repairs. But this finding is challenged as not being borne out by evidence. However, it may be, the defendant resorted to self-help. Self-help is a perilous remedy as this case issue illustrates – for it is alleged that if the premises needed any repairs then the work carried out by the tenant was far in excess of what the repairs required. Either by design or being in the nature of repairs he had brought about structural alterations to the premises to suit his purposes. This had been done without the consent of the plaintiff. But the trial Judge finds in answer to issue (7) that the plaintiff did not object. This is also disputed. If it is not correct that the defendant informed the plaintiff that he was intending to effect the necessary repairs, then this too is not correct. But it is of no significance for there is no serious claim that the plaintiff consented to any repairs being effected.

The premises was inspected by Court on invitation. A Commission was issued to Mr. Classen, an architect, who had issued a report marked in evidence and he has given evidence himself orally. The works carried out by the defendant as transpired in evidence are:

(a) a lean-to roof in asbestos has replaced the tiled roof in a part of the front of the premises extending the length of the original roof towards the front by 6 to 9 inches. This was in respect of premises No. 99. The whole of the premises itself that is both

Nos. 95 and 99 is one premises and is only 20 perches and proportionately the extent of the roof so replaced is sizeable.

(b) The premises No. 95 as it existed prior to the works being carried out is entirely roofed over in asbestos replacing the tiled roof. To support the new roof the wooden pillars that supported the old roof had been removed and replaced with masonry pillars. These pillars, however, had been erected at a point away from where the wooden pillars stood and were erected flush with the existing masonry boundary wall thus extending the length of the roof to cover a larger area than was the case before. More particularly what was an alleyway in the result has now lost its character as an alleyway and become absorbed into that portion of the room covered by the earlier roof.

(c) It is also alleged that a wall which was in the back of the premises had been closed.

(d) A vacant piece of land that existed in front of the building facing premises No. 95 was roofed over, cemented and incorporated into that part of the building with pillars being built on a half wall that existed at a side on the boundary of the premises to support the roof. This roof is in asbestos and the new structure now forms a continuous unit with the front portion of the building. This front portion of the buidling is itself an addition made during the tenancy under Hadjiar when that part of the land was also vacant according to a Town Survey Plan marked in evidence. The shop was thus extended right up to the main road which abuts these premises. All these works are alterations of the building or parts of the building according to the tenant himself – see paragraph 8 of the amended answer

The Housing and Town Improvement Ordinance (Chapter 268 of the Legislative Enactments of Ceylon) defines an "alteration" – s.6(2) thereof reads as follows:-

s.6(2): "For the purposes of this and the connected sections an 'alteration' means any of the following works:

(a) the construction of a roof or any part thereof or an external or party wall

(b) .....

(c) .....

(d) any other alteration of the internal arrangements of a building which effects any change in the open space attached to such building or its drainage, ventilation or sanitary [illegible]

(e) the addition of any building, room, outhouse or other structure.

(f) the roofing of any space between one or more walls and buildings.

(g) – (k) are immaterial."

The unchallenged finding of the trial Judge in answer to issues 8(a)(b) – see supra, is that these alterations were done without the sanction of the local authority. It is in evidence that the alterations were done not only without prior approval of the local authority but after the alterations were done the local authority refused to give approval to them. But what is worse is that the local authority has sanctioned or recommended prosecution in respect of these alterations.

It must be noted that the items listed in the section as alterations are structural. In fact an alteration, in the ordinary meaning of that word, is 'structural'. In *A.C.T. Constructions Ltd. v. Customs & Excise Commrs.* (1) Lord Roskill observed that he agreed with the view of Neil, J who said an alteration with reference to a building is a structural alteration for, otherwise, repainting a building in a different colour would also be argued to be an alteration. In this case the Crown contended on behalf of the Excise Commissioners that underpinning the foundation of an old building with the construction of an additional foundation is not an alteration but maintenance.

The question is whether by one or more of the works done in the premises as mentioned, the defendant has damaged the premises. This must be determined before the next question arises for consideration, if necessary, namely is such damage wilful? The allegation of wanton destruction was not pressed. The issue No. (9) has been framed on the assumption that the items of work referred to in issue No. (8) namely,

(a) re-roofing in asbestos and,

(b) building masonry pillars in and cementing the premises, were improvements, as they were alleged to be made with the sanction of the local authority.

The issue has been framed in these terms without putting in issue whether the items indicated amount to improvements. The affirmative answer of the Judge indicates that in his view the works mentioned were not only improvements but also that they were necessary to strengthen the building to ensure the safety of the building. The Judge here has overlooked his negative answer to the issue whether they were done with the sanction of the local authority. The Judge

in his judgment refers to the building up of the open space and the closure of the well. He, however, has taken the view that they had been done during the tenancy under Hadjiar and therefore did not need consideration. These findings are challenged and need examination.

In examining the findings and conclusions of the trial Judge consideration must naturally be given to the evidence of the architect. The Judge's own notes of inspection and the evidence of the officer from the local authority who went to inspect the premises before the issue of the building permits as well as the evidence of the carpenter are not without importance. So is the evidence of the mason.

The architect had not seen the premises before the works referred to were done on it, but the carpenter, mason and the officer from the local authority had seen it.

The carpenter's evidence has been summarised by the trial Judge and he has expresed his views thereon. In his own words:-

> "Jayasinghe (carpenter) says that the roof timber in the front portion of No. 99 was decayed. The beam in the front of No. 99 had to be replaced otherwise the roof would have collapsed. It is on this beam that the weight of the roof rests. The beam had been attacked by insects and was in imminent danger of collapsing. The rafters had also decayed and had to be replaced earlier. As such new timber was used and a new roof was constructed in the front portion of No. 99. The allegation is that this portion of the roof had been raised above the level of the roofs of the other adjoining premises and therefore it looked unsightly. The carpenter says that the roof was so raised because it would give a better appearance. In any event, it is a matter of common knowledge that it was unnesessary to maintain the same slope for an asbestos roof as is nesessary if the roof is of country tiles. This roof is shown in photographs P5 and P6. Indeed, I don't get the impression that as a result of the replacement of the country tiled roof by new sheets of asbestos the building had been rendered unsightly. One of the points made in regard to this roof is that there is no down gutter for the water to flow down. However, the photograph P6 shows that an aluminium ridge has been left at the edge of the asbestos sheets to allow the water to drain down. It was also mentioned that because the roof is higher than the roof of the adjoining premises water would seep down everytime it rains between the two roofs. I don't really think that there is such a possibility."

"In regard to premises No. 95, the carpenter says that the roof at the rear of No. 95 had decayed and the wooden pillars on which the roof was resting had also perished. The half wall on which the wooden pillars were resting had cracked and was crumbling. As a result the wall plate had got lowered causing the roof itself to be lowered. In view of this the wooden pillars were replaced by five brick pillars and the roof raised to the level at which it should have been. He says that the masonry pillars were better and more secure than the wooden pillars. Thereafter the carpenter had replaced the existing beam of that portion of the roof and new rafters were used and an asbestos roof constructed."

The summary of the mason's evidence in the words of the Judge is as follows:-

"as for Mendis, the mason, he says that crabs had dug holes on the floor and as a result the pillars on which the roof was resting had become insecure and the roof itself had got lowered. In premises No. 95 he had built 5 brick pillars flush against the boundary wall and on these pillars a new roof was constructed."

"I did not get the impression that either the mason or the carpenter had given false evidence. Indeed their evidence is subtantially consistent with the evidence of the defendant himself in regard to the condition of the premises. Considering the antiquity of this building I am not surprised that the premises were barely habitable. Indeed the photographs produced by Mr. Classen are more eloquent than all the evidence led in the case."

As regards the evidence of the officer from the local authority, the Judge says:-

"This witness was cross-examined at length but it seems to me that the only material point in his evidence is that at the time he inspected the building it was in a dilapidated condition."

The Judge's comment on the architect's evidence is this:-

" A consideration of Mr. Classen's expert evidence therefore shows beyond any doubt that whatever work that had been done by the defendant could have been done better and possibly more skilfully but that no damage as such had been done to the building and certainly it was not damages of the type that

> can be expected to be caused by irresponsible school boys and soldiers of an invading army. The work done by the defendant was neither purposeless nor undisciplined nor had it been done carelessly or wastefully."

A firm impression is created on a reading of this evidence that the roof in the front part of premises No. 99 and the roof of the area where the wooden pillars supported the roof needed substantial repairs and perhaps the floor in this area of the wooden pillars needed recementing. In fact the application to the local authority for a permit was restricted to re-roofing and re-cementing of the wooden pillars area. So if the works done by the defendant were restricted to repairs the defendant would have had no problem in this action unless the repairs itself had damaged the building, through lack of skill or otherwise. What had taken place is reconstruction of the roof and the ground support for the roof as a measure of repair. Not only has the defendant replaced the roof with a new structure with new and different materials and ancillary to that replaced the wooden pillars with brick pillars situated at different points thus also altering the internal arrangement of the area at least in respect of space. This is wholesale reconstruction and more so when considerating what had been done in the open ground space abutting the road. On an examination of the evidence I am inclined to agree with the Judge that the work on the roof is neither unsightly nor defective as alleged though architecturally it could have been more attractive. Any way on an overall view the new roof and the recemented floor is an improvement on what existed before in a damaged condition. Even so though it is an improvement structurally it is still a repair in the legal sense. In *Senanayake v. Urban Council, Gampaha* (2), Sansoni, J., as he then was, cited with approval a dictum of Denning, L.J., in *Morcam v. Campbell-Johnson* (3), in the following words:-

> "It seems to me that the test, so far as one can give any test in these matters is this: If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn-out; then albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvements."

This judgment and the dictum needs review in view of the recent decision of the House of Lords in the case cited above (*A.C.T Construction Ltd. V. Customs and Excise Commrs*) in which it was said that the word "repair" is an ordinary word in common use better left alone to be given its ordinary meaning. It ought to be a question of fact in each case or one of degree for a Tribunal of fact concerned to determine. The House of Lords did not disagree with the observation of Brandon, J. in the Court of Appeal that "although the purpose of the work is to remedy an existing or to prevent future defects in the building, it is nevertheless not within the expression "maintenance" in the ordinary and natural meaning of the word. For example, if a building has a flat roof which leaks continuously and the owner decides to replace the flat roof with a pitched roof, so as to eliminate that defect then, although that work was designed to eliminate a defect it would not in my view be maintenance in the ordinary and natural meaning of that word".

The emphasis in the *Senanayake case* (2) is replacing something which is already dilapidated or worn-out but if it is a replacement of something that is not dilapidated or worn-out then it is not a repair but just an alteration which may or may not be an improvement See for this distinction the case of *A.C.T. Construction Ltd. v Customs and Excise Commrs.* (4). For e.g. the replacement of slates by tiles. Denning, L.J. here was applying the section of the English Rent Act corresponding to s.6(1)(b) of the Rent Act No.29 of 1948 as amended. The point is if it is an improvement in this sense then the landlord can recover the cost of the improvement but not if it is a repair. So can the landlord recover the cost of the improvement but not if it is a repair. So can the landlord recover the cost of a structural alteration not amounting to a repair. In this view of the matter the replacement by the defendant of the roof and the recementing of the floor is undoubtedly a repair, but involving alterations and as I said this repair has not damaged the building A difficulty, however, is created by the refusal of the local authority to grant the certificate of conformity for this work. This difficulty applies in fact to all the works done on the premises. I shall return to this aspect of the matter later.

The new roof in so far as it has replaced the old worn-out one is a repair. But it has been extended; that is to say, it has been so constructed as to cover an area that was not covered by the old roof, namely, an alleyway which provided a passage earlier from the road through the vacant ground space abutting the road to an open

ground space at the back of the house. This passage was alleged by the plaintiff to have been open to the sky. This was denied by the defendant. It must have been open to the sky sometime in the history of this building. For otherwise there would have been no ventilation or light into the area below this roof. But at the inspection by the trial Judge the plaintiff himself had said to him that the alleway had an aluminium roof earlier and the defendant said it had a zinc roof. In the notes of the Judge's inspection this extended roof has been noted as being an extension of the rest of the roof in corrugated asbestos. This must be shutting out ventilation and light altogether. But if as the plaintiff states the passageway had earlier been covered by a roof then this replacement by the extended roof in asbestos would not in my view, be causing new damage to the building.

The building of masonry pillars also followed the need for replacement of the wooden pillars that had already decayed. So all this is comprised in the work of repair to the roof. These pillars just the same have been built flush on a new boundary wall according to the officer from the local authority. This creates a problem because the certificate of conformity has been refused for this area particularly for this reason. This as I said is part of the general difficulty that the defendant faces in respect of the necessity to get the final approval from the local authority.

There is then the open ground space abutting the main road in front. This ground space has been built upon and enclosed into a room. So is the partly open space immediately behind it. This particular portion of ground space has been open to the sky but carried walls on three sides. It also opened out to the ground space abutting the road. It would appear that this portion of ground space behind bounded by the walls on three sides had been built upon during the time of Noor Hadjiar. It is contended that even the open ground space abutting the road was also built upon during Hadjiar's time. But the defendant has been specific in his evidence that the alteration that he effected to the premises on application being made to the local authority in 1968, that is, after he became tenant of the plaintiff, was the construction of an extension in the open area in front. To quote his own words :-

> "I have summoned the Urban Council to produce necessary papers. The alterations I effected to the premises was the construction of an extension in the open area in front. The building had no extension up to the drain which is by the

road. I got the ground cemented. I also got some wooden pillars erected and some galvanized sheets were fixed on the roof. As a result a portion like a verandah came into existence. In the areas which are cemented like the verandah there were half walls earlier on three sides, namely on the side of the road and the two short walls. I got the wooden pillars erected in line with the existing walls. As a result the existing building got enlarged. The new structure was about 100 ft. in length and 50ft in width. The other boutique buildings down the road were in line with the built-up drain. As a result of the new construction these buildings also came in line with the other boutique buildings.

Counsel for the defendant submitted that this was a confusion in the mind of the defendant, for he submits that the evidence of the defendant given later, on another day, is the true position. This evidence in his own words is thus :-

> "The front portion of No.95 was vacant. I improved that section even before the plaintiff became the landlord. That was done while the Hadjiar was alive. That may be in about 1950. I have no document to prove that I obtained permission to effect that improvement."

Counsel for the plaintiff denies that this is a confusion. He submits that this latter evidence is in relation to the vacant portion behind this open area that I referred to earlier. There is, however, the application of the defendant to the local authority for approval of intended works - that is, re-roofing and re-cementing. To this application is attached a sketch. See P17. This sketch shows the front portion of the premises as a shop room. The width is 16ft. and this would be the width of the entrance to the back portion of the open space bounded by walls depicted in Plan P4 made by the architect. What is shown as a shop room in P17 cannot be the verandah like structure that the defendant is speaking of because the defendant gives the width thereof as 30ft. This would rather indicate that the open space had not been built upon at the time of his application for re-cementing and re-roofing in 1968. It must be remembered that it is only in January 1968 that the defendant became the plaintiff's tenant. Even if it had been built upon in 1950 as Counsel for the defendant contends still it will not help the defendant in view of what I shall state presently.

This alleged new verandah is certainly not a repair. It is a building of a new structure. See *Jayaratne v. Singalaxana* (5). This structure or the verandah has thus made a complete alteration of the open ground space in front of the building. In view of Denning L.J.'s dictum quoted earlier this provides something new for the benefit of the defendant. It is therefore an improvement in any event from the standpoint of the tenant though it could be prejudicial to the landlord. It had made the premises more commodious. But the snag is such things cannot be done without approval from the local authority and without a certificate of conformity. The certificate of conformity in respect of all these works had been refused. One reason given is that the alteration in the open space did not keep the required distance of 45ft from the centre of the road. The Public Inspector of Health had recommended prosecution for these unauthorised alternations. The officer from the local authority had stated that the wall and the five pillars are a new construction and that it had not been approved by the local authority and the certificate of conformity had been refused in respect of that as well.

Even in respect of the well the submission is made that though the well was closed down on orders of the local authority such an order has been necessitated by the defendant constructing a water seal lavatory close to the well. It is said that the damage caused is the construction of the water seal lavatory in such a manner as to bring about the need to close the well. It is, however, not clear as to when this had been done. However, in view of what I have to say hereafter it is not necessary to examine this contention.

While the roof as such is a useful repair and has not otherwise damaged the building, what is the position if the pillars and the wall on which this roof rests has to be demolished for lack of a certificate of conformity. Likewise, if the new front verandah, though an improvement for the benefit of the tenant, it ceases to be an improvement of any benefit to the tenant if that too has to be demolished. In areas of local authority where the construction and alterations to buildings is required by law to be subject to the rules and by-laws of the Housing and Town Improvement Ordinance it is not open to the owner of the house and far less to the tenant to undertake building operations even by way of repairs and far less by way of improvements if they involve alterations without sanction from the local authority, for everybody every day an unauthorised alteration or construction continues, the tenant or the owner is penalised and the alterations and constructions remain subject to

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demolition orders. The officer from the local authority had said that even up to the date on which he gave evidence there had been no submission by the tenant of amended plans. What a tenant can or cannot do to a premises has to be viewed at in the perspective of the relationship of landlord and tenant. It is required of a tenant to look after the premises as if it were his own. Therefore no careful tenant would undertake works on a premises which may be required to be demolished by the local authority.

There are authorities that had taken the view that replacing a cadjan roof with a tiled roof is an alteration within the meaning of the Housing and Town Improvement Ordinance. See *de Silva v. Abdul Karem* (6). Similarly removal of a wall and rebuilding it as the defendant has done in this case has been held to be an alteration and not a repair - see *Kasthuriratne v. Senanayake* (7). So the defendant has done the works mentioned in contravention of building by-laws of the local authority.

Even so, a person who builds and/or alters a building in contravention of building by-laws is given by the Ordinance an opportunity to satisfy the Chairman of the Local Authority (Chairman includes the Mayor of an Urban Council) or the Magistrate, if he is prosecuted, as the case may be, why no demolition order can properly be made in respect of the works in question. For instance he can show that though the alteration or the new erection is in breach of a provision of the Ordinance, yet it does not contravene an express statutory prohibition. See *Jalaldeen v. Albert* (8) per H.N.G. Fernando and also *Dingiri Banda v. Gomez* (9) where Alles, J. held that it is a matter of discretion for the Magistrate which he must exercise judicially to order a demolition. This discretion must, of course, be exercised to make a mandatory order for demolition where the alteration or the works contravenes a statutory prohibition as against a mere breach of a provision. So that on the evidence it is not inevitable that the tenant should remove the alterations or a new structure without an opportunity being given to him to satisfy the proper authority that the works need not be demolished.

Yet this matter has to be further examined from two stand points. The new structure on the vacant ground has no chance of being legally permitted to stand in view of it not keeping the required statutory distance from the centre of the road. The evidence of the officer from the local authority and the documents marked in that connection is clear on that. Has the tenant then caused damage *per se* by erecting a structure in contravention of a statutory prohibition?

The tenant is entitled to the beneficial user of every part of the premises. If erecting a structure on a vacant piece of ground appurtenant to the building enhances the enjoyment of the building by the tenant there is normally no reason why he should not erect a structure thereon. This, of course, may be in breach of an express or implied term of the contract of tenancy in which event the landlord can sue for damages and restoration of the premises to its original condition but not for ejectment and cancellation of the tenancy. This view I hold on the Roman Dutch Law authorities which I will cite in a moment.

Apart from a term in the contract of tenancy, erection of a structure can cause damage in one of two ways. If it is allowed to stand (being erected without the consent of the landlord) not being in contravention of a building by-law it may damage the interests of the landlord. Perhaps the value of the premises may diminish if it has otherwise not caused physical damage to the rest of the building. If it is required to be demolished and is in fact demolished the building and/or the ground may be incidentally physically damaged. Prejudice to the landlord's interests by way of devaluation of the property is not the damage prescribed in the statute. It is damage to the premises, that is, to the building and the land that is penalised. In fact, the plaintiff has said in evidence in one moment that no damage or loss has been caused to him by this structure. But this appears to be a casual piece of evidence though in answer to Court.

One would think that no damage *per se* is caused by erecting an extension without approval and it remained to be seen whether damage will be caused by the eventual demolition and the process of restoration of the premises to its original condition. No authority has been cited nor have I been able to discover any for saying that erecting a structure (unapproved) for the only reason that it is against a statutory prohibition enures to the benefit of the landlord. The answer to this problem must be suspended till the Roman Dutch Law authorities are examined on this point. More so, since the quantum and quantity of damage required to be established for ejectment of the tenant is not spelt out in the Act.

The principles of Roman Dutch Law bearing on this point are contained in Voet 19.2.18 which reads :-

> *"Ita quoque eum non nisi ob notabiliorem in re conducta versationem malignam dejici, aequum est."*

This passage makes a full comment on the causes for the ejectment of a tenant contained in paragraph 16. In paragraph 16 is found the third cause of ejectment of a tenant, which reads:-

"Vel conductor in re conducta male versetur."

He is here referring to urban tenements *"Urbana praedia"* and *"de domo vel fundo."* He insists that the *mala versatio* referred to must not be negligible or merely a breach of the convenants which stipulate the manner in which the property is to be used but must be serious and grave injury to the property. This kind of misconduct is comprised in the requirement of gross and malignant misconduct stated in the passage quoted. Commenting on the brief passage in Justinian's Code, Ch. 651 de locatio et conductio, 3., which, it is said, appears to be the source of almost everything written by the Roman Dutch Law commentators on this subject, Carpzoeveous adds a useful passage as follows that "inasmuch as the methods of abuse which should be considered sufficient to justify ejectment are not found to be enumerated in the law, it would appear that the whole question must be left to the determination of a prudent and careful Judge as to whether the particular abuse is to be restrained by ejectment or simply by damages or whether it should be, on the ground of its triviality to be ignored altogether. Then another commentator Gerard Noodt - 19.2 referring to town tenants quotes that they must behave in the houses leased to them as befits a good *pater familias - in domo conducta versari ut oportet bonum patrem familias* :- see for a fuller treatment of this subject, the case of *Silva v. Obeysekera* (10) per Bertram, C.J.

Applying these principles to the facts of this case I do not think that a careful Judge will consider the works done by the tenant on the premises has caused grave and malignant injury to the premises. He can be reasonably expected to restore the premises in the event of his having to remove the front structure, as indeed he will be compelled to, and to modify the interior works, which in the net result is bound to be such as any damage that might be caused will be negligible.

I am, therefore of the view that no damage has been caused to the premises of the kind described in the Roman Dutch Law authorities which is the kind and degree of damage that that word in the statute can reasonably be interpreted to attract. In that view of the matter the word "wilful" in the statutory provision which is not a term of art but a common English word in ordinary use does not alter the degree or character of damage required to be established for ejectment of a tenant under the statute.

A point of pleading has been taken by Counsel for the respondent that evidence has been led of alterations and structures without specific pleadings or issues on them and consequently the respondent has been gravely prejudiced by the admission of such evidence. It is not necessary to say anything more on this point than that the respondent through good luck that he has had with the law and the prudence of the trial Judge has successfully withstood this unexpected storm complained of.

For these reasons we dismiss this appeal with costs.

B.E. DE SILVA, J. —I agree.

Appeal dismissed.