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have been a re-union between Narasimha Somayajulu and Rama Somayajulu after the date of Exhibit A.

On the other points of the case I agree that the plaintiff's claim cannot be held barred by limitation. Adverse possession against Subbamma would not have effect against the plaintiff; and limitation could not have begun to run against the plaintiff while she was a minor in the *de facto* guardianship of her father's brother.

I agree also that it is not shown with sufficient clearness that Narasimha Somayajulu contributed to the purchase money for items 7 to 10 to make it necessary for us to interfere with the finding of the learned Subordinate Judge on that point.

I agree therefore that both the appeal and the memorandum of objections must be dismissed and that the costs should be borne in the manner proposed by my learned brother.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice and Mr. Justice Odgers.*

1928, May 3.

THE EAST INDIA DISTILLERIES AND FACTORIES, LTD. (DEFENDANTS), APPELLANTS,

v.

P. F. MATHIAS (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), *sec.* 108 (*e*), (*m*)—*Lessee of house undertaking to restore premises in original state—Storing of liquor on premises—Damage to premises by fire—Negligence—Liability for.*

Plaintiff let his house to the defendant company to be used as liquor warehouse, the defendant company agreeing to make the necessary structural alterations to suit their purpose and to

* Appeal No. 432 of 1925.

restore the house to the plaintiff at the end of the lease in its original state. During the period of the lease, one night, in the absence of a watchman, the liquor store-room and the whole house were destroyed by fire. In a suit by the lessor for damages,

Held that though under a general covenant such as the above, a lessee would under the English Law be liable for all damage including one arising from fire, yet, under section 108 (*e*) of the Indian Transfer of Property Act, he is not liable for damage by fire in the absence of proof that the fire was due to his negligence.

Held further (*a*) that spirits , or proof alcohol is not such a dangerous thing that a person who keeps it can be held to keep it at his peril and (*b*) that the absence of or omission to keep a watchman on the premises was not, in the circumstances of the case, the proximate cause of the damage.

APPEAL against the decree of the Court of Subordinate Judge of South Kanara in O.S. No. 19 of 1923.

The facts are given in the judgment of ODGERS, J.

Vere Mockett for appellants.—The evidence in this case shows that the defendant company was generally employing a watchman and also coolies to look after the building and the liquor store-room both day and night. The Company is not therefore liable for negligence. The fire must have been due to some outside cause and not to the absence of a watchman, even supposing that there was a duty to keep a watchman and that the watchman was absent. Absence of watchman cannot be the proximate cause of the fire. Spirits or even proof alcohol cannot ignite by itself and cannot be said to be such a dangerous thing that a person who keeps them can be held to keep them at his peril. Hence the cases quoted by the lower Court, viz. *Rylands* v. *Fletcher*(1), and *Musgrove* v. *Pandelis*(2) do not apply to the present case. Moreover in the last case negligence was brought home to the defendants. It is not so in this case. The duty on the part of the defendant company under the covenant in the case is not an absolute one irrespective of any accidental damage by fire. The duty is one to restore the premises at the end of the lease, in the original habitable state as a dwelling

(1) (1868) L.R., 3 H.L., 330. (2) [1919] 2 K.B., 43.

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house, if the house then existed. Moreover, under a general repairing clause like the one in question in this case, though there may be an absolute liability under the English law on the part of the lessee to preserve the premises even against fire, there is no such liability under the Indian Transfer of Property Act, section 108 (*e*), unless the fire is caused by the lessee's negligence.

K. S. Krishnaswami Ayyangar (with *M. A. T. Coelho* and *C. M. G. Earnest*) for respondent.—Under the covenant in this case which is general, the defendant is liable even for damage by accidental fire, if liability therefor is not specially excepted; see Woodfall on Landlord and Tenant, 20th Edition, page 732, and Transfer of Property Act, section 108, clause (*m*). Spirits are combustible and a person who brings and keeps them in a house does so at his peril. There is an absolute liability and there is no necessity to prove negligence in such a case; *Rylands* v. *Fletcher*(1), *Musgrove* v. *Pandelis*(2), *Smith* v. *London and South Western Railway Co.*(3), *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*(4), *Scott* v. *The London Dock Company*(5), *Attorney-General* v. *Cory Brothers & Co.*(6), *J. K. Hechel* v. *S. J. Tellery*(7), *The East Indian Railway Company* v. *Kally Dass Mookerjee*(8), *Bullock* v. *Dommitt*(9). There was also negligence on the part of the defendant company in not keeping a watchman on the night in question.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—After careful consideration of this case, I have come to the conclusion that the plaintiff cannot succeed unless he can bring home negligence to the defendants. It is argued that the covenant in the lease imposes an absolute obligation on the lessees to restore the building at the end of their term in the condition in which they took it, without regard to the provisions of section 108, Transfer of Property Act. That such a result might be reached

(1) (1868) L R., 3 H.L., 330.
(2) [1919] 2 K.B., 43.
(3) (1870) L.R., 6 C.P., 14.
(4) (1926) I.L.R., 48 All., 404.
(5) (1865) 34 L.J., Ex., 220.
(6) (1921) 1 A.C., 521.
(7) (1900) 4 C.W.N., 521.
(8) (1899) I.L.R , 26 Calc., 465.
(9) (1796) 6 T.R., 650; 3 R.R., 300.

in England I do not contest. English authorities were quoted and there is no doubt much to be said for the view that, if you enter into a general repairing covenant and do not provide for the contingency of fire, you will be held strictly to the words of your covenant. But India, the section 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden upon his shoulders by his covenant. In my opinion the material covenant of this lease did not contemplate the case of fire at all. It merely provided for the obligation that the lessee would incur in restoring premises which he had altered to suit his own purposes to their original use as a dwelling house at the termination of the lease. That covenant to my mind was founded upon the basis that at the termination of the lease the premises should exist in a state capable of conversion and never was meant to impose upon the lessees the obligation of re-building what had in the events that happened become a mere heap of burnt-out ashes.

With regard to the question of negligence which, of course, if established, would prove the plaintiff's case, I do not think it is established. It is quite true that there was no watchman so far as one can ascertain on this night; but I am entirely unable to gather from the evidence that that can be in any way regarded as a proximate cause of this fire. Nor can I see that the principle of *Rylands* v. *Fletcher*(1) has any application to a case of this kind for two reasons: In the first place there is no evidence whatever that proof alcohol is dangerous thing which a man can reasonably be held to store at his peril owing to its dangerous nature. It is

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(1) (1868) L.R., 3 H.L., 330.

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not apparently liable to spontaneous combustion in any circumstances and it seems more likely on the evidence and from what we have been told that the building fired the alcohol than that the alcohol fired the building. Moreover it was from the beginning known to the lessors for what purpose the lessees required the building and to what use they proposed to put it. The cases relied upon by the plaintiffs appear to me not to rest upon the doctrine in *Rylands* v. *Fletcher*(1), but to be based upon negligence. I need only refer to the latest cases relied upon, the earlier are too well known to render it necessary to discuss them again, such cases, I mean, as *Scott* v. *The London Dock Company*(2), and *Smith* v. *London and South Western Railway Co.*(3). I confess that the case that has given me most difficulty is that of *Musgrove* v. *Pandelis*(4), which was put before us as being an instance of the application of the doctrine of *Rylands* v. *Fletcher*(1). I have satisfied myself, after analysing it carefully, and especially having regard to the judgment of DUKE, L.J., that the case ultimately resolves itself into a finding of negligence against the defendant's servant. Conditions of danger were no doubt present but the determining factor was the failure of the defendant's servant who was an unskilled person put in charge of a car (in itself, I think, possibly a negligent employment by him) to turn off the tap and hence the petrol in the carburetter was ignited. Since writing this, I have seen that Sir Fredrick Pollock takes the same view of the scope of the decision in the last edition of his well-known book on Torts. The other recent case was *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*(5), which clearly contains a finding that it was

(1) (1868) L.R., 3 H.L., 330.
(2) (1865) 34 L.J., Ex., 220.
(3) (1870) L.R. 6 C.P., 14.
(4) [1919] 2 K.B., 43.
(5) (1926) I.L.R., 48 All., 404.

negligent to leave cotton bales in the place where they were left without ventilation and without inspection.

In my opinion there is no evidence of negligence here or at any rate of negligence which had any causal connexion with the fire. I think the appeal must be allowed with costs here and below. The memorandum of objection is dismissed with costs.

ODGERS, J.—This is an appeal by the East India Distilleries and Sugar Factories, Limited, through their Managing Agents Messrs. Parry & Co., against the decree of the Subordinate Judge of South Kanara awarding the plaintiff, one P. F. Mathias, Rs. 4,400 damages. The appellant company had taken a lease from the plaintiff for the purpose of storing alcohol and other spirits for the purpose of their distilling business. They had apparently leased the premises since the beginning of 1916 when they were to occupy for three years at a monthly rental of Rs. 40. The lessees held over on 23rd July 1920 and obtained a renewal for a further term of three years from 1st June 1920 at a monthly rental of Rs. 50. The defendants to the knowledge of the plaintiff made internal structural alterations in the buildings to suit their own purposes for use as a liquor warehouse. On the 27th May 1922, this building was burnt down, and the plaintiff seeks to hold the defendant company liable for reinstatement. The learned Subordinate Judge has held that the fire was occasioned by the negligence of the defendants and also that by the terms of the lease the defendants had bound themselves to restore the building undamaged and in good condition to the plaintiff. The first lease is Exhibit XIV for a period of three years from the 1st April 1910, the owner then being Mr. N. Vyasa Rao, and the lease in question is Exhibit XIII in which the

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lessor undertakes to effect certain preliminary repairs. The important covenant is as follows :—

"That the lessees on the expiry of the period of this lease or on its sooner determination, shall restore the buildings at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao, the predecessor-in-title of the lessor in the beginning and as described in the plan which is hereto appended and in good and proper condition, allowance being made for all reasonable wear and tear. That in case the lessees fail to remove the additions and alterations made by them to suit their purposes and at their cost and fail to restore the building to the original and habitable condition, the cost thereof be estimated by a competent person and shall be paid by the lessees to the lessor."

The question is whether the words in this covenant

"the lessees shall restore the building at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao"

oblige them to re-build in the case of destruction by fire, in other words, was it within the contemplation of parties that the benefit of the Transfer of Property Act, section 108 (*e*) should be replaced by this special contract? Sub-section (*m*) of this section is also important, for the lessee is

"to restore on the termination of the lease the property in as good condition as it was at the time he was put in possession subject to changes caused by reasonable wear and tear * * * and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, is bound to make it good within three months, etc."

It appears to me that what was in the contemplation of the parties when they entered into this covenant set out above in the lease was that any structural alterations made by the company for the purposes of their business should be removed and the building should be restored on the termination of the lease so as to be in good condition for occupation as a dwelling house which it apparently was before the company began to occupy.

For instance, in the lease of 1915 between these same parties, the lessees covenant at the end of the lease to put the lessor in possession

"having before the expiry of that period removed all additions and alterations made by us in the above premises for our purposes and made at our expense all necessary changes and repairs for the complete restoration of the premises to the original condition in which the premises were when they were first leased to us by your predecessor-in-title Mr. Vyasa Rao".

It seems to me therefore that although the words of the covenant might be stretched so as to cover the present circumstances, they cannot reasonably be so applied, for among other reasons, the fact that in the same sentence the lessees undertake to restore the buildings in good and proper condition, allowance being made for all reasonable wear and tear—that cannot possibly refer to the complete destruction of the building during the lease and its complete reinstatement. Some point was made on the English Law. For instance, Woodfall on Landlord and Tenant, 20th Edition, page 732, is referred to, to the effect that a tenant must re-build the premises, if burnt, provided he has covenanted to repair and keep in repair and there is no exception as to damage by fire. The answer, I think, to this is that by the Indian Law, Transfer of Property Act under section 108 (e) the exception as to damage by fire is indicated in favour of the lessee, provided the fire be not caused by his negligence. As to this, the learned Subordinate Judge comes to the conclusion that the fire was caused by the negligence of the lessees in that they failed to employ a watchman on the night in question. Apparently a watchman was generally employed, but there was no regular watchman round about the time of the fire but coolies were deputed in turn to do the duty. On the night in question the coolie appointed, after locking the warehouse at 6–30 p.m. was allowed

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to go home. It appears that two locks are placed upon the building and the three inner doors are bolted from the inside. The outer door was locked by Mr. Lobo, D.W. 2, and also by the Warehouse Officer with a Government lock. The witness says he deputed a coolie to watch on the night in question. The learned Subordinate Judge lays great stress on the fact that one witness Somayya, who was passing on his way from a bioscope performance at 11 p.m. on the night in question says that one of the outer doors of the bangalow was open and he was consequently able to see the fire burning inside. So that on this evidence the learned Judge says that the only alternatives are either that the servants of the company deliberately omitted to bolt the doors and therefore allowed "the intruder or intruders" to enter the building or these persons entered by removing the tiles of the roof. It has to be pointed out there is no evidence whatever of anybody having entered the building or of having set fire to it. But the learned Subordinate Judge considers that an intruder must have so entered and that he would not have so entered had the watchman been on duty. Under the circumstances I cannot see that there is any relation of cause and effect between the absence of the watchman and the occurrence of the fire. It may be that somebody had during the day or afternoon left some lighted substance in the building and that caused the fire to break out in the middle of the night. As to the fact spoken to by Somayya, of the door being open, D.W. 2, says that after the fire, he found both locks intact but the door had been burnt through. It may be that it was this burning of the door that enabled P.W. 1 Somayya to see the fire inside and that this was the cause of the door being open. The learned Judge further finds that the destruction by fire was rendered possible by the defendants'

default in not appointing a regular watchman. I may point out that that finding is not sufficient to mulct the defendant company in damages. It must be found that the failure to provide a watchman was the proximate cause of the fire. Before going further, one perhaps ought to refer to an authority quoted on this question of covenant, *J. H. Hechel* v. *S. J. Tellery*(1), where the lessee was held liable to make good damage caused to the leased premises by the Calcutta earthquake of 1897. There the lessee had covenanted without restriction or exception to keep the premises wind and water tight and in habitable condition and that being so, the learned Judges were of the opinion that this was a contract to the contrary and that section 108, clause (*m*) of the Transfer of Property Act did not apply. The facts of that case are in my opinion distinguishable from the present.

The other ground on which it is sought to make the company liable is that of negligence. Mr. K. S. Krishnaswami Ayyangar even went as far as to suggest that the principle of *Rylands* v. *Fletcher*(2) ought to be applied to the present case. I am not aware of any authority upon which one would be justified in holding that spirits, even proof alcohol, are dangerous things which have to be "kept in" at a man's own peril, and an analogy was sought in the common law rule "as to keeping in fire." For instance Rolle's Abridgment says:

"If a fire suddenly light in my house, I knowing nothing of it, and it burnt my goods and also the house of my neighbour, an action on the case lies against me by him."

The common law rule has been more than once altered by statute and I think it will be found that most of

(1) (1900) 4 C.W.N., 521. (2) (1868) L.R., 3 H.L., 330.

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the modern cases as to fire have turned on the question of negligence, though the Act of George III (Metropolitan Building Act) does not protect a person who brings upon his premises an object calculated to do damage if not kept under control. It was sought to liken this case to that of the motor car case *Musgrove* v. *Pandelis*(1). There, the defence was that the fire had accidentally begun, i.e., under the Fire Prevention (Metropolis) Act, 1774. But it was held that the fire that caused the damage to the plaintiff's premises was not that which took place in the carburetter but was the fire which spread to the car, and that this fire did not begin accidentally but was caused by the negligence of the defendant's servants who did not turn off the petrol tap; if he had done so, the fire would have burnt itself out harmlessly. That again is a case of negligence. So is the case in *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*(2), where it was held that the fire to the cotton would not have happened had the defendants exercised proper watchfulness and control over it. It is even sought to hold the defendants liable on the doctrine of *res ipsa loquitur*, such as the bag of flour case, *Scott* v. *The London Dock Company*(3), and under which may perhaps be included *Smith* v. *London and South-Western Railway Co.*(4) (fire caused by sparks which escaped from an engine). But it is very difficult to see how the defendant can be made liable in a case like this on this doctrine. Why these persons who to the knowledge of the plaintiffs were storing alcohol in their warehouse should have special onus of responsibility heavier than that resting on an ordinary lessee is very difficult to understand, in the absence of any special contract between the parties to this effect. There is no evidence that this is a dangerous

(1) [1919] 2 K.B., 43.
(2) (1926) I.L.R., 48 All., 404.
(3) (1865) 34 L.J., Ex., 220.
(4) (1870) L.R., 6 C.P., 14.

trade or the storage of these things is a risky or dangerous act. In the case of *Scott* v. *The London Dock Company*(1), where a bag of flour fell from a window of the defendant's warehouse, there was evidence that *prima facie* the bag which fell was under the plaintiffs' control and they had a primary duty to keep it from falling on to the heads of the public passing in the streets. So in the sparks from the engine case, the fire was proximately caused by the sparks setting fire to the dry grass lying on the banks of the railway cutting. This fire spread and eventually attacked the defendant's thatched house. There was some evidence of negligence there in the railway company allowing the dry grass to lie on the bank. So, in *Attorney-General* v. *Cory Bros. Co.*(2), where the landslide in question was held to be due to the negligence of the company in depositing the spoil on the hill side without draining the site of the tips.

In the absence then of any evidence of negligence on the part of the company, for I have already stated that the absence of watchman cannot, in any way, be held to be the proximate cause of the fire, it seems to me that the plaintiff has not succeeded in proving that he is entitled to damages at the hands of the defendants. I think, therefore, that the judgment of the learned Judge was wrong and that the appeal must be allowed with costs both here and below.

The memorandum of objection has not been argued and must be dismissed with costs.

Attorneys for appellant: *King and Partridge.*

N.R.

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(1) (1865) 34 L.J., Ex., 220. (2) [1921] 1 A.C., 521.