ment, the tenant ordinarily expects to have the capital expended replaced, though the benefit of the enhanced rent, which he has had, may be set off against the interest which he lost on the capital. The tenant ordinarily spends his income received from the land and he is not expected, in the absence of express agreement, to replace his capital out of it. It would, we think, be reasonable to allow the tenant the actual cost of effecting the improvement, as he would otherwise lose both the holding and the money spent upon it, and would be placed, on eviction, in a position much worse than he would be in if he spent no money on improving the land. We would, therefore, fix the compensation due to the tenant for the conversion and improvement of the land at Rs. 338.

The objection in regard to trees of spontaneous growth is not pressed.

The decree of the Subordinate Judge will be modified accordingly. Each party will bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1890. Feb. 14, July 22.

APPAYASAMI (DEFENDANT), APPELLANT,

v.

SUBBA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 2, 7.

In a suit by a tenant against a zamindar to release an attachment made under Rent Recovery Act, s. 40, it appeared that, according to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli:

Held, that the unit for the rule of limitation prescribed by Rent Recovery Act, s. 2, for proceedings by the landlord was the aggregate rent in arrear at the end of the fasli.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 396 of 1888, affirming the decision of C. H. Mounsey, Acting Sub-Collector of Madura, in summary suit No. 25 of 1888.

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* Second Appeal No. 667 of 1889.

APPAYASAMI v. SUBBA.

Summary suit to set aside an attachment under Rent Recovery Act, section 40, for arrears of rent due for fasli 1296 (1886-87). The rent was payable by custom in monthly instalments, beginning in November. A patta for the fasli in question was tendered in June 1887; the attachment took place in April 1888. The plaintiff alleged, *inter alia*, that the attachment was bad, in that it had been made more than a year from November 1886. He also alleged that the patta tendered was not such as he was bound to accept and this was the subject of the second issue.

The Sub-Collector and on appeal the District Judge held that the attachment was bad for the first of the above reasons.

The landlord preferred this second appeal on the following grounds:—

"Under the provisions of section 38 of Rent Recovery Act, the "rent becomes due for purposes of issuing process under the Act "only at the end of the fasli. According to the custom of the "country instalments are fixed only for the convenience of the "tenant and no legal process can be issued for the realization of "the rent until the expiration of the fasli."

Bhashyam Ayyangar for appellant.

Mr. *Johnstone* for respondent.

JUDGMENT.—The appellant is the zamindar of Kannivadi in the district of Madura and the respondent is his tenant. The former tendered a patta to the latter for fasli 1296 in June 1887, but the latter neither accepted it nor paid rent for that fasli which commenced with July 1886 and ended with June 1887. According to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli. In April 1888, the appellant attached the tenant's holding in order to bring it to sale under section 38 of Act VIII of 1865 for arrears of rent due for fasli 1296. The respondent brought this suit to set aside the attachment under section 40 of that enactment on the ground that the patta tendered was not such as he was bound to accept, and that the attachment was not made within one year, as prescribed by section 2 of the Act, from November 1888. The Sub-Collector, who tried the suit in the first instance, and the Judge, on appeal, held that the attachment was *ultra vires* so far as it related to instalments which had accrued due between November 1886 and April 1887 and set it aside *in toto* as being *excessive*; hence this second appeal.

It is provided by section 2 that process against a tenant under the Act must be taken within one year from the time *when the rent became due*. It is settled law that a landlord is entitled to tender a proper patta at any time within the fasli and that he is not at liberty to enforce the terms of a tenancy until he has tendered a proper patta. It is also provided by section 38 that it shall be lawful for a landholder to sell the tenant's interest in land when arrears of rent may not be liquidated within the current revenue year, that is to say, before the end of fasli. The question arising for decision upon these provisions of law and the kistbandi sanctioned by custom is whether the unit for the special limitation prescribed by section 2 is the instalment in arrear according to the kistbandi or the aggregate rent in arrear at the end of the fasli. The lower Courts considered that it was the former, but, in this opinion, we are unable to concur. In its ordinary sense, the expression in section 2, "when rent became due," means when rent became recoverable by action or other legal proceeding, and as no suit or other proceeding can be instituted under section 7 to enforce the terms of a tenancy unless and until a proper patta has been tendered, it is not right to say that rent accrued due to the appellants for fasli 1296 in November 1886, when patta was tendered only in June 1887. If the patta tendered was the one which the tenant was bound to accept, the rent, which the appellant sought to recover, became due in June 1887, that is to say, within one year prior to the date of the attachment in question. Again all rules of limitation, whether general or special, rest on the doctrine of *laches* and reading section 2 in the light thrown by it, the proper construction is that the section pre-supposes that the process contemplated by it is available under the Act when rent becomes due and keeps the remedy alive for one year from the date when time begins to run. By section 38, the tenant's saleable interest in his holding is not liable to be attached until after the expiration of the fasli, for which the rent claimed is due. The process of attachment becomes, therefore, available only at the end of the fasli, and, as one year is the special period prescribed by section 2, the time from which it ought to be computed with reference to the process mentioned in section 38 is from the commencement of the next fasli. The construction that the unit for limitation is the first instalment results in this anomaly, viz., that, whilst section 2 prescribes a special limitation

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of one year, the period which would be allowed under this construction is about four months. The Judge is in error in holding that "kistbandi" creates an independent obligation to pay rent by instalments from November each year whether a proper patta has or has not been tendered, for, under section 7, the landlord has no right to claim rent until he tenders a proper patta, and, in the absence of such right, the tenant can be under no obligation to pay rent at all. The suspension of the landlord's remedy, pending the issue of a proper patta, gives the tenant the corresponding right of withholding payment of customary instalments until a proper patta has been issued and modifies to that extent the contents of the customary obligation in the interest of the tenant. The Judge observes that the landlord might have tendered a proper patta before November and has in that sense been guilty of *laches*, of which he ought not to be permitted to take advantage. This view is untenable. Admittedly it is law that a proper patta may be tendered at any time within the end of the fasli, and there can be no *laches*, therefore, in not tendering the patta before November, as he has a right to tender it before the end of the fasli. The decision then that the attachment was excessive could not be supported.

No distinct finding has, however, been recorded with reference to the second issue, and the decrees of both the lower Courts must be set aside, and the case remitted to the Court of First Instance for disposal after trial of the second issue. The costs of this appeal will be provided for in the revised judgment.