that amount. The learned Subordinate Judge has rightly pointed out that the property will go to the plaintiff subject to the prior encumbrance, if it subsists.

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The appeal is accordingly dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Allen.

INDRAJIT PRATAP BAHADUR (PLAINTIFF) v. SEWAK RAI (DEFENDANT).*

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Agra Tenancy Act (Local Act III of 1926), sections 132, 138; *schedule IV, group A, serial No. 4—Suit for arrears of rent—Rent payable in kind—Crops no longer existing—Whether suit maintainable.*

Where rent is payable in kind by division of crops, a suit for the recovery of three years' arrears of rent in the shape of its money equivalent is maintainable, though the crops are no longer present, according to section 132 and schedule IV, group A, serial No. 4, of the Agra Tenancy Act. There is nothing in section 138 of the Act which stands in the way of such a suit. It is not impossible to estimate the value of a crop if the crop itself has ceased to exist. If in a particular case no criteria for the estimate be available, the suit will be dismissed for want of sufficient evidence, but not because such a suit was not maintainable at all.

Mr. *Sankar Saran*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

MUKERJI and ALLEN, JJ. :—This is a plaintiff's appeal arising out of a suit for arrears of rent and it raises a point of law which is not covered by any decision of this Court.

It appears that the defendant pays rent in kind and it is usual to divide the produce of the field on the spot in the presence of both the parties. The plaintiff's case was that there was an arrear of three years'

*Second Appeal No. 1007 of 1928, from a decree of Tej Narain Mulla, District Judge of Gorakhpur, dated the 11th of January, 1928, confirming a decree of Udit Narain Singh, Assistant Collector first class of Gorakhpur, dated the 5th of September, 1927.

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rent and he was entitled to the same. The plaintiff estimated the money value of the crop payable to him by way of rent. The defence was that the produce had been very much exaggerated and that, as a matter of fact, the defendant was not in arrear, having paid up to the karinda of the plaintiff.

Several issues were framed by the court of first instance, but the learned Assistant Collector decided the suit on the sole ground that no suit for arrears of rent could be maintained where rent was payable in the way alleged by the plaintiff. There was an appeal by the plaintiff to the learned District Judge, who agreed with the view of law taken by the learned Assistant Collector. The learned Judge, however, professed to enter into the merits of the case and found that the plaintiff had not given sufficient evidence to show that his estimate of the produce was acceptable. He was of opinion that in the absence of the crop itself it was *impossible* to appraise the value of it. As regards the question whether the defendant had paid up, the learned Judge came to no finding. He assumed for the purpose of his judgment that he had failed to pay up.

The first point which we have to consider in second appeal, which is by the plaintiff, is whether the view of law taken by the courts below is right. The view is supported no doubt by a decision of the learned Members of the Board of Revenue, but in this Court we never consider ourselves to be bound by such a decision. We have looked into the judgment, with all respect, and we have tried to appreciate the arguments on which the decision is based.

The argument on behalf of the defendant is that *in the absence of the crop it is impossible* to estimate the value of it. We are not prepared to accept this statement as correct. It may be extremely difficult to

estimate the value of the crop, but it need not be impossible. If in the particular circumstances of a case it should be found, as a fact, that it is impossible to estimate the value of a crop, a share of which is claimed by the landholder, the suit would be dismissed on the ground that the plaintiff did not adduce sufficient evidence to enable the court to justly estimate his claim, but that would be the only ground for the dismissal of the suit.

Section 132 of the Agra Tenancy Act allows a suit for arrears of rent to be brought where the rent is unpaid. The schedule IV, Group A, serial number 4 describes the nature of the suit and, in the description, it mentions that it is a suit for arrears of rent, or where rent is paid in kind, then the money equivalent to such rent. The period of limitation is three years. Thus by the authority of section 132 of the Agra Tenancy Act, 1926, an arrear of rent may be claimed at any time within three years and there is nothing in any other provision of the Tenancy Act which cuts down that right of the landholder, unless there be something in sections 138 or 139 to that effect.

Section 138 says that where rent is taken by division of the produce in kind, or by estimate or appraisement of the standing crop, if either the landholder or the tenant neglects to attend, an application may be made by one of the parties to the court for the deputation of an officer to have the division, estimate or appraisement made. This, no doubt, is one of the methods of recovering the rent in arrear. Perhaps it would not be right to say that the rent is already in arrear, when the procedure under section 138 is taken. At that moment the rent is yet unestimated and you cannot, probably, say that it is already in arrear. Anyhow, that is not a very important matter. But as we read section 138 and section 139, they lay down the procedure for the

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deputation of an officer, and there is nothing in them which can cut down the period of limitation and the right of suit granted by section 132 and the schedule of limitation.

We are therefore of opinion that the suit was maintainable. We cannot accept the learned Judge's finding that it was impossible to estimate the money value of the crop that was grown by the defendant. In this case, even if the plaintiff's evidence be unworthy of credit, we have the defendant's admission in the written statement that the crop was five maunds to the bigha. There was no bar to the court below accepting the defendant's own estimate for the purpose of assessing the rent.

The learned Judge has not decided whether as a matter of fact the defendant has paid up. He has only assumed that the rent is unpaid. The point will have to be decided.

As, on a proper reading of the judgment of the court below, it appears to us that the appeal was decided on a preliminary point, namely, the point of law, and the consideration of the facts, so far as it went, was influenced unduly by the view of the law taken by the Judge, we set aside the decree of the court below and remand the appeal to the learned District Judge of Gorakhpur for decision in accordance with law. The learned Judge will examine the entire evidence on the record and come to his own conclusions on questions of fact involved. Costs here and hitherto will abide the result.