1877.

IMPERATRIX v. BA'BANKHA'N VALAD MHAS-KOJI.

the Code of Criminal Procedure, of his having seized the property. We cannot find that, in fact, he had seized it. It appears rather that when it was found he allowed it to be restored to the owner instead of seizing it. That this was a disobedience of a direction of the law—what the direction is, and where it is set forth, has not been shown, as perhaps it might have been, in either court, and on this very account, it would seem, it is now contended that the conduct consisted in not sending a report. But the least that can fairly be allowed in favour of one criminally convicted is, that when a charge has been expressed in vague terms, the prosecution should be limited to the particular sense in which these terms have been understood in the actual trial. The mere circumstance that evidence was given about the omission to send a report in order to afford a collateral corroboration to the testimony going to prove a criminal breach of duty of another kind, did not, and does not, make the accused liable to punishment for the offence thus incidentally deposed to, but with which he was not clearly and directly charged.

We, therefore, reverse the conviction and sentence on the first head of the charge, confirming those on the second head.

Conviction and sentence on first head reversed, on second affirmed.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice West.

August 14.

NA'RA'YAN MA'DHAVRA'O NA'IK AND ANOTHER (PLAINTIFFS AND APPELLANTS) *v.* THE COLLECTOR OF THA'NA' (DEFENDANT AND RESPONDENT).*

Section 12, Clauses I. and II., Schedule III., Act VII. of 1870, Section 6, Clause IV., Articles (c) and (d) and Clause IX.—Act VIII. of 1859, Sections 29, 31, and 36—Suit for setting aside a mortgage-deed and injunction against the mortgagee—Valuation.

There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

*Regular Appeal No. 28 of 1877.

1877.

NA'RA'YAN MA'DHAVRA'O NA'IK AND ANOTHER v. THE COLLECTOR OF THA'NA'.

The right of appeal to which the plaintiff might have been entitled under sections 31 to 36 of Act VIII. of 1859 has been taken away by section 12, clause 1 of the Court Fees Act VII. of 1870.*

THIS was a regular appeal from the decision of W. Wedderburn, Acting District Judge at Thánáa.

Náráyan Mádhavráo instituted this suit against the Collector of Thánáa, and alleged that the defendant had attached the plaintiff's property on account of arrears alleged to be due to Government on certain liquor and other contracts; that during the attachment plaintiff was compelled by the defendant to execute a mortgage-deed, (Exhibit No. 10,) and that as the deed was obtained by coercion, plaintiff prayed for a decree, declaring the deed cancelled, and for an order to the Collector not to attach and sell the property mentioned in it. The plaint was written on a stamp of Rs. 10. The defendant took a preliminary objection that the plaint was not properly stamped as required by Act VII. of 1870, Schedule I. The District Judge ruled that the stamp duty payable was Rs. 775, and, as the plaintiff declined to pay the additional stamp, rejected the suit.

Máhádev Chimnáji Apte appeared for the appellants.

Nánabhái Haridás, Government Pleader, appeared for the respondent.

The arguments of the pleaders on both sides are stated in the judgment of the court, delivered by

WESTROPP, C.J.:—This court is of opinion that any right of appeal, to which the plaintiff might have been entitled under sections 31 and 36 (combined) of the Civil Procedure Code (Act VIII. of 1859), against the order of the District Judge, which fixed the amount of the court fee chargeable on the plaint, has been taken away by section 12, clause I. of the Court Fees Act VII. of 1870. Under clause II. of the same section, a court of appeal, before which a suit may come, is, if the question of amount of fee have been wrongly decided in the court below to the detriment of the revenue, empowered to require payment of the additional fee, but has no authority to reduce the fee, if wrongly decided to the detriment of the subject and advantage of the

* *See*, however, *Gunga Monee Chowdhrani* v. *Gopal Chunder Roy*, 19 W. R. 214.

revenue. Section 36 of the Civil Procedure Code is not mentioned in the second section or third schedule of the Court Fees Act amongst the enactments wholly or partially repealed by that Act; but section 2 and schedule III. are not exhaustive, and where a later Act is absolutely repugnant, in one of its provisions, to a provision in a former Act, the earlier enactment is *pro tanto* repealed. Here, accordingly, the special provision in section 12, clause I. of the Court Fees Act VII. of 1870, being that the decision of the court, in which the plaint is filed, shall be final as to the amount of fee chargeable on the plaint, the 36th section of the Civil Procedure Code, which gives a general right of appeal on the rejection of a plaint on any of the grounds mentioned in sections 29 and 31 of that Code, is repealed, so far as regards the rejection of a plaint, on the ground that it has not been sufficiently stamped in respect of the court fee chargeable on it. (1)

We thus are relieved from the necessity of deciding the very difficult question as to the fee properly chargeable in such a case as the present, viz., what provision of the Court Fees Act regulates the fee chargeable on a plaint filed by a mortgagor, seeking to set aside a mortgage alleged to have been obtained by duress or force on the part of the mortgagee, and for an injunction against any exercise, by the latter, of a power of sale contained in the mortgage. It has been argued for the mortgagor that it comes within section 6, clause IV., pl. (*c*) and pl. (*d*); whereas, on behalf of the mortgagee, the Collector of Thánâ, it has been contended that it falls within clause IX. of the same section. The difficulty is one from which it would be desirable that courts of first instance should be relieved by a more explicit declaration of the intention of the Legislature.

The appeal, accordingly, is rejected with costs, to be paid by the appellants to the respondent.

Appeal dismissed.

(1) *See* 11 Beng. L. R. 370 and Civ. Ref. 14 of 1871 (Bombay), decided 29th August 1871, not reported.