appeal relates, the claim should be held to be barred even under article 132, as the stamp duty on the plaint was not paid until after the expiry of 12 years from March 1888. The payment of stamp duty, however, relates back to the date of the presentation of the plaint, as a proper plaint, in the absence of any evidence to show that there was fraud in putting in the plaint without a stamp (*Stuart Skinner* alias *Nawab Mirza* v. *William Orde*(1)).

If the presentation was within 12 years from the date of the payment in March 1888, then the suit would be in time. The actual date of the payment in March 1888 does not appear, and the question whether the suit as regards this item is in time, must be dealt with by the lower Court, on taking evidence. We must also point out that the plaint is not sufficiently definite as to the property on which the charge is to be established. The plaintiff should be required to amend the plaint in this respect. We set aside the decree of the lower Court and remand this suit as against defendants Nos. 1 to 9, for disposal as regards items 1 and 2 in the plaint, in accordance with law.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

KRISHNAMARAZU (PLAINTIFF), APPELLANT,

v.

MARRAJU (DEFENDANT), RESPONDENT.*

1905. March 14.

Easements Act V of 1882, *s.* 13, *cls.* (*e*), (*f*)—*Easement of necessity—No easement on the ground of convenience when there is other means of access—Evidence Act I of* 1872, *s.* 92—*Oral contemporaneous agreement cannot be set up to add to a written contract.*

Held, that if A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law under section 13, clause (*e*) of the Easements Act is the same as the law in England.

Wutzler v. *Sharpe*, (I.L.R., 15 All., 270 at p. 281), followed.

Esubai v. *Damodar Ishvardas*, (I.L.R., 16 Bom., 552 at p. 559), not followed.

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(1) I.L.R., 2 All., 241.

* Second Appeal No. 351 of 1903, presented against the decree of E. L. R. Thornton, Esq., District Judge of Godavari, in Appeal Suit No. 196 of 1902, presented against the decree of M.R.Ry. P. N. Satagopa Naidu, District Munsif of Bhimavaram, in Original Suit No. 649 of 1900.

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The Municipality of the City of Poona v. *Vaman Rajaram Gholap*, (I.L.R., 19 Bom., 797), not followed.

To sustain a claim under section 13, clause (*f*) of the Easements Act, the easement claimed must be apparent and continuous.

A contract in writing cannot be added to by a contemporaneous oral agreement.

SUIT by the plaintiff to restrain the defendant from interfering with his (plaintiff's) raising a wall and to restrain the defendant from walking over a certain portion of plaintiff's ground and for Rs. 25 damages.

The plaintiff, the defendant and another V, now deceased, were brothers. They effected a partition by deed, in May 1896, by which among other things they divided certain houses and open sites. A lane leading to the defendant's house was easily accessible by using a vacant site belonging to the plaintiff under the partition and by crossing a wall which divided the plaintiff's property from the defendants. The exclusive right of the plaintiff to the said wall was admitted by the defendant in a letter of the 17th October 1897. The plaintiff on attempting to raise the wall was obstructed by the defendant, who also continued to use the plaintiff's ground as a pathway to the lane. Plaintiff brought this suit. The defendant set up an oral agreement at the time of partition, by which he was to have a right of way over the plaintiff's ground, and he impugned the letter of the 17th October 1897 as having been obtained by coercion. He further alleged that the right of way was a necessary easement under section 13, clause (*e*) of the Easements Act.

The District Munsif found on the evidence and probabilities that there was an oral agreement at the time of partition as set up by the defendant, and further that the right of way was necessary to the enjoyment of the defendant's premises in the state it existed at the time of partition, although there were other means of access to it. He also found that the letter of the 17th October 1897 (exhibit G) was obtained by coercion. He dismissed the suit with costs.

On appeal, the District Judge considered that the oral agreement could not be set up under section 92 of the Evidence Act, as it added to the partition deed which was in writing. He, however, concurred with the Munsif in finding that exhibit C was obtained by coercion: he also held that though there was another way available for the defendant, still as the use of such would

cause great inconvenience to the defendant, he had an easement of necessity over plaintiff's ground. He dismissed the appeal.

The plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for appellant.

Dr. *S. Swaminadhan* for respondent.

JUDGMENT.—In this case we are of opinion that clause (*e*) of section 13 of the Indian Easements Act, 1882, does not admit of the construction which has been placed upon it by the lower Courts. We think the word 'necessary' must be construed in its ordinary sense. If A has a means of access to his property without going over B's land A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law of England as to the cases in which a person can claim an easement of necessity so as to give him a right of way over another man's land is now well settled, and there is nothing to indicate that the Indian Legislature intended to adopt a different principle. In the Bombay cases of *Esubai* v. *Damodar Ishvardas*(1) and *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap*(2), a suggestion was made that the question of convenience might legitimately be considered, but there is no decision by the Courts of this country that the criterion is convenience and not necessity. The case of *Wutzler and another* v. *Sharpe*(3) is an authority for holding that the test under the law of this country is the same as under the English Law. To adopt the view contended for by Dr. Swaminadhan would be to recognize a right by way of easement in the nature of an easement of convenience. It is admitted that the respondent has a means of access to his property without going over the appellant's land and we must accordingly hold that he has no easement of necessity. He is not entitled to an easement under clause (*f*) of the section since the easement which he claims is not apparent and continuous. The respondent failed to establish any right by agreement. The District Judge was right in holding that oral evidence of an alleged agreement was inadmissible and the partition deed whilst it makes special provision for giving means of access to various portions of the partitioned property is silent as to any

(1) I.L.R., 16 Bom., 552 at p. 559. (2) I.L.R., 19 Bom., 797.
(3) I.L.R., 15 All., 270 at p. 281.

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means of access over the appellant's share which is claimed by the respondent in this case. It is unnecessary to consider whether the respondent surrendered any rights which he may have had by the agreement which is embodied in exhibit C, but we may observe that the evidence to show that exhibit C was obtained by coercion especially having regard to the fact that the consent mentioned in exhibit C was given by the elder brother to the younger in the presence of three mediators is extremely slender.

We must set aside the decrees of the lower Courts and grant the injunction asked for in the plaint. We do not think it is a case for damages. The respondent must pay the appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1905. April 20.

VAKKALAGADDA NARASIMHAM (THIRD DEFENDANT), APPELLANT,

v.

VAHIZULLA SAHIB AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 5), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss. 368, 582, 587—Limitation Act XV of 1877, sch. II, arts. 175 (c), 178—Article 175 (c) applies to applications made in second appeals as well as first appeals.

Section 587 of the Code of Civil Procedure authorises an application to bring in a plaintiff-respondent in second appeals and extends to such appeals the provisions of sections 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under sections 368 and 582 and for the purposes of limitation fall under article 175 (c) of schedule II of the Limitation Act and not under article 178.

THE facts necessary for this report are set out in the judgment.

T. V. Seshagiri Ayyar, *K. Subrahmania Sastri* and *K. R. Krishnaswami Ayyangar* for appellant.

C. Ramachandra Rau Saheb and *V. Ramesam* for respondent.

JUDGMENT.—It is objected that this appeal has abated because the first respondent (plaintiff) died in June 1903 and his legal

* Second Appeal No. 1565 of 1902, presented against the decree of J. H. Robertson, Esq., Acting District Judge of Kistna, in Appeal Suit No. 88 of 1902, presented against the decree of M.R.Ry. T. Kristnaswami Naidu, District Munsif of Bezwada, in Original Suit No. 512 of 1900 (*vide* Civil Miscellaneous Petition No. 414 of 1905).