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BAYLEY, J. :—The learned Advocate-General has cited no case as an authority for the making of such an order as that for which he asks, while, on the other hand, though in two of the cases cited by Mr. Inverarity, viz., *Gibbs v. Goles and Aime v. Chinnock*, the circumstances relied on by the counsel asking for the order were considerably stronger in his favour than they are in the present case, yet the orders were refused. The defendant appears to me to have taken quite a mistaken view of her position. I must, therefore, refuse to make any such order as that for which she asks. The costs of this application to be borne by the defendant.

[APPELLATE CIVIL JURISDICTION.]

February 10.

Special Appeal No. 82 of 1874.

SULEMA'N VA'DU and three others.....*Appellants.*

TRIKAMJI VELJI*Respondent.*

Vendor and Purchaser—Sale of land—Specification of area—Misdescription.

[The specification in a deed of sale of land of the area of the land sold *prima facie* implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land, the real area of which is found to fall short of the area specified in the deed of sale.]

THIS was a special appeal from the decision of DeH. Larpent, Judge of the District of Poona, amending the decree of the late Court of the Principal Sadar Amin of Poona.

The material facts of the case are briefly as follows :—

On the 17th September 1863, Ladhá Ibráhim, whom the special appellants represent, purchased from one Ramábái a field called Ghorkhillá for Rs. 2,999. On the 26th September following he sold it to the plaintiff, now special respon-

dent, for Rs. 19,999. The deed under which the sale to the plaintiff took place begins by reciting the purchase from Ramábái as well as the purchase by the latter from one Usaf, the original proprietor. It specifies the boundaries, gives the measurement of the field as 30 *acres* and a little more, the same quantity as was mentioned in the previous deeds, and states the price to be at the rate of Rs. 500 per *bighá*.* It is admitted by both parties that the right measurement of the field is only 19 *acres*, but this was discovered by the plaintiff in 1865 when he took possession from the vendor's sub-tenant. The plaintiff, therefore, brought this suit, and prayed that the sale might be cancelled (which prayer he abandoned in appeal before the Judge), or if that could not be done, claimed Rs. 7,000 damages.

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With respect to damages, both the lower courts agreed in awarding them.

The principal question raised in the High Court was as to whether the award of damages was proper.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Farran (with him *Hon'ble Mandlik*) for appellants :— Ladhá sold to the plaintiff what he bought himself, viz., the field Ghorkhillá, contained within certain boundaries. This description, which is identical with that contained in the previous deeds, is enough to identify the land, and the mention of the area is surplusage. An error in it does not affect the transaction, which was completed by the full payment of the purchase-money. And it is conceded that there is no fraud. Falsehood without fraud is not actionable: *Collins v. Evans* (a), *Kennedy v. Panama, New Zealand, and Australian Royal Mail Company, Limited* (b).

Starling (with him *Inverarity*) for the special respondent :— What the plaintiff contracted to purchase was 30 *acres* at Rs. 500 per *bighá*, and this he did not get. The mention

* A *bighá* is about $\frac{2}{3}$ of an acre.

(a) 5 Q. B. 820. (b) L. R. 2 Q. B. 580, 586.

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of the same quantity of land that the vendor had himself bought makes no difference. A purchaser is entitled to recover part of his purchase-money when the property has been misdescribed unintentionally : Dart. 124, 597 ; Sugden 27,31, 325 ; *Whittemore v. Whittemore* (c). A substantial misrepresentation, such as this, entitles the plaintiff to be relieved : *Dimmock v. Hallett* (d), *Aberman Iron Works v. Wickens* (e), *Demy v. Hancock* (f). A conveyance of too much may be rectified after the purchaser has entered into possession : *Townsend v. Stangroom* (g), *Carpmael v. Powis* (h) referred to in Dart. 683 ; *Garrard v. Frankel* (i) ; *Harris v. Pepperell* (j).

WEST, J., delivered the judgment of the Court. After disposing of a preliminary point, he said :—The land sold is described in the conveyance as containing 30 acres. It appears to have contained only 19 acres. This is a very material discrepancy ; but it is said that the specification of the area following the statement of the survey number and boundaries was a mere matter of description, and that an error in this respect, after the transaction had been completed, affords no ground for compensation. No case precisely on all fours with the present one has been cited to us from the English reports. In *Whittemore v. Whittemore* there was an express provision against annulment and for compensation in case of misdescription. The question was whether the operation of this condition was excluded by another which in terms excluded compensation on account of any error as to quantity. Those cases in which a deed, failing to express the real intention of the contracting parties, has been relieved against, rest on a principle not quite applicable to the one we have to deal with. The question seems to be whether the area of the field, as specified, was an essential part of the consideration for the payment made by the plaintiff, or whether, although the area is set down as matter of description, he bought and took the field as a particular object identified and estimated for the pur-

(c) L. R. 8 Eq. 603. (d) L. R. 2 Chan. Ap. 21. (e) L. R. 4 *id.* 101.
(f) L. R. 6 *id.* 1. (g) 6 Ves. Jun. 333. (h) 10 Beav. 26.
(i) 30 Beav. 445. (j) L. R. 5 Eq. 1.

pose of the contract independently of the circumstance of its area being or not being so much as 30 acres. *Primá facie* the specification of the area implies, we think, that the area is regarded as material by the parties, and is the quality, or one of the qualities, specially had in view as the basis of their contract. The Roman law gave an action *ex empto* in such a case: "*Et quidem tenetur ex empto venditor etiamsi ignoraverit minorem fundi modum esse*": Poth. Pan. L. 19 T. I. Section 68. Paulus is cited in the next section to the same effect. Pothier himself lays down the principle of proportional compensation in his *Traite de Vente*, Section 258; and Sections 1617, 1622 of the Code Civil embody a similar rule. It appears to be founded on justice, and to be the one which should be applied in all such cases, except where it is clear that the precise area was not regarded as material.

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We, therefore, confirm the decree of the District Court with costs.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 362 of 1873.

February 10.

RAMA'BA'I SA'HEB PATVAR- } *Defendants and Appel-*
DHAN and another } *lants.*

APPA' and others *Plaintiffs and Respondents.*

Jurisdiction—Agent's Court—Suit against a Sardár—Practice—Point not raised in the Lower Courts.

Creation of the defendant as Sardár in 1867 cannot have a retrospective effect so as to affect a suit instituted against her in the civil court in 1861 and to render the decree of that court one without jurisdiction.

A point not raised in the courts below, was disallowed as being too late when raised in the special appeal for the first time.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of Mukund Báláji, Second Class Subordinate Judge of Tasgaum.