

pose of the contract independently of the circumstance of its area being or not being so much as 30 acres. *Primâ 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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v.
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VELJI.

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 Sardâr—Practice—Point not raised in the Lower Courts.

Creation of the defendant as Sardâr 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.

1875.
 RAMA'BA'ISA'
 HEB PATVAR-
 DHAN and
 another.
 v.
 APPA' and
 others.

Appá brought this suit against Ramábái Sáheb and Rango Keshav to recover from them some land. The court of first instance threw out the claim on the ground that the plaintiff failed to prove it. On appeal, the District Judge reversed that decree, and allowed the plaintiff's claim. In special appeal, the following two grounds in the memorandum of appeal were particularly urged :—

(c.) The lower court ignored the facts that there was formerly a suit of ejectment by the present appellants against their tenants, the present respondents, and in pursuance of the decree of the Bombay Government, 25th March 1858, the appellants were actually put in possession on the 6th July 1859, and that for this reason the alleged vendor, Rango, could not be in possession at the date of the deed of sale.

(g.) The lower court had no jurisdiction, inasmuch as the suit ought to have been instituted in the Agent's Court.

The appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 10th February 1875.

Shántárám Náráyan for the special appellants.

Leith (with him *Bhairavnáth Mangesh*) for the special respondents.

WESTROPP, C.J.:—The point as to possession in clause (c) of the memorandum of appeal was not raised in the court, below, and is now too late. The point in clause (g) of the same memorandum, that Ramábái became a Sardár in 1867, and, therefore, that this suit would lie against her in the Agent's Court only, and not in the subordinate civil courts is unsustainable, inasmuch as the creation of her as a Sardár in 1867 cannot be permitted to have a retrospective effect. This Court affirms the decree with costs.