acquired property, but it is a well recognised rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property. In this case the main contest centres round the ancestral land and shops and the defendants are willing to forego in favour of the plaintiffs the houses which were the self-acquired property of their father.

For these reasons we accept the appeal and dismiss the plaintiffs' suit except in respect of the three houses. In view of the relationship existing between the parties we direct that they shall bear their own costs throughout.

N. F. E.

Appeal accepted in part.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Fforde.

LABH SINGH (DEFENDANT) *Appellant* 1925

versus

Dec. 14.

SHAHBAN MIR (PLAINTIFF)—
LACHHMAN SINGH AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 2343 of 1921.

Guardian and minor—Alienation of land by guardian—authorised in part—Suit by guardian for recovery of the excess portion—Failure to plead that the sale was unauthorised pro tanto—Subsequent suit by minor—whether estopped.

The mother appointed by the Court guardian of the plaintiff received permission to sell 600 square yards of the minor's land for payment of his father's debts, but in a deed executed by her the areas described as sold exceeded 600 square yards. In a suit on behalf of herself and the minor for recovery of possession of the land sold in excess she pleaded that only 600 square yards had in fact been sold, and lodged no appeal against the decision of the Munsif, who

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dismissed the suit and refused to adjudicate on her plea of want of authority on the ground that it had been raised only in the course of argument.

Held, that whether or not the guardian (who was a woman inexperienced in these matters) contemplated the property sold as described in the deed, it was her duty as next friend of her minor son to plead that the sale of the land was partly unauthorised, and consequently not binding on the minor.

Held, therefore, that the plaintiff was not estopped from raising the plea in a subsequent suit for recovery of the unauthorised portion of the land sold.

First appeal from the preliminary decree of Sheikh *Ali Muhammad, Subordinate Judge, 1st class, Amritsar, dated the 8th April 1921, directing that the plaintiff shall recover any area over and above 600 yards in possession of Labh Singh and his vendees.*

DEV RAJ SAWHNEY, for Appellant.

GHULAM RASUL and KHURSHAID ZAMAN, for Respondents.

The judgment of the Court was delivered by:—

LEROSSIGNOL J.—This appeal arises out of an action brought by Shahban Mir who attained the age of 21 years during the pendency of the suit, for recovery of 321 square yards of land situate in Amritsar City. In his plaint he recited that at the date of his father's death he was of five years of age and his mother was appointed his guardian by the District Judge, Amritsar, that in order to liquidate his father's debts his mother obtained permission of the District Judge to sell 600 square yards of land, that she sold 921 square yards instead of 600, that the alienation of 321 yards being the excess over 600 was entirely unauthorised and prejudicial to the plaintiff's interests and he was entitled to recover them.

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Among other pleas the defendants, who consisted of the original purchaser and his assignees, urged that inasmuch as the plaintiff had sued for this land in earlier suits the matter was *res judicata*. But the learned Judge of the Court below has held that the first judgment referred to did not decide any point on the merits and that the judgment by the Munsif, Raja Ram, dated the 26th March 1907, though it would be binding upon the plaintiff had he been an adult, could be avoided by him on the ground that his next friend in that suit had been guilty of gross negligence in not putting forward the plea that the sale by her of any land in excess of 600 square yards was entirely without authority. The third judgment referred to was not a judgment *inter partes* and has no bearing on the issue. The trial Court has decreed for the plaintiff.

The main question debated before us in this appeal has been whether the plaintiff is bound by the decision of Raja Ram, Munsif. The sale of the property in dispute took place in January 1904 and according to the sale deed the total area sold was 648 *plus* 114 square yards, or 762 in the aggregate. The suit instituted by the mother of the plaintiff in 1906 on her own behalf and also on behalf of the minor was to the effect that she had transferred approximately 600 square yards to the defendant who subsequently took possession of an area in excess of the land sold. The Munsif found that the area sold as recorded in the deed of sale was incorrectly calculated, but that determined by the length and breadth recited in the deed of sale and the boundaries therein given, the land in the possession of the vendee was only the land transferred to him. At the arguments stage it was contended that the sale of more than 600 square yards of land by the minor's mother was entirely without

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authority, but the Munsif refused to adjudicate on that plea on the ground that it had been raised too late and the plaintiffs could bring a separate action upon it. The Munsif for these reasons dismissed the suit and the plaintiff's mother did not lodge an appeal against that decision.

Now, the vendee was a *patwari* who, of course, was familiar with the measurement of land, while the plaintiff's mother was a woman quite inexperienced in these matters. From the guardianship record we find that the estimated value of the land was Re. 1 per square yard, that the vendee secured it at the nominal rate of annas ten. But if the real area transferred be calculated the real price secured was only annas eight per square yard. From this it is clear that the bargain secured by the vendee was undoubtedly favourable to him, and whether or not the plaintiff's mother contemplated without knowledge of its exact measurement the sale of the property described in the deed of sale, it was clearly her duty as next friend of her minor son to plead that the sale of more than 600 square yards was unauthorised and consequently was not binding on the minor. We accordingly hold that the previous litigation before Munsif Raja Ram does not bind the minor and in bringing this suit he is not estopped by it.

From the foregoing it follows that 321 square yards of the minor's land were sold by his guardian without authority and the plaintiff is consequently entitled to recover it.

The appellant has also contended before us that in his plaint the plaintiff made no reference to the previous litigation between the parties and that consequently he was not entitled to plead his mother's

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negligence, but the matter was raised by the defendant in his pleas and was the chief subject of contention in the Court below. There was no specific issue on the point but the matter was one for argument not for evidence and the defendant has been in no way prejudiced by plaintiff's failure to refer to the earlier litigation in his plaint.

Another point urged is that the *quondam* minor derived benefit from the sale and should offer restitution. The suit, however, is not for cancellation of the whole transaction but only for the cancellation of the unauthorised portion of it. No doubt the shops which constituted a portion of the consideration for the land sold have improved in value but the unearned increment of the portion of the land sold which will remain in the possession of the defendant is also very considerable. Even after the satisfaction of the plaintiff's decree the defendant will remain in possession of 600 square yards for which he gave in cash and kind only Rs. 475.

For these reasons we concur in the conclusions of the Court below and dismiss this appeal with costs.

N. F. E.

Appeal dismissed.