

## KOTHANDAN v. ARBUTHNOT.

1920. October 12. DOVE-WILSON, J.P., CARTER and  
TATHAM, JJ.

*Sale of land.—Transfer.—Purchaser to pay transfer expenses.—Appointment of conveyancer.—Custom.*

A contract of purchase and sale of land provided that the purchaser should pay the expenses of transfer, but did not state whether the seller or the purchaser should appoint a conveyancer to effect such transfer.

*Held*, that by custom prevailing in Natal the purchaser had the right to nominate his own conveyancer to pass transfer of the property to him.

*James v. Liquidators of the Amsterdam Township Co.* (1903) T.S. 653, discussed.

The question at issue in this action was whether the purchaser of landed property was entitled to appoint his own conveyancer to draw the necessary documents for passing transfer in a case where the purchaser had undertaken in the deed of sale to pay all the expenses of transfer.

The declaration, after alleging the purchase by the plaintiff and payment of the purchase price, averred that by the law and custom in Natal the person who paid for the work of conveyancing was entitled to engage and appoint his own conveyancer to do such work; that the plaintiff had demanded the title deeds from the defendant to enable his conveyancer to pass the necessary transfer, but the defendant without lawful reason refused to comply with such demand or to sign and deliver to the plaintiff's conveyancer the necessary declaration for seller. The plaintiff accordingly claimed a declaration of rights that he was entitled to have the deed of transfer or necessary deeds and documents or the transfer pre-

pared by his conveyancer; an order compelling the defendant to do what was necessary to enable the plaintiff to obtain transfer of the land and to deliver the title deeds and to sign and deliver the proper power of attorney and declaration so as to enable the plaintiff to obtain transfer. The plea denied the law and custom was as averred by the plaintiff, and stated that the defendant was by law entitled to nominate the conveyancer. It further alleged that the defendant had always been and was then ready and willing to give transfer of the property to the plaintiff, but that the plaintiff had refused to sign the necessary declaration for purchaser and had thereby rendered it impossible for the defendant to effect the said transfer.

At the hearing, evidence was led on behalf of the plaintiff to prove the custom averred in the declaration. Defendant's counsel intimated to the Court that he had no evidence on the point and was called upon to begin.

*E. A. Selke* (with him *H. Murray*) for the defendant: By our law the seller must transfer the property. *James'* case (supra) is on all fours with this case. The same principle is recognised by §3 of Act 16 of 1875. The regulations under Act No. 13 of 1918 provide that a fee may be paid to the conveyancer supervising a deed on behalf of the purchaser; that Act unifies the practice in all the Provinces. It is not desirable to have one law in Natal and another in other Provinces. *Webster v. Ellison* (1911), A.D., at p. 82 and 92. In the case of *Jeffkins v. Natal Land and Colonization Co.* (1876), not reported, there was considerable evidence on both sides in regard to the custom averred here. The evidence does not go the length of proving a certain and continuous custom.

[DOVE-WILSON, J.P.: The evidence shows that after *James'* case became known in Natal it became usual to stipulate in the contract that the seller should appoint the conveyancer. Is there a custom if it has been superseded by special agreement?]

No; the special agreement shows that there was a doubt. It also shows that the custom has changed. *Moult v. Halliday* (1898), 1 Q.B., at 130.

[TATHAM, J.: Law 5 of 1890 makes the purchaser, not the seller, pay transfer duty.]

That is only to protect the revenue.

*A. E. Carlisle* for the plaintiff: *Webster v. Ellison* (supra) has no bearing on this case. Custom can override the law. *Seaville v. Colley*, 9 S.C., 39, is in point. The evidence clearly establishes the custom, and is not contradicted. It is significant that Law 5 of 1860 makes the transferee pay the duty which by common law is payable by the transferor. If the law as laid down in *James' case* (supra) prevailed in Natal, there was no need for special stipulations entitling the seller to appoint the conveyancer. *Jeffkins' case* (supra) is in my favour. Act 16 of 1875, § 3, only applies where the seller by express agreement retains the right to pass transfer personally.

DOVE-WILSON, J.P.: The plaintiff contends that by the custom prevailing in Natal the party who pays for the work of conveyancing is entitled to engage and appoint his own conveyancer to do such work. The plea on the other hand is that the seller is entitled to nominate the conveyancer to pass transfer of the land. That is of course in the absence of special agreement.

Evidence has been led and it is all one way. It amounts to this: that at least since as far back as 1876, when the case of *Jeffkins v. The Natal Land and Colonisation Company* was decided in this Colony, it has been the custom, in the absence of any special stipulation between the parties, to regard the person paying the costs of transfer as entitled to nominate the conveyancer, and that the person who has to pay the costs of transfer is the purchaser. And it is significant that Act 5 of 1860 makes it obligatory on the transferee to pay the transfer duty, although it is conceded that the common law obligation would be upon the transferor.

Now, that this was the accepted custom, prior at any rate to the decision in the case of *James v. Liquidators of the Amsterdam Township Company* (T.S., 1903, 653), is not contested. But it is argued that the custom has changed since that decision, or has ceased to be a custom at all. *James'* case was decided in the Transvaal, and was to the effect that by common law the obligation to give transfer is on the seller, and consequently to do all these things which are incidental to carrying through the transfer; and consequent on that obligation the right to select the conveyancer to put through the transfer is in the seller. But accepting that to be the common law, it is over-ruled by custom. Custom if established is the local common law of the district in which it obtains. It is true that the decision in *James'* case appears to have been seized upon by certain ingenious persons, seeking for themselves a benefit which they had hitherto recognised was denied them by custom, as a pretext for claiming that the right to carry through the transfer was, in the absence of agreement, in the conveyancer nominated by the seller, but no such right appears ever to have been conceded, although it is true that since that decision the practice which had already to some extent existed of attaining that end by means of a special stipulation has become more common, and especially in sales by auction. But the very fact that that stipulation has been resorted to where it was desired that the conveyancing should be done by the seller's conveyancer, is in itself a recognition of the custom. Had there been any departure from the previous custom by the general acceptance of the common law as laid down in *James'* case any stipulation in favour of the seller's conveyancer was wholly unnecessary. But the evidence is clear that it was recognised that the law as laid down in *James'* case was in conflict with established custom here, and it was for that reason that these special stipulations were introduced in those cases where it was felt that it was more convenient, for any reason, that the seller's conveyancer should be employed; and that the custom remains, and is recognised to-day throughout Natal, that, in the

absence of any special stipulation, it is the purchaser who not only pays the costs of transfer but has the right to nominate the conveyancer. It may be that cases to which that custom is applicable have become less numerous owing to greater resort being had to special stipulations in favour of the seller's conveyancer; but I cannot take it that it has for that reason become any the less the custom, just as it has existed since at any rate 1878, in those cases where there is no special agreement. And it is certainly very significant that no witness has been called on behalf of the defence to throw the slightest doubt upon the continued existence of the custom.

It appears to me therefore that the existence of the custom is well established. It has not been contended that it is unreasonable. The attempt to show an interruption of the custom I think has failed, and there can be no doubt at all as to its exact nature and extent. It seems to me therefore that it possesses all the characteristics of a good custom which will be recognised as the local common law by the Courts. That being so, I think that the plaintiff has succeeded, and that there should be judgment in his favour.

CARTER, J. : I agree.

TATHAM, J. : Accepting as correct the decision in *James'* case (supra) we must accept it that under the common law a seller was entitled to nominate the conveyancer even where the purchaser paid the costs of transfer. The question here, however, is whether or not in Natal the common law has been abrogated by custom. The evidence leaves no room for doubt that it has been the custom for many years, and it still is the custom, for the purchaser to bear the costs of transfer, and that the person who bears the cost nominates the conveyancer. The evidence on the point is all one way. No evidence whatever has been called to throw any doubt upon it; and that being so, whatever the state of the common law may have been the custom has been established beyond any doubt. That being so, the plaintiff is entitled to the relief which he asks.

*Carlisle*: This is a test case, we do not ask for costs.

DOVE-WILSON, J.P.: There will be no order as to costs.

Plaintiff's Attorneys: *Brokensha & Chapman*.

Defendant's Attorney: *H. Murray*.

## DESAI v. REX.

1920. October 12. DOVE-WILSON, J.P., CARTER and TATHAM, JJ.

*Shop Hours Ordinance No. 12 of 1919.—Keeping open after hours.—Retail shop and eating house on same premises.—Restaurant.*

Under section 8 (4) of Ordinance No. 12 of 1919 an eating-house is exempted from the provisions of the Ordinance as to closing hours, but not if there is carried on therein any business outside the business of a restaurant not belonging to any other of the exempted classes.

D., the proprietor of a retail shop and of an eating house, which were conducted in adjoining rooms under one roof, was charged under the Ordinance 12 of 1919 with neglecting to keep the shop closed, or otherwise with selling after closing hours, and was convicted. The sale took place in the eating-house, but the articles were not all of a nature usually sold in a restaurant. The retail shop was closed.

On appeal, *Held*, that the conviction was right.

Appeal from a conviction by the Magistrate of Pine-town. The accused held a retail store licence and a native eating house licence in respect of certain premises consisting of three adjoining rooms all under one roof. In one room he carried on the retail store, in the next he kept his stock in trade, and in the third he had his eating house. He was charged (1) with contravening the provisions of § 5 (b) of Ordinance 12 of 1919 by failing to keep