trying to retrieve his brush in order to do his work. Accordingly I think this case can be distinguished from that of *Falconer*, and I concur with the judgment which your Lordships have proposed.

The Court pronounced this interlocutor—

"Sustain the appeal: Answer the question of law therein stated in the affirmative: Therefore recal the dismissal of the claim, and remit to the arbitrator to assess the damages payable to the appellant, and to decern therefor."

Counsel for the Claimant and Appellant—Shaw, K.C. — Wark. Agents — J. & J. Galletly, S.S.C.

Counsel for the Respondents—Campbell, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, December 3.

FIRST DIVISION.

[Sheriff-Substitute at Dundee.

BERLITZ SCHOOLS OF LANGUAGES, LIMITED *v.* DUCHENE.

Contract—Assignability—Delectus Personæ—Agreement not to Teach within Specified Radius.

A, who carried on a system of teaching known as the B. School of Languages, engaged C as a teacher in his schools. By the terms of his agreement C undertook that he would not during his engagement, or for two years after that engagement was concluded, teach certain languages in or near a town where A had established or should thereafter establish a B. School of Languages. Thereafter A transferred his business to a company—the B. Schools of Languages, Limited, — and assigned the contract with C. *Held* that the company had no title to enforce the restriction against C, in respect that neither the contract as a whole nor the restriction as an independent obligation was assignable without A's consent.

In October 1901 Georges Abraham, who then carried on a system of teaching languages known as the Berlitz Schools of Languages, engaged Jean Duchene as a teacher in these schools. By the terms of his engagement Duchene undertook to teach in any branch of the Berlitz Schools established or to be established in the United Kingdom, on specified terms. The agreement also contained the following clause:—"The said Duchene agrees that during his employment, and for two years after he shall have left or been dismissed from the service of the employer, he will not teach or give instruction in French, German, Spanish, or Italian privately or in any school or academy, or otherwise howsoever, in any town in which he shall have been employed by the employer, or in any town where there is a branch of the Berlitz Schools of Languages, and within a ten miles radius of such towns, either in his own name or in the name or names of any other person or persons, or as principal, assistant, apprentice, or pupil teacher, and will not, directly or indirectly, induce any person or persons to cease from attending the said schools and classes of the employer, and shall not at any time or in any place use the name of Berlitz, either alone or in conjunction with any other name, in any public notice or advertisement, or in any way as an inducement to prospective pupils of the said Duchene or any person by whom he may be employed or in any way connected, by representing to them that they will be taught on the Berlitz method."

In pursuance of this engagement Duchene taught in the Berlitz Schools, first at Glasgow, and afterwards at Dundee, until September 1902, when he left.

In January 1902 Abraham transferred his business to a company known as the Berlitz Schools of Languages, Limited. This was not intimated to Duchene, but his salary was thereafter paid by the company.

A formal deed of assignment was executed by Abraham in favour of the company, dated 29th October 1902, which contained the following clause relative to the contract with Duchene:—"Including but without limiting this generality, a contract bearing date the twenty-first day of October One thousand nine hundred and one, and made between the said Georges Abraham of the one part, and Jean Duchene of the other part, relating to the engagement and employment of the said Jean Duchene as a teacher in the schools of the said Georges Abraham in Great Britain and Ireland, together with all right competent to the said Georges Abraham to enforce the prohibition expressed in the said contract by interdict or otherwise, and that either in his name or in their own name and with or without his consent or concurrence, to hold the same unto the company, its successors and assigns absolutely."

Duchene having established a school for teaching French in Dundee, known as the Cercle Français, the Berlitz Schools of Languages, Limited, with the consent and concurrence of Abraham, and Abraham for his interest, brought the present action in the Sheriff Court at Dundee. The conclusions of the action were "To interdict the defender from at any time prior to 1st September 1904 teaching or giving instruction in the French language privately or in any school or academy or otherwise howsoever in Dundee, or in any other town in which there is a branch of the Berlitz Schools of Languages, and within a 10 miles' radius of such towns, either in his own name or in the name or names of any other person or persons, or as principal, assistant, apprentice, or pupil-teacher, and from directly or indirectly inducing any person or persons to cease from attending the schools and classes of the pursuers; and particularly, but without prejudice to this generality, from teaching or giving instruction in the French language in connection

with the institution known as the Cercle Français, of 30 South Tay Street, Dundee."

The defender pleaded, *inter alia*—"(1) The pursuers' statements are irrelevant, and insufficient to support the conclusions of the action. (3) The memorandum of agreement condescended on not being binding by the law of Scotland, the defender ought to be assoilzied."

Proof was allowed and led. By it the foregoing facts were established, but the bulk of the evidence was directed to the question whether Duchene had been made aware of the true nature of the agreement when he signed it, and as to the nature of the Cercle Français.

On 26th January 1903 the Sheriff-Substitute (CAMPBELL SMITH) pronounced an interlocutor by which he refused the prayer of the petition.

The following extract from the opinion of the Sheriff-Substitute indicates, sufficiently for the purposes of this report, the view of the case taken by him:—"I do not think the law of this country of free speech recognises the competency of permanently shutting a Frenchman's mouth in case his accent should be imitated, or of banishing him from Dundee for two years or even two weeks."

The pursuers appealed, and submitted an argument to the effect that the restriction was not invalid as in restraint of trade, which in the view taken by the Court it is unnecessary to report.

The defenders intimated that they maintained that the pursuers had no title to sue, in respect that the contract being a contract involving *delectus personæ* was not assignable without Duchêne's consent—*Ross* v. *Macfarlane*, June 19, 1894, 21 R. 396, 31 S.L.R. 305; *Tinnevelley Sugar Refining Co.* v. *Mirrlees, Watson and Yaryan Co.*, July 17, 1894, 21 R. 1009, 31 S.L.R. 823; *Grierson, Oldham, & Co.* v. *Forbes, Maxwell, & Co.*, June 27, 1895, 22 R. 812, 32 S.L.R. 601; *International Fibre Syndicate* v. *Dawson*, February 20, 1900, 2 F. 636, 37 S.L.R. 451, 3 F., H.L. 32, 38 S.L.R. 578; *Taylor* v. *R. H. Thomson & Co.*, December 13, 1901, 8 S.L.T. No. 313; *Tolhurst* v. *Associated Portland Cement Co.* (1901), 2 Q.B. 811. The English cases referred to by the other side were not law in Scotland, or if they were they were limited to the case where a restrictive covenant was transferred as part of the goodwill connected with a particular place of business.

The pursuers (appellants) argued that though they could not maintain that the contract was assignable, the agreement not to teach was an independent obligation, which might be assigned as part of the goodwill of a business, and might then be enforced by the assignee. This principle was recognised in England in cases not distinguishable in principle from the present case—*Elves* v. *Crofts*, 1850, 10 C.B. 241; *Jacoby* v. *Whitmore*, 1883, 49 L.T. 335; *Davies* v. *Davies*, 1887, 36 Ch. D. 359.

At advising—

LORD M'LAREN—This is an appeal from the Sheriff-Substitute of Forfarshire refusing a petition for interdict, under which it is sought to interdict the defender from teaching or giving instruction in the French language privately or in any school or academy in Dundee, or in any other town in which there is a branch of the Berlitz School of Languages, and within a ten-mile radius of such towns, with further conclusions to the same effect. The action is founded on an agreement between the defender and Georges Abraham, carrying on business under the name of the Berlitz Schools of Languages. Mr Abraham professes to have invented or introduced a new method of teaching modern languages, and he has set up schools in various towns in Great Britain and other European states to which he has given the name of Berlitz Schools of Languages. The defender was engaged to come over from France to Great Britain to teach French in one of Mr Abraham's schools. On his arrival in London he was asked to sign, and did sign, an agreement dated 21st October 1901, containing a clause substantially in the terms which I have quoted from the prayer of the petition for interdict, whereby the defender agreed that during his employment, and for two years after he should have left or been dismissed from the service of the employer Abraham, he would not teach or give instruction in French, German, Spanish, or Italian.

The defender was sent to teach at one of Mr Abraham's schools at Glasgow, and was afterwards transferred to Dundee. On 2nd September 1902 the defender gave up his appointment, and it is admitted that he now gives instruction in French in an institution in Dundee known as the Cercle Francais.

It is stated in the condescendence that in January 1902 the business previously carried on by Mr Abraham was acquired by a company incorporated under the Companies Acts under the name of the Berlitz Schools of Languages, Limited. The action is instituted by the company as assignees of Mr Abraham, with his consent and concurrence. It is not proved that the defender was informed of the sale of the business to a company, and as the defender was not questioned on the subject I assume that he was not informed. The mere fact that the defender continued for nine months to teach in the school in ignorance of the change of ownership of the business would not in my judgment have the effect of putting him under an obligation to the new company which he had not in fact undertaken, unless the law empowers an employer to transfer a contract of service with all its conditions independently of the consent of the employee.

The defender in fact never signed an agreement to serve the company. As his salary was paid by the company after the transfer of the business to it, and as he gave his services as a teacher in return, it may be taken that he was for a time in the service of the company although he was not informed of the change of ownership of the business.

The first question for consideration is,

whether the defender's agreement with Mr Abraham can be transferred to the company to the effect of giving the company a right to interdict in terms of the prayer of the petition. A deed has been produced purporting to assign the benefit of the agreement in question to the company, but the defender is not a party to the agreement. It is not and could not be maintained that the defender's contract of service under Mr Abraham could be assigned without his consent, and I do not understand that a condition of a contract can be assigned if the contract as a whole is not assignable. But the pursuers contend that the engagement not to teach is an independent obligation capable of subsisting and intended to subsist after the contract of service had come to an end. In a sense this proposition is true, but the conclusion founded on it appears to me to be fallacious, and the fallacy consists in substituting a new obligation for the one actually undertaken.

The title of the agreement is important. It is thus expressed—"Memorandum of Agreement made this 21st day of October 1901 between Georges Abraham of No. 12 Church Street, in the City of Liverpool, carrying on there and elsewhere the profession of Instructor in Languages under the style of 'The Berlitz School of Languages,' hereinafter called 'the employer,' of the one part, and Monsieur Jean Duchêne of Connage (Ardennes), France, of the other part." Now, in the clause on which the action is founded, Duchêne clearly undertakes during the said period of two years not to teach in any town in which he shall have been employed by the employer, or in any town where there is a branch of the Berlitz School of Languages, and within a ten miles radius of such towns. Reading this engagement in connection with the title of the memorandum, where "Berlitz School of Languages" is plainly stated to be the trade name of Mr Abraham, I think that in fair construction the engagement is not to teach in any town where there is for the time being a branch of the business carried on by Mr Abraham. The reference to any town in which the defender shall have been "employed by the employer," *i.e.*, by Mr Abraham, must be read with a corresponding limitation, because there is nothing in the context to suggest that a more onerous obligation was to be undertaken with respect to the town or towns in which the defender might be employed than with respect to other towns in which Mr Abraham had a school. But Mr Abraham is no longer the proprietor of these schools, and I am unable to admit that an obligation not to teach where the other contracting party has a school can be extended to the case of schools carried on by a company which has acquired the *school* business by purchase.

This is not the case of a continuing partnership, for I do not doubt that an agreement of this kind between a partnership concern and an employee would be binding notwithstanding the death or retirement of a partner or the admission of a new partner. In such a case the identity of the firm is not affected. But this is the case of a sale of the school business to an outside party, viz., the incorporated company, and if the pursuer's claim to stand in the shoes of Mr Abraham were admitted it is evident that the defender might be put under a more serious disability in the prosecution of his profession than he intended to undertake or did undertake.

Let me suppose that on the sale of the business the manager of the new company had invited the defender to sign an agreement in terms similar to his agreement with Mr Abraham. The defender might say with perfect fairness, I was willing to agree not to compete with Mr Abraham's schools, but you are a company with larger capital, and able to extend your business to other towns, and I am not willing to abstain from teaching in any town where there is a Berlitz School of Languages in the sense in which that term is now used. Now, under this application for interdict it appears to me that the pursuers are seeking to impose on the defender, by compulsion of law, the very obligation which, if proposed as a voluntary undertaking, he would be entitled to decline. The substance of the application is that the defender should be restrained from teaching in or near any town in which the present company has or may establish a school, while the defender's agreement was only to abstain from teaching wherever Mr Abraham had or might establish a school.

The same conclusion may perhaps be reached in a less technical view of the case. Such engagements as we are considering are only legal in so far as they are reasonably necessary for the protection of the employer against the competition of employees who have gained a knowledge of the business and its connections through their employment. If the employer retires from business, the agreement not to compete necessarily comes to an end. If he transfers his business to a purchaser, he cannot transfer the obligation not to compete without altering its character, because an obligation not to compete with A is not the same thing as an obligation not to compete with B, especially where the obligation is unlimited as to locality, and where the new owner of the business may be a person of greater resources and greater capacity for extending his business than the first owner to whom the obligation was undertaken.

These considerations appear to me to be sufficient for the disposal of the case, but it is proper that I should add that this is a bipartite contract, and I have difficulty in accepting the proposition that it can be assigned by one of the parties without the consent of the other, or that the benefit of one particular provision of the contract can be assigned by a party who is not in a position to transfer the contract as a whole. It rather appears to me that such an obligation is personal to the employer, and can only be enforced in so far as he can show an interest to enforce it, because if he has not an interest the obligation would

be a mere restraint of trade. I may also say that I cannot regard this agreement as one annexed to particular heritable subjects, and therefore the principle of the English cases relating to licensed property is inapplicable, and I do not offer an opinion as to the extension of this principle to Scotland under other circumstances. The result of my opinion is that the appeal should be dismissed.

LORD ADAM concurred.

LORD KINNEAR—I entirely concur with all that Lord M'Laren has said, and I have very little to add. I think it is very doubtful whether the obligation which it is now proposed to enforce is not too wide in its scope, and at the same time too indefinite to fall within the principle upon which obligations in restraint of trade may be supported when they are limited to a definite purpose and a fixed area, but I prefer to rest my judgment on the ground explained by Lord M'Laren, that by our law contracts involving *delectus personæ* are not assignable. I do not think it is properly an exception to this rule to say that they may be assigned with the consent of both parties, because an assignation of that kind to which both contracting parties consent is in effect a new contract for the determination of the original contract and the substitution of a new agreement into which a third person is brought in to take the place of one of the original parties. But that distinction is probably immaterial to the present case because, for the reasons Lord M'Laren has given, it appears to me to be perfectly obvious that no consent can be inferred on the part of the respondent in this case to the assignation made by his employer. The application of the principle to the circumstances of the case appears to me not less obvious, because the contract by which a man is engaged to teach in schools belonging to another is eminently a contract involving relations of personal confidence, and I think that by its terms the agreement in question brings out the personal character of the undertaking on both sides with very great clearness. Apart from that consideration, which I think is quite enough to dispose of the case, I also agree to what Lord M'Laren has explained, that the obligation which it is proposed now to enforce is by necessary consequence from the assignation a different contract, and a more burdensome one, than that which the respondent originally undertook. It is said that the undertaking not to teach in the pursuers' schools may be severed from the rest of the contract and enforced as a separate undertaking although the remaining parts of the contract are determined. I am unable to assent to that view. There is no separate consideration for the undertaking not to teach. It is to begin to be enforced from the moment the employment begins, and if the rest of the contract goes I am unable to see anything to support the unilateral undertaking not to teach as a contractual obligation in law. The argument was founded, I think, mainly if not entirely on the cases to which Lord M'Laren has referred. I do not myself think that our law and the law of England are so identical with reference to this particular point as to make these cases serviceable for the purpose for which they were used. The doctrine which, according to the explanations given by the learned judge, they seem to illustrate is that upon the demise of interests in land covenants touching the thing demised may be assigned as distinguished from covenants that are personal to the parties to the original contract as to the land, even although they affect the occupancy of the thing demised but not the thing itself. I am not prepared at this moment to say whether that is the rule on which this Court would proceed, but I am not at present satisfied that it is applicable in our law, because the rule regarding the transference of interests in land, both as regards the principle on which it is founded and the method of transference seems to me to be materially different from that which I find explained in these cases. But if these cases were applicable to our law I think it clear enough from the explanation given by the learned judges that they are not applicable to this case, because there is no demise of any interest in land whatever—there is nothing but a personal obligation undertaken by the respondent in favour of Abraham and nobody else, and I am unable to find anything in the cases cited to support an assignment of such an undertaking.

LORD PRESIDENT—I am of the same opinion.

The Court refused the appeal.

Counsel for the Pursuers and Appellants — Ure, K.C.—T. B. Morison. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents — Clyde, K.C. — W. L. Mackenzie. Agent—David Milne, S.S.C.

Saturday, November 28.

SECOND DIVISION.

[Lord Pearson, Ordinary.

BEATH & KAY *v.* NESS.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict c.* 37), *Schedule I, secs.* 1 (*b*) *and* 12—*Workman Holding Decree for Compensation not Reviewed — Effect of Receipt of Full Wages in Employment of Same Employer.*

A workman, who was the creditor in a decree under the Workmen's Compensation Act 1897 finding him entitled to a weekly payment, accepted employment from the debtors in the decree, his employers before the accident, and received from them his former wages in full. No steps under the Act were taken by the employers