ceased at the instant of receiving the injury. In *Reg.* v. *Lunny*, 6 Cox, C.C., 477, at a trial for murder, a girl heard a cry and then found the deceased, weak and injured, who made a statement immediately on her coming up to him. Monahan, C.J., admitted it as part of the *res gestæ*. In this case the rule as to admissibility seems not to have been so rigidly enforced, but neither that case nor any of the authorities would support the admission of the statement in the case now before us.

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. The Court of Criminal Appeal acted upon the authority of *Rex* v. *Norton*, and did not think it necessary to consider any further point in the appeal. By virtue of section 30 of the Children Act 1908, Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's evidence implicating the accused. This is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning of the statute, and then to direct them not to convict unless they accepted the evidence of corroboration. He did not give this direction, and therefore notwithstanding the view I have expressed about *Rex* v. *Norton*, and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed.

I have been requested by Lord Dunedin to say that he concurs in this judgment.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Attorney-General (Sir John Simon, K.C.)—Branson—Comyns Carr—Purchase. Agent—Director of Public Prosecutions.

Counsel for the Respondent—Dickens, K.C.—Bryan. Agents—Avery, Son, & Fairbairn, Solicitors.

HOUSE OF LORDS.

Tuesday, May 5, 1914.

(Before Lords Dunedin, Atkinson, Shaw, Sumner, and Parmoor.)

HADSLEY *v.* DAYER-SMITH.

(On Appeal from the Court of Appeal in England.)

Contract—Agreement in Restraint of Trade—Provision that an Outgoing Partner should not Carry on Business within a Certain Area.

Where there was a clause in a contract of partnership between house agents prohibiting an outgoing partner from carrying on or engaging or being interested in a similar business within a given area, *held* that an outgoing partner could be restrained from advertising houses to be let within the area although his place of business was outside.

The facts are detailed in their Lordships judgment, which was given at the conclusion of the appellant's argument.

Lord Dunedin—The appellant in this case was in partnership with the respondent, and carried on with him the business of a house agent. Under the partnership articles there were provisions for bringing the partnership to an end and for the partners retiring, or under certain circumstances being expelled. The partnership, so far as these two persons were concerned, was brought to an end. I use a neutral expression because I understand that it is a matter of controversy, and is indeed being litigated at this moment, whether the way in which the partnership was brought to an end was by expulsion or retirement. But for the purposes of the question upon which we are engaged it matters not, because article 29 of the articles of partnership was in these terms—"An outgoing, retiring, or expelled partner" (and it is certain that the appellant comes within one or other of those designations) "shall not, nor, in the event of the partnership property being realised under clause 26, shall either or any partner for the term of ten years from the time of the dissolution of the partnership as aforesaid, carry on or engage or be interested, directly or indirectly, either as principal or as servant or agent of another, in any business of a nature similar to or competing or interfering with the business of the partnership, or any part of such business, within a radius of one mile from the premises of the said partnership." Now the offices of the partnership were somewhere in Motcomb Street, Belgravia. The appellant set up in business for himself in Duke Street, Grosvenor Square, and it is admitted that Duke Street is at a distance of more than one mile from Motcomb Street. When there he inserted in the *Morning Post* two advertisements regarding houses to be let in Wilton Crescent, Wilton Crescent being

in close proximity to Motcomb Street, and another in Hill Street, Rutland Gate, which is admitted to be within a mile of Motcomb Street; and he also put up on the houses which were so advertised to be let a board on which were painted the words that the house was to be let, and reference was made for intending lessees to his address in Duke Street, Grosvenor Square. Upon that the respondent applied for an injunction to restrain the appellant from acting in a way inconsistent with the covenant contained in article 29 of the articles of partnership. That injunction has been granted by the Court of Appeal in terms which are an echo of article 29, and the appeal to your Lordships' House has been in order to say that this decision to which the Court of Appeal came was wrong.

I am of opinion that the decision of the Court of Appeal was quite right, and I agree with the reasons which are given by the learned Judges in their judgments. I think that the case as a matter of fact is really practically indistinguishable from the old case of *Turner* v. *Evans*, 2 De G., M. & G. 740, 2 E. & B. 512, which was cited, and the case of *Brampton* v. *Beddoes*, 13 C.B. (N.S.) 538, which came as a sequel to it. I think that the true criterion is given in *Turner* v. *Evans*. The point is to discover, by looking at the whole contract and the clause which says that certain things are not to be done, what is the true object of the prohibition. I think, treating the contract in that way, that the true object of the prohibition here was undoubtedly to prevent competition in the business of a house agent. It seems to me that when a person does those acts which I have mentioned as having been done by the appellant here, he is entering into competition with his old firm within the radius. Counsel for the appellant, in his very clear argument, urged that the business was only carried on at Duke Street and nowhere else. I do not think that a practical way of looking at a house agent's business. Certain references were made to certain dicta of noble and learned Lords in this House in the case of *Kirkwood* v. *Gadd*, [1910] A.C. 422, 48 S.L.R. 689. It is a trite saying that all dicta of Judges must be taken *secundum subjectam materiam*. The point in *Kirkwood* v. *Gadd* was to find what was the mischief which the Legislature had prohibited when it said that a moneylender should only carry on his business at his registered address, and it was held that his doing certain acts incidental to his business at other places did not contravene that prohibition. I do not think that remarks made in the course of examining that question can be taken as applicable to the question of determining what is the true meaning of the covenant here. When you take the covenant here I must say that it leaves no doubt in my mind that the substance of the matter is, "Has what the appellant has done been an act of real competition with his old firm within the prohibited area?" I think that it has, and accordingly I move your Lordships that the appeal be dismissed.

LORD ATKINSON—I concur, and have nothing to add.

LORD SHAW—In cases of restrictive covenants such as the present, whether occurring in partnership agreements or in contracts for the sale of goodwill, one has to consider first the substance of the bargain between the parties, and, secondly, the nature of the business with regard to which the contract was made. In my opinion the substance of the bargain between these parties had reference to a possible rivalry by a partner expelled from or leaving the business the partnership wherein was dissolved. The words appear to me to aim at that thing, and that thing substantially. Within a definite circle of two miles diameter in the west end of London the expelled partner is not "to carry on or engage or be interested in any business of a nature similar to or competing or interfering with the business of the then existing partnership.

That being my view of the substance of the bargain, I ask myself what was the nature of the business? It was a house selling or house letting agency. The argument presented is that houses within the prohibited area may be let or sold by the appellant, that he may advertise for houses there, that he may placard houses there as for lease or sale by him as agent, and that all this may be done systematically and as part of his regular business without contravening the restrictive covenant, if only his business address, the head office, so to speak, of his undertaking be located just outside the prohibited circle. I am not putting the argument extremely; it was presented to your Lordships just as it was to the Court of Appeal, and I entirely agree with the judgment of the Court of Appeal upon it. I think such a construction of the contract much too narrow, and I venture to express my adherence to the view stated by the President of the Admiralty Division when he interprets the words "carrying on business," occurring in the contract, as really meaning "continuing the advertising, purchasing, letting, hiring, or selling of similar houses—in a word, continuing the ordinary acts of the business of a house agent within the area of prohibition." It appears to me that this is the good sense of the situation, that this interpretation accords with the intention of the parties. I should have said so had the words "carrying on" business stood alone, but when to that are added the terms "engaging in" "being interested directly or indirectly in" a rival business within the prohibited area for the prohibited time the construction is amply confirmed.

I agree with Lord Dunedin that the principle of *Turner* v. *Evans* applies in this case. The term "carrying on of the business" must of course be a flexible term, having in view the nature of the business to be carried on, and of the particular acts done. A useful help in the interpretation of this contract is by considering to what the opposite view leads. It leads to this,

that the appellant's whole business might continue to be the selling or letting of houses within the prohibited area, that he would draw his entire income from commissions on these transactions within the prohibited area, but that this would be permitted according to his construction of the contract if his office was a yard beyond it. That construction with its absurd results is not in accordance with ordinary rules of honesty, with the bargain, or with business habits. I agree with the motion proposed.

LORD SUMNER—I concur.

LORD PARMOOR—I concur, but I should like to say one word with reference to the judgment of Eve, J., on which the able argument of counsel for the appellant was founded. I think myself that the case is a mere question of the construction of article 29 of the partnership agreement, bearing in mind, of course, the nature of the business. The contention was that the only matter which was prohibited under the words of article 29 was the establishment of a business within the prohibited area, and Eve, J., who adopted that construction, read in the word "establishment" after the word "business" and before the words "within a radius of one mile from the premises of the said partnership." If the covenant in question could be so construed I should have agreed with the judgment of Eve, J., and the argument of counsel for the appellant, but I think that it cannot be so construed, but has to be construed in the wider sense which has already been put before your Lordships' House, and I agree that the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed, with costs.

Counsel for the Appellant—Cozens-Hardy, K.C.—O. Thompson. Agents—Spyer & Sons, Solicitors.

Counsel for the Respondent—Clayton, K.C.—Jolly. Agents—Morgan & Upjohn, Solicitors.

HOUSE OF LORDS.

Friday, June 26, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Shaw, Moulton, and Parmoor.)

THOMAS & SONS *v.* HARROWING STEAMSHIP COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship — Charter-Party — Freight — Partial Loss of Cargo—Delivery by Floating off from Wreck.

Where by the charter-party a lump sum was due for freight upon delivery of the cargo at its destination, and the ship was wrecked just outside the port of delivery, *held* that floating off the cargo to the beach was equivalent to delivery by transhipment, and that loss of one quarter of it by "perils of the sea," as provided for in the charter-party, did not affect the shipowners' right to the full freight.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.), reported [1913] 2 K.B. 171, affirming a judgment of PICKFORD, J., reported [1912] 3 K.B. 321, in favour of the respondents, the plaintiffs below.

The facts are stated by the Lord Chancellor.

Their Lordships gave judgment as follows:—

LORD CHANCELLOR—If I entertained any doubt about this case I should ask your Lordships to take time to consider it, but it seems to me both on the facts and on the law to be a very plain case.

It arises between the owners of the ship "Ethelwalda," who are the respondents, which ship was chartered to the appellants. The charter-party was made on the 1st September 1911, and its bearing is this. The steamer was to carry a full and complete cargo and a full and safe deckload at the charterers' risk, not exceeding what she could reasonably stow and carry, and being so loaded was to proceed to Port Talbot or as near thereto as she could safely get, and deliver the same on being paid a lump sum freight of £1600, in consideration of which the owners placed the steamer at the charterers' disposal. There was the usual clause as to perils of the seas and so on, and the final clause that the freight should be paid in cash, less freight advanced on unloading and right delivery of the cargo.

What happened was this. The steamer sailed from the port of loading and proceeded to Port Talbot, where she arrived on the 29th October. She could not get into the dock on that day, and before she got into the dock her anchors dragged and the cables parted owing to perils of the seas and she went ashore. For the rest of what happened I turn to Pickford, J.'s account of the facts as agreed with by the Court of Appeal. Pickford, J., said that the cargo consisted partly of deck cargo which was swept off. Some of the cargo drifted on to the beach and some was not recovered, but the rest, which was partly washed out of the ship—and washed out because it was assisted by holes cut in the sides of the ship to enable the cargo to get out—was saved. There was a man named Jenkins, who appears to have acted first at the instigation of the Salvage Association and afterwards by arrangement with the captain of the vessel. Pickford, J., has found as a fact that the master of the ship promised that in consideration of Jenkins going on to perform the services he, the master, on behalf of the owners, would pay for the whole of what had been done and what would be done. The fact of it was that with the assistance of Jenkins it became possible for the shipowners to see that the cargo got into the hands of the cargo owners,