were on the brake van, whereas there were none on the truck, seems to me very probable."

Applying the principle of these authorities, which could be multiplied, to the present case, their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this value was but a natural consequence of the act of the company in setting him, such as he was, to do the work actually set him to do, and that their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it. Their Lordships are therefore of opinion that there was evidence before the jury from which they could have reasonably drawn the conclusion at which they arrived; that the case could not have been properly withdrawn from them; and that therefore the appeal of the appellant should be allowed with costs, and the cross-appeal of the respondents dismissed with costs, and they will humbly advise His Majesty accordingly.

Their Lordships allowed the appeal, and dismissed the cross appeal.

Counsel for the Appellant—Sir George Gibbons, K.C.—G. S. Gibbons (both of the Colonial Bar). Agents — Fox & Preece, Solicitors.

Counsel for the Respondents—MacMurchy, K.C. (of the Colonial Bar)—G. Lawrence. Agents—Blake & Reddon, Solicitors.

HOUSE OF LORDS.

Friday, August 1, 1913.

(Before Earl Loreburn and Lords Shaw, Mersey, and Parker.)

GODWIN (PAUPER) *v.* THE ADMIRALTY.

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

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 3 *and* 9—*Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *secs.* 1, 3, *and* 15—*Schemes for Contracting Out—Certification by Registrar of Friendly Societies.*

The proviso of section 3 of the Workmen's Compensation Act 1906, that a scheme of compensation shall only be certified by the Registrar of Friendly Societies after it has been ascertained by ballot that a majority of the workmen to whom the scheme is applicable are in its favour, does not apply to the re-certification of a scheme already certified under section 3 of the Workmen's Compensation Act 1897. Such a scheme is not invalidated by the fact that it ousts the jurisdiction of the County Court Judge as arbitrator under the Act.

Horn v. *Lords Commissioners of the Admiralty*, 1911, 1 K.B. 24, *approved.*

Decision of the Court of Appeal, 1912, 2 K.B. 26, *affirmed.*

An arbitration under the Workmen's Compensation Act 1906 was requested between a workman and his employers as to the amount of compensation payable to the former under that Act in respect of the personal injury caused to him by accident arising out of and in the course of his employment.

The applicant was in the employ of the respondents as a bricklayer in Portsmouth Dockyard, and met with accidents in May and October 1908 which resulted in injuries to the third finger of his right hand.

From November 1908 to August 1909 he was able to do bricklayer's work, but at the end of that time the finger became so diseased that he had to stop work.

Soon afterwards it became necessary to amputate the finger, and he was told that he had been returned as unfit for further employment under the respondents. He was offered certain compensation, but he refused to accept it, and on the 8th August 1910 he commenced proceedings for compensation.

A scheme of compensation for their workmen had been duly certified by the Registrar of Friendly Societies, pursuant to section 3 of the Workmen's Compensation Act 1897, and was in force at the time the applicant sustained his injuries, and was re-certified by the registrar under section 15 of the Act of 1906. The applicant had agreed on the 17th January 1908 that the provisions of this scheme should be substituted for the provisions of the Workmen's Compensation Act 1906 during the continuance of his employment as a bricklayer.

The scheme provided for the payment of an allowance to an injured workman during the continuance of his incapacity at certain rates, which varied according as his capacity to contribute to his own support was "shown to the satisfaction of the Treasury" to have been totally destroyed, materially impaired, impaired, or slightly impaired." After the Act of 1906 was passed the scheme was modified in some minor points in order to conform to the provisions of that Act, and a clause was added enabling workmen to withdraw from the scheme at any time if they desired to do so.

By their answer the respondents contended that they were only liable in accordance with the scheme, and the County Court Judge had no jurisdiction to hear the application.

It appeared, however, that it had not been ascertained by ballot of the workmen, under section 3 of the Act of 1906, that the majority to whom the scheme was applicable were in favour of such scheme.

On the 9th February 1911 the case was heard at the Portsmouth County Court, and the Judge, after reserving judgment, dismissed the application on the ground that the case was within *Horn* v. *Lords Commis-*

sioners of the Admiralty (1911, 1 K.B. 24) and he had no jurisdiction to hear it, and this decision was affirmed by the Court of Appeal (COZENS-HARDY, M.R., and FARWELL, L.J., FLETCHER MOULTON, L.J., *dissenting*), and the workman appealed to the House of Lords.

Their Lordships' considered judgment was delivered as follows:—

LORD SHAW—This is an appeal from an order of the Court of Appeal of the 7th February 1912 affirming a judgment of the County Court Judge of Hampshire. The matter in question was an arbitration having reference to the rights of a workman in the employment of the respondents, who had been injured during his employment and in the course of it.

I confess to your Lordships that in this case I was greatly moved by the dissenting judgment of Lord Moulton in the Court below, supported as it was by the powerful argument delivered by Sir Alfred Cripps on behalf of the appellant. In these circumstances I have given the case anxious consideration.

This workman had entered into an agreement which is of the nature of what is called contracting out of the provisions of the Workmen's Compensation Act. He entered into that agreement upon the 17th January 1908, and he accepted a re-certified scheme, the scheme having been re-certified under the provisions of the Statute of 1906 to which I shall now refer.

By section 15, sub-section (2), of that statute it is provided that "Every scheme under the Workmen's Compensation Act 1897 in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act." There then follows the imposition of a duty upon the registrar by the third sub-section, which provides that he shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms or has been so modified as to conform with the provisions of the Act as to schemes.

The argument for the appellant was this—It was said that before the registrar could re-certify a scheme of a new character he was bound to be satisfied in the language of the sub-section that there had been conformity with the whole provisions of the new Statute of 1906 not only *quoad* this scheme but *quoad* schemes in general. If so, one of those provisions had in this case undoubtedly not been complied with—namely, the provision which enacts that before a scheme is certified it shall be to the satisfaction of the Registrar of Friendly Societies established that the majority to be ascertained by ballot of the workmen to whom the scheme is applicable are in its favour.

My view upon the matter, after consideration, is this—Undoubtedly with regard to a scheme of this character it could not have been a living scheme in the legal sense of the term unless, initially, it had complied with all the provisions of the law applicable at the date of its birth. But this Statute of 1906 does not contemplate the granting of a re-certificate in the sense of its being a certificate in all points equal to a new certificate for a new society. I think the true operation and effect of the 1906 Act is to carry forward the old schemes as old schemes under the guarantee that their contents would, so to speak, be brought up to date and to the same level as regards the rights of the workmen. But I am of opinion that that is exactly what happened in the present case. A new certificate was not required, only a re-certificate. Had a new certificate for a new society been required it is undoubted that the registrar would have had to be satisfied that a ballot had been taken and a majority of the workmen were in favour of the scheme. But the old scheme was thoroughly legal and perfectly valid up to the passing of the 1906 Act, and therefore being legitimately, so to speak, in existence and in operation, it was carried forward with this safeguard, that so far as its contents were concerned and the protection of the workmen was concerned it should be modified to bring it up to date.

An excellent illustration occurs in the present case of what is the kind of modification which is required. Because section 3 (3) of the Act of 1906 does make a new provision affecting the substance and contents of the scheme. The sub-section stipulates that no scheme shall be so certified which contains an obligation upon the workmen to join in the scheme as a condition of their hiring. That was old. But then came this new stipulation, "or which does not contain provisions enabling a workman to withdraw from the scheme."

This contract framed under the terms of the 1897 statute did not contain that latter provision, but a copy has been given to the House showing the alterations and modifications made, and one of those modifications does include this very power which is expressly given by the new statute, namely, a provision enabling the workman to withdraw. So far as the workman's rights go, therefore, the matter has in fact been brought up to date. All that remains, accordingly, is the point that something had not happened by way of taking a ballot of the workmen, which thing would have happened as a preliminary to the scheme if that scheme had been new and under the new Act. But that something did not affect the body of the scheme itself. It was something which, as I say, was preliminary as a condition to the formation of any new scheme. When the Statute of 1906 passed there was found in operation a prior but a living and a valid scheme; and what was required by the Act of 1906 was that the old and continued scheme should be in such a form and after such modification as protected the workmen's interests and rights.

I have thought it right to mention my difficulties in the case, and to say that it is only after deliberation that I have come to this opinion. I think that the judgment of the majority of the Court of Appeal was right, and I shall move your Lordships accordingly.

LORD MERSEY—In this case the appellant, a workman, made a claim against the respondents for compensation in respect of an injury sustained by him in the course of his employment. The right to compensation was not disputed, but the parties could not agree upon the question of the amount to be paid. Thereupon the appellant commenced proceedings in the County Court under the provisions of the Workmen's Compensation Act 1906. The respondents objected to the jurisdiction of the Court on the ground that the appellant had contracted himself out of the Act by subscribing to a "scheme" which ousted the jurisdiction of the Court, and the question now is whether the scheme relied upon by the respondents was in fact operative against the appellant.

The scheme in question was originally made under the provisions of the Workmen's Compensation Act of 1897, an Act which is now repealed. Under section 3 of that Act it was provided that "if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance . . . is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may until the certificate is revoked contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but save as aforesaid this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

The scheme was drawn up under this section and was duly certified by the Registrar of Friendly Societies. The Act of 1897 was repealed by the later Act of 1906, but the later Act by sub-section 2 of section 15 provides that "every scheme under the Workmen's Compensation Act 1897 in force at the commencement of this Act, shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act." No particular form is prescribed for re-certification, but the scheme was re-certified on the 16th December 1907. Some objection was taken by the appellant to the wording of the document re-certifying the scheme, but in my opinion the document was clearly intended to operate as a re-certification and does so. On the 17th January 1908 the appellant signed a document agreeing to the terms of the re-certified scheme.

The real objection made by the appellant to the scheme was that, although it was re-certified by the registrar, it ought not to have been so re-certified, and in support of this objection reliance was placed on sub-section 3 of section 15 of the Act of 1906. That sub-section provides that "the registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes." It was pointed out that by section 3 of the new Act (which is the section which replaces, though with modifications, the 3rd section of the Act of 1897) it is provided that "if the registrar . . . certifies . . . that a majority (to be ascertained by ballot) of the workmen . . . are in favour of such scheme the employer may contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme;" and it was argued that before the old scheme could "conform with the provisions" of the new Act it was necessary that a ballot of the men should be taken in accordance with the requirements of section 3 of the new Act. I do not agree with this contention. The ballot forms no part of the scheme itself. It is merely a condition-precedent to a scheme under the new Act of 1906 coming into operation. It is true that no ballot of the men was taken before the scheme in question in this case was certified under the Act of 1897, and it is also true that no ballot was taken before the scheme was re-certified under the Act of 1906. But neither Act contains any stipulation for such a ballot. The scheme itself has been re-certified as conforming with or as having been so modified as to conform with the provisions of the new Act, and that is all that the statute requires in order to make it operative.

The words of sub-section 3 of section 15 of the Act of 1906 are inapplicable to, and are therefore not to be read as referring to, the provisions in section 3 of the Act as to a ballot. A scheme cannot conform with nor can it be modified so as to conform with a ballot. For these reasons I am of opinion that the view taken by the majority of the Lords Justices was right and that the appeal fails.

LORD PARKER—I am asked to state that Lord Loreburn concurs in the judgment I am about to read.

Under the Workmen's Compensation Act 1897 it was impossible for a workman to contract out of the benefits of the Act except as provided in section 3 thereof. Under this section the Registrar of Friendly Societies might, after taking steps to ascertain the views of the employer and workmen, certify that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment was on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Act, and upon this certificate being granted the employer might, until the certificate were revoked, contract with any of those workmen that the provisions of the scheme should be substituted for the provisions of the Act, and thereupon the employer was to be liable only in accordance with the scheme. The registrar's certificate might be made to expire at the end of a limited period, not being less than five years. It could also under certain circumstances be revoked. No scheme could be certified which contained an obligation upon the workmen to join the scheme as a condition of their hiring.

This Act was repealed by the Workmen's Compensation Act 1906. The latter Act

also contained provisions precluding a workman from contracting out of the benefits thereof otherwise than in accordance with the 3rd section of the Act. The 3rd section of the Act of 1906 differs, however, in some respects from the 3rd section of the earlier Act. It provides that the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and the workmen, may certify that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Act, and that where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions in addition to the benefits to which the workmen would have been entitled under the Act, and that a majority (ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme. Upon this being done the employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer is to be liable only in accordance with the provisions of the scheme. The registrar's certificate may be made to expire at the end of a limited period, not being less than five years, and may be renewed with or without modification. It may also under certain circumstances be revoked. No scheme can be certified which contains any obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

So far the meaning and effect of the Act of 1906 is reasonably clear, but the Legislature thought proper to make special provision with respect to schemes which, when the Act came into force, were existing schemes duly certified under the earlier Act. Such special provisions are continued in the 15th section of the Act, and give rise to the principal difficulty involved in this appeal. Sub-section 2 of section 15 provides that every scheme under the Act of 1897 in force at the commencement of the Act of 1906 shall, if "re-certified" by the Registrar of Friendly Societies, have effect as if it were a scheme under the Act of 1906. Sub-section 3 of section 15 provides that the registrar shall "re-certify" any such scheme if it be proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of the Act of 1906 as to schemes. Sub-section 4 of section 15 provides that any such scheme not "re-certified" within six months from the commencement of the Act of 1906 shall be revoked. The question is what the Legislature meant by the words "re-certify" and "re-certified" in these sub-sections.

It is in my opinion reasonably clear that in re-certifying a scheme the registrar is not merely to certify again what has been already certified under the earlier Act. This would be a futile proceeding. Further, it seems to me equally clear that in re-certifying a scheme the registrar is not required to certify everything required in a certificate under the 3rd section of the Act of 1906. If he were so required his re-certificate could make the scheme a scheme under the Act of 1906, and there would be no need for the provision that the scheme if re-certified should have effect as if it were a scheme under the Act of 1906.

In my opinion the object of re-certifying the scheme is to know that the registrar has looked into the matter and is satisfied that the scheme conforms, or has been so modified as to conform, with the provisions of the Act of 1906. No form of re-certificate is provided by the Act, and any form of re-certificate which states, either expressly or by necessary implication, that the registrar is exercising his power to re-certify would seem to be sufficient.

The question, however, arises as to what are the provisions of the Act as to schemes with which a scheme in order to be re-certified must conform or be so modified as to conform. These provisions are certainly not co-extensive with the matters required to be certified under section 3. A certificate under section 3 need not, for example, certify that the scheme contains provisions enabling a workman to withdraw from the scheme; and yet this is a point upon which a scheme in order to be re-certified under section 15 must certainly conform with the provisions of the Act. There is therefore no reason to expect that every provision of the Act on which the registrar has to certify under the 3rd section must have been observed in order to enable him to re-certify a scheme under sub-section 3 of section 15. It is simply a question of the true construction of the words used in that sub-section. In my opinion the words the "provisions of this Act as to schemes" in sub-section 3 mean those provisions of the Act which prescribe what a scheme is to contain or is not to contain, provisions with which a scheme or modified scheme can properly be said to conform or not to conform. It cannot be properly said that a scheme or modified scheme conforms or does not conform with provisions which do not relate to its contents, but prescribe conditions-precedent to its certification under the 3rd section. It follows that, in my opinion, a ballot of the workmen was not essential in order that the modified scheme in question should be re-certified under section 15, sub-section 3. I am also of opinion that the re-certificate of the registrar, though it leaves much to be desired in point of form, is a sufficient re-certificate under the sub-section, because it is clear on the face of it that he was intending to grant such a certificate as is required by the Act.

The only other point raised before your Lordships was as follows:—It was said that the scheme in question was not such a scheme as was contemplated either by the Act of 1897 or by the Act of 1906, because it purports to oust the jurisdiction of the County Court. The jurisdiction of the County Court arises under the provisions of the Acts, and by the express words of

each Act if there be a contract with a workman whereby the provisions of a certified scheme are substituted for the provisions of the Act the employer is liable only in accordance with the provisions of the scheme. In other words, the workman cannot resort to any of the provisions of the Act, and is in the same position as if he had been expressly excluded from the benefit of those provisions. In my opinion the case of *Horn* v. *Lords Commissioners of the Admiralty* (1911, 1 K.B. 24) was rightly decided. The appeal therefore fails.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Sir A. Cripps, K.C.—H. Morris. Agents—Shaen, Roscoe, Massey, & Company, Solicitors.

Counsel for the Respondents — Sir R. Isaacs, K.C. (Attorney-General) — B. A. Cohen. Agent—Treasury Solicitor.

PRIVY COUNCIL.

Friday, August 1, 1913.

(Before the Right Hons. Lords Atkinson, Shaw, Moulton, and Parker.)

KENNEDY *v.* KENNEDY AND OTHERS.

(Appeal from the Court of Appeal for Ontario.)

Trust—Validity—Rule against Perpetuities.

A testator bequeathed his house in trust for his son, his heirs, and assigns for ever, and the residue of his estate, subject to certain charges, in trust for the upkeep of the said house, unless at any time the trustees saw fit to sell the house, in which case the said residue should be instantly divisible. *Held* that the trust was void, since there was no limit to the time during which the trustees might see fit to hold the house.

Appeal from the judgment of the Court of Appeal for Ontario (Garrow, Maclaren, and Magee, JJ., Meredith, J., *dissenting*) affirming the judgment of Teetzel, J.

The testator died on the 17th February 1906, and by his will he appointed the appellant and others his executors and trustees.

His will contained the following clauses—"I give, devise, and bequeath to my son James Harold Kennedy the dwelling-house, &c., . . . to have and to hold to my said son James Harold Kennedy, his heirs and assigns, for ever, . . . for the absolute use and benefit and behoof of my said son James Harold Kennedy, but subject nevertheless to the provision hereinafter made for Gertrude Maude Foxwell and Annie Maude Hamilton. . . . The rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath to my executor, executrices, and trustees aforesaid, to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy, with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient, and to execute all deeds, documents, and other papers necessary for the sale of same, and to make title thereto to any purchaser thereof, and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained; and if for any reason it should be necessary that the said residence should be sold and disposed of, I direct upon such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

In delivering their Lordships' considered judgment Lord Parker said—The chief question now arising for decision is whether any definite limit can be assigned to the duration of the discretionary trust affecting the testator's residue. If no such limit can be assigned, the trust is void as offending against the perpetuity rule. Their Lordships are of opinion that no such limit can be assigned. . . . The argument relied on before their Lordships was to the effect that according to the true construction of the will the trust was for the benefit only of the appellant and the two ladies who were entitled to use the dwelling-house as their home, and therefore could only be exercised during the lives of those persons, or the lives or life of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which if valid would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold—an event which may not take place within the period allowed by the rule against perpetuities. The trustees or a majority of them are to determine, as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances their Lordships are of opinion that the trust offends against the perpetuity rule and is void—(see *Clarke* v. *Clarke*, 1901, 2 Ch. 110; *Blew* v. *Gunner*, 1906, 1 Ch. 624; and *Colenbier* v. *De Sommery*, 1912, 2 Ch. 622).

Their Lordships dismissed the appeal.

Counsel for the Appellants—E. Douglas Armour, K.C. (of the Colonial Bar). Agents—Blake & Redden, Solicitors.

Counsel for the Respondents — Buckmaster, K.C.—M. L. Gordon (of the Colonial Bar). Agents—Harrison & Powell, Solicitors.