no liability in respect of the pillar which the Witbank Co. were compelled to leave would ever have attached to them.

For these reasons I think that the action fails, and must be dismissed with costs.

[Plaintiffs' Attorneys, BEYERS & OOSTHUIZEN.
Defendant's Attorneys, ROOTH & WESSELS.]

[Reported by ADOLF DAVIS, Esq., Advocate.]

DE VILLIERS, J.P., WESSELS & BRISTOWE, J J. May 10th, June 26th, 1911.

GORMAN *vs.* KNIGHT CENTRAL G.M. Co., LTD.

Statute. — Interpretation. — General Words. — "Or."— Master and Servant.—Workmen's Compensation.— "Partial Incapacitation."—"Diminished Capacity." Magistrate's Court Practice.—Allegation of "Trade or Apprenticeship."—Rule 8 *of Procl.* 21 *of* 1902.— *Act* 36 *of* 1907, *sect.* 17 (*b*).

The Court will only construe "or," used in a statute, as "and" when the natural meaning would give rise to an interpretation unreasonable, inconsistent or unjust.

A workman is partially incapacitated, within the meaning of Act 36 *of* 1907, *sect.* 17 (*b*), *if, owing to the injury, he is unable either to resume work, similar to that at which he was employed at the time of the accident, or to do work for which he was fitted by trade or apprenticeship, prior to the accident.*

The dimished capacity of the workman to earn wages, within the meaning of Act 36 *of* 1907, *sect.* 17 (b) *is his diminished capacity by reason of such permanent partial incapacitation, as is proved to be due to the accident. Consequently, if the workman, when he resumes work, similar to that at*

Act 36 of 1907, sec. 17 (*b*) provides: "In case of partial incapitation for work (which shall mean inability owing to the injury to resume work similar to that at which he was employed at the time of the injury or for which he was previous to the injury fitted by trade or apprenticeship), an amount equal to the probable deficiency in his income for the next three years consequent on his diminished capacity to earn wages at the same rate as he was earning at the time of the injury less, etc."

which he was employed at the time of the accident, is able to earn the same wages as he was earning at the date of the accident, he is not entitled to compensation for permanent partial incapacitation, even though he is so incapacitated.

In a claim for compensation an allegation merely to the effect that plaintiff has been permanently partially incapacitated for work within the meaning of Act 36 *of* 1907, *sect.* 17 (b) *entitles him to lead evidence to prove what work he was fitted to do by trade or apprenticeship, prior to the accident, but the defendant will be entitled to an adjournment in order for him to meet the case then set up, if he so desire.*

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This was a special case stated by the Magistrate of Germiston under sect. 4 of the Workmen's Compensation Act 1910 (Act 11 of 1910) at the request of the defendant Company.

The plaintiff was employed by the defendant Company at a wage of 15s. per day as a cyanide beltsman on its mine, and was in consequence a "workman" in terms of the Workmen's Compensation Act of 1907. On October 4th, 1910, he sustained in his right hand a personal injury, arising out of and in the course of his work, caused by an accident on the mine. He therefore claimed that he was permanently partially incapacitated for work in terms of sect. 17 (*b*) of the Act of 1907. The defendant denied that the plaintiff was permanently partially incapacitated. At the trial the plaintiff lead evidence that he was also a barber by trade, to which the defendant objected on the ground that there was no allegation in the summons to that effect. The objection was overruled by the Magistrate and the evidence admitted, subject to the defendant's request to have the question reserved for the decision of the Supreme Court. The Magistrate found the following facts:—

(*a*) That the middle joint of the plaintiff's right thumb had become permanently stiff;

(*b*) That, in consequence of this injury, he would not be able to use scissors again effectively and would thus be unable to return to his trade as a barber; but

(*c*) That in 3 or 4 months after his discharge from treatment he would be able to resume his former employment of cyanide beltsman with practically the same efficiency as before the injury.

On these facts the Magistrate was of opinion that plaintiff was permanently partially incapacitated, as, owing to the injury, he was permanently unable to resume the work for which he was fitted by trade or apprenticeship, viz., that of a barber.

It appeared from the evidence:—

(1) That the plaintiff was discharged from medical treatment on or about January 31st;

(2) that the defendant Company was willing on that date that he should resume his former employment, but he refused to do so;

(3) that all that was required to make the plaintiff efficient at his former employment of cyanide beltsman was that he should use his right hand and thumb for 3 or 4 months;

(4) that he could not have performed every one of the duties of cyanide beltsman with efficiency on February 1st, but would have undertaken no abnormal or unusual risk by resuming this work on that date.

The Magistrate calculated the actual and probable deficiency in the plaintiff's income during the period of his diminished capacity of earning wages at £156 15s. 0d.

The following questions of law were reserved for the decision of the Supreme Court at the request of the defendant Company:—

(1) Should evidence to show that the plaintiff was a barber by trade have been admitted?

(2) Is the plaintiff permanently partially incapacitated by reason of the fact that he is permanently unable to resume his trade as a barber; he will be able in from 7 to 9 months after the accident, to resume work at which he was employed at the date of his injury.

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(3) Assuming that he is permanently partially incapacitated within the meaning of the Act, is he entitled to compensation, when he will at the expiration of a definite period be able to resume work as a cyanide beltsman at the same rate of wages as he was earning at the time of the injury?

S. S. Taylor, for the defendant: Assuming that the evidence to the effect that the plaintiff was a barber was rightly admitted, then it was a necessary allegation in the summons that the plaintiff was a barber by trade.

[WESSELS, J.: Are there any rules as to procedure?]

Rule 37 of the rules of 1908 says the procedure shall be the same as that for Magistrates' Courts. There must be a case shown on the summons. Defendant knew nothing of plaintiff's trade as a barber, and should have had notice of it; defendant might have been able to prove that plaintiff never was a barber, or he might have been able to have made a tender.

[WESSELS, J.: In a running down case you don't state particulars.]

This is a workman's case. We should have particulars in order to bring contradictory evidence if necessary. A man might have 50 trades.

[DE VILLIERS, J.P.: Would not a postponement have met your objections?]

Yes.

[BRISTOWE, J.: The plaintiff is permanently partially incapacitated.]

Yes, but not as a cyanide beltsman. Under the Act the plaintiff must only give notice of the injury not of the disablement caused by the injury. How can we fight the case unless we know of the nature of the disablement?

[BRISTOWE, J.: You can ask for particulars of incapacitation.]

There is no procedure to ask for particulars; I don't think we have any right to demand particulars. Until the summons is amended plaintiff cannot lead evidence on the point.

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[DE VILLIERS, J.P., refers to Rule 6 of the Magistrate Court Rules as to what a summons should contain.]

Permanent partial incapacitation means that he is disabled for some work or other.

[WESSELS, J.: Is there anything in our law which compels him to give particulars?]

That depends upon the general rules and procedure, that a person must give notice of his case. There is no particular form of summons; it is the ordinary Magistrate Court summons. Evidence on the first point was not admissible.

The second question depends upon the construction of the words of section 17 (*b*) of Act 36 of 1907. The principle of the Act is not to give every penny compensation. The section should be considered as if the words "neither.....nor," were in the section. The test is: Can he resume work? If he can do any of the two kinds of work mentioned in the section he cannot obtain compensation. The workman must show that he cannot do both, otherwise he does not fall under the Act.

As to the third question, a person must show that he suffers loss in his income due to that incapacity; diminished incapacity is the same as partial incapacity.

T. J. Roos, for the plaintiff: A cause of action is set out in the summons, and the only question, therefore, is whether further particulars should have been given. A summons can never be bad because particulars are omitted; the defendant could have obtained a postponement; that is the practice and would be quite a satisfactory method. If the Court holds that the allegation was material, then the Magistrate could not allow an amendment of the summons, see *Cook* vs. *Aldred* (1909, T.S. 150). The allegation was not necessary in the summons. The plaintiff need not state what particular class of work he was incapacitated for. This case is very much the same as a case for damages.

[WESSELS, J., refers to *Jameson's Minors* vs. *C.S. A.R.* (1908, T.S. 575), as to allegation of particulars of damages.]

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It would have been better pleading, if defendant's occupation had been set out in the summons, but it was not necessary. The evidence was brought under sect. 17 (*b*) and was admissible; no postponement was asked.

As to the second question, if the plaintiff proves one *or* the other, then he is permanently incapacitated and entitled to compensation. Plaintiff is permanently incapacitated, because he can never occupy his original trade as a barber. One should read the word "either" before the word "inability" in section 17 (*b*).

The third question is really the same as the second, and if the second is answered in favour of the plaintiff, then he must also succeed on the third.

S. S. Taylor replied.

Cur. adv. vult.

Postea, June 26.

DE VILLIERS, J.P.: This is a special case stated by the Magistrate of Germiston, under section 4 of Act 11 of 1910, at the request of the defendant. The facts are shortly as follows. The plaintiff was employed by the defendant at a wage of 15s. per day as a cyanide beltsman on its mine and in consequence is a "workman" in terms of the Workmen's Compensation Act of 1907. On the 4th of October, 1910, he sustained a personal injury to his right hand, arising out of and in the course of his work caused by an accident on the mine. He, therefore, claimed that he was permanently partially incapacitated for work in terms of section 17 (*b*) of the said Act of 1907. The defendant denied that the plaintiff was permanently partially incapacitated. At the trial the plaintiff led evidence that he was also a barber by trade to which the defendant objected on the grounds that there was no allegation in the summons to that effect. The Magistrate found the following facts:—

(*a*) That the middle joint of the plaintiff's right thumb had become permanently stiff;

(*b*) that in consequence of this injury he would not be able to use scissors again effectively, and would thus be unable to return to his trade as a barber; but

(*c*) that in 3 or 4 months after his discharge from treatment, he would be able to resume his former employment of cyanide beltsman with practically the same efficiency as before the injury;

(*d*) that plaintiff was discharged from medical treatment on or about the 31st of January;

(*e*) that the defendant Company was willing on that date that he should resume his former employment, but he refused to do so;

(*f*) that all that was required to make the plaintiff efficient at his former employment of cyanide beltsman was that he should use his right hand and thumb for 3 or 4 months;

(*g*) that he could not have performed every one of the duties of a cyanide beltsman with efficiency on 1st February, but would have undertaken no abnormal or unusual risk by resuming this work on that date.

The Magistrate was of opinion that the plaintiff was permanently partially incapacitated, as owing to the injury he was permanently unable to resume work for which he was fitted by trade or apprenticeship, viz., that of a barber, and calculated the actual and probable deficiency in his income during the period of his diminished capacity of earning wages at £156 15s.

The following questions of law were reserved for the decision of this Court at the request of the defendant:—

(1) Should evidence to show that the plaintiff was a barber by trade have been admitted?

(2) Is the plaintiff permanently partially incapacitated by reason of the fact that he is permanently unable to resume his trade as a barber? He will be able in, from 7 to 9 months after the accident, to resume work at which he was employed at the date of his injury.

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(3) Assuming that he is permanently partially incapacitated within the meaning of the Act, is he entitled to compensation when he will at the expiration of a definite period be able to resume work as a cyanide beltsman at the same rate of wages as he was earning at the time of the injury?

With regard to the first question Rule 8 of Schedule "B" of Proclamation 21 of 1902 provides that the "summons shall contain a concise and succinct statement of the nature of the plaint or claim." From the case as stated it appears that the summons contained an allegation to the effect that the plaintiff was permanently partially incapacitated for work in terms of sect. 17 (*b*) of the Workmen's Compensation Act of 1907. Such an allegation would entitle him to lead evidence that he was incapacitated as a barber. If on the other hand the defendant desires a postponement to enable him to meet the case set up, the Court will not hesitate to grant it.

To answer the second and third questions we have to ascertain the meaning of section 17 (*b*). Partial incapacitation for work of a workman is defined as "inability owing to the injury to resume work similar to that at which he was employed at the time of the injury or for which he was previous to the injury fitted by trade or apprenticeship." It was argued that to constitute partial incapacitation, according to this, the plaintiff must prove that he is unable to resume work similar to that at which he was employed at the time of the injury as well as work for which he was previous to the injury fitted by trade or apprenticeship. There is no doubt that this is a possible construction. Inability to do one thing or another may mean one of two things. It may either mean inability to do one of the two (and this strictly speaking is perhaps the more gramatical meaning of the two) or it may mean inability to do neither. But I may point out that, in none of the cases which have come before this Court, has this latter meaning been contended for. I must take it, therefore, that this is at least not the obvious

construction. Moreover to adopt it would to my mind be placing an unduly harsh construction upon the words. It would place a workman who has only one trade in a much better position than one who has two, although the trade the latter workman is able to ply after the accident may not be nearly as remunerative as the one for which he is incapacitated. The Act was introduced for the benefit of the workman, and this meaning would leave many cases unprovided for, cases which would be covered by the other construction. The point was not raised, but the former construction was adopted by this Court in the cases of *Honey* vs. *C.S.A.R.* (1910, T.S. 592), and *Gottwald* vs. *Richards* (1910, T.P. 1007). I, therefore, come to the conclusion that a workman falls within the definition of partial incapacitation if he succeeds in proving one of the two, either that he is unable, owing to the injury, to resume work similar to that at which he was employed at the time of the injury, or that he is unable, owing to the injury, to do work for which he was, previous to the injury, fitted by trade or apprenticeship. As the plaintiff was a barber by trade and he has been so injured that he is unable to do the work of a barber, he is partially incapacitated within the meaning of section 17 (*b*). In order to succeed, however, it is not sufficient for a workman to prove that he is partially incapacitated for work. He must in addition to that prove (1) that there will be a probable deficiency in his income, and (2) that this deficiency is consequent on his diminished capacity to earn wages at the same rate as he was earning at the date of the accident. Can the workmen prove both in the present case? Now section 17 deals only with permanent incapacitation and any compensation, granted under it, is only granted by virtue of such permanent incapacitation. When sub-section (*b*), therefore, speaks of "diminished capacity" to earn wages, it can only refer to such diminished capacity as is occasioned by, or is the result of, the permanent incapacitation of the workman. "Diminished capacity to earn wages" relates to "partial incapacitation for work." In other words the diminished capacity of the workman to earn

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wages is his diminished capacity by reason of such permanent partial incapacitation as is proved in the particular case. As in the present case (at all events as put) the plaintiff's diminished capacity is not occasioned by his permanent incapacitation as a barber, but springs from a temporary disablement as a beltsman, it is not such diminished capacity as is contemplated in the sub-section. But, as it is not clear who will be entitled to succeed, the costs of the reference will follow the event.

WESSELS, J.: The plaintiff was employed at the time of the injury as a cyanide beltsman. Prior to this he had also learnt the trade of a barber. Whilst employed as a beltsman, he was injured, and the consequence of the injury was that the middle joint of his right thumb became permanently stiff. This makes it impossible for him to use a pair of scissors properly, and he is thus unable to return to his trade as a barber. Though he cannot in future act as a barber he will, after the lapse of a few months, be able to resume his former employment of cyanide beltsman with practically the same efficiency as before the injury.

Does he, under these circumstances, fall under sect. 17 (*b*) the Workmen's Compensation Act, or have we to deal here with a case of temporary incapacitation?

The first question to which I wish to address myself is—what is the exact meaning of sect. 17?

The law provides that a workman is entitled to compensation, if a personal injury is caused to him by any accident which necessitates his absence from work for more than a week (sect. 3). In such a case he is required to give certain notices and then the Magistrate proceeds to hold an enquiry (sect. 5). If at this enquiry the Magistrate is satisfied from the evidence that the injury is one in respect of which compensation under the Act is payable, then he must make a provisional order for the payment to the workman of periodical amounts at the rate of 50 per cent. of the wages which the workman was receiving at the time of the injury. These payments are to run from the

date of the injury until the workman is sufficiently recovered to resume his work. This is a case of temporary incapacitation.

If, however, the workman became permanently incapacitated by reason of a personal injury, he can, over and above the provisional order of periodical payment at the rate of 50 per cent. of the wages he was receiving, bring an action against his employer for a lump sum.

If he has been permanently incapacitated, the Legislature has provided in sect. 17 that compensation shall be paid to him on two scales:—

1. If he is totally incapacitated for work, he is entitled to an amount equal to three years wages, subject to certain deductions.

2. If he is partially incapacitated for work, he is entitled to an amount equal to the probable deficiency in his income for the next three years, consequent on his diminished capacity to earn wages at the same rate as he was earning at the time of the injury.

To enable a workman to claim a lump sum by way of compensation he must show:—

(1) That he is a workman within the meaning of the law.

(2) That he has suffered a personal injury.

(3) That he has become incapacitated for work by reason of this injury.

(4) That this incapacitation is permanent.

When he has shown this he must show further whether he falls under the category of those who are totally incapacitated for work or of those who are partially incapacitated for work.

Now, the Legislature has not defined what it means by total incapacitation for work. Does it mean total incapacitation for work of any kind whatever, or does it mean total incapacitation for the work he was engaged in, or for the work he was fitted for?

It seems to me we must give to this section its natural meaning, *i.e.*, permanent total incapacitation for any kind of work, for, if the workman is fit for some work, he cannot be said to be permanently totally incapacitated for work. If he is not permanently totally in-

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capacitated for any kind of work, he may be permanently partially incapacitated for work. As his incapacitation is only partial, it is clear that he can do some work.

Hence it was necessary in this case to define what the Legislature meant by permanent partial incapacitation for work. It has said in effect that a workman shall be regarded as suffering from a permanent partial incapacitation for work, if he is unable, owing to the injury he has received, to resume work similar to that at which he was employed at the time of the injury, *or* for which he was previous to the injury fitted by trade or apprenticeship.

Unfortunately there is some obscurity in the definition. This arises, first, from the fact that one limb of the disjunctive sentence is clearly indicated, but not the other, and secondly, because the context makes it doubtful whether it was not intended to read "*and*" instead of "*or*."

The words of sect. 17, sub-sect. (*b*) may be read in two ways:—(1) "Permanent partial incapacitation for work shall mean *either* an inability to resume work similar to that at which he was employed at the time of the injury *or* an inability to resume work for which he was previous to the injury fitted by trade or apprenticeship."

In this case the alternative meaning of *or* would be quite clear and we would not be justified in reading *and* for *or*, whatever the result of that might be.

(2) A second way of reading the sentence is:—"Permanent partial incapacitation for work shall mean an inability to resume work *either* similar to that at which he was employed *or* for which he was fitted by trade."

It has been argued that this may mean that the workman must show that he is able to resume neither work similar to that which he was performing at the time of the injury, *nor* work for which he was fitted by trade or apprenticeship, before he can claim to be partially permanently incapacitated.

Mr. *Taylor* suggests that, if I say I am suffering from an inability to work either as a beltsman, or as a barber,

I mean that I cannot work as a beltsman and also that I cannot work as a barber. So, he argues, if I say I am unable to resume work either as a beltsman, or as a barber, I mean that I cannot resume work both as a beltsman and as a barber. This depends upon whether *or* is written wrongly for *and*. As was pointed out by SIR GEORGE JESSEL in *Morgan* vs. *Thomas* (51 L.J.Q.B., 557), "'*Or*' never does mean '*and*'. There is a context which shows that *or* is used for *and* by mistake. Suppose a man said, 'I give the black *cow* on which I ride to A.B.,' and he rode a black *horse*, of course, the horse would pass, but I do not think even a modern annotator of cases would put in the marginal note, 'cow' means 'horse.' You correct the wrong word by the context."

The problem is, "Did the Legislature mean *and* when it said *or*?"

It would appear that the section is derived from sect. 24 of Act No. 40 of 1905 of the Cape Colony. The wording in that section, leaving out unnecessary words, is as follows:—"If any workman injured as mentioned shall be sufficiently recovered to undertake any employment, but, owing to a permanent injury received, shall be unable to resume work of the character upon which he was employed at the time of the injury or for which he was fitted by trade or apprenticeship, he shall, in addition to the provisional order, have a right of action for the recovery of a sum not exceeding the probable deficiency in his income, owing to his diminished capacity *for any employment*, at the rate of wages received by him at the time of the injury."

Now I am fully aware that a Transvaal Act cannot be explanied by a Cape Colony Act, but where the former is manifestly taken from the latter, it is as reasonable to take the meaning of the parent Act into consideration as it is to refer to a former Act in the same Colony.

In the Cape Act the words, "for any employment" make it quite clear that in sec. 24 of the Cape Act, "*or*" was not intended for "*and*." The Cape Act did not restrict the claimant to a diminished capacity, both for work similar to what he was doing and for the work

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for which he was fitted by trade, but gave him compensation, if he could prove a diminished capacity for any employment.

Did the Transvaal Legislature deliberately determine to consider a workman permanently partially incapacitated only when he could do neither similar work to what he was doing, nor work for which he was fitted by trade, or did they, like the Cape Legislature, intend that he was to be regarded as permanently partially injured, when he was unable either to do the work similar to what he was doing, or the work for which he was fitted by his trade apprenticeship? The solution of this difficulty appears to me to depend entirely upon whether we should give to "*or*" its usual meaning or whether we should read "*and*" in its stead.

Upon what principal ought the Court to read "*and*" for "*or*"? It appears to me that "*or*" must always be construed in its ordinary and proper sense as a disjunctive particle signifying a substitution or an alternative, unless the context shows or furnishes very strong grounds for presuming that the legislature really intended the word *and* to be used. If to use the word "*or*" in its proper and grammatical sense would strain the plain object of the Act, the Court will presume, as in *The Metropolitan Board of Works* vs. *Steed and another* (51 L.J.M.C. 22), that "*and*" was intended for "*or.*" But, as was laid down in *Green* vs. *Wood* (14 L.J.C. Law, at p. 220) the Court must not alter words in an Act of Parliament merely to give it a meaning such as it thinks those who framed it would have done, if the question had presented itself to them.

In the *Colonial Treasurer* vs. *Great Eastern Collieries, Ltd.* (1904, T.S., p. 719), BRISTOWE, J., in delivering the judgment of the Court said, "To read '*or*' as '*and*' is a violent expedient which ought not to be adopted except in the last resort, for the simple reason that '*or*' does not mean '*and*' and, when the Legislature uses '*or*' it must *prima facie* at all events be taken to mean '*or*' and not '*and.*'"

In *Prim* vs. *Smith* (20 L.R.Q.B.D., at p. 645), LOPES, L.J., said, "we are asked to read '*or*' as if it

were "*and.*" No doubt there are cases where this should be done, but they are cases where the natural meaning would give rise to an interpretation unreasonable, inconsistent, or unjust"

Now turning to the section in question, can we say that if we give *or* its natural meaning the interpretation of the section will be unreasonable, inconsistent or unjust? Mr. *Taylor* has urged us to say that it is unreasonable because in fixing the amount we are only to regard the workman's diminished capacity to earn wages at the same rate as he was earning at the time of the injury, and, if the magistrate is only to look at the rate of wage the workman was earning at the time of the injury, there can have been no intention on the part of the Legislature that some trade, perhaps long abandoned, should also be considered. I cannot see why this should follow. The object of the Legislature was first to define partial incapacitation and than to provide a rule for guidance in estimating compensation in such a case.

It is true that past earnings at a former trade are not to be considered, and that only the rate the workman was earning at the time of the injury must be regarded in estimating the deficiency in his income, but in order to see whether he is entitled to a *lump sum* you must consider whether he is so injured that he cannot resume work similar to what he was doing at the time of the injury, or whether the injury is such that he is unable to ply his former trade: if either of these contingencies occurs then he falls under the category of persons permanently partially incapacitated. There appears to me nothing unreasonable in this, nor is it inconsistent with the rest of the Act.

If we read "*and*" for "*or*," then the workman is only permanently partially incapacitated, when he cannot resume both the work he was doing when injured and the trade he was fitted for. One is not enough: both must fail. The workman who has no trade will then be permanently partially incapacitated, when he cannot resume the work he was doing when injured, but the workman who happens to have a trade, however in-

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significant that trade may be from a wage earning point of view, will have to prove both an inability to do the work he was engaged in, and an inability to carry on his perhaps long abandoned trade. Supposing two beltsmen are injured at the same time, then if Mr. *Taylor's* view is correct, the one who is also a barber is only permanently partially incapacitated, if he can show that he can act neither as beltsman nor as barber, whilst the one who knows no other trade is to be regarded as permanently partially incapacitated. Surely the Legislature could never have contemplated anything so absurd.

The context, therefore, to my mind, does not irresistibly drive us to the conclusion that the Legislation made a mistake, when it wrote "*or*," and that it really meant "*and*."

There is, however, another argument which weighs with me in coming to the conclusion that we ought to hold that the Legislature did not intend the workman to show an incapacitation in both the work he was doing at the time of the injury and in his trade. There is no doubt whatever that, if we read "*either*" before "*inability*," as I have pointed out, the meaning is that the workman need only prove incapacity either in his trade or in the work he was doing when injured. If then there is a doubt whether "*or*" should be read as "*and*" or as "*or*," we ought to incline rather to that reading which will give the same sense to both the readings. If we do that, the workman can prove the alternative and not both forms of incapacity.

Having determined then what the Legislature meant by permanent partial incapacitation we must determine on what scale such a person should be remunerated. Here the wording of the Act is quite clear, though it may lead to curious results.

The workman must prove that there is likely to be a probable deficiency in his income for the next three years. He must also prove that this deficiency is due to a diminished capacity on his part to earn wages at the same rate as he was earning at the time of the injury.

The fact that the workman is earning at the time of the trial a wage equal to what he was earning at the time of the injury is not conclusive proof that there will not be a probable deficiency in his income for the next three years. It is quite conceivable that the injury may have diminished his capacity in the future to earn the same rate of wage as he was earning at the time of the injury, though at the time of the trial that diminished capacity had not yet begun to show itself. Thus he may have been injured so as to make it impossible for him ever again to ply his trade, though he may be engaged to do a temporary work at the same wage he was earning at the time of the injury. Take the following case:—A company in order to secure the services of an engine driver agrees to employ him as a platelayer pending the erection of the engine. As platelayer he earns less than he would as engine driver. Whilst engaged as platelayer he injures himself in such a way that he can never again drive an engine, though he can lay plates, and after the accident he continues to lay plates at the same wage as he obtained at the time of the injury. The platelaying however, is a temporary job, whereas his work as an engine driver would be continuous. Now if he must show that he was injured so as to be unable to resume work both as platelayer and as engine driver before he can be regarded as permanently partially incapacitated he would fail, for he is capable of resuming work as a platelayer at the same wage as he was earning at the time of the injury. Not falling under the category of those suffering from partial incapacitation, it is immaterial whether there will be a probable deficiency in his income. Yet as the platelayer's job was only temporary, and as he would have earned a far higher wage as engine driver, there will be a probable deficiency in his income, and his capacity for earning wages at the same rate he was earning will be diminished owing to the contracted scope of work for platelayers. Surely the Legislature did not intend that such a man is not entitled to a lump sum as compensation!

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Now coming to the present case. The magistrate was entitled to consider that the workman who was acting as a beltsman was also a barber by trade, but in awarding him compensation he had to consider whether there was a probable deficiency in his income for the next three years because of his incapacity to act as a barber. If as beltsman he was likely to continue to earn the same wages he was earning at the time of the accident, and if this income was likely to continue for three years, then, though he may be incapacitated as a barber, he will not be able to obtain compensation, for there would then be no probable deficiency in his income consequent on his diminished capacity to earn wages at the same rate as he was earning at the time of the injury.

I now come to the questions submitted for our consideration:—

(1) Should evidence to show that the plaintiff was a barber by trade have been admitted?

The answer is in the affirmative.

(2) Is the plaintiff permanently partially incapacitated by reason of the fact that he is permanently unable to resume his trade as a barber? He will be able, in from 7 to 9 months after the accident, to resume the work at which he was employed at the date of his injury.

The answer is that the plaintiff is permanently partially incapacitated.

(3) Assuming that he is permanently partially incapacitated within the meaning of the Act, is he entitled to compensation when he will at the expiration of a definite period be able to resume work as a cyanide beltsman at the same rate of wages as he was earning at the time of the injury?

This question, from what I have said, cannot be categorically answered. The mere fact that he will be able to resume work at the same rate of wage as he was earning at the time of the injury is not the only fact to determine. The magistrate must determine whether (1) it is probable that there will be a deficiency in his income for the next three years, taking into considera-

tion his incapacitation as a barber and, if so, (2) whether this probable deficiency is due to a diminished capacity on his part to earn wages at the same rate as he was earning at the time of the injury.

If the magistrate finds that there will be no probable deficiency in his income during the next three years, or if the magistrate finds that there may be a probable deficiency but that this will not be due to a diminished capacity to earn the same rate of wage, then there can be no compensation.

If, however, as the result of his injury there is a diminished capacity to earn the same rate of wage throughout the three years, then the mere fact that the workman is temporarily earning the same wage as he was at the time of the injury ought not to stand in the way of his getting compensation.

I am, therefore, of opinion that the case should be referred back to the magistate to deal with the question of compensation on the line laid down above. The costs must depend on whether, having regard to the answers which we have given, the magistrate awards the plaintiff compensation or not.

BRISTOWE, J.: This is a special case stated under sec. 4 of Act 11, 1910. The plaintiff was a cyanide beltsman in the employ of the defendant company, and on the 4th October last he met with an accident in the course of his work which injured his right hand. He was under medical treatment until the 31st January. The summons states the employment of the plaintiff by the company and the injury which he suffered, and alleges that in consequence of such injury he is permanently partially incapacitated from work within the meaning of sec. 17 of the Workmen's Compensation Act, 1907, and it claims £375 compensation. At the hearing evidence was tendered to show that the plaintiff was fitted by trade to do the work of a barber. The defendants objected to this evidence on the ground that incapacitation as a barber was not pleaded, but the magistrate over-ruled the objection, reserving the question of the admissability of the evidence for the decision

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of the Supreme Court. The only further facts material to be stated are the following:—

(1) in consequence of the injury the middle joint of the plaintiff's right thumb has become permanently stiff.

(2) this will prevent him from carrying on the trade of a barber, but not from doing the work of a cyanide beltsman, and

(3) although he could not have resumed such last mentioned work with efficiency immediately after his discharge from treatment, he became able to do so three or four months later.

The points submitted for the opinion of the Court are as follows:

(1) Should evidence to show that the plaintiff was a barber by trade have been admitted?

(2) Is the plaintiff permanently partially incapacitated by reason of the fact that he is permanently unable to resume his trade as a barber: it being established that he would be able in from seven to nine months after the accident to resume the work at which he was employed at the date of his injury.

(3) Assuming that he is permanently partially incapacitated within the meaning of the Act, is he entitled to compensation when he will at the expiration of a definite period be able to resume work as a cyanide beltsman at the same rate of wages as he was earning at the time of the injury?

The answer to these questions turns mainly on the construction of section 17 of the Workmen's Compensation Act, 1907, which deals with permanent incapacitation. This section first gives a workman who is permanently incapacitated a right of action, and secondly, it prescribes the relief which may be obtained in that action. The right of action is given by the first part of the section, and the relief or quantum of compensation is regulated by sub-sections (a) and (b). Subsection (a) deals with total incapacitation, and fixes the compensation at three years' wages calculated according to the rate of wage which the workman was earning at the time of the accident, the sum awarded being limited to a certain maximum amount and being subject to the deduction of any periodical payments re-

ceived under the earlier provisions of the Statute. Sub-section (b) deals with partial incapacitation, but inasmuch as in this case the disablement is not complete the compensation is not fixed at a sum equal to three years' wages calculated as above mentioned, but at that sum less a deduction corresponding to the extent of the disablement; an outside limit being similarly fixed and periodical payments deducted. In every case, therefore, the high water mark of compensation (up to the prescribed limit) is three years' wages at the rate which was being earned at the time of the accident. Where the incapacitation is total no allowance is made for future wage earning capacity, because ex-hypothesi that is non-existent. Where the incapacitation is partial, such allowance is made, because the capacity to earn wages still exists, although to an impaired extent.

When the subject of partial as distinct from total incapacitation is approached there are obviously two points which require particular consideration. The first is, what is to constitute partial incapacitation; and the second is how is the reduction of compensation below the high water mark to which I have referred to be calculated? Both these points are dealt with by sub-section (b). Partial incapacitation for work is defined to mean "inability owing to the injury to resume work similar to that at which he (namely, the workman) was employed at the time of the injury, or for which he was previous to the injury fitted by trade or apprenticeship," and the compensation to be recovered is declared to be "an amount equal to the probable deficiency in his income for the next three years consequent on his diminished capacity to earn wages at the same rate as he was earning at the time of the injury," less deductions for periodical payments and not exceeding in the whole £375.

A cursory glance at these provisions shows that although the probable deficiency in income is to be measured by the diminished capacity to earn the same rate of wages as was being earned at the time of the injury, yet no express provision is made as to how the wage earning capacity either before or after the acci-

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dent is to be estimated. The gauge might be merely the work on which the workman was engaged when the accident happened, or it might be work of any kind which he was physically or mentally able to do, or again, it might be certain classes of work to the exclusion of others. "Partial incapacitation for work" and "diminished capacity to earn wages" are however correlative expressions. The section assumes that the one produces the other. Any variation in the one should, therefore, give rise to a corresponding variation in the other; and it must be supposed that the same standard was intended to govern both. In considering whether partial incapacitation exists two kinds of work, and two only are to be taken into consideration (1) the work which the man was doing at the time of the accident, and (2) any other work for which he was fitted by trade or apprenticeship. And I think it must follow that those classes of work, and no others, were intended to be taken into account in estimating his wage earning capacity. Not only does this interpretation make the clause consistent, but it seems to me to be the only one which really fits the language, and is at the same time just and reasonable. If wage earning capacity had been intended to be estimated only by reference to the work which was being performed at the time of the accident the Legislature would have said so, and not have spoken of "diminished capacity to earn wages at the same rate" as was then being earned. The reference to the "rate of wages" instead of the particular work, suggests that the particular work was not the only work which the Legislature had in view. On the other hand, it would be unreasonable to extend indefinitely the kinds of work to be taken into account, because that would mean treating the injured man as though it were incumbent upon him to learn a new trade, or to descend from skilled to unskilled labour. In my opinion the kinds of work to be taken into account in determining not only the wage earning capacity after the accident, but also the capacity at the time of the accident to earn the wages which were then being earned are the same as those which have to be taken into account in deter-

mining incapacitation, namely, the work actually being performed when the accident happened and any other work for which the workman was previously fitted by trade or apprenticeship. It follows that so long as a workman is able at either of those kinds of work to earn the same rate of wages as he was earning at the time of the accident, he has suffered no diminution in wage earning capacity; and if he is unable to earn that rate of wage at either of those kinds of work, then the extent of diminution is the difference between the rate of wage he was earning at the date of the accident and the rate of wage he is still capable of earning at whichever of the two kinds of work will pay the best.

Turning now to the definition of partial incapacitation, it is clear, as I have pointed out, that, in determining whether partial incapacitation exists, no work outside the two kinds specifically mentioned can be taken into account. And it is also clear that, where the injured man is not fitted by trade to do any other work than that on which he was actually engaged, the extent of his incapacitation and similarly the amount of the compensation is to be measured only with regard to that particular work. But a difficulty arises, where, as in the present case, the plaintiff is fitted by trade to do some other work, must there, in such a case, be incapacitation for both classes of work in order to give a right of action, or will incapacitation for one only suffice?

The difficulty seems to me to arise from the omission on the part of the Legislature to insert the antithesis to the word "or," and the whole question is where that should be inserted. If it is inserted before "inability," then "partial incapacitation" means either of two distinct kinds of inability, (1) inability to do the work the man was actually performing, and (2) inability to do some other work for which he was fitted by trade. Either of such inabilities would then constitute a separate cause of action. But this interpretation involves reading a considerable number of words into the sentence, in order to express its full meaning. The sense could only be fully expressed by supplying, after "or," the words "inability owing to the injury to re-

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sume work," the whole clause reading, "which shall mean (either) inability owing to the injury to resume work similar to that at which he was employed at the time of the injury or (inability owing to the injury to resume work) for which he was previous to the injury fitted by trade or apprenticeship." The other alternative is to place the antithesis to "or" before "similar." The sentence would then run "which shall mean inability owing to the injury to resume work (either) similar to that at which he was employed at the time of the injury or for which he was, previous to the injury, fitted by trade or apprenticeship." This interpretation reads nothing into the clause except the word "either." If it is adopted then it seems to me that, upon the true construction of the clause, the inability would have to extend to both classes of work. Inability to do either of two different things means, I think that the man is able to do neither the one nor the other. If I say that I cannot do either this or that, I mean that my incapacity extends to both; and I do not agree that, in employing that mode of expression, I lay myself open to the criticism that I am using "or" when I mean "and." I doubt whether to say "I cannot do either this or that" is the same as to say "I cannot do this and that." The latter seems rather to connote inability to do the two things at the same moment. It may very likely mean the same as "I cannot do this and I cannot do that"; but that only shows that the same idea may be expressed either disjunctively or conjunctively. The disjunctive way seems to me to be that habitually employed and to be (to say the least) sanctioned by usage.

It follows from what I have said that, if grammatical considerations were the only ones to be taken into account, we should, in my opinion, be driven to adopt the latter interpretation, because it involves the smallest elision and strains the language least. But the Legislature is not always grammatical, and it sometimes expresses its thoughts in language which the most accomplished masters of literary style would not employ, and the function of the Court is not so much to criticise with minute accuracy the language which the

Legislature has thought fit to use as to extract its true meaning and intention. In the present case the first of the two interpretations which I have mentioned, though not the more preferable grammatically, is I think the one more in accordance with the general tenour of the sub-section. One must suppose that the wrong and the remedy, or the cause of action and the relief, were intended to correspond. It is, therefore, not unfair to judge of what is meant by partial incapacitation by considering in what cases a partially incapacitated workman is entitled to compensation. I have already pointed out, that compensation is not obtainable, unless there has been diminution of wage earning capacity below the level of the wages which were being earned at the time of the accident; and that, so long as a workman is able at either of the two kinds of work to earn the wages which he was then earning, there is no diminution of wage earning capacity. But this does not exhaust the matter. The workman's wage earning capacity may have been reduced only as regards the work on which he was employed at the time of the accident, while yet, as regards the other kind of work, it cannot reach the level of the wages which he was then earning. This case arose in *Gottwald* vs. *Richards*, if the JUDGE PRESIDENT'S view was correct; but whether it did or not, it frequently may arise. And it is obvious that, in such a case, the workman is intended to obtain compensation, for there is present "diminished capacity to earn wages at the same rate as he was earning at the time of the injury." Incapacitation as regards one only of the two kinds of work may, therefore, suffice to support an action. And, if so, then it follows that the first of the two alternative constructions of the clause under consideration which I have given above, is the one which must be adopted. In my opinion partial incapacitation exists where the inability extends to either of the two kinds of work, but the plaintiff can only succeed and is, therefore, only entitled to bring an action where it is of such a nature as to entitle him to the compensation provided by the act.

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It follows that the second of the questions submitted to the Court must be answered in the affirmative.

As regards the third question, I understand the magistrate to mean that, during the remainder of the three years from the time at which the plaintiff is able to resume work as a beltsman, he will continue to be capable of earning the same wages at that work as he was earning at the date of the accident. If this is so, then the third question must be answered in the negative.

As regards the first question the defendant is of course entitled to know in respect of what work the plaintiff claims to have been incapacitated. But I am not prepared to say that it is essential to plead this, though the omission to do so might entitle the defendant to an adjournment for which the plaintiff might have to pay.

The costs must depend on whether, having regard to the answers which we have given, the magistrate awards the plaintiff compensation or not.

[Plaintiff's Attorneys, PIENAAR & NIEMEYER,
Defendant's Attorneys, MACINTOSH & KENNERLEY.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

SMITH & BRISTOWE, JJ.
June 26th, 27th. 1911.

BROUDE & SIEFF vs. KOSELOWITZ.

Magistrate's Court.—Jurisdiction.—Claim ad factum praestandum.—*Procl.* 21 *of* 1902, *section* 12 (*b*) (2):

Semble, *a Magistrate's jurisdiction, under Proclamation* 21 *of* 1902, *section* 12 (*b*) (2), *is not ousted merely because the claim is one* ad factum praestandum. (Jones *vs.* Williams, *supra, p.* 536 *explained*).

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Broude & Sieff *vs.* Koselowitz.

Appeal from a decision by the A.R.M., Krugersdorp.

Koselowitz sued the appellants for a statement of account.

The point material to this report was whether such a claim, being one *ad factum praestandhm,* was within the magistrate's jurisdiction.