of the marriage (which may be left out of account in view of their ages), every one of the matters which the House of Lords enumerated in *Blunt* v. *Blunt* (1), as relevant to the exercise of discretion was involved in this case: the interest of the party with whom the appellant committed misconduct, with special regard to the prospect of their future marriage; the question whether there was a prospect of reconciliation between husband and wife; the interest of the appellant, and in particular the interest that she should be able to remarry and live respectably; and the interest of the community, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. I cannot escape the conclusion that his Honour, although he recognized that these considerations were relevant, omitted to give them the weight to which they were entitled.

I need not recite the history of the appellant's matrimonial and extra-matrimonial life; it is sufficiently stated in the preceding judgments. In my opinion, it is impossible in this case to give due attention to all relevant considerations and yet to conclude that it is better to maintain the appellant's marriage to the man who deserted her twenty-three years ago than to set her free to commence a respectable married life. In particular, it seems to me quite clear that the interests of public morality and respect for the institution of marriage will be better served in the circumstances of this case by enabling marriage to replace illicit cohabitation than by allowing disapproval of the appellant's undoubtedly blameworthy conduct to find expression in the refusal of her release from a marriage which many years ago broke down beyond hope of restoration.

On the question of delay, the learned Judge expressed himself as not satisfied that want of means was the real cause of the delay. He thought that the true explanation was that the appellant really had no actual desire to obtain a divorce until she had been living for some time with Daniels, nor until his wife had divorced him. But his Honour does not seem to have put to himself the question whether the delay was for any reason culpable. As this Court pointed out in *Turnbull* v. *Turnbull* (2), it has long been held that delay, to operate as a bar to divorce, must be culpable; it is culpable if it is of such a kind as to suggest an acquiescence in the respondent's wrongful conduct, a condonation of it, an

(1) (1943) A.C. 517.

(2) (1945) 47 W.A.L.R. 31; 19 A.L.J. 245.

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insensibility to the loss of the spouse, or an insincerity in the petitioner's complaint, or if it is something in the nature of connivance or indicates complete indifference. See *Pellew* v. *Pellew* (1); *Tollemache* v. *Tollemache* (2). The length of the delay is obviously important, but only in its bearing upon the question of the culpability of the delay.

I do not myself attach importance to the fact that, during part of the period which elapsed between the accrual of the appellant's right to sue for divorce and the institution of these proceedings, persons acquainted with the state of the authorities would or might have considered that the appellant was faced with a difficulty which was not removed until this Court decided *Waghorn* v. *Waghorn* (3). The appellant does not appear to have been affected by any misunderstanding or perplexity as to the state of the law. But her straitened circumstances and humble station in life, of which his Honour was satisfied in point of fact, appear to me not to have been accorded their due significance. His Honour referred to the availability of free legal assistance, but there was no evidence to suggest that the appellant was aware of it. Even if it be true that she had no actual desire to obtain a divorce until the opportunity to marry Daniels presented itself, I can see no ground in the evidence for concluding that her delay was culpable in any relevant sense. In the circumstances of this case I am clearly of the opinion that it would be wrong to refuse a divorce by reason of the delay that has occurred.

I agree that the appeal should be allowed and that there should be judgment for divorce.

Appeal allowed with costs. Order of Supreme Court, except pars. 1 *and* 2 *thereof, discharged. Order nisi for divorce with costs, which order may be made absolute after* 31*st December* 1950.

Solicitor for the appellant: *F. G. Hicks.*

C. C. B.

(1) (1859) 1 S. & T. 553, at p. 555 [164 E.R. 856, at p. 857].

(2) (1859) 1 S. & T. 557 at p. 561 [164 E.R. 858, at p., 859].

(3) (1942) 65 C.L.R. 289.

[HIGH COURT OF AUSTRALIA.]

THOMPSON . . . . . APPELLANT;
APPLICANT,

AND

ARMSTRONG AND ROYSE PROPRIETARY LIMITED . . . . . } RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 14-16; *Nov.* 17.

Latham C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Workers' Compensation—Amount—Total incapacity—Public holidays and annual holiday period during incapacity—Payment during absence under award—Quaere, entitlement to compensation—Workers' Compensation Act 1926-1947 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 9 *of* 1947), *ss.* 7, 9, 11, 13, 37 (4).

An industrial award made provision, *inter alia*, for payment of wages at a weekly rate, for holidays on various stated days, including Christmas Day and Boxing Day, and for fourteen days' leave annually, exclusive of prescribed holidays, after twelve months' continuous service. A worker, employed on the terms of that award, suffered an injury which arose out of and in the course of his employment, and he was thereby incapacitated for work from 18th December to 31st December 1947. The employer paid him compensation pursuant to the provisions of the *Workers' Compensation Act* 1926-1947 (N.S.W.) for part of 18th December and the whole of 19th December. In accordance with its rights to do so under the award the employer closed down its plant for the period from 20th December 1947 to 1st January 1948 and in accordance with the award paid him two weeks' wages at the weekly award rate and also additional holiday pay for Christmas Day and Boxing Day.

Held, (1) by *Latham* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ. (*Williams* and *Webb* JJ. dissenting), that the worker had during the period of his annual holidays a total incapacity for work resulting from his injury, within the meaning of s. 9 of the Act, notwithstanding that he received full wages for that period.

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(2) By *McTiernan*, *Fullagar* and *Kitto* JJ. (*Latham* C.J. and *Webb* J. dissenting, and *Williams* J. expressing no opinion), that the wages received by the worker during the period of his annual holidays, not having been received in respect of the injury and the consequent incapacity to earn, were not a payment, allowance or benefit which the worker received from the employer during the period of his incapacity to which the Commission was authorized by s. 13 of the Act to have regard.

Carmichael v. *Colonial Sugar Refining Co. Ltd.*, (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131, considered and discussed.

The Court being evenly divided in opinion as to whether the worker was entitled to both wages and compensation for the period of his annual holidays including public holidays, the decision of the Supreme Court of New South Wales (Full Court), (1950) 50 S.R. (N.S.W.) 298; 67 W.N. 146, that he was not so entitled was, pursuant to the provisions of the *Judiciary Act* 1903-1948, s. 23 (2) (*a*), affirmed.

APPEAL from the Supreme Court of New South Wales.

Andrew George Thompson, who had been employed by Armstrong and Royse Pty. Ltd. continuously for eleven years, was injured on 18th December 1947. The injury arose both out of and in the course of his employment and Thompson was thereby incapacitated for work from 19th December to 31st December 1947 both days inclusive. In respect of that incapacity the company, pursuant to the provisions of the *Workers' Compensation Act* 1926-1947 (N.S.W.), paid to Thompson compensation and also amounts for medical and ambulance expenses, the compensation being based on a total incapacity for a portion of 18th December and the whole of 19th December. On 20th December the sawmill where Thompson was employed was closed down in order to give all the employees who were entitled thereto their annual fortnight's holiday. In respect of the period which commenced on 20th December 1947 and ended on 1st January 1948, the company paid to Thompson an amount of money representing two weeks' wages at the weekly rate stipulated in the relevant award, namely, the Timber Workers (Federal) Award, No. 312 of 1947, and also additional holiday pay for Christmas Day and Boxing Day.

A claim filed on 9th June 1948, by Thompson in the Workers' Compensation Commission for compensation for total incapacity at the amount appropriate thereto for a period which included the whole of the period from 20th to 31st December 1947, was disputed by the company but the Commission ordered it to pay to Thompson weekly compensation at the rate of £5 15s. 0d. for the period 20th to 31st December 1947, both dates inclusive but excluding Christmas Day and Boxing Day. Each party was dissatisfied

with that decision, the company by reason of the award for compensation for the period excluding Christmas Day and Boxing Day, and Thompson because an award was not made in respect of those two days.

In a case stated by the Commission at the request of the company under the provisions of s. 37 (4) of the *Workers' Compensation Act* 1926-1947, the questions of law referred for the decision of the Supreme Court of New South Wales were :—(a) Is an incapacitated employee working under the terms of the Timber Workers' (Federal) Award, entitled for the period of the annual holidays both to compensation and holiday pay ? ; and (b) Is such a worker entitled under the award for the public holidays Christmas Day and Boxing Day both to wages and compensation for each day ?

Clause 16 of the award provided, so far as material, that employees were to be employed on a weekly engagement, subject to provisions made in that clause for the termination of that employment, and a weekly rate was fixed for employees doing work of the nature of that performed by Thompson. Provision was made then for hours and overtime. Clause 20 provided that all weekly employees, except certain specified exceptions, were to be entitled to holidays on various stated days, which, in the case of Thompson, included Christmas Day and Boxing Day. Deductions were not to be made from wages in respect of those holidays, except under circumstances provided for and which did not arise in this case. Clause 21 gave to every employee, after twelve months' continuous service, the right to a period of fourteen consecutive days' leave, to be allowed annually. That annual leave was to be exclusive of the prescribed holidays, which, as stated above, included Christmas Day and Boxing Day. The annual leave was required to be allowed and taken as such, and payment in lieu thereof was forbidden to be made or accepted ; and each employee before going on leave " shall be paid two weeks' wages ", the rate of such wages being the rate prescribed by the award for the particular employee in question immediately prior to the commencement of his leave.

The Full Court of the Supreme Court (*Street* C.J., *Maxwell* and *Herron* JJ.) answered both questions in the negative : *Thompson* v. *Armstrong & Royse Pty. Ltd.* (1).

From that decision Thompson appealed, by special leave, to the High Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

(1) (1950) 50 S.R. (N.S.W.) 298 ; 67 W.N. 146.

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E. S. Miller K.C. (with him *K. Gee*), for the appellant. There has never been and is not now any issue as to the right of the appellant to enjoy the annual leave and holiday pay benefits of the Award. He has received the moneys appropriate to those provisions. The real and only matter in issue is the question of his right to receive payment under the provisions of the *Workers' Compensation Act* 1926-1947 in respect of the period in question notwithstanding the enjoyment of the Award annual leave and holiday pay benefits. The right to receive the compensation payment depends upon injury and incapacity for work in consequence of such injury—the quantum of the total weekly payment being the composite of the provision referable to the appellant himself and that referable to the dependency of his wife and children on him. There is nothing in the Statute or in the Award disentitling the appellant to receive the Statutory provision upon receipt of the benefit of the holiday pay and/or annual leave provisions. The policy of the statute is against permitting a liability such as is contained in the Award to be set off in respect of compensation—see s. 48 and s. 55. There is no proper ground of distinction between the annual leave benefit and the holiday pay provision. The Workers Compensation Commission applied *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (1) but the rights to holiday pay and/or annual leave benefit under this award are only to be enjoyed if the entitlement conditions of earlier service stipulated in the award have been satisfied. The report (2) indicates that the Court would have decided otherwise had enjoyment of the award provisions there been conditioned upon service under the contract of service and not upon the mere fact of the relationship of master and servant subsisting at the time when the holiday date occurred. *Carmichael's Case* (1) cannot be reconciled with *McDermott* v. *Owners of S.S. Tintoretto* (3) which was not referred to. Reference to the annual leave provisions of this award shows that the right to annual leave is not gained merely from the existence of the relationship of master and servant at the relevant time but is available to be enjoyed and retained only if the continuous service conditions have been fulfilled. This is so both in the case where the condition has been fulfilled prior to enjoyment of the annual leave and also in the case where the annual leave benefit has been made available to the employee by the employer before the right to it has been gained by being earned. In the latter case the

(1) (1944) S.R. (N.S.W.) 233; 61 W.N. 131.

(2) (1944) S.R. (N.S.W.), at pp. 233, 234; 61 W.N., at pp. 131, 132.

(3) (1911) A.C. 35.

annual leave benefit does not rest upon any right in the employee to have it but is in the nature of an advance made by the employer at his option but subject to refund in the event of the period of continuous service owing to the employer not being given by the employee after the enjoyment of the annual leave benefit. The appellant's rights as to holiday payment and annual leave benefits were no greater nor less than those enjoyed by all other employees. His incapacity is strictly within the conception indicated in *Williams* v. *Metropolitan Coal Co. Ltd.* (1) and *Birch Bros. Ltd.* v. *Brown* (2). The close-down of the works is irrelevant to such incapacity in the same way as were subsequent occurrences such as dismissal for misconduct in *Jensen* v. *Jones Ltd.* (3); supervening disease in *Stowell* v. *Ellerman Lines* (4); disorganised labour market in *Bromley* v. *Staveley Coal & Iron Co. Ltd.* (5); *Drew* v. *Staveley Coal & Iron Co.* (5); internment as enemy alien in *Murray* v. *Portland Co. Ltd.* (6); *Cargo Fleet Iron Co. Ltd.* v. *Funck* (7); imprisonment in *North's Navigation Co.* (1889) *Ltd.* v. *Batten* (8).

G. E. Barwick K.C. (with him *C. Langsworth*), for the respondent. A worker who has received injury shall, by virtue of s. 7 of the *Workers' Compensation Act* 1926-1947, be paid compensation in accordance with that Act. Section 7 confers the right to receive compensation and the right comes into being on the happening of the injury apart from a question of incapacity. The right can only be quantified into weekly payments under s. 9 when total or partial incapacity for work results. "Incapacity for work" within the meaning of s. 9 means "incapacity to earn pre-injury wages in the open labour market". That was the underlying principle in *Williams* v. *Metropolitan Coal Co. Ltd.* (9). The pre-injury contract of employment between the appellant and the respondent remained in force throughout the whole period of the appellant's physical inability to work resulting from his injury and, by virtue of the terms of that employment, he was, notwithstanding his physical condition, able to earn under his subsisting contract all the income, whether by way of bonus, wages, holiday pay or annual leave pay, which he would have earned if he had not been physically disabled. Therefore the appellant's injury did not incapacitate him from earning full wages under a subsisting contract of employment, which was his pre-injury contract, and which

(1) (1948) 76 C.L.R. 431, at pp. 444, 448, 449.
(2) (1931) A.C. 605.
(3) (1930) 23 B.W.C.C. 518.
(4) (1923) 16 B.W.C.C. 46.
(5) (1923) 16 B.W.C.C. 77.
(6) (1922) 15 B.W.C.C. 362.
(7) (1916) 9 B.W.C.C. 318.
(8) (1933) 26 B.W.C.C. 525.
(9) (1948) 76 C.L.R. 431.

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continued throughout the whole of the period of his physical disablement. It follows that he was not incapacitated for work within the meaning of s. 9. The facts of this case distinguish it from *Williams* v. *Metropolitan Coal Co. Ltd.* (1) because the physical disability was for a limited period and during that period and thereafter his pre-injury employment continued. By virtue of the particular terms thereof the appellant was able to earn his full wages under such employment notwithstanding his physical disability: see *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (2) and *Davey* v. *Commissioner for Railways* (3). The reasoning in the two last-mentioned cases is decisive in this case. Section 13 of the Act is irrelevant in this case. That section only operates where the worker has become entitled to weekly payment under s. 9 and is only relevant when such weekly payments are being quantified. It has not any application because the appellant, not having been incapacitated within the meaning of s. 9, is not entitled to any weekly payments at all. *McDermott* v. *Owners of S.S. Tintoretto* (4) supports the respondent and not the appellant, because in that case the claim was for a period subsequent to that for which full wages were paid, and a suggestion was not made in that case that the workman concerned might have claimed compensation in respect of the period of physical disablement during which full wages were paid by the employer.

E. S. Miller K.C., in reply. The submission for the respondent must and does accept that once the appellant's injury comes within s. 9 of the statute that is, he suffers in consequence of injury a relevant incapacity for work, s. 13 does not permit of the annual leave and holiday pay payments being considered as relevant: see *McDermott* v. *Owners of S.S. Tintoretto* (4). It is said that there was "no relevant incapacity for work" by reason of (1) the appellant's contract of employment and (2) the interpretation that incapacity for work means incapacity for *the* work of the respondent. The answer is that while the particular contract of employment has a relevancy for the purpose of ascertaining whether the person injured is a worker within the meaning of the statute and, if a worker, his average weekly earnings as the basis for the compensation assessment the availability of work *under it* is not decisive of capacity *for* work. Prior to the respondent closing down its works the appellant had sustained injury and incapacity had begun and

(1) (1948) 76 C.L.R. 431.
(2) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.
(3) (1944) 18 W.C.R. 179.
(4) (1911) A.C. 35.

medical expenses were being incurred. The closing-down did not terminate that incapacity nor affect it. The reason why the respondent closed down its works was to give (as was its right irrespective of the wishes of the employees) the award annual leave benefit. If the works had been closed down because of a factor referable to the employer or the plant e.g. fire, lock-out, strike, machinery break-down, power cut-off, trade stagnation, &c. such close-down would be irrelevant as affecting incapacity for work caused by injury and the factors causing it would clearly be extraneous to such question of relevant incapacity. The argument assumes that the appellant was bound to the respondent by his contract of service *not* to accept employment with any other employer while his contract of service subsisted but the statute clearly contemplates concurrent contracts of service, e.g. ss. 14 (a), 14 (b). The appellant was entitled if physically capable to accept employment elsewhere during the period of close-down. Even though he could not work for the respondent he could have worked for other employers if he had not been incapacitated.

Cur. adv. vult.

The following written judgments were delivered :—

Nov. 17.

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales made upon a case stated by the Workers' Compensation Commission pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1947 (N.S.W.). The appellant was employed by the respondent in a timber mill. On 18th December 1947 he cut the back of his left hand by coming into contact with a hanging saw. He was totally incapacitated for work until 2nd January, when he resumed work. The injury arose out of and in the course of his employment. He therefore became entitled to receive compensation from his employer in accordance with the Act, ss. 7 and 9. He was paid compensation in respect of 18th and 19th December. The Federal Timber Workers' Award, under which he was working, provided for fourteen consecutive days' annual leave in the case of the appellant, who had been continuously employed by the respondent for a period of eleven years. The respondent closed down its works on 20th December in order to allow the employees the fourteen days' leave. The appellant was paid wages at his full rate in respect of these fourteen days. Christmas Day, Boxing Day and New Year's Day were holidays under the provisions of the award in respect of which the appellant was entitled to be paid. He was paid full wages in

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respect of these holidays. He claimed workers' compensation at the rate of £5 15s. 0d. per week (£3 10s. 0d. for himself, £1 5s. 0d. in respect of his wife and £1 in respect of his two children). His Honour Judge *Rainbow* held that he was not entitled to be paid workers' compensation in respect of the public holidays because he was not expected to perform any service on those days, so that he had received all that he was entitled to get under his contract. In the case of the annual leave, however, his Honour was of opinion that he was entitled to workers' compensation for that period because his earning capacity in respect of some possible other employment was destroyed for that period. The appellant contended that he was entitled both to holiday pay and to workers' compensation in respect of the public holidays as well as in respect of the period of annual leave, and the employer contended that he was not entitled to workers' compensation in respect of either the public holidays or the annual leave. The learned judge stated a case for the opinion of the Supreme Court upon the following questions of law :—" (a) Is an incapacitated employee, working under the terms of the Timber Workers (Federal) Award, entitled for the period of the annual holidays both to compensation and holiday pay ? (b) Is such a worker entitled under the award for the public holidays Christmas Day and Boxing Day both to wages and compensation for each day ? "

The Supreme Court answered both questions in the negative, following and applying *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (1). That was a case where the worker was paid full wages for three prescribed holidays which occurred during the period of incapacity. *Jordan* C.J. said :—" In the present case, the contract of employment was not terminated by the employer. During the three days in question, it called for no work at all, but conferred on the employee a right to full wages without work, and these were duly paid to him. Hence the injury, as regards these three days, did not disable the worker from doing everything that he was required to do under his subsisting contract of employment—namely, nothing—in order to be entitled to receive his full wages for those three days. This is, in my opinion, sufficient to dispose of the case " (2).

It is argued for the appellant that he has a statutory right under the *Workers' Compensation Act* which is not affected in any way by the contract with the employer under which he happens to be working except in so far as the terms of that contract determine

(1) (1944) 44 S.R. (N.S.W.) 233 ; 61 W.N. 131.

(2) (1944) 44 S.R. (N.S.W.), at pp. 236-237 ; 61 W.N., at p. 133.

his average weekly earnings for the period specified in s. 9 and therefore affect the amount of compensation payable. It is argued that the statute gives the right to compensation, making it conditional simply upon the injury arising out of or in the course of his employment (s. 6—definition of injury: s. 7) and upon total or partial incapacity for work resulting from the injury (s. 9). The worker may or may not have a right to recover wages, even though he does no work during the period of incapacity, but the existence or non-existence of this right, it is contended, is quite irrelevant to his statutory right. Absence from work during incapacity which is not such as seriously to interfere with the business purpose of the contract does not, in the absence of a term in the contract to the contrary, itself terminate the contract of employment, nor does the receipt of compensation terminate it (*Warburton* v. *Co-operative Wholesale Society* (1)). The worker may still have rights to some payment under his contract. In the present case there was a right to payment in respect of annual leave which was conditional upon there having been a continuous period of service, though under the award the employer could pay in advance, making an appropriate deduction if the worker left his employment before he had completed the required term of continuous service. It is therefore further argued that the payment for annual leave related only to work done at other times and was not a payment made in respect of that period. It was argued that *Carmichael's Case* (2) should be overruled.

Section 13 of the Act provides—"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the worker may receive from the employer during the period of his incapacity."

It was argued for the appellant that the case of *King* v. *Port of London Authority* (3), showed that before any payment made by an employer could be deducted under this provision it must be a payment made in respect of the incapacity. The payment made in the present case, it was said, was a payment in respect of services rendered or to be rendered at times other than the period of incapacity, and therefore such payment should not be taken into account.

For the respondent it was argued that where a contract of employment remained on foot so that the relation of employer and employee still subsisted (as in the present case) during a period of

(1) (1917) 1 K.B. 663.
(2) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.
(3) (1920) A.C. 1.

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physical incapacity and the employer in fact paid full wages (or presumably any amount greater than the amount claimable as compensation) the employee had no right to compensation. The right to compensation depended upon " total or partial incapacity for work " resulting from an injury to which the Act applied (s. 9) and it was contended that the incapacity for which the Act provided was an economic incapacity—an incapacity for earning wages. If in fact he was paid by way of wages more than the sum to which he would otherwise have been entitled as workers' compensation, his earning power was not diminished to such an extent as to entitle him to any compensation. It was argued that the right to wages and the right to compensation were mutually exclusive in the sense that there could be no relevant incapacity if there were a right to wages during the period of incapacity. In the present case the worker was entitled to full wages for both the public holidays and the fourteen days' annual leave. He was paid those wages and therefore he had no right to compensation for his period of physical incapacity after 19th December.

Reference has already been made to the relevant provisions of the Act. It is necessary to state the substance of the relevant provisions of the award under which the appellant was working. Clause 20 provides that certain days, including Christmas Day, Boxing Day and New Year's Day, shall be observed as holidays, and that no deduction from pay shall be made from wages in respect of any of those holidays. The clause contains complicated provisions which apply in cases where an employee has not worked for a full twelve months.

Clause 21 provides that, subject to certain exceptions, a period of fourteen consecutive days' leave shall be allowed annually to an employee after twelve months' continuous service (less the period of annual leave)—clause 21, par. (*a*). The annual leave is to be exclusive of public holidays—par. (*c*). Paragraph (*e*) provides for the calculation of continuous service. The leave must be allowed and taken, and with some exceptions payment is not to be made or accepted in lieu of annual leave—par. (*h*). Leave is to be given at a time fixed by the employer within a specified period and upon certain notice to the employee—par. (*i*). The employer may allow annual leave before the right to it has fully accrued, and provision is made for an adjustment if the employee leaves the employer's service before completing the twelve months' continuous service in respect of which the leave was granted—par. (*j*).

The *Workers' Compensation Act* was introduced for the purpose of making provision for employees who were incapacitated for work

by reason of injuries received arising out of or in the course of their employment. The amount of weekly compensation (ss. 9 and 11) as distinct from lump sum compensation (s. 16) is fixed as a proportion of the average weekly earnings of the worker. When such a payment is made for total or partial incapacity the payment is related only to loss of wages. It has no relation to pain and suffering or other damage to the worker. It is therefore a reasonable conclusion that the Act was not intended to give compensation to a worker who was in fact paid full wages for the period of his incapacity or who was paid by his employer in respect of that period an amount greater than the amount of workers' compensation which could otherwise have been claimed. But the question is whether the Act does actually bring about this result.

The case for the employer was argued upon the basis that when full wages were paid there was no incapacity within the meaning of the Act because the fact that the worker was paid full wages showed that his economic capacity was unimpaired whatever might be the case with respect to his physical capacity. The strange result of the adoption of this argument in the present case would be that the worker was incapacitated for work within the meaning of s. 9 of the Act on 18th and 19th December, but that he became capable for work during the succeeding period of about two weeks, even though he might not have been able to get out of his bed. In my opinion this argument does not give proper effect to the words of s. 9. The phrase "where total or partial incapacity for work results from the injury" must refer to physical injury resulting in physical incapacity for actually doing work. That incapacity is relevant where it produces an incapacity to earn his living as he did before the injury (per *Evershed* L.J. in *Ruocco* v. *Surrey County Council* (1)) in a market for his labour which was reasonably accessible to him (*Birch Brothers Ltd.* v. *Brown* (2)). Otherwise it is irrelevant for the purposes of the Act. It is in this sense that "incapacity" in s. 9 can be said to mean incapacity to earn wages. A payment of money by the employer does not and cannot terminate or in any way affect the existence of any physical incapacity. In the present case, therefore, I am of opinion that the appellant was in fact totally incapacitated for work during the whole period of annual leave and that the argument that there was no incapacity during that period should not be accepted.

The respondent employer disclaimed any reliance upon s. 13. This section requires that in fixing the amount of the weekly

(1) (1947) 177 L.T. 613, at p. 616. (2) (1931) A.C. 605.

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payment, regard shall be had to any payment, allowance, or benefit which the worker may receive from the employer during the period of his incapacity. If this section is construed as meaning that in fixing the amount of the weekly payment regard is to be had to any payment &c. made by the employer in respect of the period of incapacity, then if the payment in respect of annual leave was made in respect of the period of annual leave the Court should have regard to that payment, and as that payment exceeded the amount which could be claimed as workers' compensation, should make no award for compensation, though if at the time the claim was determined there was a continuing incapacity, a declaration of liability should be made to protect the interests of the worker: see *King* v. *Port of London Authority* (1). A worker may have a continuing right to compensation but may not be entitled at a particular time to payment of compensation (*McCann* v. *Scottish Co-operative Laundry Association Ltd.* (2)). Thus the right to payment of compensation will remain dormant until the incapacity prevents or diminishes the earning of wages (*Everett* v. *Associated Equipment Co. Ltd.* (3)). It is contended for the appellant, however, that it was conclusively determined in *McDermott* v. *Owners of S.S. Tintoretto* (4), that s. 13 applies only to require the assessing tribunal to have regard to such payments as are received "in respect of the incapacity" and received in respect of that period of it which is covered by the compensation: per Lord *Loreburn* (5). (It may be observed that no court has given effect to the literal words of the section, which relate only to payments &c. received *during* the period of incapacity.)

A payment made to a worker by an employer which was in no way related to his employment—e.g., payment for goods purchased—would at once be held to be irrelevant in the application of the section. The object of the section is to enable the assessing tribunal to decide what payments &c. are relevant and what are irrelevant.

It is not entirely easy to construe the words of Lord *Loreburn*—"payment in respect of the incapacity". Workers' compensation itself is plainly paid in respect of incapacity. If an employer pays full wages during a period of incapacity is a distinction to be drawn between a first case where a considerate employer pays out of compassion so that the payment may perhaps be said to be made in respect of the incapacity, and a second case where the

(1) (1920) A.C. 1.
(2) (1936) 154 L.T. 503, at p. 505.
(3) (1947) 2 All E.R. 132.
(4) (1911) A.C. 35.
(5) (1911) A.C., at p. 39.

employer pays because, though he may have no compassion for the worker and believes that the worker caused his injury by his own carelessness, he thinks on the whole that it is prudent, for some reason, to pay his wages? There may be a third case where the employer pays full wages because he considers that he is bound to pay under the contract of employment notwithstanding the incapacity. As a general rule wages are payable only as consideration for work done and if no work is done no wages are payable. Whether this is so depends entirely upon the terms of the contract (*O'Grady* v. *M. Saper Ltd.* (1)). The terms of a contract of employment may be such that wages are payable even though no work is done. Thus a worker may be paid compensation for a period during which he does no work, but the payment of compensation does not alter the terms of a subsisting contract of employment, though *Elliott* v. *Liggens* (2) shows that an employee may be estopped from alleging that wages are due for a period during which he has claimed and taken compensation—the right to which depended upon the absence of a right to wages. Thus there may be a third case where a worker is entitled under his contract to be paid wages notwithstanding incapacity and is paid accordingly. In such a case it would be difficult to say that wages were paid "in respect of the incapacity". The attempt to apply distinctions between such cases and possible other cases in order to decide whether a payment was made "in respect of the incapacity" would, in my opinion, result in confusion and injustice. The judgment of their Lordships in *McDermott* v. *Owners of S.S. Tintoretto* (3) can, in my opinion, be reasonably interpreted as requiring a tribunal to take into account payments made by an employer in his capacity as an employer which are made in respect of the period during which the worker is incapacitated. It is in my opinion by the application of s. 13, and not by reason of the application of any principle that there is no incapacity if wages are paid, that the payment of an amount as wages in excess of the amount claimable as workers' compensation prevents a right to claim payment of compensation arising for any period in respect of which wages are paid.

This view is, in my opinion, supported by the decision of the Court of Appeal in *Funnell* v. *Allen West & Co. Ltd.* (4) and the group of cases reported with that case. In *Funnell's Case* (4) there was in fact a partial physical incapacity for work, but the

(1) (1940) 2 K.B. 469.
(2) (1902) 2 K.B. 84.
(3) (1911) A.C. 35.
(4) (1947) 177 L.T. 220.

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employer nevertheless paid the workman full wages. The County Court judge said that the workman had " to show that at this moment there is a diminution of his earning capacity and, in my opinion, he has entirely failed to show any such thing. He is employed by his old employers, at his old work, and is in receipt of the same wages that men of his standing get who have never had an accident at all " (1). The learned judge then pointed out that if the incapacity increased and he was unable to earn full wages the workman could apply to have compensation re-assessed. It was accordingly held that there was no " compensatable incapacity at this moment ". This decision was upheld in the Court of Appeal (2). It was said that there was physical incapacity but that a physical incapacity which did not reduce the value of the workman's labour in the open market did not entitle him to compensation. Therefore if the worker is in fact receiving full wages he cannot in respect of the period during which he is paid such wages recover workers' compensation, though if there is a continuing incapacity he is entitled to a declaration which will enable him to have compensation assessed if he is no longer paid such wages and the incapacity still persists (*Chandler* v. *Smith* (3); *King* v. *Port of London Authority* (4)). The effect of the cases is, in my opinion, accurately stated in *Willis's Workmen's Compensation*, 31st ed. (1938), at p. 299, where it is said that—" It may happen that the injured workman cannot at the time show that he is entitled to any pecuniary payment, because, for example, his employer is paying his full wages . . . " See also *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 930—" If the injury, though serious, does not cause incapacity for work or interference with the wages, no compensation can be awarded."

The cases show that in order that an employer should become liable actually to pay compensation in respect of a particular period there must be (1) an injury of the worker as defined in the Act; (2) a resulting incapacity for doing the work for which he was earning wages; (3) a consequent economic loss of wages. If in fact he is still receiving those wages in respect of a particular period he fails to establish the third element and the employer is not liable in respect of that period—though he would become liable if, the incapacity continuing, he ceased to pay the wages.

This view of the case meets the argument for the appellant that although he was paid full wages he was during the relevant period disabled from engaging in other work than that which he

(1) (1947) 177 L.T., at p. 220.
(2) (1947) 177 L.T. 220.
(3) (1899) 2 Q.B. 506.
(4) (1920) A.C. 1.

did under his contract of employment. In my opinion this is an irrelevant consideration where he was paid the full wages to which he was entitled under his contract of employment. Those wages are regarded by the Act as the measure of his earning capacity and if he receives them without reduction it cannot be said that his relevant earning capacity is reduced.

Further, it is, in my opinion, immaterial that a certain period of continuous service is required in order to entitle a worker to full holiday pay or pay for annual leave. The fact that certain qualifications are required in order to entitle a worker to holidays or annual leave does not bring about the result that the payment is made in respect of some of the work which he does at some other time—which it would be quite impossible to specify. The payments for holidays and annual leave are expressly payments made in respect of the particular holidays and the particular period of annual leave. This fact distinguishes this case from *Glendenning* v. *State Coal Mines Control Board* (1), where it was held that compensation could not be reduced because the worker had three and a half days' leave due to him. Thus, in the present case, for the reasons already stated, regard must be had to the payments for holidays and annual leave by reason of s. 13 of the Act.

The basis of the decision in *Carmichael's Case* (2) was that the workman's capacity for work was not affected by the Act because he was still able to do on the holidays in question everything which his contract required him to do, namely nothing. In my opinion this fact does not show that the workman was not suffering from incapacity. As I have already said, incapacity for work in s. 9 must mean incapacity for doing work—physical incapacity. But for reasons which I have stated compensation is payable only where there is an economic consequence to the worker in loss of earnings. The fact that he is fully paid for a non-working period shows that he has lost nothing in earnings by his incapacity during that period, but it does not, in my opinion, show that there was no incapacity during that period. Accordingly, although I agree in the result reached by *Carmichael's Case* (2), I am of opinion that that result cannot be supported by the reasoning upon which the court relied. In my opinion the answers given by the Supreme Court to the questions in the case stated were correct and the appeal should be dismissed.

The Court is equally divided in opinion and therefore the decision of the Supreme Court is affirmed and the appeal is dismissed —*Judiciary Act* 1903-1948, s. 23 (2) (*a*).

(1) (1933) 7 W.C.R. 119.

(2) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.

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McTIERNAN J. This case raises questions under the *Workers' Compensation Act* 1926-1947 of New South Wales. They concern the liability of the respondent in respect of an injury received by the appellant whereby he was incapacitated for work during a period which comprised leave and holidays.

The case shows that on 18th December 1947 the appellant was disabled for work while in the respondent's service by an injury which arose out of and in the course of the employment and that the disablement did not cease until 30th December 1947.

It appears that the respondent paid compensation under the Act to the appellant for incapacity for work on the first and second days of the disablement only. The respondent denies that the injury resulted in incapacity for work within the meaning of the Act during any longer period than these two days.

The period beginning on 20th December and ending on 30th December coincided with annual leave and Christmas holidays taken by the respondent's employees in accordance with the Federal industrial award regulating the employment.

The appellant was employed on the terms of that award; it does not purport to relieve the respondent of any liability to which he was subject under the Act to pay compensation in respect of the injury received by the appellant.

The employees of the respondent had a legal right by virtue of the award to leave and holidays with pay. It provided for the " annual close-down " of the plant to permit the employees to take such leave. The plant was closed down for this purpose from 20th December 1947 to 2nd January 1948.

The appellant's employment was not terminated in consequence of the injury. While disabled by it he remained in the respondent's employment. He received from the respondent, when it closed down the plant, wages on the footing that he was entitled to annual leave and holidays on Christmas and Boxing Days during the period beginning on 20th December 1947 and ending on 30th December 1947.

The result was that during this period the appellant was in the respondent's employment, but the contractual relation between them did not involve the element of work. It was a workless period in the employment.

A worker is entitled to receive compensation in accordance with the scale prescribed by the Act " where total or partial incapacity for work results from the injury ", s. 9. The Act makes the earnings of the worker the basis of the compensation. In the case of total or partial incapacity for work the employer is

liable to pay the compensation in the form of a weekly payment during the incapacity. The Act says that in the case of partial incapacity the weekly payment shall not exceed the difference between the amount of the average weekly earnings of the worker before the injury and the average weekly amount he is earning or is able to earn in some suitable employment after the injury. The nature of the case of total incapacity precludes such a limitation on the weekly payment of compensation.

It is argued for the respondent that "incapacity for work", the phrase in s. 9, means incapacity for work in the employment in which the worker was injured and, consequently, if during any period of the physical disablement resulting from the injury, there is no work in the employment during that period, there is no incapacity for work resulting from the injury.

The phrase "incapacity for work" is a set form of words used in Acts of this type and its meaning is well settled. There is nothing in the present Act which shows that the phrase was intended to have a special significance different from its recognized meaning. The decisions in which the meaning of the phrase is discussed are numerous. It is hardly possible to refer to all of them. The respondent's argument on the meaning of the phrase may be tested by reference to some of the cases.

Cardiff Corporation v. *Hall* (1) shows that the principle upon which compensation is given under a Workers' Compensation Act is based on the diminution of earning power by reason of the injury. In that case *Buckley* L.J. said that the Act makes the employer "an insurer of 'capacity for work'" (2). This capacity is the worker's power to earn wages. The principle was again stated in *Harwood* v. *Wyken Colliery Co.* (3).

In *Woodilee Coal & Coke Co. Ltd.* v. *M'Neill* (4) Lord *Dunedin* said "Now, surely, supposing there had been no provisions as to cutting down by prescribing the maximum, the compensation would obviously have been a payment which should make up to the man for the fact that he is an injured man instead of a whole man, and when you put into money what is the difference between an injured man and a whole man you say, 'As a whole man he would have been able to earn so much at this moment; as an injured man he can only earn so much'; and the difference is the compensation."

In *Birch Bros. Ltd.* v. *Brown* (5) Lord *Macmillan* said "My Lords, to be entitled to compensation under the Act a workman

(1) (1911) 1 K.B. 1009.
(2) (1911) 1 K.B., at p. 1027.
(3) (1913) 2 K.B. 158.
(4) (1918) A.C. 43, at p. 48.
(5) (1931) A.C., at pp. 626, 627.

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must be totally or partially incapacitated for work as a result of his having suffered personal injury by an accident arising out of and in the course of his employment. It is now accepted that by incapacity for work is meant incapacity to earn wages by working. The personal injury sustained by the workman may incapacitate him from earning wages either by rendering him physically unfit to work or by preventing him from getting work by reason of some handicap which his injury has imposed upon him in the labour market notwithstanding that he is as physically fit for his work as he was before his accident." This passage clearly brings out the significance of the word " for " in the phrase " incapacity for work ". The loss for which the Act gives the worker compensation is " incapacity for work ".

The submission for the appellant on the meaning of " incapacity for work " mainly depends upon Lord *Macnaghten's* observations in *Ball* v. *William Hunt & Sons Ltd.* (1) :—" Now ' incapacity for work ' as the phrase is used in the schedule seems to me to be a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident." It appears from the opening of the next sentence in that judgment that these observations were not intended to define the phrase conclusively.

Lord *Loreburn* said in the same case :—" In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. I think this view is in accordance with previous decisions of the Court of Appeal. The principle is carefully discussed in *Cardiff Corporation* v. *Hall* (2). And certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury " (3).

Reference may also be made to Lord *Atkinson's* observations in *King* v. *Port of London Authority* (4).

The reasoning in *Williams* v. *Metropolitan Coal Co. Ltd.* (5) is in line with the decisions. In that case *Dixon* J. said, " but it is not true that incapacity is a conception covering nothing but incapacity for the man's former work or for work in his former industry " (6).

The respondent's submission on the meaning of the phrase " incapacity for work " is not supported by authority. The phrase

(1) (1912) A.C. 496, at p. 500.
(2) (1911) 1 K.B. 1009.
(3) (1912) A.C., at pp. 499. 500,
(4) (1920) A.C., at pp. 27, 29.
(5) (1948) 76 C.L.R. 431.
(6) (1948) 76 C.L.R., at p. 449.

does not merely mean inability to work for the employer in whose service the worker was injured. An injury results in incapacity for work, according to the intention of the Act, when it takes away or diminishes the power of the worker to earn wages in some suitable employment.

Admittedly the injury resulted in the total incapacity for work of the appellant on 18th and 19th December 1947. The liability of the respondent to pay compensation under the Act in respect of the injury continued until it ceased to deprive the appellant of the power to work. It did not cease to do so until 30th December 1947. The contractual relation between the appellant and the respondent during the period beginning on 20th December 1947 and ending on 30th December did not alter the fact that during that time the appellant was physically disabled for work by the injury. The contract is not capable of countering the fact that the injury took away the appellant's power to earn wages during the whole of the period from 18th to 30th December. In my opinion the injury resulted in incapacity for work during that period and the respondent is liable under the Act to pay compensation during that period of the incapacity.

The moneys which the appellant received by way of wages during the annual leave and holidays could not operate to terminate the state of incapacity for work. The test is whether he was physically able to earn wages. It is not whether he received wages. In *Ball* v. *William Hunt & Sons Ltd.* (1), Lord *Shaw of Dunfermline* quoted with approval the following passages—" What the arbiter has to consider is not what the man is receiving, whether under the name of wages or charity, from his employer, but what could the man earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident " (*Clelland* v. *Singer Manufacturing Co.* (2)). " In my opinion incapacity for the purposes of the Workmen's Compensation Act is primarily physical incapacity, in which may well be included such personal disfigurement as may lessen the sphere of employment, although the power to work remains as good as before. It does not, in my opinion, include inability to get employment which arises from something not personal to the workman " (*Carlin* v. *Stephen & Sons Ltd.* (3)). Further the test is not whether he might be called upon to do any work during the period beginning on 20th and ending on 30th December 1947.

(1) (1912) A.C., at p. 511.
(2) (1905) 7 F. 975, at p. 983, per Lord *M'Laren*.
(3) (1911) Sess. Cas. 901, at p. 907, per Lord *Salvesen*.

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The test is whether he would have been physically able to work if he had been called upon to work. The fact is that by reason of the injury he was not able to work.

It is irrelevant that the respondent paid him wages under the award in respect of that period unless the payment comes under s. 13. The construction and application of this section are governed by the case of *McDermott* v. *Owners of S.S. Tintoretto* (1) (see also *Considine* v. *McInerney* (2)).

The payments made in respect of annual leave and holidays had no connection with the incapacity. They were made in respect of part of the period of the incapacity but not in respect of the incapacity itself. The payments made under the award and compensation payable under the Act are not overlapping benefits. The respondent made the payments to satisfy its liability under the award to give annual leave and holidays with pay. Section 13 does not cover the discharge or settlement of a debt due to this worker.

It would be against the policy of the Act to treat the payments as a set off against or as equivalent to compensation payable under the Act: cf. *Flynn* v. *Burgess* (3) and *Kirk & Randall Ltd.* v. *Bourke* (4).

The principles upon which the case of *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (5) was decided are not correct.

The appellant is entitled to receive the compensation which the Act gives him. In my opinion he is entitled to compensation computed under s. 9 in respect of the period from 20th to 30th December (both days inclusive) in addition to the moneys paid by the respondent to him.

This conclusion necessarily follows from the facts. The appellant on 18th December 1947 received an injury arising out of and in the course of his employment: the injury totally disabled him until 30th December 1947: during that period the injury rendered him totally unfit to work or to earn any wages. By reason of these facts the respondent was liable to pay compensation to the appellant in accordance with the Act for the whole period from 18th December to 30th December. The respondent was liable to pay an amount of weekly compensation assessed in accordance with s. 9 on the basis that the injury resulted in the appellant's total incapacity. It was not lawful for the respondent's liability to be discharged, either wholly or partially, except in accordance with the Act. The

(1) (1911) A.C. 35.
(2) (1916) 2 A.C. 162.
(3) (1914) 48 Ir.L.T. 132.
(4) (1919) 88 L.J. K.B. 1145.
(5) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.

payments made by the respondent to the appellant could not be set off against the respondent's liability or be taken into account in computing the amount of compensation, except in accordance with the provisions of s. 13. The appellant could not by receiving money from the respondent, independently of the Act, extinguish his statutory right to an award of compensation computed in accordance with the Act. The only amount which could be set off against the respondent's statutory liability was the amount paid by the respondent by way of compensation in respect of the appellant's total incapacity on the first and second days of the disablement. In order to apply s. 13 it is necessary to interpret the section in accordance with *McDermott* v. *Owners of S.S. Tintoretto* (1). The leave and holiday pay had no connection whatever with the appellant's incapacity for work. These payments cannot diminish the respondent's liability to pay compensation to the appellant in accordance with the Act.

In my opinion both questions should be answered " Yes " and the appeal should be allowed with costs. The respondent should pay the costs of the appeal to the Supreme Court.

WILLIAMS J. This is an appeal by A. G. Thompson, a timber worker employed by the respondent under the provisions of a Federal award No. 209 of 1947, from an order of the Full Supreme Court of New South Wales answering in the negative two questions asked in a case stated by the Workers' Compensation Commission of New South Wales under the provisions of the *Workers' Compensation Act* 1926-1947 (N.S.W.). These questions are :—(a) Is an incapacitated employee, working under the terms of the Timber Workers (Federal) Award, entitled for the period of the annual holidays both to compensation and holiday pay ? (b) Is such a worker entitled under the award for the public holidays Christmas Day and Boxing Day both to wages and compensation for each day ?

These questions are in a general form but they relate to an application for compensation by the appellant and can only be answered in relation to the facts of his case. The application was made in respect of an injury which arose out of and in the course of his employment on 18th December 1947 and which totally incapacitated him for work from 19th to 31st December 1947.

Under the terms of the award the respondent was entitled to close down its plant annually for the purposes of allowing annual leave to all or the bulk of its employees and its plant was so closed down for a period including the period 20th December to 31st December 1947. The respondent paid the appellant compensation

(1) (1911) A.C. 35.

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for the portion of 18th December that he was unable to work on account of his injury and for the whole of 19th December 1947. It also paid the appellant the sum of £15 17s. 8d. representing two weeks' wages at £6 12s. 6d. per week and holiday pay for Christmas and Boxing Days amounting to £2 12s. 8d. These amounts were paid so that the appellant should receive in full two weeks' wages before going on leave and holiday pay for Christmas and Boxing Days as provided in the award. Nevertheless the appellant applied to the Commission claiming compensation for total incapacity at the rate of £5 15s. 0d. per week, which included the period from 20th to 31st December. The respondent denied liability on the ground that in respect of the period for which compensation was claimed the injury did not disable the worker from doing everything that he was required to do under his contract of employment with the respondent in order to entitle him to receive wages for such employment so that the injury had no relevant disabling effect and that in respect of Christmas and Boxing Days the appellant was paid holiday pay. The Commission found that the appellant was not entitled to compensation for Christmas and Boxing Days, but was entitled to compensation for the rest of the period 20th December to 31st December 1947.

The Supreme Court answered both questions in the negative and in my opinion this was right. During the whole of the period from 20th to 31st December the appellant was not incapacitated from earning the wages due to him under his employment because under the terms of the award he was entitled to holiday pay and two weeks' wages before going on annual leave and he was entitled to these payments without having to do any work in this period. The award provides so far as material that a period of fourteen consecutive days' leave shall be allowed annually to an employee after twelve months' continuous service (less the period of annual leave) and that each employee before going on leave shall be paid two weeks' wages. The award also provides that an employer may allow annual leave of an employee before the right thereto has accrued due and that where the employee subsequently leaves or is discharged from the service of the employer before completing the twelve months' continuous service in respect of which the leave was granted, the employer may for each one completed month of the qualifying period of twelve months not served by the employee deduct from whatever remuneration is payable upon the termination of the employment one-twelfth of the amount of wages paid on account of the annual leave. It is not clear on the facts whether on 20th December 1947 the appellant had earned annual leave with full pay by having done fifty weeks' continuous

service prior to that date or whether he had only worked in respect of the relevant annual period from 1st September 1947. But this is immaterial because the appellant remained in the employment of the respondent and did not apply for compensation until 9th June 1948 and the award was not made until 9th December 1948, by which time his right to the pay for annual leave had become absolute.

As *Jordan* C.J. pointed out in *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (1), "The Workers' Compensation Act, 1926, as amended, provides that a worker who has received a personal injury arising out of or in the course of his employment shall receive compensation; but it makes no provision for payment of compensation except in cases where death or total or partial incapacity for work result from the injury. Hence, it is a condition of a worker's right to receive compensation in respect of any period that the injury should have totally or partially incapacitated him for work during that period, that is, to some extent incapacitated him from obtaining or performing work of the kind in which he was employed at the time of the accident, or of earning full wages thereby, to the same extent as he could before the injury, assuming such work to be available." In *Aitkin* v. *Goodyear Tyre & Rubber Co. (Aust.) Ltd.* (2) his Honour also pointed out "Since the Act makes no provision for payment of compensation except in these two classes of case (that is, where death or total or partial incapacity results from the injury), it is clear that it is against the economic, not the physiological, results of employment injury that the Act provides insurance in the name of compensation—against injury which causes either death leaving dependants on the one hand, or total or partial incapacity for work on the other."

In *Ball* v. *William Hunt & Sons Ltd.* (3) Earl *Loreburn* L.C. said: "I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch." Lord *Macnaghten* said: "Now 'incapacity for work' as the phrase is used in the schedule seems to me to be a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident" (4). Both these statements have been frequently cited in subsequent cases. Earl *Loreburn's* statement seems to me to be more favourable to the employer than that of Lord *Macnaghten* because the latter said that incapacity

(1) (1944) 44 S.R. (N.S.W.), at p. 236; 61 W.N., at p. 133.
(2) (1945) 46 S.R. (N.S.W.) 20, at p. 22; 62 W.N. 233, at p. 235.
(3) (1912) A.C. 496, at pp. 499, 500.
(4) (1912) A.C., at p. 500.

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for work occurs whenever the injury affects the capacity of the worker to earn the same wages at the work in which he was employed at the time of the accident, whereas Earl *Loreburn* said that the injury only causes incapacity for work when it results in the worker being unable to earn the same wages as before, not necessarily at the same work but at any form of work reasonably accessible to him. In *Ruocco* v. *Surrey County Council* (1) *Evershed* L.J. said that " on the basis of the statements by Earl *Loreburn* and Lord *Macnaghten* which have been read, the test to be applied is in reference, not to the fact of the applicant's ability physically in all respects to do the work which he did before, but rather to the fact of his capacity to earn his living as he did before the accident." There are statements to the same effect in *Williams* v. *Metropolitan Coal Co. Ltd.* (2). The present appellant was physically incapacitated for work for a short period but during the whole of this period he was paid his full pre-accident wages. There is no evidence that the injury left any after effects which might in the future make his labour saleable for less than it would otherwise fetch. As *Jordan* C.J. said in *Carmichael's Case* (3) :—" Hence, the injury. . . . did not disable the worker from doing everything that he was required to do under his subsisting contract of employment—namely, nothing—in order to be entitled to receive his full wages . . . the injury had no relevant disabling effect." The appellant's physical incapacity for work during its short existence at no time produced any economic loss. He was able to earn his full wages at the work at which he was employed at the time of the accident because it happened that in this period he was entitled to full wages without having to do any work. He was not therefore incapacitated for work within Lord *Macnaghten's* test, and no case arose for applying Earl *Loreburn's* test because, whilst he remained in his existing employment, it was unnecessary to inquire whether there was some other equally profitable employment reasonably accessible to him. He was not therefore entitled to any compensation, and in the absence of any evidence of any possible after effects to even a declaration of liability. His present application fails, I think, upon the reasoning of the Court of Appeal in *Funnel* v. *Allen West & Co. Ltd.* (4) and *Bailey* v. *Ransomes & Marles Bearing Co. Ltd.* (5). The appellant was not paid any wages out of compassion. He was paid his full wages because he was legally entitled to them. His disability caused no loss of earning capacity

(1) (1947) 177 L.T., at p. 616.
(2) (1948) 76 C.L.R., at pp. 444 (*Starke* J.); 449, 450 (*Dixon* J.).
(3) (1944) 44 S.R. (N.S.W.), at pp. 236-237; 61 W.N., at p. 133.
(4) (1947) 177 L.T. 220.
(5) (1947) 177 L.T. 221.

present or future. During the whole of the period he was able to earn his living as he did before the accident. As *Scott* L.J. said in *Everett* v. *Associated Equipment Co. Ltd.* (1), his right to compensation was dormant and it remained dormant during the whole period of his incapacity.

It was contended that once the Commission found that the appellant was incapacitated for work during the period 20th to 31st December 1947, he became entitled to an award of compensation calculated in accordance with s. 9 of the *Workers' Compensation Act* and that payments which the respondent made to him during this period could only be taken into account, if at all, under s. 13 of the Act. In my opinion s. 13 has nothing to do with the facts of the present case. It only operates where the worker is entitled to an award of compensation. Here he was not entitled to any such award.

I would dismiss the appeal.

WEBB J. I would dismiss this appeal.

The appellant, a timber worker, was injured by accident and totally incapacitated on 18th December 1947 and so remained until 31st idem. The respondent paid the appellant workers' compensation for part of 18th and the whole of 19th December. During the period 20th December to 1st January 1948, inclusive, the respondent paid the appellant two weeks' wages for annual leave, and also holiday pay for Christmas Day, Boxing Day and New Year's Day. The payments were made under the Timber Workers' Award (Federal). The award required annual leave to be taken; and, except in circumstances that did not obtain here, payments in lieu were forbidden. The Full Court of the Supreme Court of New South Wales held in effect that workers' compensation was not payable after 19th December 1947.

Workers' compensation is given for loss of the power of earning (*McDermott* v. *Owners of S.S. Tintoretto* (2)), and that loss is, I think, measured in a case like this by what the worker would have earned, and not by what he could have earned, if he had not been incapacitated. His employment was not terminated by his incapacity: he continued to be the employee of the respondent. Section 9 (1) of the New South Wales Act, like the corresponding provision of the English Act, provides that compensation is to be a proportion of past earnings in the service of the employer liable to pay the compensation. Lord *Macnaghten* said in *Ball* v. *Wm. Hunt*

(1) (1947) 2 All E.R., at p. 134.

(2) (1911) A.C., at p. 41, per Lord *Atkinson*.

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& Sons Ltd. (1), that compensation under the English Act was for loss or diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident. Later, in *Harwood* v. *Wyken Colliery Co.* (2), *Duckley* L.J. observed that the workman would be compensated, if within the statutory limits, he were put in a position as good as that in which he would have been if he had not been injured. If the appellant had not been injured he would have been on paid annual leave from 20th December 1947 until 1st January 1948, i.e., beyond the period covered by his incapacity; so that his incapacity did not reduce his earnings. But although he lost no pay during his incapacity he had no recreation as distinct from rest. The award suggests that an annual rest period, but not necessarily a recreation period, of fourteen days is essential for the wellbeing of timber mill workers, as it requires the leave to be taken and prohibits acceptance of a monetary equivalent. If recreation, and not merely rest, was necessary, and the appellant could have obtained leave for it, it would have been without pay. Without compensation then the appellant would not in fact have been in a position as good, within the statutory limits, as that in which he would have been if he had not been injured. However, as stated by Lord *Atkinson* (3) and Lord *Macnaghten* (1), the compensation is for loss of the power of earning, and loss of earning power does not include loss of recreation. There was no submission to the contrary. Loss of earning power resulting from incapacity to work due to injury by accident arising out of or in the course of employment does not necessarily entitle the injured worker to compensation. Take, for example, an employee who works during the day for one employer, but at night for another employer, in the same industry, but on different tasks. The employee suffers an injury at his day work which does not incapacitate him from performing the day work, but does incapacitate him from performing the night work, e.g., the injury causes the loss of fingers which does not interfere with the performance of the day work but prevents him from doing the night work. He cannot recover compensation, although he suffers a loss of earning power. It follows that mere loss of earning power does not give a right to compensation. It must be a loss of earning power in respect of the work being done when the injury occurs. Until that loss is suffered there is no right to compensation. No such loss occurred here. Payment for the holidays and leave period prevented that.

(1) (1912) A.C., at p. 500.
(2) (1913) 2 K.B., at p. 165.
(3) (1911) A.C., at p. 41.

If I am wrong in holding that the test in a case like this, where the contract of employment continued throughout the period of incapacity, is what the employee would have earned, and not what he might have earned, but for his incapacity, then I agree with the Chief Justice that leave pay is a proper deduction under s. 13, as it was a payment during and in respect of the period of his absence from work and because of such absence. It mitigated the loss of earning power during the period of incapacity and in the circumstances I think it is properly set off against that loss. The contrary is not, I think, indicated by Lord *Loreburn's* test in the *Tintoretto Case* (1), i.e., that the payment to be a set off against compensation must be in respect of the incapacity. His Lordship must be taken to have had in mind the economic consequences of the incapacity, and not the incapacity itself, i.e., the absence from work and consequent loss of earning power. I do not think we should take his Lordship as indicating that the employer should pay twice for this economic result to the employee by refusing to allow the employer a set off of payments made for the period under the contract of employment, more particularly when the compensation is required to be based on wages earned in the same employment. It is immaterial, I think, that the payment of compensation is for an enforced absence. As a matter of fact, the respondent company closed down for the period of annual leave, as it had the right to do under the award: the employees had no option but to absent themselves from work during the period in question; but I do not rely on this right to close down. Keeping in mind that the compensation is not for the accident itself, or for pain or suffering, but for the economic consequences of absence from work and loss of earning power, no reason for refusing a set off under s. 13 of leave pay suggests itself to me. Payment for the leave period and payment of workers' compensation if made would be for the same purpose, i.e., for the support of the appellant during a particular period. The leave payment is not properly regarded merely as a sum based on past services: it is a payment to the employee for his support during a specified period, his period of leave, which in this case included the whole of the period of his incapacity for which compensation is claimed. If workers' compensation is payable in addition to the holiday and leave payments, then the legislature has required a double payment for the same period and purpose. I do not think that was intended.

(1) (1911) A.C., at p. 39.

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FULLAGAR J. The facts of this case have already been stated. The relevant provisions of the Act are, I think, the following. Section 7, read with the definition of the word "injury" which is contained in s. 6, provides that a worker who has received personal injury arising out of or in the course of his employment shall receive compensation from his employer in accordance with the Act. The words "in accordance with the Act" send us, for the purposes of this case, to s. 9, which provides that "where total or partial incapacity for work results from the injury" the compensation payable shall include (a) a "weekly payment" in respect of the worker, (b) a "weekly payment during the incapacity" in respect of his wife and children, and (c) in certain circumstances a "weekly payment during incapacity" in respect of certain dependants. Section 13 provides that, in fixing the amount of the weekly payment, regard shall be had to any payment allowance or benefit which the worker may receive from the employer during the period of his incapacity.

I will consider the case first apart altogether from s. 13. The case states that Thompson was injured on 18th December 1947, and that the injury arose both out of and in the course of his employment with the respondent. It further states that he was "thereby incapacitated for work" from 19th to 31st December 1947, both days inclusive. This has been rightly assumed, I think, to mean that total incapacity for work resulted from the injury in the sense that Thompson, by reason of the injury, was incapable of doing any work during the period mentioned. If the words "total incapacity for work" in s. 9 mean or include incapacity to do any work, it would seem clearly to follow that all the conditions required by the statute were fulfilled, and that Thompson was entitled to compensation on the basis of total incapacity in respect of the period in dispute.

Mr. *Barwick* argued that "incapacity" did not mean or include mere inability to work. He said that it meant inability to earn what the worker would, if he had not been injured, have earned during the relevant period. And he said that, if the worker remained in the employment of the one employer during the relevant period, what had to be considered was what he would have earned in that employment if he had not been injured. Here it would be correct, I think, to say that the worker continued in the same employment before the injury, during the period of his inability to work and after the cessation of that inability. If he had not been injured, he would have earned no more than he did in fact receive at the hands of his employer. There was, therefore, if the

argument is sound, no incapacity in the relevant sense. From the point of view of the argument it does not matter whether we regard the "leave pay" and the "holiday pay" (both of which were paid before the leave period commenced) as wages paid in respect of a period during which the worker was not required to work or as a bonus in respect of past services paid on the eve of the commencement of the leave period. If it were a relevant question, I think I should regard the former view as more in accordance with reality. One would naturally speak of the worker as having "leave on full pay" as distinct from "leave without pay," and as receiving "holiday pay".

I think that I have fairly stated the argument presented for the respondent. I think that it adopts the only legitimate analytical approach to the question which arises in this case. It recognizes that the question turns on the meaning of the words "incapacity for work". But I am of opinion that it cannot be supported. A man is totally incapacitated for work when he is, by reason of his injury, physically unable to work. The words in their natural and primary sense mean that. When their meaning has been expounded by reference to inability to earn wages, the purpose has been to make the meaning more specific, and the result has been to extend rather than restrict the meaning. Thus in *Ball* v. *William Hunt & Sons Ltd.* (1) the worker had recovered his ability to work, but, because the accident had left him with only one eye, he found it impossible to obtain employment. The House of Lords held that he was entitled to compensation. It was with reference to the facts of that case that Lord *Loreburn* (2) delivered his often quoted definition of incapacity for work. So Lord *Macnaghten* (3) spoke of "inability to earn wages, or full wages, as the case may be": Lord *Atkinson* (4) spoke of "loss of the power to earn wages": and Lord *Shaw* (5) of the "incapacity to earn a wage". The case of *Birch Bros. Ltd.* v. *Brown* (6) was a similar case, and Lord *Macmillan* said:—"It is now accepted that by incapacity for work is meant incapacity to earn wages by working" (7). Incapacity to earn wages by working includes physical inability to perform any work. The cases cited, and others to the same effect, decide that it includes more. To say that, although there is physical inability to do any work, yet, because wages have been paid, there is no incapacity for work is, I think, to misconceive the purpose and effect of what was said

(1) (1912) A.C. 496.
(2) (1912) A.C., at pp. 499, 500.
(3) (1912) A.C., at p. 500.
(4) (1912) A.C., at p. 504.
(5) (1912) A.C., at p. 507.
(6) (1931) A.C. 605.
(7) (1931) A.C., at pp. 626, 627.

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by the learned Lords in the cases cited and to attribute to the words " incapacity for work " a meaning which they cannot bear. I think that this is the real and sufficient answer to the argument for the respondent. The matter, however, is by no means free from authority.

The respondent's case is supported by a decision of the Full Court of New South Wales, in which, on facts which I regard as indistinguishable from those of the present case, the right of the worker to compensation was denied. The case is *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (1). The reasons for the decision were given by *Jordan* C.J., with whom *Halse Rogers* J. and *Roper* J. concurred. I am not quite sure whether the decision really rests fundamentally on the same interpretation of the expression " incapacity for work " as was put by Mr. *Barwick* or whether it rests rather on an implication from the nature and purpose of the statute. *Jordan* C.J. said :—" The Workers' Compensation Act 1926, as amended, provides that a worker who has received a personal injury arising out of or in the course of his employment shall receive compensation ; but it makes no provision for payment of compensation except in cases where death or total or partial incapacity for work result from the injury. Hence, it is a condition of a worker's right to receive compensation in respect of any period that the injury should have totally or partially incapacitated him from obtaining or performing work of the kind in which he was employed at the time of the accident, or of earning full wages thereby, to the same extent as he could before the injury, assuming such work to be available " (2).

So far the matter seems to be approached from the point of view that the case turns on the meaning of " incapacity for work ", as I think it must turn. But his Honour proceeds :—" In the present case, the contract of employment was not terminated by the employer. During the three days in question, it called for no work at all, but conferred on the employee a right to full wages without work, and these were duly paid to him. Hence, the injury, as regards these three days, did not disable the worker from doing everything that he was required to do under his subsisting contract of employment—namely, nothing—in order to be entitled to receive his full wages for those three days. This is, in my opinion, sufficient to dispose of the case. For the three days in dispute, the injury had no relevant disabling effect " (3).

(1) (1944) 44 S.R. (N.S.W.) 233 ; 61 W.N. 131.

(2) (1944) 44 S.R. (N.S.W.), at p. 236 ; 61 W.N., at p. 133.

(3) (1944) 44 S.R. (N.S.W.), at pp. 236-237 ; 61 W.N., at p. 133.

The view thus finally expressed seems to be that there was incapacity for work, but that it was not a relevant incapacity for work, because the worker was in employment and was not required to work in order to receive his wages for the three days in dispute. This rather seems to me to introduce an implication into the statute, an exception thought to be properly implied from its nature and object.

Speaking with the greatest respect, I am unable to think that *Carmichael's Case* (1) was rightly decided. In so far as it rests upon a restrictive interpretation of the words "incapacity for work", it does not seem to me that it can be supported. The words cannot, as I have said, be read as referring to anything but a physical condition, and the question of the existence or non-existence of a physical condition cannot be answered by reference to the terms of a particular contract or to what is required for the performance of a particular contract. It is true, of course, that the fact that a worker is being paid full wages by his employer is relevant to the question whether an injury has resulted in incapacity for work. But this is only because prima facie employers do not pay full wages to men who are unable to do any work. And it is never conclusive evidence. It would, of course, be conclusive evidence if "incapacity for work" meant inability to obtain wages from a particular employer. But the expression means inability for physical reasons to sell his labour in the open market. This is the whole point of *Funnell* v. *Allen West & Co. Ltd.* (2). In that case *Morton* L.J. (as he then was), speaking for the Court of Appeal, said :—"The workman appeals, and his counsel contend that the county court judge failed to apply Lord *Loreburn's* definition of 'incapacity for work' in *Ball* v. *William Hunt & Sons Ltd.* (3). They contend that he wrongly took the view that there cannot possibly be a partial incapacity for work if a man is employed by his old employers at his old work, and is in receipt of the same wages as those received by men of his standing who have never had an accident. We agree that a partial incapacity for work may exist in the circumstances just stated; for instance, the employers may be paying the workman, out of compassion, more than his labour is actually worth in the open market" (2). I would add that they might be paying him because an industrial award compelled them to pay him, in which case the position would be the same, though a question might arise as to whether

(1) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.
(2) (1947) 177 L.T. 220.
(3) (1912) 106 L.T. R. 911, at p. 912; (1912) A.C., at p. 499.

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s. 13 or its counterpart could be invoked. *Morton* L.J. proceeded :— " No doubt the fact that a man is doing his old work, and is in receipt of the same wages as those received by men of his standing who have never had an accident, is strong evidence that there is no ' incapacity for work ' within Lord *Loreburn's* definition ; but it is not conclusive evidence " (1). His Lordship then proceeded to examine the reasons which the county court judge had given for his decision, and came to the conclusion that he had not misunderstood or misapplied Lord *Loreburn's* definition. Certain passages in the judgment indicated that the learned judge had " had the open market in view ". If he had not had the open market in view, but had acted on the assumption that the question of incapacity for work was conclusively determined by reference to the relation between the worker and his continuing employer, the case would have been sent back to him. The well-established position is clearly put by *Starke* J. in *Williams* v. *Metropolitan Coal Co. Ltd.* (2). His Honour said :—" Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that *in the open labour market* his earning capacity in the future is less than it was before the injury (*Birmingham Cabinet Manufacturing Co.* v. *Dudley* (3) ; *Jackson* v. *Hunslet Engine Co.* (4)). The words " in the future " in this passage refer, of course, to the time of commencement of the incapacity, and it does not matter whether the duration of the incapacity is one week or many years. The italics are mine.

In so far as the decision in *Carmichael's Case* (5) depends on an implication from the nature and object of the Act, it is, in my opinion, at variance with the whole trend of English and Australian authority. The Act has always been construed from the point of view that its nature and object are those of an Act to benefit the worker. In *Williams* v. *Metropolitan Coal Co. Ltd.* (2), in a passage following immediately on that which I have quoted above, *Starke* J. said :—" It is erroneous to say that the whole object of the Act is to compensate a worker for injury whether by disease or otherwise only to the extent to which he is thereby incapacitated from earning his full wages in the employment in which the injury arose, or that the clear intention of the Act is to limit its operation to the matter of restoring the financial position of the

(1) (1947) 177 L.T. 220.
(2) (1948) 76 C.L.R., at p. 444.
(3) (1910) 102 L.T. 619.
(4) (1915) 84 L.J. K.B. 1361.
(5) (1944) 44 S.R. (N.S.W.) 233 ; 61 W.N. 131.

worker in relation to the industry in which he had been working at the time of the injury." Striking examples of a refusal to introduce any implication which would take away or limit the right of the worker to compensation if the statutory conditions are literally fulfilled are to be found in *McCann* v. *Scottish Co-operative Laundry Association Ltd.* (1), and the cases collected in the judgment of Lord *Thankerton* (2). These cases show that compensation is payable during incapacity resulting from an accident notwithstanding that the worker, even if he had met with no accident, could not have earned anything because of some disease unconnected with the accident, or because of another accident unconnected with the employment, or because he is undergoing a term of imprisonment, or because of a strike. As *Hamilton* L.J. (as he then was) said in *Harwood* v. *Wyken Colliery Co.* (3) :—" The Act is a guarantee of workmen against the risk of accident. It is not founded on indemnity, and the ideas of retribution for wrongdoing and of *restoratio in integrum* are foreign to it." *Hamilton* L.J. did not, of course, mean that (apart from provisions which correspond to s. 16 of the New South Wales Act) the Act gave compensation for injury as such. He meant that the Act must be allowed to speak for itself, and that its own express provisions with regard to the consequences of an accident are not to be qualified or limited by the importation of ideas developed in the law of tort and in equity. So the receipt of a pension or superannuation allowance is never held to destroy or limit the worker's right to compensation, unless it can be brought within a provision corresponding to s. 13 of the New South Wales Act as interpreted by the courts. See, e.g., *Yates* v. *Hemsworth Rural District Council* (4).

It remains only to consider whether s. 13 of the Act can be applied in this case. Actually Mr. *Barwick* expressly declined to invoke s. 13, and I think that he was right in so declining, because the authorities seem to be conclusively against its application to such a case as the present. We begin with *McDermott* v. *Owners of S.S. Tintoretto* (5). We may note in passing that we do here find an implication introduced, but it is an implication in favour of the worker. In that case the worker, a seaman, had received certain payments by way of maintenance under the Merchant Shipping Acts, and Lord *Loreburn* L.C., said :—" It is clear that compensation is to begin exactly where the right to maintenance ends. Reading the words of the Act which we

(1) (1936) 154 L.T. 503.
(2) (1936) 154 L.T., at p. 506.
(3) (1913) 2 K.B., at p. 170.
(4) (1929) 22 B.W.C.C. 649.
(5) (1911) A.C. 35.

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have to construe in the light of what I have just said, I have no difficulty in seeing where their generality is limited. It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the county court judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament" (1). Lord *Atkinson* said that the provision in question meant that regard should be had to "any payment allowance or benefit which the workman should receive from his employer *in respect of the injury and the consequent incapacity to earn*" (2). It is the language of Lord *Loreburn* that is always quoted. Both Lord *Loreburn's* language and the (perhaps more general) language of Lord *Atkinson* must, it was said, be read in the light of the actual facts of the case, and it is clear that the actual decision does not govern the present case. But the rule laid down has been held to be of general application. It has been used as providing the test by which it is to be decided whether a pension or superannuation allowance is to be brought into account against the worker. In *Considine* v. *McInerney* (3) it was held that the particular allowance there in question had to be taken into account, but Lord *Buckmaster*, Lord *Loreburn* and Lord *Atkinson* all applied the test laid down in the *Tintoretto Case* (4). Lord *Buckmaster*, after coming to the conclusion that the worker would not have been entitled to the superannuation allowance but for the fact that he had become physically infirm, said: "The occasion, therefore, on which the pension was payable was inseparable from his injury" (5). Lord *Loreburn* said:—"These words are quite general, but it is obvious there must be some limitation, or the declared purpose of the Act will be frustrated. They can refer only to what the workman receives in respect of the incapacity. If that were not so, then the employer might be relieved of his statutory burden by the accident that he had given to the workman some money or some benefit for a perfectly different purpose, or connected with a perfectly different duty" (6). Lord *Atkinson* said that it was obvious that a payment allowance or benefit to be taken into account was a payment allowance or benefit "given in respect of that for which the compensation is to be awarded, namely, the

(1) (1911) A.C., at p. 39.
(2) (1911) A.C., at p. 41.
(3) (1916) 2 A.C. 162.
(4) (1911) A.C. 35.
(5) (1916) 2 A.C., at p. 171.
(6) (1916) 2 A.C., at p. 172.

injury received by the workman" (1). (See also *Langford* v. *Port of London Authority* (2); *Yates* v. *Hemsworth Rural District Council* (3) and *Williams* v. *Metropolitan Coal Co. Ltd.* (4)). In *Denning* v. *Metropolitan Water, Sewerage and Drainage Board* (5) Judge *Perdriau*, referring to s. 47 of the Act, which contains a provision analogous to that of s. 13, said:—"In my opinion the phrase 'benefits under any other Act' in subsection (1) of section 47 means those which as a result of his injury the worker is entitled to under some Act other than the *Workers' Compensation Act*; there must be a connecting link between the injury and the benefits —e.g., sick leave on full pay or other benefit which accrues as a result of the injury." In *Glendenning* v. *State Coal Mines Control Board* (6) the same learned Judge said:—"In *Denning* v. *Metropolitan Water, Sewerage, and Drainage Board* (7) I ruled that the term 'benefits under any other Act' in section 47 (1) of the *Workers' Compensation Act*, 1926-1929, did not include the value of extended and annual leave under an industrial award, and that the cash value of these paid to the deceased worker's widow were not deductible from the lump sum payable to her and other dependants under the said Act. I then expressed the opinion that there must be a connecting link between the injury and the benefits before the value of the benefits could be deducted from the compensation payment, and, I think, a similar principle should be applied here." In these two passages his Honour was, in my opinion, correctly interpreting high English authority.

In the present case the payments in question had nothing whatever to do with the accident or the injury or the incapacity. It follows, in my opinion, that s. 13 has no application to the case.

In my opinion this appeal should be allowed.

KITTO J. On 18th December 1947 the appellant received an injury arising out of or in the course of his employment with the respondent, and thereupon he became entitled under s. 7 (1) of the *Workers' Compensation Act*, 1926-1947 (N.S.W.), to receive compensation from the respondent in accordance with the Act. He was physically disabled by the injury from doing any work until 2nd January 1948, on which date he resumed work with the respondent. The contract of employment subsisting at the time of the injury continued in force throughout the period of the

(1) (1916) A.C., at pp. 175, 176.
(2) (1926) 95 L.J. K.B. 887.
(3) (1922) 22 B.W.C.C. 649.
(4) (1948) 76 C.L.R. 431.
(5) (1932) 6 W.C.R. 158, at p. 163.
(6) (1933) 7 W.C.R. 119, at p. 123.
(7) (1932) 6 W.C.R. 158.

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appellant's disability. Under the industrial award which prescribes the wages and conditions of his employment under that contract, he was not entitled to wages in respect of that portion of 18th December during which he was unable to work or in respect of 19th December, and he was paid compensation in accordance with the Act in respect of those days on the basis of total incapacity for work. But in respect of the balance of the period of his disability he was entitled under the award to be paid, and he was paid, full wages (including holiday pay for public holidays), the reason being that that was the period fixed pursuant to the award for his annual leave on full pay. The question is whether he was entitled to be paid, in addition to his wages, workers' compensation on the basis of total incapacity for work in respect of the period of his annual leave.

As I have said, the receipt of the injury entitled the appellant to receive compensation in accordance with the Act. The Act did not enable him to be awarded any sum by way of compensation unless his case fell within s. 9, i.e., unless his injury resulted in "total or partial incapacity for work". In fact it resulted in total inability to do any work, and prima facie that would mean that it resulted in his total incapacity for work within the meaning of the section. But it was contended for the respondent that because the appellant's contract of employment was not terminated, and because in accordance with its terms he was entitled to receive and did receive full wages throughout the period of his disability, his injury should be held not to have resulted in an incapacity for work within the meaning of the section for which any amount of compensation could be awarded. The argument was that, where the employment, out of or in the course of which an injury to a worker arises, continues until the effects of the injury have ceased, the only capacity of the worker which it is material to consider is his capacity to perform such work (if any) as, according to the terms of the employment contract, he has to perform in order to become entitled to his full wages; and that therefore, where those terms entitle the worker to receive full wages without performing any work at all, his inability to do any work does not involve incapacity for work within the meaning of the section for which compensation is to be paid. The judgment of the Full Court of New South Wales in *Carmichael* v. *Colonial Sugar Refining Co. Ltd.* (1), if it be correct, supports this argument.

In my opinion, the argument misconceives the effect of the decisions of the courts upon the provisions of the English *Workmen's*

(1) (1944) 44 S.R. (N.S.W.) 233; 61 W.N. 131.

Compensation Acts corresponding with s. 9 of the New South Wales Act. It is true that those decisions establish that " incapacity for work " is an economic and not a physical fact, and that it is against the economic, not the physiological, results of employment injury that the Act provides insurance in the name of compensation: *Aitkin* v. *Goodyear Tyre & Rubber Co. (Aust.) Ltd.* (1). But it is I think, erroneous to interpret such statements as meaning that compensatable incapacity for work cannot exist where the injury does not result in any loss of wages under the contract of employment in force at the time of the injury. Loss of wages is in most cases a result of, but it does not itself constitute, the relevant economic fact. That fact is the inability, or the reduced ability, by reason of a physical deficiency, to sell work for wages. " It is now accepted that by incapacity for work is meant incapacity to earn wages by working " (*Birch Brothers Ltd.* v. *Brown* (2)). Thus compensation is awarded, not for loss of wages, nor for impairment of physical condition *per se*, but for the economic aspect of that impairment, namely a lost or diminished ability to obtain wages by working.

This is made abundantly clear by Lord *Loreburn's* frequently quoted definition in *Ball* v. *William Hunt & Sons Ltd.* (3):— " There is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch." The inquiry, then, must be as to the result of a man's physical defect in relation to the market for his labour. If his physical defect is such that he cannot go into the market at all, because he cannot offer to perform any labour, it seems to me to follow necessarily that he has a total incapacity for work. He has no labour to sell; and to say that nevertheless he is not incapacitated for work, because he is getting wages under a continuing contract of employment which in the circumstances does not require him to give any labour in return for wages, appears to me to involve a complete desertion of Lord *Loreburn's* definition. His Lordship's expression " any market reasonably accessible to him " has often been paraphrased as " the open market "; see, for example, *Funnell* v. *Allen West & Co. Ltd.* (4). It is the general market in which the worker, but for his injury, could reasonably have offered his labour. To concede, as I think one must, that

(1) (1945) 46 S.R. (N.S.W.), at p. 22; 62 W.N., at p. 235.
(2) (1931) A.C., at pp. 626, 627, per Lord *Macmillan*.
(3) (1912) A.C., at pp. 499, 500.
(4) (1947) 177 L.T. 220.

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total incapacity for work exists whenever an injury makes a worker's labour unsaleable in the general market for such labour, is to admit that its existence is not disproved by the fact that a particular employer is paying him wages for doing nothing. Indeed, the fact that a worker, after receiving an injury, is found to be in receipt of wages is never decisive of capacity for work. This fact may or may not point towards the conclusion that he has capacity for work; and whether or not that is the proper conclusion depends upon the circumstances. To the extent to which the wages are produced by anything other than work, e.g., by the compassion of the employer, the receipt of them is irrelevant to the question of capacity for work: *Funnell* v. *Allen West & Co. Ltd.* (1); *Hawkins* v. *Australasian United Steam Navigation Co. Ltd.* (2); and the clearest possible case of wages being produced by something other than work would seem to be the case where wages are paid because of a legal obligation to pay them for a period in which no work is performed.

It was said in the Supreme Court that the right to claim compensation and the right to be paid wages are mutually exclusive rights; and the Court applied a statement by Judge *Perdriau* in *Davey* v. *Commissioner for Railways* (3) that "it is clear that compensation is to begin exactly where the right to full wages ends". These statements, in my opinion, propound an erroneous test of incapacity for work. Such a test finds no warrant in the words of the Act, or, so far as I know, in any of the English decisions. One case relied upon in support of them is *Elliott* v. *Liggens* (4); but that case is to be understood, I think, as deciding only that, by claiming and accepting compensation on the basis that his earnings after the accident were less than his earnings before it, a worker is estopped from asserting that he was entitled during the period covered by the compensation to wages at the same rate as before the accident. Again, in *Birch Bros. Ltd.* v. *Brown* (5), Lord *Macmillan* said: "Even the actual obtaining of employment by a handicapped workman may not prove his recovered economic capacity to earn wages, for the job may have been given to him out of philanthropy or be merely nominal. In such a case the compensation is diminished or ended not because the workman is really proved to have recovered his earning capacity but because wages and compensation are mutually exclusive." But this means, I think, what the same learned Lord said in *McCann*

(1) (1947) 177 L.T. 220.
(2) (1938) 12 W.C.R. 99, at pp. 108-111.
(3) (1944) 18 W.C.R. 179, at p. 182.
(4) (1902) 2 K.B. 84.
(5) (1931) A.C., at p. 630.