[HIGH COURT OF AUSTRALIA.]

LANG . . . . . APPELLANT;
DEFENDANT,

AND

WILLIS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Aug.* 21, 22; *Nov.* 28.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Defamation—Slander—Parliamentary election—Statements at public meetings—Defamatory meaning—Damage to plaintiff's character—Plaintiff a candidate—Privileged occasion—Misdirection and non-direction of jury—Findings possibly influenced by irrelevant considerations—Defamation Act 1912 (*N.S.W.*) (*No.* 32 *of* 1912), *sec.* 5*—*Supreme Court Rules* (*N.S.W.*), *r.* 151B*.

At a parliamentary by-election for a mining constituency, both the respondent and one S. claimed to represent the New South Wales Labor Party as the "selected" candidate. The appellant was the leader of the party, and the respondent had been closely associated with him in its management and control. Prior to, and during the electoral campaign, the respondent made statements to the press to the effect that he wished to alter the control of the Labor movement in New South Wales and terminate the "dictatorship" of the appellant. At a number of meetings addressed by the appellant during

* Sec. 5 of the *Defamation Act* 1912 (N.S.W.) provides as follows:—"(1) On the trial of any action for defamatory words not imputing an indictable offence, the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby. (2) If the jury are of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant."

Rule 151B of the Regulæ Generales of the Supreme Court of New South Wales provides that "no direction, omission to direct, or decision as to the admission or rejection of evidence given by the Judge presiding at the trial shall without the leave of the Court be allowed as a ground for . . . notice of motion" for a new trial "unless objection was taken at the trial to the direction, omission, or decision by the party on whose behalf the notice of motion has been filed."

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the campaign and subsequently, which were attended mainly by miners and other members of the Labor Party, the appellant strongly criticized the respondent for contesting the election. He said, *inter alia*, that the respondent had the support of persons associated with disruption in the Labor movement, that he was making the same kind of attack on the appellant as were the adversaries of the Labor movement, that he was actuated by motives of self-interest, that he was a concealed enemy of the Labor Party, that his conduct in opposing the selected and endorsed Labor candidate was an act of treachery to the rank and file and the leadership of the Labor Party, and that the enemies of the Labor movement were getting the respondent to pull away support from a leader whom they could not buy. In an action for slander in respect of the statements made by the appellant at these meetings, counsel for both sides asked the Judge to rule on the question whether the respondent or S. had been the duly "selected" Labor candidate for the constituency. The Judge ruled that S. had been duly selected, but also informed the jury that different minds might reach a different conclusion, and, at the end of the summing-up, he acceded to the request of the respondent's counsel and told the jury that the question whether the respondent was insincere did not depend upon the construction of the rules. The Judge also ruled that the words used by the appellant could not reasonably be regarded as imputing that the respondent had been bribed and bought by the political opponents of the party. He left to the jury the question whether the words used were defamatory, and also the question whether, under sec. 5 of the *Defamation Act* 1912 (N.S.W.), they were spoken on an occasion when the respondent's character was likely to be injured. At the trial it was not contended for the respondent that the question under sec. 5 of the *Defamation Act* was not properly left to the jury. The notice of appeal to the Supreme Court did not complain that the Judge misdirected or omitted to direct the jury as to the application of sec. 5 of the *Defamation Act* nor raise any ground that the verdict was against evidence or unreasonable. The majority of the Full Court ordered a new trial on certain counts upon the ground that the words used in the speeches declared upon in such counts were capable of meaning that the respondent had been bribed and bought by the political opponents of the Labor Party. The defendant appealed to the High Court,

Held, by *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* and *Dixon* JJ. dissenting), that the appeal should be allowed upon the grounds :—

(1) that the jury were entitled to find, under sec. 5 of the *Defamation Act*, that, in all the circumstances, the statements of the appellant were made upon occasions when the respondent's character was not likely to be injured thereby ;

(2) that having regard to rule 151B of the *Supreme Court Rules* and to the conduct of the trial on his behalf, the respondent should be precluded from raising on appeal the point that the trial Judge's reference to the question who was the selected candidate was based upon a misconstruction of the rules of the Party or was an immaterial issue ;

(3) that the trial Judge was right in withdrawing from the jury the innuendo that the respondent had been bribed and bought by the opponents of the Labor Party.

Per Starke, Dixon and *Evatt* JJ.: Election speeches made to large audiences of unidentified persons are not necessarily privileged, even although matters of general interest to the electors are dealt with therein.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

An action for slander was brought by Albert Charles Willis in the Supreme Court of New South Wales against John Thomas Lang. There were seven counts in the declaration which concluded with a claim for £20,000. The defendant pleaded not guilty to all the counts. He paid into Court the sum of one shilling in full satisfaction of the plaintiff's claim, and pleaded that pursuant to rule 89A of the *Supreme Court Rules*, notwithstanding such payment in, he denied liability. The words complained of were spoken by the defendant in the course of speeches, all but one of which were delivered in the course of a by-election for the election of a member of the Legislative Assembly of New South Wales to fill a vacancy caused by the death of the member for the electorate of Bulli. There were several candidates, including the plaintiff and Mr. Sweeney, both of whom claimed to be contesting the election in the interests of the Labor Party. Both were members of an association called the Australian Labor Party, State of New South Wales, the rules of which made special provision for the selection of candidates for seats in Parliament, but, owing to the shortness of time which elapsed between the death of the previously sitting member and the date fixed for the by-election, compliance with certain provisions of the rules of the party dealing with the selection of candidates was not possible. In these circumstances a dispute arose as to whether the plaintiff, who had been selected by the local electorate council, or Sweeney, who had been selected by the central executive, ought to be regarded as a duly selected candidate. In the electoral campaign Sweeney had the support of the defendant, who was the leader of the Labor Party in New South Wales and leader of the opposition in the State Parliament. It was common ground that so far as the Labor Party

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was concerned the by-election involved more than the question of who was to be returned to Parliament. It was treated as a trial of strength between the plaintiff and the defendant; and this appeared from the language set out in the various counts in the declaration. The language complained of in the action consisted of long passages from speeches. So far as appeared from them and from other evidence, the substantial charges made by the defendant against the plaintiff were that the plaintiff had the support of persons associated with disruption in the Labor movement, that he was making the same kind of attacks on the defendant as the adversaries of the defendant were making and was presumably seeking the same objective; that he was actuated by motives of self-interest, that he was challenging the Labor movement and its leadership; that it could not be said that he was sincere, though mistaken, because he "knew the rules backwards"; that he was a concealed enemy of the Labor Party; that it was strange that he was refraining from pressing a claim against the Government—to which the Labor Party was in opposition—until after the by-election, he having a claim for compensation against the Government; a suggestion that enemies of the Labor movement were getting the plaintiff to pull away the support from a leader, the defendant, whom they could not buy; that the plaintiff's conduct in opposing the selected and endorsed Labor candidate was an act of treachery to the rank and file and the leadership of the Labor Party; that the plaintiff had personally canvassed the directors of The Labor Daily Ltd. to obtain an appointment as managing director; and that he had asked for the position of Agent-General. In the course of making these charges the defendant said, among other things, that it was his duty to convince his audience "that Mr. Willis' appeal is a spurious and insincere one"; that Mr. Willis was not satisfied with what he had got out of the movement but wanted more, and, to get it, was "trading upon the miners' sentimental regard for rank and file control," that he was "a concealed enemy sailing under the flag of a Labor independent candidate"; that he was waging an underground fight within the Labor movement; that he "threw over the Labor Party so that he might cling to his job at all costs"; that Willis, "a subtle and insincere politician was able to trade upon

your genuine affection for the principle of rank and file control"; that "when the ship was sinking he rushed for the shore without warning his mates, but now that she is sound again and safely afloat, he wants to take up his old position on the bridge," and that "the only man who worked a confidence trick upon you is the man you placed your confidence in."

No evidence was called on behalf of the defendant, with the result that at the close of the plaintiff's case, after an address by his counsel, the concluding address was delivered by counsel for the defendant.

There was not any dispute that, during the course of the address by the defendant's counsel, counsel for both parties joined in asking the trial Judge to rule who was the selected candidate. In response to this joint request a ruling was given in favour of Sweeney. But the trial Judge informed the jury that different minds might arrive at a different conclusion, and at the end of the summing-up acceded to the request of the plaintiff's counsel that the question whether the plaintiff was insincere and spurious, as the defendant was alleged to have said, did not depend upon his, the trial Judge's, construction of the rules. The relevant rules of the Australian Labor Party, State of New South Wales, are as follows:—"89. The (Central) Executive shall have sole charge of all matters relating to elections . . . but shall not in any way interfere with the functioning of any Electorate Council . . . with regard to the selection of Candidates for . . . State . . . Elections, provided the Platform, Rules and Constitution of the A.L.P., State of New South Wales, are adhered to. 90. In electorates where the Local . . . Council shall have failed to take the necessary steps as laid down by the rules, to select a candidate at least . . . one month before the date of a by-election, such selection shall rest with the Executive. 91. In the case of selection for a by-election where an Electorate Council . . . " is "in existence, the Executive shall call same together for the purpose of making the selection for that particular election. 92. When owing to the inaction of an Electorate Council . . . the selection for a by-election falls to the Executive it shall select a nominee from amongst those nominated by the local organizations . . . 101. Electorate Councils shall select their

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candidates for . . . a by-election at least one month before the date of the by-election."

The jury returned a verdict for the defendant on all counts.

Upon an appeal by the plaintiff to the Full Court of the Supreme Court the questions argued were :—(*a*) That the trial Judge was in error in his interpretation of the rules of the Australian Labor Party, and in ruling that Sweeney was the duly selected candidate for the by-election ; (*b*) that the trial Judge should have directed the jury that they could find that the plaintiff honestly thought that he was the duly selected candidate ; and (*c*) that the trial Judge should have directed the jury that the innuendo of domination and bribery in the first, third, fourth and fifth counts was capable of being supported by the words complained of. The notice of appeal to the Full Court contained no complaint that the trial Judge misdirected or omitted to direct the jury as to the application of sec. 5 of the *Defamation Act* 1912 (N.S.W.), nor any ground that the verdict was against evidence or the weight of evidence or that the verdict was unreasonable.

The Full Court, by a majority, granted a new trial on five of the seven counts in the declaration. *Halse Rogers* J. and *Maxwell* A.J. concurred in thinking that the alleged defamatory statements were capable of sustaining the innuendo that the plaintiff had been bribed and bought by opponents of the Labor Party. *Jordan* C.J., on the contrary, agreed with the ruling of the trial Judge on this question. With regard to the interpretation of the rules and the direction proper to be given thereon neither *Jordan* C.J., nor *Maxwell* A.J., found any reason for granting a new trial.

From that decision the defendant now, by leave, appealed to the High Court.

Further material facts and particulars of the trial Judge's summing up appear in the judgments hereunder.

Flannery K.C. (with him *Curtis* K.C. and *Cassidy*), for the appellant. The trial Judge correctly ruled that according to the rules of the organization Sweeney was the candidate duly selected to represent that organization. A ruling on the matter was given at the request of both parties. Even if the ruling be wrong it was immaterial to

the issues of defamation and damages, and, in any event, in view of the remarks of the trial Judge, there was not any miscarriage of justice. The jury was correctly directed on the issue of damages. It is not suggested by the respondent that the summing up was so lacking in essentials as to amount to a mistrial. The complaint is that the summing up contains redundancies, e.g., as to the truth of the statements made, although truth was not open as a defence. That is not a justification for a new trial. The simple issues involved in this case are defamation and damages. Those issues should be determined without reference to rules of the organization. If, however, such a reference is made, then rules 90, 92 and 101 support the ruling given by the trial Judge. The word "failed" in rule 90 does not import default or neglect; it refers to a state of affairs (*R.* v. *Southwark Borough Council*; *Ex parte Southwark Borough Market Trustees* (1)). There is not any evidence that the respondent was approved by the executive. None of the proceedings contemplated by the rules were carried out in point of time, or in point of fact. The scheme of the rules is to invest the executive council of the organization with wide powers. There is not any evidence that any person gathered the impression that the respondent had been guilty of, or even was suspected of, bribery and corruption. The question of defamation or no defamation is one for the jury to determine (*Maxwell* v. *Daley* (2); *Parker* v. *Falkiner* (3)). Assuming that the words complained of were spoken on a privileged occasion, there was not any evidence of malice to go to the jury (*Crick* v. *Butler* (4); *Adam* v. *Ward* (5); *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 247). Privileged occasion prima facie destroys malice.

Sir *Thomas Bavin* K.C. (with him *J. W. Shand* and *Wesche*), for the respondent. This Court should find expressly that the words were not spoken on a privileged occasion, otherwise a further appeal might be involved. That question was not raised at the trial, therefore the point was not open for argument on the appeal (*Bailey* v. *Willis* (6)). The summing up was defective. Not only was

(1) (1921) 37 T.L.R. 357.
(2) (1854) 2 Legge 843.
(3) (1899) 10 L.R. (N.S.W.) (L.) 7; 5 W.N. (N.S.W.) 57.
(4) (1891) 12 L.R. (N.S.W.) (L.) 75; 7 W.N. (N.S.W.) 141.
(5) (1917) A.C. 309.
(6) (1930) 30 S.R. (N.S.W.) 131; 47 W.N. (N.S.W.) 23.

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the jury's attention not directed to the proper issues, but it was actually diverted from the issues which should have been considered. Persons who take part in election campaigns remain within the protection of the law. The words complained of were not justified by any utterances on the part of the respondent. Personalities can be introduced only under the restriction applied by the law with regard to fair comment and privilege. The summing up was silent on this point. There was not any evidence to justify the way the matter was put to the jury. If there was a misdirection in any material matter that might have affected the mind of the jury, there must be a new trial unless it is shown that the jury was not in fact affected by it. To allow the jury's attention to be diverted to facts irrelevant to the particular issue is a misdirection which should be corrected by a new trial (*Ryan* v. *Ross* (1); see also *Bray* v. *Ford* (2), and *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 784). The fact that a party asked for a ruling on a certain point does not affect his rights if an incorrect ruling was given. The ruling that Sweeney was the duly selected candidate must have affected the jury's mind to the prejudice of the respondent. That ruling was wrong. Evidence as to the truth or untruth of the words complained of is material on the question of damages, and also, if the Full Court is right, on the question of privilege. Although on a strict interpretation of the rules of the organization neither the appellant nor the respondent was the duly selected candidate, the respondent was the selected candidate according to the spirit of the rules. Those rules do not in fact provide for an occasion similar to that which arose here. In view of the fact that the appellant is the leader of the organization there is evidence from which the jury could infer malice. The statements made by the appellant mean that the respondent was bribed. The defamatory statements were made at a public meeting; therefore they were made on an occasion when the respondent's character was likely to be injured, and the trial Judge should have so ruled. In his direction to the jury on the issue of defamation the trial Judge did not say that the question of truth was not relevant. The omission by counsel to request the trial Judge to direct the jury that his ruling, although relevant upon some

(1) (1916) 22 C.L.R. 1. (2) (1896) A.C. 44.

matters, should not be considered in connection with other matters, cannot operate to preclude the submission on appeal that when considering those other matters the jury was influenced by irrelevant considerations (*Ryan* v. *Ross* (1)). Rule 151B of the *Supreme Court Rules* is not applicable ; that rule was designed to meet a position similar to that which was present in *Bailey* v. *Willis* (2). In view of the public nature of the meeting, its size and the means taken that all persons present should hear the statements, those statements were not made on a privileged occasion.

[EVATT J. referred to *Adam* v. *Ward* (3).]

A meeting held during the course of, and in connection with, a political contest is not a privileged occasion (*Harwood* v. *Astley* (4) ; *Duncombe* v. *Daniell* (5) ; *Pankhurst* v. *Hamilton* (6) ; *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 247).

[DIXON J. referred to *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 248, and *Bruce* v. *Leisk* (7).]

Flannery K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :— Nov. 28.

RICH J. This is an appeal by leave from an order of the Full Court of New South Wales for a new trial in an action for slander brought by the respondent against the appellant. There were seven counts in the declaration which concluded with a claim for £20,000. The defendant pleaded not guilty to all the counts, and also brought into Court the sum of one shilling and said that it was sufficient to satisfy the whole of the plaintiff's claim, and that pursuant to rule 89A of the *Supreme Court Rules*, notwithstanding such payment into Court, he denied liability. The circumstances out of which the action arose are sufficiently stated in the judgment of the learned Chief Justice of the Supreme Court of New South Wales in the following terms :—" The words complained of were spoken by the defendant

(1) (1916) 22 C.L.R., at p. 13.
(2) (1930) 30 S.R. (N.S.W.), at p. 136; 47 W.N. (N.S.W.), at p. 25.
(3) (1917) A.C. 309.
(4) (1804) 1 Bos. & P. (N.R.) 47 ; 127 E.R. 375.
(5) (1837) 8 C. & P. 222; 173 E.R. 470.
(6) (1887) 3 T.L.R. 500.
(7) (1892) 19 R. (Ct. of Sess.) 482.

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in the course of speeches all but one of which were delivered in the course of a by-election for the election of a Member of the Legislative Assembly of New South Wales to fill a vacancy caused by the death of the Member for the Electorate of Bulli. There were several candidates, including the plaintiff and Mr. Sweeney, both of whom claimed to be contesting the election in the interests of the Labor Party. Both were members of an Association called the Australian Labor Party, the rules of which made special provision for the selection of candidates for seats in Parliament; but, owing to the shortness of the time which elapsed between the death of the previously sitting Member and the date fixed for the by-election, it was not possible that certain provisions of the rules of the Party dealing with the selection of candidates could be complied with. In these circumstances, a dispute arose as to whether the plaintiff, who had been selected by the local electoral body, or Mr. Sweeney who had been selected by the executive, ought to be regarded as a duly selected candidate. In the electoral campaign, Mr. Sweeney had the support of the defendant, who was the leader of the Labor Party in New South Wales and leader of the Opposition in the Parliament of New South Wales.

It is common ground that, so far as the Labor Party was concerned, the by-election involved more than the question of who was to be returned to Parliament. It was treated as a trial of strength between the plaintiff and the defendant; and this appears from the language set out in the various counts in the declaration. The language complained of in the action consists of long passages from speeches. So far as appears from them, and from the evidence to which we have been referred, the substantial charges made by the defendant against the plaintiff in this internecine warfare were—that the plaintiff had the support of persons associated with disruption in the Labor Movement; that he was making the same kind of attacks on the defendant as the adversaries of the defendant were making and was presumably seeking the same objective; that he was actuated by motives of self-interest; that he was challenging the Labor Movement and its leadership; that it could not be said that he was sincere though mistaken, because he 'knew the rules backwards'; that he was a concealed enemy of the Labor Party; that

it was strange that the plaintiff was refraining from pressing a claim against the Government (to which the Labor Party was in opposition) until after the by-election, he having a claim for compensation against the Government; a suggestion that enemies of the Labor Movement were getting the plaintiff to pull away the support from a leader (the defendant) whom they could not buy; that the plaintiff's conduct in opposing the selected and endorsed Labor candidate was an act of treachery to the rank and file and the leadership of the Labor Party; that the plaintiff had personally canvassed the directors of the *Labor Daily* to obtain an appointment as managing director; and that he had asked for the position of Agent-General. No evidence was called on behalf of the defendant; with the result that at the close of the plaintiff's case, after an address by plaintiff's counsel, the concluding address was delivered by counsel for the defendant." The questions argued in the Supreme Court are stated both by the Chief Justice and *Maxwell* A.J., as he then was, in substantially the same words. I quote them from the latter's judgment:—" (1) That the learned trial Judge was in error in his interpretation of the rules and in ruling that Mr. Sweeney was the duly selected candidate for the by-election in question; (2) that His Honor should have directed the jury that they could find that the plaintiff honestly thought that he was the duly selected candidate; and (3) that His Honor should have directed the jury that the innuendo of domination and bribery in the first, third, fourth and fifth counts were capable of being supported by the words complained of." The notice of appeal to the Supreme Court contains no complaint that his Honor misdirected or omitted to direct the jury as to the application of sec. 5 of the *Defamation Act* 1912, nor any ground that the verdict was against evidence, or the weight of evidence or that the verdict was unreasonable. *Halse Rogers* J. and *Maxwell* A.J. (the Chief Justice dissenting) concurred in thinking that the alleged defamatory statements were capable of sustaining the innuendo that the plaintiff had been bribed and bought by the opponents of the Labor Party. The Chief Justice, on the contrary, agreed with the ruling of the learned trial Judge on this question. With regard to the interpretation of the rules and the direction proper to be given thereon, neither the Chief Justice nor *Maxwell*

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A.J. found any reason for granting a new trial. *Halse Rogers* J., although apparently of a different opinion, did not attach so much importance to this ground as to the third ground, namely, that the trial Judge should have left the innuendo charging bribery to the jury. Before us the respondent abandoned the contention made at the trial and before the Full Court that he was the duly selected and indorsed candidate of the Labor Party and submitted that the error in the trial Judge's interpretation was the declaration that Sweeney was the duly selected and indorsed candidate. There is no dispute that both parties joined in asking the trial Judge to state who was the selected candidate. In response to this joint request the learned Judge gave the ruling now complained of. But his Honor guarded himself by informing the jury that different minds might arrive at a different conclusion, and at the end of the summing-up acceded to the request of respondent's counsel that the question whether his client was insincere and spurious, as the appellant is alleged to have said, did not depend upon the Judge's construction of the rules. In my view of the case it is unnecessary to pass any opinion on the question of the strict interpretation of the rules as to who was selected under them. Whether the words were defamatory or not did not turn on the question of the rules. The respondent himself was jointly responsible with the appellant in importing this matter into the case as a major issue. The ruling having been given in the guarded manner I have mentioned, the only specific direction which respondent's counsel thought fit to ask for was acceded to by the trial Judge. Rule 151B of the *Supreme Court Rules* reads "No direction, omission to direct, or decision as to the admission or rejection of evidence given by the Judge presiding at the trial shall without the leave of the Court be allowed as a ground for such notice of motion unless objection was taken at the trial to the direction, omission, or decision by the party on whose behalf the notice of motion has been filed." It precludes respondent, in my opinion, from asking for a new trial on the ground of omission or misdirection by the Judge in his summing up. The facts are that the Central Executive of the Labor Party picked Sweeney as its chosen candidate, and Willis now admits that he could not be regarded as an officially selected candidate. I, therefore, agree that the

Chief Justice and *Maxwell* A.J. were right in holding that the respondent failed in maintaining grounds 1 and 2, as no substantial wrong has been occasioned (cf. *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (1)).

I now turn to the question whether the alleged refusal of the trial Judge to leave to the jury the innuendo alleging that the respondent "was under the domination of and had been bribed and bought by the political opponents of the Labor Movement" is a substantial ground for granting a new trial. At the trial the learned Judge left to the jury an innuendo in the following terms "that the plaintiff was politically dishonest, self-seeking and insincere and was accustomed to be actuated by motives of self-interest while assuming to act for the benefit of the Labor Movement. That he was secretly working against and to overthrow the Labor Party and Movement and to assist the opponents of the said Labor Party and Movement." This is literally in the terms in which the respondent cast the innuendo excepting that part of it alleging bribery. It is common knowledge that both in England and Australia Members of Parliament change their opinions, and become converts to the party of their former opponents. This may take place not altogether from an altruistic point of view, but it does not follow that when any benefit attends such a conversion it amounts to bribery in the sense attributed by respondent's counsel. And the instances of alleged conversions in local politics given in extracts from the appellant's speeches contained in the declaration suggest no trace of bribery. I think, therefore, that that part of the innuendo which I have quoted completely covers the slanderous statements contained in the counts of the declaration. I, therefore, agree with the Chief Justice and the trial Judge that the refusal of the latter does not afford any substantial ground for ordering a new trial.

The remaining matter to be considered is the application of sec. 5 of the *Defamation Act* 1912. It reads :—"(1) On the trial of any action for defamatory words not imputing an indictable offence, the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby. (2) If the jury are

(1) (1919) A.C. 304.

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of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant." In the course of his summing up the learned trial Judge directed the jury in the following terms:— "It is open to you to find that they were uttered upon an occasion and in circumstances when the plaintiff's character was not likely to be injured. If you thought that you would find a verdict for the defendant." On the appeal before the Supreme Court no objection was taken by the respondent's counsel to this direction, or, indeed, was any objection that it was defective or erroneous taken at the trial of the action. The rule (*Rule* 151B) already stated precludes a litigant in a Court of final appeal from raising any point which might have been taken at the trial. It is, I think, too late to ask this Court to entertain this ground, notwithstanding the respondent's non-observance of the rule. "That rule was intended to apply, and does apply, to all directions without exception" (*Bailey* v. *Willis* (1)). It must be remembered that the occasion was not one when political policy or questions of State interest were being agitated. The election was made the battle ground to decide the leadership of the State Labor Party, and was fought apparently with great heat and amidst popular local excitement. The speakers did not mince their words, but spoke a language calculated to be understood by the miners in the Bulli electorate—a coal mining district. It cannot be said that the appellant began the abuse if it may be so shortly described, but the speeches of the respondent and the appellant at the election were a continuance of a struggle already begun for predominance in the party. The section of the *Defamation Act* already quoted was first introduced into the statute law of New South Wales in 1847, and was required to meet the hard conditions of pioneer days. It appears to provide a wider protection than that afforded by the doctrine of privilege at common law. It does not allow words imputing an indictable offence to be uttered, but it empowers the jury to consider whether words which they regard as defamatory were spoken on an occasion when despite the defamatory character of the language the plaintiff's character is not likely to be injured. In my opinion, the jury were entitled under the words of

(1) (1930) 30 S.R. (N.S.W.), at p. 136; 47 W.N. (N.S.W.), at p. 25.

the section to regard this as such an occasion. The Legislature no doubt considered that not all defamatory statements injured the character of the person attacked, and that the jury was better fitted to determine this question. The jury would take into consideration the occasion on which the words were spoken; for instance, they might take one view of words spoken at a vestry meeting or a meeting of directors, and another of words uttered in the heat of a family squabble or of a quarrel in a shearing shed or a taproom or bar. Having regard to all the circumstances, the jury, with their knowledge of local elections and politics and their understanding of the manner in which speeches at elections are received by bystanders, came to the conclusion that these statements did not injure the respondent's character, and I see no reason to disturb their conclusion.

The appeal should be allowed.

STARKE J. The plaintiff Willis brought an action against the defendant Lang for slander, spoken in the course of an election campaign. The member for the Bulli seat in the Legislative Assembly of New South Wales had died, and a by-election to fill that seat became necessary. Willis nominated as a candidate for the seat in the Labor interest, and claimed that he was the candidate duly selected according to the rules of the Australian Labor Party. One Sweeney also nominated as a candidate for the seat in the same interest, and he too claimed that he was the candidate selected according to those rules. Lang, who was the leader of the Labor Party in New South Wales, supported Sweeney, and declared that he and not Willis was the candidate duly selected and indorsed according to the rules of the Party. But in the course of speeches supporting Sweeney, Lang attacked Willis. The substantial charges made by Lang against Willis were that Willis' appeal was spurious and insincere, that he was an insincere politician, that he was fighting for himself and not for the electors, that he was a concealed enemy of the Labor Party and had the support of its adversaries, that his conduct in opposing Sweeney was an act of treachery to the rank and file and the leadership of the Labor Party, and that when a newspaper styled the *Labor Daily* of which Willis was director, was in difficulties, Willis applied for and accepted the office of

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Agent-General of New South Wales in London and followed his life-long practice of being well away when the bricks began to fall—that when the ship was sinking he rushed for the shore without warning his mates. Lang pleaded not guilty, traversed certain introductory averments and paid one shilling into Court, denying liability. But he did not justify his statements. And truth of the matters charged does not in New South Wales amount to a defence unless it was for the public benefit that the matters should be published (*Defamation Act* 1912, sec. 7). Nor did he at the trial suggest that the matters charged were fair comment upon a matter of public interest, or that they were spoken on a privileged occasion without malice. And he called no evidence. Yet the jury found a verdict for him. It is not surprising in these circumstances that the majority of the learned Judges of the Supreme Court ordered a new trial. But this Court nevertheless gave special leave to appeal, and the appeal now falls for determination.

It was said in support of the appeal that whether the words complained of were defamatory or not was a question of fact for the jury; and next, that the provisions of sec. 5 of the *Defamation Act* 1912 of New South Wales warranted the verdict. That section provides:—"(1) On the trial of any action for defamatory words not imputing an indictable offence, the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby. (2) If the jury are of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant." Defamation or no defamation is doubtless a question for the jury, and it requires a strong case to set aside their verdict as against the weight of evidence. It is "from the nature of the subject . . . always more difficult to interfere with the finding of a jury for a defendant in a slander action than in many others, inasmuch as opinion, formed on all the circumstances of the case, including the interpretation of the language used, is so large a factor in arriving at a result." But the verdict of a jury, even in a defamation action, is liable to be set aside if it be one to which

"reasonable men could not or ought not to have come" (*M'Inerney* v. *Clareman* " *Printing and Publishing Co.* (1); *Metropolitan Railway Co.* v. *Wright* (2); *Australian Newspaper Co.* v. *Bennett* (3)). This rule of reason must also be applied to the *Defamation Act*: the Act does not permit a jury to find, arbitrarily and capriciously, that defamatory words were spoken on an occasion when the plaintiff's character was not likely to be injured, if that be a conclusion to which reasonable men could not or ought not to have come. Now it was said at the Bar that Lang and Willis were engaged in a political contest, and that hard knocks must be accepted on both sides. But, even in such a contest, it is not true that the political and personal character and honesty of a man may be attacked with impunity. The substance of the words charged by Willis and spoken by Lang has already been set out. They are not seriously disputed, and are not capable of any but a defamatory meaning. The statements—which were made at public meetings and were well-considered and deliberate—necessarily injure the reputation and character of Willis, and a finding that they were spoken on an occasion when Willis' character was not likely to be injured thereby is beyond all reason, and a conclusion to which reasonable men could not or ought not to have come. The verdict was therefore rightly set aside by the Supreme Court and a new trial ordered.

There is also another ground which supports the order of the Supreme Court. According to English law, a defendant cannot, under the guise of giving evidence of the plaintiff's bad character, adduce evidence in chief of, or endeavour by cross-examination of the plaintiff and his witnesses to elicit, any facts which tend to establish the truth of the defamatory words, unless justification is pleaded (*Gatley* on *Libel and Slander*, 1st ed. (1924), p. 674; 2nd ed. (1929), pp. 736, 737, and cases there cited). But in New South Wales a practice has grown up—it is not necessary in the present case to say whether it can be supported—which allows a defendant to adduce evidence in mitigation of damages tending to establish the truth of the defamatory matter. Counsel for Lang, accordingly, sought to establish in cross-examination of one of the plaintiff's

(1) (1903) 2 I.R. 347.
(2) (1886) 11 App. Cas. 152.
(3) (1894) A.C. 284; 15 L.R. (N.S.W.) (L.) 234; 11 W.N. (N.S.W.) 1.

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witnesses that Sweeney, and not Willis, was the selected and indorsed candidate according to the rules of the Australian Labor Party. Counsel for the plaintiff in re-examination put in those rules. Rule 90 provides that " in electorates where the local Branch or Council shall have failed to take the necessary steps as laid down by the rules, to select a candidate at least . . . one month before the date of a by-election, such selection shall rest with the Executive "; and rule 92, that " when owing to the inaction of an electorate Council or electorate Branch, the selection for a by-election falls to the Executive, it shall select a nominee from amongst those nominated by local organizations." Both parties sought the ruling of the learned trial Judge upon the question whether Willis or Sweeney was the duly selected candidate according to the Party rules. He gave no decision until after counsel for Willis had addressed the jury. The proceedings in this connection, so far as material, are thus reported in the transcript of the trial :—" His Honor said that . . . it seemed to him that under Rule 90 . . . the Council of the electorate had failed to select a candidate one month before the date of the election. Rule 91 was a corollary to that, that in the case of proceeding to an election in the right time it rested with the Executive Council to call the Electoral Council together. Then the last one that Mr. *Windeyer* "—who was counsel for Willis—" relied on was, he thought, rule 92. In this case there were a number of candidates who had sent in their nominations. Apparently none of them were acknowledged by a local organization, and the Executive Council had a number of nominations in front of it, those nominations apparently being signed by members of the local council or local selection committee, and in his opinion they did the right thing under the circumstances in picking one of those. Consequently he ruled in the circumstances that as the local committee had failed within one month to make a selection it was the duty of the Executive to do it. Mr. *Windeyer* asked whether His Honor meant a selection within the Rules, and His Honor replied in the affirmative." Counsel for Lang had also, in cross-examination of Willis, extracted an admission that it would be a gross act of treachery and insincerity for one who was not a properly selected candidate to oppose a selected candidate at an election. The ruling of the learned Judge, coupled

with this admission, was apparently used by counsel in his address to the jury, for the purpose of justifying the defamatory words—though there was no plea of justification—as well as for the purpose of mitigating damages. But the learned Judge did not correct this misuse of his ruling and the evidence. He told the jury that Willis was not the duly selected candidate, and that Sweeney was. And, while he did tell them that truth was not a defence and that they could only consider it in mitigation of damages, on the other hand he at no time warned them that his ruling had no bearing upon the question of defamation, and, indeed, he repeatedly suggested in his charge that in considering that question the jury might have regard to the truth of the matters alleged. In dealing with the accusation of treachery, the learned Judge said :—"Mr. *Curtis* pointed out that what was the act of treachery was opposing the selected Labor candidate. Whether you consider the truth of that is a matter for you, but it certainly does accuse Mr. Willis of being guilty of an act of treachery." Such a charge, which, as *Halse Rogers* J. observed, in all probability "had a great effect on the minds of the jury," could only mislead and confuse them.

Further, it appears to me that the ruling was a misconstruction of the rules of the Labor Party. Willis, I agree, was not, according to those rules, the duly selected candidate for the Bulli seat ; although an electorate council did purport to select Willis, it was impossible, in the circumstances of the case, to do so one month before the date of the by-election, as laid down by rule 101. It was said that the selection then rested with the Central Executive, and it selected Sweeney (rules 90, 92). But it is doubtful, I think, whether there was any failure within the meaning of rule 90, or any inaction within the meaning of rule 92, on the part of the electorate council, when it was not possible for it in the circumstances to comply with the rules ; and in any case Sweeney was not selected by the Central Executive from amongst those nominated by any local organizations, as required by rule 92. It follows that Sweeney was, no more than Willis, duly selected as a candidate according to the rules.

The verdict of the jury ought, therefore, to be set aside owing to misdirection and non-direction of the learned trial Judge.

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It was suggested that the words were spoken on a privileged occasion, and that the verdict could be supported on this ground. All that it is necessary to say as to this contention is that it was not raised at the trial, that evidence was not directed to it, that it was not left to the jury, and that the evidence as it stands leaves it uncertain whether the occasion was privileged and, in any case, whether it was not maliciously used.

Finally reliance was placed upon rule 151B of the *Supreme Court Rules*. It provides that no direction or omission to direct by the Judge presiding at the trial shall, without leave of the Court, be allowed as a ground for a motion for a new trial unless objection was taken at the trial to the direction or omission by the party on whose behalf the motion is made. Objection was taken at the trial to the ruling of the learned Judge that Sweeney and not Willis was the duly selected candidate, and although the misuse of the ruling, both by the learned Judge and by counsel, was not specifically mentioned, that is all involved in the objection to the ruling itself.

The trial wholly miscarried, and Willis has been denied justice according to law, not only in form but in substance. And a new trial should accordingly be had, as the Supreme Court directed. The appeal ought to be dismissed.

DIXON J. Under the rules of the "Australian Labor Party, State of New South Wales," when a by-election is to take place, it is the duty of the electorate council to select the party candidate one month before the date of the poll. The Central Executive is required to call the electorate council together for the purpose. The selection is by ballot. The ballot commences on a date fixed by a resolution of which seven days' notice must be advertised. Before going to ballot, the nominations must be submitted to the Central Executive for indorsement.

"Where the . . . Council shall have failed to take the necessary steps as laid down by the rules, to select a candidate . . . one month before the date of a by-election, such selection shall rest with the Executive. When, owing to the inaction of an Electorate Council . . . the selection for a by-election falls to the Executive, it shall select a nominee from amongst those nominated by the local organizations."

Owing to the death of the sitting member for the constituency of Bulli in the Legislative Assembly of New South Wales, a by-election became necessary. The electorate council at once set about the calling for nominations and the holding of a ballot. The ballot was to commence on the fourteenth day after the vacancy occurred. On the twelfth day, a writ was issued fixing the polling day for the election to the Legislative Assembly upon a date only nineteen days later, that is, a calendar month after the occurrence of the vacancy. When this date was fixed, it became impossible to comply with the requirement of the Party rules that the selection ballot should be held one month before the parliamentary election. The Central Executive proceeded at once to select a candidate, purporting to exercise the power given to that body in cases "where the local Council shall have failed to take the necessary steps as laid down by the rules, to select a candidate at least one month before the date of a by-election." It did not, however, select a nominee from amongst those nominated by the local organizations. The candidate whom it selected, Mr. Sweeney, had not been so nominated. The electorate council went on with its ballot, which resulted in the selection of Mr. Willis, who is the plaintiff in the action. He had not been indorsed by the Central Executive.

Mr. Willis and Mr. Sweeney each determined to stand for the seat as the selected Labor candidate.

In my opinion neither of them was a duly selected candidate of the Party. Mr. Willis was not duly selected, because, apart from the inability of the electorate council to hold the selection ballot within the prescribed time, he was not indorsed by the Central Executive. Mr. Sweeney was not duly selected, because, apart from the question whether a "failure" or "inaction" on the part of the electorate council occurred so that the Central Executive's power of selection arose, he was not nominated by a local organization.

In the election campaign which ensued Mr. Sweeney was supported by the parliamentary leader of the Labor Party, Mr. Lang, who is the defendant in the action. Mr. Lang delivered speeches in the constituency attacking the conduct and candidature of Mr. Willis. Some weeks after the election, Mr. Willis made a public speech in

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reference to the affairs of the company conducting the *Labor Daily* newspaper in which he and Mr. Lang were concerned. Shortly afterwards, Mr. Lang made, in reference to the same matters, a speech attacking the conduct of Mr. Willis. Mr. Willis then instituted against Mr. Lang an action of slander complaining of passages in these several speeches.

Under the law of New South Wales, oral defamation is actionable without proof of special damage, but "the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby. If the jury are of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant" (sec. 5 of the *Defamation Act* 1912).

The speeches of Mr. Lang had been fully reported, and the words declared upon were admittedly used. Imputations which they made upon the plaintiff have been reduced to the following summary by *Jordan* C.J. :—"That the plaintiff had the support of persons associated with disruption in the Labor Movement; that he was making the same kind of attacks on the defendant as the adversaries of the defendant were making and was presumably seeking the same objective; that he was actuated by motives of self interest; that he was challenging the Labor Movement and its leadership; that it could not be said that he was sincere, though mistaken, because he 'knew the rules backwards'; that he was a concealed enemy of the Labor Party; that it was strange that the plaintiff was refraining from pressing a claim against the Government (to which the Labor Party was in opposition) until after the by-election, he having a claim for compensation against the Government; a suggestion that the enemies of the Labor Movement were getting the plaintiff to pull away the support from a leader (the defendant) whom they could not buy; that the plaintiff's conduct in opposing the selected and indorsed Labor candidate was an act of treachery to the rank and file and the leadership of the Labor Party; that the plaintiff had personally canvassed the directors of the *Labor Daily* to obtain an appointment as managing director; and that he had asked for the position of Agent-General."

In the course of making these charges, the defendant said, among other things, that it was his duty to convince his audience "that Mr. Willis' appeal is a spurious and insincere one"; that Mr. Willis was not satisfied with what he had got out of the Movement, but wanted more, and, to get it, was "trading upon the miners' sentimental regard for rank and file control"; that he was "a concealed enemy sailing under the flag of a Labor independent candidate"; that he was waging an underground fight within the Labor Movement; that he "threw over the Labor Party so that he might cling to his job at all costs"; that Willis, "a subtle and insincere politician, was able to trade upon your genuine affection for the principle of rank and file control"; that his conduct in opposing the selected and indorsed Labor candidate was an act of treachery to the rank and file and the leadership of the Labor Party; that "when the ship was sinking he rushed for the shore without warning his mates, but now that she is sound again and safely afloat, he wants to take up his old position on the bridge" and that "the only man who worked a confidence trick upon you is the man you placed your confidence in."

If the requisite basis of fact were established by evidence, and a jury under a proper direction found that the words complained of were a fair and bona fide comment on matters of public interest, that finding might, perhaps, stand, because it might be considered open to the jury so to regard all the defamatory matter set out in the declaration. But, if the jury found that none of the matter bore a defamatory meaning, then, in my opinion, that finding could not be sustained, because no reasonable man who understood the question could arrive at it.

In slander, it is more difficult than in libel to set aside a finding that words are not defamatory, because "spoken words divorced from their context and surroundings may appear to be a slander which when controlled by such context and such surroundings are nothing of the sort" (per *Sankey* L.J. in *Broome* v. *Agar* (1)). To enable the Court to set aside such a finding the case for doing so must be "clear and beyond argument" (1). "A claim for defamation is essentially a matter upon which a jury's verdict must be

(1) (1928) 138 L.T. 698, at p. 702.

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taken; if the words are plainly defamatory without innuendo, and the jury refuse so to decide, the verdict is perverse; so also if the innuendo is so clear that there really is nothing for real consideration" (per Lord *Buckmaster* in *Lockhart* v. *Harrison* (1); see, too, per Lord *Dunedin* (2), and per Lord *Phillimore* (2); and *Rofe* v. *Smith's Newspapers Ltd.* (3); *Doyle* v. *McIntosh* (4)).

In the present case, there are defamatory innuendos which it would be difficult to avoid attaching to the words complained of. But, putting innuendos on one side, the natural meaning of the words conveys definite charges, and adopts specific descriptions of the plaintiff's conduct which appear to me necessarily to reflect upon his character, and to be altogether incapable of anything but a defamatory meaning. I am, further, of opinion that it would not be reasonably open to a jury to find that the occasion upon which the defamatory matter complained of was published was such that the character of the plaintiff was not likely to be injured thereby, and so to find for the defendant under sec. 5 of the *Defamation Act* 1912. A jury does not, in my opinion, under that provision exercise an uncontrolled authority. It must act on evidence and within the limits of reasonableness (cf. *Darby* v. *Reid* (5)). The attacks upon the plaintiff were made with the very object of affecting the opinion held of his conduct by electors. Unless some special circumstances existed in relation to any hearer or hearers which would operate to nullify the effect intended to be produced, the nature of the imputations was such as necessarily to shake the opinion of the hearers in the plaintiff's character or reputation for loyalty, honesty or disinterestedness in his public and political dealings. No evidence was given of any such circumstances. The speeches were delivered to very large public audiences, the members of which could not, of course, be identified. In my opinion, there was no evidence to support a finding under sec. 5 that the occasion was such that the plaintiff's character was not likely to be injured by the defamatory words, and it would be opposed to the obvious fact that the words

(1) (1928) 139 L.T. 521, at p. 523.
(2) (1928) 139 L.T., at p. 524.
(3) (1927) 27 S.R. (N.S.W.) 313, at p. 316; 44 W.N. (N.S.W.) 37, at p. 38.
(4) (1917) 17 S.R. (N.S.W.) 402; 34 W.N. (N.S.W.) 177.
(5) (1851) 1 Legge 704.

complained of, unless disbelieved or discredited, would gravely impair the plaintiff's political reputation with such audiences.

At the trial of the action, the plaintiff's counsel opened to the jury that the slanders were untrue and malicious. He then called witnesses upon the issue of publication. One of these was cross-examined as to facts stated in the words complained of, and as to facts relating to the question—was Mr. Sweeney or Mr. Willis the duly selected candidate ? In re-examination, the plaintiff's counsel put in evidence the rules of the Party. He proceeded to call evidence including that of the plaintiff himself to prove the incorrectness of facts stated in the defamatory words. The defendant's counsel did not raise the defence of fair comment. There was no plea of justification. Under the law of New South Wales in an action of defamation truth is not a defence unless it was for the public benefit that the defamatory matter should be published (sec. 7 of the *Defamation Act* 1912). At common law, in the absence of a plea of justification, the defendant cannot prove the truth of any part of the matter complained of, either as an answer to the action or in mitigation of damages (*Speck* v. *Phillips* (1); *Vessey* v. *Pike* (2); *Bracegirdle* v. *Bailey* (3); *Hobbs* v. *Tinling*; *Hobbs* v. *Nottingham Journal* (4)). But it has long been the practice in New South Wales in actions of libel and slander to allow the defendant to show in mitigation of damages that the matter complained of is true (*West* v. *Wigg* (5); *Harper* v. *Bennett* (6)). This practice arose because the statutory provision, that truth is no answer to the cause of action unless to publish the matter complained of be for the public benefit, was considered to involve an abrogation of the common law rule that the defendant shall not rely upon matters tending to prove truth, except under a plea of truth either to the defamation declared upon, or to so much of it as the defendant seeks to prove true. We are not called upon in the present case to decide whether the existing practice can be justified in principle. But the course which counsel took at the

(1) (1839) 5 M. & W. 279, at p. 281; 151 E.R. 119, at pp. 119, 120.
(2) (1829) 3 C. & P. 512; 172 E.R. 526.
(3) (1859) 1 F. & F. 536; 175 E.R. 842.
(4) (1929) 2 K.B. 1, at pp. 18, 43.
(5) (1886) 3 W.N. (N.S.W.) 46.
(6) (1900) 21 L.R. (N.S.W.) 365; 17 W.N. (N.S.W.) 176.

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trial is explained by its existence. In seeking to disprove the truth of charges made against the plaintiff and of facts stated in the words declared upon, he was forestalling a case which it was open to the defendant to make in mitigation of damages. If he were able to prove, not merely that charges made against the plaintiff were without foundation, but that the defendant knew it, the malice which the jury might then infer would be a reason for their awarding heavier damages. If, at the trial, the Court had adopted an interpretation of the Party rules which supported the plaintiff's claim to be the duly selected candidate, this would have been no ground for supposing that the defendant knew or believed that the plaintiff's claim was well founded. Such a ruling by the Court would have been irrelevant to malice. On the other hand, a ruling that Mr. Sweeney was, upon the construction of the rules, the duly selected candidate might, perhaps, be capable of use by the defendant, but only as a matter tending to reduce damages. The plaintiff's counsel appears to have sought a ruling from the Judge that his client was the selected candidate. But the question was not decided until after his case had closed. The defendant called no evidence. In his concluding address to the jury the plaintiff's counsel claimed, as I infer, that the plaintiff was the selected candidate to the knowledge of the defendant, who, nevertheless, accused him of treachery to his party in standing. The defendant's counsel, before making his reply, then sought a ruling from the Judge that Mr. Sweeney was the duly selected candidate, and the learned Judge thereupon so ruled. In his cross-examination of the plaintiff, defendant's counsel had obtained an admission to the effect that for a member of the Party to oppose the duly selected candidate, after submitting himself unsuccessfully for selection would be an act of treachery. In his reply, the defendant's counsel made great use of this admission in combination with the Judge's ruling that Mr. Sweeney was the duly selected candidate. He pressed it upon the jury that, according to his own confession, the plaintiff had been guilty of the treachery the defendant had charged against him.

It is apparent that the course which the case had taken made it very likely that the jury would lose sight of the issues upon which the defendant's liability depended, namely, the defamatory meaning

of the words declared upon and the likelihood of injury to the plaintiff's character upon the occasion when their publication occurred. The plaintiff having a very strong case upon these issues, so strong that, as I have said, a finding against him on either of them would, in my opinion, be unreasonable, made much capital out of matters which, as he considered, went to damages. One of these matters, the contention that he was and Mr. Sweeney was not the duly selected candidate, had been ruled against the plaintiff after his counsel had completed his address to the jury. The ruling, although it destroyed the effectiveness of much that had been put to the jury on behalf of the plaintiff was, nevertheless, irrelevant to his cause of action, the ingredients of which remained wholly unaffected. The defendant's counsel seized upon the ruling and employed it in a way that must have been very effective forensically, but nevertheless was legally inadmissible. In these circumstances it became peculiarly important that the jury should receive from the presiding Judge a direction which should recall or call their attention to the issues upon which liability depended, should define them clearly and should exclude from the consideration of them matters which, although looming so large in the course of the trial, were legally irrelevant to them and affected only damages. The learned Judge commenced his summing up with a sufficiently clear statement of the question for the jury :—" The main question for you," he said, " is whether the words that were spoken by the defendant were defamatory of the plaintiff." Again, " If they are defamatory, that is, if they are calculated to bring the plaintiff into hatred, ridicule or contempt and so injure his reputation, then you will proceed to the question of damages. Truth is not a defence. A good deal has been said in this case about the words being true. You can consider that only in so far as that may mitigate the damages. Truth is no defence at all, so you come back to the question of whether the words are defamatory."

But he then turned to an examination of the words complained of. The manner in which he dealt with them, in my opinion, could not fail to lead the jury to suppose that the correctness of the assertions made entered into the question whether they were defamatory—

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that in considering that question they should take into account the facts tending to bear out the statements made.

He began with the first count thus :—" The defendant is alleged to have said ' As I see it, my duty to-night is to convince you that Mr. Willis's appeal is a spurious and insincere one.' Mr. Lang is there supporting a candidate selected by the executive. I am ruling that Mr. Willis was not the duly selected candidate at all, not duly selected by the Electorate Council because that rule had not been complied with."

In dealing with the next passage in which the defendant claimed that Mr. Sweeney was the selected and endorsed candidate for whom alone anyone can vote who has the welfare at heart of the Labor Movement, the learned Judge said " I have ruled that Mr. Willis was not duly selected, and I have ruled that Mr. Sweeney was properly selected."

In dealing with the passage relating to the newspaper, the learned Judge again referred to the facts proved. He read a statement contained in the words complained of alleging that after exchanging confidences with leaders of the opposite party, the plaintiff at the head of a band of malcontents came out into the open and challenged the Labor Movement and its leadership. He then proceeded " When he makes statements of this kind it is for you to consider under the circumstances whether or not they are defamatory. They are capable of it, some of them at any rate. You have heard what the matters were." And he again deals with the actual facts.

In these and other passages of the summing up, the question of defamatory meaning is confused with the facts upon which the words complained of are founded. They convey to the jury that the defamatory character of the words is dependent upon or affected by their correctness in fact. In particular the decision of the Judge upon the question who was the selected candidate is given a relevance to the question of defamatory meaning to which in fact it was completely irrelevant. Moreover, much importance is clearly attached to it. That this treatment of the matter was not due to an attempt to deal at once with what affected both liability and damages is made certain by the fact that, after going through all the counts, his Honor said :—" There is the whole matter which is declared upon as being

defamatory. It is for you to say whether it is defamatory. If you think it is, then you pass to the next part of the question, and that is what damages Mr. Willis has sustained." Beyond the preliminary definition of defamation as that which is calculated to bring the plaintiff into hatred, ridicule or contempt, there was nothing to guide the jury upon the issue of defamatory meaning, and there is much to mislead them. The learned Judge more than once put to them meanings undeniably defamatory and asked whether they were defamatory. For instance, he said :—" Mr. Lang, speaking from his position as leader of the Labor Party, says that he is a concealed enemy because although he is not selected he is still running as a labor candidate. Is there anything defamatory in putting it in that way ? " Again, " There undoubtedly he refers to Mr. Willis as being a subtle and insincere politician trying to trade on their principles with regard to rank and file control. That is capable of a defamatory meaning. As I said at the beginning, you have to consider that in connection with all the circumstances of the case. There is the fight going on, and you will consider whether the words were uttered in a defamatory sense or whether they were only ordinary arguments."

Indeed, in relation to the passage accusing the plaintiff of an act of treachery to the rank and file and the leadership of the Party, his Honor, after stating that counsel had pointed out that what was the act of treachery was opposing the selected Labor candidate, said : " Whether you consider the truth of that is a matter for you, but it certainly does accuse Mr. Willis of an act of treachery." At the conclusion of the summing up, counsel for the plaintiff requested, but did not obtain, a direction that Mr. Sweeney was not and Mr. Willis was the selected candidate, and a direction that the question of the plaintiff's sincerity did not depend upon the construction of the rules. The jury found a general verdict for the defendant. In my opinion, that verdict ought not to be allowed to stand. There was a complete miscarriage in relation to the question of liability. The learned Judge did not put to the jury the question under sec. 5 of the *Defamation Act* 1912, except that at the end of his charge he remarked :—" It is open to you to find that they were uttered upon an occasion and in circumstances when the plaintiff's character was

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not likely to be injured. If you thought that you would find a verdict for the defendant." Up to that point, his direction appeared to exclude such a consideration. But, even if the provision had been adequately put to the jury, I do not think a verdict for the defendant under it could be supported. The sole remaining issue submitted upon which liability could turn was defamatory meaning. Upon that issue, the jury, if they followed the Judge, were completely led astray by the introduction of irrelevant considerations and erroneous standards. *Jordan* C.J. based, in some degree, his dissenting view that a new trial should not be ordered, upon the immateriality of the interpretation of the rules to the question of the defamatory character of the words complained of, including those charging insincerity. I agree that in reason the two things are entirely unconnected. But in view of the course of the trial and the summing up, it is a consideration which I regard as requiring an opposite conclusion. To my mind it provides an explanation of the verdict. A finding that none of the words declared upon bore a defamatory meaning could scarcely be arrived at, except upon some misunderstanding or under the influence of irrelevant considerations. What was emphasized by defendant's counsel, and afterwards dealt with as relevant to defamatory meaning by the learned Judge, cannot be supposed to have been rejected by the jury from its consideration of the issue. But a ground greatly relied upon by the defendant in support of the verdict is that the plaintiff's counsel by his conduct of the case contributed to what occurred, and that he did not make the appropriate objection at the trial. In my opinion, what he did cannot be regarded as actively contributing to the misuse made of the question, who was the duly selected candidate, or of any other matters in evidence. It nowhere appears that he used any such matters upon the question of defamatory meaning. On the other hand, the Judge having ruled against him on the question of the selected candidate after he had addressed the jury, his client was peculiarly entitled to the protection of the Court from a misapplication of that ruling. The question whether the plaintiff is precluded on the ground that his counsel failed at the trial to take the appropriate objections depends upon other considerations. Rule 151B of the General Rules of the Supreme Court provides that no direction

or omission to direct or decision as to the admission or rejection of evidence given by the Judge presiding at the trial shall, without the leave of the Court, be allowed as a ground for such notice of motion, unless objection was taken at the trial to the direction, omission or decision by the party on whose behalf the notice has been filed. The plaintiff's counsel specifically objected to the ruling that Mr. Sweeney was the duly selected candidate as erroneous. In my opinion it was erroneous. The fact that being erroneous it was also misused by the learned Judge does not detract from the objection, but adds another objection. It does not deprive the party of the objection he took. He cannot at one and the same time be precluded from asserting that the Judge's ruling was irrelevant to the issue upon which it was used, because he did not raise that objection, and from relying upon the objection which he did raise to the correctness of the ruling because the ruling was irrelevant. But in any case this is not a case where there is a specific misdirection or non-direction. The whole trial miscarried because there was a disregard of the legal standards of liability. In the Supreme Court counsel for the defendant, upon the new trial motion, submitted that the publications complained of were privileged. The proposition appears to me to be untenable that election speeches made to a large audience of unidentified persons are privileged because the speaker deals with matters in which the electors have an interest. It was suggested that the last speech complained of was shown to be made in answer to an attack upon the defendant by the plaintiff, and that privilege attached to it for this reason. It is sufficient to say that the evidence does not support the contention.

I have not dealt with the question whether, in withdrawing an innuendo from the jury, an error was committed, because in the view I take of the case the verdict found is open to much graver objections.

In my opinion the order of the majority of the Full Court directing a new trial is right, and the appeal should be dismissed.

EVATT J. The respondent sued the appellant for damages for slander in respect of (1) six speeches delivered in the course of a State by-election for the southern mining district constituency of

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Bulli, and (2) one speech delivered to miners in the northern district. The jury found a verdict for the defendant on all counts, but the Full Court ordered a new trial though the majority announced that they did so with "deep regret" (*Rogers* J.), particularly as the case "proceeded from the heat and conflict associated with political elections" (*Maxwell* A.J.), and the words sued on were "spoken in the heat of a political struggle" (*Rogers* J.). The Chief Justice, however, thought that no such result (a new trial) should occur, and with his judgment there and that of my brother *Rich* here I am in agreement.

Certain aspects of the case are worthy of special note.

The plaintiff was represented at the trial by two of the most able and experienced members of the common law Bar. They sought to procure an advantage for their client by extracting a ruling from the Judge that their client, although contesting the Bulli by-election against the wishes of the executive of the Labor Party and of the leader of its parliamentary party, was, according to the rules, the person entitled to carry the banner of the party. The manœuvre of counsel failed, because *James* J. ruled that the plaintiff was *not* so entitled. That ruling was right, and so much was expressly admitted in this Court by plaintiff's counsel.

James J., however, went further and gave his opinion that Mr. Sweeney (the official candidate supported by Mr. Lang) *was* "the endorsed candidate," it being his view that it was the duty of the executive to make a selection if, owing to the date of the by-election, it became impossible for the local body to comply with the rules. If this ruling was erroneous, the amazing result is that although one of the main functions of the political Labor organization is to put forward parliamentary candidates bearing its imprimatur and indorsement, yet in the case of many, if not all, by-elections, no candidate can properly be put forward as the candidate of the Labor Party. I express no opinion as to whether this is the true position, because *James* J. also told the jury that "Legally on my ruling Mr. Willis was not the selected one, but those rules would have to be construed, and perhaps someone else might put a different construction on them." This was a clear intimation that the purely

legal question of construction of the rules was not of supreme significance in the case.

Even if the ruling of *James* J. were regarded as erroneous, the plaintiff who, through his counsel, sought to gain a position of advantage by introducing an immaterial issue, but who failed in the attempt, should not be permitted to have the verdict set aside. It is perfectly plain that the question of the construction of the rules did not, and could not, concern the issues of (*a*) slander or no slander or (*b*) the statutory defence under the *Defamation Act*. Nor, in the event, could it possibly have affected the question of damages, for the jury did not reach that question in this case. When at the conclusion of the summing up, plaintiff's counsel said that the question was whether the plaintiff's candidature was insincere and spurious, and his Honor said " I will leave that to the jury "—this indicated that such aspect of the case was a matter for the jury to consider.

Now the jury must have found that the words spoken were not defamatory of the plaintiff, or that such of the words as were defamatory were spoken upon occasions when the plaintiff's character was not likely to be injured (*Defamation Act* 1912, sec. 5).

It is of great importance that, in the notice of appeal to the Full Court, eleven grounds were taken, and all of these, except ground 8, related to matters arising out of the ruling which the plaintiff's counsel originally invited. It was not suggested that, except for these matters, either the Judge misdirected the jury or that the jury's verdict was against evidence. At the trial of the action, no objection was taken to any other matter. The general rule on the common law side of the Supreme Court of New South Wales is that an appellant should not have a verdict at nisi prius set aside where he omits to make his legal submission at the hearing, and fails to include the point in his notice of appeal. In the present case, to take an example, the plaintiff, if his position was otherwise untenable, should never have been allowed to canvass either the finding of the jury or the direction of the Judge on the issues of (*a*) slander or no slander, or (*b*) the statutory defence under sec. 5.

Ground 8 of the notice of appeal was that the trial Judge should not have withdrawn from the jury any of the innuendos

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assigned in the various counts. All that is complained of is that *James* J. told the jury that the words could not reasonably be regarded as imputing that the plaintiff " was under the domination of and had been bribed and bought by the political opponents of the Labor movement." The declaration shows that this was a single and indivisible innuendo. There are, I think, two answers to the objection. First, I think *James* J. was right in his ruling. Second, it is impossible to conclude that the ruling, if wrong, affected the verdict. The innuendos which were left to the jury included almost every possible form of political misconduct. If the jury's verdict was based upon the view that the words were not defamatory of the plaintiff, they must have considered that the words in fact used were not calculated to injure the plaintiff's reputation. It is impossible to suppose that their verdict on this point would have been affected by the Judge's further direction that, in addition to being capable of imputing political dishonesty, self seeking, cowardice, insincerity, hypocrisy and treachery, the words were also capable of supporting the specific innuendo which *James* J. excluded from their consideration.

Upon a finding for the defendant on an issue of slander or no slander very different considerations arise from those applicable where the issue is libel or no libel. In the latter case, the Court has the written matter before it, and, theoretically at least, is in as good a position to determine the issue as is the jury. Even so, Fox's Act (which is in force in New South Wales), though relating in terms only to criminal cases, is regarded as presenting a substantial obstacle in the way of interfering with a finding for the defendant. But in cases of slander, the difficulty of interference is enormously increased. A striking illustration of this is presented by the Court of Appeal's decision in *Broome* v. *Agar* (1). The judgment of *Scrutton* L.J. in that case (dealing with words which were admittedly used and which seemed incapable of an innocent construction) now seems to bear the approval of the House of Lords (*Lockhart* v. *Harrison* (2) ; *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (3)).

(1) (1928) 138 L.T. 698 ; 44 T.L.R. 339.

(2) (1928) 139 L.T., at p. 523 ; 44 T.L.R. 794, at p. 796.

(3) (1934) 50 T.L.R. 581, at p. 584.

Here, all the surrounding circumstances had to be considered by the jury. They are elaborately set forth in the judgment of my brother *McTiernan*. It appears that the plaintiff, Mr. Willis, had challenged Mr. Lang's leadership of the Labor party, although the former had been closely associated with the latter during part of the period of that leadership. Mr. Willis' press interviews suggested that his objective was to rescue the Labor movement from the thrall of the defendant's dictatorial control. In this unusual form of combat, the selected battleground being a mining constituency, it was inevitable that hard blows would be given and exchanged. In my opinion, the jury might well accept the view that, in spite of the vituperation and strong criticism, the audiences addressed did not regard the words uttered as likely to injure the plaintiff's reputation, or to affect him adversely in their minds.

Further, no appeal was taken by the plaintiff against the jury's finding upon the issue of slander or no slander ; so it is unnecessary to trace the learned trial Judge's summing up to the jury on the point. But I must say that I dissent from the suggestion that so experienced a Judge made the elementary error of failing to distinguish between the libellous character and the actual truth of an imputation. Indeed, the passages sought to be relied on in this Court for that purpose are all capable of another explanation. I am reinforced in this opinion by the significant silence of plaintiff's counsel in respect of this part of the summing up, as well as by their failure to refer to the matter in their notice of appeal to the Supreme Court.

The main question of the statutory defence under sec. 5 is closely related to the issue of slander or no slander. Sec. 5 is the statutory embodiment of the special right and duty of the jury to restrict successful actions of slander, as distinct from libel, to instances where the plaintiff's " character " was likely to be injured upon the occasion complained of. It is unnecessary to determine whether a jury's finding in this respect is placed beyond review. At the very least, the jury may consider all the aspects of the occasion in question, and they are not debarred from considering the circumstances leading up to and surrounding the particular occasion. This does not mean that every political meeting necessarily creates an occasion when a jury should, or even may, apply sec. 5. But

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here, having regard to all the circumstances, I think it is impossible to deny to the jury their right to act under the section. The learned trial Judge so directed, no objection was taken at the trial, and the point was not even raised upon the appeal to the Full Court. In the circumstances, the jury's finding should not have been set aside.

One further matter: I disagree with the opinion expressed in the Supreme Court that the facts proved showed that the occasions of all seven speeches were "unquestionably privileged" (*Maxwell* A.J.). Of course it is possible that a privileged occasion will arise in relation to a speech at a public or an election meeting. But the common law warrants no such general doctrine of privilege as was here asserted on behalf of the defendant, and apparently by the majority of the Full Court. The general question of privilege I had occasion to discuss in the recent case of *Telegraph Newspaper Co.* v. *Bedford* (1). In my opinion the theory that privilege attaches to *every* occasion upon which speakers at election meetings choose to broadcast before large gatherings opinions or information about one or other of the candidates cannot be supported.

In my opinion the appeal should be allowed.

McTIERNAN J. In the evidence which was led by the respondent at the trial there may be found an account of the matters mentioned in the alleged defamatory speeches, and the setting in which they were made. This is of importance because the appellant had recourse at the trial to sec. 5 of the *Defamation Act* 1912 of New South Wales, and the jury returned a verdict in his favour. Sec. 5 is in these terms:—"On the trial of any action for defamatory words not imputing an indictable offence, the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby. (2) If the jury are of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant."

The appellant and the respondent were two of the directors of a newspaper, called the *Labor Daily*, which was established on the

(1) (1934) 50 C.L.R. 632.

initiative of the respondent about the beginning of 1924, when he was secretary of a trade union of coalminers, a position which he held before he became a member of the Legislative Council of New South Wales. The newspaper was sustained by financial assistance received from this and other unions, and from the appellant and respondent. The *Labor Daily* had a very close association with a political organization called the Australian Labor Party, State of New South Wales, the rules of which provide that members elected to the Parliament of New South Wales "under its auspices" shall form a "distinct party" in Parliament. The appellant was the leader of this group, which is known as the Parliamentary Labor Party.

In April 1931, the respondent, who at that time was the managing director of the newspaper and held office in a Ministry led by the appellant, was appointed Agent-General of New South Wales in London. He retired from political office, and tendered his resignation as managing director of the newspaper; but instead of accepting it the directors of the newspaper granted him leave of absence while he was Agent-General, and appointed Mr. Tyrell, who was a director, to act as managing director. The respondent did not draw his salary as managing director while he was a member of the Government, and at periods when the newspaper was in difficulties he did not draw it in full. The respondent's appointment as Agent-General was terminated by a Ministry which supplanted that led by the appellant. The respondent returned to Sydney and raised with the Premier in the new Ministry the question of compensation for loss of office. When he informed the appellant of this interview the latter advised him against being involved in expensive litigation. The respondent also saw Mr. Tyrell in anticipation of resuming his position as managing director, but was not invited, nor was he able, to do so. At the trial the respondent was asked the question "Have you tried to do so?" and he answered "I have never tried personally for reasons that happened with Mr. Tyrell and Mr. Lang." The evidence continued "Q. Something passed between you and Mr. Tyrell which made that impossible?" "A. Yes." However, the respondent continued to be a director, and he and the appellant attended directors' meetings. At one

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of these meetings, held soon after his return, he became aware that Labor Daily Ltd., the proprietor of the newspaper, gave a debenture to the appellant in his own name to secure the repayment to him of large sums of money which he had provided to enable the newspaper to carry on. These sums were advanced before and after the respondent's appointment as Agent-General. Some time before such appointment, and when the respondent was managing director, the appellant expressed a wish to get a debenture for advances already made, but the respondent dissented and that question was never discussed at any meeting of the directors before the respondent went to London. When the respondent was in London the company's bankers pressed the company to reduce its overdraft. The appellant supplied more funds to meet this emergency, and in February 1923, the directors, some of whom were associated with the coal miners' union, agreed to give the appellant a debenture to secure the repayment of all the money which he had advanced. It seems that the respondent's view was that this step put the appellant in control of the newspaper. The respondent gave an account of a statement which the appellant made at a meeting of the council of the Miners' Union on 25th May 1933. This statement was made very soon after the respondent had opened his campaign as a candidate at a by-election to elect a member of the Legislative Assembly of New South Wales for the electorate of Bulli. The respondent's account of the statement is as follows:—"Q. In regard to the Miners' Council meeting on the 25th, who else were present besides Mr. Lang? A. The whole of the miners' delegates from the different States, and on invitation Mr. Lang, Mr. Tyrell, and Mr. McGrath, the directors of the *Labor Daily*, Mr. Teece, Mr. Rees, Mr. Hoare and I, and I believe Mr. Cullen was there. They came there to ask the miners if they could find £10,000 to take the place of the Bank. The discussion drifted on to the question of Mr. Lang's debenture. He made a statement there concerning the putting of his money into the paper. He said at a certain date—I believe in May or June, 1931, while I was still away—that they had received a letter from the Bank asking them to reduce the overdraft, and giving them short notice to do it, that he attended the directors' meeting, and some suggestion was made at the meeting first by Mr.

Hoare as to whether the miners would find the money, and he said no, that the miners were not going to find another penny, that it was time for them to appeal to other unions. At any rate, none of them could show a way of getting the money. Mr. Lang said that the miners had been appealed to, and Mr. Hoare said then that these and other unions had refused. Then Mr. Lang said 'Leave it to me and I will see what I can do in connection with the matter,' and that afterwards he saw the manager who was acting for the bank at the time, I understood that it was a locum in charge there, the manager being away on holidays—and that he had failed to do any good with the gentleman who was in charge, but that he got someone to bring the manager back to try and use his influence with him. However, he failed; they could not get them to agree to stand it over, and that he then agreed to find this additional money over a period of 5 or 6 months on the conditions that he had the right to overhaul the staff, dismiss certain people, and generally to reconstruct the staff there to enable him to get his money back. In answer to another question about his debenture he said 'Well, if I have to use trust money I must see that I am properly secured.' The discussion went on through that day to the following morning, but Mr. Lang did not come the following morning. That was in answer to a question why he insisted on a debenture. I had already stated that I was against giving a debenture, and that was the reason given by Mr. Lang that he wanted to have a debenture properly secured. They gave all the employees at the *Labor Daily* notice. From a list revised by him certain people were struck out and other people were appointed in their places, and that they had reduced their expenditure. I have checked it up and found there is very little difference. That is what Mr. Lang said."

The first signs of the hostility which had been engendered between the parties appeared at a meeting of the directors in February 1933. A recent conference of the members of the Australian Labor Party, State of New South Wales, known as the country conference, held at Goulburn, had approved of a policy described as the socialization of credit, which had been propounded by the appellant. A subsequent conference, known as the metropolitan conference, appears to have preferred a policy known as the socialization of industry.

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But at the later conference of the whole association, known as the Easter conference, the policy approved at Goulburn was adopted. It seems that the protagonists of the policy adopted by the metropolitan conference had been strongly attacked in the editorial columns of the *Labor Daily*. At a directors' meeting held in February 1933 a discussion took place about these articles, and the appellant moved that the editor's action in publishing the articles be indorsed. The respondent took strong exception to this motion and the articles to which it related, and proposed by way of amendment that a statement should be published with the object of healing the dispute. The amendment was carried, but the statement was not issued, because it was left to the directors to prepare the statement, and they did not meet again until after the Easter conference. It was then considered that the publication of the statement would not be of any use.

Some time after the company granted the debenture to the appellant, the council of the miners' union gave instructions for the preparation of a report as to the state of its securities for the advances which it had made to enable the paper to be carried on. On 7th April 1933 they received a report which stated that " our directors did not exercise sufficient care when they voted to grant a debenture to J. T. Lang to take precedence of the agreements entered into by the company and the federation, thereby giving us no protection." The report also contained a recommendation that the directors of Labor Daily Ltd. " be requested to immediately request Mr. Lang to agree to cancel this debenture." The respondent said that he was asked by the council of the miners' federation to act for them in having these recommendations carried out. The appellant received a copy of the report, but the directors of the company did not deal immediately with the miners' request for the cancellation of the debenture, as they had become concerned as to what should be done in the matter of a petition for the winding up of the company presented by a George Buckland, who had obtained a substantial verdict against the company. The report appears to have been dealt with by the directors at a meeting held very soon after the electorate of Bulli became vacant, and while Buckland's judgment

was still unsatisfied. The respondent gave evidence that the appellant contended that the advances made by the miners "did not come before him and that he came next to the bank." The directors would not agree to the proposals in the report. When the directors were discussing the situation created by the petition for winding up, the appellant, according to the respondent's evidence, supported the report of a committee of directors, who proposed that the company's bank should be asked "to come in and then be bought out." The respondent deposed that the appellant said "that the bank should come in, that he (the appellant) should find £10,000 to clear the bank out, and that he would come in with his debenture, that he should be in charge and that the paper should be sold." The respondent explained that the sale was to be made "by the debenture holder, the only one, and the company reconstructed, and further that the shareholders in unions and others that were in that arrangement be made to give them another debenture or shares." The proposal was opposed by the respondent, and the directors agreed to a motion proposed by him, in substance instructing the company's solicitor to give security in respect of the petition for winding up pending an appeal against the verdict, and that endeavours should be made to bring about a settlement. A settlement was effected and the bank advanced to the company the amount which Buckland finally took in settlement of his demand.

The rules of the Australian Labor Party, State of New South Wales, provide for the "selection and indorsement" of members of the association as parliamentary candidates, and for the formation of electorate councils from its local branches. There is a central executive of the whole association consisting of persons selected by the vote of the various groups of trade unions and branches into which it is organized, to represent such groups and the members of the branches. Any member desirous of being selected as a parliamentary candidate is required by the rules to sign a pledge that he will not oppose "the selected and indorsed candidate," and that he will if elected vote on all questions which involve matters of policy or affect the fate of the Government, as the majority of the parliamentary party may decide at a caucus meeting; and that he would not retire from the contest without the consent of the central

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executive. The pledge must be forwarded to the general secretary, who is an officer of the central executive. The rules provide that any member of the association who opposes the selected and indorsed candidate is to be excluded from membership for a number of years. Rule 101 provides that an electorate council shall select their candidate for a by-election one month before the date of the by-election.

The member for Bulli in the Legislative Assembly in New South Wales died on 3rd May 1933, and the local electorate council met three days afterwards. It decided to invite nominations from persons qualified to contest "the selection." Under the rules nominations must be signed by not less than six members of the association or of affiliated organizations resident in the electorate. At the next meeting of the electorate council, which was held on 16th May, all nominations which had been received were handed to the general returning officer, who is also attached to the central executive. The date fixed for the by-election rendered it impossible to comply with rule 101 or with rule 111 which provides that no motion to fix the date for the commencement of a ballot for the selection of a candidate shall be entertained except at a special meeting called for that purpose, and that in the case of a by-election seven days' notice of such meeting shall be advertised in the *Labor Daily* and a local newspaper. But it does not appear that it was impossible to comply with rule 114 which says "Immediately upon nominations being called the branch secretary shall forward to the general secretary a supplementary list of members and duplicates of tickets issued to persons who have become members up to twelve months prior to the date of calling for nominations, and it shall immediately instruct the credentials committee to draw up a certified roll of members, one copy for use in branch polling booths, and another to be forwarded to the general secretary." The secretary of the electorate council said in evidence that this rule was not complied with. The nominations of the candidates, of which there were a number, were not endorsed by the central executive as provided by rule 109, which provides that all such nominations shall be submitted to the executive for indorsement before going to the ballot. The electorate council nevertheless proceeded to hold

a ballot to select a candidate. On the 17th May before the votes cast in the ballot were counted, the central executive chose Mr. Sweeney, who was associated with the miners' union in the electorate, as the Labor Party's candidate. He was one of the persons nominated for selection in the ballot which was conducted by the electorate council. The decision of the executive that he was to be the Party's candidate was communicated to the electorate council, but the counting of the ballot was proceeded with. The respondent won the ballot. A meeting of the electorate council was held at which the respondent was present by invitation of the secretary and was informed of the result of the ballot. In answer to a question whether he was prepared to stand "as the selected candidate in view of what has happened in Sydney," he replied "If it is the wish of the council and you want me to stand, then I will stand." The electorate council expressed its wish that he should stand.

Before the respondent opened his campaign he was present at a meeting of the directors of the newspaper at which the attitude of the miners' council to the appellant's debenture was discussed. At that meeting one of the directors asked the question "What about this position at Bulli: what is developing there?" and the respondent replied "Well, what is there about it. I won the selection down there and I am not going to let the men down that I pledged my word to, as all the candidates did, too. If they want me to run I am going to run." The evidence as to this incident continues: "Q. You say they pledged their word, that is in the nomination paper? A. Yes. I said I was going to stand. I said I could not understand what the fuss was or what the opposition was that had been raised to me. I said I had been definitely advised that the highest authorities do not want you in Bulli under any circumstances. Q. Whom did you say that to? A. To Mr. Lang. I said you are the person who is blamed for what is taking place now." The respondent having reiterated his determination to be a candidate, the appellant who was present at the meeting said: "Oh well, I suppose we have got to go down and support the man that has been selected by the executive."

It became apparent that the election speeches which would be delivered by the respondent and the appellant would not be entirely

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devoted to ordinary political questions. The reply which the respondent made to the appellant was in these terms " I want to tell you now that if I go down there, there are one or two things that I intend to make a fight of. I want this paper restored to the control of the shareholders, the trade-union movement, and I am against the inner group control as exercised now." He explained in evidence that he meant " control of the movement." Continuing his evidence he deposed that he said at this meeting of the directors: " I am against any dictatorship in the movement. These were the three points mentioned quite frankly across the table." The appellant made no further statement at the meeting, and afterwards on 24th May the respondent opened his campaign in the electorate. He admitted in cross-examination that his aim in fighting for the seat was " to restore the *Labor Daily* to the control of the shareholders, and to restore control of the labor movement to where it belonged, that is, the rank and file." He said " I wanted to save Mr. Lang from himself, from Mr. Lang's dictatorship." The respondent also admitted that he had made statements to the same effect in talking about his candidature to the press. On that occasion he admitted saying that " the fight has been going on under the surface for a long time, and would have become public if the Bulli by-election had not occurred," and what he referred to was " the dictatorship of the *Labor Daily* based upon Mr. Lang's debenture and whose (*sic*) refusal to allow the publication of any opinion other than that which suited." He quoted as an instance of the exercise of this control the articles which had been published containing attacks on the members of the association who at the metropolitan conference supported the socialization of industry.

The appellant was, as the respondent admitted, " the acknowledged leader " of the Parliamentary Labor Party, and he carried out his determination to go into the electorate of Bulli and support Mr. Sweeney. He made a number of speeches in which he attacked the respondent. Mr. Sweeney was the successful candidate. After the by-election the respondent went to Cessnock where, it was admitted, coalminers are a very numerous section of the community, and addressed a public meeting at which he referred to the appellant's position as debenture holder, and dealt with statements made by the

appellant in the course of his Bulli speeches, concerning the amount of salary drawn by the respondent while he was managing director of the *Labor Daily*. Thereupon the appellant addressed a public meeting at Cessnock where he replied to the respondent's speech.

The respondent's action, in which he claimed £20,000 damages from the appellant for alleged slander, was founded on statements made by the appellant in the course of his speeches at a number of election meetings held in the Bulli electorate and in the course of his address at the public meeting at Cessnock. These statements, which are set out in the seven counts of the declaration, are extracts from these various speeches. The speeches appear to have been lengthy; the first, it was stated, lasted for two hours.

Truth is not a defence to an action for slander in New South Wales, but the respondent led evidence to prove the falsity of the statements complained of, because proof of their falsity was calculated to aggravate damages if the jury should have come to that issue, and also served to forestall the defence, if raised, that the occasions on which the statements were published were privileged at common law. At the trial the publication of the statements alleged was ultimately not denied. The appellant called no evidence, and the jury returned a verdict in his favour.

It was common ground between the parties, as *Jordan* C.J. said in the course of his judgment given in the present respondent's appeal to the Full Court of the Supreme Court of New South Wales, that "so far as the Labor Party was concerned the by-election involved more than the question of who was to be returned to Parliament. It was treated as a trial of strength between the plaintiff and the defendant." Indeed, the evidence shows that the respondent entered the contest avowedly for the purpose of ventilating the domestic affairs of the *Labor Daily* and attacking the control exercised by the central executive in the affairs of the Australian Labor Party. The conflict between the appellant and the respondent was described at the trial in the speech of the appellant's counsel as a political squabble and, as already stated, counsel had recourse to sec. 5 of the *Defamation Act* 1912.

In summing up, the trial Judge made it clear enough to the jury that a number of passages in the statements complained of had a

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defamatory meaning, but the jury returned a verdict for the defendant. In argument before us counsel for the respondent attacked the verdict on a ground which was not taken in his notice of appeal to the Full Court. He contended that the trial Judge did not adequately direct the jury as to its duty under sec. 5. But no objection was taken at the trial to the Judge's direction, or his omission to give any direction, with respect to this matter. The right of an unsuccessful party in an action in New South Wales to attack a verdict on appeal to the Full Court of the Supreme Court is governed by rule 151B of the *Rules of the Supreme Court*, which was promulgated on 15th September 1925. This rule says: "No direction, omission to direct, or decision as to the admission or rejection of evidence given by the Judge presiding at the trial shall without the leave of the Court be allowed as a ground for such notice of motion unless objection was taken at the trial to the direction, omission or decision by the party on whose behalf the notice of motion has been filed."

In *Bailey* v. *Willis* (1) *Ferguson* J., in explaining the principle underlying that rule, said:—"It is a salutary principle that you cannot raise in the appellate Court a point that was open to you in the Court below if you allowed the decision there to be arrived at, and took the chance of its being in your favour, without raising the point. It is urged that there is an exception to that principle where the direction of the Judge on the measure of damages is in question. No doubt there have been decisions to that effect, based upon grounds which I have never quite been able to understand. I know that in their application they have in some cases given rise to grave injustice. It was in view of those decisions and that experience that this Court passed a rule in 1925 (Reg. Gen. 151B) expressly providing that no direction given by the Judge presiding at the trial should, without the leave of the Court, be allowed as a ground for a new trial motion unless the direction was objected to at the trial. That rule was intended to apply, and does apply, to all directions without exception. So far as the matter rests in the discretion of the Court, I am satisfied that this is not a case in which we should allow this new point to be raised for the first time at this

(1) (1930) 30 S.R. (N.S.W.), at p. 136; 47 W.N. (N.S.W.), at p. 25.

stage." Moreover, no application was made by the present respondent to the Full Court to attack the verdict on any grounds other than those contained in the notice of appeal to that Court. Assuming the summing up to be defective, it is now too late to allow this objection, which is taken before us for the first time, as a ground for a new trial.

The conclusion at which the jury was required to have arrived before returning a verdict for the defendant in this action was that the words were spoken on occasions when the respondent's character was not likely to be injured by them. Sec. 5 adds to the occasions existing at common law on which the person who publishes a slanderous statement not imputing an indictable offence does not incur liability to pay damages to the person of whom the statement is published. But the statutory immunity is not made dependent on the existence of any common interest between the defendant and his listeners; it is not destroyed by malice. The reason for the immunity is not founded on grounds of public policy; while the Judge decides whether the occasion is privileged at common law, sec. 5 remits to the jury the determination of the matter on which the immunity is founded. In the present case the jury heard the respondent give evidence, and were instructed by his examination and cross-examination as to his career and to the causes which he had publicly supported and the views which he had publicly expressed. Evidence was given from which the jury could form an idea of the kind of questions for which the respondent had made the by-election his battleground. Persons who were present at the meetings at which the statements complained of were made, gave evidence as to other statements made by the appellant in these speeches, and in some cases as to the manner in which they were influenced by what the appellant said. Although the statements were made with the intention of defeating the respondent, and perhaps were untrue in some respects, malice if found does not disentitle a defendant to have recourse to sec. 5. The respondent relied upon oral publication to persons present at the election meetings and also at the public meeting held at Cessnock, which appears to have been attended mainly by miners. I am unable to say that a jury using its knowledge of men and affairs acted unreasonably in determining

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upon the evidence before it that the oral publication of the statements in the declaration on the occasions in question was not likely to injure the respondent's character, and in returning a verdict for the defendant.

The only grounds upon which the present respondent asked the Full Court of New South Wales to order a new trial were compendiously stated by *Maxwell* J., then Acting Justice, in these terms: "(1) That the learned trial Judge was in error in his interpretation of the rules and in ruling that Mr. Sweeney was the duly selected candidate for the by-election in question; (2) that his Honor should have directed the jury that they could find that the plaintiff honestly thought that he was the duly selected candidate; and (3) that his Honor should have directed the jury that the innuendo of domination and bribery in the first, third, fourth and fifth counts were capable of being supported by the words complained of."

The parties at the trial combined in requesting the learned Judge to rule whether the respondent or Sweeney was the selected candidate of the Labor Party. The respondent contended that he filled that rôle, the appellant that Mr. Sweeney did so. There is much weight in the comment of *Halse Rogers* J. who said in the Full Court: "It is to be remembered that one of the matters much canvassed in the by-election was the control exercised or claimed by the executive, and the parties to this defamation action seem to have transferred certain issues from the political arena to the Court." In compliance with the request of the parties the learned Judge ruled that Mr. Sweeney was the selected candidate of the Labor Party. The appellant's contention is that this ruling was correct, as the executive had power in the events which happened to make the selection under rule 90. This rule is as follows: "In electorates where the local Branch or Council shall have failed to take the necessary steps as laid down by the rules, to select a candidate at least three months before the expiration by effluxion of time of a Parliament, or one month before the date of a by-election, such selection shall rest with the Executive." The respondent's contention before us was that neither he nor Mr. Sweeney was selected according to the rules. He abandoned the ground, which he took in his notice of appeal to the Supreme Court and at the trial, that he was duly selected under the

rules of the association. The respondent contended that rule 90 did not extend to permit the executive to select a candidate unless the local body had made default in making a selection one month before a by-election, and that no such default had occurred, because the by-election was fixed for a date which did not allow of a selection being made at least one month beforehand. It may be observed that although the electorate council called for nominations from members in order to select a candidate, nothing was done pursuant to rule 114, which aims at securing the immediate compilation of a roll of members of the association qualified under the rules to vote at a selection ballot. If the condition precedent to the right of the executive to make a selection had occurred, there can be no doubt that the ruling of the trial Judge was literally correct. But if the condition precedent to the making of a selection by the executive, mentioned in rule 90 or any other rule, had not been fulfilled, the solution of the question is not, as the respondent contended, that there was a *casus omissus*, and that neither the respondent nor Mr. Sweeney was entitled to be called the selected and indorsed candidate. The rules, it is true, set up machinery for the selection of a parliamentary candidate by the local body, and in certain events by the executive. But if that machinery cannot work, and those events do not happen, the result is not that the executive, which has the power of indorsing candidates for selection, is forbidden to indorse one of the candidates who have been nominated and to choose him to be the party's candidate in the constituency, while declining to indorse the others. The real significance of the learned Judge's ruling in favour of Mr. Sweeney's candidature was that it declared him to be the accredited party candidate. It is indisputable that in fact he was. He was the only candidate indorsed and chosen by the executive to contest the election, and even if the learned Judge wrongly interpreted the express provisions of the rules relating to the powers of the executive to select a candidate, his decision, which was in effect that Sweeney held the party's credentials, accorded with fact. Reference has been made to rule 131 which says that members elected to Parliament under the auspices of the Australian Labor Party, State of New South Wales, shall form a distinct parliamentary party, and rule 132 is in these terms:

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"No member of Parliament other than an indorsed member of the A.L.P., State of N.S.W., shall be admitted to membership of the Parliamentary Labor Party." Mr. Sweeney was qualified under this rule if he secured election. Although the respondent contended he was the "selected candidate," he did not claim that he would be qualified, if elected, to be admitted to the Parliamentary Labor Party. Although the question whether Sweeney or Willis was the duly selected candidate was immaterial on the issue of defamation or no defamation, as the respondent joined with the appellant in seeking a ruling on that question cannot complain that it was given; the ruling was in my opinion substantially correct. But assuming the contrary, the summing up was, in my opinion, calculated to prevent the jury from being influenced on the issue whether the words were defamatory or not, by the Judge's ruling in favour of Sweeney. The Judge told the jury that truth was no defence, and he also addressed them in these terms:—"Legally on my ruling Mr. Willis was not the selected one, but those rules would have to be construed, and perhaps someone else might put a different construction on them. He ran, as he contended, as the Party candidate. On the other hand, Mr. Lang said 'No, you are not the Party candidate, you have not been selected properly; Mr. Sweeney is,' and on that ground at any rate he treated Mr. Willis as being guilty of an act of treachery in running against the selected candidate." This statement conveyed to the jury, as I read it, an intimation that the rules were not so clear that it would not be open to the respondent or some other person to say that the respondent was duly selected according to the rules.

Before the learned Judge completed his summing up, counsel for the present respondent said:—"Your Honor will remember that the expression used by Mr. Lang in the first count is about an insincere and spurious candidate. I ask your Honor to give the direction that the question whether he was insincere and spurious does not depend upon the construction of the rules." And his Honor said "I will leave that to the jury." I read his Honor's words as an intimation to the jury that he gave them the direction for which the respondent applied. In the result I think that *Jordan* C.J. and

Maxwell A.J. were right in refusing to order a new trial on grounds 1 and 2 of the summary of notice of motion to the Full Court of the Supreme Court.

No objection was taken to the refusal of the Judge to leave to the jury the innuendo of " domination " as distinct from the innuendo of " bribery and domination." But it was contended that he erred in saying that the allegation in each of these counts would not sustain the innuendo that the respondent had been " bribed and bought by the political opponents of the Labor movement." I agree with *Jordan* C.J. that the learned Judge did not err in withdrawing that innuendo. The statements alleged, in my opinion, fall short of imputing that any person belonging to another political party had corruptly promised or given the respondent money or valuable consideration to assist such party, or to oppose or injure the Labor Party. The innuendo charges that the words complained of have that meaning.

It becomes unnecessary for me to consider the question whether the occasion on which the words were published was privileged at common law.

In my opinion the appeal should be allowed.

Appeal allowed with costs. Order of Full Court discharged and verdict for defendant restored. Respondent to pay costs of appeal to Full Court.

Solicitors for the appellant, *Harold T. Morgan & Sons.*

Solicitors for the respondent, *C. Don Service & Co.*

J. B.