DEFAMATION

SLANDER — EXTENT OF PRIVILEGE

The plaintiff, Sarah McKenna, was an employee of the Mansfield Leland Hotel Company. The manager of the company in the presence of the supervisor, who was the immediate superior of the plaintiff, charged the latter with taking a quantity of butter and as a result the plaintiff was dismissed. Later a prospective employer sought a recommendation of the plaintiff. The manager refused to give the recommendation and, on the insistence of the prospective employer, explained that he believed butter had been taken by the plaintiff. The trial court sustained the defendant's motion for a directed verdict and on appeal the judgment was affirmed. *McKenna* v. *The Mansfield Leland Hotel Co.*, 55 Ohio App. 163, 9 N.E. (2d) 166 (1937).

The plaintiff made out a prima facie cause of action for slander. The words might reasonably be understood to constitute a charge of crime. *McDonald* v. *Louthen*, 136 Ark. 368, 206 S.W. 674 (1918); *Koontz* v. *Weide*, 111 Kans. 709, 208 Pac. 651 (1922). A publication is made when words are spoken so that a third person hears and understands them. *Hedgpeth* v. *Coleman*, 183 N.C. 309, 111 S.E. 517, 24 A.L.R. 232 (1922); *Massee* v. *Williams*, 207 F. 222, 124 C.C.A. 492 (1913). There was a publication by the manager in both instances. There is some doubt as to whether the first statement was a publication by the corporation. Contrast, *Globe Furniture Co.* v. *Wright*, 49 App. D.C. 315, 265 F. 873 (1920); and *Prins* v. *Holland North America Mortgage Co.*, 107 Wash. 206, 181 Pac. 680, 5 A.L.R. 451 (1919). But the statement to the prospective employer was clearly a publication by the corporation. Even so the defendant might be protected by a claim of privilege and the real issue is whether a conditional privilege exists.

A conditional privilege is said to exist when a communication is made in good faith and without malice by one who has an interest in the subject matter to one having a corresponding interest. *Baker* v. *Clark*, 186 Ky. 816, 218 S.W. 280 (1920); *Fahey* v *Shafer*, 98 Wash. 517, 167 Pac. 1118 (1917).

Here the first statement was made to the employee in the presence of the supervisor. But if both the manager and the supervisor have a sufficient interest, as they do here, it would seem that a conditional privilege exists.

The court says that there was no evidence of malice and cites 98 A.L.R. 1301 which states that a conditional privilege cannot be rebutted

except by proof of actual malice. This is the orthodox view. *Popke* v. *Hoffman*, 21 Ohio App. 454, 153 N.E. 248 (1926); *Ely* v. *Mason*, 97 Conn. 38, 115 Atl. 479 (1921). But there is some authority for saying that a lack of probable cause would defeat the privilege. *Holway* v. *World Pub. Co.*, 171 Okla. 306, 44 Pac. (2d) 881 (1935); *Hodgkins* v. *Gallager*, 122 Me. 112, 119 Atl. 68 (1922).

The manager's statement to the prospective employer was also conditionally privileged. When statements about a servant are volunteered, courts frequently insist that the defendant, if he is to be privileged, should have a legal or, at least, a moral duty to speak. *Fresh* v. *Cutter*, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L.R.A. 67 (1890); *The Norfolk and Washington Steamboat Co.* v. *Davis*, 12 App. D.C. 306 (1898). But when the information is given in response to a bona fide inquiry by some one who has an interest in the subject matter, it is clear that the occasion is privileged. *Doane* v. *Grew*, 220 Mass. 171, 107 N.E. 620, L.R.A. 1915 C, 774, Ann. Cas. 1917 A, 338 (1915); *Solow* v. *General Motor Truck Co.*, 64 F (2d) 105 (1933); *Rosenbaum* v. *Roche*, 46 Tex. Civ. App. 237, 101 S.W. 1164 (1907). Again malice would rebut the privilege but the court finds no evidence of that here.

The court's holding that whether the occasion was privileged or not, when the facts are undisputed as they were here, was a question for the court, is in line with the great weight of authority. *Mauk* v. *Brundage*, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903); *Stewart* v. *Riley*, 114 W. Va. 578, 172 S.E. 791 (1934); annotation in 26 A.L.R. 833.

EUGENE C. STEEL

DESCENT

INHERITANCE OF DESIGNATED HEIR THROUGH DECLARANT

George Crommer, brother of Ida Shaffer Smith, designated as his heir-at-law Minnie M. Frazee who was the mother of defendants Lu Ella Banta and La Taska Grace. George Crommer and Minnie M. Frazee died before Ida Shaffer Smith. Delia M. Rogers *et al*, heirs of Ida Shaffer Smith, filed a petition in common pleas court seeking the partition of real estate descending from Ida Shaffer Smith. In a cross petition, defendants Lu Ella Banta and La Taska Grace allege their right to part of this estate claiming as heirs of Ida Shaffer Smith. The common pleas court held that defendants had no such right. The court