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Licenses: Bobbers not Barbers

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woman want of chastity are actionable *per se*.[7] An assertion merely of libidinous tendencies or general bad conduct is not sufficient.[8] An actionable imputation may be made by the use of cant or slang words or provincialisms which, according to their ordinary meaning, are not defamatory.[9] The court in this case saw fit not to attach a transient meaning to the word "sport" and inasmuch as no extenuating facts are shown and the case arises on demurrer it was properly decided.[10]

V. W. D.

Licenses: Bobbers not Barbers.—The discussion under this epigrammatic caption is occasioned by the recent decision of the Minnesota Supreme Court[1] State v. De Guile (Minn. 1924), 199 N. W. 569, declaring that a statute,[2] making it unlawful for any person to follow the occupation of a barber unless he shall have first obtained a certificate of registration is not applicable to women employed in so-called beauty parlors who dress and cut, or bob women's hair. This in spite of the fact that the statute says that "to shave or trim the beard or cut the hair of any person for hire or reward . . . shall be construed as practicing the occupation of barber within the meaning of this act."[3] The court bases its decision upon the ground that although beauty parlors were in existence at the time of the enactment of the statute the legislature manifestated no desire to include beauty parlors,[4] and even indicated that they did not wish to include them. Being in derogation of a common right and penalizing conduct devoid of moral turpitude, the statute must be strictly construed and not extended by implication to classes not clearly within its terms.[5] The unlawful act must be specifically and clearly described and provided for. "It is not enough that the case may be within the apparent reason and policy of the Legislation upon the subject, if the Legislature has omitted to include it within the

[7] *Peterson v. Rasmussen*, 191 P. 30; *Coquelet v. Union Hotel Co.* (Md.) 115 A. 813; *Richardson v. Roberts*, 23 Ga. 215; *Hasley v. Brooks and Wife*, 20 Ill. 115; *Reynolds v. Tucker and Wife*, 6 Ohio St. 516; *Bereford v. Wible*, 32 Penn. St. 95. In Wisconsin the general rule being that words which impute to another a crime involving moral turpitude, and which subjects the party committing it to a fine or imprisonment are actionable. *Beneway v. Conyne*, 3 Chand. 214; *Ranger v. Goodrich*, 17 Wis. 28; *Gibsen v. Gibsen*, 43 Wis. 23; *Mayer v. Schleichter*, 29 Wis. 646; *Hacker v. Heiney*, 111 Wis. 313.

[8] *Martin v. Sutter*, 212 P. 60; *K— v. H—*, 20 Wis. 239; *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724; 1 Starkie on Slander, 422, 431.

[9] *Wimer v. Allbough*, 78 Iowa 79, 42 N. W. 587, 16 Am. S. R. 422; *Acker v. McCullough*, 50 Ind. 447; *Logan v. Logan*, 77 Ind. 558; *Clute v. Clute*, 101 Wis. 137; Newell, Slander and Libel (2nd ed.) 603.

[10] *Lubcke v. Teckam*, 179 Wis. 543.

[1] *State v. De Guile*, 199 N. W. 569.

[2] Ch. 424, Laws of Minn. 1921.

[3] Id.

[4] The opinion states: "It would have been easy to say so."

[5] "Taxes by way of licenses for the pursuit of ordinary business or common occupation must be imposed in clear and unambiguous language." *Wilson v. D. C.* 26 App. D. C. 110; *State v. Small*, 29 Minn. 216, 12 N. W. 703.

terms of its enactments.[6] This opinion would seem to be authority for the rule that though occupations may be similar or analogous, and the same reasons exist for their regulation,[7] they must be clearly included in the legislation or they will not be brought within its provisions. Conceding therefore that there are the same apparent reasons for licensing a hairdressing establishment whose clients are women as there exists for licensing a similar establishment whose customers are men, and that the services performed are materially the same, it would almost seem that a statute requiring one to be licensed without a similar provision governing the other would be unlawful discrimination.[8]

The discrimination, if any exists, may appear to be on account of sex, but this is not true, for the general application of the statute seems to be that women who shave the beards of men are required to obtain licenses, while men who confine their tonsorial activities to the shearing of "woman's crowning glory" have not been required to secure a license. The discrimination is not, therefore, based upon the sex of the operator, but is a distinction in the class of occupation based upon the sex of the

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[6] *State v. Finch,* 37 Minn. 433, 34 N. W. 904. "A street car does not fall within designation 'road vehicle' in charter provision giving right to 'tax, license, and regulate road vehicles.'" *Mil. Elect. Ry. Co. v. City of Milwaukee,* 167 N. W. 428, 167 Wis. 384.

[7] The right of the state to license barber shops is a valid exercise of the police power of the state to safeguard health and has been consistently upheld by the courts. It is based upon the ground that communicable diseases may be readily spread by unclean methods in barber shops. *People v. Logan,* 284 Ill. 83, 119 N. E. 913; *Com. v. Ward,* 136 Ky. 146, 123 S. W. 673; *Moler v. Whisman,* 243 Mo. 571, 147 S. W. 985, 40 L. R. A. N. S. 629; *Ex Parte Lucas,* 160 Mo. 218, 61 S. W. 218; *La Porta v. Hoboken Bd. of Health,* 71 N. J. L. 88, 58 Atl. 115; *State v. Armeno,* 29 R. I. 431, 72 Atl. 216. But is this danger decreased by the fact that the patrons of a beauty parlor are women? The contrary is believed by the Wisconsin Supreme Court, who have taken judicial notice of the fact that, "It is thought by the highest medical authorities that the main source of venereal infection is the prostitute," and is further evidenced by the fact that in times and countries where such immorality was and is tolerated the legislative bodies have required periodical medical examination of such women. *Peo. ex rel. Boroni v. Fox,* 202 N. Y. 616, 96 N. E. 1126.

[8] "Rev. Stat. 1899 Mo. 10089 (Ann. St. 1906, p. 4600) provides that all rooms or buildings occupied as biscuit, bread or cake bakeries shall be drained and plumbed in a manner to conduce to the proper and healthful sanitary conditions thereof—*Held,* that as such section applied only to bakeries named and did not apply to those engaged in making pie and pastry, or crackers and confectioneries, as to which there was the same reason for keeping buildings and rooms occupied by that class of bakeries in a sanitary condition, it was invalid as a discrimination between persons belonging to the same class forbidden by Const. Art. 4, Sec. 3 (Ann. St. 1906, p. 197)." *State v. Mihiscek;* 225 Mo. 561, 125 S. W. 507, Am. St. Rep. 597. An "act imposing a license tax on barbers, but exempting from the tax (1) students of state schools who are serving as barbers, (2) those serving as barbers in eleemosynary institutions, (3) those following the occupation in towns of 1,000 inhabitants or less, is unconstitutional as discriminatory." *Jackson v. State,* 55 Tex. Cr. Rep. 557, 117 S. W. 818.

subject upon whom the service is performed. If the discrimination were on account of the sex of the operator it would probably be unlawful[9] unless peculiar circumstances or the inherent nature of the class or occupation should demand the exercise of the police power.[10]

A Kansas statute, similarly vague, has given rise to the same controversy in that state. It provides that "It shall be unlawful for any person to follow the occupation of a barber in this state unless he shall have first obtained a certificate of registration as provided in this act."[11] In an action by the owner of a beauty parlor against the state to prevent the State Barber Board from requiring her to secure a license under the above statute it was held, in the language of a syllabus written by the court, that "The proprietor of a hairdressing and beauty parlor, the important features of whose business include cutting hair, massaging, clipping hair with barber clippers, singeing the hair, giving tonics, shampooing, and manicuring, *BUT NOT SHAVING THE FACE*,[12] is not a 'barber' within the meaning of that word as used in a statute subjecting the followers of that occupation to examination and regulation."[13] In the course of its opinion the court says: "If persons who do work similar to that of barbers, *BUT DO NOT UNDERTAKE TO SHAVE*[14] their customers, are to be brought within the discipline of a regulatory board, it should be by virtue of new legislation rather than by an extension of the scope of existing law by interpretation." This grasping at the slightest grounds of distinction between similar classes

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[9] Not affording equal protection of the laws. U. S. Const., 14th amendment.

[10] Sec. 2339 Wis. Stats. 1913, granting marriage licenses only where the male applicant was free from acquired venereal disease and requiring him to undergo a physical examination within fifteen days before the license is granted was held not to be discriminatory. Timlin, J., in a concurring opinion in the case of *Peters v. Widule*, 157 Wis. 641, 147 N. W. 966, says: "A point is made that requiring the prospective husband to submit to the examination without making the prospective wife do so conflicts with the fourteenth amendment to the U. S. Constitution. . . . But the men desiring to marry form a very definite class quite germane to the object sought to be accomplished by the statute." In the prevailing opinion, Winslow, C. J., says (at p. 670 in *Wisconsin Reports* and p. 974 in the N. W.): "Theoretically the argument is strong. . . . The medical evidence in the case, however, corroborates what we suppose to be common knowledge, namely, that the great majority of women who marry are pure, while a considerable percentage of men have had illicit sexual relations before marriage and consequently the number of cases where newly married men transmit a venereal disease to their wives is vastly greater than than the number of cases where women transmit the disease to their newly married husbands. . . . The question is 'whether there are characteristics which in a greater degree persist through the one class than in the other and which justify the different treatment.' That there are such characteristics in the class of unmarried men is as certainly true as it is discreditable to the male sex." This distinction can hardly be applied to the question under discussion. Is the immoral woman less particular about her personal appearance than the chaste woman?

[11] Kan. Gen. Stat. 1915, par. 10326.

[12] The italics are writer's.

[13] *Keith v. State Barber Board*, 112 Kan. 834, 212 Pac. 871.

of occupations is indicative of the tendency of the courts to confine the application of licensing and regulatory statutes in derogation of a common right strictly to the specific instances enumerated in the statute.[15]

The Legislature of Wisconsin is blessed with a foresight most unusual in state legislatures, having avoided this question entirely. Not only has it passed a statute requiring barbers to be licensed,[16] but it has included a chapter regulating beauty parlors.[17] This statute contains this definition: "Barbering is shaving, trimming the beard, cutting the hair, shampooing, scalp or face massage of a male over ten years of age for payment."[18] It is specific and leaves no need for interpretation. The chapter regulating beauty parlors provides that "no person shall follow the occupation of beauty parlor manager, operator or apprentice without a license."[19] It is significant that although the statute has taken great pains to define the occupation of barbering most exactly, yet upon the definition of a beauty parlor it is ominously silent. Apparently the courts are not alone in their trepidity of encroaching upon the exclusive domain of the "deadly sex," for the Wisconsin Legislature, though bolder, appears equally ignorant of the artificial aids to pulchritude employed by the "female of the species."

WILL C. GOBEL.

Master and Servant: Employee of National Guard is entitled to compensation under Employers' Liability Law.—Can a national guardsman recover a compensation award under the Workmen's Compensation Act for injuries suffered while serving in his capacity as a guardsman or in doing any work connected therewith? This question has been aswered in the affirmative by the recent case of *Nebraska National Guard v. Morgan,* (Neb. 1924) 199 N. W. 557. One Morgan was employed as a carpenter to erect shed kitchens for each of the companies of the Nebraska National Guard which were to gather for an encampment near the city of Ashland in August, 1923. Plaintiff was employed on July 23 and worked for six consecutive days until he met

[14] The italics are writer's.

[15] "A corporation engaged in producing, buying and selling oil, and oil products, owning and using tank cars solely for transporting its own products, which ownership is necessitated by the failure of railroads to provide cars, is not engaged in the business of owning tank cars within the Laws of Florida 1913, sec. 6421 . . . and by sec. 46 imposing such tax on 'any corporation owning, controlling or operating tank cars.'" *Texas Co. v. Amos,* 81 So. 471, 77 Fla. 327; *Matthews v. State,* 214 S. W. 339, 85 Tex. Cr. App. 469. "Under Motor Vehicle Law, par. 289, defendant telephone repairer, while using automobile furnished him by employer to convey himself and necessary materials from place to place, *held* not a chauffeur." *People v. Dennis,* 166 N. Y. Supp. 318.

"The mere giving of massage treatments professionally falls within the profession of a trained nurse and one who gives such treatments is not required to be licensed." *People v. Hettinger,* 150 Ill. App. 448.

[16] Chap. 158, Wis. Ann. Stats. 1923.

[17] Chap. 159, Wis. Ann. Stats. 1923.

[18] Sec. 158.01, Wis. Stats.

[19] Sec. 159.02, Wis. Stats.