

WYETH v. THOMAS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1909.)

1. CONSTITUTIONAL LAW (§ 88*)—LIBERTY—
CONSTITUTIONAL GUARANTY—"LIFE, LIBERTY,
AND PURSUIT OF HAPPINESS."

The right to "life, liberty, and the pursuit of happiness," secured to every one under the state and federal Constitutions, includes the right to pursue any proper vocation to obtain a livelihood.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 164, 165; Dec. Dig. § 88.*]

For other definitions, see Words and Phrases, vol. 5, p. 4157.]

2. CONSTITUTIONAL LAW (§ 88*)—LIBERTY—
CONSTITUTIONAL GUARANTY—"LIFE, LIBERTY,
AND PURSUIT OF HAPPINESS."

The refusal to permit one to engage in a business of an undertaker is a violation of a right to enjoy "life, liberty, and the pursuit of happiness," secured under the state and federal Constitutions, unless there is some good reason for the refusal; and the refusal to permit one to bury the dead body of a relative or friend, except under an unreasonable limitation, is an unlawful interference with a private right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 164, 165; Dec. Dig. § 88.*]

3. CONSTITUTIONAL LAW (§ 81*) — POLICE
POWER.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, safety, or morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the state; but no other interference of the public to the detriment of an individual is permissible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

4. HEALTH (§ 20*)—BURIAL OF DEAD—REGU-
LATIONS—VALIDITY.

The Legislature has power to exercise complete control of the burials of the dead, so far as is necessary for the protection of the public health, the promotion of the public safety, and the detection of crimes resulting in death, within the police power, as is done in Rev. Laws, c. 78, §§ 37-44, and chapter 29, §§ 6, 8, 10, 11.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 20.*]

5. HEALTH (§ 21*)—CONSTITUTIONAL PROVI-
SIONS—POLICE POWER.

The mere assertion that a subject relates, though in a remote degree, to the public health, does not render an enactment on the subject valid; but the act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate, before an act which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor is valid.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 21.*]

6. HEALTH (§ 35*)—BURIAL OF DEAD BODIES—REGULATIONS—VALIDITY.

The rule adopted by the board of registration in embalming, created by St. 1903, p. 483, c. 473, providing that no permits for burial shall be issued to any person who is not a registered embalmer, cannot be sustained on the theory that the regulation promotes the public health, on the ground that an embalmer is more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer, especially since Rev. Laws, c. 29, §§ 1, 6, 10, 12, recognize ways of ascertaining whether death was from a contagious disease without employing an embalmer for that purpose.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 35.*]

7. CONSTITUTIONAL LAW (§ 60*)—DELEGATION OF LEGISLATIVE POWER.

The Legislature cannot delegate the power to make laws, conferred on it by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 89; Dec. Dig. § 60.*]

8. CONSTITUTIONAL LAW (§ 63*)—DELEGATION OF LEGISLATIVE POWER.

St. 1905, p. 483, c. 473, creating a board of registration in embalming, if construed to authorize the board to adopt a rule providing that no permits for burial shall be issued to any person who has not received a certificate from the board, is unconstitutional, because delegating general legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 63.*]

9. APPEAL AND ERROR (§ 320*)—CASES CERTIFIED—NATURE OF PROCEEDINGS.

A petition for mandamus to compel the board of health of a city to grant petitioner a license as an undertaker is on the law side of the court, and only questions of law can be reported to the full court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 320.*]

Report from Supreme Judicial Court, Suffolk County.

Mandamus by Benjamin F. Wyeth against Charles H. Thomas and others, as the Board of Health of the City of Cambridge, to compel the granting to petitioner of a license as an undertaker. The cause was reported for the consideration of the full court. Peremptory writ of mandamus awarded.

Arthur P. Stone, for petitioner. Gilbert A. A. Pevey, for respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the respondents, the board of health of the city of Cambridge, to grant the petitioner a license as an undertaker. Among the facts agreed are the following:

"Second. That the petitioner, Benjamin F. Wyeth, is an inhabitant of Cambridge, is an undertaker by trade, and has been for 46 years engaged in the trade of undertaker in various capacities, and has carried on for some years past the business of undertaking under the name of Benjamin F. Wyeth; that said undertaking business as conducted by the petitioner is a profitable one, and it is his support and the support of his family;

that the petitioner is the sexton of the First Church in Cambridge, and the members in attendance at that church and other residents of Cambridge and the vicinity have been accustomed from time to time to engage him to perform such services as may be required in connection with the burial of the dead.

"Third. That the petitioner, Benjamin F. Wyeth, is a competent undertaker and is well versed in the duties and practices of that trade or business, except in so far as he is ignorant of the processes of embalming.

"Fourth. That the petitioner, Benjamin F. Wyeth, does not hold himself out to the public as one skilled in the methods of embalming dead bodies, and has not, and never has had, and has not applied for, a certificate or license from the board of registration in embalming to enable him to engage in the business of embalming dead bodies.

"Fifth. That a large part of the petitioner's trade or business does not require a knowledge of embalming, and in many instances the petitioner is not required nor directed to embalm the bodies of the dead intrusted to his care.

"Sixth. That in all cases in which the said Benjamin F. Wyeth has had occasion to have the bodies of the dead embalmed, he has, since January 1, 1906, procured the services of an embalmer duly registered by the board of registration in embalming, or he has intrusted the work to some servant or agent in his employ who was duly registered as aforesaid.

"Seventh. That the respondents to this petition or their predecessors in office had, up to and including the 1st day of May, 1907, always given to the said Benjamin F. Wyeth a license to act as undertaker upon his application therefor."

From other facts in the case, and from the respondent's answer, it appears that the only reason for refusing to grant the petitioner's license as an undertaker is that he is not licensed as an embalmer. He cannot obtain a license as an embalmer without making application under rule 2, section 1, adopted by the board of registration in embalming, and complying with the requirements of the section, which is as follows:

"The applicant must have taken a regular course at a reputable school of embalming whose course of instruction is satisfactory to this board, and must have had not less than a year and a half of experience in active work with a practicing embalmer." The question of law presented by the report of the single justice is whether the respondent's refusal to grant a license, solely for this reason, is legal.

St. 1905, p. 483, c. 473 is "An act to establish a board of registration in embalming." Under section 6 the board is to adopt rules and regulations, not inconsistent with the provisions of this act and the statutes of the

commonwealth, governing the care and disposition of human dead bodies, and the business of embalming." Under the authority of this section the board has adopted rules and regulations whereby they assume to put the whole business of the management of funerals and the burial of the dead in the hands of persons holding a license as embalmers from this board. The first part of rule 9, § 2, is as follows: "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks, selectmen of a town, or any other persons authorized to issue burial permits to any person or persons who have not been registered and received a certificate from the state board of registration in embalming." Under this rule no one can bury lawfully the dead body of a former member of his family unless the permit for burial is obtained by a licensee of this board. No one can perform the ordinary duties of an undertaker without first having procured a license as an embalmer. No one can obtain a permit for the disinterment of a dead body for any cause, at any time, however long after the burial, unless he is a licensed embalmer. Surely the fitness of a person to receive a permit for the disinterment of a dead body cannot depend upon his knowledge or ignorance of the process of embalming. The question is presented whether there is any warrant under the Constitution and the laws for this interference with the liberties of the people.

The respondents in their answer rest their defense largely upon the action of the board of registration in embalming, and adopt as their own the views upon which this action presumably was founded.

The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the Constitution of the United States, which does not permit a state to deprive any person of life, liberty or property without due process of law. The nature of this right has been stated and illustrated in many cases. *Com. v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968; *Com. v. Perry*, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533; *Winthrop v. New England Chocolate Company*, 180 Mass. 464, 62 N. E. 969; *Austin v. Murray*, 16 Pick. 121; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal, and the refusal to permit one to bury the dead body of his relative or friend, except under an un-

reasonable limitation, is also an interference with a private right that is not allowable under the Constitution of the commonwealth or the Constitution of the United States.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety or the public morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the state, and no other interference of the public to the detriment of an individual is permissible.

The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the Legislature of this state has made elaborate provisions and strict regulations covering these subjects. *Rev. Laws, c. 78, §§ 37 to 44, inclusive*; chapter 29, §§ 6-8, 10-12, 15. Of its power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety, there is no question.

No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health.

The only particular in which the respondents have suggested, either in their answer or their argument, that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. To use the language of the agreed statement of facts: "In the opinion of the respondent board of health these rules for preserving and embalming human dead bodies have a tendency to and do increase, on the part of the undertaker, the knowledge of the nature of the disease from which the party deceased may have suffered, and which may have caused death." There is certainly a grave reason to doubt the correctness of this opinion. No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But if there may be some slight increase of knowledge, from

this source, to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. As was said in the opinion in *Lochner v. New York*, 198 U. S. 45, 57, 25 Sup. Ct. 539, 543, 49 L. Ed. 937: "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person, and in his power to contract in relation to his own labor." From such a possibility no such benefit could come as to justify a requirement that all human bodies should be embalmed for such information in regard to the cause of death as can be acquired through the process of embalming, or a requirement that an embalmer should always be employed as undertaker for the chance of a valuable discovery from his observation, without his using the process of embalming. The law recognizes direct ways of ascertaining whether death was from a contagious disease, without employing an embalmer for that purpose. Rev. Laws, c. 29, §§ 1, 6, 10, 12. These ways seem a thousandfold more important and reliable than any possible knowledge that an embalmer might have from his training in that business, beyond the knowledge of an undertaker of experience who was not an embalmer.

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the state. If such a regulation had been made an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the Appellate Division of the Supreme Court of that state. *People v. Ringe*, 125 App. Div. (N. Y.) 592, 110 N. Y. Supp. 74.

From another point of view the rules and regulations of the board of registration in embalming, relied on by the respondents as

an important reason for their decision, are invalid. In *Brodhine v. Revere*, 182 Mass. 598-600, 66 N. E. 607, 608, is this language: "It is well established in this commonwealth and elsewhere that the Legislature cannot delegate the power to make laws, conferred upon it by a Constitution like that of Massachusetts." Then follow numerous citations from different states, with the words: "This doctrine is held by the courts almost unanimously." None of the cases referred to later in the opinion, in which there was a delegation of legislative authority for a local or special purpose or in matters of administration, and none of the cases which have been decided since, and which are referred to in *Com. v. Kingsbury*, 199 Mass. 542, 85 N. E. 848, go far enough to legalize a delegation of authority to change a general law for all the people of the commonwealth, with no local or special reason for seeking the aid of an administrative board, as the rule about the issuing of permits and some of the other rules of this board purport to change the general laws on this subject for all the people in every city and town in the commonwealth. If the statute were construed to authorize the making of such rules, it would be held unconstitutional as assuming to delegate general legislative authority.

We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper and illegal. According to the report, upon this determination of the question of law, a writ of mandamus is to issue. The case being on the law side of the court, only questions of law could be reported to the full court, and by the terms of the report the question of discretion whether to grant the writ must be taken to have been decided in favor of the petitioner. The report is equivalent to a finding upon the answer and the facts agreed that the only reason for the respondent's refusal was that the petitioner was not licensed as an embalmer, and that except for this, the respondents, in the exercise of their judgment and discretion would have granted the license. Upon these facts nothing remains but to enter the order:

Peremptory writ of mandamus to issue.