he may not.[17] If recovery is granted, many Ohio cases may be cited for the proposition that a party is not expected to anticipate that others will violate the law;[18] if recovery is denied, a more or less literal construction of the statute is relied on. The statute does not always bar recovery, nor will it as long as negligence and not absolute responsibility is the test, and yet there is a decided tendency in the latter direction; doubtful cases will involve a question of the degree to which the statute may be carried. For this no absolute test can be applied. A. E. H.

WILLS
PROBATE PRACTICE

Claim for Funeral Expenses

Decedent, during his lifetime, contracted with a funeral director for funeral services. The funeral director took complete charge. He buried the deceased in the casket, grave vault, and clothes, which had been selected by him, and performed other services including transportation to the cemetery. A charge of $654.95 was made against the estate. The executor rejected the claim and tendered $350 citing Section 10509-121, Ohio General Code, which provides that an executor may allow $350 for funeral expenses and that the Probate Court must approve the allowance of any sum in excess of such amount. The funeral director refused tender and filed suit in the Municipal Court of Columbus[1] which allowed the claim. The Court of Appeals affirmed the decision of the Municipal Court and held that the statute does not require the approval of the Probate Court to the allowance of a claim of a funeral director in excess of $350 founded on a contract made with the decedent in his lifetime.[2]

The problem of "burial of the dead" has involved an excessive amount of litigation in Ohio and the ability to contract before death for funeral expenses to be paid, from the estate, after death has been

[17] Note 6, *supra*.

[18] Hangen v. Hadfield (N. 10 supra); Hess v. Kroger Grocery & Co., (N. 3 supra); Sidle v. Baker, 52 Ohio App. 89 (1936); Cleveland Ry. v. Goldman, 122 Ohio St. 73, 170 N.E. 641 (1930); Juergens v. Bell Dist. Inc., 135 Ohio St. 335, 21 N.E. (2d) 90 (1939) Goldberg v. Jordan, 130 Ohio St. 1, 196 N.E. 775 (1935) Swoboda v. Brown, 129 Ohio St. 512, 196 N.E. 274 (1935). In the majority opinion of the principal case, Judge Hart says that while this is true of negligence in general, it has little, if any application to the requirements of the statute in question.

[1] Ohio G.C. sec. 10509-133, allowing suit on rejected claim if filed within two months.

[2] Schroyer v. Hopwood, 65 Ohio App. 443 (1940).

the basis for much of this litigation. It often arises where the wife attempts to bind her separate estate for her funeral expenses.

Liability for a wife's funeral expenses, under the common law, always devolved upon the husband[3] and this liability to third parties cannot be removed by the wife's will charging her separate estate with payment.[4] However, the funeral director has recourse against both the wife's estate and the surviving husband in such a case,[5] but since the husband is under a duty to pay the funeral expenses he is not entitled to reimbursement from the estate of his wife.[6] Where the wife charges her separate estate by contract or will, as between the husband and wife there seems to be no good reason why the husband should not recover from the executor of the wife's estate.[7] There is also a common law duty on the husband to pay for the medical services rendered to his wife,[8] but it has been held that the wife can bind her separate estate and relieve her husband from his liability.[9] By analogy the wife should be able to relieve the husband from his liability for her funeral expenses but the courts are disinclined to allow this and apparently distinguish between debts incurred while administering to the living and debts incurred in the burial of the dead. In the former the law of contracts apply but in the latter absolute liability is imposed which cannot be contracted away although the wife can, by contract, become concurrently liable with the husband.[10] In justification of this distinction it is said that the burial of the dead is a matter of necessity; the public health requires that it be done and a proper public sentiment requires that it be done decently.[11] "A funeral cannot be delayed for judicial inquiries to determine upon whom the moral obligation to proceed rests most heavily."[12] In other words the funeral director may conduct the funeral decently and orderly and look to such person as ought to pay for his recompense.

As to what constitutes a "decent funeral," each case must be determined by the circumstances of the deceased. The amount allowed

[3] Stonsifer v. Schriver, 100 Md. 24, 59 Atl. 139 (1904).
[4] Lee v. Hempy, 35 Ohio App. 402, 172 N.E. 421 (1929).
[5] Eveland v. Sherman, 9 Ohio N.P. (n.s.) 559 (1910).
[6] Modified by Ohio G.C. sec. 10509-125 which reads: a husband shall be entitled to reimbursement from the estate of his wife for her funeral expenses, if paid by him, to the extent that the rights of other creditors of the estate will not be prejudiced by such reimbursement. *Cf.* Estate of Guthrie, 28 Ohio N.P. (n.s.) 447 (1931).
[7] 4 CINN. L. REV. 486 (1930); Rocap v. Blackwell, 79 Ind. App. 232, 173 N.E. 726 (1923).
[8] Toledo v. Duffy, 13 Ohio C.C. 482 (1897).
[9] Withrow v. Boone, 16 Ohio N.P. (n.s.) 506 (1914); Gunn v. Samuels, Adm., 33 Ala. 201 (1858); McClellan v. Filson, 44 Ohio St. 184, 5 N.E. 861 (1886).
[10] Lee v. Hempy, *supra* note 4.
[11] Rex. v. Stewart, 12 Ad. & Ell. 773 (English Kings Bench 1840).
[12] Sears v. Giddey, 41 Mich. 590, 2 N.W. 917 (1879).

for funeral expenses is governed by the value of the decedents estate, his station in life, and the customs of the people in the same station, but the expenditure must be reasonable and if extravagant will be disallowed.[13] In *Foley* v. *Brocksmit*,[14] a janitor whose associates were laboring men and his most intimate friend a street sweeper, left an estate worth $5000. The undertaker provided such a casket "as he had never sold before or since." In holding the expense unreasonable the court said, "manifestly this does not comport with a modest estate nor with the station of the deceased in business or society." Text writers feel that if greater economy were insisted on, in small as well as great estates, many a widow and heir struggling under the privation of bitter poverty would have reason to be thankful for being prevented from wasting a substantial part of their means upon the fruitless pomp and ceremony of an extravagant funeral.[15] "Assets of an estate should not be squandered in ostentatious display of the weakest of all vanities."[16]

It is possible that the Ohio Legislature had this in mind when they enacted Section 10509-121, General Code, the pertinent part of which is that the executor shall receive and pay the debts of the deceased applying the assets in the following order: "1. Bill of funeral director not exceeding three hundred fifty dollars, such other funeral expenses as are approved by the court . . . 2. Debts due to all other persons." If the legislature desires to prevent extravagance, it would seem that the limitation upon the amount of funeral expense should be made absolute but the clause "such other funeral expenses as are approved by the court" indicates that in some instances one may exceed the statutory amount. It appears that the statute is meant to be a warning to funeral directors that they may not furnish an excessive funeral and expect to be paid out of the decedent's estate unless the court allows the amount in the excess of $350.

In Ohio there is *dictum* to the effect that one could require in his will that any amount, no matter how extravagant or if it used up the entire estate, should be spent on his funeral.[17] Thus it would seem that what one could do by will he could do by contract. The facts in the principal case are unusual. In very few instances does a person in full health select his casket, his funeral raiment, prepare for his final interment, and agree that the bill shall be paid after his death out of his

[13] Krole v. Close, Adm., 82 Ohio St. 190, 92 N.E. 29 (1910).
[14] 119 Iowa 457, 93 N.W. 344 (1903).
[15] 2 WOERNER ON ADMINISTRATION (3 Ed.) at p. 1195.
[16] Bradleys Estate, 11 Philadelphia 87 (1875); *In re* Rooney, 3 Redf. (N.Y.) 15 (1877).
[17] Estate of Kaercher, 6 Ohio N.P. (n.s.) 459 (1908).

estate. There seems to be no acceptable reason why a person cannot enter into an agreement for a "stylish" funeral and, as long as the Ohio Courts and legislature permit an "ostentatious display" after death, such an agreement becomes a valid debt against the estate.

Where the estate is sufficient to pay all debts no questions of priority arise. However, if the estate is inadequate, such part of the bill of the funeral director as exceeds the three hundred fifty dollars, unless approved by the court, should be included under item 7 of the statute along with "debts due to all other persons." In the principal case the estate was adequate and the problems of priority was not present.

R. W. C.