Mont. 489, 31 Pac. (2d) 729 (1934); *contra*, *Buck* v. *Buck*, 60 Ill. 241 (1871); *Dickey* v. *Dickey*, 154 Md. 675, 141 A. 387 (1928); *Parker* v. *Parker*, 55 Cal. App. 458, 203 Pac. 420 (1921). Though the stipulations of the parties to alimony are usually adopted, the court is not bound by them. *Warren* v. *Warren*, 116 Minn. 458, 133 N.W. 1009 (1902). The contract is merely an advisory instrument for the court, depending on the court's approval for its legal efficacy and effect. *Hayes* v. *Hayes*, 75 S.W. (2d) 614 (Mo., 1934). Neither the parents nor the court itself can deprive the court of its continuing jurisdiction over the welfare and maintenance of minor children in divorce action. *Barrett* v. *Barrett*, 39 Pac. (2d) 621 (Ariz., 1934). Considering the social significance of these cases, the result is much to be preferred to that based upon the impairment of the obligation of contact argument.

The recent case of *Newkirk* v. *Newkirk*, 129 O.S. 543, 196 N.E. 146 (1935), without opinion, permitted a deduction in the divorce decree and relied on *Corbett* v. *Corbett*, *supra*, as their authority. However, there was a conflict as to the existence of a contract between the parties. In *Higbee* v. *Higbee*, another case decided without opinion on October 23, 1935, the Supreme Court refused a motion to certify the record of the lower courts. The Common Pleas and Court of Appeals had held that the court had no jurisdiction to permit a decrease in the obligation of the parties to the contract except upon showing duress or fraud. Did the *Newkirk* case change the Ohio existing law? The Ohio Supreme Court by failing to write an opinion in the last two cases has missed an opportunity to lay down a definite rule on the subject in the State of Ohio. Perhaps, from *Newkirk* v. *Newkirk*, *supra*, we may infer that Ohio will tend to follow the recent trend of decisions of the other states, i.e., a divorce decree that has embodied a contract of the spouses for alimony for the wife and support of the child can be decreased or increased if the necessary circumstances are found for either.

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INTEREST

GRANTED BECAUSE OF UNREASONABLE DELAY IN PAYMENT TO CREDITOR OF DECEDENT.

One Haskenkamp died Dec. 20, 1925. J. M. Murray, having a claim for funeral services and expenses, presented the will for probate on two different occasions, both times in the court of the wrong county. The will was finally sent to Hamilton County, where the decedent had lived, and was admitted to probate. The administrator had tendered the

principal sum on several occasions, but Murray had refused the amount unless the interest was paid. Murray started suit on Nov. 7, 1930. The Court of Appeals for Hamilton County held that Murray was entitled to interest on the claim against the estate, due to the fact that there was an unreasonable delay in administration. *Hawke, Admr.*, v. *Murray*, 47 Ohio App. 380, 191 N.E. 884, 40 O.L.R. 318, 16 Abs. 302 (1933).

An early New York case stated that executors and other trustees are chargeable with interest if they were negligent in not paying over money due from estates. *Dunscomb, et al.*, v. *The Executors of Dunscomb*, 1 Johns. Ch. 508 (1815). Interest is allowed for the breach of a contract, or when some duty is violated. *Gordon Newel* v. *Executor of Caroline Keith*, 11 Vt. 214 (1839). Interest is an incident to "just compensation" where liability has its origin in the obligation of a contract. *Prager* v. *N. J. Fidelity and Plate Glass Ins. Co. of Newark, N. J.*, 245 N.Y. 1, 156 N.E. 76, 52 A.L.R. 193 (1927). The law assumes that interest is the measure of damages for delay in the payment of money that is due. *Loudon* v. *Taxing District*, 104 U.S. 771, 26 L.Ed. 923 (1881); *In re Ashland Emery and Corundum Co.*, 229 Fed. 829 (1916); *Young* v. *Godbe*, 15 Wall. 562, 21 L.Ed. 250 (1872); *Henderson Cotton Mfg. Co.* v. *Lowell Machine Co.*, 86 Ky. 668, 7 S.W. 142 (1888). Where a party is guilty of unreasonable and vexatious delay in making payment of a just claim, the debt is chargeable with interest. *Chicago* v. *Tebbetts*, 104 U.S. 120, 26 L.Ed. 655 (1881); *Agency of Canadian Car and Foundry Co., Limited, et al.*, v. *American Can Co.*, 258 Fed. 363, 6 A.L.R. 1182 (1919). The above cases clearly show that whenever a debtor is in default for not paying money, justice requires that he should indemnify the creditor, and such damage is given in the form of interest. Interest has been held recoverable as of right where money has been improperly retained. Other courts have held such a right exists only where it can be implied from the nature of the promise, or is expressly reserved, but when it is given as damages it is a matter of discretion. *Miller* v. *Robertson*, 266 U.S. 243, 45 Sup. Ct. 73, 69 L.Ed. 265 (1924); 15 R.C.L. 10.

An early Ohio case stated that an administrator is not chargeable with interest unless he is guilty of unreasonable and unnecessary delay in the settlement of his accounts. *Thomas W. Cooch, et al.*, v. *Irwin, Admr.*, 7 Ohio St. 22 (1857). Assets in the hands of an administrator which are tied up by litigation in good faith do not bear interest. *James* v. *West, Adm., et al.*, 67 Ohio St. 28, 65 N.E. 156, 47 W.L.B. 857 (1902). A certain statute enacted in Ohio in 1869, was not cited in the latter case. "* * * when money becomes due and payable upon any

bond, bill, note, or other instrument of writing, upon any book account, or settlement shall be entitled to interest at the rate of six per cent per annum, and no more." Ohio G.C., Sec. 8305. This section of the code may have been applicable to the case of *James* v. *West*, and also the principal case. If so, it seems that it would not have affected the decisions beyond setting the rate at which interest is allowable.

The courts are in conflict as to the time when interest begins to run. Some courts hold that interest begins to run from the time the money should have been paid, and not from the time that the delay became unreasonable. *C. W. Ribble* v. *C. Bullion, et al.*, 87 Neb. 700, 128 N.W. 32, 31 L.R.A. (N.S.) 350 (1910); *Chicago* v. *Tebbetts, supra; Minard* v. *Beans*, 64 Pa. 411 (1870); *Young* v. *Godbe, supra.* Other courts have allowed interest only from date of demand. *Shepard* v. *The City of New York*, 216 N.Y. 251, 110 N.E. 435, Ann. Cas. 1917C, 1062 (1915); *Necedah Mfg. Corp.* v. *Juneau County*, 206 Wis. 316, 237 N.W. 277, 96 A.L.R. 4 (1931); *Agency of Canadian Car and Foundry Co., Limited, et al.*, v. *American Can Co., supra.* In the principal case, the court, in its discussion, said, "There is no direct controlling authority in this state announcing when interest shall begin to run upon the claim for funeral expenses." The undertaker asked for interest from Feb. 21, 1926, which apparently was allowed. Allowing interest from the date the claim was due, is probably the fairest method. The principal case was inclined to follow that method.

In the principal case the undertaker was allowed interest, although he might have avoided the delay, by probating the will earlier in the proper court. Where a party allows the claim to lie dormant for a long time, it is unreasonable that interest should be added, so long as the delay was due to the fault of the creditor. *Redfield* v. *Ystalyfera Iron Co.*, 110 U.S. 174, 3 Sup. Ct. 570, 28 L.Ed. 109 (1883); 33 C.J. 190. In view of the fact that the undertaker in the principal case made some efforts to probate the will, though his efforts were ineffectual, it might be suggested that the case be distinguished from cases where interest was not allowed, on two possible grounds: First, that the funeral director did not allow the claim to lie dormant in an unreasonable manner, since he made some effort. Second, courts are anxious to close up estates as soon as possible, and are more apt to allow the interest as a penalty for the delay, than would be true in ordinary contract cases.

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