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THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND THE ONTARIO POWER COMPANY OF NIAGARA FALLS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN JOSEPH ALBRIGHT (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Contract—Purchase of shares in company—Mortgage on company property—Security for bonds—Covenant to provide sinking fund—Earnings for calendar year—Payments at fixed date—Payments "accrued but not yet due"

As security for its bond issue the Ont. P. Co., in 1903, gave a mortgage of all its property to a trust company and agreed to provide a fund to redeem said bonds by paying, on the first of July in each year from 1903, one dollar for each electrical horse power sold and paid for during the preceding calendar year. In 1906 it gave another mortgage to secure debentures and again agreed to provide a sinking fund on the same terms and conditions except that the rate was twenty-five cents per h.p. payable out of net earnings. In 1917 the Hy. El. Com. entered into a contract with A. (acting for himself and other shareholders) to purchase ninety per cent of shares in the Ont. P. Co. and as much of the remaining ten per cent as A. controlled when the sale was completed. In this contract A. covenanted that when the sale was completed he would leave with the Ont. P. Co. a sum estimated by him to be equal to "* * * sinking fund payments on the bonds and debentures * * * which shall have accrued but shall not be due at the time for completion." The time for completion was fixed at Aug. 1, 1917. On that date A. left with Ont. P. Co. a sum representing the power sold and paid for during the preceding month of July.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

Held, Anglin J. dissenting, that the phrase "payments * * accrued but not due" meant that the obligation to pay accrued (in the conventional sense meant by the parties) as soon as sufficient h.p. was sold and paid for and continued to accrue *de die in diem* so that A. was obliged to leave an amount equal to one dollar per h.p. sold and paid for from the first of Jan. the beginning of the calendar year 1917.

Per Duff J. The interest and sinking fund payments under the second mortgage where payable out of net profits. As the existence of such profits has not been shown there is no liability to pay.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the defendant.

The material facts are sufficiently indicated in the above head-note.

Lafleur K.C. and *MacInnes K.C.* (*E. F. Newcombe* with them) for the appellant.

Anglin K.C. for the respondent.

IDINGTON J.—By agreement dated 12th April, 1917, the respondent (hereinafter called the *vendor*) entered into an agreement with the Hydro-Electric Power Commission of Ontario (hereinafter called the *purchaser*) to which The King, represented by the Lieutenant Governor of Ontario; The Ontario Power Company of Niagara Falls; The Ontario Transmission Company, Limited; and Niagara, Lockport & Ontario Power Company, were also parties, whereby the vendor agreed, by the first operative part thereof, as follows:—

First: Vendor agrees to sell to the purchaser and the purchaser agrees to purchase from the vendor, ninety thousand (90,000) shares of the par value of one hundred dollars ($100.00) each, of the capital stock of the Power Company and the remaining ten thousand (10,000,) of the par value of one million dollars ($1,000,000) to the extent that the holders thereof put the vendor in a position to make delivery of such shares to the purchaser prior to the time for completion as hereinafter defined.

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It is rendered clear by further parts of the agreement that the object of the purchaser was to acquire the practical ownership of the Power Company and certain other properties or assets set forth in a schedule, and that the Power Company had given mortgages by the terms of which certain debentures and interest were to be secured and further that to improve the security and reduce the amount of such liabilities certain sums were to be paid annually into a so-called sinking fund kept by the Trust Company holding said mortgage securities on behalf of the debenture holders secured by said mortgages.

The agreement provided that it should not become operative unless and until executed and delivered by all the parties.

The vendor agreed that neither the Power Company nor the Transmission Company would, before the the time for completion, create any further shares of their capital stocks respectively, or any bonds, debentures or like securities.

The time for completion was to be the first day of the calendar month that should fall next after sixty days from the execution and delivery of said agreement by all the parties thereto, which turned out according to the course of such events to be the 1st of August, 1917.

The agreement contained the following provisions:

> The vendor agrees with the Power Company and the purchaser that in addition to the assets set out in said schedule "C" hereto, there shall be left in the hands of the Power Company at the time for completion a sum estimated by the vendor to be equal to—
>
> (*a*) Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said Schedule "D" which shall have accrued but shall not be due at the time for completion, and

(*b*) The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes and assessments for the year 1917, adjusted to the time for completion, and if such estimate shall, after completion, prove inaccurate, the excess of deficiency when determined shall be paid by the vendor to the Power Company, or by the Power Company or the purchaser to the vendor as the case may require.

The vendor and purchaser have disagreed over the construction of item (*a*) of the foregoing part of the agreement and hence this litigation over the correct computation of the amount to be left in the sinking fund.

It seems to me clear that the very nature of what the parties were contracting for was to get the stock and other assets at the actual value they had on the price basis of the stock purchased being fixed but subject to the encumbrances being increased by interest or being reduced by what had accrued in favour of the sinking fund, but not yet payable, and to be adjusted accordingly as if payable on the 1st of August.

They seem to have agreed to treat everything else mentioned but the sinking fund in that way.

And, as an illustration of such mode of adjustment counsel for respondent told us in answer to a question I put that the taxes were computed up to the 1st of August and so agreed on.

Counsel's suggestion about taxes being due in Ontario according to the statute declaring them so from the beginning of the year, does not, I respectfully submit, seem a very convincing reason for refusing to apply same rule to the sinking fund item.

To fall back upon the first of July pay day for the amount earned in the previous calendar year according to the agreement with the Trust Company does not seem to me any more convincing.

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The respondent allowed for the month of July and paid accordingly, but refuses to pay for the six previous months.

I cannot follow the reasoning which allows for July but refuses that which in like manner had accrued in the sense the parties so evidently used the word in relation to the words following it "but shall not be due at the time for completion".

The argument founded on the terms of one or more of the mortgages to the Trust Company seems rather far afield.

And supposing the agreement had been fully executed by all parties on its date, and thus the 1st of July had become the date for adjustment, some of the arguments would, so far as founded on these incidents, have to be changed somewhat.

Perhaps then it would have been argued that the sum to be left in the sinking fund being due but unpaid need not be paid at all because it was in regard only to what "shall have accrued *but shall not be due*" that this provision was applicable.

I must say that I fully agree with the reasoning of the learned trial judge as applied when correcting in the formal judgment the amount recoverable as being what was within the reasonable contemplation of the parties.

Agreeing as I do with that and the reasoning of the Chief Justice of the Exchequer Court, presiding in the second Appellate Division when the further documents in evidence were presented for the first time, I need not repeat what has been well said.

I am of the opinion that the appeal should be allowed with costs and the judgment of the learned trial judge be restored with costs throughout.

DUFF J.—The majority of the Appellate Division has held that the sinking fund payments are, for the purposes of the agreement of April, 1917, to be treated as accruing *de die in diem* between the dates fixed for payment and as apportionable accordingly. This, it is not seriously disputed, involves the attribution to language giving rise to the dispute of an unusual and unnatural meaning. It is the basis, indeed, of the respondent's argument that these payments accrue due as an entirety on the date of payment and that there is not in the interval any accrual in any sense known to the law and that accordingly, apart from some special understanding that they should be considered apportionable for the purposes of the agreement out of which the dispute arises, they are not apportionable. I am convinced that the language of the clause in question is perfectly sensible with reference to the subjects to which it relates, the interest and sinking fund payments dealt with, and applying the language of the clause in its ordinary and well understood meaning the appellants have established their contention with reference to the first trust deed but have failed to establish it with reference to the second.

The controversy concerns the effect of the words

> interest and sinking fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in Schedule D which shall have accrued but shall not be due at the time for completion

I agree with the argument presented on behalf of the respondent that we must be informed of the provisions of the instruments dealing with the payments for interest and sinking fund here referred to in order to ascertain the meaning and effect of the words "shall

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have accrued but shall not be yet due". But the object of looking at these instruments, it must be observed, is to ascertain the meaning expressed by the words themselves in the context in which they appear having regard to the particular circumstances with reference to which they are used. The subjects of this provision are such interest and sums payable for the purpose of a sinking fund as shall have accrued but shall not be due at the time mentioned; and in order to apply the provision you must ascertain what interest and what sums of the character mentioned fall at the specified time within the described category—the category defined by the words

> interest and sinking fund payments * * * accrued * * but not yet due.

The word "due" in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense in the present instance is perfectly clear—otherwise the contrast expressed between payments "accrued" and payments "due" would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as "accrued payments" would be, and standing alone it would *prima facie* receive that reading, moneys presently payable; but the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted —and it may have this meaning although it appears from the context that the right completely constituted

or the liability completely constituted is one which is only exercisable or enforceable *in futuro* —a debt for example which is *debitum in praesenti solvendum in futuro*. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.

I fear I must, in view of the arguments advanced on behalf of the respondent and of the opinions expressed in the Appellate Division to which I shall refer with more particularity later, elaborate a little this point as to the meaning of the word "accrued." Generally sums received as rent, for example, and other sums of money payable periodically at fixed times are not, apart from statute, apportionable unless by reason of express provision or by implication an intention is manifested that they should become due *pro rata* from day to day. This intention is sometimes implied from the purpose of the payment as for instance in the case of charges for the maintenance of children which, though payable at fixed times, are considered to accrue from day to day because intended for the daily maintenance of the children. *Hay* v. *Palmer* (1). So in the case of interest where the interest payable on money lent was payable at fixed periods, it was held none the less to become due *de die in diem* and this upon the ground that the creditor might call in his capital at any time and interest was considered to be earned and to become due each day as the price of the creditor's forbearance. *Wilson* v. *Harman* (2);

(1) 2 P. Wms. 502.

(2) [1755] 2 Ves. Sen. 672 at p. 673.

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Hay v. *Palmer* (1); *Pearly* v. *Smyth* (2); *Ex parte Smyth* (3). And this conception of the contract to pay at a specified date interest on money lent—that the sum payable on the date fixed was an accumulation of sums which had accrued *de die in diem* (a day according to a familiar notion being treated for this purpose as an indivisible unit)—came to be accepted as corresponding with the true nature of such a contract even when the principal, being itself payable at a fixed date, would not be called in at the discretion of the creditor. In *In re Rogers Trusts* (4) Kindersley V. C. declined, after investigating the practice in the master's office, to give effect to an argument that the principle was confined to those cases where the creditor was entitled to recall his principal at pleasure.

And the form of words employed to express the idea that interest reserved as payable on a fixed date becomes due from day to day (because earned by forbearance of principal) has varied little since Lord Hardwicke's time. Lord Hardwicke himself used the phrases "accrues every day" in *Pearly* v. *Smith* (2) and "becomes due from day to day" in *Wilson* v. *Harman* (5); Mr. Swanston in his note to *Ex parte Smyth* (3) "accruing *de die in diem*" and "becomes due *de die in diem*"; and Kindersley V. C. at page 340 in *Re Rogers Trusts* (4), says

> the interest payable on the debentures though payable half yearly is not an entirety but an accumulation of each day's interest which accrues *de die in diem* and which though not presently payable is still due.

An accurate writer, Mr. Leake, speaking of interest upon debts payable at fixed periods says it is considered to "accrue due". Leake, Uses and Profits of Land, page 447.

(1) 2 P. Wms. 502.
(2) [1745] 3 Atk. 261.
(3) [1815] 1 Swan. 337 at p. 357.
(4) [1860] 1 Dr. & Sm. 338 at p. 341.
(5) 2 Ves. Sen. 672.

The same phraseology appears in the Apportionment Act of 1870, which provides that certain

> periodical payments in the nature of income * * * shall, like interest on money lent, be considered as accruing from day to day

although it is at the same time provided that the apportioned part of such payment shall only be payable or recoverable when "the entire portion * * * shall become payable," And in the judgments applying the Apportionment Act there are many illustrations of this use of the word "accrue". One or two examples will suffice.

In *In re Howell* (1) the court of Queen's Bench had to consider the question whether, a tenant having become bankrupt during the currency of a quarter, that part of the quarter's rent apportionable to the part of the quarter before the order of adjudication should be held to be rent "accrued due", within section 42, s.s. 1 of the Bankruptcy Act of 1883. Such apportionable part of the quarter's rent was of course not recoverable from the tenant until the expiry of the quarter; but it was held, nevertheless, that is to say, notwithstanding the fact that it was not payable until the end of the quarter, to have "accrued due" within the meaning of section 42, from day to day. In other words, the effect of the Apportionment Act was held to be that, rent accruing *de die in diem*, the part attributable to the time elapsed must be considered as "accrued due" for the purpose of applying a statute passed before the Apportionment Act itself.

Again in *In re Lucas* (2), the Court of Appeal had to consider the construction and effect of a will by which a testator had directed his executors to "forgive to" a certain tenant

(1) [1895] 1 Q.B. 844. (2) 54 L. T. 30.

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all rent or arrears of rent which may be due and owing from him to me at the time of my decease.

The court differed as to the construction of the phrase but there appears to have have been no difference of opinion upon the point that rent, although payable at a fixed date, becomes, by force of the language of the Act "considered as accruing from day to day", due from day to day, the amount so due being *debitum in praesenti solvendum in futuro;* as Fry L. J. says at page 32, section 2 of the Apportionment Act

> altered the Common Law of England, and whereas before the Act rent only, (unless of course it is otherwise specially reserved) became due when it became payable after the Act it became due from day to day

I will not multiply examples. Where, as Kindersley V.C. says, a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment. Sums of money so divisible are to be distinguished from sums which, payable at a fixed date, are so payable as an entirety and not divisible at all. Such as, for example, rent before the Apportionment Act unless a contrary intention appeared from the manner in which it was reserved; and wages unless (as where the sum payable periodically is made up of moneys due for piece work 6 Q.B.D. 1) the terms or circumstances of the hiring express or imply another intention. These (rent and wages are selected by the respondents as typical illustrations

of their proposition that "a debt accrued only when due") are not apportionable because, as Littledale J. said in *Slack* v. *Sharpe* (1) (a case cited by Riddell J. and relied upon by the respondents here)

> although the time in respect of which the rent becomes due goes on accumulating the rent is an entire thing and becomes due all at once.

Let us consider then the application of the contractual clause in question to the sinking fund payments in respect of which the dispute arises. And first of the earlier series of debentures secured by the Trust Deed of the 2nd Feb., 1903.

The language of the trust deed which describes the obligation, and the conditions of it, to pay into a sinking fund or rather to pay to the trustee for the purposes of a sinking fund is far from precise. The company is to

> pay * * the sum of $1.00 for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

The expression "electrical horse power" denotes, of course, a rate, an engineer's unit for measuring the time rate of expenditure of electrical energy in doing mechanical work. Obviously this eliptical language must have been employed with reference to some words or some business practice known to the parties. Its real import would appear to be sufficiently ascertained from the subsequent course of business, followed by common consent, in which "electrical horse power" in this clause was treated by both parties as denoting an electrical horse power "year" an aggregate of 8760 or 8784 electrical horse power hours according to the year. The electrical horse power hour means, for all pertinent purposes, electrical energy supplied

(1) 8 A. & E. 366.

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for one hour and always capable on expenditure of performing mechanical work at the rate of one horse power; and as the practice of the parties shews, for the purpose of computing the sinking fund payments, it was of course immaterial whether horse power hours were supplied simultaneously or in succession, the method adopted having been to ascertain the aggregate number of horse power hours for a year from half hour readings, and then to divide that number by 8760 or 8784, as the case might be. The quotient would give the number of dollars payable on the 1st of July succeeding the end of the calendar year.

It was assumed on the argument and appears to have been assumed throughout the litigation that the amount of the sinking fund payment was determined by the number of horse power hours sold during the specified period, *i.e.*, the preceding calendar year. According to the true meaning of the deed (see also the form of the bond, in the record) it may very well be that this sum is a function of the number of horse power hours paid for during the year, not of the number sold, but the admissions as well as the course of litigation entitle us to proceed upon the assumption above mentioned; and indeed it is immaterial, in so far as regards the effect of the agreement of 1917, which construction be followed. According to this construction, just as soon in the month of January as, according to the readings of the company's meters, it appeared that 8760 or any multiple of 8760 horse power hours (or the equivalent in kilowatt hours) had been supplied a liability arose to pay to the trustee the sum of $1.00 or the corresponding multiple of that sum, for the purpose of the sinking fund and a like additional liability arose at every successive point of time when the aggregate number of horse power hours, so supplied,

reached 8760 or a multiple of 8760. The liability was then fully constituted but the obligation was not to pay at once, it was to pay in the future.

If on the true construction of the sinking fund clause in the trust deed the amount of the sinking fund payments depends upon the amount paid during the calendar year for sales whenever made, then an obligation to pay accrues the moment the price of a horse power year is paid to the company.

To these facts the application of the clause under discussion seems to present little difficulty. The sum of one dollar becomes due to the trustee for sinking fund as each "horse power year", in the sense above described, is sold or paid for according to the proper construction of the contract in the sense that there is an indefeasible obligation then and there constituted to pay on the 1st of July succeeding the termination of the current calendar year. The aggregate of these sums of $1.00 due in this sense during the current calendar year constitutes the totality of the payment which becomes exigible on the date named for payment. Therefore it would be strictly in accordance with the usage illustrated above to apply to these several sums of $1.00, the phrase "shall have accrued but shall not be due" on the several dates on which the duty to pay them arose.

I have dwelt upon this at some length because of some observations in the leading judgment in the court below which appear to indicate that the position of the appellants at this point has been misapprehended. Riddell J. says:

> It is common ground that there is no accrual under the mortgages and independently of the sale contract—in the absence of statutory provision, a debt only accrues when it is due—Patteson J. in *Slack* v. *Sharpe* (1).

(1) 8 A. & E. 366 at p. 373.

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The appellants maintained most explicitly before the trial judge as well as in this court, that under both trust deeds of the Power Company there was accrual in the manner above mentioned, and there was no admission that the principle of the case cited by Riddell J. (which applies only as explained above to periodical payments becoming due as entireties such as wages and rent when not otherwise reserved) had any sort of application to the sinking fund payments in question. Indeed Riddell J. himself says in a later passage of his judgment:

> It is argued that the payments must be considered as accruing by wording of the mortgages".

And the learned judge then proceeds to illustrate the appellants' contention by a useful analogy.

> I can see, (he says) no difference between such a provision—(speaking of the sinking fund clause) and a provision that a coal mining company should pay $1.00 for each ton of coal sold and paid for during the preceding calendar year.

Substitute "horse power year" for "ton of coal" and this sentence accurately paraphrases the clause in question from the appellants' point of view—with the consequence under the appellants' argument, that on receipt of payment of the price of one ton of coal a liability to pay the sum specified would at once be indefeasibly constituted, in other words, such a sum would accrue due though not yet payable.

It is suggested moreover by the learned judge that the sinking fund payments accruing during the seven months period ending on the 1st of August could not be accurately ascertained until after the expiry of the whole year, but this is not in accordance with the admitted facts as the following passage from the respondent's factum shews:—

79. On the other hand the appellants say that sinking fund payments had accrued on August 1st, 1917, in respect, and only in respect, of power sold and paid for between January 1st, 1917, and July 31st, 1917, inclusive. It is clear that on any day the power which had actually been generated and disposed of down to midnight of the preceding day could be easily and accurately ascertained. Indeed it could be so ascertained to within half an hour of ascertainment, the readings of the integrating meters being taken and recorded half hourly. On the appellants' contention, therefore, the provision for estimating was unnecessary and senseless. The exact payments could have been readily ascertained and made on August 1st, 1917.

Another view expressed in the court below may perhaps be noticed here. It is this. The sinking fund clause, it is said, creates an obligation to pay a sum of money for the sinking fund on a specified date and for the rest that clause only prescribes a method of ascertaining the amount which is to be paid; and counsel for the respondent urges that for all relevant purposes the effect would be just the same if the obligation was to pay the sum of $1.00 for every $10.00 of principal secured by the bonds. The answer to this seems to be that under the clause in controversy there is no liability to pay any sum for sinking fund purposes until electrical energy is sold according to the terms of the clause; then and then only the constitutive elements of the liability come into existence. But when that occurs the liability is created and is indefeasible—although it is a liability only to pay in the future. The facts which determine the extent of the liability, in other words, are those which determine its existence; and it is not an unnatural but a strictly accurate use of language to describe such a liability as a liability "accrued".

The respondent's chief contention expressed in a variety of forms has two branches. 1st, that the sinking fund payments under all three series of debentures are entire payments and consequently that in

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respect of such payments or any part of them there could not in any sense known to the law, be an accrual before the day on which they became exigible; and 2nd, that the words under consideration can have no operation unless some special meaning calculated to serve the purposes of the parties in framing this clause be ascribed to them, and they should therefore be read in a sense which makes the sinking fund payments under all three series apportionable. This sense, it is argued, is supplied by the analogy of interest which accrues *de die in diem* between the dates upon which it becomes periodically payable.

My reasons for rejecting this contention will perhaps sufficiently appear from what I have said. But to summarize briefly what has already been expressed—the office of a court of law called upon to construe a written document is to ascertain the intention of the parties from the meaning of the words used and when such language is fairly capable of more than one construction, to determine that construction from the context, the subject matter and the facts in reference to which it is used; but it is no part of the function of a court in construing such instruments to endeavour to ascertain the intention of the parties from the circumstances by ascribing to words the parties have selected a non-natural meaning—a signification which they will not fairly bear. *Great Western Ry. Co.* v. *Bristol* (1). On the theory of the respondent all the sinking fund payments to which the agreement applies are non-apportionable because they accrue as entireties. The argument assumes an agreement by the parties that these payments shall for the purposes of the clause in question, be considered to accrue *de die in diem*. No such agreement is expressed and I can discern

(1) 87 L. J. Ch. 414 at pp. 429 and 430.

no good ground for assuming it. The analogy appealed to with so much emphasis—the analogy of interest—does not support it. In truth the argument rejects the analogy of interest, for interest as above mentioned is apportionable precisely because it does not become payable as an entirety but is considered for the reasons mentioned an accumulation of segregable elements. Nor can it be urged that on the appellants' construction the clause is without application to the Transmission Company's bonds for the clause deals with interest as well as with sinking fund payments. This implied term that all sinking fund payments, though in truth payable as entireties, are for the purposes of the agreement to be treated as accruing *de die in diem*, cannot, I am convinced, be deduced from the language of the clause construed in light of context and object; it can only be arrived at—if at all—by the inadmissible process of attributing to the parties an intention they have not expressed and bringing the documents into conformity with the assumed intention by imparting to its words a colour which does not belong to them.

The points raised by the appeal case have, I think, been sufficiently discussed, but I think an observation is necessary upon the attempt of the respondent to give weight to his contentions by reference to the Transmission Company's agreement. By that agreement a sum of $30,000 is payable on the 1st of July in each year for sinking fund purposes. It appears that the respondent agreeably to his construction of the apportionment clause of the agreement of April, 1917, left with the Power Company the sum of $2,500, one-twelfth of the sum of $30,000 due July 1st, 1917. The argument is now pressed upon us with not a little fervour that the failure on the part of the Power

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Company to return this sum was an acceptance by conduct of the respondent's interpretation of the clause in dispute.

The Transmission Company's agreement was not before the trial judge. It was admitted in the Appelate Division on the application of the present respondent, on the ground no doubt that the agreement being one of the instruments contemplated by that clause should be before the court, and the propriety of referring to the agreement itself does not admit of doubt. But the agreement alone was admitted, and we have no evidence before us of any of the circumstances touching the retention of the sum mentioned or of any of the communications between the parties relating to the construction of the disputed clause and whether repayment was or was not offered does not appear. The matter is not touched upon in the pleadings.

The question therefore whether the conduct of the parties in relation to this sum of $2,500 amounts to a construction by conduct of this agreement is obviously not a question that can be raised in this court and speculation as to that conduct can, in the absence of evidence, have no effect unless it be to becloud the real issues to be decided on the appeal.

Still less is it permissible to assume that this court, in the absence of any issue of estoppel or the like, is bound to construe and apply the disputed clause upon the hypothesis that such construction and application are fixed and determined by something which happened between the parties of which it is not informed judicially. The respondent naturally recognized, when he decided upon his course, that a decision making all payments apportionable *de die in diem* would be more favourable to him than one based upon the principle for which the appellants now contend.

What the respondent did in pursuance of his own interests is of no bearing upon the question before us; nor in the way in which these questions are presented is the conduct (so far as disclosed) of the appellants.

The respondent advances an argument founded upon the adjustment clause which he says has no office under the construction of the appellants. The argument ignores the fact that the adjustment clause applies to taxes and other matters not affected by the questions now agitated; and in relation to them I am unable to say on the material before us what practical operation or importance it may have.

As to the payments for sinking fund under the second trust deed of the Power Company I have reached the conclusion that the appellants must fail. It may be that the sinking fund clause creates a charge upon the net profits; but whether it creates such a charge or not there is no liability to pay unless there are net profits. I am not sure that the appellant's contention upon this point has not eluded me. In so far as I have succeeded in apprehending it, it appears to be that the existence of net profits is a divestitive condition. I cannot agree with that. The obligation is an obligation to pay out of net profits; that is the only obligation. I think the existence of net profits is one of the constitutive elements of liability.

In the result the judgment of Orde J. should be varied by reducing the amount awarded by one-fifth.

ANGLIN J. (dissenting)—The plaintiffs appeal from the judgment of an Appellate Divisional Court (1), reversing the judgment of Mr. Justice Orde (2) and dismissing their action. Their claim is to compel the defendant to

(1) 19 Ont.W.N. 273. (2) 19 Ont.W.N. 54.

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provide a sum of $93,359.95 (and $14,579.49 interest thereon) for which Mr. Justice Orde gave them judgment, to be paid to the Toronto General Trusts Corporation as the mortgagee-trustee for the holders of debenture bonds of the Ontario Power Company and to be applied by the trustee towards the redemption of such bonds. The sum awarded by the judgment of the trial court approximately represents $1.25 for each electrical horse power sold by the Power Company from the 1st of January to the 30th of June, 1917. The defendant left with the Power Company (for payment to the mortgagee-trustee on the 1st of July, 1918) the sum of $15,637.54, being an amount estimated to be equivalent to $1.25 for every electrical horse power sold by the Power Company between the 1st of July and the 1st of August, 1917, which he asserts is all that he was required so to provide under his contract with the plaintiffs.

The question for decision arises out of a provision in an agreement for the sale by the respondent Albright to the appellant, the Hydro-Electric Power Commission, of 90% of the shares of the stock of its co-appellant, the Ontario Power Company, and of so much of the remaining 10% of such shares as he should be able to acquire. By the provision in question (set out in full below) the vendor promised to leave with the Power Company *inter alia* a sum equal to so much of the sinking fund payments upon three specified mortgages as

> shall have accrued but shall not be due at the time for completion,

i.e., of the sale contract. The Ontario Power Company also owned the stock of the Ontario Transmission Company, a subsidiary corporation. The purpose of the sale from Albright to the Hydro-Electric Power

Commission was to vest in that body complete control of the Ontario Power Company, its assets and undertaking and of the Transmission Co., its assets and undertaking. It is common ground that the vendor in fact delivered to the purchaser appellant substantially all the shares of the Ontario Power Co.

The assets and undertaking of the Power Company were subject to two mortgages dated February, 1903, and June, 1906, respectively, made to a trustee to secure two debenture bond issues. The bonds outstanding in respect of these two mortgages on the 1st of August, 1917, when they were assumed by the purchaser, amounted respectively to $9,984,000 and $2,880,000. The assets and undertaking of the Transmission Company were likewise subject to a mortgage made to a trustee to secure bonds issued by it, dated August, 1905. This mortgage was also assumed by the purchaser and the amount oustanding in respect of the bonds secured by it was $1,805,000.

Interest on the bonds secured by the first mortgage of the Power Company was payable half-yearly on the 1st of February and the 1st of August. The Power Company by that mortgage also undertook to pay to the mortgagee-trustee on the 1st of July in each year—commencing on the 1st of July, 1909—a sum of money for the purpose of a fund, called a sinking fund, to be applied towards the redemption of the bonds secured by the mortgage. The sum so to be paid on the 1st of July, 1909, and that to be paid on each subsequent anniversary of that date during the currency of the mortage, which is to expire in 1942, was to be the equivalent of $1 for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding

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calendar year. The parties are agreed that "calendar year" means the year from the 1st of January to the 31st of December. The trustee was required to use the money so to be paid and any interest arising therefrom while in its hands, in purchasing in the open market at the lowest price for which they should be obtainable—but not exceeding par and a premium of 10% thereon and accrued interest—any of the bonds secured by the mortgage that could be so purchased. The parties are in entire accord as to the mode in which the sum to be paid annually on account of the sinking fund so called should be computed. It is accurately stated in the judgment of Mr. Justice Riddell, who spoke for the majority in the Appellate Divisional Court.

The second mortgage, which matures in 1921, contains a like provision for sinking fund payments except that the amount to be paid on the 1st of July in each year—commencing on the 1st of July, 1912—is to be a sum equal to 25 cents for each electrical horse power sold and paid for during the preceding calendar year. The obligation in this instance, however, is only to pay out of "net earnings" after providing for operating expenses, taxes, and interest and sinking fund payments in respect of the bonds secured by the first mortgage. Interest on the bonds secured by the second mortgage is payable half-yearly on the 1st of January and July.

Interest on the bonds secured by the Transmission Company's mortgage, which matures in 1945, is payable half-yearly on the 1st of November and the 1st of May. By a contemporaneous agreement the Transmission Co. undertook to pay to the mortgagee-trustee named in its mortgage as and for a sinking

fund for the redemption of its bonds the sum of $30,000 on the 1st of July in each year, commencing on the 1st of July, 1911. There is a provision that the moneys so to be paid shall be used in purchasing the bonds of the Transmission Company outstanding similar to that in the Power Company's mortgages.

The scheme of the three debenture bond mortgages appears to be identical. A lump sum is to be paid by the mortgagor towards a so-called sinking fund on the 1st day of July in each year, commencing in each instance on the 1st of July which occurs approximately six years after the issue of the debenture bonds. Each of these annual payments may, in a sense, be regarded as a payment in respect of the year which expires on the day before it falls due and in that sense as accruing during that year. The sum so payable under each of the two Power Company mortgages is to be, in the case of the first mortgage, as many dollars, and, in the case of the second mortgage, as many quarter dollars, as the company shall have sold electrical horse power during the preceding calendar year; but it is none the less a lump sum payable on a fixed date and having no other relation to, or connection with, the Power Company's earnings during such preceding calendar year. Computation on the basis of sales made during the year ending on the day before that fixed for payment, or on that of sales during the year ending 12, 18 or 24 months before that date, or on any other basis which would have suited the purposes of the parties, might quite as well have been stipulated for. The character of the sum to be paid and its relation to the earnings during the "computation period," if I may so term it, would in each case be precisely the same. In no case, except perhaps where the computation

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period should coincide with the year in respect of which the payment is to be made, could such payment be said to be accruing in any sense whatever during that period. In the case of the mortgage of the Transmission Company, which did not sell electrical power, a lump sum payment of a fixed amount is stipulated for in lieu of the lump sum the amount of which is to be arrived at by the computation provided for in each of the other two mortgages. This is the only difference between them; and I cannot regard it as material.

It is common ground that under none of these three mortgages was there any accrual in a legal sense of any part of the moneys payable towards the several sinking funds before the date on which they fell due. The entire liability for each of the three sums payable on the first of July in each year (after 1911) under the respective mortgages, and every part of it, accrued only on the day when such payment actually fell due.

But the sale agreement from the respondent Albright to the appellant, the Hydro Electric Commission, dated the 12th of April, 1917, contains a covenant by the vendor Albright, that at the time for completion (August 1st, 1917, *i.e.*, 60 days after the execution and delivery of the agreement was completed) there should be

> left in the hands of the Power Company * * * a sum estimated by the vendor to be equal to—
>
> (*a*). Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company which shall have accrued but shall not be due at the time for completion, and
>
> (*b*). The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes and assessments for the year 1917, adjusted to the time for completion, and if such estimate shall, after completion, prove inaccurate, the excess or deficiency when determined shall be paid by the Vendor to the Power Company, or by the Power Company or the Purchaser to the vendor as the case may require.

All adjustments as to interest, rentals, taxes, etc., have been agreed upon. The parties are also at one as to the amount left by Albright with the Power Company in respect of the next sinking fund payment under the Transmission Company's mortgage. The last payment of $30,000 on that account was made by the Power Company, while still under the control of Albright, to the trustee-mortgagee on the 1st of July, 1917. The sum of $2,500, one-twelfth of the $30,000 which would become payable on the 1st of July, 1918, was left with the Power Company on that account and both parties are in accord that this was the sum which under the sale agreement the vendor covenanted should be left with the Power Company on account of that item as an amount "accrued but not due" at the time of completion of the sale.

As already stated it is common ground that nothing had legally accrued at that date in respect of the three sinking funds. Moreover, the parties are agreed that the term "accrued" was meant to have some conventional meaning; and as to the Transmission Company's mortgage, they both say that it was intended to designate that part of the next maturing payment of $30,000 which bears to it the same proportion as the one month elapsed since the date of the last payment bears to the 12 months which would elapse between that date and the date on which such next naturing payment would fall due. The respondent Albright contends that the word "accrued" bears precisely the same conventional meaning in regard to the sinking fund payments to be made under the two Power Company mortgages. The appellants, on the other hand, maintain that, as to these two payments, not one-twelfth but seven-twelfths of the next maturing payments had "accrued" on the 1st

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of August, 1917, notwithstanding that the amount due in respect of sinking fund payment under the two Power Company mortgages on the 1st of July, 1917, had been fully paid by that company to the mortgagee-trustee on that date.

Counsel for the appellants base their contention on the fact that the amount of each of the two payments made on the 1st of July, 1917, was equivalent to $1 in the case of the first mortgage and 25 cents in the case of the second mortgage for each electric horse power sold by them during the calendar year 1916 and that the corresponding sums to be paid by the purchaser (appellant) on the 1st of July, 1918, would be similarly computed on the sales of electrical horse power made and paid for between the 1st of January and the 31st of December, 1917. They maintain that the payments made on the 1st of July, 1917, were of the amounts which had accrued under the Power Company mortgages in respect of sinking funds up to the 31st of December, 1916, and not up to the date when they fell due and were paid. They add—at first blush plausibly enough—that, inasmuch as the vendor has received the earnings of the Power Company from the electrical horse power sold by it between the 1st of January and the 30th of June, 1917, he should provide the money requisite to meet the corresponding portions of the sinking fund payments to be made in July, 1918, which the agreement provides should be computed on the basis of the electrical horse power sold and paid for during the whole calendar year of 1917, and that such corresponding portions of the sinking fund payments due on the 1st of July, 1918 should be deemed to have "accrued" *de die in diem* up to the 31st of December, 1917, within the meaning of that term as conventionally used in the sale agree-

ment. No doubt that would be the case if it had been stipulated that the moneys to be paid on sinking fund account on the 1st of July, 1918, should be paid out of, or had in any way been made a charge upon, the proceeds of the sales of electrical horse power during the year 1917.

But, admittedly, the annual sinking fund instalments were not payable out of the earnings of the preceding calendar year and were in no sense a charge upon those earnings. Any view, however presented, that there was in any sense an accrual of each of such instalments during the whole calendar year preceding that in which it was made payable rests, unconsciously it may be, but nevertheless necessarily, upon the idea that the earnings of that calendar year were so charged. That idea involves a fallacy, subtle and seductive no doubt, but nevertheless a fallacy.

So far as they can be said to represent, or be in any way referable to, a period of elapsed time, the instalments on sinking fund accounts due on the 1st of July of any year were payments in respect of the 12 months which had then elapsed since the last previous instalments fell due. These payments may thus in a conventional sense be regarded as having accrued *de die in diem* during those 12 months. That, in my opinion, is the correct interpretation of the word "accrued" as used in regard to the sinking fund payments in clause (*a*) of the sale agreement above quoted. It gives to that word the same meaning when applied to each of the three mortgages in regard to which it is used, as in my opinion the parties almost certainly intended. It accords due recognition to the collocation of the words "interest and sinking fund payments"; sinking fund payments are treated as accruing, like interest, from gale day to gale day. Finally, it does

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not ignore the fact that it is of a proportionate part of the "payments" next to mature, alike on interest account and on sinking fund account, that the parties speak and apparently were contemplating the accrual.

But the fundamental error in the appellant's application of the word "accrued" is that, from whatever point of view it is considered, it necessarily involves the idea that the annual payments on account of sinking funds provided for in the two Power Company mortgages are either to be made out of the proceeds of the sales of power during the preceding calendar year or, in some way undefined and undefinable, constitute a charge on such proceeds, whereas in point of fact the number of electrical horse power sold during the preceding calendar year is introduced merely as the factor by which the number of dollars or quarter dollars that shall make up each annual instalment payable towards the respective sinking funds under the Power Company mortgages is to be determined.

Other formidable difficulties which the appellants encounter in the application of the word "accrued" for which they contend suggested at bar, I find it unnecessary to discuss.

I should perhaps allude, however, to the fact that under the second Power Company mortgage sinking fund instalments are payable only out of "net earnings" after the payment *inter alia* of the instalment of sinking fund under the first mortgage. The existence of such "net earnings" can be ascertained only on or after the date when the sinking fund payment fell due. It is therefore difficult to appreciate in the case of the bonds secured by the second mortgage how any sinking fund payment not already due can in any sense be said to have "accrued".

I am for the foregoing reasons of the opinion that the construction placed upon the provision of the sale agreement under consideration by the majority of the learned judges of the Appellate Divisional Court was correct and that this appeal therefore fails.

BRODEUR J.—We have to determine in this case the respondent Albright's liability concerning certain sinking fund payments under the agreement for sale by him of the 12th April, 1917 to the appellant, the Hydro Electric Commission.

By this agreement Albright was selling ninety per cent of the shares of a company called the Ontario Power Company. The contract dealt also with the assets and liabilities of the company and provided that these assets and liabilities were mostly transferred and assumed by the purchaser, the Hydro Electric, from the date of the completion of the contract, which was to be the first of August, 1917.

Albright claims that he was bound under the contract to make these sinking fund payments from the first of July to the first of August, which represented a sum of about $15,000. On the other hand, the Hydro Electric Commission contends that Albright should also provide for these sinking fund payments from the first of January, 1917, to the first of July, 1917, which would represent a sum of about $90,000.

The trial judge decided in favour of the Hydro Electric Commission but his judgment was reversed by the Appellate Division of the Supreme Court.

The case turns mostly upon the construction of the following clause of the agreement of sale.

> The vendor agrees with the Power Company and the Purchaser that in addition to the assets set out in said schedule "C" hereto there shall be left in the hands of the Power Company at the time for completion a sum estimated by the vendor to be equal to

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(a) Interest and sinking fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said schedule D *which shall have accrued but shall not be due* at the time for completion.

Schedule C referred to in this clause gave a description of the assets of the Ontario Power Company and of the Transmission Company, the latter being a subsidiary company of the big corporation, the Ontario Power Company.

Schedule D mentioned in the above clause gave a list of the liabilities due by the Ontario Power Company and the said subsidiary company. Among these liabilities were bonds and debentures due by the Power Company to the extent of nearly $13,000,000, under two mortgages dated respectively the 2nd of February, 1903, and the 30th of June, 1906, between the Power Company and the Toronto General Trust Company.

By these mortgages, the Ontario Power Company agreed to pay to the Toronto General Trusts for the purpose of a sinking fund for the redemption of its bonds a certain sum of money payable on the first of July of each year

for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

In the second of these mortgages, it was provided that the sum stipulated for the sinking fund was to come out of the net earnings of the company after payment of certain obligations therein stipulated.

There was also amongst the liabilities mentioned in schedule D a sum of about $2,000,000 due by the Transmission Company for bonds it had issued. But the sinking fund provided for the redemption of its bonds was a fixed sum of money.

It is important to state for the purpose of giving us a correct view of the agreement for sale of the 12th of April, 1917, that the assets of the Ontario Power Company did not include any rentals or sums of money payable for power supplied which had been earned but would not be due on the first of August, 1917.

There was then, until the contract would be completed, an understanding that these assets earned but not paid should belong to the vendor. It is also contended with a great deal of force that the payments on the sinking fund should be treated in the same way viz: that the vendor should take care of these payments.

Being entitled by the agreement to receive the income earned but not paid before its completion the vendor must be supposed to take on his shoulders the responsibility for the sinking fund then accrued but not due. The time of payment which is stipulated on the first of July each year is in respect of money earned during the previous calendar year. At the beginning of each year the company binds itself to take out of its sales of horse power a certain sum of money which, on the first of July of the next year, will have to be paid to its creditors for the maintenance of the sinking fund. The accrual takes place from the first of January of each year. The sale of horse power did not provide a basis for calculating the payments. It is the condition of the liability; when the sale of a horse power is made and when the payment for it has taken place the liability arises and accrues.

The fact that a specific sum of money is to be paid for the sinking fund in connection with the last mortgage does not, in my opinion, alter the situation.

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I have come to the conclusion then that the accrual begins on the first of January, 1917 and not on the first of July.

The appeal should be allowed with costs of this court and of the court below and the judgment of the trial judges should be restored.

MIGNAULT J.—By agreement dated April 12th, 1917, the appellant purchased from the respondent 90,000 shares out of 100,000, the total share capital of the Ontario Power Company of Niagara Falls, and the remaining 10,000 shares to the extent that the holders thereof would put the respondent in position to make delivery, the price being 80% of the par value ($100.00) of the shares, so that if all the shares were transferred to the appellant the total price amounted to $8,000,000. The Ontario Power Company then owned the shares of a subsidiary company, the Ontario Transmission Company, Limited, which was also a party to the contract. It had entered into two mortgage agreements with the Toronto Trust Corporation, as trustee, to secure the repayment of two issues of its bonds.

By the first mortgage agreement, besides the payment of interest semi-annually on February 1st and August 1st, the Power Company promised to pay to the trustee on the 1st of July, 1909, and on the 1st of July in each year thereafter.

> for the purpose of a sinking fund for the redemption of the said bonds the sum of one dollar for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

By the second mortgage agreement the Power Company in addition to the interest on its bonds payable on January 1st and July 1st, obliged itself

to pay to the trustee out of its net earnings and after the payment of its operating expenses and taxes and the interest upon its first mortgage bonds and the constitution of the sinking fund in its first mortgage provided, on the 1st of July, 1912 and on the 1st of July in each year thereafter.

for the purpose of a sinking fund for the redemption of the said bebentures the sum of twenty-five cents for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

The Transmission Company had also mortgaged its assets to secure a bond issue, and had agreed with the trustee to pay to the latter, as and for a sinking fund for the purchase of outstanding bonds, the sum of $30,000 on the 1st of July, 1911 and a like sum on the same date in succeeding years. The interest on its bonds was payable on the 1st of May and the 1st of November in each year.

To return to the sale agreement between these parties the third clause is of importance in view of the present controversy. Its effect, so far as it need be stated, is that the respondent agreed that he would do all things necessary to be done so that the respective assets of the Power Company and the Transmission Company should at the time for completion consist of those described in schedule "C" to the agreement, that their respective liabilities should at the time for completion be those described in schedule "D" and in default of so doing or in so far as he should not so do, the respondent would pay or settle all such liabilities. The respondent also agreed that in addition to the assets set out in schedule "C" there should be left in the hands of the Power Company at the time for completion a sum estimated by him to be equal to:

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(*a*) Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said Schedule "D" which shall have accrued but shall not be due at the time for completion, and

(*b*) The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes, assessments for the year 1917, adjusted to the time for completion, and if such estimate shall after completion prove inaccurate, the excess or deficiency when determined shall be paid by the vendor to the Power Company, or by the Power Company or the purchaser to the vendor as the case may require.

The clause went on to say:—

The assets of the Power Company at the time for completion are not intended to include any rentals, sums of moneys payable or to be become payable for power supplied or otherwise, under any lease or contract which shall have accrued or shall have been earned, but shall not be due or payable at the time for completion, and if they do include any such items the purchaser shall use every reasonable effort to collect such items, and if when collected shall pay, or procure to be paid, to the vendor, the amount thereof adjusted to the time for completion, and the purchaser shall also at the time for completion pay or procure to be paid to the vendor the value of all prepaid insurance, rentals, taxes, rates (including local improvement rates), assessments and payments for telephone services adjusted to the time for completion.

The parties agree that the time for completion was August 1st, 1917. The difference between them is as to the sum which the respondent should have left in the hands of the Power Company for sinking fund payments on the bonds and debentures of the Power Company. As to the bonds of the Transmission Company there is no difficulty; $30,000 was to be payable on the 1st of July, 1918 and $2,500, one-twelfth of that sum is admitted to be the proper amount. The respondent contended that one-twelfth of the estimated sinking fund payment due on the 1st of July, 1918, on the bonds of the Power Company was all that he had to provide for, while the appellant claimed that it was entitled to seven-twelfths of that sum or the amount representing the period between the 1st of January and the 1st of August

1917, calculated in the manner and according to the formula adopted by the parties. The learned trial judge took the latter view, the Appellate Division, Mulock C. J. Ex., dissenting, the former one.

Everything turns on the meaning of the words

> sinking fund payments * * which shall have accrued but shall not be due at the time for completion.

I have cited the clause in the mortgage agreements which provides for these sinking fund payments. It obliges the Power Company to pay on the 1st of July in each year

> for the purpose of a sinking fund for the redemption of the said bonds the sum of one dollar (in the case of the second issue of bonds, twenty-five cents) for each electrical horse power sold by the company and paid for by the purchasers thereof during the previous calendar year.

The respondent contends that these so-called sinking fund payments are prepayments of capital to be made on the first of July each year, and that the sum of one dollar or twenty-five cents, for each electrical horse-power, etc., is merely the measure of the amount to be paid. If this were the case, the word "accrued" would be meaningless, for periodical payments on capital cannot be said to accrue while they are not yet due.

The appellant claims that the sale and the receipt of the sale price of electrical horse-power is the condition of the obligation to make a sinking fund payment. That appears to result from the language of the mortgage agreement and if it can further be said that, on these sales of electrical horse-power being made and paid for, the sum of one dollar or twenty-five cents for each electrical horse power is to go to form the next sinking fund payment, there is, in that sense, something that can be said to accrue. It seems obvious,

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and the parties admit, that the word "accrue" was used by them in a conventional sense, so we have to look at clause three of the sale agreement to discover what this conventional sense really is.

This clause appears to me to be an adjustment clause. It must be remembered that at the date of the sale agreement the parties could not know precisely what would be the time for completion, which was the time for adjusting everything between them, and they provided for this adjustment at that uncertain date by a very detailed clause. The interest payments on the bonds, which fell due at different dates, are dealt with in the same manner as the sinking fund payments and the taxes, rates, asssessments, payments for telephone services, rentals, and the value of all prepaid insurance were to be paid by the purchaser to the vendor, adjusted to the time for completion. Similarly with respect to any rentals, sums of moneys payable or to become payable for power supplied or otherwise, under any lease or contract, which should have accrued or should have been earned, but should not be due or payable at the time for completion, and which the purchaser should collect, it promised to pay the same to the vendor adjusted to the time for completion. The vendor was also to leave in the hands of the Power Company the proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park adjusted to the time for completion.

It is therefore clear that this clause is an adjustment clause and it would be singular if the sinking fund payments were not also to be adjusted to the time for completion. Indeed the respondent admits that they must be since he has paid a twelfth of the estimated

sinking fund payment to become due on the 1st of July, 1918, but his difficulty is that the parties clearly looked on these payments as accruing from day to day and from month to month, and from his point of view it is difficult to find any accrual.

The appellant's contention, to my mind, is more consistent with the clearly expressed intention of the parties to adjust everything to the date for completion, and to treat these sinking fund payments as if they accrued from day to day. For if the respondent is to keep the full amount received for each electrical horse-power sold and paid for from January 1st to August 1st, 1917, and the appellant is to pay to the trustee one dollar and twenty-five cents for each electrical horse-power so sold and paid for to the respondent (and it would be paid to him by the appellant under the clause concerning collections of amounts due for previous sales of power if the respondent had not already received it from the purchasers) the parties have not adjusted everything at the time for completion and the respondent would receive without obligation to pay and the appellant would pay without having received. I hesitate to place such a meaning on this clause unless I am forced to do so by its language.

In his factum, the respondent says:

> The obvious purpose of taking the Power Company's sales during the preceding calendar year as the basis for calculating or computing the sinking fund payment due on a stated day in the next year was simply that periodical repayments of principal should be in proportion to revenue previously received. The words quoted had to do with the ascertainment of the amount of each payment but with nothing else.

I would think that if periodical repayments of principal should be in proportion to revenue previously received they should, as between vendor and purchaser,

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be borne by the one by whom the revenue was received, otherwise the adjustment which is so minutely provided for as to everything else, fails in respect of these sinking fund payments.

And it must not be forgotten that the parties treat these payments as accruing before they become due. The word "accrue" can have some meaning, at least a conventional one, if applied to the dollar for each electrical horse-power sold and paid for, which goes to form the next sinking fund payment and in a sense is appropriated thereto, for the fund which is to form the next sinking fund payment grows thus from day to day, and whether it is put aside for that purpose or not is immaterial. We have therefore something which accrues in connection with these payments and that something appears to me to have been within the contemplation of these parties when they signed the sale agreement.

The respondent says that the payment is for the preceding calendar year, that on the 1st of August, 1917, anything due for the previous calendar year had been paid for a month previous. and that the language of all these agreements cannot be applied to something accruing from January 1st to August 1st, but merely and at the most to something which accrued during the previous year.

But here the vendor is to leave with the Power Company a sum estimated by him to be equal to sinking fund payments which shall have accrued but shall not be due at the time for completion. This is a provision made for the next payment on account of the sinking fund due the 1st of July, 1918, and then there would be something due for each electrical horse-power sold and paid for during the preceding calendar year. This sinking fund payment, due in eleven

months, can be equitably adjusted between the parties only by making the respondent pay for the sales made and paid for during the first seven months of 1917 according to the mode of calculation adopted by the parties, and if the clause has not really this meaning the parties have failed to express what I must consider was their intention. But I have no difficulty in placing this meaning on the adjustment clause.

The respondent argued that the payment and acceptance of $2,500.00 paid by him on account of the sinking fund payment due on the 1st of July, 1918, by the Transmission Company, shewed that the sinking fund payments on the bonds of the Power Company should be similarly dealt with. This payment, however, is not made by the Transmission Company for the preceding calendar year, nor is it based on sales or receipts, and the mortgage deed shows that it is made for the year computed from the 1st of July each year.

I have given my best consideration to this case and my conclusion is that the appeal should be allowed and the judgment of the trial judge restored with costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *W. W. Pope.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*