1949

April 7-8
July 20

BETWEEN:

DOROTHY J. McDOUGALL,.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession duty—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, s. 3(1) (g) as amended by 6-7 Geo. VI, c. 25, s. 3—Death benefits paid by a company to widow of one of its employees under a plan set up for that purpose—Beneficial interest in death benefits not accruing nor arising in favour of widow by survivorship or otherwise—Payment to widow purely voluntary on the part of company—No contractual relationship between employee and company as to payment of death benefits—Widow has no legal right to payment of death benefits—Payment so made not of a superannuation or pension character—Such payment outside the scope of the original section 3(1) (g) of the Act and its amendment—Succession—Appeal allowed.

When M., an employee of the Bell Telephone Company of Canada, died in 1946 the Company paid to his wife, the appellant, a sum of money under its "Plan for Employees' Pensions, Disability Benefits and Death Benefits" to which neither the deceased nor any other employee contributed any money, the Company providing for all the expenses of its operation. That payment was not included in the succession duty declaration. It was, however, incorporated into the assessment made by the respondent on the ground that the disposition of property made in that manner was a dutiable succession under the Dominion Succession Duty Act, 4-5 Geo. VI, c. 14 (1940-41), as amended. The appeal was taken from that part of the assessment only.

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Held: That no "beneficial interest" (as that term is used in subsection 3(1) (*g*) of the Act) in death benefits accrued or arose in favour of the appellant by survivorship or otherwise upon the death of her husband. *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1947) 2 A.E.R. 78; *Re Williamson, Williamson et al* v. *Treasurer of Ontario* (1942) 3 D.L.R. 736 referred to.

2. That the payment to appellant was purely voluntary on the part of the company and outside the scope of the original subsection 3(1) (*g*) of the Act.

3. That no contractual relationship existed between the deceased and the Company as to the payments of death benefits.

4. That the appellant had no right in law to compel the Company to pay her the death benefits.

5. That the payment so made to appellant is not of a superannuation or pension character and, therefore, is not brought into tax by reason of the added part of subsection 3(1) (*g*) of the Act.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

Charlemagne Venne, K.C. for appellant.

Hugh O'Donnell, K.C. and *I. G. Ross* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON, J. now (July 20, 1949) delivered the following judgment:

This is an appeal from an assessment made under the Succession Duty Act, ch. 14 of the Statutes of Canada, 1940-41, as amended. One D. H. McDougall (hereinafter called "the Deceased"), who died on October 22, 1946, domiciled in Montreal, was at that date an employee of the Bell Telephone Company of Canada (hereinafter referred to as "the Company") and had been in its employ continuously since 1922. Following his death, that Company paid to his wife, the appellant, for her own personal use and benefit, two sums totalling $11,100 in accordance with its policy of making grants to dependants of deceased employees under the plan which it called "Plan for Employees' Pensions, Disability Benefits, and Death Benefits." The respondent in assessing the estate of the deceased to succession duty has added that amount to the value of

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the estate as declared by the appellant on the ground that the disposition of property in that manner was a dutiable succession under the Act. An appeal is now taken from that part of the assessment only.

"Succession" is defined by section 2(m) of the Act and includes any disposition of property deemed by section 3 to be included in a succession.

It is submitted by the respondent that the assessment is valid under the provisions of section 3(1) (*g*) of the Act. As originally enacted, that subsection was as follows:

3.(1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

(*g*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

I shall hereafter refer to subsection (*g*) as above quoted as the original part of subsection (*g*).

By 6-7 Geo. V., ch. 25, subsection (*g*) was repealed and a new subsection (*g*) was substituted therefor. The new subsection contained all the original subsection, followed by the words:

including superannuation or pension benefits or allowances payable or granted under legislation of the Parliament of Canada or of any Province, or under any other superannuation or pension fund or plan whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada, or of any Province thereof, or out of any fund established for the purpose, which benefits or allowances shall be deemed for the purposes of the Act to have been purchased, acquired, or provided by the deceased.

This part of the subsection I shall hereafter refer to as the added part of subsection (*g*). The new subsection as amended was in effect at the time of Mr. McDougall's death.

The Company's first plan, called "Employees' Pension and Benefit Fund," was established in 1917 pursuant to by-law 16 enacted in February, 1917. Clause 1 of that by-law was as follows:

Nothing in this By-law contained and nothing which may be done in pursuance hereof shall create expressly or by implication or inference any contract or contractual relation or obligation between the Company and any employee or the legal representatives or dependants of any employee. The pensions and allowances heretofore granted, or which may hereafter be granted to any such employee, representative or dependant shall be

deemed alimentary and for personal use, and shall not be assigned or otherwise alienated, and shall not confer upon any employee, representative, dependant or any other person any right or interest capable of being assigned or otherwise alienated, or of being seized, attached, garnisheed, or otherwise made subject to any process or proceeding in law or equity.

The by-law provided for the appointment by the Board of a Committee with such powers and duties regarding the administration and carrying out of the plan as the Board might direct. All payments of pensions and allowances were to be charged to a reserve fund of $400,000 and provision was made for its maintenance, such reserve being continued also for the general purposes of the Company. So far as I am made aware, that by-law has remained in force since its enactment.

The original plan has been frequently modified and amended either by the Board or the Committee. The employees as such have had no part in its initiation or administration, nor were they consulted at any time in regard thereto, and there is no evidence that its terms were at any time the subject of collective bargaining between the Company and its employees. As of January 1, 1928, a material change occurred in the plan. All reserves then on hand and which had previously been available for payment of pensions and benefits were transferred to the Royal Trust Company as Trustee of a fund to be known as the "Pension Fund," and the Company undertook to maintain that fund by periodic charges to operating expenses. Thereafter, that Pension Fund existed only for payment of pensions. After January 1, 1928, all other benefits (accident, sickness disability and death benefits) were charged to the operating accounts of the Company when and as paid. Since 1928, no separate fund has been available for payment of such benefits. The original plan was in effect at the time when the deceased entered the employ of the Company. It is admitted that from the time he joined the Company he had full knowledge of the plan as varied from time to time, as had all other employees. Neither the deceased nor any other employee contributed any money to any of the benefits provided for in the plan and no deductions were made from their salaries or wages, the Company alone providing for all the expenses and outlays incidental thereto. Exhibit 1 is the plan in effect as of October 22, 1946.

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The deceased at the time of his death was still an employee of the Company. His wife and one daughter, aged fourteen, survived him.

Mr. McDougall's death resulted from sickness and the Committee therefore proceeded under the provisions of section 7(2) of the plan which refers to "Sickness Death Benefits" and is as follows:

(2) In the event of the death of any employee, occurring on or after January 1, 1930, and resulting from sickness as defined in Paragraph 1 of Section 6 of this Plan, hereinafter referred to as death by sickness, if the employee's term of employment has been two years or more there may be paid (and, in the circumstances described in sub-paragraph 4 (a) of this Section, there shall be paid) a Sickness Death Benefit which shall not be in excess of Two Hundred and Fifty Dollars ($250) or an amount computed according to the following schedule, whichever is greater:

Employee's Term of Employment	Maximum Sickness Death Benefit
2 but less than 3 years	4 months' wages
3 " " " 4 "	5 " "
4 " " " 5 "	6 " "
5 " " " 6 "	7 " "
6 " " " 7 "	8 " "
7 " " " 8 "	9 " "
8 " " " 9 "	10 " "
9 " " " 10 "	11 " "
10 years or more	12 " "

Payment of the Sickness Death Benefit, subject to the conditions imposed in Paragraph 5 of this Section and elsewhere in this Plan, shall be made to the employee's beneficiaries, as provided in Paragraph 4 of this Section.

By the provisions of section 7(4), the persons who may be beneficiaries of Sickness Death Benefits are limited to the wife (or husband) and the dependent children, and other dependent relatives of the deceased. Section 7, however, provides (subject to the provisions of section 7(4) (c) not here applicable) that the maximum Sickness Death Benefits shall be paid to the wife of the deceased if living with him at the time of his death (and in certain cases the husband of the deceased employee), or to the child or children of the deceased employee, and supported by him; but that if the deceased left him surviving both a wife and child, or children (as therein described), that "the Committee, in its discretion, may pay the Death Benefit to or for any one or more of such possible beneficiaries in such portions as it may determine." In this

case the Committee exercised its discretion by paying the maximum amount to the appellant; and further exercised the discretion given it by section 7(5) by paying that amount in two instalments, instead of in monthly sums equal to the monthly wages of the deceased. The payments so made to the appellant were charged to and paid out of the operating expenses of the Company.

It is submitted by the respondent that the benefits or allowances here granted are within the original part of the subsection; that while the deceased did not purchase or provide the beneficial interest which accrued or arose by the survivorship of the appellant by direct payment of any amount, that the benefits or allowances are part of the consideration for his services and were therefore a provision made by him. A careful consideration of the plan and of the evidence leads me to the conclusion that this submission cannot be supported and that the payment of Death Benefits to the appellant was, in fact, voluntary on the part of the Company.

Section 1 of the plan (Exhibit 1) is as follows:

The Bell Telephone Company of Canada undertakes, in accordance with this Plan, to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness or when they are retired from service, or, in the event of death, to their dependent relatives.

This "undertaking" of the Company to provide the monies requisite to the operation of the various parts of the plan would seem, *prima facie,* to be an offer or promise to the employees and, if communicated to and accepted by them, the prospective benefits might be looked upon as part of the consideration for their services, and therefore, being a provision made by them, come within the original part of section 3(1) (*g*).

But the "undertaking" to provide the benefits is made "in accordance with this Plan" and is therefore subject to the further provisions contained in the plan. Section 10 which follows authorizes the Board of Directors to vary the plan as they see fit and to terminate the plan.

The Board of Directors of the Company may from time to time as they deem it advisable and shall at intervals not exceeding five year periods cause an investigation or investigations to be made into the working of this Plan including actuarial evaluations of the Pension Fund, and may make such changes (if any) in the said Plan as they may in

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their discretion see fit *or may terminate this Plan;* but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder and changes involving the pension benefits or the rate of contribution to the Pension Fund shall be subject to evaluation by a duly qualified actuary.

While, therefore, such changes or alterations in the plan would not affect the rights of an employee to any benefit or pension to which he had become entitled by award, it is clear to me that the Board of Directors could at any time, without the consent of any employee, cancel the entire plan as to the payment of Sickness Death Benefits, even after the death of an employee and at any time before the Committee had actually paid the benefits to the dependent relatives, and such dependent relatives would have no legal right thereafter to payment of any amount.

Section 8(2) of the plan, while no doubt intended primarily for the protection of the employees and dependent relatives, would seem also to effectively preclude them from taking any proceedings against the Company to enforce payment of Sickness Death Benefits. It is as follows:

8(2) The pensions and benefits provided herein shall be deemed alimentary and for personal use, and shall not be assigned or otherwise alienated, and shall not confer upon any employee, representative, dependent, or any other person any right or interest capable of being assigned or otherwise alienated, or of being seized, attached, garnisheed, *or otherwise made subject to any process or proceeding in law or equity.*

Reading these sections together with paragraph 1 of By-law 16 (*supra*), I have reached the conclusion that they are repugnant to the idea that the award and payment of the benefits are anything else but voluntary. They negative the suggestion that the Company's undertaking in section 1 of the plan is part of the consideration for an employee's services and is "a provision made by him." If, therefore, the deceased's dependants had endeavoured to enforce payment of the benefits, they could not, in my opinion, have done so successfully. Reference may be made to in *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1). The facts in that case were that:

On the sale of N.'s interest in a partnership firm to M. and V., a term of the sale was that M. and V. should undertake to pay certain annuities, and, by a deed dated Feb. 4, 1942, made between M., V. and

(1) (1947) A.E.R., vol. 2, p. 78.

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N., M. and V. agreed to pay certain annuities to N.'s three daughters from the death of N. The deed provided, *inter alia,* that the annuities should be paid by quarterly payments to the persons "entitled thereto," that each annuity should be paid exclusively out of income brought into charge to income tax, and that M. and V. charged "all their respective interests in the profits and assets of the partnership firm with payment of" the annuities. N. died on May 5, 1943, and the question was whether the daughters were liable for estate duty and succession duty in respect of the annuities provided to be paid by the deed.

It was held:

(i) on the true construction of the deed, notwithstanding the use of the word "entitled to," the annuitants had no rights thereunder either at common law or in equity, except the right to retain any sums paid to them.

(iii) the word "interest" in the Finance Act, 1894, s. 2(1) (*d*), meant such an interest in property as would be protected by the courts, and the annuities payable under the deed were, therefore, not annuities within the meaning of s. 2(1) (*d*), and the annuitants were not liable to estate duty in respect of them.

(iv) since the annuitants had no right to sue for the annuities, they did not become "entitled" to them within the meaning of that phrase in the Succession Duty Act, 1853, s. 2, and, therefore, they were not liable to succession duty in respect of them.

In that case the Court had to consider the provisions of section 2(1) (*d*) of the Finance Act, 1894, which was as follows:

(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . .

(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

It will be observed that the wording of subsection (*d*) is identical with the original part of subsection (*g*) of section 3(1) of the Act now under consideration. In the case cited, Wynn-Parry, J. said at p. 80:

The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by Mr. Noad, the deceased. However, the vital question is: Did any beneficial interest, within the meaning of that phrase as used in the section, accrue to the plaintiffs on the death of Mr. Noad? In my view, the word "interest" in the sub-section means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and counsel for the Crown, does not contend to the contrary—that the effect of the deed of Feb. 4, 1942, is not to create any trust in favour of the annuitants. It further appears clear to me, from the reasoning of the Court of Appeal in *Re Schebsman, Ex p. Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd. & Schebsman,* that at common law the annuitants have no right to sue Mr. Miller or Mr. Vos under the deed. On the receipt

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by each of the annuitants of any payment in respect of her annuity, the property in the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as each annuitant is concerned, the deed is *res inter alios acta*, and she has no right there under.

And at pp. 82-3 he said:

On its true construction, I cannot find—and this is really admitted—that the deed confers on any of the annuitants any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed. In my view, the annuitants are not persons to whom the deed purports to grant something or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place on the word as appearing in the Finance Act, 1894, s. 2 (1) (*d*).

. . . .

on the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section. Therefore, I hold that the annuitants are not liable to estate duty in respect of the annuities.

Counsel for the respondent submits, however, that even if the plan as initiated was purely voluntary on the part of the Company, yet at the time of the deceased's death it had been put on a contractual basis by reason of changes made therein. I have already considered his argument as to the effect to be given to the "undertaking" of the Company as contained in section 1 of the plan. He refers also to Exhibit "D", a pamphlet entitled "Questions and Answers Concerning Amendments to Plan for Employees' Pensions, Disability Benefits and Death Benefits." It bears the name "The Bell Telephone Company of Canada" and is said to be effective February 22, 1939. On the first page thereof there appears the following:

QUESTIONS AND ANSWERS CONCERNING YEAR 1939
AMENDMENTS TO THE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS

1. *Question*

Why is the Plan being distributed in pamphlet form to employees?

Answer

In view of important amendments recently made to the Plan, as detailed in this series of Questions and Answers, it is considered an opportune occasion to more fully acquaint employees with the various provisions of the Plan.

2 *Question*

What important amendments have been made to the Plan?

Answer

(*a*) The Plan, when first established in 1917, contained a stipulation that the Plan was tentative only. This stipulation has been removed from the revised Plan.

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(*b*) The Plan previously stipulated that there was no contract or contractual relation or obligation between the Company and any employee or the legal representatives or the dependents of any employee. This stipulation has been removed from the revised Plan and the payment of pensions and benefits, subject to the provisions of the Plan, is now an obligation of the Company.

(*c*) The Plan previously contained the provision that pensions or benefits could be suspended or terminated, in the discretion of the Employees' Benefit Committee, in cases of misconduct or conduct prejudicial to the interests of the Company. This provision has been removed from the revised Plan.

The remainder of the pamphlet deals almost entirely with pension matters with which I am not here concerned.

It is submitted that by reason of the above questions and answers, the Company made it clear to the employees that thereafter the payment of pensions and benefits became a contractual obligation of the Company which could be enforced by the employees, their legal representatives or the dependants of employees. It is to be noted first, however, that the "obligation" of the Company is "subject to the provisions of the plan." I have already referred to the provisions of section 8(2) which provides that the pensions and benefits shall not be made subject to any process or proceeding in law or equity; and to section 10 which authorizes the Board to amend the plan as it deems advisable and to terminate the plan entirely. There is no evidence whatever that the Board of Directors authorized the issue of the pamphlet Exhibit "D" which I assume was put out by the Committee. But even if the Board did so it would appear that it had no power to create any contractual relationship between the Company and its employees as to payment of pensions and benefits. As I have already noted, By-law No. 16, so far as I am made aware, remained in force and effect throughout and the Board's powers to approve and amend the plan from time to time are expressly limited by the provisions of clause 1 of By-law 16, the opening sentence of which is as follows:

> Nothing in this by-law contained and nothing which may be done in pursuance hereof shall create expressly or by implication or inference any contract or contractual relation or obligation between the Company and any employee or the legal representatives or dependants of any employee.

If, however, I am in error in concluding that there was no contractual relationship between the Company and its

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employees regarding payment of such death benefits to employees' dependants, and such relationship did in fact exist, I would be of the opinion that the dependants (in this case the widow and/or child of the deceased) would have no right of action against the Company for such benefits. If any such contract existed it was between the Company and its employees. No representations were made to the "dependants" and it could not be said that they were parties to any agreement with the Company or the Committee in charge of the plan. Moreover, it is clear that no trust was created in favour of any of the dependants. At common law, therefore, so far as the "dependants" are concerned, the contract, if any such existed, was *res inter alios acta* and they had no enforceable rights therein. The dependants of deceased employees are not persons to whom the contract (if any) purports to grant something or with whom some agreement is purported to be made, and in these circumstances there was no beneficial interest arising or accruing by survivorship or otherwise to them on the death of the deceased (see *Re Miller's Agreement, Uniacke* v. *Attorney-General, supra*).

Reference may also be made to *Re Williamson, Williamson et al.* v. *Treasurer of Ontario* (1). That was a case under the Succession Duty Act of Ontario, R.S.O., 1937, ch. 26, in which similar payments under the plan of the Bell Telephone Company were under consideration. Section 10(*b*) of the Ontario Act was identical in language with the original part of subsection 3(1) (*g*) of the Dominion Act, except that the word "annuity" was omitted at the beginning of the subsection. Plaxton, J. held that the payments were voluntary and not a provision made by the deceased and that if the payments had been withheld by the Company the dependants could not have succeeded in an action to enforce payment. He also stated that while there was no evidence before him that the plan had been brought to the attention of the deceased employee in that case, his decision would have been the same had it been established that he had knowledge of the plan. It may be noted, however, that in the report of that case it is not stated that Exhibit "B" (above referred to) was in evidence.

(1) (1942) 3 D.L.R. 736.

My finding, therefore, is that the payments made to the appellant by the Company were voluntary and outside the scope of the original subsection (*g*).

It is of interest to note that in the administration of s. 2(1) (*d*) of the English Finance Act, referred to above, one of the requirements in matters of this sort is that the recipients must have either individually or collectively an enforceable right to the benefits. Reference may be made to Green's Death Duties, Second Edition, p. 104, where it is stated as follows:

> In the case of provident and superannuation schemes or funds, connected with the deceased's employment, Estate duty is payable under s. 2(1) (*d*) wherever—
>
> (1) there was a contract or arrangement between the deceased on the one hand, and his employers or the trustees or the other contributors on the other hand, under which the benefits in question are payable to the deceased's relatives or nominees; and
>
> (2) the recipients have either individually or collectively an enforceable right to the benefits; and
>
> (3) the deceased contributed, either voluntarily or compulsorily, to the scheme; or, if he did not contribute directly, the benefits are part of the consideration for his services.

The respondent alternatively submits that the payments so made to the appellant are brought into tax by the added part of subsection (*g*). The amendment, I think, was intended to declare that "superannuation or pension benefits or allowances," payable or granted as therein provided, constituted one form of "annuity or other interest" as used in the opening words of the subsection. He submits that the added part of the subsection is not limited in its application to benefits or allowances of a superannuation or pension character, but that all "allowances" payable or granted as therein provided are deemed to be successions and therefore subject to tax. The payments made to the appellant were no doubt "allowances" but it is clear that they were not of a superannuation or pension character. The deceased had not been superannuated or placed on pension and nothing in the nature of superannuation or pension accrued to the appellant.

In my view this submission of the respondent cannot be supported. I am quite unable to find that the word "allowances" as used in the subsection can be taken by itself and without reference to the preceding words "superannua-

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tion or pension benefits or," or as bringing into tax allowances which are other than those of a superannuation or pension character. I am of the opinion that the word "allowances" is used merely as an alternative to the word "benefits" with the intention that payments of a superannuation or pension character, whether payable as "benefits" or granted as "allowances" should be brought into tax if payable or granted as therein provided. If there were any doubt on this matter, it is entirely removed in my opinion by consideration of the words that follow: "payable or granted under legislation of the Parliament of Canada or of any province, *or under any other superannuation or pension fund or plan.*" Excluding those benefits or allowances payable or granted under Provincial or Dominion legislation (with which I am not here concerned), the benefits or allowances which are brought into tax are those which are payable or granted *"under any other superannuation or pension fund or plan."* There can be no question, I think, that the "fund or plan" referred to in the part I have underlined must be of a superannuation or pension character.

On the ground, therefore, that the payments to the appellant were not superannuation or pension benefits or superannuation or pension allowances, I must find that they are not brought into tax by reason of the added part of section 3(1) (*g*). Having already found that they are not within the ambit of the original part, it follows that the appeal must be allowed. Having reached that conclusion, it is not necessary to consider the question as to whether or not they were paid "out of any fund established for the purpose."

The assessment as to this item was erroneously made and the appeal must be allowed with costs.

Inasmuch as the appellant (in order to secure the release of the said payments) paid the succession duties in regard thereto, under protest, she is entitled to repayment of the said sum which I am advised is $578.49. If the parties are unable to agree on the proper amount, the matter may be spoken to.

Judgment accordingly.