

After his death the "residue" *i.e.*, what then remains, is to be divided. This brings the case within *Re Storey*, 14 O. W. R. 904, and *Re Johnson*, 27 O. L. R. 472, and indicates that the widow is entitled to encroach upon and use the money for her maintenance. At the request of the parties to avoid trouble in the future, I fix the amount proper to be used at \$450 per annum.

Costs out of estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 19TH, 1914.

MCLEOD v. ROREY.

5 O. W. N. 784.

Contract—Penalty—Liquidated Damages—Mortgage—Counterclaim—Costs—Set-off.

FALCONBRIDGE, C.J.K.B., allowed plaintiff \$250 damages in an action upon a mortgage contract.

Action on a mortgage to recover the mortgage moneys and for a sale of the lands mortgaged.

G. N. Weekes, for plaintiff.

M. P. McDonagh, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — The \$3 a day mentioned in the agreement ought to be considered as penalty and not as liquidated damages.

I allow the defendant \$250 damages plus a sum sufficient to balance plaintiff's claim for interest; I deduct from plaintiff's claim of \$500 defendant's set off or counterclaim of \$250, leaving a balance of \$250 due to plaintiff. I fix balance of costs of action on one side and of counterclaim on the other at \$75 in plaintiff's favour.

Judgment for plaintiff for \$250 and \$75 costs.

Thirty days' stay.