

death. I make no distinction between the trustee, herself a beneficiary, and the other beneficiaries. It is true that a discretionary power is conferred upon the trustee, and she was not to be bound to divide equally, but she was bound to give each a "share," and the Court in such case would restrain her from giving a purely illusory share. The *primâ facie* right was to have an equal division, and it was not intended that the trustee should act capriciously or dishonestly. The Court cannot exercise the personal discretionary power conferred upon the trustee, but is in a position to carry out substantially the intention of the testatrix. The property included in the residuary clause—and it includes the lot described in the second clause—in my opinion should be distributed according to the number of grandchildren living at the death of the testatrix, the share of each being increased by the share which Margaret Brimacombe would have taken had she survived.

If it appears necessary that a trustee should be appointed, I may be spoken to, or it may be made the subject of a substantive motion.

Costs of all parties out of the estate.

MACDONELL V. DAVIES—LENNOX, J.—MARCH 2.

Arbitration and Award—Ground Rent of Premises Fixed by Award—Action for Value of Use and Occupation—Fair Rental Value of Premises—Evidence.—The plaintiff sued for the money value of the defendant's use and occupation of premises in the city of Toronto from the 30th September, 1910, until the 29th July, 1914, claiming \$125 a month, or \$5,750, giving credit for \$2,062.50, paid on account of occupation rent. The learned Judge said that no satisfactory evidence of the fair rental value of the premises was given; and that the plaintiff had no right to recover upon the basis of a use and occupation rent. In a brief written opinion the learned Judge referred to a previous action between the same parties, *MacDonell v. Davies* (1913), 4 O.W.N. 620, and to proceedings upon an arbitration and an award made by the arbitrators. He found that the defendant had paid the plaintiff, for the period of his occupation, at the increased ground rent determined upon by the arbitrators, with interest—in all \$2,062.50; and, as the award had not been set aside or questioned, this was all the plaintiff was entitled to. Action dismissed with costs. G. H. Watson, K.C., for the plaintiff. M. H. Ludwig, K.C., for the defendant.