

Britton, J.]

IN RE CLARK.

[Nov. 19, 1904.]

*Will—Construction—Gift to class—Death of member of the class before the testator—Right of children of deceased member of class.*

The testator, who at the time of making his will in 1891, had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children.

*Held*, applying the principle of *Re Williams* (1903), 5 O.L.R. 345, that s. 36 of the Wills Act did not apply and that the children of the deceased child took no share.

*W. Bell*, for executors and children of testator. *F. W. Harcourt*, for children of deceased child.

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## Province of British Columbia.

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### SUPREME COURT.

Full Court.]

KING v. WILSON.

[Nov. 22, 1904.]

*Pleading—Sale of medical practice—Covenant not to open an office—Injunction restraining from practising—Judgment not supported by pleading.*

Defendant agreed with plaintiff "not to open an office or have one for the practice of medicine in, etc." Plaintiff sued alleging that defendant had agreed "to refrain from practising as a physician" and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain defendant from practising." Defendant admitted that he had agreed "not to open an office nor to have one for the practise of medicine."

At the trial plaintiff's evidence was directed to proving that defendant in breach of the agreement did "open and have an office," and the defendant relying on the pleadings which had not been amended offered no evidence.

Judgment was given restraining defendant from opening or having an office.

*Held*, on appeal, that the judgment was not supported by the pleadings and must be set aside.

*Sir C. H. Tupper*, K.C., for appellant. *Davis*, K.C., for respondent.