from the plaintiff company and defendant denies liability at the most for anything more than the premiums. The cause is apparently at issue without any reply being delivered.

On the examination of defendant for discovery, it was sought to prove that defendant and the Insurance Brokerage Company were really the same person under different names —and production was asked from him of the company's books which was refused. The examination was thereupon enlarged and a motion made for a further affidavit on production by defendants to include these books and other documents on the hypothesis of the identity of the defendant and the Insurance Brokerage Co.—being true.

No such allegation appears in the pleadings at present, and as discovery is relevant only to what appears there, this motion cannot succeed at present. See *Playfair* v. *McCormack*, 24 O. W. R. 56,.

The proper course to take now is to give plaintiff leave to reply so as to set up the present contention—and direct defendant to file a further affidavit in which these documents will be produced or their non-production justified or accounted for in some way.

The plaintiff will then be entitled to further examine defendant if desired. Under the facts of this case, costs will be in the cause.

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HON. MR. JUSTICE MIDDLETON. MAY 2ND, 1913.

## RE ELIOT.

4 O. W. N. 1198.

*Will—Construction—Testamentary Exercise of Power of Appointment—Rule against Perpetuities—Reading of Instruments Together—Income—Payment to Guardian—Surplus over Maintenance—Vesting of Shares.*

MIDDLETON, J., *held*, that in order to ascertain whether a power of appointment and the exercise thereof infringed the rule against perpetuities "you must wait and see how in fact the power has been executed and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power."

*In re Thompson* 1906, 2 Ch. 199 and *Re Phillips*, 4 O. W. N. 751, followed.

That therefore a testamentary exercise of a power of appointment in favour of the children of the testatrix when they should arrive at the age of 25 years was valid as all the children were over 4 years of age when the appointment became operative, but an attempt to confer a power of appointment upon her daughters in favour of their unborn issue was invalid.

*Hancock* v. *Watson*, 1902, A.C. 14, followed.