

"3. The defendant pleads, and the fact is, that in a certain action in the High Court of Justice, wherein David Kennedy is plaintiff, and the said James H. Kennedy, this defendant, and others are defendants, the Judicial Committee of the Privy Council dismissed the appeal of the said James H. Kennedy from the judgment of the Court of Appeal, which last-named Court declared that the clauses in the will of the said deceased David Kennedy, dealing with the residuary estate of the deceased, were void.

"4. Under the judgment of the Judicial Committee of the Privy Council aforesaid, to which the defendant craves leave to refer more particularly at the trial, it has been finally determined that the said David Kennedy died intestate as to his residuary estate, of which residuary estate the lands claimed by the plaintiffs are a part, if the deed given by the deceased David Kennedy in his lifetime to this defendant of the lands in question herein is set aside.

"5. The defendant submits, therefore, that the plaintiffs have no title to the lands in question, and never did have, and consequently cannot maintain this action."

The defendant by this pleading seeks to get behind the registered ownership, for reasons he gives in the pleading. Can he do this? I do not think that the Master in Chambers or a Judge on appeal from the Master in Chambers should be called upon to decide this question.

Then it is said that the defendant cannot any further litigate the question of ownership, registered or otherwise, because the matter is *res judicata* as between these parties. If that is established, the defendant will not succeed; but, again, it appears to me that the question of *res judicata*, in this matter of protracted and complicated litigation, ought not to be tried at this stage and merely upon objection to the pleadings. If I correctly understand the plaintiffs' contention, it is, that, upon proof of registered title, they are entitled to succeed, notwithstanding what is alleged by the defendant. I am not able to agree with that proposition.

The plaintiffs further contend that they now establish by judgments and papers produced that the matter is *res judicata*. That may be so, but so important a question should not be decided in an interlocutory proceeding.

The pleading is not embarrassing. It is not an attempt improperly to retry a matter already tried. It is, as it appears to me, properly enough raised by way of defence to the plain-