The usual order was made for service out of the jurisdiction on Ballantyne and Lowell & Christmas.

These two defendants moved to set aside that order and service thereunder.

The two grounds relied on in support of the motion were: (1) that the matter was res judicata, having been determined in the action brought by Gillard; (2) that in any event this action was premature until the final disposition of that action.

As to the first ground, it was answered that the parties in the two actions are not the same, and that the issues are altogether different.

This, I think is correct. It may be that Gillard would be entitled to recover as being an innocent holder for value, and yet that the plaintiffs might succeed in their action against Ballantyne et al. for inducing them to make it.

In any case the defence of res judicata will be open to defendants, and cannot be disposed of on the present motion. It is really equivalent to a demurrer to the statement of claim, and must be disposed of in Court: see Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187.

As to the second ground, it seemed to me at first to be entitled to considerable weight. It is plain that, if the plaintiffs in this action are successful, the measure of damages will depend largely on the final determination of the Gillard action. Still it does not seem right to delay them on this ground. This point can safely be left to be dealt with by the Court hereafter. Prima facie the plaintiffs have a cause of action, as the allegations in the statement of claim must be assumed to be true at present and for the purpose of this motion. It should therefore be dismissed, and the defendants should forthwith deliver their statements of defence.

The costs of this motion may be in the cause, as it might be thought it was a case for invoking the "discretion in the Court as to allowing service" spoken of in Baxter v. Faulkner, 6 O. W. R. 198.