

that is immaterial. According to the settlement, the balance of the purchase-money was to be paid as soon as the registration of the Maclean mortgage had been vacated. When this took place does not appear. Payment not having been made, the plaintiffs, on the 23rd October last, filed a statement of claim, and, on the 29th October last, sent the defendant's solicitor a statement of account shewing the amount alleged to be due, and claiming \$50 for costs. On the 3rd November last, payment not having been made, the plaintiff's solicitors wrote to the defendant's solicitors requiring them to file a defence. And it is here that some misunderstanding arose. Mr. Cooke, a solicitor in the employment of the defendant's solicitors, says that, on receipt of this letter, he telephoned to either Mr. Davis or Mr. Mehr, and arranged with him that the action should stand until the return of Mr. Mackenzie to the city, as it was a matter on which the latter alone was instructed. This alleged arrangement is denied by Mr. Davis, and he states that he is informed by his partner, Mr. Mehr, that he at no time had any conversation with Mr. Cooke or with any one else regarding this matter.

This conflict is regrettable. In the circumstances of the case, it seems extremely probable that, in the absence of Mr. Mackenzie, some communication would in the ordinary course of business be made by Mr. Cooke to the plaintiff's solicitors in response to their letter of the 3rd November. Mr. Davis denies that the communication was made to him, which is no doubt true, and he says that Mr. Mehr informed him that he had no conversation with Mr. Cooke on the subject. I have, therefore, Mr. Cooke's positive statement that he did communicate with Mr. Davis or Mr. Mehr, and I do not think that that is displaced by Mr. Davis's affidavit and his hearsay statement as to what Mr. Mehr said.

In these circumstances, by some mischance, no doubt, the judgment appears to have been signed, in breach of an understanding that the matter was to stand till Mr. Mackenzie's return, and must be set aside, with costs to the defendant in the cause, to be set off against any money which may be found due by the defendant to the plaintiff.

With regard to the motion to set aside the statement of claim, I do not think that should be done on the present application. Where a settlement of a suit is come to, it is not perfectly clear that the settlement may not be specifically enforced in the same action, while there are some cases which seem to shew that a