

ject. I have therefore Mr. Cook'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' 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 defendant to 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 new action is necessary, e.g., *Emeris v. Woodward*, 43 Ch. D. 185; *Pryer v. Gribble*, 10 Ch. 534; *Askew v. Millington*, 9 Ha. 65; *Forsyth v. Manton*, 5 Madd. 78; on the other hand there are others which seem to shew that it may be enforced in the suit which is the subject of settlement; see *Small v. Union Permanent Building Society*, 6 Pr. R. 206; *Smith v. Shirley*, 32 L. T. N. S. 234; 58 L. T. Jour. 443.

In the present case it may be said the statement of claim is not to enforce the compromise, but is based on the original cause. It is, however, subject to amendment. At all events it would seem clear that if the defendant wishes to set up the compromise or settlement he may do so by his defence. It would not, I think, be proper to strike out the statement of claim merely because it is based on the original cause of action; the settlement of 12th April, 1911, may be a bar, but that is a matter which I think cannot properly be decided on an interlocutory motion to strike out the pleading. No extra expense appears to have been occasioned by this branch of the motion.

The order therefore will be that the judgment be set aside and the defendant is to have until Tuesday next inclusive to file his defence.