

ascertain from such examination the grounds upon which the plaintiff held him liable. The evidence as to the size of the stable, which the defendant had taken down before the commencement of the action, was contradictory and very unsatisfactory, none of the witnesses having made an actual measurement of it. Several affidavits have been filed on the motion for a new trial, and from these it would appear that the space covered by the building is well marked and ascertainable, and that the actual measurements made on the site shew that the stable was much larger than the plaintiff's witnesses declared it to have been. The affidavits also state that a stable of the dimensions shewn by the measurement of the site would be large enough to accommodate the 47 cattle. If the evidence contained in these affidavits had been adduced at the trial, there is good reason to believe that it would have met and outweighed the evidence produced by the plaintiff. We think there should be a new trial on the grounds of surprise to the defendant, the costs of the former trial and of this appeal to abide the event of the new trial.

*Meighen and McClure*, for plaintiff. *Howell*, K.C., for defendant.

Full Court.]

CASS v. McCUTCHEON.

[June 9.

*Practice—Amendment—Parties to action—Trustee and beneficiary—Contract.*

By the original statement of claim, the plaintiff asked for an injunction to restrain the defendant from committing a breach of a contract made between them for the supply of all the bricks to be made by defendant during the season of 1903, for specific performance of the contract and for damages for alleged breach of it.

An interim injunction was granted, but it was afterwards dissolved by the Full Court (see note of decision, vol. 39, p. 529). The plaintiff then obtained an order from the referee giving leave to amend the statement of claim by adding the Manitoba Construction Company, being the company referred to in the contract as about to be incorporated, as co-plaintiff; but this order was set aside on appeal to a judge who held that, whatever the company's rights might be as between it and the plaintiff, there was no contract of any kind between the company and the defendant, and that the company's interest, if any, in the contract could not in any way affect the defendant.

The plaintiff then applied for and obtained an order allowing amendments to the statement of claim, the effect of which