

works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary despatch, then the architect may give ten days notice to do what is necessary, and upon the contractors failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission, as the case may be), without process or suit at law, to take the work, or any part thereof mentioned in such notice, out of the hands of the contractor."

*Held*, (SEGEWICK and GIROUARD, JJ., dissenting) that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee.

At the trial the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question of malice on the part of the architect. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for defendants.

*Held*, that this ruling did not constitute a rejection of evidence, but was merely a direction as to the marshalling of evidence, and within the discretion of the trial judge.

Appeal dismissed with costs.

*S. H. Blake*, Q.C., and *W. Cassels*, Q.C., for appellant.

*McCarthy*, Q.C., and *Fullerton*, Q.C., for respondent, city of Toronto.

*Nesbitt and Grier*, for respondent, Lennox.

Ontario ]

[Feb. 18.

ISBISTER v. RAY.

*Partnership—Note made by firm—Representation as to members—Judgment against firm—Action on against reputed partner—Agreement as to liability.*

An action was brought against the firm of M., I. & Co., as makers, and against J. I. as indorser of a promissory note. Judgment went by default against the firm, but the action failed as to J. I., it being held that an agreement established on the trial by which the holders of the note admitted that it was indorsed for their accommodation, and agreed that the indorsee was not to be liable, was a conclusive answer. An action was afterwards brought on the judgment against the firm to recover from J. I. as a member thereof, and also on several promissory notes made by the said M., I. & Co.

*Held*, affirming the decision of the Court of Appeal (22 A. R. 12), which reversed the judgment of the Divisional Court (24 O.R. 497), as to the action on the judgment, but affirmed it on the other claim, that J. I. having succeeded in the former action on the ground that it had been agreed that he was not to be liable in any way on the note, there in suit, the judgment on such former action was a conclusive answer to the present.

*Held*, further, that as to the other notes sued on, J. I. having, when the notes