

and in support of the defendant's counterclaim to prove the damage arising from them; but the evidence was rejected, and judgment given in the action and on the counterclaim against the defendant.

The first question which arises is, whether there is proof that the contract has been complied with to the satisfaction of the architect. Neither he nor the plaintiffs are called. Proof of facts necessary to be proved should be under oath. We have here the fact proved that the architect has given a certificate, but we have not the truth of the certificate established. . . . The defendant did not agree to pay in 33 days after the architect's final certificate, but after completion. The contract, it is true, contains a clause, "Provided further that, if required, in each case a certificate shall be obtained by the contractor from the Registrar . . . that he . . . finds no mechanics' liens or claims recorded . . . and thereupon and on or before the said thirty-third day after completion of the said works, a final certificate shall be obtained from and signed by the architect. But the same proviso goes on to declare that "if, from any reasonable cause whatever, such final certificate should not be obtained or the giving of the same should be refused by said architect, the said contractor shall nevertheless . . . be entitled to proceed at law to enforce payment of the balance due to him . . . and the production of a final certificate shall not in any case be a condition precedent to his right to recover . . . and such balance . . . shall be recovered, if justly due, without the necessity of any production in evidence of any final certificate, and the right of action hereby provided shall not be controlled by the arbitration clause hereinafter set forth."

It is, I think, manifest that the giving of the final certificate is of little importance, and that the rights of the parties in the action are to be determined wholly irrespective of its being obtained or not. . . . The fact to be proved at the trial, therefore, is not the giving of his certificate, but the fact of his satisfaction; and that, in so far as it may be availed of, should be proved by oral testimony. If it were a question of previous instruction for a deviation, the previous instruction in writing would be established by the proof of the writing, but subsequent written statement of satisfaction is not proof of satisfaction. Then there is nothing in this contract enabling the architect to forgive default of performance. He may in advance, when he has the choice, require a change to be made, but that does not authorise him always to say, "You have done that which you should not have done, or, you have left undone that which you should have done, but, although I am not satisfied,

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