

v. Powell, 26 A.R. 407. Dealing with that doctrine, Mr. Justice Lister, delivering the judgment of the Court, says (p. 410): "The doctrine of 'substantial performance' pressed by counsel for the plaintiff, and which is held by the Courts of many States of the neighbouring Union, has never been adopted by the English Courts or by the Courts of this country. Mr. Hudson, in the second edition of his work on Building Contracts, vol. 1., p. 201, refers to this doctrine thus: 'Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of "substantial performance" will enable the builder to recover, unless there is some act of the employer, such as acceptance, waiver, or prevention, or evidence from which a contract can be implied to pay for the work as performed and according to value, although it is not entirely completed.'" Then the learned Judge goes on to point out that the author refers to certain cases which he names; then he proceeds: "The plaintiff, having failed to establish that the contract was performed or that its non-performance was owing to the fault or concurrence of the defendant, cannot, as it seems to me, on the authorities, recover in this action."

It is impossible to come to the conclusion, on the evidence, that the defendant or her husband, by anything that was done, acquiesced in the improper work, or the use of improper materials by the plaintiff.

There is nothing from which it could be found as a fact that they acquiesced in the substitution of the inferior lumber for the lumber that was to be used, or that the defective work was to be accepted as if it had been in accordance with the contract.

It is an extraordinary doctrine to urge that, where a person makes a contract with a builder, no architect intervening, to put up a verandah or house in accordance with a certain stipulation, because the person who makes the contract with the builder is there and sees the work going on, he is therefore prevented, if it turns out afterwards that the builder has put in improper material or done improper work, from objecting to it. There is no such law, and it is contrary to common sense.

It is very probable that these people knew nothing about matters of that kind, and it requires somebody of experience in work of the character of that which was being done to tell what we are asked to assume the defendant or her husband knew.

It may be that this is a very hard case, and that the defen-