The contract having been established and admitted, a very important question of law has risen, namely, whether the defendants can, in the face of the architect's final certificate, dispute the validity of the plaintiffs' claim, unless they can prove that the certificate was given by the fraud and collusion of and between the architect and the contractors, and this is not alleged.

Where under a contract for the performance of work the decision of the architect or engineer on matters within the contract is made final and conclusive, and the certificate of the architect or engineer of the architect is made final and conclusive, both parties are bound by the decision or certificate of such architect or engineer, unless fraud and collusion between the parties claiming under the decision or certificate of the architect or engineer is established, or unless upon a construction of the contract between the parties it appears that the decision or certificate was not intended to be final and conclusive. There is ample authority for this proposition. I need only cite three decisions of the Supreme Court of New Zealand in support of it, namely, Forrest *v.* Ohinemuri County 299 N.Z.L.R. 401, 12 G.L.R. 342, Burns and Kenealy *v.* Furby 4 N.Z.L.R. 110, and Fraser *v.* Mayor of Hamilton 32 N.Z.L.R. 205, 15 G.L.R. 156.

Some years ago the Royal Institute of British Architects sanctioned a form of contract which has been from that time in general use in the building trade in Great Britain, and it has been held by the English Court of Appeal in Robins *v.* Goddard 1905 1 K.B. 294, that because in that form of contract there is an Arbitration clause to which a dissatisfied party to the contract could resort, and which gave the Arbitration power to open up, review, and revise any certificate or decision of the architect, save in regard to matters expressly excepted from the Arbitration clause, the certificate or decision of the architect having been made subject to the decision of an arbitrator, the certificate or decision was not final. It was further held in that case that the builder having sued the employer, and the employer not having elected to go to Arbitration, the employer could in the action dispute the validity and finality of the architect's certificate. Mr. Justice Farwell had held that the certificate was final (Robins *v.* Goddard 1904 2 Ch 261) and his judgment was reversed. The general facts in that case were practically similar to those in the present case, and if the contract in this case was not materially different from the contract in Robins *v.* Goddard, this Court ought to follow the judgment of the English Court of Appeal.

It is clear that the arbitration clauses in the "Conditions" which are incorporated in the present contract have been founded upon the British contract. Clause 32 of the British contract is as follows:—

> Provided always that in any case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect under clauses 4, 16 and 19 and the exercise by him under clause 18 of the right to have any work opened up) or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of . . . . . and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificate, shall not be opened until after the completion, or alleged completion of the works unless with the written consent of the employer or architect and the contractor. The arbitrator shall have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given.

I cite in full clauses 25 and 26 of the present contract:—

> 25. In case any question, dispute, or difference shall arise between the employer or the architect on the one hand and the contractor on the other touching the construction of this contract or as to the payment for extra works for which the architect shall have given or shall have refused to give an order in writing, or as to any allowance or compensation to be paid to the contractor, or as to the refusal of the architect to measure or appraise or to issue any certificate, or touching the appointment of any substitute for the architect, or as to any other matter or thing arising out of these conditions, or relating thereto, such dispute, shall, if not otherwise distinctly provided for by any of the foregoing clauses, be settled and determined by the award of one referee if the parties can agree on one reference, and the award of such referee shall be made within 30 days after the matter shall have been referred to him or within such further time, not being more than 30 days additional, as the referee shall by any writing signed by him from time to time appoint, or within such further time as the Supreme Court or a Judge shall order, and the said award when so made shall be final and binding upon all parties.
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> 26. The said referee shall have power to examine witnesses, including the parties, on oath, and to call for all documents and papers relating to the matters referred, and the costs and expenses attending and incidental to the said reference and award shall be borne and paid by the owner or contractor as the said referee shall direct. The referee shall have power to open, review, and revise any certificate, opinion, decision, or requisition, or notice, save in regard to the said matters expressly excepted as above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid in the same manner as if no certificate, opinion, decision, or requisition or notice had been given.