

It had knowledge of more than that; for on its file there is, as I have mentioned, an express statement on behalf of the Palms estate, through Clarke, Cowan, & Bartlet, their Windsor solicitors, in 1904, that the water lots surrounding the island had not been granted to them, and asking for a patent. The lease of January, 1907, was made by the Palms estate four years after the defendant Gauthier had been openly operating the fisheries.

The express disclaimer of the Palms estate was repeated in November, 1909, by the Detroit attorneys of the estate, to Behan; and that position was maintained in this action until after the defendant Gauthier was added; the original defendants pleading (par. 3) that they bought out to the channel-bank, and the plaintiff joining issue on that statement. The Ontario Government were not likely to be ignorant of the fact, if it be a fact, that the Dominion Government operated these fisheries from 1892 to 1903.

No witness from the Department of the Ontario Government concerned was called—and naturally so, where the only allegation was that the Crown grants overlapped; so that there is nothing to shew their state of knowledge at the time, a reasonable step to take if the fraud was said to be perpetrated on them. This is the more necessary, as the Minister's letter refers to evidence being before the Department when the license was granted. This may and probably was Gauthier's evidence; but that should not be left to surmise. It is not enough that a judgment may be right; it must be founded on evidence of the facts on which it rests.

Under these circumstances, and apart from the principle I have alluded to, I think there is no such proof as is required from a party alleging fraud in another, and that that must be the test where a finding of fraud is made, although not asked for in the pleadings or adopted by any of the parties.

The judgment should be reversed, and the proper declaration made as indicated as to what passed under the patent to Paxton. As to the original defendants, so much of the judgment as orders them to give up possession to the plaintiff should be set aside, and judgment entered dismissing the claim for possession and mesne profits, and also dismissing the counterclaim of these defendants for specific performance, with a declaration that the dismissal of these claims is not to be a bar to any subsequent action arising out of or by reason of the alleged contract or contracts. There should also be a declaration that the rights of the plaintiff, if any there be, arising out of any practice of the