

serves though in the view which he took of the case he considered it immaterial.

In the Divisional Court Mr. Justice Street expressed himself as follows :—

"The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers therefore in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question, was not selling 'lands reserved for Indians,' but was selling lands belonging to the Province of Ontario."

The Chief Justice adopted the reasons of the learned Chancellor.

There was a second Appeal to the Supreme Court. The majority of the learned Judges in that Court held that the case was governed by the decision of this Board in *St. Catharines' Milling Company v. The Queen* and the Appeal was dismissed. Mr. Justice Gwynne dissented but the reasons for his opinion given by that learned and lamented Judge seem to be directed rather to show that the decision of this Board in the previous case was erroneous.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catharines' Milling Company v. The Queen*. The argument of the learned Counsel for the Appellants at their Lordships' Bar was that at the date of the Letters Patent issued by the Dominion officers to their predecessors in title the land question was held in trust for sale for the exclusive benefit of the Indians and therefore there was no beneficial interest in the lands left in the Province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion offi-

cers as against the Government of Ontario and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By Section 91 of the British North American Act 1867 the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the Province as an Indian reserve in infringement of the proprietary rights of the Province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case* (1898 A. C. 499) as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the Government of the Province taking advantage of the surrender of 1873 came at least under an honorable engagement to fulfil the terms on the faith of which the surrender was made, and therefore to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result however is that the choice and location of the lands to be so appropriated could only be effectually made by the joint action of the two Governments.

It is unnecessary to say more on this point for as between the two Governments the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. c. 5) and the Legislature of Ontario (54 Vict. c. 3) and subsequently signed (16th April 1894) by the proper officers of the two Governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the treaty and that before the true boundaries had been ascertained the Government of Canada had selected and set aside certain reserves in intended pursuance of the treaty and that the Government of Ontario was no party to the selection and had not yet concurred therein and it is agreed by Article 1 (amongst other things) that the concurrence of the Province of Ontario is required in the selection. By subsequent Articles provision is made "in order to avoid dissatisfaction or discontent among the Indians" for full inquiry