trary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction,

Held, that the question where the sale took place was one of fact, and the magistrate having found, as shown by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the court could not review his decision.

Held, also, that the defendants were not entitled to a *certiorari* to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the *certiorari* they did not show affirmatively that the Act was not in force there. But

Held, that the conviction was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants having paid his half of the fine and costs might be imprisoned for the other's default; and this defect was not cured by ss. 87 and 88 of the Summary Convictions Act, R. S. C. c. 178.

W. R. Riddell, for defendants.

Watson, for magistrate.

Delamere, for complainant.

Divisional Court.] [May 23.

BRADY *v.* SADLER.

Crown patent—Construction of—Reservation of drowned lands—Use of bracket boards on mill-dam—Prescription—Evidence.

A crown patent, issued in 1852, conveyed to the plaintiff, B., a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats and persons." The lot actually contained 200 acres, but the dry part was only sixty acres. Before the issue of the patent there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot.

The two judges composing the Divisional Court agreed in reversing the judgment of PROUDFOOT, J., 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiff's lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was

Held, per ARMOUR, C.J., that the words in the grant "containing by admeasurement sixty acres, be the same more or less" did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and, therefore, that B. took under the patent not only the dry part of lot 9, but also the drowned land excluding the channel of the river, and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam.

Per STREET, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and, therefore, the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards.

Remarks upon the admission of extrinsic evidence to aid in the construction of a Crown patent.

Moss, Q.C., and *H. O'Leary*, for the plaintiff.

S. H. Blake, Q.C., and *T. Stewart*, for the defendant.