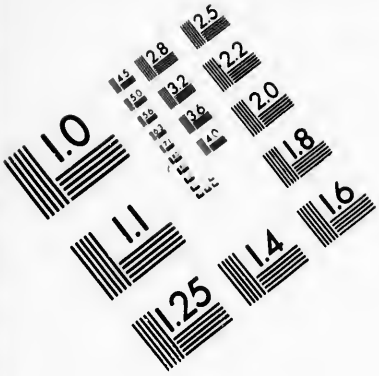

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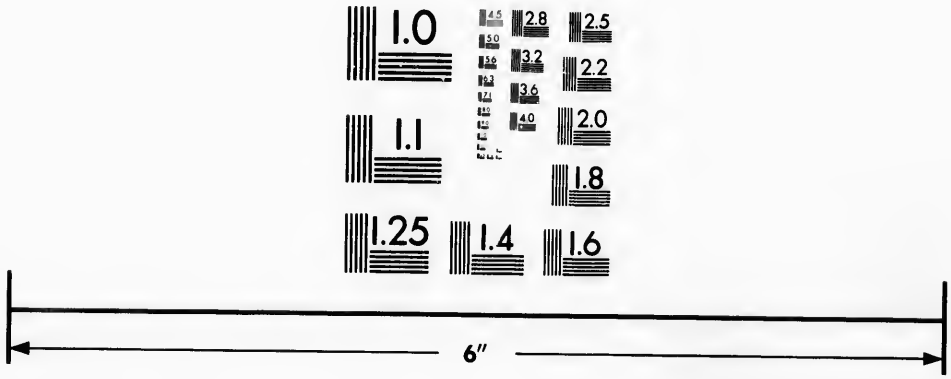

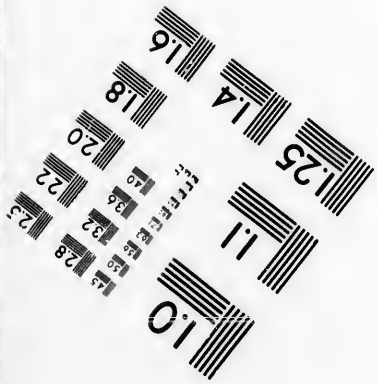

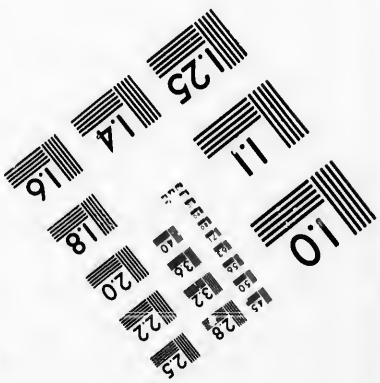

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THE JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE IN THE PROVINCE OF ONTARIO.

READ BY

E. J. SENKLER, ESQ.

JUDGE OF THE COUNTY COURT OF THE COUNTY OF LINCOLN.

At the annual meeting of County Court Judges held in 1885.

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THE JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE IN THE PROVINCE OF ONTARIO.

THE office of Justice of the Peace and the Court of Quarter Sessions were evidently in existence in what is now the Province of Ontario before the meeting of the first Parliament of the Province of Upper Canada. This is clear from the language of several of the statutes passed at the first session of this Parliament which met at Niagara on the 17th September, 1792. By chapter 5 the magistrates of each and every district in the Province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires within the same. By chapter 6 any two or more justices of the peace, acting under and by virtue of His Majesty's commission within the respective limits of their said commissions, were empowered to hold Courts of Request within their respective divisions, which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions; and by chapter 8 the justices of the peace for the several districts in Quarter Sessions assembled were authorized to procure plans and elevations of a gaol and court house, and approve of one of them and contract for the building of such goal and court house. By statutes passed in subsequent sessions of the same Parliament the times of holding these Courts were fixed and changed, and by subsequent Parliaments the existence of these Courts was recognized; but it was not until the first session of the third Provincial Parliament which met on the 29th May, 1801, that the Statute 41 George III. chapter 6 was passed, by which—after reciting that doubts had arisen with respect to the authority

under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the Province, and also the authority under which commissions of the peace, commissions of assize and *nisi prius*, commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively—it was declared and enacted "that the authority under which the said Courts and commissions had been erected, holden and issued, and also all matters and things done by or by virtue of the same, are so far as relates to the authority under which the same have been so erected, holden, issued, and done, good and valid to all intents and purposes whatsoever, and that the provisions of all the Acts of the Legislature of the Province respecting the said Courts and commissions, or any of them, are hereby declared to extend and be in force (except as hereafter mentioned) in each and every the said districts respectively."

The enactment, so far as it relates to the authority under which commissions of the peace have been issued and the Courts of General Quarter Sessions of the Peace have been held, was embodied in the Consolidated Statutes for Upper Canada, chapter 17, section 1, and in the Revised Statutes of Ontario chapter 44, section 2, and no doubt is the authority under which the Courts of General Sessions of the Peace are now held in Ontario.

It will be observed that this enactment did not create the Courts nor even define their jurisdiction. It simply gave the sanction of the Legislature to the Courts and to the authority under which they were held, and did not indicate what that authority was.

I think, however, there can be little doubt but that the first commissions of the peace were issued in what is now Ontario in consequence of the introduction of the English criminal law, and as a part of that system.

I have not found any decision to that effect, but it seems the reasonable conclusion from the ascertained circum-

stances, and it is the view adopted by the writer in the *Canada Law Journal* of February, 1871, of an article on the jurisdiction of the Courts of General Sessions of the Peace in case of perjury; in which article the question of the origin and jurisdiction of these Courts is considered and dealt with so fully as really to leave but little to be said on the subject.

It is almost unnecessary to say that the criminal law of England was introduced by royal proclamation into the then Province of Quebec in 1763, a few months after the cession of that Province to Great Britain under the Treaty of Paris, and that on the extension of the limits of that Province so as to include all the present Province of Ontario, by the Imperial Act 14 Geo. III. chapter 83, it was by the 11th section of that Act, after praising the certainty and lenity of the criminal law of England and the benefits and advantages resulting from the use of it, which had been sensibly felt by the inhabitants from an experience of nine years, during which it had been uniformly administered, enacted that the same should continue to be administered and should be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial; and that by the Provincial Act 40 George III. chapter 1, passed in July, 1800, after reciting the Imperial Act just referred to, it was enacted that the criminal law of England, as it stood on the 17th September, 1792 (being the date of the meeting of the first Provincial Parliament), should be and was declared to be the criminal law of the Province.

I think, then, it may be fairly assumed that the Courts of General Quarter Sessions of the Peace in the Province of Upper Canada possessed whatever jurisdiction the same Courts had in England on the 17th September, 1792.

As the County of Lincoln was settled early in the history of this country, the first Parliament of the Province being held within its limits, I was in hopes of finding some old commissions of the peace which might throw light on the mode in which they were originally issued. The earliest in date that I have been able to find, however, was issued

in 1817. It appears to follow closely the form given in Archbold's Practice of the Quarter Sessions of the Peace as used in England, even retaining among the offences to be inquired into and punished by the justices appointed by it, "enchantments, sorceries, arts magic." The same words are included in the commissions of 1823 and 1828, but omitted in that of 1833, and all subsequent thereto. Of course they had no effect, all prosecutions for these offences, except for pretending to practise witchcraft, having been abolished by 9 George II. chapter 5. Their retention only affords another instance of forms surviving the object for which they were created.

The jurisdiction of the Courts of Quarter Sessions in England has been so reduced and limited by the English Statute 5 & 6 Vict. cap. 33, passed 30th June, 1842 (which has never been adopted in this country), that the English decisions since that time are of no assistance to us but are rather calculated to mislead, and but little help can be obtained from modern treatises which are of course written with a view to the existing practice in England. A very clear and succinct statement of the jurisdiction of these Courts under the commission (as distinguished from jurisdiction under subsequent statutes) will, however, be found in Archbold's Practice, already alluded to, at the commencement of the work to which I refer my readers, and of which I will merely give a brief outline and the results.

The Courts of General Quarter Sessions were established by the Act 34 Ed. III. cap. 1, by which it was enacted that in every county in England should be assigned for the keeping of the peace one lord, and with him three or four more of the most worthy in the county, with some learned in the law, and that they should have power to restrain the offenders, rioters and all other barrators; and to pursue, arrest, take and chastise them according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and custom of the realm; and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid.

In the commissions issued in pursuance of the statutes the language of the statutes is amplified a good deal, but the words all and all manner of felonies and trespasses (or trespassings, as I see in the later commissions in this Province) are always used, and the jurisdiction of the Court is governed by the construction put on these words.

What is the proper construction was in former times a matter much disputed, and during these times it was settled that neither perjury at common law nor forgery at common law is within the jurisdiction of the Court; and this was recognized and affirmed by Lord Kenyon in the case of *Rex* v. *Higgins*, 2 East 5; and although he admitted he did not know the reason for the decisions, he considered them so well established that he would not interfere with them. Subject to those two exceptions, Mr. Archbold says that in modern times the general opinion of the profession is that the Court of Quarter Sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanors, whether created before or after the date of the commission. As to the word trespasses, he says the word used when the commissions were in Latin was "transgressiones," which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass lies. It was usually rendered into law French by the word "trespas," and that is the word used in the original French of the Statute 34 Edward III. cap. 1, and it is there rendered into English by the word "trespasses." It is said that when a statute creates a new offence, and directs it to be prosecuted before a court of Oyer and Terminer or general gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the Sessions with respect to that particular offence: *Rex* v. *Rispail*, 1 Wm. Bl. 368; 3 Burr. 1320.

Where, however, a statute required that the offenders against it should be carried before a justice of the peace, and by him committed to the county gaol there to remain

until the next Court of Oyer and Terminer, great session or gaol delivery, the Court held that as the offence was a misdemeanour only, and the defendant might be prosecuted for it without being apprehended or in custody, the clause in the Act did not prevent the indictment being preferred at the Sessions; *Rex* v. *Cook*, 4 M. & S. 71.

It would seem from this latter case that the Sessions would only be barred jurisdiction where there was an express direction that the offence should be prosecuted before the Court of Oyer and Terminer or general gaol delivery.

Although Lord Kenyon, as I have already mentioned, in recognizing the fact that perjury and forgery at common law were exceptions to the class of offences which, being violations of the law of the land, have a tendency as it is said to the breach of the peace and are therefore cognizable by the Sessions, uses the expression, "why exceptions I know not," it seems clear that the reason why it was held that the Sessions had not jurisdiction over them was that it was considered these offences had not a direct and immediate tendency to cause such breaches of the peace as some other offences, which for that reason had been held to be indictable at the Sessions. In 2 Hawkins' Pleas of the Crown, book 2, cap. 8, sec. 64, it is said: "Yet it hath of late been settled that justices of the peace have no jurisdiction over forgery and perjury at the common law, the principal reason of which resolution, as I apprehend, was that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass' in its most proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to create such breaches of the peace as libels and such like, which on this account have been judged indictable before justices of the peace."

This passage is quoted by Mr. Justice Wightman in his judgment in *ex parte Henry Bartlett*, reported in 7 Jurist

649, decided in 1843, when the question of the power of a justice to commit for trial on a charge of forgery was discussed at considerable length.

This reasoning seems to be adopted and approved of by Chief Justice Wilson in the case of *Regina* v. *McDonald*, 31 U. C. R. 339, when he says perjury and forgery not being attended with a breach of the peace, the Courts of Quarter Sessions cannot try them.

Assuming then that the Court of Quarter Sessions in Upper Canada had the same jurisdiction as these Courts in England, and consequently jurisdiction over all cases of felony and misdemeanour except perjury and forgery, and such new offences as by the Act creating them were directed to be tried at the Courts of Oyer and Terminer and general gaol delivery; it remains to consider the changes effected by Canadian legislation and the decisions of our own Courts.

The Statute 7 William IV. chapter 4 abolished the distinction between grand and petit larceny, and enabled the Sessions to try all cases of simple larceny (under certain restrictions when they were not presided over by a barrister). This statute seems to follow substantially the English Act 7 & 8 George IV. chapter 29, sections 2 & 3, although in the English Act the Court of Quarter Sessions is not mentioned, but every Court whose power as to the trial of larceny before was limited to petit larceny was given the power to try every case of larceny, the punishment of which could not exceed the punishment therein mentioned for simple larceny.

It is said in Dickenson's Guide to the Quarter Sessions that in England prior to this Act the Courts of Quarter Sessions only professed to try petit larcenies.

The various enactments in force as to the Sessions were consolidated in chapter 17 of the Consolidated Statutes for Upper Canada, and most of those are now in chapter 44 of Revised Statutes of Ontario.

No definition or limitation of the jurisdiction of the Court is to be found in either of these statutes, although in the Consolidated Statutes, chapter 17, section 3, is to be found

the 5th sec. of 7 William IV. cap. 4 declaring that it shall not be necessary for any Court of Quarter Sessions to deliver the gaol of all prisoners who may be confined upon charges of simple larceny, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer if by reason of the difficulty or importance of the case, or for any other cause it appears to them proper to do so.

In the Dominion Statutes passed in 1869, 32 & 33 Vict. there are several important enactments affecting the jurisdiction of the Sessions.

They are 32 & 33 Vict. cap. 29, sec. 12, by which it is enacted that no Court of General or Quarter Sessions or Recorder's Court, nor any Court but a Superior Court having criminal jurisdiction, shall have power to try any treason or any felony punishable with death or any libel.

This is, except as to the prohibition against libel, a re-enactment of 24 Vict. cap. 14 in substance.

Mr. Taschereau in his book on the Criminal Acts has given a list of the offences in respect of which the Sessions have not jurisdiction, in which he has included administering poison or wounding with intent to murder, and carnally knowing a girl under ten years of age. In both cases the death penalty has been abolished since the publication of his book, and I presume the offences are now within the jurisdiction of the Court.

Then 32 & 33 Vict. cap. 20 sec. 48 by which it is enacted that neither the justice of the peace, acting in and for any district, county, division, city or place, nor any judge of the sessions of the peace, nor the recorder of any city shall at any session of the peace try any person for any offence under the 27th, 28th and 29th sections of that Act, that is for causing injuries by the explosion of gunpowder or other explosive substance or any corrosive fluid to persons or buildings, ships or vessels, and 32 & 33 Vict. cap. 21. sec. 92 by which it is enacted that no misdemeanour against any of the sixteen last preceding sections of that Act shall be prosecuted or had at any Court of General Quarter Sessions of the Peace; these sixteen sections all relate to frauds by agents, bankers or factors.

Chief Justice Wilson in the case of *Regina* v. *McDonald*, 31 U. C. R. at page 339, refers to the three statutes which I have just mentioned, and says: "The exceptions contained in the last three named statutes, and the excepted cases of forgery and perjury, define as nearly as may be what the general jurisdiction of the Sessions of the Peace is: the unexcepted offences they may try."

This judgment was pronounced in 1871. Since then the Dominion Act, 37 Vict. cap. 9, was passed (in 1874), by section 118 of which it is enacted that no indictment for bribery or undue influence, personation or other corrupt practices shall be triable before any Court of Quarter or General Sessions of the Peace.

This Act refers to elections of members of the House of Commons, but it is suggested by Mr. Justice Taschereau, that perhaps the words of the section I have quoted are wide enough to extend to elections of the Local Legislature and to municipal elections.

I do not know of any other provisions limiting the jurisdiction of the Sessions. It is quite possible that some have escaped my observation as the little time at my disposal has not allowed me to make as close and thorough an examination of the statutes as I could have wished. I did not, however, expect to make this paper exhaustive of the subject. In any case which may come up for trial of an unusual character or under any special statute the provisions of the Act creating or defining the offence will always have to be carefully examined to ascertain what provisions if any, have been made as to the mode of trial.

In addition to the offences I have named, Mr. Taschereau suggests that counterfeiting coin is declared to be treason by different statutes, and consequently is not triable at the Sessions. No doubt counterfeiting the king's money in former times was treason, but under the Canadian Statutes it is expressly declared to be felony, the form of indictment given in the Criminal Procedure Act uses the word feloniously, and so do the forms I find in the books on criminal pleading. I doubt the offence now being punishable as treason.

Mr. Taschereau also suggests that subornation of perjury is by common law not within the jurisdiction of the Sessions, and refers to Dickenson's Quarter Sessions in support of his view. This authority sustains him, but the cases referred to in Dickenson do not seem directly in point. The reason, however, for excluding perjury seems equally forcible for excluding subornation of perjury.

I have more than once referred to the case of *Regina* v. *Macdonald*, 31 U. C. R. 337, in which it was laid down that the sessions had no jurisdiction in cases of either forgery or perjury. This case follows, on the question of forgery, the decision of Chief Justice Robinson in *Regina* v. *Dunlop*, 15 U. C. R. 118, and is supported on the question of perjury by the subsequent decision of *Regina* v. *Currie*, 31 U. C. R. 582.

In none of these cases is the distinction between forgery and perjury at common law and the same offences by statute adverted to, nor does it appear what was the nature of the offence in these cases in this particular. In the English authorities I have referred to, the jurisdiction of the Sessions is denied in cases at common law, and it is admitted that the sessions had jurisdiction in cases of perjury at all events under the Statute 5 Eliz. cap. 9, (which relates to perjury by witnesses in Court), by virtue of the words of that statute. In the article in the *Canada Law Journal* of February, 1871, to which I have already adverted, the view is sustained that the Sessions still have jurisdiction in cases of perjury by witnesses in Court, and a distinction is taken between the language of our statute 32 & 33 Vict. cap. 23, sec. 6, and the English Act, 14 & 15 Vict. cap. 100, sec. 19, from which our Act is taken, as indicating that in this country the jurisdiction over such cases is not confined to the assizes only as in England. The writer of that article, however, suggests that in view of the directions given by the statute of Edward to the Sessions in cases of difficulty not to give judgment unless in the presence of a justice of one or the other Bench, or the justice assigned to hold the assizes, it is not probable that the justices in Sessions will take upon themselves to decide

such cases, but will leave them over to be tried by the judge holding the assizes.

Since the decisions I have cited from 31 U. C. R., I think it still more likely that the course he suggests will be adopted.

I had intended saying something on the jurisdiction of the Sessions in matters of appeal from magistrates' convictions, but this paper has been drawn out longer than I expected, and I find that all I could say on that subject can readily be found from the authorities in Robinson & Joseph's Digest.

I will conclude by saying that whatever may be the difficulties in reconciling the opinions expressed at different times on the subject, a safe guide to the present jurisdiction of the Sessions may be found in the words I have quoted from the judgment of Chief Justice Wilson in *Regina* v. *Macdonald*, 31 U. C. R. 351, supplemented, of course, by whatever limitations may have been made by subsequent statutes.