

Mr. Justice Cooley's treatise did not reach Victoria until a year ago, but this extract describes very accurately the condition which this Court has actually pursued since April, 1879.

Having therefore noticed the greater part of the views pressed upon us by the Attorney-General, which in our opinion were not very important to be considered at all, and which we dismiss as not touching the real point at issue, we turn to examine the constitutionality of the impeached sections by the only test to which we can apply, viz: the British North America Act, the "paramount statute," to use Mr. Justice Cooley's words; and the only questions we can entertain are those stated by Lord Selborne in *Regina vs. Burah*, 3 Privy Council appeal cases, page 905, viz: "Is this thing which has been done legislation? Is it within 'the general scope of the words which affirmatively give the power? Does 'it violate any express condition or restriction in the creating Act (or in 'any other Imperial Act) by which that power is limited?' I think these questions should be answered unfavorably for the constitutionality of the sections now impeached. The rule is stated to much the same effect by Mr. Justice Cooley (*Constitutional Licitations*, page 204.)

The impeached sections are section 28 and 32 of the local Act, 1881, chapter 1; section 28 is as follows:

"The Judges of the Supreme Court shall have power to sit together 'in the City of Victoria as a full court, and any three shall constitute a 'quorum, and such full court shall be held only once in each year, at 'such time as may be fixed by Rules of Court."

And section 32 runs thus, so far as is material:

"The Supreme Court Rules, 1880, shall as modified by this Act be 'valid * * * and the Lieut.-Governor in Council shall have power to 'vary, amend or rescind any of these rules or make new rules, provided 'the same are not inconsistent with this Act, for the purpose of carrying 'out the scope and aim of this Act and of the 'Better Administration of 'Justice Act, 1878.' These rules need not be uniform but may vary as 'to different districts in the Province as circumstances may require. And 'section 17 of the Judicature Act, 1879, with respect to Rules of Court 'shall continue to be in force, subject to such proviso."

(Section 17 of the Act of 1879 directs all Rules of Court to be made by Order in Council.)

These sections must stand or fall as they agree or disagree with the British North America Act, 1867. I do not know whether the Act, 1881, chapter 1, has been disallowed at Ottawa or whether it has been left to its operation. It is quite clear that if originally unconstitutional it cannot be in any degree confirmed by being left to its operation, which merely means the absence of any formal condemnation by the Governor-General's constitutional legal advisers.

I shall endeavor to show: 1st, that these sections deal with a matter, and in a manner, that is not either expressly or by reasonable implication, affirmatively placed within the power of the local Legislature. This I think can be established without going beyond section 92 and its subsections. But if we look at the rest of the British North America Act, I think it will also clearly appear: 2nd, that the impeached sections infringe the plain words of other sections of the British North America Act and are repugnant to its manifest intentions.

The only part of the British North America Act, so far as I can see,