'The Native Lands Act, 1869,' or by the proceedings taken in the Native Lands Court in pursuance of the said Act."

2. We understand that we are not called upon, in answering this question, to do more than determine whether any vested right in the persons named has been taken away or prejudicially affected by the Act of 1869; for of this alone are we competent to judge. As to the words "improperly or unconstitutionally," we think it most respectful to understand that the Legislature thereby has intended itself to characterize its own act, in case it should appear that the Statute in question has interfered with the rights of the claimants.

We are not asked whether the Statute is *ultra vires*. That is not here the meaning of the term "unconstitutional." Were the Act impeachable as contrary to the Constitution of the Colony, or as repugnant to some Imperial Statute affecting the Colony, we should, in the exercise of our ordinary jurisdiction, be able to take cognizance of the matter. But we cannot as Judges undertake to decide whether the General Assembly did rightly or wrongly in enacting a law which is not in excess of its own statutory powers. The question of right or wrong in such a case is one of State policy, and not a matter of law. The Superior Courts are, indeed, continually called upon to criticise the form of Acts of Assembly, nor is it unusual or improper in a Judge to suggest, from the Bench, amendments of the law with a view to avoid or rectify some practical inconvenience or injustice. But it is outside the functions, and beyond the competency, of any judicial body within the Colony, formally to condemn a legal Statute as an improper exercise of legislative power. We cannot, therefore, suppose that we are called upon to do so in the present case. We entirely agree with what has been said upon this subject by Mr. Justice Johnston.

3. The question directly raised by the Act of 1871 is as to the validity of certain leases made by individuals of the Native race to the claimants and to a person from whom they derive title.

The lands comprised in these leases had been brought by the Native owners under the operation of "The Native Lands Act, 1865," and they had submitted their claim to the land for investigation by the Native Lands Court, under section 21, in order to obtain a Crown grant. By orders dated 26th and 27th June, 1868, the Court directed certificates of title to be made out and issued in favour of the Native claimants. There were three separate parcels of land. The certificates for two parcels were dated and issued on 22nd July, 1868; the certificate for the remaining parcel on 13th October in the same year. The leases to Messrs. Lundon and Whitaker, and also a lease to Mr. Eicke, under whom Lundon and Whitaker claim a portion of the land by assignment, were all executed in the course of the year 1869; consequently, after the issue of the certificates. But subsequently to the dates of the several orders, and prior to the issue of the several certificates, the same Natives had executed leases of the same lands to Messrs. De Hirsch and Graham; such leases bearing date respectively 30th June, 1868, and 9th and 10th July in the same year. Lundon and Whitaker, and Eicke also, had notice of the leases to De Hirsch and Graham before they obtained their leases. Under these circumstances, the claimants, Messrs. Lundon and Whitaker, contend that they acquired a valid estate and interest in the lands in question, the prior leases being, as they assert, void and illegal.

4. The claimants complain that the supposed valid estate and interest thus acquired has been defeated, and the title of De Hirsch and Graham set up, by or by virtue of "The Native Lands Act, 1869," and the proceedings taken thereunder. Our inquiry is to be whether this complaint is or is not well founded.

5. In the argument before us, the opposition to the claim, offered on behalf of the Colonial Government, was wholly founded upon the assertion of the original validity of the prior leases; and it was not attempted to be denied that, but for these earlier transactions, Lundon and Whitaker would have obtained a good title. As, however, in the course of the proceedings under the Act of 1869, an opinion to the contrary was expressed by the Native Lands Court, it is as well to say that we have satisfied ourselves upon the point, and that we hold the purchase of Messrs. Lundon and Whitaker to have been in itself good, under "The Native Lands Act, 1865;" and we proceed shortly to state the reasons for our conclusion.

6. As the Act of 1865 provided for the issue of Crown titles to lands comprised in certificates under section 23, such lands would, as a matter of course, in the absence of special restrictions on alienation, become alienable to Europeans so soon as the commutation of tenure was affected. On the issue of a Crown grant, if at no earlier stage of the process, the right of alienation would be conferred. As regards lands comprised in certificates in favour of tribes or hapus, or in certificates issued to individual claimants under section 43, we find no indication of a purpose to legalize alienation which could be supposed to over-ride the prohibitions of the common law and of the Constitution Act.

The absolute repeal of the Ordinance of 1846, (Session VII. No. 19,) affords some ground for the inference of such a purpose, but clearly, we think, no adequate ground. In the case of tribal certificates and certificates under section 43, the tenure is, by the Act of 1865, neither commuted, nor in course of commutation; and commutation of tenure has apparently been looked to by the framers of the Act as the means whereby the Crown right of pre-emption should be got rid of.

But as regards lands comprised in certificates under section 23 the case is different, and it seems plain that it was meant to permit the alienation of such lands by the Native owners, even prior to the issue of the Crown grant. Section 47 appears to be conclusive upon this point; and there are numerous other provisions which it is impossible to understand in any other way. We refer more particularly to sections 55–58–59–63–74 and 75.