As regards the warden's appointment of Mr. Hughes, the court say that it is a judicial act, which in their judgment cannot be properly performed without notice to the parties. Whether there is any sense in which such an act can be called judicial need not be discussed. It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointments should be made with integrity and impartiality, but it is now to their lordships to hear them called judicial acts, and it is certainly not the practice to give notice or to invite discussion in any way before making such an appointment, though the appointer might in some cases think fit to do so. If it were held that notice was a condition precedent to their validity, many appointments, and consequently many awards, would be invalid in England. In the statute now under discussion, careful provisions are made for notice to an owner at the commencement of proceedings, but when he has once failed to appoint his arbitrator, power is given to the warden to appoint, and nothing is said about notice. For these reasons their lordships hold that the objection to Mr. Hughes' appointment has no substance in it.

On the point of uncertainty, the court below think, as Mr. Justice Townshend puts it, that the intention of the statute is to fix definitely just how much of the owner's land should be taken from him; and this, in the judgment of Mr. Justice Meagher, is to be determined by the inspector of mines prior to the making of the award. Otherwise, they say, the lessee's right extends to the whole property described in the notice; and that is too general and indefinite a right to be upheld. It seems, however, to their lordships that this general and indefinite right is the very thing which the statute contemplates as existing, and for the exercise of which it provides compensation to the landowner so far as the injury to him can be estimated.

Their lordships have not the means in this case of learning the exact nature of the rights which the crown in Nova Scotia possessed prior to the statute in question for the purpose of getting precious metals. But they observe that the statute does not confer any such rights. In the case of prospecting licensees it is assumed that the licensees can make the requisite experiments. In the case of leases it is assumed that the lessees can enter and work. In both cases provisions for compensation to landowners are introduced by way of restrictions and conditions imposed on the rights conferred by the crown. It was doubtless the intention of the legislature to lay down a fairly workable system for the exercise of concurrent rights, very apt to come into conflict, and not at all easy to adjust with nicety. Probably their attempt has removed many occasions of uncertainty and quarrel; and if it has left some, that is not surprising, considering the intractability of the subject matter.

The first restriction imposed on a lessee is that of section 18, viz., an absolute prohibition against entering and working under peril of forfeiting the lease, if the lessee does not previously agree with the landowner or proceed to have his damages appraised. The damages are to include all the acts and things contemplated by section 20. In the absence of agreement therefore it is necessary, before the lessee can break up a yard of ground, to estimate the damage to be done by necessary shafts and excavations, by the construction of roads and drains, by the erection of necessary works and buildings, and by the occupation of so much ground as may be required for opening and working the mine, including such spaces as may be necessary from time to time for dumping grounds. But it is impossible to specify beforehand whither the proper work of a mine may lead or what works may become necessary; and, in the case of dumping grounds, it is expressly anticipated that the necessity may arise from time to time. As the damages are to be paid beforehand all that can be done is to make the best estimate of them that can be made. To a certain extent disputes are provided for by introducing the inspector of mines. Whether he is to be called in once for all before the award, and forecast definitely what land is to be occupied, as one of the learned judges below thinks, or whether he is to be called in from time to time whenever the lessee alleges necessity for occupying land, or the owner denies it, is a question to be decided when it arises. It does not arise here, because there has been no dispute as to the areas proper for occupation. It is only important as showing how clearly the framers of the statute saw the uncertainty of the subject they were dealing with.

The statute does not in terms make it competent, but probably it is competent, to the lessee to give such a notice as would exclude portions of the demised area from the award of damages, and from his right to use or occupy, leaving subsequent requirements to be dealt with either under section 26 or by fresh notice under section 18. In such case he might have less damage to pay in the first instance. If he asks that the full rights which the statute contemplates shall be paid for, he would have to pay damage on the basis that, subject to the control of the inspector, there is no part of the land which may not be used by him. His discretion will be guided by the nature of the area demised. And in such a case as this, where the area is mostly barren rock, only 4½ acres in extent, and where a nominal sum, or a mere trifle, may well be supposed to cover all damage which can reasonably be contemplated as likely to occur, the most obvious course would be to give notice in the terms of the statute.

Here the notice is in the terms of the statute and the material part of the award in the same terms. Mr. Justice Weatherbe states it to be the common practice, nor is there any contradiction of that statement. Where the uncertainty comes in, except so far as it is inherent in the subject matter, their lordships cannot see. Lessees, land owners and inspector, all put together, cannot tell what works or occupations will be necessary or required; but the award is to the effect that, whatever are found to be so, the damage done by them is estimated beforehand at 50 dollars (five for each share.)

Their lordships are of opinion that the judgment of the supreme court should be discharged, and the motion to quash the award dismissed with costs, and that the respondent should pay the costs of this appeal. They will humbly advise her majesty in accordance with this opinion.