tion 63 of the Mining Act of Ontario seems to place it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid in whole or in part may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights; though, if he claims on his own or some other person's behalf to be entitled to be recorded for or to be entitled to any interest, the dispute must so state. In this case the Commissioner dealt with the matter in the first instance, and not by way of appeal from the Recorder, and it would seem to follow that an appeal would lie from his decision under sec. 151. The same right would appear to exist now, if not previously, even when the decision is upon an appeal from the Recorder. It must be taken as proved or not really open to dispute that Smith and O'Hara, who filed the application and dispute, were licensees, and therefore entitled on that ground to dispute Hill's claim and to maintain this appeal against the adverse decision of the Commissioner. But, in so far as Smith claims the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case has been made to entitle him to such a position.

On the 17th June, 1908, on which day Smith . . alleges that he discovered valuable mineral and staked out the claim upon the lands described in it, the same claim was under staking and record as a mining claim filed by Montgomery, duly transferred for valuable consideration to Hill, and upon it men in Hill's employ were then actually engaged in working.

The onus being upon Smith to shew, if he could, that valuable mineral in place had been discovered by him . . on land open to prospecting (sec. 35), he could only do so in this instance by shewing that Hill's claim had lapsed, been abandoned, cancelled, or forfeited (sec. 34); and in this respect he has wholly failed. . . . Nor upon the evidence can there be any reasonable suggestion of a lapse. . . .

The lands comprised in the claim were, therefore, not lands open to prospecting under sec. 35. . . .

I perceive much difficulty in holding that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim at a time when he is still working it, and claiming a right to do so, can be turned into a discovery sufficient to lay the ground-work of a claim for the benefit of the adopter. . . .

[Reference to Cranston v. English Canadian Co., 1 Martin's Mining Cases 394; In re McNeil and Plotke, 13 O. W. R. 14.]