

of marshalling the questions to be tried. He cannot be said to have been wrong in first determining the status of the appellants.

He finds that neither McNeil nor McCully has any claim to the property by reason of the supposed fact that their staking, &c., were not in accordance with the Act in particulars which will require consideration. But he adds: "It is not open to me to investigate the strict legality of the Plotke claims; were that question open, I am by no means sure that I could agree with the Recorder in upholding their validity."

The appeals were, therefore, dismissed and without costs, solely upon the ground of the absence of status of the two appellants to sustain an appeal from the Recorder to the Commissioner.

Upon the appeal before us, it was agreed by counsel for the appellants that in case the Court were of opinion that the Commissioner was wrong in the ground upon which he rested his judgment, the case might be remitted to him to deal with it upon the merits. The question upon which the Divisional Court divided in *Re Wright and Coleman Development Co.*, 12 O. W. R. 248, now in appeal, therefore, does not arise here.

In order to appreciate the objections to the status of the appellants, it will be necessary to go back into the history of this property.

In 1907, 13th November, certain claims made by H. A. McNeil (not the appellant here) and Plotke were cancelled upon the ground that neither had made a discovery of valuable mineral. Some or all of the posts of these former stakings remained upon the property, but it is not clear how many, or which, or how long.

15th November, Plotke alleges that a discovery was made and staking done by one Douglas for him.

16th November, Plotke's application for this was recorded as application No. 10263. As to this application, the Commissioner, upon a former proceeding before him, says (judgment 27th December, 1907, after holding that he cannot give effect to the appeal then before him): "Were I permitted to do so, I would without hesitation find as a fact that that application is invalid, that in fact the staking and discovery claimed by the affidavit of Douglas to have been made and done on 15th November, 1907, was never really made or done." The Commissioner nowhere retracts this