

The fact that the by-laws of the company—probably invalid, and now repealed—contained provisions looking to unanimity of action on the part of the directors and shareholders, carries no weight as evidence of the pre-existing agreement relied on between the plaintiff and the defendant Henderson, when it is considered that they were framed upon some model which already contained such provisions. It is impossible to say that they derived from an agreement rather than from the model or that the idea of unanimity was not for the first time given expression to in them.

MEREDITH, J.A.:—This case is not one in which it can be said that everything, or indeed very much, depended upon the veracity of the witnesses, and, therefore, much upon their demeanour in the witness-box. It may, I think, be taken for granted that none of them intentionally said that which was untrue. The transaction took place a good while ago; and I have no doubt that the discrepancies in the testimony may be fully accounted for by the effect of that lapse of time upon memories not unwilling to be swayed by self-interest—perhaps the normal condition. The truth is rather to be found in the writings, the surrounding circumstances, and the probabilities of the case. The onus of proof was upon the plaintiff; proof of an extraordinary agreement; and I agree with the Judges of the Divisional Court in their conclusion that that requirement cannot be said to have been satisfied, having regard to all of the testimony and the circumstances of the case.

The agreement alleged is one that ought to have been evidenced in writing, and one which ordinarily would have been; yet it was not, although a comprehensive writing was prepared, and executed, setting out terms upon which the parties were to carry on the business and interests each was to have in it.

Upon this short ground the appeal should, I think, be dismissed.

Moss, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

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OCTOBER 30TH, 1909.

RE SMITH AND HILL.

*Mines and Minerals—Mining Claim—Dispute—Status of Disputant—Licensee—Decision of Commissioner—Right of Appeal—Mining Act of Ontario—Discovery—Abandonment.*

An appeal by H. A. Smith from an order or decision of the Mining Commissioner, brought directly to the Court of Appeal