

Anglin, J., Magee, J., Clute, J.]

[Feb. 13.

BEARDMORE v. CITY OF TORONTO.

SMITH v. CITY OF LONDON.

*Striking out statement of claim as shewing no cause of action—
 Staying proceedings to add party defendant—Con. Rule 261
 —Hydro-Electric Commission—7 Edw. VII. c. 19, s. 23—
 No action to be brought against the Commission without the
 consent of the Attorney-General—Refusal of fiat—Ultra
 vires—Refusal of Commission to become a party to the suit
 —Contract—Abortive attempt of plaintiff to bring all
 parties before the court—Right of plaintiff to relief.*

Appeal from order of Latchford, J., see ante, p. 82, where the facts are fully set forth.

Held, 1. A pleading should not be struck out on a summary application under Rule 261, unless it is, upon mere perusal, obviously unsustainable, and not merely demurrable—but plainly and incontrovertibly bad and insufficient—and unless the court is satisfied that the plaintiff clearly discloses no cause of action at all.

2. There being a provision in the contract that it should not come into force until an Order in Council had been passed to that effect, until such order is passed the contract is not binding upon either party. As to this, ANGLIN, J., who delivered the judgment, said: "Whatever may be done towards validating these contracts by legislation, the court should, I think, assume that, pending litigation in which the power of municipalities to make the contracts is questioned, the Lieutenant-Governor would not by Order in Council declare them binding upon the Commission; and that, in the event of the courts declaring them to be ultra vires of the municipal corporations, such Orders in Council would not thereafter be passed."

2. That under the above circumstances, the contract not being binding upon the parties, the Commission was not a proper party to the action.

3. The case of *Atlantic & Pacific Tel. Co. v. Dominion Telegraph Co.*, 27 Grant 592, and *Hare v. London North-Western Ry. Co.*, 1 J. & H. 253, are not applicable to the facts of this case. Whilst the Judicature Rules have not altered the legal principles with regard to parties to actions or the right of defendants to insist on certain parties being before the court, the court has now the discretionary power to grant or refuse such