

as ordered in December, 1902; so that defendants were perfectly justified in assuming that the action was abandoned and making the present motion. This opinion was made more probable by the admission on the argument that plaintiff is not in such a position that the costs could be recovered against him by defendants if they were finally successful in the action.

In these circumstances, I think that justice will be done to both parties by the following order. The motion is dismissed on these terms: that the costs thereof (fixed at \$30) be paid within 4 weeks from this date; that plaintiff do within the same time file his further affidavit on production; and, if defendants so desire, that plaintiff set the case down first on the list for trial at the non-jury sittings at Hamilton commencing on 12th June next. . . . This will be without prejudice to an application for a postponement if plaintiff is still really unable to stand the strain of a trial in June.

In default of any compliance with the terms of this order, the action will be dismissed with costs.

CARTWRIGHT, MASTER.

JANUARY 20TH, 1905.

CHAMBERS.

PRINCE v. TORONTO R. W. CO.

*Pleading—Allegation of Immaterial Fact—Striking out—
Rule 268—Evidence.*

Motion by defendants to strike out paragraph 5 of the statement of claim.

The statement of claim alleged: (1) that plaintiff was a conductor in the service of defendants; (2) that he was injured because the car on which he was started forward suddenly and jerked him off; (3) that to save himself from falling plaintiff grasped one of the rods of the window guard, but, on account of the rod being improperly fastened, it broke away and allowed plaintiff to fall off the car; (4) that plaintiff's injury was caused by the improper construction or defective condition of the motor propelling the car, by reason of which the car was started suddenly; (5) that the car was one of a number which had theretofore been condemned by the city engineer, and which defendants had been ordered to remove from their line of railway and discontinue