

A perusal of the evidence disclosed that the car, the repairs on which were extensive, and only \$35 of which were paid for by the plaintiff, had been run 4,500 miles, and without those repairs might well be only of the value stated. The plaintiff could not claim to add their value to that of the unrepaired car unless and until he had paid for them. There was, therefore, no sufficient reason for increasing the damages.

If the plaintiff files an affidavit shewing that the car was not returned or tendered before his notice of appeal was served or since, the judgment will be amended by striking out para. 2 thereof and substituting therefor judgment for \$800 with \$75 costs, less the \$67.75 unpaid, and there will be no costs of the appeal. If the affidavit is not filed within two weeks, the appeal will be dismissed without costs.

Order accordingly.

FIRST DIVISIONAL COURT.

DECEMBER 30TH, 1920.

WILLOX v. NIAGARA AND ST. CATHARINES R.W. CO.

Negligence—Automobile Stalled on Track of Street Railway Company—Street-car Running into Automobile—Negligence of Motor-man—Findings of Jury—Evidence—Onus—Nonsuit—Appeal.

Appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Welland, dismissing an action for damages for injury to the plaintiffs' motor car and to themselves personally by being struck by a car of the defendants running upon their electric railway.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

D. Inglis Grant, for the appellants.

F. W. Griffiths, for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs were husband and wife. The action was tried with a jury, who found for the plaintiffs, but the trial Judge nonsuited. The evidence of the plaintiff Harvey Willox established that he backed his automobile into a ditch between the travelled part of the highway and the defendants' railway track; that there the engine stalled, with the result that part of the automobile projected into the course of the defendants' street-car; that at the