PRINCE EDWARD

TODAY AND THURS.
First Showing
In the Maritimes

AL JOLSON
IN THE "SINGING FOOL"
THE GREATEST STAR OF STAGE AND SCREEN IN HIS GREATEST TRIUMPH

His heart is breaking, but he must make the people laugh! He must make them cry! He sees the form of his lost child —His "Sonny Boy"—coming toward him—arms outstretched —Pathos and smiles blended in this masterpiece.

ORCHESTRA—NEWS—NOVELTY
ONLY 2 DAYS—USUAL PRICES

CAPITOL
TODAY ONLY

CAPITOL TOMORROW
"MYSTERY RIDER"—COMEDY AND

Indian raids — plot and counterplot — romance riding along —this picture has everything for an evening's entertainment!

McCoy will thrill thrill you and make you cheer his daring stunts!

"PLUNKED ON THE CORNER"
Comedy
And Serial

JUDGEMENT

—Continued from page 1—

November 1928, about 6.30 a. m., a collision took place between the car of the plaintiff and the car of the defendant near the centre of the area of intersection of Prince and Grafton Streets in the City of Charlottetown whereby the plaintiff's car was damaged.

The width of the paved roadway on Prince Street between the curbs is 31 feet and of Grafton Street, where it enters the area of intersection from the west, 33 1-3 feet. Approximately at the central point of the area a silent policeman had been located but had been removed before the accident. The point where it had been was not in doubt.

The plaintiff's car driven by John McAleer was proceednig eastward along Grafton Street bound for the railway station with a passenger for the train, which was scheduled to leave the station at 6.45 a. m. The course of the plaintiff's car was at right angles to that of the defendant's car. The area was lighted by one or more street lights burning at the time of the accident. The only persons present at the collision who were examined as witnesses on behalf of the plaintiff were the driver, John McAleer, and his passenger, James Reid. Neither one of them saw the defendant's car until after the collision happened. The light shed by the evidence on the defendant's car and his conduct is dim and uncertain. We first become aware of his presence on the scene when the light of his car flashed into the plaintiff's car in the moment before the collision. The defendant's car was then near to or upon the place where the silent policeman had been located. It was headed south and projected about 2½ feet into the southern half of Grafton Street. It does not appear that it ever advanced along Prince Street beyond that point. The plaintiff's car had on the other hand, after the accident kept on its main course along Grafton Street for about 70 ft. when it swerved, turned over on its side and came to a stop. The exact position of the defendant's car immediately following the accident and its condition are not disclosed by the evidence further than that it was not over-turned, was at a point about 25 feet distant from plaintiff's car and shortly proceeded to its destination.

The rear left fender of the plaintiff's car was injured by the collision, the rear tire flattened and other damage done as a direct result of the collision or indirectly by the over-turning of the car.

Medicine Chests
Are not complete without Minard's. Used for cuts, bruises and pains of all descriptions.

Position of Car.

The only direct evidence to establish negligence in the defendant is founded upon the position of his car at the time of the accident. He had evidently been proceeding southward along Prince Street but whether at the time of the collision he was moving southward or was stationary is not made clear. In any case his car at the critical moment was located where it had a perfect right to be unless it thereby unlawfully obstructed the passage of the plaintiff's car.

What evidence is there of such obstruction? It is properly claimed on behalf of the plaintiff that under the law of this Province his car had the right of way. That is a right however which is commonly over-estimated. It has several limitations. It was the plaintiff's duty in passing the other car in such a case to "keep to the right of the intersection of the centres" of Prince and Grafton Streets. Under bye-law No. 2 of the City of Charlottetown, enacted under the authority of "The Motor Vehicle Act 1922," it was also the duty to "keep to the right as near the curb as circumstances and weather conditions and traffic permit."

In the present case the plaintiff by going along the southern line of Grafton Street, even without swerving into the open way which was further to his right on Prince Street, had ample room to pass safely if he himself had observed the traffic rules. When the collision took place there was a space of 6 to 8 feet clear space between his car and the southern line of Grafton Street and beyond that to the right was the open way on Prince Street.

Rules of the Road.

There are few questions which give rise to more misunderstanding than the rules of the road. In a recent Ontario case, Allen V. Lord reported in 34 Ontario Weekly Notes page 245, Chief Justice Mulock delivering the judgment of the Court of Appeal thus states the general principles of the rule.

"Highways are not by law divided into right or wrong sides. Subject always to legislation regulating the use of highways one is entitled to drive along any part of a highway, provided that in the exercise of such right he has due regard for the rights of others. In other words, he must act reasonably. What is reasonable depends on all the attendant circumstances—where he (defendant) was on the highway at the time of the accident is only one circumstance—That one circumstance alone is not sufficient to establish negligence."

The fact that a driver has the right of way may be a material question in deciding who is in fault but it still remains his duty to exercise reasonable care to avoid a collision with vehicles approaching on his left. He is still bound to look to the left as well as to the right for approaching vehicles. If the driver who does not hold the right of way comes to a crossing and finds no one approaching it on the cross street, within such a distance as to indicate danger of interference or collision, he is under no obligation to stop or wait but may proceed to use such crossing as a matter of right. While the statute does provide that at intersections motor vehicles on the right hand side shall have the right of way it does not warrant or permit vehicles on the right hand side to proceed recklessly into a collision.

A Dominant Principle

An excellent summary of the principles applied by the Appellate Division of the Supreme Court of Ontario in interpreting the rules of the road is set forth in the head note of Hanley v. Hayes, reported (1925) 3 D. L. R. page 782.

"A statute giving a right of way at intersections to vehicles on the right hand of other vehicles is only applicable where two vehicles are approaching an intersection so nearly simultaneously that a collision is inevitable if both proceed without altering speed. It does not give a permanent right to all vehicles on the right hand side, irrespective of the position of other vehicles, nor can it be used as a cloak for the negligence of a driver claiming the right of way who sees or ought to see that a collision is inevitable unless he slows down."

All rules of the road are subject to this dominant principle that each so use the highway as not to make its use by others dangerous. Caution and care are constantly required of every driver.

The action of the driver of plaintiff's car seems to have been induced by a fatal misunderstanding of his rights in this regard. On cross examination by Mr. McLean, K. C., the following questions were put to the driver, McAleer, and the following answers were given by him.

Q. You went to within 21-2 feet of the intersection?
A. Yes sir.
Q. Why did you not go to the east a little more?
A. I did not have to.
Q. No matter what would happen?
A. I had the right of way.
Q. That is the reason you stood right in to the centre of the intersection?
A. I wasn't right in. I was 21-2 feet away from it.

On the question of the action of the cars at the time of the collision, the defendant's counsel continued the cross examination of the driver, thus

Q. McDonald was standing there quiet without a move?
A. How do you mean 'was standing?'
Q. His car was standing?
A. No sir.
Q. How do you know?
A. He hit us. He hit the car that I was driving.
Q. Will you deny that you hit his car, hit him on the front wheel?
A. No sir.
Q. You won't deny that you hit his car on the front fender?
A. No sir.
Q. You may have hit his car?
A. I don't know.

Mr. Johnston, K. C., counsel for the plaintiff on, re-examination said to witness—

Q. I want you to explain what you meant when you said you did not know whether you hit his car.
A. I don't know anything about where they struck.
Q. You just know he ran into you?
A. Yes sir.

James F. Reid, the passenger in plaintiff's car, testified—"The car came down Prince Street and hit us. I had a $10.00 bill in the book in my pocket. I was just in the act of putting it in my pocket. He was just in the intersection when the light flared in on the back seat where I was sitting. Immediately it all happened like that and when it hit us I was knocked to the side of the car and had concussion of the brain."

Then followed a question by plaintiff's counsel.

Q. You say you had struck?
A. I don't know whether it had struck.

and in cross examination in answer to the following questions—

Q. You cannot swear whether he ran into you?
A. The only think I know is that I went to the left.
Q. You were in the back seat. You were not observing?
A. No sir.

The $10.00 bill was found in the car next morning Witness said he had not time to put it away. He saw the flash and immediately the collision took place.

Further Evidence Reviewed

Some further evidence was given by several witnesses as to marks upon Prince Street claimed by plaintiff to have been made by the wheels of a car heavily braked, the marks extend on Prince Street southwardly to near the site of the silent policeman and continue in a curve eastwardly on Grafton Street, but the connection of the marks with the defendant's car and the inferences that might be drawn from the character and direction of the marks were purely speculative. If made by the defendant's car they may have evidenced an effort on his part to stop the car to avoid a collision.

Owen Proud, who keeps a garage for the repair of cars and who repaired plaintiff's car after the collision, was of the opinion that the character of the injury to plaintiff's car indicated that it was done by the defendant's car running into the plaintiff's.

Upon such wavering and self-contradictory testimony as that given by the two witnesses who were present at the accident and the speculative nature of the remainder of the testimony for the plaintiff and considering that the plaintiff had ample room to have passed safely by keeping to the right of his side of the roadway, as was his legal duty, I would hesitate to say that a prima facie case has been made out against the defendant even without taking into account the all important question of contributory negligence on the part of the plaintiff, which will now be considered.

Question For Decision

The ultimate question to be decided is—assuming that the defendant was guilty of negligence, did the plaintiff by some negligence on his part help to bring about the disaster? It will not avail the plaintiff to prove that the defendant was negligent to any degree short of being the sole cause of the accident.

In Davy v. The London & South Western Railway Company reported 12 Q. B. D., page 70, Brett, M. R., thus defines the onus placed upon the plaintiff in such a case—

"The plaintiff's cause of action being that the accident to him was caused solely by the negligence of the defendant, if he omits to give prima facie evidence of any part of his cause he must be non-suited."

In that case the defendant's railway crossed a public footpath on the level. A foot passenger while crossing from the down side to the upside of the railway was knocked down and injured by a train on the upline. Owing to the position of certain buildings which stood by the line it was impossible for anyone crossing from the down side of the line to see a train coming until he got within a step or two of the down line, but a person standing on the down line had a clear view up and down the line for several hundred yards. Plaintiff stated that he had looked to the right but not to the left. If he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the Company, employed as gatekeeper at the crossing, standing near the crossing but he gave no warning. Plaintiff was nonsuited at the trial. On appeal it was held "that the nonsuit was right— that though there was evidence of negligence on the part of defendants, yet according to the undisputed facts of the case the plaintiff has shown that the accident was solely caused by his omission to use the care which any reasonable man would have used."

That was a case where the accident happened through the fault of both plaintiff and defendant, and this having been shown by the plaintiff's own evidence it was held that he could not recover and the nonsuit was confirmed.

There is perhaps no clearer definition of the onus which the common law imposes on a plaintiff in an action of this kind than was given by Lord Ellenborough, C. J., in Butterfield v. Forrester, reported 11 East's Reports at page 60 (1809,) when he said—

"Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Plaintiff's Responsibility

It is now in order to consider whether or not the plaintiff in the events which happened was free from blame; whether by his unlawful acts or omissions he was responsible in any degree for the accident.

He was "in the taxi business" as he said, that is, he kept a number of motor cars and employed several chauffeurs to carry passengers for hire. The car in this case appears to have been unobjectionable. It was duly registered and in good condition, but it is contended on behalf of the defendant that the driver was disqualified by the statute law of this Province from driving the car and that the plaintiff by authorizing or suffering him to operate the car was guilty of negligence. The statute referred to is "The Motor Vehicle Act 1922," as amended and the relevant sections are—

Sec. 70—Every owner of a registered car shall be entitled to receive an operator's license free of charge provided such owner is not less than seventeen years of age and shall produce a certificate of qualification to operate a motor vehicle, or such other evidence of qualification as shall be satisfactory to the Secretary. Like privilege may be extended, if similarly qualified and of the proper age, to one member of the owner's family or to such other person as the Secretary may see fit. Such operator's license shall not permit the person to whom it is granted to act as a professional chauffeur for wages or for a livelihood. Such license must be carried by the person to whom it is issued when operating a motor vehicle.

Sec. 70a—Special operator's licenses may be granted to qualified persons who do not wish to operate motor vehicles for wages and who are not members of owner's family by paying a special fee for such license.

The requirements of the law respecting chauffeurs, much more exacting than for drivers of private cars, are set forth in S. S. 61 and 62 of the Act, as follows—

Sec. 61—No chauffeur shall operate a motor vehicle on the public highways in this Province unless he or she has been duly licensed and registered under the provisions of this Act and is upwards of seventeen years of age, and shall have paid for such registration and badge, such fee as may from time to time be fixed by the Lieutenant Governor in Council and shall have complied with all the provisions of this Act.

Sec. 62—Before the chauffeur's license is granted, for the first time, the applicant for such license must file with the Secretary a satisfactory certificate of competency from an authorized examiner who has been duly appointed by the Secretary for that purpose or from a Technical School or from such other reliable source as the Secretary may approve of, attesting to his fitness, and to his technical knowledge of the mechanism of motor vehicles, his sobriety and general good character; and if the Secretary is satisfied that the applicant is a fit and proper person to receive such license, he shall grant and register the same.

And Section 67 provides that "no person shall employ as chauffeur of a motor vehicle any person not especially licensed as such."

Embracing all classes of drivers is Section 60, which is as follows—

Sec. 60—No person shall operate a motor vehicle on the public highways of this Province unless he or she is duly licensed to do so under the provisions of this Act.

There is a special provision in the Act for extra provincial cars; the drivers must be qualified and the car registered according to the law of the Province or State in which the owner resides.

Contention for Plaintiff

It was urged by plaintiff's counsel on the argument that Section 60 does not absolutely prohibit an unlicensed person from driving a car, but that it operates merely as a traffic regulation, the breach of which would be satisfied by a fine, and the case of Godfrey v. Cooper, reported 51 D.L. R. at page 455, was chiefly relied upon to support this contention. I do not think that case applies. What it did decide was that passengers in a motor car driven for hire on the highway were not prejudiced in their action for damages by reason only of the fact that the driver of the motor car was unlicensed and was guilty of contributory negligence.

In my opinion Section 60 means exactly what its words import. It stands as a barrier against unqualified or disqualified persons driving motor cars on the public highways. It gives effect, for example, to the disqualification of persons under 17 years of age. Such a person cannot get a license. It assures passengers for hire in taxi cars that the driver is a competent driver of good character, conformably to the provisions of S. S. 61 and 62 of the statute above quoted, otherwise he could not hold a license. Without the license there could be no effective control of the motor vehicle traffic under the statute.

There is no question that the legislature had the power to prevent any unlicensed person from operating a motor car on the highways. They could not express in clearer words than those used their intention to exercise that power. The effect of the statute in my opinion is that a motor car on the highway being operated by an unlicensed person is in the position of a trespasser on the highway with the rights of a trespasser and no more. The law still protects it against injury maliciously, wilfully or wantonly done.

Unlicensed Driver's Responsibility

It is however sufficient for the purpose of this case to hold as I do that if the owner of a car, whether private or public, permits or suffers it to be driven on the highway by an unlicensed person he, as well as the unlicensed person, is guilty of negligence and the degree of negligence increases if the person is under the statutory age and further still if the car he operates is one which serves the public for hire.

In this case there is no question of ultimate negligence. The defendant's car is first disclosed by the evidence almost in the moment of collision and there is nothing to show that the collision could then have been avoided or the result mitigated in any degree by an act of the defendant.

The plaintiff described his occupation as "the taxi business" in which he employed several cars and chauffeurs. He had taken out for himself an owner's license. McAleer, the driver of the car in question, was in his employ. He described his duties as "answering the telephone" but on cross examination he said that he had also driven motor cars for the plaintiff and also acted as chauffeur when "they were in a pinch". On the present occasion, he said "they were in a pinch," The other drivers were out with the other cars and he was the only employee of the plaintiff present on the premises when Reid applied as a passenger to be taken to the railway station. With the passenger Reid in the back seat McAleer said he drove the car along Great George Street until he reached Grafton Street, turned to the east proceeding along Grafton Street, slowed down to see the time on the Town Clock, and kept going east along his right hand side of the street, picked up to about 15 miles an hour and slowed down again at Prince Street, blew his horn at about 20 feet from Prince Street. The morning, he said, was fine but dark. He had his lights on.

Witness' Account of Collision

Questioned by counsel for plaintiff McAleer gave this account of the collision.

Q. You say you blew your horn and slowed down at Prince Street?
A. Yes sir.
Q. Where were you on Prince Street when this car struck you?
A. About the centre. My hind wheel was about the centre of Prince Street on the south side of the policeman.
Q. When what happened?
A. When this man struck our fender.
Q. What was the first you knew? Did you notice anything before he struck you?
A. The head lights flashed right on and he hit us right after that.

That is the only direct evidence for the plaintiff as to how the collision came about. Later on cross examination he was asked—

Q. Before you got on Prince Street did you look on Prince Street?
A. I looked to my right and to my left and saw nobody.

This statement of the driver that he looked to the right and left before he got on Prince Street is the only evidence given that he was taking any care to guard against the possible approach of vehicles at the intersection and is no more than to say that from some unlocated point on Grafton Street he looked on Prince Street and saw nobody.

The law places upon the operator of a motor car a far greater responsibility than this driver realized. It required of him that as long before he entered the intersection as he had a view of Prince Street and while in the area of the intersection he should have been on the alert to see any approaching or obstructing vehicles. If the lights were dim or any obstacle prevented a clear view of the passageway the care and caution to be exercised by the driver should have increased to meet the conditions. It would be difficult to find conditions which offered less excuse for an accident. The exercise of the most ordinary skill and care would have avoided it. The driver of the plaintiff's car does not appear to have exercised any care or caution but relying upon his supposed exclusive right of way seems to have gone blindly and negligently into the collision.

In my opinion the accident was principally if not wholly caused by a succession of acts of negligence by or on behalf of the plaintiff each sufficient to negative any right of action in the plaintiff. The verdict of the jury should be set aside and the motion for a nonsuit allowed with costs.

JUDGE HASZARD CONCURS

Mr. Justice Haszard gave judgment as follows—

I concur fully in the judgment of the learned Chief Justice. In connection with this suit I wish to emphasize one feature of the judgment delivered; that is the reference to the want of qualification of the driver of the plaintiff's car.

Under examination replying to the question—"Why did you not go to the east a little more?" he said, "I did not have to," and further replying, said "I had the right of way." In my opinion these replies indicate a very great deal. They show that the witness did not know or understand the law or the rules of the road, as it was apparent from the evidence that there was ample room for him to have passed safely and it was his duty to have done so. His failure was no doubt the immediate cause of the collision which should not have happened.

In remarking upon this incident I do so for the reason that it is well known that it too frequently happens that cars are to be seen on our streets and highways driven by young boys and girls under the required age and without proper authority, which should not be.

It is to be hoped hereafter in the light of this case that a stricter compliance with the law and regulations in connection with drivers of automobiles and other vehicles of that kind may be more rigidly enforced. Here the plaintiff by reason of the incompetency of the driver of his car is the sufferer.

The rule in equity, that a claimant seeking to have equity must come into court with clean hands, applies here. Before the plaintiff can claim to have his loss made good he must bring himself within the rule. This he cannot do by reason of his neglect to comply with the provisions of the law which provide the regulations that are deemed necessary for the safety of the public in having qualified drivers in charge.

Case Cited

In Honor v. Bangle (1920) 19 Ontario Weekly Notes at page 380, a case very similar in many respects to the present case was as follows—

The plaintiff owned a milk waggon, a one ton Ford car; the defendant owned a Hudson Super Six which when the collision with the plaintiff's car occurred, was carrying a large quantity of liquor admittedly illegally. At the street intersection the plaintiff had the right of way being on the right of the other car but the defendant's car passed in front of the milk waggon and so nearly escaped contact that it was hit upon the rear wheel. Both cars turned over and neither driver was injured but both milk and whiskey were a complete loss. The plaintiff sought to recover for the damage done to his car and for the lost milk. The defendant counter-claimed and asked for the amount of the damage done to his car, admitting that the value of the lost liquor could not be recovered, and that the amount paid as a fine was too remote. This action was tried before a jury at Sandwitch. Middleton, J. in a written judgment said that the driver of the milk waggon had no license for the current year but had passed all necessary examinations and had held a license the previous year. The illegality of the conduct of both parties was not the cause of the accident and nothing turned on the right of way. Each driver was guilty of negligence and the negligence of each was a proximate cause of the accident. Had either used due care or caution the accident would not have taken place. It was a case of concurrent negligence and both claim and counter-claim failed and both should be dismissed.

In this case the negligence of the plaintiff in permitting an unqualified driver to operate his car and the negligence of the driver in not keeping a proper look out and not using care to avoid a collision put the plaintiff in the wrong to such a degree that he cannot recover.

The application for a nonsuit must be allowed with costs.

The attorneys in the case were Mr. J. J. Johnston, K. C., for the plaintiff and Messrs McLean and MacKinnon, K. C., for the defendant.