

*Mooney v. Chapdelaine*, 90 N. H. 415; *Sullivan v. Sullivan*, 91 N. H. 341; *Mack v. Hoyt*, 94 N. H. 492. In discussing the last clear chance doctrine, the Presiding Judge warned the jury not to be "Monday morning quarterbacks" and decide what the defendant should have seen and done but what he did see and do in the short time that elapsed after he discovered the plaintiff's situation. It follows that there was no error prejudicial to the defendant in the instructions given to the jury.

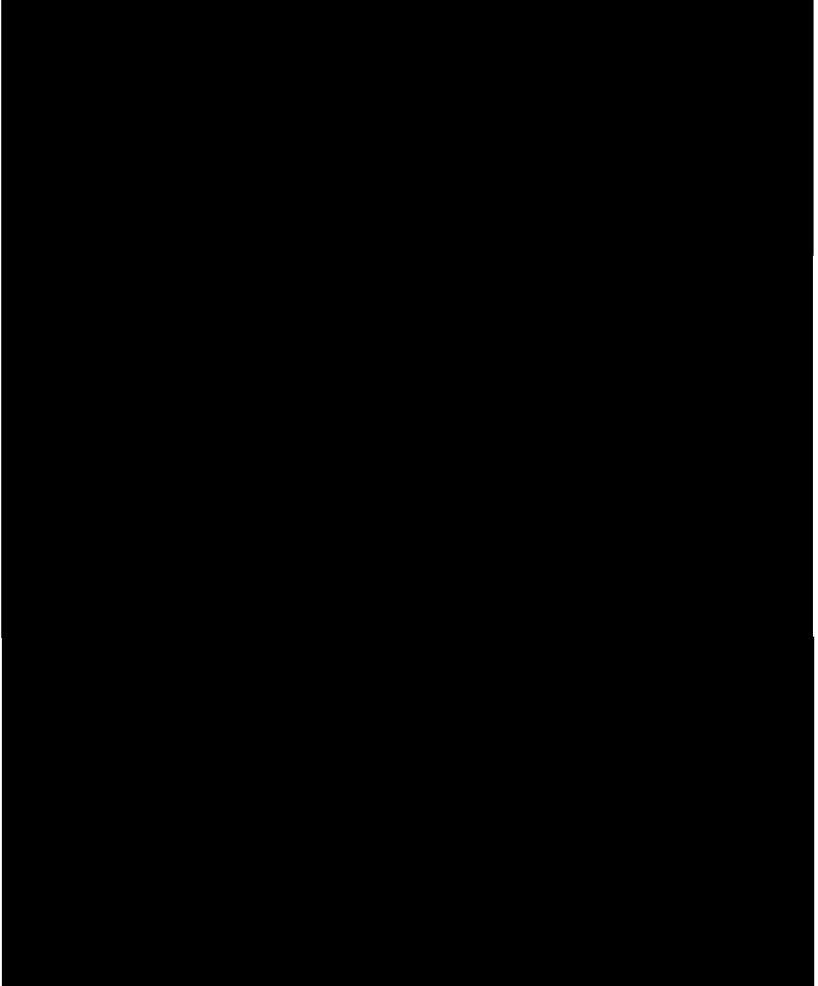
The motion for a directed verdict is predicated on the propositions that as a matter of law the plaintiff's driver was negligent and the defendant was not negligent. That the motion was properly denied is evident from both the reasoning and result in *Shimkus v. Caesar, ante*, 286. The plaintiff's driver was not guilty of contributory negligence as a matter of law in coming out of the driveway as he did (*Spear v. Penna*, 92 N. H. 190) and the credibility of his testimony was for the jury. *O'Brien v. Public Service Company, ante*, 79. This is so regardless of certain conflicting testimony on speed and distance elicited upon cross-examination (*Liouzis v. Corliss*, 94 N. H. 377) and variations in a written report signed by him but prepared by his employer. *Mack v. Hoyt*, 94 N. H. 492, 495. There was evidence that the defendant was on his left hand side of the road as he approached a driveway which he knew to be obstructed and from which he expected that motor vehicles might be entering the highway. This presented an issue for the jury to determine whether he used ordinary care under the circumstances which might be found to exist upon the conflicting testimony. *Holt v. Grimard*, 94 N. H. 255, 258.

*Judgment on the verdict.*

All concurred.

Hillsborough, }  
May 3, 1949. } No. 3813.

JOHN W. McLANE & a. v. C. H. ROBINSON Co.



*Warren, Wilson, Wiggin & Sundeen (Mr. Wiggin orally), for the plaintiffs.*

*Sulloway, Piper, Jones, Hollis & Godfrey (Mr. Alwah Sulloway orally), for the defendant.*

KENISON, J. The issue in this case is whether there is evidence to support the conclusion of the Trial Court that there was no material mutual mistake as to the width of the passageway conveyed. There

is no claim nor evidence to support any claim of fraud and misrepresentation (*Morgan v. Morgan*, 94 N. H. 116) or duress and undue influence (*Webber v. Phipps*, ante, 1) or even a mistake by the plaintiffs innocently induced by the defendant (*Rickle v. Mills*, 93 N. H. 191). It is therefore unnecessary to consider the conditions under which equity will grant relief for an unilateral mistake. *Carignan v. Company*, ante, 262, 265; 3 Pomeroy, Equity Jurisprudence (5th ed.) s. 870a; Restatement, Contracts, s. 505. It is plaintiffs' sole claim that the use of the words "fifty foot passageway" by the parties and the attorney who prepared the deeds was a mutual mistake, it being the intention of the parties at the time of the conveyance to convey and receive only the use of an existing unobstructed passageway approximately twenty-five to twenty-nine feet in width.

In support of its argument that the Court's decree dismissing the bill in equity is contrary to the evidence, the plaintiffs point to the fact that the defendant has used the passageway for thirteen years at considerable inconvenience without protest to anyone as to the obstructions thereon. While this affects the weight of the defendant's evidence that the parties intended a fifty foot passageway, it does not follow as a matter of law that a passageway of lesser width was so intended by the parties. It could be found that defendant's failure to use the obstructed portion of the passageway "is indicative of indifference to a temporary invasion of one's right as much as of recognition of the other party's claim of right." *Farmington Library Ass'n v. Trafton*, 84 N. H. 29, 32. Unlike the situation in *Hogan v. Lebel*, ante, 95, there is no ambiguity in the description of a right of way as expressed in the deed and the findings of the Trial Court being sustained by the evidence must stand. *Chabot v. Shiner*, ante, 252.

It is finally suggested that if this decree is affirmed, reformation for mutual mistake will be withheld merely because the defendant denies the claim of mutuality of mistake. Fortunately this is not true as *Hould v. Company*, 83 N. H. 474, conclusively demonstrates.

*Exceptions overruled.*

All concurred.