

2. The trial judge having at the close of the trial announced his intention of withdrawing the case from the jury counsel for plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and, having neglected to do so, it was now too late for them to object.

3. The objection was without merit as the jury was applied for by defendant and not by plaintiffs.

*A. Drysdale, Q.C., for appellant. H. Mellish, for respondent.*

Full Court.] MESSENGER v. THE TOWN OF BRIDGETOWN. [July 18.

*Municipal corporation—Action claiming damages for obstruction in highway—Contributory negligence—Defence of sustained—Improper rejection of evidence—New trial refused where no substantial wrong or miscarriage—O. 37, R. 6.*

An excavation made by defendants in the highway for the purpose of laying a small pipe, when filled in, left a mound of earth from four to five feet in width at the base, and from eight to nine inches above the surface.

Plaintiff's horse, in passing over the place where the pipe had been laid, and the earth filled in, stumbled and fell, throwing plaintiff out, and causing him to sustain serious bodily injury.

In an action by plaintiff claiming damages the evidence shewed that plaintiff had driven over the place where the accident occurred, in daylight, a few hours before, that in returning, at about ten o'clock at night, he was driving at the rate of seven miles an hour, that his horse was seventeen years old, and was lame at times, that it had been known to stumble, that it was without shoes at the time of the accident, and that the springs of plaintiff's waggon were in a defective condition.

*Held*, that, on the whole case, the earth construction was not negligently made, and was not a more serious obstruction than was usual on such roads at such places, and that the stumbling was due to plaintiff not using proper care with this horse and carriage in approaching, at that time of the night, a place which he had seen before.

On the trial, evidence having been given of the individual opinion of plaintiff's neighbours as to his general reputation for veracity, defendant's counsel proposed to ask the witness the question "whose opinion do you know?" The evidence having been excluded,

*Held*, that the question should not have been disallowed.

*Held*, notwithstanding, that as, assuming plaintiff's testimony to be perfectly true, no case was made out against the defendant, there was no necessity for sending the case back for a new trial, for rejection of evidence, there having been no substantial wrong or miscarriage, within O. 37, R. 6.

Per WEATHERBE, J. As defendant had undertaken to support the exclusion of evidence that was clearly admissible there should be no costs.

*W. E. Roscoe, Q.C., for appellant. J. J. Ritchie, Q.C., for respondent.*