

side to prevent the wheels of vehicles from coming in contact with the brick walls, and 12 feet 5 inches in width above these; the other, the easterly, being 9 feet 1 inch in the highest place and 8 feet $11\frac{3}{4}$ inches in the lowest, and somewhat narrower than the other, the width above the cement blocks being 10 feet $6\frac{1}{2}$ inches.

The deceased mounted the load and drove safely through the westerly archway but on coming to the easterly one was struck on the upper part of his chest by the top of the archway and so crushed as that death subsequently ensued.

His widow brings this action and claims to recover an account of the negligence of the defendants, stating in her pleading such negligence to consist in the fact that the archway was not of sufficient height and width.

At the trial it was further contended that the act of the defendants in erecting and maintaining the archways of irregular heights was also negligence.

The action was tried before Kelly, J., and a jury at London, and at the conclusion of the plaintiff's case, counsel for defendants asked for a dismissal on the ground that no evidence of negligence on the part of the defendants had been shewn which could properly be submitted to a jury. Effect was given to this contention.

There was evidence that the deceased had driven through the archway 2 or 3 times before. There was no evidence as to whether on these occasions his waggon was or was not loaded. The trial Judge found as follows:—

"I shall have to grant a non-suit because the evidence submitted by the plaintiff herself is that this man was in the habit of going there. The measurements do not by themselves constitute a danger. There is no evidence of any change between the times that he had gone before and the time he met with this unfortunate accident which caused his death. There is the uncontradicted evidence of his own admission to the yard foreman that he was the author of his own trouble—that it was his own fault. Added to that is the evidence of his change of position from what might have been a safe position to an unsafe one, and the absence of evidence of the difference in height between the two arches at the time the accident occurred, so far as that is material."

After some discussion it was admitted by defendants' counsel that the archways were of the same height at the time of the accident as when measured by the witness who testified