

premises and a very full and satisfactory report. Neither party tendered any evidence to attack his findings in any way.

The report shews that the excavation extends some 230 feet from the road, and is of a depth varying from 20 to 26 feet. The soil will probably come to rest when sufficient has fallen to create a slope of $1\frac{1}{2}$ horizontal to 1 vertical.

The works proposed by the plaintiff are to my mind altogether extravagant and unreasonable, for the reasons pointed out by the engineer. They would involve an expenditure of approximately \$10,000. The remedy proposed by the defendant, a small retaining wall along the top of the bank, is entirely inadequate. The replacement of the slope would cost about \$2,200.

I suggested to the parties a consideration of the question whether this case was not one in which damages might be awarded in lieu of an injunction or mandatory order. The counsel for defendant accepts this suggestion; counsel for the plaintiff contends that this is not a case in which the statute ought to be applied; but without waiving this contention, he gave evidence going to shew the injury done to his lands.

I have come to the conclusion that the case is one in which I should not award an injunction, but damages, and that the damages awarded should be in the nature of compensation and should not be confined to the damages already sustained. In *Shelfer v. London Electric Co.*, [1895] 1 Ch. 287, A. L. Smith, L. J. at p. 322, lays down a working rule, stating that damages should be granted if the injury to the plaintiff's legal right is small and is capable of being estimated in money, and can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the defendant to grant an injunction.

I would supplement what is there said by pointing out that anything like laches or acquiescence on the part of the defendant, even though insufficient to defeat his right, ought to be a most material factor in considering the proper remedy.

In this case the plaintiff probably shared the opinion entertained by the defendant, that the soil was sufficiently rigid to make it safe to leave a practically perpendicular wall; at any rate the plaintiff made no protest and sought no injunction until the entire excavation was made. This