

the road. Above or northward from the dam stretches the mill pond, and on each side of this lie the lands of the plaintiffs. The plaintiff Thomas W. Cardwell owns the west half of lot eleven lying to the west or to the left of the pond, looking north, save some village lots which front on the travelled road. He also owns the west half of lot 12, which lies immediately north of the west half of lot 11.

The plaintiff, Benjamin Cardwell, owns the east half of lot eleven, lying to the east or to the right of the pond looking north, and the village lots nearest the mill property. He also owns the east half of lot twelve, which lies directly north of the east half of lot 11.

The west and east halves of lot thirteen—the owners of which are not plaintiffs in this action—lie to the north of the lands of Thomas and Benjamin Cardwell. Then come the lands of the other plaintiffs; Patrick Fitzpatrick owning the west half of lot 14, and William Garvey owning the east half of lot 14.

Each of the half lots contains one hundred acres.

The complaint of the plaintiffs is that the dam has been raised twenty-one and a half inches since 1885, and has been tightened, resulting in a great increase in the water backed upon their lands, with consequent damage, in later years. The defendant denies the raising and tightening of the dam, and claims the right to flood these lands whenever the natural flow of the Ouse requires him to do so in operating his mill.

The defendant purchased the mill and appurtenant lands in 1885; and in his conveyance from Geo. Read there are included "the mills, dam, and machinery now therein" and a right to enter into and upon an embankment on the west side of the Ouse for the purpose of repairing, amending, and rebuilding the same.

In general outline the facts appear to be that this mill was a going concern when purchased by defendant, and that his predecessor in title, John Powel, had for many years maintained the dam in question with a seven-foot head, according to the evidence of Henry J. Walker, who had run it for seven years until 1884 or 1885. The embankment mentioned in the defendant's deed was then in place, and has been maintained ever since.

In 1886, 1900, 1901 and 1908, some repairs and improvements were made to the dam.