

referred to 1 Geo. V. ch. 41, sec. 25. I overruled the objection; but Mr. Watson relied on it, and in consequence did not cross-examine at length.

I think that Wright was a competent witness; and the only restraint that I can find in the statute is in sec. 3, which does not in any way affect his right to give evidence. The weight to be attached to it might be measured in some degree by sec. 25. . . .

Having regard to the detailed evidence of the repairs that were done, how they were carried out and why, and particularly to the dates and the present height, as well as the user sworn to, I have come to the conclusion that the dam was not raised during these repairs; but that confusion has been caused regarding the effect of the work of repair and by the lapse of time, and that what has been spoken of as additional timber is in reality timber used to replace, at the same height, that already in use or worn out. . . .

I am, therefore, unable to find that the dam was in fact raised by the defendant.

As to the tightening of the dam, the evidence varies. The method of putting in sawdust, etc., originally used, has been followed by the defendant, and was in use as late as December, 1912, when Wright took his measurement. It might have been done oftener of late years, and there is some evidence of this.

Counsel for the defendant, upon the assumption that the dam has remained at the same height—which I have found to be correct—argued at the trial that he had the right to hold all the water that in its natural course came down the Ouse, for so long and during such periods, long or short, as the supply enabled him so to do. In other words, this means that the capacity of the dam and the supply of water were the only limitations on his right to dam the flow of the stream.

I think the right of the defendant must be qualified in some way, and that at least it must be shewn that the user, while not absolutely continuous *de die in diem*, must at all events be so constant that a consistent course of action and use must exist, even though periods elapse without the user being actively asserted. I have, therefore, to determine what the actual user has been, as defining the scope of the defendant's rights.

In the view I take, it is unnecessary to follow out the devolution of title. The property conveyed was a mill property, with an existing dam; and whatever rights the defendant has acquired depends upon prescription, and not upon the conveyances subsequent to his deed from Read, in none of which is there any express recognition of his rights, and, therefore, no express servi-