Assuming that the right to pass offensive odours from one messuage over another can be acquired by user, and making other assumptions in the defendants' favour, the claim of prescription was not tenable. The time at which prescription must begin is when an actionable wrong is committed; and, so long as the land was vacant, no action would lie, for no one suffered injury by the passing of smells over it. Sturges v. Bridgman (1879), 11 Ch. D. 852, seemed wholly in point. So long as the adjoining land remained wholly vacant, and no attempt was made to sell it, and no other damage could be shewn, the time did not begin to run. Nothing of the kind was shewn to have taken place 20 years before this action. This defence failed as against all the defendants.

It was said that there was an implied grant of an easement over the land acquired by the plaintiff company, based upon the fact that in 1893 the owner of lots 2, 3, 4, and 5 sold to the defendants, or their predecessors in title, lot 5 with an existing building thereon, then used as a rendering plant, and consequently must be considered as impliedly granting the right to operate the plant.

Reference to Hall v. Lund (1863), 1 H. & C. 676, 682, and other cases.

The evidence made it clear that the offensive odours were quite as great and noticeable when the Synod conveyed in 1893 as at the commencement of this action; and so, by implication, the right was given to the grantees to operate their works as they had been doing without interference from the Synod as owners of lots 2, 3, and 4. No difficulty arose from the tenancy by the defendants or their predecessors in title of lots 3 and 4; and the easement now in fact enjoyed did not differ from that of which there was an implied grant. The plaintiff company could not set up the Registry Act, for it had express notice of the nuisance, made inquiries about it, and bought on the hypothesis that it was to be abated.

The plaintiff company and the plaintiff Orford set up a quit-claim deed of the 20th January, 1914; and, if they could rely upon its express terms in their fullest sense, they might make out an answer to the claim of implied grant. But this deed was not put in evidence, and it seemed reasonably clear that it was never intended to have the wide effect contended for. If these plaintiffs desired to set up this deed, they should be allowed to have an issue as to it upon paying the costs of this appeal, and in the issue the defendants should be at liberty to ask for rectification etc. If these plaintiffs, within 10 days, elect to take an issue, and pay the costs of this appeal within 10 days after taxation thereof, the further disposition of this appeal as to these plaintiffs will be reserved until after the trial of the issue—otherwise the appeal of the