

is and should be placed in the reliability of our land records as a protection against latent rights, if they exist, but do not appear of record, and in no way are made known to the public, but it is to be feared that it would.

The case at bar is a marked instance of the wrong, if not the fraud, that may be practised upon innocent purchasers arising from such a result; and to what extent the titles to other lands may be affected in like manner is not known.

Our conclusion is, that the plaintiffs are barred by the foreclosure of the Williams mortgage.

*Bill dismissed.*

BLODGETT J., did not sit: the others concurred.

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GRAFTON.

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NORTH HAVERHILL WATER CO. v. METCALF.

When a claimant of an aqueduct title uses the water without an actual promise, express or implied, to pay for the use, assumpsit on the fiction of a promise implied by law is not an appropriate form of action for settling the disputed title.

ASSUMPSIT, for water carried by an aqueduct to a house which the defendant bought of Jackson, the plaintiff in interest. Facts found by a referee.

*G. W. Chapman*, for the plaintiffs.

*G. F. Putnam* and *Bingham, Mitchells & Batchellor*, for the defendant. Since the defendant bought the house and began to use the water, he has claimed the right to use it as a part of his estate, and the plaintiffs, with knowledge of his claim, have permitted the water to run to his premises. Assumpsit cannot be maintained. The only course open to the plaintiffs was to cut off the water, or acquiesce in his claim. *Aqueduct Co. v. Page*, 52 N. H. 472.

DOE, C. J. No promise, express or implied, was in fact made by the defendant to pay for his use of the water. The water-right claimed by him is also claimed by the plaintiff in interest; and the suit is brought to settle the disputed aqueduct title. The fiction of a promise implied by law contrary to the fact may be invented and used, for the sake of the remedy, to enforce the performance of a legal duty. *Sceva v. True*, 53 N. H. 627; *Kelley v. Davis*, 49 N. H. 187. The law does not leave this disputed title

unsettled for want of an adequate method of procedure, but no fiction is required by adequacy or convenience of the plaintiff's remedy. Assumpsit does not lie. *Barron v. Marsh* [ante 107].

*Case discharged.*

BLODGETT, J., did not sit: the others concurred.

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ROGERS v. ASHLAND SAVINGS BANK.

There may be a right of homestead in land on which there is no building, but which is occupied as a part of the place of his home by the owner living in a hired house.

DECLARATION (upon Gen. Laws, c. 138, s. 20) of the grounds of the defendants' denial of a homestead right claimed by the plaintiff. Trial by the court. The plaintiff and her husband (who is the execution debtor) occupy a leased tenement. They own no real estate except the premises in question, upon which there is no building, and which are situated at some distance from their hired house. The court found the plaintiff entitled to a homestead if under the law she can be.

*C. A. Jewell*, for the plaintiff.

*J. L. Wilson*, for the defendants.

DOE, C. J. The question is of the legal possibility of a homestead right in the land under any circumstances consistent with those stated in the reserved case. The exemption may attach in cases in which the debtor "is owner of a homestead, or of any interest therein." G. L., c. 138, s. 1. If the plaintiff's husband, owning and occupying the house and an adjoining garden, had sold the house and the land under it, but had continued to own and occupy the garden, and as a lessee had remained in the house, the garden might continue to be a part of the place of his home; and adjacency is not a requisite of the homestead right. The question whether the land was a part of the home place, is a question of fact that has been determined at the trial term. *Allen v. Chase*, 58 N. H. 419; *Cole v. Bank*, 59 N. H. 53, 321.

*Judgment for the plaintiff.*

CARPENTER, J., did not sit: the others concurred.