it related to a consideration as to when a suit could be deemed commenced, under section 8 of the act of March 3, 1875 (section 738, Rev. St.), against a noninhabitant defendant, so as to stop the running of the statute of limitations. The facts, in the case cited, were, briefly, that a bill was filed on May 11, 1881, by which it was sought to enforce a vendor's lien on a lot for the purchase money, evidenced by a note due February 4, 1867. The defendant Evans filed a plea setting up the Kentucky statute of 15 years in bar of the action. To this plea a demurrer was filed. The bill alleged, as does the bill in the case at bar, that Evans was not an inhabitant of the district, and could not be found in it; and, furthermore, prayed for an order of court requiring him to appear and plead to complainant's bill. The bill was not sworn to, but I regard this as quite immaterial to the question involved in the case at bar. The important fact was that the necessary affidavit for the order contemplated by section 8 of the act of March 3, 1875, was not filed until April 12, 1883, when the "warning order" was entered. Barr, District Judge, in considering the question, said:

"The plea of defendant is upon the theory that this suit was not commenced, as to Evans, until at least this warning order was made by the court. The complainant insists that under the provisions of the eighth section of the judiciary act, approved March 3, 1875, the suit is commenced at the time of the filing of the bill in the office, and that the warning order cannot, by the terms of this section, be made until the suit has already commenced."

Precisely the same contention is made by counsel for complainant in the case at bar. The learned judge, after reciting the material parts of section 8 of the act of March 3, 1875, proceeded:

"In construing this section we must look to the scope and object of the enactment. It is true, the suit is 'commenced' upon the filing of the bill, for the purpose of taking the necessary steps to bring the defendant, who is a noninhabitant, before the court. This is true in a suit against an inhabitant, and the court may make orders necessary or proper to bring the defendant before the court as soon as the bill is filed. But does it follow that congress declared in this section a suit 'commenced' against a noninhabitant of the district upon the mere filing of the bill, so as to stop the running of the statute of limitations? If we are to look alone to the language of the section, is it not rather when, and only when, 'it shall be lawful for the court to entertain jurisdiction' that the suit is 'commenced' against the noninhabitant defendant? It seems to me that congress did not intend, and has not determined, when a suit is commenced against a defendant so as to stop the running of the statute of limitations, and that this court must determine the question in the absence of a statute. Whenever a complainant has in good faith obtained process, or, it may be, whenever he has done all that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before. In this case it was the duty of the complainant to obtain process under the provisions of this section, or, at least, to have filed an affidavit and moved for the proper order, and, as he did not do this until after the expiration of the 15 years, the demurrer to the pleas should be overruled." Citing Pindell v. Maydwell, 7 B. Mon. 314; Lyle v. Bradford, 7 T. B. Mon. 111; Hayden v. Bucklin, 9 Paige, 513; Fitch v. Smith, 10 Paige, 9; Webb v. Pell, 1 Paige, 564; Ross v. Luther, 4 Cow. 158; s. c. 15 Am. Dec. 341, and note.

Counsel for complainant, however, seeks to avoid the force of this decision by contending that efforts were made, before the statute had ceased to run, to obtain process, and that, as the re-

sult of these efforts, the subpœnas previously referred to were issued and served in time, and that, therefore, the complainant comes within the exception recognized by Judge Barr when he says that "whenever he [the complainant] has done all that is necessary for him to do to obtain process to bring a defendant before the court, then his suit is commenced as to that defendant, and then the running of the statute ceases, and not before." But the difficulty with this contention is that the subpœnas, though issued and served before the statute had ceased to run, were void and of no effect for the reasons heretofore explained, and they were not necessary as a condition precedent, under the allegations of nonresidence in the bill, to obtain the special order for extraterritorial service required under the act of March 3, 1875. In the second place, the affidavit for this special order was not made, nor the order granted, until March 5, 1896, or two days after the statute had ceased to run. In order that a complainant may avail himself of the exception stated by Judge Barr, he must not only have done all that is necessary for him to do to obtain any process, but it must be the appropriate process,—that which, under the nature and circumstances of the case, is authorized by law and recognized by the court as legal and effectual service,—and, furthermore, this must be done before the statute has ceased to run, and not at a time subsequent, no matter how soon thereafter. This counsel for complainant failed to do. The affidavit for, and special order of, extraterritorial service, as required by section 8 of the act of March 3, 1875 (section 738, Rev. St.), were not made until two days after the period of limitation provided by the act of March 3, 1891, had taken effect. There is no question in the case but that counsel for complainant were acting bona fide. But this feature of the case cannot operate to extend the statute of limitations. As was aptly said by Chief Justice Marshall in McIver v. Ragan, 2 Wheat. 25: "Courts cannot insert in the statute of limitations an exception which the statute does not contain." While the delay was, undoubtedly, inadvertent and unfortunate, still I fail to see how I can relieve the complainant from the bar of the statute. As was said by the late Judge Sawyer, in the case of Kielley v. Mining Co., 3 Sawy. 505, Fed. Cas. No. 7,761, "the rules of law are rigid, and we are bound by them." The exception of the defendants to the complainant's answer to the plea in bar will therefore be allowed, the plea in bar will be sustained, and the bill dismissed; and it is so ordered.

WATKINS v. LITTLE.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1897.)

No. 387.

MORTGAGE OF HOMESTEAD—TEXAS STATUTE—ESTOPPEL.

In Texas, a wife who, in an application for a loan, joins her husband in representations that the lands proposed to be mortgaged, and which are contiguous to, but not a part of, the tract on which they reside, are no part of their homestead, is estopped thereby, where they have been acted on in good faith, as against a title acquired under the mortgage, when, at the time, they owned 200 acres in addition to the mortgaged lands, including the tract on which they actually resided, and parcels contiguous thereto, and also an outlying disconnected timber tract used in connection with the others for fuel and timber supplies.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action of trespass to try title, brought by J. B. Watkins against Maria F. Little. Upon the verdict of a jury, judgment was rendered partly in favor of plaintiff and otherwise for defendant, and plaintiff brings this writ of error.

The land in controversy is described in the petition of the plaintiff, to wit: "Situated in the county of Dallas, state of Texas, 160 acres out of the William Gatlin one-third league survey, patented to the heirs of said Gatlin, January 5, 1874, patent No. 432; 120 acres of land. Also 45 acres of said survey. Also 6 acres out of the Thomas Freeman survey, patented to said Freeman, February 26, 1842, by patent No. 136, Vol. 2, located about 12 miles south, 35 degrees east, from the city of Dallas." Petition charged that the value of said land was $5,500; that the reasonable rental value thereof was $500 per year. Plaintiff's petition was indorsed that it was brought to try title as well as for damages. The defendant answered by general demurrer, and by plea of not guilty, and stated that on the 1st day of February, 1887, and many years prior thereto, she, being the wife of William Little, and they being citizens of the state of Texas, had lived upon the land described in plaintiff's petition as their homestead; that on the above date William Little borrowed from plaintiff, J. B. Watkins, the sum of $3,000, and he and the defendant, his wife, executed their promissory note of that date for said sum of money, payable five years after date, with interest at the rate of 6 per cent. per annum, payable semiannually, and they also executed and delivered to the said J. B. Watkins, as trustee, their deed of trust of that date, by which they conveyed to the said Watkins the land described in plaintiff's petition to secure the payment of said promissory note; that at the time of borrowing said money the said lands were actually resided upon and occupied as a rural homestead by the said William Little and the defendant, who continued to occupy and use said lands as a homestead until the death of said William Little, which occurred on the 10th day of September, 1888; since the death of her husband, the defendant has continued to occupy said lands as her homestead, and they still constitute her homestead; that after the death of said William Little the said J. B. Watkins procured Ben. Cabell, the sheriff of Dallas county, to sell said lands owned by virtue of the above-mentioned deed of trust, at which sale said J. B. Watkins became the purchaser of said lands for the sum of $1,500, and received from said substitute trustee a deed therefor. The plaintiff replied to this answer by supplemental petition, which contained a general demurrer, and a general denial, and a special plea, in substance, as follows, to wit: That, at the time of the execution of the deed of trust referred to in said answer, defendant and her husband, the said William Little, owned not only the lands described in said mortgage, but about 200 acres of other lands lying adjacent hereto, and embraced in the surveys and patents of William Freeman, William Gatlin, and the Dixon league; and that by a written statement and verbally the defendant and her husband, the said

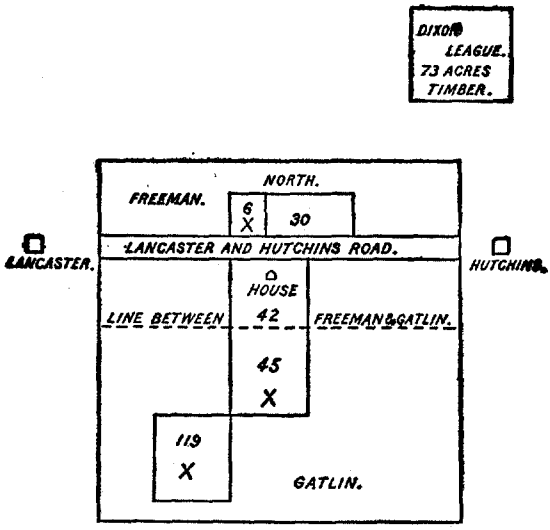
William Little, designated their homestead as being and situated upon one of the several tracts composing their homestead, which was not included in said deed of trust, upon which tract the dwelling house in which the said William Little and the defendant resided was situated. That, in order to procure the loan of $3,000 referred to in defendant's answer, the defendant and her husband, the said William Little, did, by an obligation in writing of date February 2, 1887, appoint the J. B. Watkins Land & Mortgage Company their agent to procure for them a loan for a term of five years, interest payable semiannually, to be secured by bond and first trust deed upon lands therein described, which are the same lands sued upon and described in plaintiff's original petition; to which said written application, as a part of it, was appended an affidavit made by the defendant and her husband, in which they stated, among other things, in substance: "That no portion of the above-described property is our homestead, or the homestead of any other person or persons; that our homestead, upon which we reside, and to which our title is perfect, consists of about two hundred acres, the same being embraced in the surveys and patents of William Freeman, William Gatlin, and the Dixon league." That the said mortgage company, acting by and through its proper officers, believed that said statement made by the defendant and her husband was true, and, so believing, and knowing nothing to the contrary, the said mortgage company made the said loan to the said William Little for the benefit of Eliza Harris, who was then, and still is, a nonresident of the state of Texas, and who knew nothing of defendant's homestead claim to the land sued for. That, as an evidence of said loan, the said William Little and defendant executed and delivered to said mortgage company their real-estate mortgage coupon bond, with coupons attached as specified in said bond, all payable to the said Eliza Harris, and made the said deed of trust to secure said bond, which deed of trust contained a provision that, in case of the death of said J. B. Watkins, or his refusal to act, or other legal incapacity, then the acting sheriff of the county of Dallas and the state of Texas should be the successor of the trust. That said deed of trust recited that no portion of the lands therein described was the homestead of the said William Little and defendant. That default was made in the payment of said bond, and said land was sold in pursuance of its terms, and was purchased at said sale by the plaintiff, who relied, in making said purchase, upon the statement made in the aforesaid application, and who became the purchaser of said land because he believed said statements to be true; and the bond, mortgage, and the application for the loan were attached as exhibits to plaintiff's supplemental petition. The defendant replied to plaintiff's supplemental petition by general demurrer and general denial and special allegation: That at the time of the execution of the papers aforesaid she did not know that the deed of trust involved the land now in dispute, but was led to suppose, and did suppose, that said deed of trust was upon other lands; that she did not then know that an attempt was being made to create a lien upon her homestead; that, if she had known that fact, she would not have executed said instruments; that at the time of the execution of said deed of trust and other instruments she was actually residing upon, and in peaceful possession of, said lands as her homestead. The case was tried by a jury, who returned into court a verdict in the following words and figures, to wit:

"We, the jury, find for the defendant 30 acres of land north of Hutchins and Lancaster road, being part of Freeman survey, and on south side remainder of Freeman survey, including residence of said defendant and enough of the Gatlin survey which is under mortgage to make homestead of 200 acres. We also find for plaintiff the remainder of said Gatlin land on extreme south of the land in controversy, and 6 acres known as 'John Little Place' north of aforesaid road. W. O. Henderson, Foreman."

Upon this verdict a judgment was entered partly in favor of the plaintiff and otherwise for the defendant.

On the trial, evidence was introduced tending to prove the following facts, to wit: The plaintiff introduced in evidence the bond and mortgage or deed of trust referred to and described in the pleadings of the parties, and also the deed made by the trustee in pursuance of said deed of trust to the plaintiff,

J. B. Watkins, for the land in controversy, as alleged in said pleadings; also that at the date of the execution of the said deed of trust the defendant was the wife of William Little, and that they owned, in a compact body, lying in Dallas county, in the state of Texas, 239 acres of land, subdivided into four tracts, of which two were situated on the Freeman survey, one containing 42 acres and the other 36 acres; and the other two on the Gatlin survey, one of which contained 45 acres and the other one 119 acres,—a substantially accurate plat of which is here given, to wit:



Each of said four tracts was originally prairie land, and the whole of each was in cultivation by William Little when said mortgage was executed by the defendant and William Little, her husband. When the mortgage was executed, the residence of the said Little and his wife was in the 42-acre tract next to and south of the Lancaster and Hutchins road, as represented on the plat. All of said land was then cultivated as part of his homestead by the said Little. The 170 acres included in the mortgage is designated on the plat by the cross marks, it being composed of the 119-acre tract and the most southern 45-acre tract and the most western 6 acres of the 36-acre tract. The said Little also owned on the Dixon survey a tract of 75 acres, which was situated about four miles distant from his residence, and was entirely separated from the land above described by land belonging to other people. The said 75-acre tract was timbered bottom land, subject to overflow, and much less valuable than the other land. It was not inclosed, but Little got from it his firewood and timber used upon and about his residence and cultivated land, there being no timber upon the other land. William Little died more than four years before the land in controversy was sold by the trustee, leaving his wife, the defendant, surviving him; and his estate was never administered. Both William Little and his wife, M. F. Little, the defendant, as a preliminary step to the loaning of the money and the execution of the mortgage, made a written application to the J. B. Watkins Land & Mortgage Company for the loan, which was signed and duly sworn to by each of them, in which they described by metes and bounds the 170 acres of land that this suit is brought to recover, and which they subsequently included in their mortgage to secure the loan from the said J. B. Watkins Land & Mortgage Company as the agent of Eliza Harris, and, among other things stated in said application, they swore "that no portion of the above-described property [meaning the land in controversy] is our homestead, or the homestead of any other person or persons; that our homestead [meaning the said William Lit-

tle and defendant], upon which we reside, and to which our title is perfect, consists of about two hundred acres, the same being embraced in the surveys and patents of Wm. Freeman, Wm. Gatlin, and the Dixon league"; that the said representations were made before the loan was made to the said applicants, and for the purpose of procuring it; that the said J. B. Watkins Land & Mortgage Company believed that said statements were true, and was induced by such belief to make the said loan upon the security given by the mortgage of said land, as the agent of the said Eliza Harris, who was a nonresident, and who had no knowledge or information regarding said land, or defendant's homestead claim, or said transaction.

The court charged the jury as follows:

"(3) In the case on trial the homestead of William Little and his wife, Maria F. Little, consisted of two hundred acres of the land actually occupied and used by them as a homestead, and said homestead, to the extent of said 200 acres, could not be mortgaged by the trust deed under which plaintiff claims if said Little and wife were living on it at the date of said trust deed, and openly using and cultivating it as their homestead. If, however, you find that the land north of the Hutchins and Lancaster road and that south of said road amounted to about 236 acres, and that it was all in use by the defendant and her husband on February 22, 1887, when the trust deed was executed (they, defendant and her husband, living on it, cultivating and using it as their homestead), then they had the right and power to mortgage to plaintiff the excess over two hundred acres of their homestead land; and if you find from the evidence that the 30 acres or thereabouts on the north side of the road was embraced in the lands dedicated and claimed by defendant and her husband as a homestead in the affidavit attached to plaintiff's petition, then you may include said 30 acres in the 200 acres you find for defendant, if, under foregoing instructions, you allow defendant 200 acres as a homestead.

"(4) If you find 200 acres of land as a homestead for defendant, and that 30 acres or thereabouts, referred to in paragraph No. 3, above, was a part thereof, then you will commence on the south side of the road, and designate, including the home dwelling, enough of land to make, together with the said 30 acres on the north side of said road, 200 acres.

"(5) You will find for plaintiff the 6 acres on the north side, known as the 'John Little Place.'"

The plaintiff requested the court to give the jury the following three special charges, but the court refused to give either of them, to wit: "You are instructed to find a verdict for the plaintiff in this cause for the land in controversy in this suit." "You are instructed to find whether defendant and William Little owned lands other than those in controversy in this suit, in the same vicinity, at the time they made the deed of trust to Elizabeth Harris, and used them in connection with said lands in controversy, as a homestead; and if you find that they did so own other lands, and that such other lands were designated by them, at the time of making such mortgage or deed of trust, as a homestead; and if you find that defendant and said William Little, in order to procure the loan of money mentioned in said deed of trust, did represent to the J. B. Watkins Land & Mortgage Company that said lands in controversy were not their homestead, and that said loan of three thousand dollars was in good faith made upon said lands in controversy without any knowledge that defendant and William Little actually claimed the same as their homestead; and if you further find that defendant and William Little did not actually reside on the tracts of land mortgaged; and if you further find that defendant and William Little so owned as much as two hundred acres of land besides the lands in controversy, including the tract upon which they resided,—then you are instructed that defendant is now estopped from setting up homestead claim to the land in controversy, and in that event you will find for the plaintiff the land in controversy. You are instructed that the homestead may consist of the tract of land on which the parties may actually reside, and other tracts of land not connected with it, including timber lands used as a source of timber and firewood for the home or farm, and that fencing and cultivating are not necessary to make and constitute such contiguous or timber lands part of the homestead."

The learned counsel for the plaintiff in error, in their brief attacking the instructions given by the trial court to the jury, say: "In giving these charges, it was intended by the court to instruct the jury that the owners of a homestead in Texas, upon which they actually reside at the time, cannot estop or bind themselves by fraudulent acts or representations. In other words, the charge intended to recognize the doctrine that in Texas the time-honored principle of the common law that a man shall not profit by his own fraud is not in force with regard to the homestead. It is not contended that the rule is not applicable here, just as it is elsewhere, with regard to every right, and all species of property, except the homestead. With regard to the homestead right alone, the charge implies that the constitution of Texas permits an owner who actually resides on a homestead to find, if he can, a victim upon whom he may use any and all artifices that his ingenuity can suggest to deceive such victim, and thereby, with the sanction and aid of the state and federal judiciaries, take from him his property. The proposition is a startling one, and it will be found an unwelcome one to our people. It cannot be disguised that expressions may be found in at least one opinion by an eminent judge of the supreme court of Texas suggesting such an interpretation of our constitution. Loan Co. v. Blalock, 76 Tex. 86, 13 S. W. 12. But it is contrary to the rule declared in other cases, and, even if the case is correctly interpreted, it cannot stand. No court should feel constrained to follow that opinion, or any case resting on it, if one can be found. In this case the trial court seemed to be of the impression that our law is that in every transaction with the owner of a homestead who resides on it, the opposite party is conclusively held to know that fact. The argument seems to be that nothing will excuse a person going to deal with the owner of a homestead from going upon the land to see whether or not he resides on it. The general rule is that misrepresentations do not estop when the falsehood is open and apparent. In other words, falsehood avoids a transaction when it is intended to deceive, and actually does deceive; but it does not avoid a transaction when it does not deceive. We do not understand that any diligence is required upon the part of the deceived person to protect himself. The principle is that parties dealing with each other have the right to rely upon the truthfulness of material statements unless their falsehood is apparent, and therefore investigation or further inquiry not a duty. Like possession of land is notice of the rights of the occupant, so actual occupation of a homestead is notice. Both are sufficient notice, in the absence of other things. But this principle is to be applied only when it stands alone, and not when it comes in contact with other equally well settled and equally important rules of law. Like presumptions, it is a rule to be applied in the absence of evidence, and not against evidence. A stranger dealing with the owner of a piece of land may be very well charged with the knowledge that, if he lives on it, it may be his homestead; but he may still believe his deliberate representation that he does not live on it at all. But, in such a case as this, actually visiting and inspecting the land would not protect a stranger. He may know that the tract contains largely more than 200 acres; he may know that 200 acres, including the residence and some part of the tract or tracts, is protected as a homestead; but actual inspection cannot, though he exercises the utmost diligence, enable him to know out of what particular part of the larger tract or tracts the exempted 200 acres shall be carved. He only knows that the laws of Texas permit the owner, in the first place, to carve out of the larger tract and designate the exempt 200 acres, so that the remainder of his land may be dealt with as unexempt. The owner may practice a fraud in such cases by pointing out land not his own as the land set aside for his homestead, or he may practice a fraud by pointing out less than 200 acres as constituting the 200 acres exempt, when, in fact, he knows the land so pointed out includes a much smaller acreage. How shall a stranger protect himself from such deception? Shall he, at his peril, take with him maps and field notes and copies of deeds, and call in a skilled surveyor to verify lines and measurements? We do not believe it. Our laws exempt a homestead from execution and mortgages, but they are not intended to exempt it from liability for the fraudulent devices of its owners or occupants. Though a homestead in fact, it may cease to be *that for* the purposes of a given case by the deceitful and fraudulent prac-

tices and arts of its owners. We cannot believe that it is the purpose of our laws to transform our homesteads from shields to protect an honest people into an offensive weapon with which to deceive and plunder those who are unsuspecting. This would be a different case if the money lender had in fact known that he was taking a mortgage upon a homestead, and had been striving to counteract our laws merely by means of untruthful statements made by the owner. In such a case the lender would not have been deceived, and the principle of estoppel on account of misrepresentations would have had no application. There are some expressions in the opinion in the case of 76 Tex. 86, 13 S. W. 12, indicating that it was a case of that kind; but in the case now before the court there is not an intimation or a suspicion of contrivance upon the part of the lender, nor anything to justify the belief that he did not trust the statement that the mortgaged property was no part of the homestead of the borrowers. Under such circumstances, does the law demand or honesty permit that defendant in error, after having taken the lender's money, shall also keep the land?"

W. W. Leake, for plaintiff in error.
W. B. Gano, for defendant in error.

Before PARDEE, Circuit Judge, and SPEER and PARLANGE, District Judges.

PARDEE, Circuit Judge, after stating the case, delivered the opinion of the court.

William Little and Maria F. Little, his wife, in 1887 owned several parcels of different surveys or tracts of land, containing in all 315 acres, the several parcels lying contiguous to each other, with the exception of one timbered tract about four miles distant. They actually resided upon one of the parcels containing 42 acres, but were cultivating the remainder, except the timbered tract, which was used for timber and fuel supply. Considering the uses of the various parcels, they had a right, in connection with the 42-acre parcel, on which they actually resided, to select any of the other tracts (to an acreage not exceeding 200) as a homestead, the same to be exempt from forced seizure and sale, except as permitted by the constitution of the state. After selecting and designating the homestead, they had a right to deal with the other parcels and portions of their lands not selected as one ordinarily deals with his own. Under these circumstances, and in view of these rights, they applied to the Watkins Land & Mortgage Company for a loan of money, offering as security to mortgage a part of the lands in question, and by sworn representations that their homestead, upon which they resided, consisted of about 200 acres, and formed no part of the property proposed to be mortgaged, distinctly asserting that the lands which they proposed to mortgage constituted no part or parcel of their homestead, obtained a loan of a large sum of money, and secured the same by a mortgage upon the lands so as aforesaid sworn not to constitute a part of the homestead upon which they resided, and which lands so mortgaged did not necessarily constitute a part of the homestead unless they so at the time willed. The present contention is that the sworn representations upon which the loan was made in good faith must be disregarded, and that now the wife, Maria F. Little, her husband being dead, be held entitled to have set apart to her as a homestead a large part of the land so as aforesaid mortgaged, because, at the time of

the mortgage, the Littles, husband and wife, actually resided upon those lands. As a matter of fact, at the time of the mortgage, the Littles no more resided upon the lands mortgaged than they did upon every other part or portion of the 315 acres owned by them, except, of course, the 42-acre parcel upon which they did actually reside. The homestead question eliminated, the above representations made by Little and wife would estop them from claiming, in law or in equity, any interest in the mortgaged lands prior in right to the title acquired under the mortgage; and this is too well settled to need any citation of text-books or adjudged cases. In Ivory v. Kennedy, 13 U. S. App. 279, 6 C. C. A. 365, and 57 Fed. 340, which was a case where Kennedy and wife and Walker and wife had obtained a loan of money on sworn representations that Walter Kennedy and Sarah M. Kennedy, his wife, and John F. Walker and Serena K. Walker, his wife, all lived together as one family on the tract of land known as the "Old Kennedy Homestead," and that they used and occupied the said 200 acres as their homestead, and that they did not in any wise use or claim any other land as a homestead; and yet thereafter Serena K. Walker, as the wife of John F. Walker, claimed other 200 acres as a homestead, the question was with reference to the form of decree in connection with a vendor's lien and claimed homestead rights, and this court said, in discussing that matter:

"Under the circumstances of this case, we are of the opinion that we should follow the precedent set by the supreme court of Texas in a like case. We are the more inclined to this because it is all that the complainant asks, and because, under the facts, the demand of the defendants for an additional homestead, in view of their representations and affidavit to induce the complainant to part with his money, is inequitable, and tends to operate a fraud upon the complainant; and, while we recognize the public policy of the state of Texas, as declared in its constitution, in favor of the exemption of homesteads from forced sales generally, we do not think that the present is a case calling upon us to invent new precedents, or to stretch the general rules of equity, in order to give the defendants a homestead for which, by the record, they have not paid, and which, under the law, may be, and ought to be, sold to satisfy a just debt."

In Investment Co. v. Ganzer, 23 U. S. App. 608, 11 C. C. A. 371, and 63 Fed. 647, where a homestead was claimed as against alleged colorable vendor's lien notes, this court held that, notwithstanding the homestead was involved, the husband and wife were bound by the representations made by them as against bona fide holders of the lien notes.

In Investment Co. v. Burford, 17 C. C. A. 602, 71 Fed. 74, which was a much-considered case, and in many respects similar to the one under consideration, this court unanimously held:

"Under these circumstances, and under the plain provisions of the law, Burford had a right to designate and set apart, out of the tracts of land owned by himself and his wife, the homestead, not exceeding 200 acres, to which the family was entitled under the constitution of the state; and when he did so designate and set apart the homestead openly and aboveboard, with the consent of his wife, and without infringing on the rights of others, he had the full right to deal with the balance of the land as free and clear of all homestead rights, and other parties had the right to deal with him in regard to such land as free and clear of the homestead right. This being the case, when we find by the undisputed evidence that, in accordance with the forms prescribed by law, Burford designated the 304 acres of the Inman sur-

vey, upon which there was a dwelling house (messuage and curtilage) formerly occupied by him and his family as a homestead, as the homestead of the family, and on the faith thereof made a deed of trust of the other surveys owned by him to secure a loan from the Texas Loan Agency, and afterwards a loan from the complainant, we are bound to hold that Burford is now estopped by lawful covenant from claiming, as against the complainant, a homestead other than that so as aforesaid designated, to say nothing of an estoppel in equity by and through the recitals in the trust deed and under the affidavit made by him, and now set forth in the record."

We do not find the views heretofore expressed by this court in conflict with the general trend and purport of the many decisions of the superior courts of the state of Texas in relation to homesteads and homestead rights, although individual cases may be found declaring an extreme view. Such cases, however, are no more to be reconciled with the general run of decisions of the supreme court of Texas than they are with the decisions of this court.

The charge given by the court in the present case is in conflict with the views heretofore expressed by this court and with the law of the case. The second charge which was requested by the plaintiff below and refused by the court, to wit:

"You are instructed to find whether defendant and William Little owned lands other than those in controversy in this suit, in the same vicinity, at the time they made the deed of trust to Elizabeth Harris, and used them, in connection with said lands in controversy, as a homestead; and if you find that they did so own other lands, and that such other lands were designated by them, at the time of making such mortgage or deed of trust, as a homestead; and if you find that defendant and said William Little, in order to procure the loan of money mentioned in said deed of trust, did represent to the J. B. Watkins Land & Mortgage Company that said lands in controversy were not their homestead, and that said loan of three thousand dollars was in good faith made upon said lands in controversy, without any knowledge that defendant and William Little actually claimed the same as their homestead; and if you further find that defendant and William Little did not actually reside on the tracts of land mortgaged; and if you further find that defendant and William Little so owned as much as two hundred acres of land besides the lands in controversy, including the tract upon which they resided,—then you are instructed that defendant is now estopped from setting up homestead claim to the land in controversy, and in that event you will find for the plaintiff the land in controversy. You are instructed that the homestead may consist of the tract of land on which the parties may actually reside and other tracts of land not connected with it, including timber lands used as a source of timber and firewood for the home or farm, and that fencing and cultivating are not necessary to make and constitute such contiguous or timber lands part of the homestead."

—Appears to be in accord with Ivory v. Kennedy, Investment Co. v. Ganzer, and Investment Co. v. Burford, supra, and the law of the case.

The judgment of the circuit court is reversed, and the case is remanded, with instructions to grant a new trial, and thereafter proceed in accordance with law, and the views expressed in this opinion.

SPEER, District Judge (concurring). I cannot wholly agree with the views of the majority of the court, although I concur to a certain extent in the judgment of reversal. The action of the circuit court of the Northern district of Texas, from which the appeal is taken in this case, seems to be in accordance with the decisions of the highest

court of appeal of that state. However these may vary from the views with regard to similar controversies which may be entertained elsewhere, they must be regarded as controlling a question of title to land in that state. The action is trespass to try title, and is pending at law. The plaintiff must recover on the strength of his legal title, and in accordance with the decision of the highest appellate court of Texas he has no title to the main body of the land, for the reason that it is the rural homestead of the defendant. This fact is found by the jury, and there is nothing in the way of evidence set out in the record, except in the particulars hereinafter mentioned, which would justify the court in disregarding or setting aside that finding. The finding is itself supported by the decision of the Texas court of appeals in Pellat v. Decker, 72 Tex. 581, 10 S. W. 697. The court observes in that case:

"Pellat and wife actually and continuously used the property as their home from 1872 until this action was brought; and this, as to such property, is the conclusive designation of homestead, against which no declaration to the contrary can be allowed any weight. The law provides a method, when the rural homestead is of a larger tract, whereby the homestead may be designated, and the excess subject to execution identified."

It is true that the defendant, Maria Little, and her husband, William Little, then in life, made an affidavit that no portion of the property in controversy was their homestead, or the homestead of any other person or persons. This affidavit is the same instrument which purports to appoint J. B. Watkins their agent to secure the loan upon which the plaintiff's supposed title is based. Now, it is plain from a careful perusal of that instrument that the plaintiff, Watkins, was not the agent of Maria Little and her husband, but was the agent of the lender. In illustration of this, the same instrument makes the applicant swear that "the answers to the following questions given by affiants are full and correct: What is your indebtedness? How much live stock and other property in addition to real estate have you,—horses, mules, cattle, hogs, poultry, machinery, implements, etc.?" It makes the applicants for the loan swear to the character of the land, and in the paper there are several blanks, which indicate that it is merely a printed form, prepared for carrying on the business of the J. B. Watkins Land & Mortgage Company, of Laurens, Kan. These questions are manifestly put in the interest of the lender. Similar expedients have been resorted to by other companies engaged in lending money, and in order to avoid the laws of the state against usury. See Security Co. v. Gay, 33 Fed. 636. The principle decided in that case was affirmed by the supreme court of the United States in Trust Co. v. Fowler, 141 U. S. 384–415, 12 Sup. Ct. 1–9. It cannot be doubted, therefore, that the plaintiff, as the agent of the lender, had knowledge of the existence of his homestead. In point of fact it did not exist, and the only remaining question is, does this affidavit, however unconscionable it may be, estop the party making it from the assertion of homestead rights? In the case of Loan Co. v. Blalock, 76 Tex. 86, 13 S. W. 12, the borrower made a sworn application for a loan, in which he stated that the land was not his homestead; that he owned another tract, therein described, which he and his family occupied as a homestead. The court said:

"The constitution forbidding the fixing on the homestead of liens other than such as are thereby expressly permitted, no estoppel can arise in favor of a lender who is attempting to secure a lien on the homestead in actual use and possession of the family, based on declarations of the husband and wife, made orally or in writing, contrary to the fact. To hold otherwise would practically abrogate the constitution. If property be homesteaded in fact and law, lenders must understand that liens cannot be fixed upon it, and that declarations of husband and wife to the contrary, if made, must not be relied upon. They must further understand that no designation of homestead contrary to the fact will enable parties to evade the law, and incumber homesteads with liens forbidden by the constitution."

It cannot be said that the plaintiff was a bona fide purchaser without notice. The facts were sufficient to put him on inquiry, and he is, therefore, chargeable with notice of all he could have ascertained if inquiry had been made. Nor did he, at the sale by the substituted trustee, succeed to the rights of a bona fide purchaser without notice, which might have protected him, even though he had actual notice himself. He was, as we have stated, the agent of the lender; and, since he had notice of the homestead, the principal also had notice, and was not herself entitled to be treated as a bona fide purchaser. The case, therefore, is in all respects different from that of Hazzard v. Fitzhugh (decided at the present term) 24 C. C. A. 232, 78 Fed. 554. There the plaintiff was the bona fide purchaser of a security similar to that on which the plaintiff here relies. She, however, bought a title which came through a third person, and, however colorable the transaction might have been between those who were parties to the device to defeat the Texas law, so far as she was concerned, she was entitled to be treated as an innocent purchaser. Here, however, the plaintiff knew, or might have known, the fact of the homestead. But it is insisted that he was misled by the fraud and turpitude of the defendants, and because of that fraud he ought to recover. What seems to be a sufficient reply to this is the fact that we are in a court of law, and, if the facts set up in this answer are true, and the fraud is so great as would avoid the estate created in behalf of the defendants by the constitution of the state of Texas, it is an equitable cause of action, and cannot be maintained at law in an action of trespass to try title. In that respect also the case differs from that of Hazzard v. Fitzhugh, supra, where the proceedings were pending and disposed of in a court of equity. In one respect only do I think the judgment should be reversed. The defendant and her husband owned 315 acres of land, made up of five tracts. Of these, four of the tracts, aggregating 242 acres, were contiguous, and one tract of 73 acres was some four miles distant from the others. The four tracts were originally prairie lands, and were in cultivation by defendant's husband, and upon one of them was situate the family mansion. From the 73-acre tract the family got their accustomed supply of firewood, and their supplies of timber used about the cultivated land. The defendant and her husband mortgaged 170 acres out of the four tracts, and in the written application for the loan made a sworn statement that the 170 acres was not homestead property, and that the other portions of the lands not mortgaged (some 145 acres, including the 73-acre tract) constituted the homestead. The actual homestead in use may be described as in the brief of defendant's attorney: "A mansion house with ad-