"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-

joining land." Bouv. Law Dict. and Worcester. "The place of residence; the place where he lives." Philleo v. Smalley, 23 Tex. 502. This definition might be applied, however, to a tract of 1,000 acres as well as to one of 200 acres. The exempted homestead, however, under Texas law, is defined by the constitution as follows: "The homestead shall consist of not more than two hundred acres of land which may be in one or more parcels with the improvements thereon." As stated by the supreme court of Texas in Brooks v. Chatham, 57 Tex. 32:

"The constitution expressly provides that the rural homestead may consist of one or more parcels, and the fact that they may be distant several miles the one from the other is immaterial; and in many cases, to enable the head of the family to maintain a prairie farm, it may be necessary to have woodland, which can only be obtained at a distance even as great as was the distance between the two tracts of land in this cause claimed to be the homestead of the appellants; but when the lands are separated there must be such use as will amount to a designation of homestead of the subsequently acquired parcel as fully as the same would be required in the original homestead. The constitution does not determine how the homestead shall be designated, but its protection is extended only to that which is homesteaded. Nor have we any statute which provides how the designation of the homestead shall be made, which is to be regretted."

It cannot be doubted, therefore, that prior to the creation of the plaintiff's lien in this case the entire 315 acres was, so far as use could make it so, the actual homestead of the defendant and her husband, but that the constitution gave its protection to an undefined 200-acre tract only out of the whole tract. When the homestead consists of more than 200 acres, the excess is subject to designation, and its designation may be compelled by the creditor, if not voluntarily by the owner (Rev. St. 1879, arts. 2346–2364), and these statutes are cumulative only (Id. art. 2366). The mortgagee in the case at bar was put on notice by the application for the loan that the lands proposed to be mortgaged lay in the same surveys and same neighborhood as that stated to constitute the homestead upon which was the mansion house, and the tracts actually touch each other. And yet it contented itself with the loose statement that "our homestead, upon which we reside, and to which our title is perfect, consists of about two hundred acres; the same being in the surveys and patents of Wm. Freeman, Wm. Gatlin, and the Dixon league." It is very clear, therefore, that under the Texas law the 145 acres not mortgaged must be increased to the extent of 55 acres out of the tract mortgaged to make the requisite exemption under the Texas constitution. I think it equally clear under the Texas law that where the actual homestead in use consisted, as in this case, of 315 acres, the defendant and her husband could, prior to creating a lien on the excess over 200 acres, voluntarily designate which part of the 315 acres would be their exempted homestead. The attorney for the defendant does not deny her right to make such designation within certain limits after credit given, but does dispute her right to make such designation prior to credit given, and as a basis of credit. There is quite a difference, however, between restricting the limits of a homestead below the 200-acre tract exempted by law and defining the particular full 200 acres exemption out of a still larger body of lands. It was certainly never intended to cut off the right of landowners to raise money on