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

the excess over 200 acres. The case of Railway Co. v. Winter, 44 Tex. 612, cited by defendant's attorney to the point that where the tract consists of more than 200 acres the homestead exemption allowed to the head of the family must be taken out of that portion of the tract contiguous to that upon which the improvements are situate, and that he will not be permitted to pick over the different tracts to make up the 200 acres exempted, seems to be addressed to the idea that, as the creditor's right accrued before a designation of the particular exempted tract out of a large body of lands, an equitable adjustment of the rights of the parties, standing somewhat in the relations of tenants in common, would require that the head of the family should take his 200 acres contiguous to the improvements, which are made his by the law. But this principle certainly cannot be invoked to enable the debtor to undo a designation of a homestead made by him upon the faith of which he obtains money, and extend it to his other lands, not so designated. As the head of the family and the wife designated at the time of the loan certain tracts as the homestead, they are estopped from denying that the land thus designated constitutes a part of the homestead. And to the extent that these parts designated as homestead fall short of the 200-acre exemption allowed by the constitution, the defendant is entitled to go upon the part mortgaged to complete the 200-acre exemption; but no further.

This view of the case makes the 73-acre tract necessarily a part of the homestead, and, in effect, sustains the sixth assignment of error, leaving the other action of the circuit court undisturbed.

THOMPSON et al. v. N. T. BUSHNELL CO.

(Circuit Court, D. Connecticut. April 28, 1897.)

No. 884.

1. RES JUDICATA—EXTENT OF ESTOPPEL.
   Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried and determined, so that the judgment could not have been rendered without deciding it, there is no estoppel.
2. SAME—DECREE IN PATENT SUIT.
   Where a decree sustains one claim of a patent, but there is nothing, either in the decree or the opinion, showing whether another claim is or is not valid, the defendant in a second suit is not estopped from contesting its validity.

This was a suit in equity by Harry G. Thompson and others against the N. T. Bushnell Company for alleged infringement of a patent. The cause was heard on defendant's motion for leave to amend its answer.

John K. Beach, for complainants.
Phillipp, Munson & Phelps, for defendant.

TOWNSEND, District Judge. Motion to amend answer. The complainants herein, by the usual bill, ask for an injunction and accounting by reason of the alleged infringement of their patent, No.

328,019, granted October 13, 1885, to Thaddeus Fowler. The defendant moves to amend its answer by adding thereto the names of certain persons alleged to have previously known and used said improvement, in order to lay the foundation for introducing newly-discovered evidence that the patentee was not the first or original inventor thereof. Complainants object to said amendment on the ground that the question of validity is res adjudicata. In a former litigation upon the merits between the complainants and certain vendees of G. W. Griffin & Co., the court entered a formal decree dismissing the bill. Thompson v. Jennings, 66 Fed. 57. Complainants thereupon filed a disclaimer, and brought this suit against another vendee of said Griffin & Co. It appears from the pleadings and the opinion of the court that the questions of validity of the two claims of said patent and of infringement were in issue, and that the court found that the first claim of the patent was valid. Complainants contend that the opinion of the court is evidence of what matters were actually adjudicated therein, and that such general decree of dismissal cannot be claimed to qualify the adjudication of the issues actually litigated and determined. It is unnecessary to deny this contention, or to affirm the contention of defendant as to the effect in this action of said disclaimer, or of the language of the court in construing the first claim of said patent. In order that said former judgment should operate as an estoppel, it is essential that there should be certainty to every intent. Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried or determined, so that the judgment could not have been rendered without deciding it, there is no estoppel. Russell v. Place, 94 U. S. 606, 610. Here, whatever may be claimed from the opinion of the court as to the first claim or infringement thereof, neither the opinion nor the decree shows whether the second claim of the patent is or is not valid. Therefore, within the rule laid down in Packet Co. v. Sickles, 5 Wall. 580, the defendant is not estopped to make the amendment as prayed for. The motion is granted.

KING v. ELKHORN & S. R. LAND TRUST et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

INJUNCTION—AGREEMENT OF PARTIES.

In a suit to enjoin the cutting of timber by a defendant pending ejectment, the parties filed in court an agreement that defendant might continue to cut timber, but should deposit all the royalties therefrom in bank, to remain until rendition of judgment in the ejectment suit; and that, "upon either party securing a judgment" in the trial court, he should be permitted to withdraw "all the accumulated royalties," on giving bond to the losing party satisfactory to the court, pending any appeal, etc. In the ejectment suit plaintiff recovered only a portion of the lands sued for. *Held*, that plaintiff was only entitled to withdraw an amount of royalties apportionable to the lands recovered.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Daniel Trigg (M. F. Stiles and Sipe & Harris on the brief), for appellant.

S. C. Graham, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Western district of Virginia, at Abingdon. On the 7th April, 1894, the appellant filed his bill of complaint against the appellees in the circuit court of the United States for the Western district of Virginia. The bill, after stating the jurisdictional facts, alleged: That the complainant therein was the owner in fee, entitled to the possession of, and in actual possession of, "all that portion lying in the said county of Buchanan of the tract of five hundred thousand acres of land which was granted by the commonwealth of Virginia to Robert Morris by patent of June 23, 1795." Then follows a full and minute description by metes and bounds of the land in the patent. That the land is wild land, covered by a heavy growth of marketable timber, constituting its chief value, which complainant was about to utilize. That the defendants, without right and without leave of complainant, have come on the land, and are cutting and removing trees and timber of great value therefrom. Then follow other statements showing the facility with which all this could be done. The bill prayed an injunction. Upon the filing of the bill a rule to show cause why an injunction be not granted was issued, and a restraining order was entered. The defendant the Elkhorn & Sandy River Land Trust demurred, and sustained the demurrer with an answer. The entire claim of complainant was put in issue, and his title denied, the defendant asserting title in itself. W. M. Ritter, who was also a defendant, filed his answer, admitting that he was cutting timber on this land, and averring that he did this under the authority of a lease from his co-defendant, the lawful owner. A copy of this lease is in the record. Replication was filed on 21st May, 1894. On 23d May, 1895, an agreement was entered into between the complainant and the Elkhorn & Sandy River Land Trust and W. M. Ritter, and on the 24th February a copy of that agreement, signed by all the parties by their attorneys, was filed in court as a part of the cause, leave having been given for that purpose by the judge, on notice to the parties thereto. This agreement provides: (1) That Ritter should go on and cut and manufacture all timber mentioned in his contract (above referred to) on the tract of land known as the "Greenbrier Tract," in Buchanan county, part of a 2,093-acre survey. (2) That he deposit all royalties or sums due for said timber as they become due in the National Exchange Bank at Lynchburg, Va., subject to the order of the United States circuit court for the Western district of Virginia, there to remain on deposit until the trial of the action of ejectment pending between the complainant and the defendants, or until the royalties shall be withdrawn by the parties to this agreement. (3) The third makes provision for the speedy trial of

the action of ejectment. (4) "That upon either party securing a judgment in the trial court upon said action of ejectment, the prevailing party, upon giving a sufficient bond, payable to the losing party, with security satisfactory to the court, shall be permitted to withdraw all the accumulated royalties from said bank, and shall collect from said W. M. Ritter all subsequent royalties as they become due, pending any appeal that may be taken by the losing party to a higher court, and until the final determination of said action." The construction of these words is the crucial question in this case.

The next step in the case, as shown by the record, is a notice signed by the attorney of the complainant, to the defendants, that he will move on the 1st day of December, 1895, at 10 a. m., before Hon. John Paul, one of the judges of the court, at Harrisonburg, for an order directing the National Exchange Bank of Lynchburg to pay to complainant all moneys deposited by Ritter with said bank under the stipulation. The motion came on to be heard on 5th December, and the order of the court thereon was duly made and filed. It recites the appearance of the parties before the court, the notice served on the defendants, the production by the complainant, in support of his motion, "of a judgment of this court on the law side thereof" in a cause of H. C. King, plaintiff, against the Elkhorn & Sandy River Land Trust et al., defendants, in ejectment, entered on 4th December, 1895, giving the words of the judgment, with a full description of the land found in detail by metes and bounds; and then adds:

"Whereupon the court, considering the said agreement and the said judgment, doth adjudge, order, and decree that the said H. C. King is not entitled to recover the whole of the said fund and the future amounts that may become due from the said W. M. Ritter for timber hereafter cut upon the land in controversy in this cause, but only so much of the said fund so deposited, and which may hereafter accrue from future cutting, as may have accrued or may hereafter accrue from the land which was recovered in the said judgment; and that the defendant the Elkhorn & Sandy River Land Trust is entitled to recover so much of said fund as accrued, or may hereafter accrue, from the residue of the 2,093-acre tract named in said judgment. And thereupon the court doth direct that an account be taken and reported by Samuel M. Graham, who is hereby appointed a special commissioner for the purpose, showing the amount and the value of the timber cut by the said Ritter upon either side of the line of the said land named in the said judgment."

Then we find the report of the commissioner, showing that of the timber cut by Ritter some of it was on the land recovered by complainant in the ejectment suit, and some on the land of defendants, and that of the royalties paid by Ritter $1,717.02 belonged to complainant, and $1,839.19 properly belonged to the defendant the Elkhorn & Sandy River Land Trust. This report was confirmed on 6th May, 1896, and the bank, acting as depositary, was ordered to distribute the fund in accordance with it. At the request of complainant this order was suspended for 60 days from 9th May, 1896, to give him time to appeal therefrom, and to give a supersedeas bond. It was then suspended for a further period of 30 days from 9th July, 1896, for the same purpose. Soon thereafter complainant moved before Judge Paul for leave