that such judgment creditors are entitled to an equitable lien on the property of the defendant not covered by the deed of trust, and which was in the hands of the receivers at the time the judgments were obtained, and to priority of payment out of said property over the simple contract creditors. Such lien is not a common-law or statutory lien,—a lien that can be enforced or perfected by an execution, because of the rule that a judgment recovered after the appointment of a receiver does not become a lien upon property in his hands,—but such a lien or priority as exists in equity, and of which courts of equity take cognizance in the distribution of a trust fund.

The accounts, bills receivable, and cash in the hands of the receiver, as reported by the master, were not subject to levy and sale under execution, and no lien could have been acquired on them by a judgment and execution at law. No other proceedings were taken by the interveners to subject them, or to obtain a lien on them.

The exceptions of the interveners to the master's report relative to the claims of the judgment creditors Charles Seales and J. J. Fitzgerald are sustained. All other exceptions of interveners and the exceptions by the complainants to said report are overruled, and the additional exceptions numbered 12, 13, and 16, to said report, filed by the complainants, are also overruled. All other additional exceptions filed by the complainants are sustained. A decree will be entered in accordance herewith.

CÆSAR et al. v. CAPELL et al.

(Circuit Court, W. D. Tennessee. August 17, 1897.)

1. FORECLOSURE SUIT—PLEADING—INNOCENT PURCHASER.
   Averments in a bill for the foreclosure of a mortgage, filed some time after maturity of the bond secured, that plaintiffs are the owners of such bond, and that it was assigned to them by the payee for value, are insufficient to give them standing as innocent purchasers before maturity without notice of defenses.
2. SAME—SUFFICIENCY OF PLEA — STATUTES REGULATING FOREIGN CORPORATIONS.
   A plea to a bill for the foreclosure of a mortgage which avers that the mortgage contract was made in Tennessee, that the mortgagee was a foreign corporation which had not complied with the requirements of the statutes to entitle it to do business in the state, that it had opened an office in the state for the purpose of making loans, and securing the same by mortgages of lands in the state, and had been, and then was, doing "an extensive loan and mortgage business" throughout the state, does not sufficiently plead facts showing that the making of the contract in suit was not an isolated transaction, or that the corporation was "carrying on business" or "attempting to do business" in the state, within the prohibition of the statutes.
3. FOREIGN CORPORATIONS—REGULATION BY STATE—"DOING BUSINESS" IN THE STATE.
   Where a foreign corporation, which has not complied with the statutes of Tennessee by filing its charter, etc., through any agency whatever, makes a loan of money to a citizen of Tennessee, which the latter contracts to repay at the domicile of the corporation, and secures by a mortgage on land in the state of Tennessee, such transaction does not constitute a "doing of business" by the corporation in the state of Tennessee, within the prohibitory and penal provisions of the statute.

4. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—RULES OF DECISION.
While federal courts follow the construction of a state statute by the courts of the state, they are not required to adopt a construction based on implications from the language of a judicial opinion.

5. CONTRACTS—LAW GOVERNING—INTENTION OF PARTIES.
Where a citizen of Tennessee and a corporation of Missouri entered into a contract which would have been invalid under the laws of Tennessee, but valid under those of Missouri, and by its terms made it a Missouri contract, and to be there performed, it will be presumed that they intended it to be governed by the laws of that state.

6. SAME—EFFECT OF MORTGAGE ON PLACE OF CONTRACT.
A contract for a loan of money and its repayment, evidenced by a bond dated and payable in Missouri, is not rendered a Tennessee contract by the fact that the debt is secured by mortgage on land in that state.

7. FOREIGN CORPORATIONS—STATE REGULATION—MORTGAGES.
The provision of the statutes of Tennessee prohibiting foreign corporations, unless they comply with its requirements, from owning or acquiring property within the state, do not render invalid a mortgage on lands within the state securing a valid debt to such a corporation.

8. SAME—STATUTES OF TENNESSEE CONSTRUED.
Under Laws Tenn. 1877, c. 31, and Laws 1891, cc. 95, 122, regulating foreign corporations "doing business" in the state, a corporation is to be considered as doing business in the state only where it becomes in a sense domesticated therein, subject to be sued in the courts of the state, and responsible to its citizens as are domestic corporations.

9. SAME—FAILURE TO COMPLY WITH STATE STATUTE—EFFECT OF SUBSEQUENT COMPLIANCE ON CONTRACTS.
Under the Tennessee statutes requiring foreign corporations to comply with certain conditions to entitle them to do business in the state, a contract made by a foreign corporation which had not complied with the conditions becomes enforceable on a subsequent compliance.

10. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—RULES OF DECISION.
Federal courts are not bound by the construction of a state statute by the courts of the state, as applied to contracts entered into before such construction was adopted.

11. EQUITY—DEPOSIT IN COURT AS TENDER—POWERS OF COURT.
Where a defendant in a foreclosure suit before answer or plea voluntarily pays into court a sum as a tender, with an admission that such sum is due, and without imposing conditions as to the deposit, the court has power to refuse to permit the withdrawal of the money, and to order it paid to the plaintiff as a payment pro tanto on the mortgage debt, though defendant by his pleading has put in issue the validity of the mortgage contract. Such order, however, will be made without prejudice to the right of defendant to make his full defense.

In Equity.

Hearing on Plea.

(August 17, 1897.)

The bill alleges that the widowed defendant and her husband in his lifetime executed a deed of trust to the plaintiff Jarvis, now a citizen of the state of New York, whereby was conveyed a tract of land of 484 acres situated in Haywood county, Tenn., in trust to secure to the Jarvis-Conklin Mortgage Trust Company the payment of a bond for $6,000 executed and delivered by them for money loaned, due five years after date, with interest payable semiannually on the 1st days of February and August. There are no distinctive allegations in the bill setting forth the tenor and effect of the bond, but it is made an exhibit to the bill, and appears to be a coupon bond by which, five years after date, the obligors promise to pay to the order of the Jarvis-Conklin Mortgage Trust Company, "at its office in Kansas City, Missouri," $6,000, with interest at the rate of 6 per cent. per annum, payable semiannually according to the tenor and effect of the interest notes thereto attached, and of even date therewith. Then fol-

lows this recital: "This note is given for an actual loan of the above amount, and is secured by a trust deed of even date herewith, which is a first lien on the property herein described." The paper is dated at Kansas City, Mo., August 1, 1891, and signed by William E. Capell and Lezinka Capell. Then follow, in the inverse order of their numbers, the four unpaid coupons, each for the sum of $180, No. 10 of which reads as follows:

"On August first, 1896, for value received, we promise to pay to the Jarvis-Conklin Mortgage Trust Company or bearer, at the office of said company in Kansas City, Missouri, one hundred and eighty dollars, for interest due on a principal note of six thousand dollars. This coupon note bears interest at the rate of six per cent. per annum after due.

"[Signed] Wm. E. Capell.
"Lezinka Capell.

"Dated Kansas City, Mo., August 1st, 1891."

The others are in the same form and words, except as to payment dates.

The bill alleges that "said bond is now the property of complainants Cæsar and Fowler, is overdue and wholly unpaid, together with interest thereon payable semiannually from August 1, 1894." Cæsar and Fowler are British subjects, complainants in the bill along with Jarvis, the trustee. The bill alleges that the Jarvis-Conklin Mortgage Trust Company, the payee in the bond, was a corporation organized and existing under the laws of the state of Missouri, with its principal office in Kansas City, in that state, and then avers that, "being such, was the owner of said bond, and assigned and delivered the same to these complainants for value." The bill again alleges that the obligors have not paid any part of the principal and interest, except as before mentioned, and contains other allegations not necessary now to be noticed. The bill does not set out the tenor and effect of the deed of trust, except so far as to state that it was made to secure payment of the bond above mentioned; but it also is made an exhibit to the bill, and prayed to be taken as a part of it. From its inspection in aid of the bill, it appears to be an indenture between William E. Capell and his wife, Lezinka Capell, of the county of Haywood and state of Tennessee, and Samuel M. Jarvis, trustee, of the county of Jackson and state of Missouri, by which they recite that they "are justly indebted unto the Jarvis-Conklin Mortgage Trust Company in the sum of six thousand dollars, borrowed money, as is evidenced by their note of even date herewith for the sum of six thousand dollars, due and payable on the first day of August, 1896, with interest at the rate of six per cent. per annum from date until maturity." It also recites that the interest payments are evidenced by 10 coupons, and that said note and coupons are payable to the order of the Jarvis-Conklin Mortgage Trust Company at its office in Kansas City, Mo. In the usual form, the instrument then conveys the 484 acres of land in Haywood county by metes and bounds to said trustee or his successors, in trust, forever, releases claims of homestead and dower, waives the equity of redemption, and states the trust to be that in case of default in the payment of the indebtedness, or any part thereof, according to the tenor and effect of the bond and coupons, on the application of the legal holder of the note, it shall be lawful for the trustee to sell the premises upon certain named conditions, and place the proceeds to the payment of costs and expenses of executing the trust, including the attorney's fee of $600, compensation to the trustee, and all sums paid for taxes, insurance, assessments, and charges to protect the title, and finally to the payment of the principal and interest due upon the note and its coupons. The bill prays in the ordinary form for a foreclosure, for an account, and application of the proceeds of the sale that is to be made under judicial decree according to the tenor and effect of the deed of trust itself.

The defendants appeared, and on the 5th day of June, 1897, filed their plea, by which it is averred that the Jarvis-Conklin Mortgage Trust Company at the time of the making of the loan and the execution of the mortgage was a foreign corporation organized and chartered under the laws of the state of Missouri, and that at that time, to wit, August 1, 1891, it had not filed a copy of its charter with the secretary of state of the state of Tennessee, and had not caused an abstract of same to be recorded in the register's office of Haywood

county, Tenn., as required by the acts of the legislature of Tennessee (chapter 122 of the Acts of 1891 and chapter 31 of the Acts of 1877 of said state), although the said Jarvis-Conklin Mortgage Trust Company was at that time doing business in said state and in the said county of Haywood in violation of said acts (the said company having opened an office in the city of Memphis, Shelby county, Tenn., for the purpose of making loans in Haywood and other counties throughout the said state, and securing the same by mortgages and deeds of trust on lands situated in said counties in the said state), and that the said company was in fact at that time, before, and after, doing an extensive loan and mortgage business throughout the state, and also did and was doing a large business in the said county of Haywood, through the said local agencies, and in violation of said acts, and that the loan herein sued on was made through the said agencies, and in violation of said acts (the said loan being negotiated in Haywood county, Tenn., where the said William E. Capell and wife, Lezinka Capell, lived and resided, and where they executed the bond and coupons, and where they received the money for the same, and where the lands are situated which are secured in the deed of trust, and the said trust deed being also executed and acknowledged in this state); that the said company, although it did business "as above set out" from 1890 to the year 1893, did not comply with the said act of 1897 (chapter 122) until the 30th of March, 1892, when a copy of its charter was filed with the secretary of state, and on May 16, 1892, when an abstract of the same was filed in the register's office of Haywood county, Tenn.; that the said loan with its trust deed, bond, and coupons, set out and exhibited with complainants' bill, was therefore null and void; that the legislature of Tennessee, by an act of 1895 (chapter 119), extended the time in which foreign corporations having made loans in violation of said act could file their charters, and that complainants, if entitled to recover in this case at all, are only entitled to recover under and by virtue of said act of 1895 (chapter 119), and that under this act no suit can be brought to recover thereunder within two years from the passage thereof, to wit, May 10, 1895, and therefore May 10, 1897, was the earliest possible day in which complainants' suit could have been legally instituted, and the same, having been brought on April 22, 1897, was therefore premature, wherefore the defendants pray that the same may be abated and dismissed, and demand judgment of this honorable court whether they ought to be compelled to make any answer to said bill of complaint, and pray that they may be hence dismissed with their reasonable costs in this behalf. On the 9th of June, 1897, the minor defendants, who are joined in the foregoing plea by their guardian ad litem, filed a separate plea in all respects the same as that which is above set out, the two being copies of each other.

Scruggs & Henderson, for plaintiffs.
Lee Thornton, for defendants.

HAMMOND, J. (after stating the facts as above). The pleas in this case are somewhat inartificial. They are, in the first place, without leave of the court, double, inasmuch as they set up matter both in bar and in abatement. They also do not within themselves state all that is necessary to render the pleas a complete equitable bar to the case made by the bill, by clear and distinct averments of the facts themselves, but deal mostly in mere conclusions of fact and law drawn by the pleader from the undisclosed circumstances or supposed facts of the case. Also they ignore certain material facts stated in the bill, bearing upon the issue tendered by the pleas. For instance, it appears by the bill that the note and coupons were dated at Kansas City, Mo., and were to be paid there; also, it appears by the deed of trust that it was given for a note and coupons payable to the Jarvis-Conklin Mortgage Trust Company at its office in Kansas City, Mo.; and thus,

upon the very face of the contract itself, both as to the indebtedness and the security, it is recited that the obligation was to be performed in the state of Missouri. These averments are not traversed by the plea nor any answer accompanying it, nor are there any averments of either plea or answer by way of confession and avoidance of the effect of these acknowledged statements in the bill; and finally, in the averments themselves that are relied upon as showing that in this transaction between the Jarvis-Conklin Company and the defendants' intestate there was a violation of the statutes of Tennessee which have been pleaded in defense, there is almost a total absence of any statement of specific and definite facts which might show that the Jarvis-Conklin Company did or attempted to do business in the state of Tennessee without having complied with the provisions of the statute which is relied upon as a defense. It is stated that it was at that time doing business in the state of Tennessee and county of Haywood, in violation of the acts; but this is only a conclusion of fact or an inference drawn by the pleader, and not a statement of any fact itself. It is stated that the company had at that time opened an office in the city of Memphis for the purpose of making loans in Haywood and other counties throughout the state, and securing the same by mortgages and deeds of trust; but, again, this is not an averment of specific facts that would enable the court to see from the recitals of the plea itself that an office was opened in the city of Memphis, and the nature and character of that office, and the other facts from which it is assumed that it had a purpose to make loans, and secure the same upon mortgages throughout the state. Again, it is said that it was before and afterwards doing an extensive loan and mortgage business, and also did and was doing a large business in the county of Haywood, through the said local agencies, without stating any particular facts from which the court can see that the business done was a loan business and a mortgage business, and how it was done through the local agencies. There is no averment of fact in this, but only the inference which the pleader draws from what he seems to know or to have been informed concerning the business of the Jarvis-Conklin Mortgage Trust Company; and yet again it states that the loan herein sued upon was made through said agencies, and in violation of said acts, which is the very question to be determined by this litigation, both as to the fact and law. It is not stated specifically how the loan was made through the agency, who was the agent, what was the character of his agency and the extent of his authority, what he did, how he did it, where he did it, and all the circumstances that would show upon the face of the plea that the business was done in the state of Tennessee. It is next said that this loan was negotiated in Haywood county, Tenn., where the defendants resided, and where they "executed" the bond and coupons sued on, and where they "received" the money for the same. This averment does not show the facts which are described as "negotiations," does not show what facts are relied upon to sustain the averment that the bond and coupons were executed in Tennessee, nor how the money was received,—whether it was by draft payable at Kansas City, Mo., or New York, or elsewhere, which for their convenience was cashed in Tennessee at their request by some banker

who was willing to do that, or whether it was directly paid over to the makers of the note by some agent of the company within the state of Tennessee. In other words, almost every averment of this plea in respect of this transaction is a mere general conclusion of fact drawn by the pleader, and not the averment of any specific act done by the parties or their agents. The same may be substantially said about most of the other averments in the plea, and, taken altogether, it would be entirely competent to decide this case upon the insufficiency of this plea in respect of its form; for it surely does not comply with the description of sufficient pleas as laid down in Mitf. Eq. Pl. (6th Ed.) 341, 351, et seq., and 1 Daniell, Ch. Prac. (5th Ed.) 684 et seq. But these authorities show that courts of equity are very liberal in the matter of pleading, and do not deny to the parties the defenses they make because of any mere defects of form; and as the bill itself is also quite inartificial, depending in many of its material averments upon the assistance which it gets by an inspection of the exhibits to the bill, rather than the averments contained in it, and a decision on that ground would only result in amendments to the bill and the pleas, I have concluded to determine the questions at issue without reference to these inconvenient defects in the pleadings.

Plaintiffs rely in argument upon a defense of innocent purchaser without notice, sustained by the case of Lauter v. Trust Co., —— Fed. ——, in the United States circuit court of appeals for the Sixth circuit, and decided May 17, 1897, which would be an all-sufficient defense if it were available to complainants on the pleadings in this case, but it is not. The bill by way of anticipation nowhere states facts entitling complainants to claim as innocent purchasers before maturity for value, without notice. It does aver that the bond is the property of the plaintiffs Cæsar and Fowler, and in another place that the Jarvis-Conklin Mortgage Trust Company, being the owner thereof, assigned and delivered the bond and coupon to these plaintiffs for value, but it does not aver that this assignment was in due course of business and before maturity; and, as the bond became due on the 1st of August, 1896, we cannot say but that this assignment was within the nine months from that maturity to the filing of the bill. Again, the bill does not aver that at the time of that assignment, whether before or after maturity, the plaintiffs Cæsar and Fowler, who are now the holders of the paper, had no knowledge of the fact that the Jarvis-Conklin Mortgage Trust Company, at the time the loan was made, being a corporation of the state of Missouri, had not filed a copy of its charter with the secretary of state, and had not caused an abstract of the same to be recorded in the register's office of Haywood county, Tenn., where the land lies, as required by the acts of the legislature which are set up in the plea. If the bill had averred these facts, the plea must have been accompanied by an answer denying them, before it could be a defense; but as there was nothing in the bill showing that the holders were innocent purchasers for value before maturity, without notice of the infirmity, it was not required that the plea should be accompanied by an answer denying these alleged facts, nor can we know now what the real facts are in that regard. In the Lauter Case, above cited, it

appeared that the note was assigned before maturity, in due course of business, for value, and without any notice of the infirmity, and it has therefore no application here; and we must decide this case without regard to that defense against the alleged illegality of the transaction. It may be open to the plaintiffs to set up the facts only by way of amendment to the bill, since the abolition of special rejoinders to pleas in equity which have fallen into disuse. Mitf. Eq. Pl. 382. But, until this be done, we need pay no further attention to that defense.

This plea broadly assumes that every business transaction having any connection of fact with this state by a foreign corporation which has not complied with the statutes is the doing of business, or attempting to do business, in contravention of them, and that all contracts arising out of such transactions are null and void. This cannot be so, and a properly drawn plea should show, either directly or by its necessary implications, that the particular contract involved in the litigation is not within any category of transactions not comprehended within the prohibitions of the statute, whatever they be. For instance, the statute cannot constitutionally apply to any transactions within the category of foreign interstate commerce, as was asserted by two of the justices in their concurring opinion in the case of Manufacturing Co. v. Ferguson, 113 U. S. 727, 736, 5 Sup. Ct. 739, nor within the category of an isolated transaction, as was decided in that case by all the other justices of the court. In Paul v. Virginia, 8 Wall. 168, it was decided that the transaction of insuring against fire is one concerning an instrumentality of commerce, and not commerce itself; and the court there cites approvingly the case of Nathan v. Louisiana, 8 How. 73, and gives the opinion in that case a somewhat more extensive application than its technical limitations as a precise adjudication would require, from which it may be assumed in favor of the defendants here that, if dealing in the purchasing and selling of foreign bills of exchange is not foreign or interstate commerce, dealing in bond and mortgage securities, by either lending on them originally, or buying and selling them afterwards, is also not interstate commerce, particularly as we have been cited to no case holding otherwise. But it does not appear in this plea by any negative averment that this was not an isolated transaction of its kind, as was that in Manufacturing Co. v. Ferguson, supra. It is true that the plea avers in the general way already stated that this company was doing an extensive "loan and mortgage" business in the state, but it does not aver that the specific nature and character of that other business was just like this contract, not even by saying that the other transactions were similar to this, or that they were analogous in all substantial respects to that we have here. It need not have averred each particular transaction to be given in evidence in support of this plea, perhaps, but it should have shown that the other business was the same as this business, or sufficiently like it to take it out of the category of isolated transactions; and therefore we cannot say from this plea, or from anything we have before us, that this was not a single transaction like that in Manufacturing Co. v. Ferguson, supra. For anything that appears definitely from the

allegations of the plea, it may have been. Doubtless the plea could have been framed to show that the company was making contracts of loan and mortgage other than this that were, in their legal effect and character, Tennessee transactions or Tennessee contracts, if that be the fact; or, sustaining the broadest construction of the statute in favor of the defendants, it might have shown that this foreign corporation was doing, in any way whatever, any other business whatever within the scope of its charter, which amounted to "carrying on business" in Tennessee, or "attempting to do business" in Tennessee, to use the language of the statute, so that it was really not engaged in a single transaction, but in many, all in defiance of the prohibitions of the statute. But this plea does nothing of the kind. On the contrary, it conveniently and gratuitously presupposes that this particular transaction was a Tennessee contract, and that all and any business that could be done by this company concerning lands in this state could only be done in violation of the statute, without pleading any other circumstance concerning the contract to make that fact plain. In other words, the plea assumes that a foreign corporation which has not complied with the regulations of the statute cannot have a loan and mortgage transaction with a citizen of Tennessee, conveying lands in Tennessee, without the business being done in that state. This is a mistaken assumption, and a plea based upon it cannot be a sufficient defense as showing the invalidity of a contract arising out of a violation of the prohibitions of a statute. This is made entirely plain by the decision of the supreme court of Tennessee in the case of Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386. In that case, Cannon, a citizen of Memphis, had a loan from a building and loan association in the state of Minnesota, secured by a deed of trust upon lands in Shelby county, Tenn. He and his wife executed a joint note to the company, and, to use the language of the opinion, "this note was dated and made payable at Minneapolis," and provided for the payment of 5 per cent. premium and 5 per cent. interest, and for 10 per cent. attorney's fee in default of payment of the note. One of the defenses set up there was that the Minnesota corporation had not complied with the statutes we now have under consideration, and therefore the transaction was void, but that was sufficiently answered by the showing made that the loan was effected prior to the passage of the act of 1891, and was therefore not within its provisions. But another defense was made, that the transaction was usurious, in violation of another penal act of Tennessee which makes void any note agreeing on its face to pay more than the lawful interest allowed; and in reply to that defense the supreme court of Tennessee says that although the note stipulates on its face to pay 5 per cent. interest and 5 per cent. premium, as it was dated and made payable at Minneapolis, and the interest and premium were payable at the office of the company in Minneapolis, Minn., it was a Minnesota contract, and, being expressly authorized by the charter of the company and by the laws of that state, it was valid. In other words, being a Minnesota contract it was not amenable to the penal laws of Tennessee. Precisely the same reasoning would have led the court to say that it was not amenable to the penal

laws of Tennessee in regard to the prohibition laid upon foreign corporations from doing business in Tennessee, for the simple reason that the making of such a contract is not doing business in Tennessee, but in Minnesota. The court did not find it necessary in that case to decide this, because there was another sufficient answer to the defense set up under the later penal statute of Tennessee, that it was made before the statute was passed. Counsel do not cite and I have found no case in Tennessee directly deciding this point, but for my part I am unable to see any reason why that contract should have been exempt from the penalties of the usury laws of Tennessee, any more than it should be exempt from the penalties of the foreign corporation act of 1891. They are both penal statutes, both based on public policy which the legislature has declared for the protection of the citizens of Tennessee in their business dealings, and, so far as I can see, are, in respect of this question of invalidity, precisely the same in their nature and character; and, if the fact that the contract is to be performed in the state of the domicile of the foreign corporation relieves it from the penalties in the one case, I do not see why it should not relieve it in the other. It does not appear in the Case of Cannon where the "negotiations" for the loan were had, whether in Tennessee or in Minnesota; but it is altogether inferable that Cannon and his wife did not go to Minnesota to make the negotiations, but that it was done either through the agency of the United States mails, or through the agency of other representatives of the foreign insurance company in the state of Tennessee. The trustee in the mortgage was a citizen of Tennessee and of Shelby county, and, to one as familiar as the writer of this opinion is with the citizens of this county, it is not an unfair inference that he was likewise the agent through whom the loan was negotiated, and that that fact would appear by an inspection of the full record in the case, as it rests in the chancery court of Shelby county or the supreme court of Tennessee. We may take judicial notice of the fact that ordinarily the business of the county is done in that way, and, while I would not extend the facts of the case beyond the recitals of the reporter, I think, from the nature and character of the transaction, we may at least suggest that there is nothing in the case to show that the negotiations preceding the loan in that transaction were very dissimilar to those which are set up in this plea.

In another case pending before me, involving these Jarvis-Conklin Mortgage Trust Company mortgages, counsel for the company has cited an unreported case of Partridge & Wife v. The Jarvis-Conklin Mortgage Trust Company, arising in the chancery court of Tennessee, and going by appeal to the supreme court of Tennessee, from the record of which it appears that that company had made a loan to Partridge and wife, and taken a mortgage very similar, if not precisely like this. The trustee advertised the property for sale on default of payment, and Partridge and wife filed a bill to enjoin the sale upon the ground that the contract was usurious. By the agreed statement of facts it was admitted that 10 per cent. interest was charged, although the papers were written upon their face to bear only 6 per cent.; but it was also agreed that, by the laws of the state of Mis-

souri then in force, it was lawful to charge 10 per cent. It was also agreed that the application for the loan was made to one W. A. Smith, the agent of the Jarvis-Conklin Mortgage Trust Company at Memphis, Tenn., and that he forwarded the application to the home office, at Kansas City, Mo., where the loan was allowed by the company, acting through its proper officers at Kansas City. It was further agreed that the notes, though signed in Memphis, were dated at Kansas City, Mo., and that the money was paid in Kansas City, Mo., through the banks, upon a draft given by the agent at Memphis. Upon this agreed statement of facts the chancellor dissolved the injunction, and upon an appeal to the supreme court the judgment was affirmed. There were no opinions prepared and filed, but it is understood that both courts based the judgment upon the fact that the contract was not made in Tennessee, but was made in Kansas City, Mo. It is said in the brief of counsel furnishing us with the abstract of this case that there are two other cases involving Jarvis-Conklin Mortgage Trust Company mortgages of similar import to the last-mentioned Partridge Case; the court holding that the contract was not complete until the company agreed to it in Kansas City, Mo., and that it was a Missouri contract. It is greatly to be regretted that we have not been favored with opinions by the supreme court of Tennessee in these cases, but, presumably, they base their judgment upon the case of Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386.

One of the latest and most extensive writers upon the law of corporations in several chapters has treated of the relation of foreign corporations to other states in which they do business, with or without permission, express or implied; and he has gathered and classified the most important and modern cases upon that subject, with a general tendency in his text to support the most absolute powers of prohibition on the part of the states as against foreign corporations. 6 Thomp. Corp. §§ 7875–7984. But one cannot read the cases relating to the restrictive legislation of the states without at once observing that the courts everywhere are doing all that they can to confine this absolutism, which nowhere else exists under our laws, within the reasonable bounds of due regard for the ordinary principles of justice, at least. It may be that the absolute power of a state to prohibit foreign corporations from doing business within that state when they are not engaged in strictly interstate commerce will enable the legislature of a state to say that no contract made by a foreign corporation with a citizen of that state, or concerning land situated in that state, shall be valid, or that it shall not be valid except upon compliance with arbitrary conditions prescribed at the unrestrained will of the legislature. But I am satisfied that the legislation of the state of Tennessee which we are now considering has not gone to that extent, and yet we must go precisely to that limit in order to sustain this plea, for that is the very thing which it avers. For my part, I am not willing judicially to concede this, notwithstanding the broad language of much of the writing upon this subject,—that it is within the power of the legislature of the state of Tennessee to annul a contract made by one of its citizens with a foreign corporation simply because the parties to the contract deal with each other across the state lines;

each remaining within his own domicile, and using the ordinary instrumentalities of intercommunication for the purpose of reaching their agreement; not upon any theory that this is doing business with a foreign corporation which may be excluded from any given state other than that of its domicile. The state may prohibit the foreign corporation from becoming domesticated within its boundaries; it may prohibit it from residing there, in the sense that it establishes its working agencies within that state, and it may use all the appliances open to governmental power to exclude such agencies; it may close its courts to the foreign corporation, deny it all protection of its laws, punish it with any instrumentality of governmental force available for punishing those who violate the prohibitions of the statutes; and it may do all this under circumstances that, if the corporation were an ordinary citizen, might provoke retaliation by his government, or even provoke war, as against those barbarians upon whom the ordinary intercourse of civilization is sometimes imposed by war. But it does not follow from all this that in the relations that exist between our states, as members of a Union, and under a common constitution, the states can make absolutely null and void all contracts that are made between a corporation of one state and a citizen of another state, so that the courts sitting within the boundaries of the latter shall be under a prohibition to enforce the contract. If the courts of the state are required to do this, and to an extent that the constitution of the United States would not permit the obligation of the contract to be interfered with if the stockholders had been acting jointly in their individual capacity, or as partners of each other, in the exercise of that freedom of citizens of the states to contract and trade with each other which it is the object of our constitution to secure, there is yet no authoritative decision going that far in its adjudication, whatever language may be used in writing about it. Suppose a corporation of the state of Missouri opens communication by mail with a citizen of Tennessee to do precisely that which was done in this case, and it should result in precisely the contracts that were made. Would not the postmaster general, the postmaster at Kansas City, the postmaster at Memphis, and all the letter carriers active in the operation, be human agencies of the foreign corporation for doing the business in the state of Tennessee? Would they not be as much the agents of the foreign corporation, in offering or accepting the loan, and in conducting the particular negotiations, as any other duly-accredited agents would be who are temporarily sent into the state of Tennessee, or reside there, for the purpose of making these negotiations, and would not the foreign corporation, through these epistolary agencies, be doing business in Tennessee as much in the one case as it would in the other? Or suppose the citizen of Tennessee goes to Missouri, and there executes and delivers the bond and mortgage, or, first executing them in Tennessee, he takes them to Missouri for delivery. Would not this be also doing business in Tennessee? Now, under any or all of these circumstances, could the legislature of Tennessee say that this contract should be null and void? It has the same control over foreign corporations, to prohibit the doing of business in the state, in the one case as in the other, if we are to accept the absolutism of this doctrine to

its utmost limits, and it is just this power that is invoked in aid of this plea, with the practical result, if allowed, that a citizen of Tennessee would be permitted to take from citizens of Missouri, acting in a corporate capacity in that state, a large sum of money, appropriate it to his own use, and refuse to repay it according to the terms and tenor of his own contract, which is neither hurtful in itself, nor in any sense immoral or wrongful in its uses or purposes. Such a right of annulment must rest solely and entirely upon the most arbitrary exercise of unrestrained governmental power, which exists in no constitutional country, unless it may be as against corporate entities.

Certainly the courts will not aid either party to such a contract in escaping its obligations upon any doubtful construction of the legislation, and not until the legislature of Tennessee has said in plain and unequivocal terms that a bond dated at Kansas City, Mo., with the contract of loan to be performed there, or the security only incident to that contract upon lands in Tennessee, is to be held null and void because the foreign corporation has not previously filed its charter with the secretary of state, and caused an abstract thereof to be recorded in the county where the land lies; or not until the supreme court of the state has, by an unequivocal declaration, announced that such a contract is within the equivocal prohibitions of the statute, will the courts of the United States import such prohibitions into the statute by any implication or doubtful or elastic words. It is quite true that that which is prohibited cannot be enforced, and that contracts made in contravention of lawful and constitutional legislation may be invalid, if the legislature says so, either expressly or by necessary implication; and it is the duty of all courts, state and federal, to give effect to this principle, but not until the effect of the prohibition is beyond all controversy and doubt. What we hold here is that where a foreign corporation, which has not complied with prohibitory and penal statutory regulations about filing its charters and abstracts in the state of Tennessee through any agency whatever, makes an agreement with a citizen of that state to lend him money, which the citizen of Tennessee agrees to repay to the foreign corporation at its own domicile, and, to secure that payment, gives a mortgage upon lands situated in the state of Tennessee, there is no "carrying on of its business," or "acquiring or owning property," or "doing" or "attempting to do any business," within the state of Tennessee, according to the tenor and effect of this statute. That is doing business in Missouri with a citizen of Tennessee, or it is the "doing of business" in the state of Missouri by a citizen of Tennessee with a corporation created by the laws of Missouri, and not amenable because of this transaction to the authority of the state of Tennessee, or at least the legislature of the latter state has not attempted by this act to annul such a contract as that. The cases cited from the supreme court of Tennessee by counsel do not sustain the position that such a transaction is doing business within the state, within the purview of any of these statutes. The supreme court of Tennessee considered them in the case of State v. Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893, deciding that foreign fire insurance companies which had already complied with other laws of Tennessee especially prescribing regulations for the government of domes-