tioner as having a lien prior and superior to that of the Louisville Trust Company, and that the lands covered by said liens, respectively, shall be sold for the payment of the amount due on account of said claims, so as to be assigned and transferred to your petitioner," and for general relief. It is called in one of the briefs "defenses and set-offs against the foreclosure" of the mortgage, and in another "the contention that about $100,000 of claims purchased, etc., should be assigned to him, foreclosed, and declared prior to the $500,000 mortgage, etc." And here again the fallacy of the whole contention appears in the use of the word "purchased." Blake did not buy these claims, but paid them. In the "suggestions as to the decree," concluding one of the briefs, it is suggested—First, that the foreclosure of the bond mortgage should be delayed; secondly, that the various defenses and set-offs should not only be applied to reducing the bonded debt to be foreclosed, but primarily to the payment of the installment of interest, for the forfeiture of which the declaration of maturity of the whole debt was made, wherefore we infer that it is contended that the right of foreclosure now would be thereby defeated; thirdly, that the wrongful conduct of the Pine Mountain Company in reference to the Appalachian lease should be held to have excused the payment of interest, and therefore the bonds have not been matured; and, lastly, that the improvement company should be given a reasonably time to make another lease, and "save its property from being absorbed by the Pine Mountain Company." Whatever these suggestions, and the pleadings on which they are based, may be technically denominated, under the rules of pleading, or as descriptive of the equitable nature of the relief sought, they are not those of specific performance; but, regardless of any considerations of technical defects, they all depend on an assumed priority of lien, which does not exist, and cannot be made available for all these formidable purposes. As we have before pointed out, Blake has so identified himself with the improvement company as its owner and paymaster, and his contracts are so interwoven and inseparably connected with those of the improvement company, that it is impossible for a court of equity to specifically perform any one, or on any one side, without decreeing specific performance of all of them on all sides, and the first thing to order in this direction, and on the suggested lines of decree, would be that the improvement company should perform its existing obligation to pay the purchase money, which would relieve all the rest. Its insolvency is a misfortune, no doubt, but there is no equitable reason in this record for imposing that misfortune on the Pine Mountain Company by the process suggested, instead of leaving it with Blake, who voluntarily assumed the risk of that misfortune. The claim of set-off stands on no better ground, and to call the proposed performance by that name does not render it any more available in a court of equity. If Blake had recovered a judgment at law for his damages for the alleged breaches of these contracts, and had execution with a nulla bona return, and the Pine Mountain Company had still the bonds in its exchequer, he might possibly reach them and their lien as assets of the company to pay its debts, but that relief is im-

possible here. If he could procure such a judgment, even through these proceedings in equity, and were entitled to it, when the fact is known that he never came into the enterprise until the bonds had been distributed to the stockholders, it would be an end of that relief, whether they are to be treated as innocent purchasers or not, for they are not parties to this litigation. He being a subsequent creditor, unless he can reach back and tie to the original creditors, —which he cannot do until at least their debts are paid by somebody, —we cannot see that he can complain of that distribution.

The complaint about the Appalachian lease is that the Pine Mountain Company would not consent that the improvement company should cut the timber for sale on the market to put it in funds to comply with its obligations under the lease to extend the railroad. The necessity for so raising money shows the desperate straits to which affairs had come, and the Pine Mountain Company might find justification for calling this a dangerous waste and impairment of security for the bonds. Whatever wrong there was, however, cannot be redressed in this proceeding. All we can rule about it is that it is not a ground for a rescission of the contract, nor a set-off, in the present attitude of the case.

Another cause of complaint in the case by Blake, in aid of his demand for rescission or set-off, is that the trust to the Germania Trust Company was not drawn according to the memorandum agreement for that trust contained in the Blake contract. We have already pointed out that this is not a ground for rescission. The decree of the circuit court has conformed the stipulations of the trust deed to the Blake contracts, and without that it is so obviously a right to have the trust administered according to the Blake contracts, as between the parties, that the trustee, in settling its accounts, would be compelled to conform its dealings to the Blake requirements without such correction, though it is well enough to make them. But this demand goes further, and it is denied that the trustee company had any right to advance money to the Pine Mountain Company to pay any debt Blake had not assumed to pay, or rather had not, by his contract, directed the trustee to pay out of the proceeds of the land; and this is undoubtedly true, and has been so, in effect, decided by the decree below, as we understand it. The further complaint under this head, that the trustee had no right to advance any money for any purpose, not even to pay what we may call the Blake claims, is not so clear, and we need not now decide it; for we are not, in this proceeding, taking any accounts of the trustee, or making any settlement between the parties, nor administering that trust, and what may or may not be credited by or charged to the trustee cannot be now determined. All we have before us is that this objection, whatever force there be in it, is not a ground of rescission or preference or set-off, as against the lien of the debenture bonds.

Finally we come to the question so much litigated and argued, arising out of the superimposed mortgage made by Blake after the Minneapolis lands were appraised, and before the final deed was made. We agree with the circuit court that Blake had no right,

under a proper construction of the contract of August 10, 1892, to place that mortgage on the property. The circuit court thought that the right of Blake to impose a mortgage within the limit of $20,000 was foreclosed by the appraisement, while the appellant Blake contends that, up to the final deed, he might properly place the mortgage. Much proof has been taken to show what the parties intended, upon the theory that, the language being ambiguous, it may be interpreted by the light of the facts. Either side simply testifies to its own construction, and if we should go into the proof it would be more difficult to determine where the intention lay, than to find it from the documents themselves. It is not an impossible inference from the proof—indeed, it may be probable—that Blake had it in his mind to do what he did do, but it is certain that that intention was not expressed in the contract, nor is it necessarily to be implied from it, and it is quite as certain that he never disclosed that intention or that desire to the Pine Mountain Company. On the other hand, it is altogether certain that the Pine Mountain Company did not understand that to be a right of Blake, and did not intend to contract that he should have what his counsel calls "an option" to do that thing. It was certainly contrary to the interest of the Pine Mountain Company to give Blake that privilege, and it will not be held to have done it without the words used bind it to that construction, or unless it is a necessary implication from within the four corners of the instrument. The parol proof may be looked to when an ambiguous expression is to be interpreted, but not to supply omissions, except where there are formal proceedings, and the jurisdiction to reform the words and phrases used, which must be done before construction takes place. There is a conclusive presumption that parties have put their whole agreement in writing, and previous negotiations are merged in it. Certainly any undefined, concealed, or unexpressed designs or intentions cannot be added by parol to words of a stipulation that import a consistent and sensible meaning within the scheme of the writing itself. Bailey v. Railroad Co., 17 Wall. 96, 105; Baker v. Nactrieb, 19 How. 126; Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536; Forsyth v. Kimball, 91 U. S. 291; Insurance Co. v. Mowry, 96 U. S. 544, 547; Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46; Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419; Manufacturing Co. v. Soxman, 138 U. S. 431, 11 Sup. Ct. 360; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738; Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., 72 Fed. 317, 323. Nor is there anything enlarging this authorized use of parol testimony in interpreting contracts to be inferred from the general expression used in Le Roy v. Beard, 8 How. 451, 466, or Goddard v. Foster, 17 Wall. 123, 142, about aiding the language employed by proof of the situation of the parties, the acts of the parties themselves, and "any other circumstances having a legal bearing and throwing light on the question," nor in its repetition in Runkle v. Burnham, 153 U. S. 216, 224, 14 Sup. Ct. 837. Neither of these cases is at all inconsistent with those we have cited from the supreme court of the United States. If the testimony here be admissible, it only confirms the in-

terpretation we give the contract apart from it, by showing conclusively that there was no agreement of the parties, mutually understood, that Blake should have a right or "option" to put mortgages on the land to be offered, so long as he did not exceed the limit. Their minds never consciously came together on that point, whatever might have been in either mind on that subject. Apart from all the testimony, the contracts are quite clear on the point. The ordinary rule is that contracts speak in præsenti, from the date of their execution, unless they themselves indicate some other time, which is only saying, however, that all men, in all things, using the language of the present, mean the present, unless the contrary appears. "We are all of opinion," said Baron Pollock, "that the deed must be taken to speak from the time of its execution. That is the plain interpretation of what was done by the parties. It is the same as if, on the day of the execution of the deed, a person had heard the defendant use the language contained in it." Jayne v. Hughes, 10 Exch. 430, 433. Thereby was saved to the plaintiff a bar of the statute of limitations. And so the habendum of a lease was not allowed to relate back to the date of the commencement of the tenancy in fact, so as to bring a destruction on the premises prior to its date within the protection of the covenants. Shaw v. Kay, 1 Exch. 412. Although the contract of August 10, 1892, is not a deed conveying lands in præsenti, and indeed is only an agreement to convey in futuro, and speaks of the conveyance to be made thereafter, it is a contract acting in the present in its obligation to do on either side the things to be done by each, and was intended to speak of the conditions then existing, and that which was to be done thereafter by either side was only to be done in future because it required time to complete the present performance. It did not specify the lands to be conveyed by Blake, on the one hand, nor the claims to be paid by the Pine Mountain Company, on the other, with any specific description, and only in a general way, because in the nature of the situation, as to each the description had to be general, and provision was made to insert the particulars, so to speak, when they could be described specifically. The lands were to be pointed out and appraised, the books to be examined for the claims to be paid. It might just as well be claimed that after August 10, 1891, the Pine Mountain Company could create new debts, which Blake must pay, to make up the $100,000 of assured liabilities, as to claim that Blake might create new incumbrances to make up that limit. The $100,000 was the maximum limit, but, if the debts described should be less, Blake did not have to pay more. So the incumbrances were limited to one-half the fair market value, as per appraisement on any single tract, and the aggregate on all should "not exceed" $20,000, as the debts assumed were "not to exceed" $100,000, following the language of the original contract between the improvement company and the Pine Mountain Company. The present existence of the debts to be assigned is more specifically pointed out, it is true, because the words "now liable" are used in that connection, but none the less implied is the correlative obligation to convey the lands as then existing in respect of incumbrances. The contract provides, in its very

words, that the aggregate of incumbrances "existing" against said property shall not exceed $20,000, which word is quite as significant as the words "now liable," albeit not so absolutely certain in its significance, but only because of the omission of the word "now."

It was the opinion of the circuit court that Blake had power to create mortgages up to the appraisement, but not after. We think he had no power to create any after August 10, 1892. The whole instrument shows that it speaks of titles and incumbrances of that date. The parties were "to proceed at once to Minneapolis, Minn., and upon arrival there said second party is to furnish list and description of the real estate by lot, block, and subdivision. The property is to be pointed out, value determined, titles examined, and conveyances made by good and sufficient warranty deed as soon as practicable in the ordinary course of business." So it is throughout. The language implies present conditions, not future conditions; and provision is made for speedy removal of defective titles, or the immediate substitution of other property without defects. On the other hand, the obligations to be paid by the Iron Mountain Company are to be speedily ascertained. If less than the $100,000 "at the date of this agreement," a pro rata share of the real estate is to be reconveyed, and the debts are to be paid "within thirty days," or within that time from future maturity. Everything speaks of accomplished conditions to be immediately adjusted to this agreement, and there is no indication of changing the facts on which the conditions rest by the action of either party. In other words, the contract speaks in præsenti, and takes effect as if the parties had been heard to make the statements of that date; and all that is future is merely administrative, adjunctive, and auxiliary, and not creative. Much stress is laid on the words "shall not exceed," as relating to the incumbrance; the form indicating future action, and thereby creating this "option." But this is not a necessary implication as against all the rest of the document, and even grammatically the word "shall" may be used in the preterit present sense of "must," of which it is a synonym, and not always, or perhaps not most frequently, in the auxiliary future sense which is now urged here. Cent. Dict. The subsequent contract of October 25, 1892, does not change this feature of the other in any sense. Neither party had carried out the commands of the first, no matter for what cause, whether because of the dispute about this "option," and Blake's assumption to exercise it by creating a mortgage up to the limit, or otherwise, and this subsequent contract reserved that dispute for subsequent settlement by litigation. Therefore the question wholly depends on the construction of the document of August 10, 1892. We do not say that it might not have been a fair inference from the document itself, interpreted by the "light thrown upon the question" from the parol proof, that Blake could "point out" other lots or parcels than those he owned himself on the 10th day of August, 1892, nor that he might not, after that date, acquire property to be included; and possibly, when so acquired or used, if incumbrances existed at the date of acquisition the other side might have been compelled to take them, because of the general description of the thing sold,

and the elasticity of choice of lots to be offered for appraisement; but that would be an altogether different thing from that of Blake himself creating a mortgage on the whole offering subsequent to August 10, 1892, merely to reach the utmost limit allowed. So important a privilege as that should have been definitely expressed, and, not being so, cannot be implied.

What is to be the effect of this ruling of the circuit court, which we approve, when it comes to making a decree upon that fact,—that Blake violated the contract by placing the mortgage,—is a question of greater difficulty than the construction of the contract. Practically, it does not seriously involve the decree, since in this proceeding the trust of October 25, 1892, to the Germania Trust Company is not being administered at all. Technically, courts of equity, in exercising their power over trusts, may construe wills and deeds of trust, but generally not contracts in which there is no element of trust, such as the contract of August 10, 1892, is. Yet the parties seem in the contract of October 25, 1892, to have proceeded upon the theory that there was some such equitable remedy; for, in the reservation between them of this dispute from that settlement, Blake consents to enter his appearance "to such action" in the chancery court, subject to removal to the federal court. Of course, they could not confer the jurisdiction by contract or consent. Technically, again, perhaps the only remedy to settle the dispute was an action at law by the Pine Mountain Company against Blake for a breach of the contract. What would have been the measure of damages is not certain, until the developments of fact should show what had resulted in the way of damage. Obviously it could not be measured by the lump sum of the mortgage imposed, because the lands might be enough, notwithstanding, to pay the debts, and Blake be entitled to something back under the contract. Under the first of the two contracts there was a stipulation that, if the debts should turn out less than $100,000, Blake was to have lands reconveyed in proportion according to the appraisement, and while the Pine Mountain Company took them absolutely, and was to pay the outstanding debts speedily and absolutely, it was subject to this condition, and therefore the amount of the superimposed mortgage would not measure the damage. Nor would it under the second of the two contracts, when the Germania Company, as trustee, undertook to sell and apply the proceeds to the payment of the debts. Perhaps a court of law could have measured the damage by a process of valuation, and, if a court of equity should take charge of the dispute, it might have to find the same measure of damage. But that has not been done, and until it has been done the amount Blake is to pay has not been ascertained. The decree below directs "that J. D. Blake shall forthwith cause to be removed from the property embraced in the deeds executed by him to the Pine Mountain Iron & Coal Company, and referred to in said agreement of October 25, 1892, all incumbrances created by the mortgage of said Blake for $17,290, so that the said property shall stand free and released from any claim by reason of the execution of said mortgage by the said Blake. The said mort-

gage is the same that was executed by said Blake to the Metropolitan Trust Company of Minneapolis, Minn., dated 29th day of August, 1892." If Blake had been directed to bring the instrument into court to be canceled, or to execute some release or deed, or what not, perhaps the court could have compelled him thus "to remove" the mortgage, if it might proceed effectually to decree upon titles to land in another state, and in the absence of the mortgagee or those holding under him, but it does not do this. It, in effect, commands Blake to remove the mortgage by paying the mortgage debt. Undoubtedly the court had power to determine the point of litigation on the bill for rescission and the pleadings in that case, as an incident to the granting or denial of that relief, for the Pine Mountain Company pleads the wrongful mortgage as a defense to Blake's complaint of its nonperformance. We hold that he has no equity of rescission, whether the mortgage be rightful or wrongful; but if there had been grounds for it, and this wrongful mortgage did impede performance, as no doubt, in its natural effect, it would tend to do, if the property were close in its margins of value, it would be a defense to the bill, and the court might so declare. The cross bill of the Pine Mountain Company asks to have the contract of August 10, 1892, reformed by showing the true agreement in this respect; and, more than this, we think the point is within jurisdictional judgment upon Blake's intervening petition or cross bill asking to have the trust deed to the Germania Company reformed to comply with the stipulations of the contract between him and the Iron Mountain Company. In that contract this very dispute was reserved for adjudication in some form appropriate to a court of equity, and while, in the strictest technical sense, it is possible that the trust created by the deed of trust is disconnected with that dispute, and the trustee could proceed in administration without its settlement, still on the rescission bill we have hold of the question, and on the pleadings otherwise it is in litigation; so we think we need not remit the parties to a court of law, but may, in reforming the trust deed, note this stipulation, and give effect to it by directing a declaration in the trust deed that the imposition of the mortgage was unauthorized, and the trustee is directed, in any settlement of his accounts with Blake, to proceed on that basis of settlement, leaving the parties free to act as they may be advised to secure any further relief to which they may be entitled in that behalf. The decree of the circuit court will be affirmed, with costs to be paid by the appellant.

MANHATTAN TRUST CO. v. SIOUX CITY CABLE RY. CO. (WESTINGHOUSE ELECTRIC & MANUFACTURING CO. et al., Interveners).

(Circuit Court, N. D. Iowa, W. D. October 28, 1896.)

1. CONDITIONAL SALE—MORTGAGES.

Where property is sold and delivered under a contract that it is to remain the property of the vendor until fully paid for, which is not acknowledged and recorded, it is not subject, under Code Iowa, § 3093, to the lien of a prior mortgage of all the property then owned, or thereafter to be ac-