as also in the common-law action referred to in the plea in bar, were lost prior to the trial below; that an order was made on April 22, 1897, to re-establish the lost papers; that the papers in this equity cause were re-established, but that the papers in the common-law cause were not. The final decree in this cause was signed on August 15, 1898. It recites that the cause was heard and determined "upon the bill, demurrer, answer, plea, depositions, and other documents on file." The decree adjudged the assignment of said notes to be fraudulent and void, and the same was set aside. The decree further proceeded to adjudge "that complainant have and recover of the defendant the sum of $8,506.27 for the principal of the seven notes, with $4,593.37 as interest at 6 per cent. per annum, * * * making in the aggregate the sum of $13,099.64; and, if the sum is not paid within 30 days, execution should issue on complainant's demand, provided, however, that the delivery of all said notes to the clerk of this court within 30 days shall be accepted in full satisfaction of this decree." The defendant corporation appealed, assigning for error, among other matters, with much particularity and detail, that the demurrer and plea in bar should have been sustained, and that there is no evidence to sustain the decree; also that the decree is not in accordance with the prayer of the bill. In the brief on behalf of appellant it is said: "The scope and object of the prayer was for the recovery of the seven notes, or for the proceeds of the same if they had been collected, * * * A decree for a specific sum of money, without proof of the value of the past-due notes, and when no part of the prayer was for the money value of the notes, unless they had been collected, was obviously erroneous."

H. B. Tompkins and R. C. Alston, for appellant.

M. F. Caldwell, for appellee.

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

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

The appellee contends that, as the demurrer and the plea were filed after the answer, they came too late, and should not be noticed. But it is clear that the complainant consented that the demurrer and the plea might be filed and be passed upon, and he cannot now be heard to object that they were improperly or unseasonably filed. The trial judge evidently was of opinion, and properly so, that the demurrer and the plea were before the court by consent of parties, and in the decree he passed on the demurrer and the plea, as well as on the merits. But there was no force in the demurrer. The bill made out a sufficient case to authorize a court of equity to take jurisdiction. As to the plea, whatever merit it may have had, the defendant failed to offer any proof in its support, and it was therefore proper to overrule it. The order dismissing the law case, standing alone, did not substantiate the plea. The attempts to show by an affidavit made after the trial of this cause the nature of the law action which was dismissed cannot, of course, avail the appellant. On the merits, we are of opinion that the decree of the lower court should be reversed, for the reason that the complainant failed to prove his case. Three different theories as to the facts and circumstances of this case are presented: The bill charges substantially that the notes were transferred by the bank in contemplation of bankruptcy and otherwise, in violation of Rev. St. U. S. § 5242, for a pre-existing debt of the bank. The answer avers, in effect, that the transfer was not to secure a pre-existing debt, but to secure the collection of drafts

by the bank. The proof would make a case where the notes were put in the hands of the receiver of the Sheffield & Birmingham Coal, Iron & Railway Company for payment by him, and where, instead of paying the notes, he kept them without right or authority. Inspection of the testimony of the two witnesses, which constitutes the entire evidence for the complainant, shows that he failed to prove the essentials of his bill of complaint.

In Railroad Co. v. Bradleys, 10 Wall. 299, it was said:

"It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

The decree appealed from is reversed, and the cause is remanded to said circuit court, with instructions to dismiss the bill.

REINHART et al. v. AUGUSTA MIN. & INV. CO. MANHATTAN TRUST CO. v. SAME. VAN VOLKENBURGH et al. v. PROUT et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 734.

1. CORPORATIONS—RECEIVERS—FUND CHARGEABLE WITH EXPENSES.
A receiver was appointed for a mining corporation, upon a bill alleging insolvency of the corporation, and inability to earn its charges and operating expenses. By consent, he was to operate the mines, and was authorized to borrow money, and was directed to pay all debts for labor and supplies incurred by the corporation within the six months preceding his appointment; payment to be made from earnings and income, or from money borrowed. *Held*, that the expenses of the receivership and the debts for labor and supplies were not payable alone out of the income and revenues of the corporation, but they might be paid out of the corpus of the estate.

2. SAME—MORTGAGES—PRIORITY.
The receivership was afterwards extended to a suit to foreclose a mortgage of the mining property, on motion of the trustee of the mortgage; and a decree was passed, without objection, ordering a sale, and giving the debts for labor and supplies, and the expenses of the receivership, priority over the mortgage. A decree of distribution was passed in accordance with the decree of foreclosure, and no appeal was taken therefrom, except by certain of the mortgage bondholders, who had caused the receiver to be appointed. *Held*, that the mortgage bonds were not entitled to priority over said expenses and debts, since the parties had agreed otherwise.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

On October 12, 1892, Joseph W. Reinhart, Phillip Van Volkenburgh, and others, citizens of the state of New York, filed their bill in equity in the circuit court of the United States for the Northern district of Georgia. The bill was brought for the complainants named in the bill, and such others as might thereafter be joined as complainants. The bill averred that the Augusta Mining & Investment Company, incorporated under the laws of the state of Virginia, owes the complainants certain promissory notes, due on demand, for money loaned said corporation to enable it to carry on its business in Polk county, Ga.; that payment of the notes had been refused, the corporation alleging as a reason for the refusal lack of money to pay the notes, or any part of them; that, in