plained, is rebutted by the proof that all the defendant received was the proceeds of sale of his stock in the new company, by no possibility the fruit of the judgments. And the complainant cannot claim an interest in that stock or its proceeds, without affirming the trustees' sale of the railroad, and the subsequent formation of the new company, followed by the issue of the stock. Such a sale, if valid, would have destroyed the old company, three-quarters of the stock of which the complainant owned. But the sale has been judicially determined to have been invalid, the old company has recovered the property, and the new has been consequently adjudged never to have had a legal existence. The consequence of this is that the complainant now holds his full interest in the old company, unimpaired by any sale. After this it is impossible to see how he can assert that any part of the new stock or its proceeds belonged to him; and if it did not, nothing has been collected for him, even if he can be considered the owner of the judgments. Nor has he been injured by the entries of satisfaction, for if he became the owner of the judgments by force of the instruments of August 24th, 1860, as he avers, he is the owner still, notwithstanding the entries of satisfaction, for no one but the owner could cause valid acknowledgments of satisfaction to be made. For these reasons the decree must be

AFFIRMED.

FRENCH, TRUSTEE, v. HAY ET AL.

1. A. filed a bill against B., a purchaser of property at a sale made by C., a trustee to sell, charging both B. and C. with collusion and fraud in the sale, and praying discovery from both parties, that the sale might be set aside, &c., and that B., who had taken possession of the property, might be charged with its rents, but not making such a prayer as to C. Both B. and C. appeared and answered. The court charged B. with rents, but did not charge C. B. appealed, and the decree charging him being affirmed, and a master having reported to the inferior court the amount of rents, a final decree was there made against B. for them. At the same time that this decree was made (B. being insolvent), the

complainant asked and got leave to file an *amended* bill against the two parties; Mr. D., an attorney of the court, appearing in court—but without any authority from C.—and consenting that such a bill should be filed. The amended bill was accordingly filed, alleging that B. was insolvent; that *C.* was chargeable for the rents as well as B., and that both were chargeable for use of certain furniture on the premises when B entered them. Neither B. nor C., apparently, had actual knowledge of the filing of this bill. And a decree was entered, *pro confesso*, against C. for both the value of the rents and the injury to the furniture. On C. getting knowledge of this decree it was vacated, and notwithstanding opposition by him a decree for rents was entered, leaving the case open as to both parties in respect to the furniture. B. and C. then answered *as to the whole case*.

Subsequently (being entitled as respected citizenship to do so) they removed the case into the Circuit Court of the United States under the act of March 2d, 1867, which court set aside *all* the decrees in the State court and, ordering that the case should stand for hearing on bill, answer, and pleadings, opened the entire suit as if nothing had been done anywhere else in any part of it. C. answered denying all the material allegations of all the bills; and testimony being taken no proof of their truth appeared as to him. The Circuit Court annulled the decrees, *in toto*, in the State court against *both* B. and C., and dismissed the whole bill. A. appealed to this court. *Held*,

First. That the decree against B. was wrongly vacated; that as to *him* the decree in the State court on the original bill for rents was *res judicata;* and that *that* decree stood as though no amended bill had been filed, and unimpeachable as to everything covered by it; while as to the other matter (the damage to the furniture), the Circuit Court of the United States should by issue directed to a jury, or by reference to a master, have ascertained it and have decreed accordingly.

Second. That the State court committed a gross error in entering a decree against C. for rents, on the amended bill, where the original bill had not prayed that he should be charged with them, and that his answer denying, as it did, all the material allegations of both bills against him, and those allegations being otherwise unsupported, the decree of the State court was, as to *him*, rightly vacated, and the bill, as to *him*, rightly dismissed.

2. When a case has been removed from a State court, into the Circuit Court of the United States, under one of the acts of Congress relating to such removal of cases (in this case the act was that of March 2d, 1867), an objection that the act has not been complied with in respect of time and other important particulars, will not be listened to in this court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken and the case ready for hearing. Nor ought it under such circumstances to have been listened to in the Circuit Court. It came too late, and must be held to have been conclusively waived.

Statement of the case.

APPEAL from the Circuit Court for the Eastern District of Virginia; the case, though between the same parties as the preceding one (that is to say, between French and Hay), not relating to the same transactions, and being thus:

In October, 1858, McCullough owning a house and lot in Alexandria, Virginia, and being indebted to Harper in the sum of $3000, evidenced by six negotiable notes of $500 each, conveyed the premises in the month named, to Brent, in trust to secure the payment of the six notes. He then leased the premises, together with certain furniture then in the house, to James French, for five years at a rent of $600 a year; and in March, 1859, conveyed the premises to Robert French in trust for the wife of the said James; assigning at the same time to Robert French the lease previously made to James; the money to be paid upon which would in the course of the five years amount to exactly $3000, and which it was agreed should be paid to Harper in extinguishment of his debt of that amount.

On the execution of the lease James French went into possession.

The rents were applied as agreed on, so that when the rebellion became flagrant, as it did in the spring of 1861, all the notes had been paid, excepting one. Five hundred dollars were, therefore, thus due by McCullough to Harper, and were still secured by the deed of trust to Brent.

In this state of things McCullough, the debtor, died; Harper, his creditor, went south into the rebel lines, indorsing the note for the $500 and leaving it with his wife in Alexandria. James French and wife followed Harper, leaving a Mrs. Brandy, a sister of French's, in occupation of the house and furniture; and things in Alexandria got into such confusion as in a civil war might occur in a place situated as it was.

With the death of McCullough and the withdrawal south of the other original actors, two new persons appeared. One Alexander Hay, a citizen of Pennsylvania, a creditor of McCullough, who upon his death applied for and got letters of administration from the proper court at Alexandria on

McCullough's estate; and the other, J. B. Stewart, a citizen of New York, who alleging himself to have become owner of the remaining note of $500 due by the estate of McCullough, applied for and got in the usual court at Alexandria, an order by which Hay was substituted as trustee in the place of Brent, now alleged to be in the Confederate army.

Hay, in order, as he alleged, properly to administer on McCullough's estate as the legal administrator of it, and also to execute as substituted trustee, his newly received trust, now, December, 1865, advertised and sold as trustee, under the deed of trust executed to Brent in 1858, the premises conveyed by it; Dr. Ripley, a surgeon in the army, bidding them off as purchaser at $2600; *the deed of McCullough to Robert French in trust for the wife of James French, executed in March*, 1859, *having never been put on record until about a month before this sale, and neither Hay nor Dr. Ripley apparently having ever heard of it until after the sale was made.*

Dr. Ripley, now hearing of the deed to French, and fearing that there might be trouble about title, and about getting possession, refused to pay for or to take the property; and Stewart being willing to take his bid, Ripley assigned the bid to him. But Hay too was alarmed, and some allegations reaching his ears that Stewart when he made the motion for the substitution of a trustee in the place of Brent, did *not* own the remaining note of $500 as he had alleged he did, would take no money from nor execute any deed to Stewart. In short, after the sale he did nothing whatever, and his connection with the property ended. Stewart, however, got possession of the house under an arrangement between himself and its then occupant, and being once in, held on to the occupancy.

In February, 1866, the rebellion being now ended, and Harper and the other parties who had gone south having come back to Alexandria, their old home, Robert French, as trustee of Mrs. James French, filed a bill in the County Court of Alexandria, against Stewart, Hay, Brent et al., alleging that Stewart was not owner of the remaining $500 note, when the order of court putting Hay as trustee in the

place of Brent was made, and that the note was at that time still owned by Harper, and that the sale by Hay was collusive and void; that the note had since been paid, and that so the whole $3000, which the property was conveyed to Brent to secure, was now discharged; and the complainant entitled to hold the property upon the trusts created for Mrs. Robert French by the deed of March, 1859, there being now no prior trust. The prayer of the bill was:

"That the defendants, Stewart and Hay, may make full and true discovery of all their transactions connected with the sale, by the said Hay, of the property described, to the said Stewart, that the sale may be set aside, and the deed made in pursuance thereof delivered up and cancelled; that the said *Stewart* may render an account of the rents and profits of the said property while in the use and occupation thereof."

No prayer, as the reader will observe, was made that *Hay* might be charged with rents and profits.

On the 2d of June, 1866, Stewart filed his answer; the same being sworn to and signed in the ordinary way, and signed also by his attorney, C. F. Doddridge, Esquire.

On the 8th of December following, the court decreed that the sale was void; that the property should be restored to the complainant; that *Stewart* was chargeable with the rents and profits, and that the case should be referred to a master to ascertain the amount. An appeal was thereupon taken by *Stewart* to the proper court of the State—the State District Court—which affirmed the decree of the County Court. Upon the return of the case to the County Court it was referred to a master to take an account of the rents and profits, pursuant to the decree.

The master reported that Stewart was chargeable with $3276, from which sum was to be deducted the payments made by him, amounting in all to $887, and leaving a balance against Stewart of $2389, and on the 2d of June, 1869, the court decreed that he should pay that sum with interest from the 26th of October, 1868. This the reader will understand was for rents and profits of the real estate only, and not for use of furniture.

At the same time when this decree was made leave was given to the complainant to file an amended bill; "William Dulany" (said the record), "an attorney of the court, appearing in court and consenting thereto."

He thereupon, June 7th, 1869, did file such bill, charging that *Hay* had participated in the frauds of Stewart, and should be held equally liable with him for *rents*, and that *both* were chargeable in addition for loss and damage touching the *furniture* in the house when Stewart took possession. The bill was taken as confessed by Hay, and on the 21st of August, 1869, it was decreed that he should pay to the complainant on account of rents and for the detention and damage to the furniture, $3389, with interest from the 26th of October, 1868, the date already named in the former decree. Thereafter Hay and Stewart applied to the court to vacate the decrees against them, and for leave to appear and answer; the grounds of their application being that no process upon the amended bill had been served upon them, and that they had no notice or knowledge of its pendency against them until after the decree *pro confesso* had been entered, nor until a short time before the application now made; and Hay averred and showed by his own oath and by other proofs that Mr. Dulany, the attorney, who had acted for him in that behalf had done so by a misunderstanding, wholly without his consent or knowledge; and he set forth a variety of facts which, if true, made a complete defence to the bill.

On the 23d of December, 1869, the court vacated the decree of the 21st of August, 1869, against Hay, but at the same time and in the same order decreed against him for the sum of $2389, with interest from the 26th of October, 1868, on account of the *rents*, and ordered that an issue should be tried on the law side of the court touching the *furniture;* and that Hay and Stewart should both have leave to answer. They thereupon answered as to the whole case; denying each and all of the allegations both of the original and the amended bill. On the 8th of February, 1870, they moved the court for an order for the removal of the case

to the Circuit Court of the United States for that district, pursuant to the act of Congress of the 2d of March, 1867. An order was made and the cause was removed accordingly. The whole proceedings in the State court, including, of course, all the bills and the answers, among the latter, the answer of Hay denying each and all of the allegations of the bills, were thus transferred as the record for the circuit of the United States.

In the Circuit Court of the United States Hay and Stewart severally moved the court to vacate the several decrees against them made by the Circuit Court of the county. These motions were heard, and the several decrees were annulled, and it was "ordered that the case do now stand for hearing on the bill, answer, and pleadings." Testimony was thereafter taken, by agreement, upon both sides. On the 13th of October, 1873,—near three years after the case had been removed, and when it was ready for hearing—the complainant moved the court to remand it to the court whence it came, he insisting that the act of Congress under which the case had been removed, had not been complied with in respect to time and several other important particulars. The motion was overruled. The case was then heard upon the merits and the bill dismissed.

The complainant appealed to this court, and the case was thus brought here for review.

In the argument here the objection touching the removal of the case from the State court was renewed, and the case otherwise discussed both on technical points and on merits.

Mr. W. Willoughby, for the appellant; Messrs. H. H. Wells and G. W. Paschall, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The objection made in the court below touching the removal of the case from the State court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the trans-

fer was made. The objection came too late. Under the circumstances it must be held to have been conclusively waived.*

We shall consider the record as regards Stewart and Hay as if they were not joint defendants. The case as to each presents a distinct aspect, and requires a separate examination.

I. AS TO STEWART.

On the 2d of June, 1866, he filed his answer to the original bill. It was subscribed and sworn to by himself, and signed by Mr. Doddridge as his counsel. He thus entered his appearance and placed himself within the jurisdiction of the court. The proceedings thereafter, including his appeal to the State District Court, appear to have been in all things regular down to the removal of the case to the Circuit Court of the United States. The decree of the 8th of December, 1866, from which the appeal was taken, was a final one.† When affirmed by the appellate court it was conclusive of the rights of the parties as to everything covered by it, and could not be affected by any action of the Circuit Court of the county or of the United States in the subsequent progress of the case. That decree was *res judicata* of the most solemn character.‡

The decree of the 2d of June, 1869, ascertained the amount due from Stewart for the rents, and ordered that he should pay it. This terminated the litigation under the original bill. After the close of that term—except for reasons not claimed nor shown to exist—the court had no power to revoke or modify this decree.§ Nothing of the kind was attempted. At the same time that this decree was entered leave was given to the complainant to file the amended bill,

* Taylor *v.* Longworth, 14 Peters, 174; Executors of Brasher *v.* Van Cortlandt, 2 Johnson's Chancery, 242; Skinner *v* Dayton, 5 Id. 191.

† Forgay *v.* Conrad, 6 Howard, 204; Thomson *v.* Dean, 7 Wallace, 342.

‡ Campbell *v.* Campbell, 22 Grattan, 649; Thomson *v.* Albert, 15 Maryland, 282; Hammond *v.* Inloes, 4 Id. 139.

§ Cameron *v.* McRoberts, 3 Wheaton, 591; Bank of the United States *v.* Moss et al., 6 Howard, 31; United States *v.* Glamorgan, 2 Curtis, 236.

William Dulany, Esq., an attorney of the court, "appearing in court and consenting thereto." The amended bill was filed on the 17th of that month. It sought to make Hay liable also for the rents, and Hay and Stewart liable for the loss and damage as to the furniture. This did not in any wise affect the previous litigation and decrees as to Stewart under the original bill. Those decrees continued to stand as if the amended bill had not been filed.* The general rule is that an amendment of the bill gives a defendant the right to answer as if he had not answered before.† In the state of the case which existed when the amendment here in question was made, no amendment could be allowed. It was then too late. A final decree covering the entire original case subsisted. The court had no power over that decree and never attempted to exercise any. The further relief sought could be reached, if at all, only by a supplemental bill.‡ It was a gross error to allow the amended bill to be filed. But the point was not made in the State court nor in the court below, nor in the argument here. The case, according to our views, can be properly disposed of without reference to it. We have, therefore, laid it out of view. An amended bill is esteemed a part of the original bill and a continuation of the suit. But one record is made. But the amendment is sometimes of such a character that it is regarded as an independent graft upon the original case and the beginning of a new *lis pendens*.§ Stewart complained that Dulany appeared and acted for him as to the amended bill without authority. Whether Dulany did so or not is immaterial. New process is neces-

* Young *v.* Frost, 1 Maryland, 394; Washington Bridge Co. *v.* Stewart et al., 3 Howard, 413; Walsh *v.* Smyth, 3 Bland, 20; Keene *v.* Wheatley and Clarke, 9 American Law Register, 60.

† 1 Daniell's Chancery Practice, 411 (Perkins's edition of 1865).

‡ Thorn *v.* Germand, 4 Johnson's Chancery, 363; Shephard *v.* Merrill, 3 Id. 423; Chandler *v.* Pettit, 1 Paige, 168; Stafford *v.* Howlett, 1b. 200; Bowen *v* Idley, 6 Id. 46; Ross *v.* Carpenter, 6 McLean, 382; Walsh *v.* Smyth, 3 Bland, 20; Sanborn *v.* Sanborn, 7 Gray, 142; Verplanck *v.* Mercantile Insurance Co., 1 Edwards, 46.

§ Miller *v.* McIntire, 6 Peters, 61; Walsh *v.* Smyth, 3 Bland, 20.

sary unless waived upon a supplemental bill and a bill of revivor, but not upon an amended bill as to defendants who are already before the court.* Being in court they are bound to take notice of the filing of such bills as of any other proceeding in the case. In the English practice the complainant is required to serve a copy of the amendment upon the solicitor of the defendant,† but this, it is believed, is rarely if ever done in the courts of the States, unless required by an established rule of practice or a special order in the case. In the courts of the United States the subject is regulated by the twenty-eighth rule of equity practice. The State court, by an order of the 23d of December, 1869, directed an issue to be tried as to the furniture, and gave Stewart leave to answer the amended bill.

This was all he had a right to claim, and left him nothing to complain of. In this condition of things the case went to the Circuit Court of the United States. That court possessed the same power in the case as the State court while the case was before it, no more and no less. It certainly did not sit as a court of errors or appeal with jurisdiction to reverse the final decree of the State court made under the original bill. That would be contrary to the intent and meaning of the act of Congress under which the removal was made. Its authority as to Stewart was limited to the allegations of the amended bill in regard to the furniture. So far as he was concerned it presented no other subject of litigation, and nothing else was open to examination under it. If that bill had not been filed there could have been no transfer as to him. On the 22d of October, 1872, the court below, as before stated, set aside all the decrees of the State court and ordered that "this case do now stand for hearing on the bill, answer, and pleadings." The entire case was thus opened anew, as if nothing had been done under the original bill by the State court. This was clearly an error. We think the liability of Stewart as to the furniture was well made out by the complainant.

* Cunningham *v.* Pell, 6 Paige, 657; Longworth *v.* Taylor, 1 McLean, 516.
† Woodhouse *v.* Meredith, 1 Jacob & Walter, 207.

The court below, by an issue at law, as directed by the interlocutory order of the State court, or by a reference to a master, should have ascertained the amount and decreed accordingly.*

The order vacating the decrees of the State court as to Stewart, made under the original bill, is VACATED. The final decree dismissing the bill as to him is REVERSED, and the case will be REMANDED to the court below with directions to proceed

IN CONFORMITY WITH THIS OPINION.

II. AS TO HAY.

He also filed an answer to the original bill. Like Stewart's, it was subscribed and sworn to by himself, and was subscribed by counsel. He, too, was bound to take notice of the filing of the amended bill. But the original bill claimed no decree against him. The amended bill, as to him, made an entirely new case. It set up the first claim against him as to the rent and the furniture. His own affidavit and the other proofs showed clearly that Dulany had no authority to appear as his counsel; that he had no actual knowledge of the filing of the bill until after the decree *pro confesso* was taken against him, and that he had a complete defence. It is within the discretion of a court of equity, upon a proper showing, to set aside a decree *pro confesso* upon such terms as it may see fit to prescribe.†

The State court well exercised its authority in setting aside the decree against Hay, but it committed a gross error in decreeing against him *eo instanti* the payment of $2387 on account of the rent, leaving the case open only as to the furniture. To revoke the first decree because he had been ignorant of the filing of the amended bill, and, hence, had made no defence, and then to renew it without giving him an opportunity to be heard, was, to say the least, a singular

* Kelsey *v.* Hobby, 16 Peters, 269.

† Wooster *v.* Woodhull, 1 Johnson's Chancery, 539; Beekman *v.* Peck, 3 Id. 415.

anomaly. So far as he was concerned the claim as to the rent and the furniture rested upon exactly the same foundation. If it was proper that he should be heard as to one it was equally so that he should be heard as to the other. There was no difference. The same considerations applied with respect to both. In the renewed decree damages as to the furniture might as well have been included as the charge for the rent. It was no less wrong as to the latter than it would have been as to the former. Time and opportunity to defend being refused, the decree was in effect another decree *pro confesso*. It certainly was not a decree upon the merits after a hearing upon the charge as to the rents.

After the transfer of the case he applied to the Circuit Court of the United States to vacate this decree upon the same showing as in the State court, and it was done. A bill for fraud could not have been maintained, because there was no foundation for the charge. A bill of review would not have availed him, because there was no error apparent upon the face of the decree nor upon the record. The circumstances under which the decree was rendered were very peculiar. They have been stated. The proper mode of seeking redress was by motion upon the showing which was made.* The Circuit Court had the power to do what it did and properly did it. This was less expensive, less dilatory, and much to be preferred to a bill, even if the same relief could have been had in that way. It was also more in accordance with the spirit of sound equity practice.

The entire case made by the bill as to Hay was thus opened. His answer denied all the material allegations against him, and we find in the record no evidence whatever to sustain them. No effort seems to have been made to procure any.

* Kemp *v.* Squire, 1 Vesey, Sr., 112; Robinson *v.* Cranwell, 1 Dickins, 1; Erwin *v.* Vint, 6 Mumford, 267; Pickett's Heirs *v.* Legerwood et al., 7 Peters, 144; see also Tilden *v.* Johnson, 6 Cushing, 354; Balch and wife *v.* Shaw, 7 Id. 284; Hall *v.* Williams, 1 Fairfield, 278.

The bill as to him was rightly dismissed, and in this respect the decree of the Circuit Court is

AFFIRMED.

NOTE.

AT the same time with the preceding case was argued, and just after its adjudication was adjudged, another which here follows, an offshoot from the first case, issuing from it as a branch from a main stock. It is requisite, of course, that before reading the smaller case now given, the reader should be possessed of the larger one already reported.

FRENCH, TRUSTEE, *v.* HAY.

When, in a case which is properly removed from a State court, under one of the acts of Congress relating to removals, into the Circuit Court of the United States, a complainant getting a decree in the State court and sending a transcript of it into another State, sues the defendant on it there, the Circuit Court into which the case is removed may enjoin the complainant from proceedings in any such or other distant court until *it* hears the case; and if, after hearing, it annuls the decree in the State court, and dismisses, as wanting equity, the bill on which the decree was made, may make the injunction perpetual.

THE present case was thus:

On the 3d of February, 1870, that is to say, six weeks after the decree for $2389 (leaving the matter of furniture open), for rents mentioned in the former case* as having been given, 23d of December, 1869, in the County Court of Alexandria, in favor of James French, the trustee, against Alexander Hay, the said French sent a transcript of the decree to Philadelphia, the place of Hay's residence, and sued Hay on it, in one of the local courts there. Hay had, two days before the transcript was sued on, that is to say on the 1st of February, 1870, made the affidavits requisite to remove the case into the Circuit Court of the United States under the act of Congress; though the case was not yet actually removed, nor indeed removed until the 12th following.

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* *Supra*, p. 243, towards the bottom of the page.