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of the plaintiff in error must have prevailed, if it had been contemporaneous with that of the defendant; and the delay since does not appear to have operated injuriously to him, nor to have retarded, in any degree, the ultimate decision of the case. For if the record had been filed at the time of the motion to dismiss, it is now evident, from the state of the term, that the case could not have been reached and disposed of, during the present session of the court. The court, therefore, will order it to be reinstated on the docket and continued, and the mandate, which was improvidently issued, to be recalled.

ON consideration of the motion, and of the arguments of counsel thereupon had, as well against, as in support of, said motion, it is now here ordered and adjudged by this court, that the judgment of this court, docketing and dismissing, with costs, the writ *of error in the above-
 *286] entitled cause, on Tuesday, the 9th day of February last, of the present term of this court, be and the same is hereby declared utterly null and void; and that the mandate of this court, directed to the judges of the said circuit court in this cause, be and the same is hereby revoked; and it is also now here further ordered, that the clerk of this court do forthwith send to the judges of the circuit court of the United States for the southern district of Mississippi, a copy of this order of court, under seal of this court.

*287] *JANE YOUNG and others, Legatees of JOHN PARKS, deceased,
 Appellants, v. EDWARD L. SMITH and HENRY N. ALLEN, Executors of the last will and testament of JOHN PARKS, deceased.

Appeal.—Final decree.

A bill was filed by residuary legatees, claiming to receive from the executors their respective proportions of the estate of the testator; on a reference to a master to take an account, the master reported \$1795.27 to be in the hands of the executors, which sum was paid by them into court. The report was referred back to the master, who made his final report, by which he found a further sum in the hands of the executors, exclusive of sundry uncollected debts, then outstanding, some bad, and some good; exceptions were filed to this report, which were disallowed by the court. The circuit court decreed, that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors; and as to the residue of the debts due the estate, as soon as the same, or part of them should be collected, the amount should be paid into court for distribution, to be made under the direction of the court: *Held*, that this was an interlocutory, and not a final decree, in the sense of the act of congress; and an appeal from the same could not be taken.¹

APPEAL from the Circuit Court for the Southern District of Alabama. This case was before the court, on a motion to dismiss the appeal; the decree of the circuit court of Alabama, being, as was contended by *Sergeant*, for the appellees, an interlocutory, and not a final decree. *Key* opposed the motion.

STORY, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of the southern district of Alabama, in a suit in equity; and the only question now submitted for our consider-

¹ See note to *Lea v. Kelly*, *ante*, p. 213.

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ation is, whether the decree in the case is a final decree, in the sense of the acts of congress of the 24th of September 1789, ch. 20, § 22 ; and the act of 3d of March 1803, ch. 93 ; from which an appeal lies to this court.

The original bill was brought by the plaintiffs (now appellants) *against the appellees, as executors of John Parks, to recover their respective proportions, as residuary legatees, of the personal estate [*288 of the testator, under his will, and for an account and due administration of the assets. Upon the coming in of the answer, it was referred to a master to take an account ; the master afterwards made a report, to which exceptions were filed ; and it was thereupon ordered by the court, that the sum of \$7795.27, admitted to be in the hands of the executors, be paid into court, subject to the order of the court, which was accordingly paid ; and the report was, thereupon, referred back to the master : and after several intermediate proceedings and reports, the master made his final report on the 2d of March 1840, by which he found a balance then in the hands of the executors, of \$11,355.23, inclusive of the said sum of \$7795.27, and exclusive of sundry uncollected debts, then outstanding, some of which were good, some doubtful, and some bad. To this report, the plaintiffs filed certain exceptions, on the 27th of the same month ; which exceptions were disallowed by the court as not having been taken before the master, or filed in the proper time. And thereupon, the court proceeded to decree that the report be accepted, that the plaintiffs should have execution for the said sum of \$11,355.23 ; and “that as to the residue of the debts due to the estate of John Parks, deceased, and not collected, it is ordered and adjudged by the court, that as soon as the said executors shall succeed in the collection of the same, or any part thereof, that they do pay the amount into court for distribution, to be made under the direction of this court.” The plaintiffs having received the said sum of \$7795.27, acknowledged the receipt thereof ; which was to be credited on the decree as a payment made on the 18th of November 1838 : to the above decree, the appeal is taken.

We are of opinion, that the decree is an interlocutory and not a final decree, in the sense of the act of congress. It is plain, that it does not dispose of the whole matter in controversy between the *parties. And [*289 if an appeal could now lie upon the decree already rendered, an appeal could also lie, from time to time, from any future decree of distribution of any assets which may be collected after the former decree, *toties quoties* ; without any final decision being made of all the matters in controversy. In our judgment, this would be against the clear import and intention of the acts of congress ; which were designed to give an appeal only from a decree final upon the whole matters and merits of the controversy. The consequence is, that the appeal must be dismissed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and was argued by counsel : On consideration whereof, it is the opinion of this court, that the decree in this case is an interlocutory and not a final decree, in the sense of the act of congress ; whereupon, it is now here ordered and decreed, that this appeal be and the same is hereby dismissed, with costs, and that this cause be and the same is hereby remanded to the said circuit court, to be proceeded in according to law and justice.