it would make but little difference whether the rents received were collected voluntarily or by process of law.

It would seem, therefore, that the court was right in assuming that Mrs. Freeman was a party to the appeal, and in concluding that the decree she obtained against Mrs. Clay, pending such appeal, for rents of the dower estate, was not conclusive of the rights of the parties. It also seems to us from an inspection of the record that this bill of review is without equity. On the facts stated in the original bill, filed in 1882 by Mrs. Clay and Brutus J. Clay against Mrs. Freeman and D. I. Field, Jr., it is clear that neither D. I. Field, Jr., as heir at law, nor Mrs. Lucy C. Freeman, as the widow of David I. Field, Sr., was entitled to any rents of the partnership plantation and property until after the partnership debts due Christopher I. Field were paid and settled. This was the decision of the supreme court in the case as reported in 118 U. S. 97, 6 Sup. Ct. Rep. 964. Conceding the contention of Mrs. Freeman that she was no party to that suit on appeal, the law of the case is nevertheless good as a finding by the supreme court of the United States upon a given state of facts. As Mrs. Freeman was not entitled to collect rents of her dower estate prior to the payment of the partnership debts, it follows that the decree she obtained pending the proceedings on appeal, and the money she recovered thereunder, were inequitably recovered. In short, the record shows that, in the proceedings that have been pending for some years between the heirs of Christopher I. Field, on the one side, and the widow and heirs of David I. Field, on the other, Mrs. Freeman has obtained from Mrs. Clay the sum of $2,215, which she had no right to, and which she, contrary to equity and good conscience, retains. The decree of the circuit court is affirmed, with costs.

RICHMOND *v.* ATWOOD.

(*Circuit Court of Appeals, First Circuit.* September 27, 1892.

No. 8.

1. APPEALABLE ORDERS—INTERLOCUTORY DECREE—INJUNCTION IN PATENT CASES—CIRCUIT COURT OF APPEALS—MEASURE OF RELIEF—FORM OF MANDATE.
   A decree which is rendered after full hearing on the merits, and which sustains the validity of a patent, declares infringement, and awards a perpetual injunction and an accounting, is an "interlocutory decree," granting an injunction, from which an appeal will lie to the circuit court of appeals, under section 7 of the act of March 3, 1891. *Jones Co. v. Munger, etc., Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, approved.
2. SAME—CONSTRUCTION OF STATUTE.
   The term "interlocutory order or decree" was used in its broadest sense in this section, and should be given full scope, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal.
3. SAME—DECISION ON APPEAL—MANDATE.
   On such an appeal, where the whole record is before the circuit court of appeals, and, in order to determine the rightfulness of the injunction, the court necessarily examines the whole case on the merits, and reaches the conclusion that there is no

infringement, it may not only reverse the decree and dissolve the injunction, but may also vacate the order for an accounting, and order the bill dismissed, thus rendering such a decree as the lower court should have rendered on the whole case. *Jones Co.* v. *Munger, etc., Co.*, 50 Fed. Rep. 785, 1 C. C. A. 668, disapproved.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by Benjamin S. Atwood against Charles C. Richmond for infringement of a patent. The circuit court sustained the patent, found infringement, and entered a decree for perpetual injunction and for an accounting. 47 Fed. Rep. 219. Defendant appealed. The circuit court of appeals, after a hearing on the merits, reversed the decree, holding that the patent was void for want of novelty, or that, if sustainable at all, defendant had not infringed it. 48 Fed. Rep. 910. Thereafter the appellee filed a motion for a rehearing, and a petition that the question as to the construction of the patent should be certified to the supreme court. At the hearing of this motion the court raised the question as to its jurisdiction to entertain an appeal at the stage which the case had reached below, and as to the form of its mandate, to wit, whether it should simply order that the decree for an injunction be reversed, or should direct that the bill be dismissed; and upon these questions leave was given the appellant to file a brief. Reversed, injunction vacated, and bill ordered dismissed.

Frederick P. Fish, *William K. Richardson*, and *James J. Storrow, Jr.*, for appellant.

The "Act to establish circuit courts of appeals," printed in 138 U. S. 709,[1] provides, in section 6, that "the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the district court and the existing circuit courts," (in all except certain cases,) and that "the judgments or decrees of the circuit courts of appeals shall be final * * * in all cases arising under the patent laws." Section 7 provides that "where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals."

This statute (as will be more fully set forth in the considerations upon the statute hereto annexed) provides an appeal from an interlocutory decree of the circuit court granting an injunction and referring the question of damages and profits to a master. Such a decree is made after final hearing upon the pleadings and proofs, and the merits of the cause between the parties are fully determined thereby. If upon appeal the court of appeals, having before it the entire case, is of opinion that the patent is invalid or has not been infringed, the court will follow the practice of the supreme court of the United States in reversing a final decree of the circuit court, and will send a mandate to the circuit court directing that the bill be dismissed. The invariable order of the supreme court in reversing a final decree of the circuit court sustaining a bill for infringement of letters patent is: "The decree is reversed, and the cause remanded, with a direction to dismiss the bill of complaint, with costs."

[1] 1 C. C. A. iii.

See, for example, among the recent cases which show the uniform practice: *St. Germain* v. *Brunswick*, 135 U. S. 227–231, 10 Sup. Ct. Rep. 822; *Yale Lock Manuf'g Co.* v. *Berkshire Nat. Bank*, 135 U. S. 342–403, 10 Sup. Ct. Rep. 884; *Burt* v. *Evory*, 133 U. S. 349–359, 10 Sup. Ct. Rep. 394; *McCormick* v. *Graham's Adm'r*, 129 U. S. 1–19, 9 Sup. Ct. Rep. 213; *Brewing Co.* v. *Gottfried*, 128 U. S. 158–170, 9 Sup. Ct. Rep. 83. The mandate sent to the circuit court corresponds to this order. See the papers on file in *Evory* v. *Burt*, equity docket of this circuit, case No. 2,753, which shows the form of such a mandate.

It is provided by the act to establish circuit courts of appeals, in section 10, that whenever, on appeal, a case coming from a district or circuit court is determined in the circuit court of appeals in a case in which the decision of the circuit court of appeals is final, "such case shall be remanded to the said district or circuit court for further proceedings, to be there taken in pursuance of such determination." Under this section, where an appeal is taken from an interlocutory decree granting an injunction, and it is determined upon the merits by the circuit court of appeals that the patent is invalid, or that there is no infringement, or, in general, that the complainant's bill cannot be sustained, the decree of the circuit court must be reversed, and the cause remanded to that court, with a direction to dismiss the bill of complaint, with costs, following the practice of the supreme court. Inasmuch as the decree of the circuit court granting the injunction was made upon final hearing, and the appellate court decided upon all the pleadings and proofs that the complainant's case fails, it would obviously be insufficient to reverse the decree, only in so far as it grants an injunction, and remand the case to the circuit court, with directions only to enter a decree denying an injunction. The appellate court has decided upon the merits that the bill cannot be sustained, and any action by the circuit court, except to dismiss the bill, would therefore simply be reversed again by the court of appeals.

Reference to the well-established practice in such jurisdictions as allow an appeal from interlocutory decrees or orders, granting injunctions and other relief, shows conclusively that the appellate court, when it has the entire case before it, will dispose of the entire case whenever it can do so, and will instruct the lower court to enter such a decree as will put an end to the controversy. We note the date of each case, as showing how long the practice has been settled.

In New York (prior to the Code) an appeal was allowable from an interlocutory decree or order, and the practice was expressly settled that on an appeal from an interlocutory order the court of appeals would determine finally between the parties, if the merits of the case were fully before it, as will be seen by reference to early New York cases.

Le Guen v. *Gouverneur*, 1 Johns. Cas. 436, (1800.) The chancellor had made an interlocutory order, after the evidence had been taken in a cause, directing an issue to a jury to try the fact of fraud. The highest court of the state, on an appeal from this interlocutory order, decided that a previous judgment at law between the parties was binding, and the bill of complaint was accordingly dismissed. The case was very elaborately argued, and the judges delivered opinions *seriatim*.

RADCLIFF, J., says, (page 499:) "I have also no doubt that this court may proceed further, if it appear that the merits are fully in its possession, and determine finally between the parties. That such is the power and frequently the practice of the house of lords in England is evident from the cases which have been cited."

KENT, J., holds, (page 508:) "It is the settled rule of the house of lords in England upon appeals always to give such a decree as the court below ought to have given. This is the great and leading maxim in their system of ap-

pellate jurisprudence, and instances are accordingly very frequent in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided fully on the merits."

See, also, LANSING, C. J., page 521. The judges referred to the house of lords cases very fully, and pointed out the idleness of sending back a case for further action by the chancellor, when the entire merits are before the court on appeal. It was accordingly ordered that the interlocutory order should be reversed, and that the bill should be dismissed.

Bush v. *Livingston*, 2 Caines, Cas. 66, (1805.) This was similarly an appeal from an interlocutory order of the chancellor after the evidence had been taken. The order was reversed, and an order entered disposing of the case. The court referred to the preceding case, and says that the court in that case directed the complainant's bill to be dismissed "on precedents from the proceedings of the house of lords of England on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, and that it will save litigation and expense, I am myself contented to be bound with the precedent which has been made." See, also, to the same effect, *Bebee* v. *Bank*, 1 Johns. 529, (1806.)

The same is the practice in the New Jersey court of equity, where an appeal lies from an interlocutory decree granting an injunction. *Newark & N. Y. R. Co.* v. *Mayor, etc.*, 23 N. J. Eq. 515, (1872.) The court points out, discussing the English and New York cases, that the appellate court will dispose of the entire controversy between the parties: "The general rule is that the appellate court will render such judgment as the inferior court, under all the circumstances, should have given."

In England this principle is so well settled that it is not discussed at all in the books, but is found to be the unquestioned practice from the earliest times. Among the early cases in the house of lords, cited by Mr. Chancellor KENT, are the following: *Governors, etc.*, v. *Swan*, 5 Brown, Parl. Cas. 429, (1760.) Upon an appeal from an interlocutory order of the chancellor, it was "ordered and adjudged that the decree complained of should be reversed, and that the respondent's bill should be dismissed." See, to the same effect, *Ellis* v. *Segrave*, 7 Brown, Parl. Cas. 331, (1760;) *Bouchier* v. *Taylor*, 4 Brown, Parl. Cas. 708, (1776.)

Similar cases on appeal from interlocutory decrees, where the house of lords reversed the decree and made an order terminating the controversy, remitting the case to the court of chancery to carry out the decree, are as follows: *White* v. *Lightburne*, 4 Brown, Parl. Cas. 181, (1722;) *Attorney General* v. *Wall*, Id. 665, (1760;) *Scribblehill* v. *Brett*, Id. 144, (1703.) Numerous other cases to the same effect can be discovered in the English books. *McCan* v. *O'Ferrall*, 8 Clark & F. 30, (1841.)

This decision of the house of lords shows what their well-established practice is. The case came up upon appeal from a complicated decree in Ireland with which the house of lords did not agree. The lord chancellor pointed out that the usual course of the house of lords was "to declare the principle on which the decree is to be founded, and to refer it back to the court to carry it into execution." But he pointed out that sometimes mistakes were made by the lower courts in complicated cases. "I think it more expedient and more calculated to save expense to the parties that this house in making its order should frame the decree in such a manner as to prevent the necessity of any further reference to the court below." Accordingly the house of lords made a very long order, declaring to what decree the complainants were entitled, and ordering that "the cause be remitted to the court of chancery of Ireland to make a decree conformable to the above declaration, and to carry these directions into effect."

The English cases quoted above were all decided long before the judicature acts, and show conclusively the well-established practice of courts of equity in cases where appeals from interlocutory decrees are allowed. This practice of the English chancery should be followed by this court. Rev. St. U. S. § 913, provides that "the forms of mesne process, and the forms and modes of proceedings in suits of equity, * * * in the circuit and district courts, shall be according to the principles, rules, and usages which belong to courts of equity, * * * except when it is otherwise provided by statute or by rules of court made in pursuance thereof." Under this statute it is well settled that the United States court will "adopt the principles, rules, and usages of the court of chancery of England." *Vattier* v. *Hinde*, 7 Pet. 253–274; *Bein* v. *Heath*, 12 How. 168–178.

And this principle is now embodied in an express rule of the supreme court of the United States, Equity rule 90. Accordingly this court, upon an appeal from an interlocutory decree granting an injunction, having all the merits of the case before it, will proceed finally to dispose of the case, and will remand the case to the circuit court with a direction to dismiss the bill of complaint if, in the opinion of the appellate court, the suit cannot be sustained. The object of the act in establishing the appellate court is to save trouble and expense to suitors, and this object is best attained by a mandate which will obviate any unnecessary proceedings in the court below.

This court in each case will instruct the court below to make the order or decree which it should have made upon the facts before it. If the appeal is from an order granting a preliminary injunction, and this court is of opinion that the validity of the patent is doubtful, or that the complainant will not be irreparably damaged by waiting until final hearing, it will direct the court below to rescind the order granting a preliminary injunction; then the case proceeds for final hearing. If the appeal is from an interlocutory decree granting an injunction, and this court is of opinion that the bill cannot be sustained, then it will direct the court below to dismiss the bill. In both cases the parties are put in the situation which they would occupy if the court below had decided in accordance with the opinion of the appellate court, and this is the plain intention of the statute.

Considerations upon the jurisdiction of this court under the statute.

We have been requested by the court to submit a short brief bearing upon the meaning of the statute in providing for an appeal from an "interlocutory order or decree granting or continuing an injunction." See section 7 of the act to establish circuit courts of appeals, above quoted.

The intention of congress in passing this section of the statute is made plain by the following considerations:

It was long ago settled that the supreme court had no jurisdiction to entertain an appeal from a decree at final hearing granting an injunction, and referring the cause to a master for an account, either in a patent cause or in other like causes in equity, for such a decree is only "interlocutory." The long, tedious, and expensive process of accounting had first to be gone through with, and the final decree, based on the master's report, entered, before an appeal could be taken. By the statutes of the United States, (Rev. St. § 692,) an appeal to the supreme court lies only from "final decrees."

"In this respect the practice of the United States chancery courts differs from the English practice; for appeals to the house of lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute. * * * But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees." *Forgay* v. *Conrad*, 6 How. 201–205.

And it has therefore been held in frequent cases that the supreme court has

no jurisdiction, under the acts of congress, to entertain an appeal from an "interlocutory order or decree." The cases are cited and summarized very fully in *Iron Co.* v. *Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32. In this case the decree granted an injunction and ordered a reference to a master for an account. The court held that the decree was not a final and appealable one. So in *Lodge* v. *Twell*, 135 U. S. 232, 10 Sup. Ct. Rep. 745, it was held that a decree setting aside a sale and appointing a receiver "was interlocutory, and not final."

In accordance with the preceding cases it has been expressly held that an appeal will not lie to the supreme court from a decree for a perpetual injunction in a patent cause, with reference to a master to take accounts, such a decree being interlocutory, and not final. See *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Railroad Co.* v. *Soutter*, Id. 510-521.

Under this statutory limitation of the jurisdiction of the supreme court, it often happens that great hardship is caused to a defendant, against whom an erroneous decree is rendered at final hearing by the circuit court, in that he is put to the useless expense of a generally prolonged accounting before a master, and is kept during all this period under an injunction, (the well-established practice being that the injunction stands until the appeal is decided.)

The Supreme Court Reports are full of cases like *Clark Thread Co.* v. *Willimantic Linen Co.*, 140 U. S. 481, 482, 11 Sup. Ct. Rep. 846. In this case the decree in favor of the patent was rendered in May, 1879. The period from that time until June 17, 1886, was consumed in "a long contest in the master's office," and in deciding the exceptions to the master's report, at the end of which time damages to the amount of over $150,000 were awarded by final decree of the circuit court. Thus a period of over seven years elapsed, during which the defendant was under injunction, and vast amounts were consumed in legal expenses. The case then went up to the supreme court, which reversed the decree of the circuit court, and ordered that the bill should be dismissed!

This is only one example of many to be found in the Supreme Court Reports of the great hardship caused by inability to take an appeal at once from the decree sustaining the patent and granting the injunction. No compensation could ever be awarded to the defendant in the above case for being unjustly deprived by injunction of the use of a valuable construction for seven years, nor could any of the large sums expended in useless fees during the accounting be recovered. This hardship has long been a matter of complaint among the members of the bar who practice in patent cases; and it was a cause of general satisfaction that congress, in section 7 of this act, had attempted, as was supposed by the bar, to remedy this hardship by allowing an appeal to be taken at once from the interlocutory decree granting the injunction. It may seem to the court that this general understanding among the members of the bar should have some weight in the matter, and upon grounds of public policy it is certainly desirable that the statute should be given this construction, if compatible with the intention of congress and the language of the statute.

We submit that there can be little doubt of the intention of congress. The evil complained of was the great delay of appeals during the accounting before the master. To interpret the statute as referring only to orders granting a preliminary injunction would be to take away the chief benefit of the statute. In the first place, preliminary injunctions are seldom asked for, now that it is well established that the court will only grant such injunction in cases where there has been a prior adjudication or acquiescence or some special equity, and where the court is reasonably free from doubt. Furthermore, in such cases, the court will often dissolve the preliminary injunction upon

the defendant's filing a proper bond. And again, the cause can be rapidly pushed to final hearing by the defendant. So that the hardship arising from the inability to appeal from an order granting preliminary injunction is slight, compared to the hardship arising from the inability to appeal from an interlocutory decree granting a perpetual injunction.

It is well settled that the court, in construing a statute, will endeavor to carry out the intention of congress, and will consider the circumstances which led to the passing of the statute. *Platt* v. *Railroad Co.*, 99 U. S. 48–64; *Kohlsaat* v. *Murphy*, 96 U. S. 153–160; *Heydenfeldt* v. *Gold & Silver Min. Co.*, 93 U. S. 634–638; *Blake* v. *Banks*, 23 Wall. 307–319; *U. S.* v. *Freeman*, 3 How. 556–565; *Wilkinson* v. *Leland*, 2 Pet. 627–662; *U. S.* v. *Wiltberger*, 5 Wheat. 76–95; *Brown* v. *Barry*, 3 Dall. 365–367.

It is therefore clear that this court should look at the hardship which this section was passed to remedy, and that the intention of congress should be carried out in construing this statute. Congress certainly intended to provide that the action of a circuit court in granting an injunction at final hearing may be reviewed by the appellate court before the long and expensive process of taking accounts before the master is completed, as is the established practice of the English court of chancery and many other equity courts.

We submit, further, that the meaning of the language of the statute is plain. The words are, "interlocutory order or decree granting or continuing an injunction." This language is to be interpreted according to its usual meaning at the time of passing the statute, and no construction can be given it rendering a part of the words meaningless. *Railroad Co.* v. *Moore*, 121 U. S. 558–572, 7 Sup. Ct. Rep. 1334; *The Abbotsford*, 98 U. S. 440–444; *Minor* v. *Bank*, 1 Pet. 46–64; *Maillard* v. *Lawrence*, 16 How. 251–261; *Platt* v. *Railroad Co.*, 99 U. S. 48–58; *Market Co.* v. *Hoffman*, 101 U. S. 112–115.

Under these settled rules of construction, we submit that there can be no doubt as to the meaning of the section here in question. The words "interlocutory order" can only refer to the order of the court granting a preliminary injunction upon affidavits. This is never properly spoken of as a decree, although some few cases may be found where the word "decree" is incorrectly used of such an order. On the other hand, the words "interlocutory decree" refer, by the well-settled usage of the courts, to the decree on the merits at final hearing, by which an injunction is granted, and the case is referred to a master for an account or other like proceedings.

If the jurisdiction of the court should be limited under this section to appeals from preliminary injunction, the words "or decree," in section 7, become not only superfluous, but also entirely incorrect.

We will *first* refer to the usage of the supreme court of the United States. The difference between the three different determinations of the court of equity in the progress of a suit, namely, "preliminary injunction," "interlocutory decree," and "final decree," is well shown in *Worden* v. *Searls*, 121 U. S. 14–19, 7 Sup. Ct. Rep. 814. This was a bill in equity upon letters patent, and the court distinguishes very clearly, as follows: "A preliminary injunction was issued and served. * * * An interlocutory decree was made, declaring that the reissue was valid, and had been infringed, and awarding a perpetual injunction, and a reference as to profits and damages. * * * On the report of the master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover," etc.

In *Lodge* v. *Twell*, above cited, where the court dismissed an appeal as not being from a final decree, it expressly held that the decree "was interlocutory and not final, even though it settled the equities of the bill."

In *Beebe* v. *Russell*, 19 How. 283–285, the circuit court had decreed that certain conveyances should be executed, and referred the case to the master. The court dismissed the appeal, holding that it was not from a final decree,

saying that no case had been decided by the supreme court "in which the distinction between final and interlocutory decree has not been regarded as it was meant to be by the legislation of congress, and as it was understood by the courts in England and this country, before congress acted upon the subject. A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision."

So, also, in *Perkins* v. *Fourniquet*, 14 How. 313–323, the court distinguishes clearly between an "interlocutory decree," referring the case to a master to take an account, and a "final decree" for a stated sum.

In order to ascertain what was the settled meaning of an "interlocutory decree granting an injunction" in patent causes, we have looked through the United States Reports as far back as 128 U. S., and we find the following patent cases in which a decree at final hearing, ordering an injunction and referring the case to a master for an accounting, is expressly spoken of as an "interlocutory decree," while the decree based on the master's report is called the "final decree." We have not looked any further, but do not doubt that the cases can be indefinitely increased. Our citations are sufficient to show the established meaning of this phrase.

In *Magowan* v. *Packing Co.*, 141 U. S. 332–337, 12 Sup. Ct. Rep. 71, the court says: "Issue being joined, proofs were taken, and the case was heard before Judge NIXON, then the district judge, who entered an interlocutory decree in favor of the plaintiff for an account of profits and damages and a perpetual injunction. * * * On the report of the master, * * * a final decree was entered."

In *McCreary* v. *Canal Co.*, 141 U. S. 459, 460, 12 Sup. Ct. Rep. 40, it is said: "Upon the hearing in the circuit court, an interlocutory decree was entered in favor of the plaintiff, finding the validity of the patent, and the infringement by the defendant, and ordering a reference to a master for an account."

In *St. Germain* v. *Brunswick*, 135 U. S. 227, 228, 10 Sup. Ct. Rep. 822, it is said: "Replication having been filed, proofs were taken, and an interlocutory decree was entered in favor of the complainant, sustaining the patent, finding that there had been infringement, and referring the case to a master."

In *Yale Lock Manuf'g Co.* v. *Berkshire Nat. Bank*, 135 U. S. 342–344, 10 Sup. Ct. Rep. 884, the court says: "After replication, proofs were taken on both sides, and the case was heard. * * * An interlocutory decree was entered, adjudging reissue No. 8,550 to be valid, that the defendants had infringed those claims, and ordering a reference to a master to take an account."

In *Cornely* v. *Marckwald*, 131 U. S. 159, 160, 9 Sup. Ct. Rep. 744, the court says: "There was an interlocutory decree for the plaintiff, establishing the validity of the patent and its infringement, and ordering a reference to a master to take an account of profits and damages."

In *Collins Co.* v. *Coes*, 130 U. S. 56–64, 9 Sup. Ct. Rep. 514, it is said: "The circuit court originally granted an interlocutory decree in favor of the plaintiff, in accordance with the opinion of Judge LOWELL. * * * But a rehearing was afterwards moved for and granted, the interlocutory decree vacated, and the bill dismissed."

In *Hurlbut* v. *Schillinger*, 130 U. S. 456–458, 9 Sup. Ct. Rep. 584, the court says: "Issue having been joined, proofs were taken on both sides, and * * * the court entered an interlocutory decree, adjudging that the reissued patent was valid, that the defendant had infringed it. * * * The decree also ordered a reference to a master to take an account of the profits and damages."

In *McCormick* v. *Graham's Adm'r*, 129 U. S. 1, 2, 9 Sup. Ct. Rep. 213, the court says: "After issue joined, proofs were taken on both sides, and * * * the court made an interlocutory decree, holding the patent to be

valid as regards its first and second claims, decreeing that the defendant had infringed those claims, * * * and referring it to a master to take an account of profits and damages."

In *Brewing Co.* v. *Gottfried*, 128 U. S. 158–163, 9 Sup. Ct. Rep. 83, it is said: "An interlocutory decree was entered, holding the patent to be valid as to claims one and two, and to have been infringed as to those claims, and referring it to a master to take an account of profits and damages."

The distinction is also clearly pointed out in the case of *Potter* v. *Mack*, 3 Fish. Pat. Cas. 428, in a decision by Mr. Justice SWAYNE, of the supreme court. This case is a leading case upon the proposition that an injunction will not be suspended during the proceedings before the master. Here a decree had been made for a perpetual injunction, and directing an accounting. An application was made that the injunction should be suspended until final decree, and was refused. The court says: "He cannot appeal from the decree, as it at present stands, because, although the decision is final as to the merits of the case, it is in form an interlocutory decree only, and the rule established by the supreme court is that an appeal can be taken only from a final decree. * * * An interlocutory decree was entered, and notice of the injunction has been duly given to the defendant. Now, we are asked to suspend the operation of this injunction until a final decree is made."

Second. We would refer to the established meaning of these words, as settled by the text-books.

In Walk. Pat. §§ 644–649, the distinction is fully drawn: "An interlocutory decree in an equity patent case is a decree which adjudges that the patent sued upon is valid, and that the defendant has infringed it, and that a master in chancery take and report an account of the profits, * * * and of the damages, * * * and sometimes that the defendant be permanently enjoined from further infringement. No appeal from such a decree lies to the supreme court. Until a final decree has been made for a specific money recovery, in pursuance of an account of profits and damages, the case is within the control of the court."

The same text-book shows that the grant of a preliminary injunction is not spoken of as a "decree" at all. Walk. Pat. §§ 658–662. See, also, section 698: "A refusal of a permanent injunction will generally follow from the fact that the patent has expired at the time of the interlocutory decree."

Rob. Pat. §§ 1131, 1132, is equally clear on this subject. "An interlocutory decree is a decree in favor of the plaintiff upon the issues created by the bill and answer, and referring the cause to a master in chancery for an account of profits and an award of damages. * * * A final decree is a decree which terminates the litigation, either by awarding to the plaintiff the profits, damages, and other permanent relief to which he is entitled, or by deciding the cause upon its merits in favor of the defendant. The final decree for the plaintiff cannot be granted where an account is necessary until the account has been taken by the master, and reported to and accepted by the court."

The above citations seem to show conclusively what is the established meaning of the words "interlocutory decree." In the case at bar the court certainly entered a decree, from which an appeal was taken; and this decree certainly granted an injunction. There can be no dispute about that. And, furthermore, it was an "interlocutory decree," as is expressly settled, not only by the cases above cited, but by the cases of *Barnard* v. *Gibson*, 7 How. 650, and *Humiston* v. *Stainthorp*, 2 Wall. 106, in which it was expressly held that a decree in a patent cause, which was absolutely indistinguishable from the decree here appealed from, was not a final decree. In both cases the court said: "The decree is not final."

As the decree in the case at bar, therefore, was an "interlocutory decree,"

and "granted an injunction," it is a case which comes within the express language of section 7 of the statute, and also within the intention of congress, as above set forth.

As to the jurisdiction of the court in this particular case, we submit that there can be no question. For certainly the circuit court has entered a decree; if this decree is an "interlocutory decree," the court plainly has jurisdiction under section 7 of the statute, as the decree grants an injunction. If, on the other hand, this decree is a "final decree," then the court has, of course, jurisdiction under section 6 of the act, which makes this court an appellate court, with jurisdiction "to review by appeal or by writ of error final decisions of the district court and the existing circuit courts." The decree of the circuit court in this case must be of either one kind or the other, for there are no other kinds of decrees known to the law. We have pointed out above that in patent causes these are the only kinds of decrees, and the fact is also established by the best text-books upon general equity practice.

In Daniell's Ch. Pr. (5th Ed.) 986, it is said: "A decree is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience. It is either interlocutory or final. An interlocutory decree is when the consideration of the principal question to be determined, or the further consideration of the cause generally, is reserved until a future hearing."

This text-book, on pages 1671–1673, further makes it plain that the granting by the court of a preliminary injunction upon affidavits is not a "decree" at all, (as we pointed out above,) but is "an order for an injunction." It is said, on page 1679: "An injunction which has been granted on an interlocutory application is superseded by the decree made at the hearing of the cause. The injunction may be permanently continued, or made perpetual, by the decree."

Story, Eq. Pl. (10th Ed.) § 408*a*, also distinguishes between final and interlocutory decrees. Seton, Decrees, (4th Ed.) p. 2, which is the leading work upon this subject, says: "Decrees are either final or interlocutory." So, also, in Fost. Fed. Pr. § 318, it is said: "Decrees are either final or interlocutory."

Thus *quacunque via data*, the court has jurisdiction to entertain this appeal. It appears from the record, page B, that the circuit court entered a "decree for perpetual injunction, and for an accounting," from which decree the defendant appealed. If the decree was final, the court plainly has jurisdiction, under section 6 of the statute. If the decree was interlocutory, it has jurisdiction, under section 7. We believe, however, that, upon consideration of the authorities above cited, this court will have no doubt that this cause is one of those which was expressly intended by congress to be covered by section 7 of the statute.

NOTE. We have not searched the Federal Reporter for the use of the words "interlocutory decree," because of the labor involved. We will call attention to *Saddle Co.* v. *Smith*, 38 Fed. Rep. 414, 416, where Judge SHIPMAN says: "Let there be an interlocutory decree for an injunction and an accounting." Many other like cases could doubtless be found.

Payson E. Tucker and *Charles F. Perkins*, for appellee.

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

ALDRICH, District Judge. The opinion of this court, through COLT, circuit judge, was rendered upon the general merits involved, February

2, 1892, and the case is reported in 5 U. S. App. 1, 48 Fed. Rep. 910, 1 C. C. A. 144, (1st Circuit) and is now before us upon a motion for rehearing, and a petition that the questions of merit be certified to the supreme court. Upon reargument of the foregoing motion, the question is raised as to the right of this court to entertain an appeal at the stage of the proceeding reached in this cause; and, in the event that jurisdiction exists, the further question is presented whether the mandate of this court should direct a final disposition of the cause in the court below.

After considering the briefs and rearguments, we find no reason for doubting the correctness of the conclusion stated in the former opinion as to the merits, and the motion for a rehearing and the petition for certification to the supreme court are denied, and we do not feel called upon to add anything to the reasons already stated upon this branch of the case.

The questions of jurisdiction and scope of mandate, however, not having been raised on the former arguments, or considered in the opinion, seem not only to demand our attention, but that we should state our reasons at some length.

Section 7, of the act of March 3, 1891, creating the circuit court of appeals, provides:

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals;" and, in order that such right of appeal should be the more highly remedial in favor of the party aggrieved, it was further provided, in the same section, that "it shall take precedence in the appellate court."[1]

Of course, in our endeavor to ascertain the meaning of this section of the statute, we must bear in mind that, prior to its enactment, an appeal from an interlocutory injunction order was unknown in the federal courts. Having in view, therefore, this rule of law and the plain language of the statute; considering also that the purpose of the lawmaker, plainly expressed, was to give a right of appeal, not conferred by the general provisions of the statute as to appeals from final decision,—it seems to us evident that it was intended to remove the restriction, and extend the right to all that class of interlocutory orders or decrees which interfere with the possession of property, or operate in restraint of a party's business.

Since Sir William Blackstone's day, at least, decrees and orders in equity proceedings have only been subject to one division, and have been classed, generally, either as final or interlocutory decrees or orders; and an "interlocutory decree" has been repeatedly defined as any decree made before final decision, and for the purpose of ascertaining matter

[1] C. C. A. vii.

of law or fact preparatory to a final decree. Blackstone says, (volume 2, p. 452:) "The chancellor's decree is either interlocutory or final:" and in Harrison's Practice in Chancery, (volume 1, p. 622,) it is said that "a decree is either final or interlocutory." Again, Barb. Ch. Pr. 326:

"Decrees are of two kinds,—interlocutory and final. An interlocutory decree is properly a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a final decree."

In Seton on Decrees, (page 1,) it is said:

"Decrees are either final or interlocutory. If the decree determined all the questions in issue between the parties, and did not adjourn any matter for further consideration, it was called a 'final decree.' In strictness, however, a decree was said to be 'interlocutory' until it was signed and enrolled. For. Rom. 183. But ordinarily it has been termed 'interlocutory' when it was pronounced for the purpose of ascertaining matter of law or of fact previously to a final decree."

It is quite clear that this single division of decrees into two classes, and two only, interlocutory and final, has been generally accepted by lawyers and judges in this country and England. 1 Newl. Ch. Pr. 322; Seton, Decrees, 2; Kerr, Inj. 11, 12; High, Inj. § 1694; Adams, Eq. 375; Daniell, Ch. Pr. 986; Fost. Fed. Pr. § 318; Walk. Pat. §§ 644, 649; Rob. Pat. §§ 1131, 1132; 2 Madd. Ch. 462; *Kane* v. *Whittick*, 8 Wend. 224; *Jenkins* v. *Wild*, 14 Wend. 539; *Forgay* v. *Conrad*, 6 How. 201; *Barnard* v. *Gibson*, 7 How. 650; *Perkins* v. *Fourniquet*, 14 How. 313; *Beebe* v. *Russell*, 19 How. 283; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Railroad Co.* v. *Soutter*, 2 Wall. 510, 521; *Worden* v. *Searls*, 121 U. S. 14, 7 Sup. Ct. Rep. 814; *Brewing Co.* v. *Gottfried*, 128 U. S. 158, 163, 9 Sup. Ct. Rep. 83; *McCormick* v. *Graham's Adm'r*, 129 U. S. 1, 2, 9 Sup. Ct. Rep. 213; *Hurlbut* v. *Schillinger*, 130 U. S. 456, 458, 9 Sup. Ct. Rep. 584; *Collins Co.* v. *Coes*, 130 U. S. 56, 64, 9 Sup. Ct. Rep. 514; *Cornely* v. *Marckwald*, 131 U. S. 159, 160, 9 Sup. Ct. Rep. 744; *Iron Co.* v. *Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32; *Lodge* v. *Twell*, 135 U. S. 232, 10 Sup. Ct. Rep. 745; *St. Germain* v. *Brunswick*, 135 U. S. 227, 228, 10 Sup. Ct. Rep. 822; *Yale Lock Manuf'g Co.* v. *Berkshire Nat. Bank*, 135 U. S. 342, 344, 10 Sup. Ct. Rep. 884; *Magowan* v. *Packing Co.*, 141 U. S. 333, 337, 12 Sup. Ct. Rep. 71; *McCreary* v. *Canal Co.*, 141 U. S. 459, 460, 12 Sup. Ct. Rep. 40; *Saddle Co.* v. *Smith*, 38 Fed. Rep. 414, 416; *Potter* v. *Mack*, 3 Fish. Pat. Cas. 428; *McVickar* v. *Wolcott*, 4 Johns. 510; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Morgan* v. *Rose*, 22 N. J. Eq. 583, 593.

It will be observed, from an examination of the cases in the supreme court of the United States, that a decree in patent cases, declaring the patent in question valid, and that it has been infringed, and for an injunction and an accounting, has uniformly been referred to as an interlocutory decree, and the cases are numerous, like *Barnard* v. *Gibson*, *Forgay* v. *Conrad*, *Humiston* v. *Stainthorp*, *Railroad Co.* v. *Soutter*, *Beebe* v. *Russell*, and *Iron Co.* v. *Martin*, *supra*, where, upon an appeal from a decree determining the general property right, granting an injunction,

and an order for an accounting before a master, it has been held that the decree was not final or appealable.

It is true, that the cases in the supreme court are based upon a different statute, and in unmistakable language deny the right of appeal from interlocutory decrees. But they are for that reason none the less significant, as showing what has been understood as the line between interlocutory and final decrees. We must assume that congress used the term "interlocutory order or decree," in this connection, in its common and well-understood sense, and as intending the line of distinction accepted and interpreted by the federal courts; and it follows that all injunction orders and decrees which were interlocutory, and not final, within the meaning of the old statute, and for that reason not appealable, are interlocutory under the new statute, and therefore, by the same logic and upon the same reasoning, are appealable.

We think the term "interlocutory order or decree" was used in its broadest sense, and that the purpose of congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory, or final.

As already said, we think the term was used in its broadest sense, and, in our opinion, full scope should be given to this provision of the statute, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal. It is plain that the policy intended to be emphasized by this statutory exception to the general provision of the statute and the rule of law, limiting the right of appeal to final decision, is this: that, as injunction orders deprive parties of the possession and control of property and business, and, in case of error, work irreparable mischief and great injustice, the party upon whom the order operates should have an early opportunity to have the record examined by the appellate court, and, if error is discovered, to have it corrected without the delay necessarily incident to litigation in its various stages before reaching final judgment.

As the statute in question undertakes to introduce a new feature in federal procedure, by conferring the right of appeal from certain orders and decrees before final decision, we have approached a consideration of its scope and effect with caution; and, in view of the doubt which always comes from entering new fields, it is very gratifying to learn that the circuit court of appeals in the fifth circuit has, in a similar case, adopted the same construction in a forcible opinion recently rendered by PARDEE, circuit judge, in *Jones Co. v. Munger, etc., Co.*, reported 50 Fed. Rep. 785, 1 C. C. A. 668.

The remaining question, however, is more troublesome, especially in view of the conclusion reached by the same court, in the same case, that the mandate to the court below should go to the injunction order merely. Although the report of the case fails to show how fully the question was considered upon argument, and the opinion presents no discussion thereof, we have given due consideration to its weight as an authority,

but still feel bound to announce a different conclusion upon the same question.

At the outset, we must notice that there are many instances where cases of this character have been before the supreme court, upon a full record, in which complete relief has not been granted. But it must be observed that the failure to afford relief resulted from the limitation in the older statute, which conferred the right of appeal from final decision only,—the court, under such statute, having no appellate jurisdiction to review and furnish either partial or full relief until after final decision. The failure to make final disposition did not result from a lack of power in a court having appellate jurisdiction to afford complete relief, but from a total lack of jurisdiction, at such a stage of the proceeding, to entertain the appeal, or to afford any relief whatever. The former decisions and practice in the federal courts, therefore, by reason of this distinction, have no force whatever upon the question whether a court having statutory appellate jurisdiction to review at interlocutory stages, and having the complete record of a full hearing upon the general merits, may proceed to correct the fundamental error, and finally dispose of the case in the manner in which it should have been disposed of in the court below.

No practice having been adopted by the supreme court upon this subject, for the reason stated, that heretofore the statutory right of appeal did not exist, we get no aid from the reported cases in that court. We must assume that congress, in furnishing equitable remedy by appeal, had reference to the equity system as understood and practiced in England, and as adopted and applied to our own institutions; and, in determining the power and the duty which result from this legislation, we must look to the English system, usage, and practice, and to the decisions of our state courts, where a similar right of appeal from such decrees has been conferred by statute. It is, of course, well understood that a court of equity is to decide on the law and fact, (*Le Guen* v. *Gouverneur*, 1 Johns. Cas. 500, 506;) and that an appeal in equity is an appeal upon the law and fact involved in the cause, (Adams, Eq. 375;) and that, "in absence of any restrictive clauses, every appellate tribunal is clothed with all the powers of the tribunal appealed from, and is bound to exercise them upon the same principles," (*Briggs' Petition*, 29 N. H. 553;) and "ordinarily, from the nature of judgments, the decision of an appellate tribunal must have as great force, at least, as the judgment of the inferior tribunal upon the same matter would have had if no appeal had been taken," (*Blake* v. *Orford*, 64 N. H. 302, 10 Atl. Rep. 117.)

Unquestionably the circuit court upon the hearing therein might have found the facts against the complainant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the

injunction, permit the accounting to go on, and, after the useless expense and annoyance incident to such an investigation, upon re-examition of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? In our view, the accounting could in no way aid the final execution of the right already ascertained by this court, and under such circumstances would be worse than idle; and a rule which would permit such circuity and circumlocution is unnecessary, and would not be useful to either the parties or the court. Now, this case must be distinguished from the class of cases where the injunction is preliminary, and granted upon the bill, or where there is only a partial hearing upon the merits, or where the record is incomplete, or evidence is excluded which should have been considered. We are not called upon to decide as to the scope of the mandate under such circumstances, but it is probable that no one would contend that, as an invariable rule, it should go to a final disposition of the cause upon its merits. *Deas* v. *Thorne*, 3 Johns. 543; *Huntington* v. *Nicoll*, Id. 566.

It is quite probable, indeed quite clear, that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate court interferes reluctantly with injunctions granted *in limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause. In the case under consideration, the hearing in the circuit court upon the merits, as to the validity and the infringement of the patent, was full and complete, and the general property right was determined, so far as it could be done by that court; and the perpetual injunction, the order to account, and the appointment of the special master were based upon such determination of the property right. The record before us is complete. Everything is here for our consideration which was before the court below. We must go to the full merits, as shown by the record, in order to determine whether the interlocutory decree for a perpetual injunction is founded in error, and, if we determine the property right adversely to the complainant, the injunction should be dissolved; and no sufficient reason has been suggested why the accounting—to which the complainant is not entitled, and which would be an invasion of a right, and therefore inequitable and improper, under our view of the case—should proceed.

It is not necessary for purposes of analogy to enlarge upon the well-understood fundamental truth expressed in the constitutions, statutes, and decisions of the various states, that the system of common law and equity jurisprudence of England prevail in this country, so far as the same are not repugnant to our institutions, for the reason that rule 90 of the supreme court, (adopted by this court, rule 8,) regulating the practice of the courts of equity of the United States, provides, in effect, that, in the absence of an express rule or decision, the practice shall be

regulated by the practice of the high court of chancery in England, so far as the same may be reasonably applied, not as positive rules, but as furnishing just analogies. We do not refer to this as furnishing an absolute rule for the determination of rights, but as indicating a recognition of the system of practice ordinarily controlling equity procedure in the federal courts. It may still further be observed that, as early as 1818, the supreme court in determining a question of procedure, in *Robinson* v. *Campbell*, 3 Wheat., said, (page 222:)

"The court, therefore, think that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, * * * according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of those principles."

And in 1851, in *Pennsylvania* v. *Bridge Co.*, 13 How. 518, 563, it is said:

"The rules of the high court of chancery of England have been adopted by the courts of the United States. * * * The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

See, also, Rev. St. U. S. § 913; *Vattier* v. *Hinde*, 7 Pet. 252, 274; *Bein* v. *Heath*, 12 How. 168, 178. And to the same effect in the state courts. *Newark & N. Y. R. Co.* v. *Mayor, etc.*, 23 N. J. Eq. 515, 517; *State* v. *Rollins*, 8 N. H. 550; *Pierce* v. *State*, 13 N. H. 536; *Connecticut River Lumber Co.* v. *Olcott Falls Co.*, 65 N. H. 290, 21 Atl. Rep. 1090; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436, 508.

In the case last referred to Chancellor KENT says, (page 508:)

"Our system of jurisprudence is borrowed from the English system, and in all its great outlines, as well as in its subordinate parts, is happily modeled after that admirable monument of the experience and wisdom of ages."

See, also, "Note by the Court" in *Thomson* v. *Wooster*, 114 U. S. 112, 5 Sup. Ct. Rep. 788.

Of course, it is understood that this adoption is subject to the limitation that it must be in keeping with the principles of our institutions, and subject to the acts of congress, limiting or enlarging the same, as, for instance, the old statute limiting the right of appeal, contrary to the English system, to appeals from final decrees. But now that this limitation is removed, and the right of appeal from interlocutory injunction orders and decrees has been created by statute as in England, without any restriction as to the manner in which equity and justice shall be administered thereunder, it only remains to inquire what the chancery practice of England has been in this respect, and whether the same may reasonably be applied as consistent with our institutions, and as a matter of convenience and safety in equity procedure in this jurisdiction.

In England, any person aggrieved by a decree or order of the court of chancery is entitled as a matter of right to appeal to the house of lords, (2 Daniell, Ch. Pr., 4th Ed., 1471;) and, in practice, this right extends to interlocutory decrees, (Id. 1492; *Forgay* v. *Conrad*, 6 How.

201, 205;) and later (14 & 15 Vict. c. 68, § 10) this right was extended to decisions, decrees, and orders of the court of appeals. Mr. Daniell, speaking of the right of appeal from interlocutory decrees, says, (page 1492, Id.:)

"Appeals from courts of equity by petition differ from appeals by writ of error from the judgments of the courts of law, which will only lie where the judgment is final. The reason for this distinction is stated to be that courts of equity often decide the merits of a case in intermediate orders, and the permitting of an appeal in the early stage of the proceedings frequently saves the expense of further prosecuting the suit."

See, also, 2 Smith, Ch. Pr. (2d Ed.) p. 40; *McNeill* v. *Cahill*, 2 Bligh, (N. S.) 316.

Indeed, it seems to have been the practice, from an early period, in the house of lords, to direct a final disposition of causes before it with a full record, upon appeal from interlocutory orders and decrees based upon a hearing upon the merits below, whenever it was found that there was no equity in the complainant's cause; and the action of the appellate court in this respect was not confined to causes in which it concurred with the chancellor from whom the appeal was taken, but extended to instances where the findings were reversed upon an examination of the record. *Bouchier* v. *Taylor*, 4 Brown, Parl. Cas. 708, (1776;) *Governors, etc.*, v. *Swan*, 5 Brown, Parl. Cas. 429, (1760;) *Ellis* v. *Segrave*, 7 Brown, Parl. Cas. 331; *White* v. *Lightburne*, 4 Brown, Parl. Cas. 181; *Scribblehill* v. *Brett*, Id. 144; *McCan* v. *O'Ferrall*, 8 Clark & F. 30; *Rous* v. *Barker*, 4 Brown, Parl. Cas. 660. The case of *McCan* v. *O'Ferrall*, *supra*, was before the house of lords in 1840, and, although in that case the matters involved were not finally disposed of by decree, the lord chancellor states the rule, with the reasons for it, (page 66,) saying:

"Now, my lords, the usual course of proceeding in this house, in arranging the minutes of the decree, has been to declare the principles upon which the decree is to be founded. * * * That, however, has been found to lead, sometimes, to repetition of appeals. * * * Where, therefore, it is possible, I think it more expedient, and more calculated to save expense to the parties, that this house, in making its order, should frame the decree in such a manner as to prevent the necessity of any further reference to the court below."

This practice is by no means new in the equity jurisprudence of our own country. In a very early case in New York, involving interests of great magnitude,—*Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436, (1800,)—and at a period when Chancellor KENT was a member of the court of errors, the question was under consideration as to the measure of relief to be afforded upon an appeal from an interlocutory order directing the trial of an issue at law. The appellate court determined that the complainant had no equity, and after much argument and full consideration, which involved a review of the English cases and the practice of the house of lords, proceeded to final judgment, and dismissed the bill. The question was one of new impression in the American courts, and three judges rendered opinions in the cause; KENT, J., in the course of a luminous opinion, (page 508,) saying:

"It is the settled rule of the house of lords in England, upon appeals, always to give such a decree as the court below ought to have given. This is the great and leading maxim in their system of appellate jurisprudence, and instances are, accordingly, very frequent, in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided fully on the merits."

Again he says, (page 508:)

"Their power on appeals is exercised with great latitude in dismissing the bill, or modeling the relief, or granting it conditionally, as may best answer the ends of justice and the exigencies of the case."

Again, (page 509:)

"Possessing the authority to decide finally, I think we ought to exercise it in this instance. * * * All the proofs are before us. * * * The cause is as ripe here as it was in the court below, for ultimate decision; and, if we are persuaded in our own minds that the facts before us can never support the allegations of fraud, we ought to say so, and put an end to the contention."

And in the same line and to the same effect RADCLIFF, J., says, (page 499:)

"I have also no doubt that this court may proceed further, if it appear that the merits are fully in its possession, and determine finally between the parties. That such is the power, and frequently the practice, of the house of lords in England, is evident from the cases which have been cited. * * * On similar appeals, they affirm, reverse, or alter the order for an issue, and sometimes proceed to dismiss the bill, or otherwise decree on the merits. The power of this court is the same, in this respect. I can see nothing in our constitution or laws to restrain it. * * * In this case, the propriety of making a final decree arises out of the appeal itself, which brings before us the whole merits of the cause."

Again, (page 500:)

"The power appears to me essential to a court of appeal in the last resort, and I have no doubt that it is vested here."

The authority last referred to is of unusual value, both by reason of its involving the first American discussion of the question, and from the great learning of the court rendering the opinion, and this, together with the fact that a full report of the case (Johns. Cas. 1800) is not easily accessible, would seem to justify the somewhat extensive quotations. Five years later the same court, through SPENCER, J., in *Bush* v. *Livingston*, 2 Caines, Cas. 66, in making a final decision of the cause, said, (page 85:)

"There remains only one point to be considered; that is, whether the court will finally decide the cause. In the case of *Gouverneur & Kemble* v. *Le Guen*, this court, on an appeal from the order of the chancellor, directing an issue, finally decided the cause, and directed the complainants' bill to be dismissed. It did so on precedents from the proceedings of the house of lords in England, on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, that it will save litigation and expense, I am myself contented to be bound by the precedent which has been made." See, also, *Beebe* v. *Bank*, 1 Johns. 529.

In 1822 the doctrine of *Le Guen* v. *Gouverneur* was referred to with apparent approval in *Dale* v. *Roosevelt*, 6 Johns. Ch. 255, 257, and, so far as known, the practice obtained in New York until the adoption of the Code; and the fact that a different practice has prevailed since the abridgment of the right of appeal, as said in *Newark & N. Y. R. Co.* v. *Mayor, etc.*, 23 N. J. Eq. 519, is aside from the purpose. In *Terhune* v. *Colton*, 12 N. J. Eq. 312, although the precise question under consideration was not involved, ELMER, J., (page 318,) speaks of an interlocutory order which involved the merits of the case; and in 1872 the precise questions which we are now considering came before the New Jersey court of errors and appeals in the case of *Newark & N. Y. R. Co.* v. *Mayor, etc.*, 23 N. J. Eq. 515.

The New Jersey statute provided that "all persons aggrieved by any order or decree of the court of chancery may appeal from the same or any part thereof;" and the case last referred to involved both the right of appeal from an interlocutory order, and the power of the court to conclude the cause upon its merits. These questions received careful consideration by the chief justice, who announced the opinion of the court, not only sustaining the right of appeal, but, after reviewing the English and New York cases, said, (page 521:) "In view of these authorities, I can entertain no uncertain opinion with regard to the power of this court to deal with the present case on its merits." Again: "It seems to me that this court should pass upon the question as to the equity of the bill," etc.

Under the authorities, and the equity practice to which we have referred, and upon principle, it seems to us clear that, while the appellate court is not bound by an inflexible rule so to do, it may in its discretion, and should, when equity so requires, make full direction as to the manner in which the cause shall be disposed of below. No special or peculiar conditions have been suggested as existing in this case, as a reason why the mandate should not be as broad as the decree in the circuit court; but, on the contrary, as it seems to us, there are strong equitable reasons why an accounting in a patent case, which is incident to and based upon a finding and a decree which upon the record appears to the appellate court to be erroneous, should not proceed; and it is our conclusion, as the full record is before us, upon appeal from an injunction granted by an interlocutory decree, after a full hearing, and a finding which undertakes to finally dispose of the property right involved, that we should direct a final disposition of the cause in accordance with the view which we hold upon the substantial merits. It therefore follows that the findings of the circuit court are reversed, the decree for an injunction and for an accounting is vacated, and it is ordered that a mandate issue accordingly, and with further direction that the bill be dismissed.

NATIONAL FOUNDRY & PIPE WORKS, Limited, *v.* OCONTO WATER CO. *et al.*

(*Circuit Court, E. D. Wisconsin.* October 10, 1892.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—FRANCHISES.
   The charter of the city of Oconto conferred the powers belonging to municipal corporations at common law, and contained the "general welfare" clause usual in city charters, (Laws Wis. 1882, c. 56.) The general law conferring on cities the power to legislate upon the construction and operation of waterworks had not been adopted by the city, so as to derive any powers therefrom. *Held*, that the city had no power to confer a franchise for owning and operating waterworks, and for other things collateral thereto.
2. CORPORATIONS—BONDS—VALIDITY—WHEN "ISSUED."
   A water company put forth bonds of the par value of $125,000, depositing $25,000 of them with a trust company under a deed of trust, and the other $100,000 in trust as collateral for an advance of $40,000. Thereafter advances of $27,000 were contracted for, and in part made. *Held*, that the bonds, although pledged and not sold, were "issued," within the meaning of Rev. St. Wis. § 1753, which declares void any bonds issued by a corporation, except for money actually received, equal to 75 per cent. of their par value; and the same were not enforceable in the hands of the pledgee.

In Equity. Bill by the National Foundry & Pipe Works, Limited, against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb, and others. On motion for receiver and injunction. Granted.

W. D. Van Dyke and *Geo. H. Noyes*, for complainant.

W. H. Webster, for defendants.

JENKINS, District Judge. The conceded facts upon which the present application for a receiver and for an injunction are based, so far as now necessary to state them, are these: The complainant on the 2d day of January, 1892, recovered judgment in this court in an action at law against the Oconto Water Company for $24,250.04 damages and costs, and, upon return of execution *nulla bona*, filed this bill against the judgment debtor and others to subject its property to the payment of the judgment. The Oconto Water Company was incorporated under the Revised Statutes of Wisconsin, on the 8th day of July, 1890, for the purpose of constructing and operating a system of waterworks within the city of Oconto, and of supplying the city and its inhabitants water for protection against fires, and for domestic, manufacturing, and other purposes. On the 9th day of July, 1890, the city of Oconto adopted an ordinance whereby it was ordained "that the Oconto Water Company, its successors and assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain, and operate waterworks in the city of Oconto; to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes, bridges, or public grounds of the city, as now or may hereafter be laid out; to acquire and hold, as by law authorized, any and all real estate, easement, and water rights necessary to that end and purpose, with all necessary and proper buildings, wells, conduits, or other means of obtaining water supply, with all necessary machinery and attachments thereto, to supply the city and the inhabitants thereof with good and