

SHIRAS, Circuit Justice. This is a motion asking us to certify to the supreme court the question whether this court has jurisdiction to hear and determine the cause. Upon a former occasion we felt constrained to refrain from passing on the merits of the case while it was pending on an appeal to that court. 76 Fed. 401. Nor do we now perceive that any useful result would be promoted by granting the present motion. Until the supreme court shall have determined the questions there pending, on the appeal and on the motion to dismiss the appeal, this court thinks it would not be proper to deal with the case on its merits, and it may be that the action of the supreme court may relieve this court from any further duty in the case.

NORTH BLOOMFIELD GRAVEL MIN. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1897.)

CIRCUIT COURT OF APPEALS—JURISDICTION—ORIGINAL ORDERS.

A circuit court having ordered an injunction to issue, an appeal was taken, and thereupon it directed that the injunction should not issue until further order. Application was then made to the circuit court of appeals for an original order directing the court to vacate this latter order. *Held*, that the appellate court could give no such directions, as its jurisdiction is only appellate, and it can act upon the court below only by mandate.

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

C. W. Cross, for appellant.
Samuel Knight, Asst. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge (orally). In the case of North Bloomfield Gravel Mining Company v. U. S., an application was made to this court to direct that the court below vacate an order that had been made suspending the operation of an order of injunction. The lower court, in reaching its conclusion, ordered an injunction to issue. 81 Fed. 243. Upon an appeal being taken, it directed that the injunction should not issue until the further order of the court. On appeal to this court an application is made for an original order. We think we have no jurisdiction to issue an order concerning any matter pending in the court below. That court made an order denying the injunction. An appeal might have been taken to this court from that order. On final hearing of this case the matter can be reviewed, but in the meantime we see no way by which the action of the circuit court can be directed from this court. We can issue no injunction from this court, and can only act on the lower court by a mandate. Our jurisdiction is appellate. The motion will be denied.

BAKER v. WALTER BAKER & CO., Limited.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1897.)
No. 245.

APPEALABLE DECREES—REFUSAL TO DISSOLVE INJUNCTION.

When the circuit court, after final hearing, has made an interlocutory order for a perpetual injunction, it has concluded the matter so far as it is concerned; and, if the defendant fail to appeal within the 30 days allowed by the statute, his only remedy is by appeal after final decree. He cannot thereafter move the court to dissolve the injunction, and then take an appeal from its order denying his motion.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

This was a suit in equity by Walter Baker & Co., Limited, against W. H. Baker, for infringement of a trade-mark. The circuit court, after a final hearing, granted a perpetual injunction. 77 Fed. 181. The present appeal is taken by the defendant from an order refusing to modify the decree in certain respects, and also refusing to dissolve the injunction.

W. L. Putnam and George G. Grattan, for the motion.

R. T. Barton, opposed.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case is here on appeal from the circuit court of the United States for the Western district of Virginia. The appellees now move to dismiss the appeal on the ground that this court is without jurisdiction to entertain it. The cause in which the appeal is taken was instituted for the infringement of a trade-mark. The pleadings having been completed, and all the evidence closed, the case came to a hearing on the merits; whereupon the court below, on the 11th of September, 1896, ordered an injunction to issue, perpetually restraining the defendant, his servants and agents, from using the trade-mark in controversy. In the decretal order the court reserves for the present the question of directing an account of profits or damages. No appeal was taken from this decree by the defendant. It appears from the record that there was also pending in the circuit court of the United States for the Southern district of New York another suit involving the same question brought by the same complainants, Walter Baker & Co., Limited, against James Elwood Sanders, who was the agent of the defendant in the Virginia case. This cause having been carried by an appeal to the circuit court of appeals of the Second circuit, that court, on the 29th of April, 1897, modified the decree of the court below, and entered a decree in effect the same as that entered in the Western district of Virginia, but differing somewhat in detail. Thereupon the defendant in the last-named case filed his petition in the circuit court of the United States for the Western district of Virginia, praying that the decree of the 11th of September, 1896, be modified and reheard in certain particulars, and for a decision of the question of an account of profits