Case No. 4,731.

FENTON v. COLLERD.
COLLERD v. FENTON et al.

{8 Ben. 27;[1] 11 N. B. R. 535.}

District Court, S. D. New York. Feb., 1875.

PARTIES—WITHDRAWING APPEARANCE.

1. A suit in equity was brought by an assignee in bankruptcy. The assignee absconded. Defendant moved to dismiss the bill. In a cross suit brought against the assignee and others, a motion was made to withdraw the appearance of the assignee, and that other defendants, against whom an order had been entered taking the bill pro confesso, might have leave to answer. It appeared that a co-assignee had been appointed, but had not been made a party to the suit: *Held,* that the motion to dismiss could not be entertained, nor any further proceedings had in the first suit until proceedings had been taken, on notice to the co-assignee, to bring him in and compel him to elect whether he would be made a party to the suit.
2. As the assignee was personally served in the suit, his appearance could not be withdrawn.
3. The order taking the cross-bill as confessed must be vacated; but, before that suit could proceed, the co-assignee must be made a party.

These were cross actions, the first by {John B. J.} Fenton, as assignee in bankruptcy of Daniel G. Brown, to set aside a chattel mortgage held by the defendant {Abraham} Collerd, which was commenced in December, 1873; and the other by Collerd, seeking, among other things, to set aside the bankruptcy proceedings as fraudulent, which was commenced in March, 1874, and in which an order had been entered taking the bill pro confesso. In May, 1874, Fenton absconded; a motion was now made by the defendant in the first suit to dismiss the bill, or that the complainant give security for costs, and a motion was made in the second suit, that three of the defendants might have leave to answer and that the appearance for Fenton be withdrawn. It appeared on the motion that a co-assignee with Fenton had been appointed but had not been made a party to either action.

BLATCHFORD, District Judge. As to the motion to dismiss the bill and proceedings in the first suit, or, if that motion be not granted, then that the plaintiff give security for the costs and disbursements of that suit, I should not deem it proper to grant either motion, on the facts shown, even if the suit were in proper shape for such a motion to be entertained. But, as it appears that there is a co-assignee appointed with Fenton, and as Fenton has absconded, it is not proper to entertain the motion, or to proceed further in the suit until proper proceedings are taken by the defendant, on notice to the co-assignee, to bring him in and compel him to elect whether he will or not be made a party plaintiff to the suit and become responsible for its conduct.

As to the motion in the cross suit, that the defendants Dickinson, Brown and Taylor have leave to answer, and that the appearance for the defendant Fenton be allowed to be

withdrawn, I should be disposed to allow the three defendants named to answer, were the suit in proper shape. But, before the suit can proceed further, the plaintiff in it must take measures, on notice to the co-assignee of Fenton, to make him a party defendant to the suit. An order may be entered vacating the order taking the bill as confessed against the defendants Fenton, Taylor, Dickinson and Brown. As the defendant Fenton was personally

served with process, the appearance for him cannot be withdrawn.

In all other respects the motions in the two suits must be suspended, with leave to bring them on again, after the proceedings have been had in respect to the co-assignee.

[1] {Reported by Robert D. Benedict Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.}