Note from Professor: The focus of this case is on whether the terms of a contract can be enforced against a non-party, specifically a third party who has assumed obligations under the contract. Key takeaways from the decision are the requirements needed for the non-party to acquire such a liability, and the court's development of the holding in *Lawrence v. Fox*.

This case has been edited by the professor. If you would like to view the full case, you may do so on Westlaw.

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69 N.Y. 280
Court of Appeals of New York

VROOMAN
v.
TURNER.

1877.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 8 Hun, 78.)

This was an action to foreclose a mortgage.

The mortgage was executed in August, 1873, by defendant Evans, who then owned the mortgaged premises. He conveyed the same to one Mitchell, and through various *mesne* conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the same to defendant Harriet B. Turner, by deed which contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof."

The referee found that said grantee, by so assuming payment of the mortgage, became personally liable therefore, and directed judgment against her for any deficiency. Judgment was entered accordingly. ***

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Intermediate.

ALLEN, J. The precise question presented by the appeal in this action has been twice before the courts of this State, and received the same solution in each. It first arose in King v. Whitely, 10 Paige, 465, decided in 1843. There the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage except so far as the same were a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency upon a foreclosure and sale of the mortgaged premises. It was conceded by the chancellor that if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage and to a decree over against the grantees for the deficiency. This would have been in accordance with a well established rule in equity, which gives to the creditor the right of subrogation to and the benefit of any security held by a surety for the re-enforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a quasi surety for the payment of the mortgage debt. (Halsey v. Reed, 9 Paige, 446; Curtis v. Tyler, *id.*, 432; Burr v. Beers, 24 N. Y., 178.) ***

It is true there need be no privity between the promissor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promissee to him, will so connect him with the transaction as to be a substitute for any privity with the promissor, or the consideration of the promise, the obligation of the promissee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promissor. A mere stranger cannot intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement.

It is said in Garnsey v. Rodgers (47 N. Y. 233), that it is not every promise made by one person to another from the performance of which a third person would derive a benefit that gives a right of action to such third person, he being privy neither to the contract nor the consideration. In the language of Judge RAPALLO, "to entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited." See, also, Turk v. Ridge (41 N. Y., 201), and Merrill v. Green (55 *id.*, 270), in which, under similar agreements third parties sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties, and failed. The courts are not inclined to extend the doctrine of Lawrence v. Fox to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which Lawrence v. Fox and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promissee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promissee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promissor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promissee, in the third party, to adopt and claim the promise as made for his benefit.

In Lawrence v. Fox a prominent question was made in limine, whether the debt from Halley to the plaintiff was sufficiently proved by the confession of Halley made at the time of the loan of the money to the defendant. It was assumed that if there was no debt proved the action would not lie, and the declaration of Halley the debtor was held sufficient evidence of the debt. GRAY, J., said: “All the defendant had the right to demand in this case was evidence which as between Halley and the plaintiff was competent to establish the relation between them of debtor and creditor.” In Burr v. Beers, (24 N. Y., 178), and Thorp v. Keokuk Coal Co., (48 N. Y., 253), the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the principle of Lawrence v. Fox, Halsey v. Reed, and Curtis v. Tyler, supra. See also per BOSWORTH, J., Doolittle v. Naylor, (2 Bos., 225); and Ford v. David (1 Bos., 569). It is claimed that King v. Whitely and the cases following it were overruled by Lawrence v. Fox. But it is very clear that it was not the intention to overrule them, and that the cases are not inconsistent. The doctrine of Lawrence v. Fox, although questioned and criticised, was not first adopted in this state by the decision of that case. It was expressly adjudged as early as 1825, in Farley v. Cleveland, (4 Cow., 432), affirmed in the court for the correction of errors in 1827, per totam curiam, and reported in 9 Cow., 639. The chancellor was not ignorant of these decisions when he decided King v. Whitely, nor was Judge DENIO and his associates unaware of them when Trotter v. Hughes was decided, and Judge GRAY in Lawrence v. Fox says the case of Farley v. Cleveland had never been doubted.

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Notwithstanding the different spelling, this is the same Farley v. Cleaveland case referred to by the court in Lawrence v. Fox.

The court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and so much of the judgment as directs her to pay the same must be reversed with costs.

All concur, except EARL, J., dissenting.

Judgment accordingly.
