

**MORTGAGEE V. PURCHASER SUBJECT TO
MORTGAGE.**

The argument that there is a "want of privity" between a mortgagee and a purchaser of the lands subject to the mortgage, whereby the former is debarred from recovering his debt directly from the latter, does not appear to have been ever seriously questioned. We venture to think that the argument is based upon assumption, rather than upon sound legal deduction.

The purchaser has been assumed to be a stranger to the mortgage contract, and his rights and liabilities have been dealt with on that footing.

If a mortgagor die without having paid off his mortgage, against whom is the mortgagee entitled to enforce payment? Most people would answer, "Against the mortgagor's executor or administrator, of course." Why, "of course"? A brief enquiry into the position and liabilities of executors and administrators will show not only that they are not liable upon such contracts "of course," but that, in cases where they are liable, their liability is governed by principles which are in terms applicable to purchasers of lands subject to a mortgage.

By way of introduction, let us, first of all, ascertain in what light the law regards a purchaser, and what this privity is, the (supposed) want of which has proved so troublesome to mortgagees.

It is almost needless to say that a purchaser occupies the position of one of his vendor's "assigns," a term which comprehends "all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law": *Baily v. DeCrespigny*, L.R. 4 Q.B., p. 186.

Privity of contract (for this is the species of privity with which we have to do) is a term less easy of definition. Judges and text-writers alike seem to fight shy of defining it, and refer one to the various cases in which it has formed the subject of discussion.

These cases show that privity of contract is a relationship between two or more parties to a contract, by virtue of which relationship each is bound to the other or others in respect of certain rights and liabilities. Persons who are not included in this relationship are called *strangers* to the contract; and, as regards them, there is said to be a want of privity.

In attacking the current theory, we shall adopt the precaution-