

The plaintiff, by his purchase, acquired no more title to the lumber than the mortgageor had. The commercial rule, which protects negotiable paper in the hands of an innocent purchaser, without notice of infinity of title, does not extend to the sale of chattels; and the plaintiff, by his purchase, acquired no title to the lumber, if it was removed and sold without the knowledge or consent of the mortgagees. The three hundred feet of lumber, not included in the mortgage, was so mingled with the mortgaged lumber as to be indistinguishable from it, and, until pointed out and claimed by the owner, might be taken and held by the mortgagees. *Gilman v. Hill*, 36 N. H. 311; *Robinson v. Holt*, 39 N. H. 557; *Taylor v. Jones*, 42 N. H. 32. Though a demand was made for the whole lumber, it does not appear from the case that the mortgaged part was pointed out, identified, or claimed by the plaintiff before suit.

The attachment of the lumber by the defendant, on a writ in favor of the mortgagees, did not estop him from setting up the defence of a taking and sale under the mortgage by him as the mortgagees' agent, unless the attachment was made with notice to the mortgagees of their rights under the mortgage. However that may have been, if they had knowledge of their title at the time of the attachment, they could not afterwards set up a claim under the mortgage. If they received the money which came from the sale of the lumber, with a knowledge of its source and of their rights under the mortgage, they could not afterwards deny a consent to the sale, though the money was not applied on the mortgage debt.

Whether the mortgagees, or the defendant as their agent, had notice at the time of the attachment that the lumber came from the mortgaged premises, or whether they knew that the money paid them by the mortgageor, Williams, was a part of the purchase price of the lumber, does not appear by the case. The report may be recommitted to give the plaintiff an opportunity to show that the mortgagees had knowledge or notice in either particular. On the facts now appearing, there must be judgment for the defendant.

Case discharged.

STANLEY, J., did not sit: the others concurred.

59	402
70	110

59	402
71	376

59	402
72	233

PARKER & a. v. NASHUA.

It is not a defence to an action against a town for damages to land from an overflow of water occasioned by the negligent management of an adjacent highway, that the water was prevented from escaping from the land as quickly as it otherwise would by reason of an embankment made by the owner of the land for a walk.

CASE, for negligently permitting a gutter and culvert connected with a public highway to become obstructed, whereby water was thrown back upon and damaged the plaintiffs' land and dwelling-house. The culvert was within the limits of a railroad at a highway crossing, and was constructed and managed by the railroad. Before the overflow complained of, the defendants had reconstructed a sidewalk and raised the grade next to the plaintiffs' land, with their consent, and they had added to it a concrete surface. The embankment made by the walk, to some extent, prevented the escape of the water from the plaintiffs' premises.

The court instructed the jury that the plaintiffs could not recover in this action for any damage occasioned by the reconstruction of the sidewalk, nor any arising from surface water not coming from the obstructed gutter. But if water was cast upon the plaintiffs' land from the gutter, by reason of the culvert's being obstructed through the want of care and negligent management of the defendants, the plaintiffs could recover any damage from such overflow, and a recovery would not be prevented because the water was retained upon the premises longer than it otherwise would have been but for the embankment raised in constructing the sidewalk. The defendants excepted to the instructions. The plaintiffs had a verdict, which the defendants moved to set aside and for a new trial.

Sawyer & Sawyer, Jr., with whom was *Stevens*, for the defendants.

Hoitt and Burns, for the plaintiffs.

ALLEN, J. The defendants were liable for any damage to the plaintiffs' land arising from negligence in failing to suitably maintain and manage its streets. *Gilman v. Laconia*, 55 N. H. 130. And it made no difference that the obstructed culvert was within the limits of a railroad crossing and under the care of the railroad. *State v. Dover*, 46 N. H. 452; *Sides v. Portsmouth*, ante, p. 24.

The instructions to the jury excepted to by the defendants were, in effect, that the plaintiffs could recover damages occasioned by the choking up of the culvert, but not damages arising from the reconstruction of the sidewalk, and that the plaintiffs' assistance in making the sidewalk was not contributory negligence. The instructions were only a statement of the law, that the defendants were liable to a land-owner for damages to his premises by water thrown upon them through their negligence in managing an adjacent highway, and for no other cause in the case. There was no question of contributory negligence. It was the right of the plaintiffs to usefully and beneficially enjoy their land. For that purpose they could erect buildings, excavate a cellar or a well, and construct suitable walks; and though any of these might, to a greater or less extent, and for a longer or shorter time, prevent water

wrongfully thrown upon the land from escaping, the plaintiffs could not, on that account, be deprived of their remedy. They could not, for the express purpose of retaining the water, nor by acts from which such a purpose could be inferred, erect a dam or other structure, and then be heard to complain. Nor could they be deprived of the beneficial enjoyment of their land through any anticipation of the defendants' negligence. The construction of a sidewalk for purposes of travel did not impose upon them any duty greater than would have been imposed by building a like structure on their land wholly outside the highway, nor was their right to recover lessened by it. For damages arising from their own acts, or from any other cause than that complained of, the plaintiffs in this action could not recover. For the injury, which was the natural consequence of the defendants' neglect of duty, they were entitled to compensation. The question of contributory negligence did not apply, and the instructions were sufficiently favorable to the defendants.

Judgment on the verdict.

FOSTER, J., did not sit; the others concurred.

SAWYER v. NASHUA.

Money invested in the bonds of a railroad corporation incorporated in this state is taxable as money at interest.

APPEAL, from the refusal of the tax assessors of Nashua to abate a tax. Facts agreed. The tax was assessed upon bonds of the par value of \$4,500, and appraised at \$3,250, issued by the N. & R. R. Co., pursuant to the statutes of 1873, c. 139. The money raised from the bonds was used in the construction of the road, and is a part of the capital so used. The road was commenced in 1872, and opened to the public in 1874. The plaintiff complied with all the statute requirements, but the assessors refused to abate the tax.

A. W. Sawyer, for the plaintiff, contended that the bonds were not taxable,—(1) because they are not expressly enumerated with other descriptions of bonds subjected to taxation by Gen. Laws, c. 53, s. 6; (2) that, being a part of the capital of the railroad, they are exempt under the provisions of Gen. Laws, c. 62, s. 1; (3) that, if the capital of the road were taxable, as it will be at the expiration of ten years from the time its construction was commenced, the taxing of the bonds would be double taxation.

E. E. Parker, for the defendants.