Suppose half the jury thought the plaintiff was driving at the rate of six miles and an eighth per hour, and the other half thought his speed did not exceed six miles. They would not agree upon the special finding; but would that prevent them from finding that the rate of speed, whichever of the two rates it was, did not contribute to produce the injury? Might they not well have found upon the testimony here presented, that if the plaintiff was driving at a rate not exceeding five miles an hour, as he testified, the same results, to wit, the frightening the horse, his starting to run, and the upsetting of the carriage would have followed? If so, did it really make any difference as to the issue then on trial if he was going more than six miles an hour? We think the answers to these questions must demonstrate the injustice of making such a test decisive of the plaintiff's right to recover. The true question was (on this part of the case) whether he was using due and reasonable care under all the circumstances, or whether a want of such care on his part contributed to produce the injury.

We have no reason to doubt that this question was submitted to the jury, in a manner calculated to give to the testimony offered by the defendants as to the plaintiff's rate of speed, all its legitimate effect, or that it was passed upon by them in a manner which must preclude our interference with the conclusion at which they arrived. In each case the entry must be

Motion and exceptions overruled.

Note by the Editor of the "American Law Register."

The cases are probably not altogether harmonious in regard to the effect of illegality in a contract or business, upon the right to recover upon any matter merely incidental to the main contract or business. It seems well agreed, that if the action is based upon any matter which is in violation of law, whether it be also *contra bonos mores* or not, it cannot be maintained. There was formerly an attempt to distinguish, in this respect, between *mala prohibita* and *mala in se*, as if contracts against positive law merely, were not to be held illegal to the same extent as if they involved also positive moral turpitude. There seems to have been an opinion somewhat extensively prevalent among men of the better class in our country, that if one peaceably submitted to endure the penalty of a statute, he had answered all the law required of him, and that he thereby obtained full pardon and absolution for his violation of the law. For instance, if in his conscience he felt the law to be in conflict with any higher law, as the constitution of the state, or the Divine law, he was at full liberty to act upon his own impulses, or convictions, and incurred no moral guilt provided he submitted to pay or endure the penalty.

Upon a somewhat similar view, it seems, at one time, to have been considered that Sunday laws, or those requiring abstinence from ordinary secular labor on the Lord's Day, did not render contracts made in violation of the statute void, but only exposed the parties to the penalty of the statute: *Geer* v. *Putnam*, 10 Mass. 312; 2 Parsons on Cont. 762. But later cases have placed the question upon the true ground, that the effect of the statute must be to render all acts done in violation of the statute void for all purposes, so that no action could be maintained upon any contract made in violation of these statutes: *Lyon* v. *Strong*, 6 Vt. 219; *Robeson* v. *French*, 12 Met. 24; *Gregg* v. *Wyman*, 4 Cush. 322. And the same rule has been extended to sales of property in violation of statutory regulations as to inspection, license, and stamping. As in actions for the recovery of the price of lottery tickets sold in violation of statutes: *Hunt* v. *Knickerbacker*, 5 Johns. 327; or for the enforcement of contracts for the sale of lands where a penalty was inflicted by statute; *Mitchell* v. *Smith*, 1 Binn. 110; or where the statute prohibited, under a penalty, the selling of shingles unless of a particular dimension or if not surveyed, and the action was for the recovery of the price of shingles sold in violation of the statute; *Wheeler* v. *Russell*, 17 Mass. 258. Cases of this character are very numerous in the reports, and not be discussed.

It seems, however, in all this class of cases to be considered, that in order to defeat the action, it must appear that it is some way founded upon, or in furtherance of, the illegality. Thus, a contract founded upon the consideration of future cohabitation is held void, as being against public morals: *Walker* v. *Perkins*, 3 Burr. 1568; s. c. 1 Wm. Bl. 517. But contracts founded upon past illicit cohabitation, even where one of the parties is married, have been upheld: *Turner* v *Vaughan*, 2 Will. 339; *Walker* v. *Perkins*, *supra*; *Hill* v. *Spencer*, Amb. 641; *Kaye* v. *Moore*, 2 Sim. & Stu. 260; *Nye* v. *Moreley*, 6 B. & C. 133.

But where a party contributes to the maintenance of anything prohibited by law, or against the policy of the law, as where one lets lodgings to an immodest woman to enable her to carry on illicit cohabitation there, with different men, he cannot recover the rent. But if the woman merely lodge there and receives her visitors elsewhere, it is here said he may recover the rent: *Appleton* v. *Campbell*, 2 C. & P. 347. So, also, he cannot recover in such case, although at the time of letting the plaintiff did not know of the use to which the tenant purposed to put the lodgings, if he suffers her to occupy them after he learns the use: *Jennings* v. *Throgmorton*, R. & M. 251; *Lloyd* v. *Johnston*, 1 B. & P. 340. And it seems to have been held, that one may recover for getting up an expensive dress to be worn by a woman of bad fame, at public places, in furtherance of her vicious mode of life, even when the plaintiff knew the use for which it was intended beforehand: *Lloyd* v. *Johnston*, 1 B. & P. 340. But we should have doubted the entire soundness of the last case on this point. And Lord Ellenborough seems to have held, in *Bowry* v. *Bennett*, 1 Cowp. 348, that in such case the plaintiff cannot recover, where the work is done to forward prostitution, and to be paid out of the avails of such a course of life. And it has been held, that where houses have been leased for brothels, the lessor knowing the use contemplated, no recovery could be had upon the covenants in the lease: *Smith* v. *White*, Law Rep. 1 Eq. 626. And although, as stated above, at one time it seems to have been held that the plaintiff must expect to derive some advantage from the illegality, in order to defeat the action, that is