

unlawful act, or travelling unlawfully, was a contributory cause to the happening of the accident within the legal meaning ordinarily attached to these words.

Neither, as I think, can the fact that the party receiving the injury was at the time of the injury engaged in an unlawful act, deprive him of the right of recovery. If the plaintiff, at the time of the injury, had been profaning the name of the Deity, he would have been engaged in an unlawful act: but no one would hold that such an act would bar him from recovering of the town if it were otherwise liable for the injury sustained. The town could not relieve itself from the consequences of its own wrong or neglect by alleging the illegal act of the plaintiff. Punishments are provided for all unlawful acts, but their administration is not committed to the discretion of towns; neither has a town the right to add to the prescribed penalty the injuries resulting from its own wrongful act or neglect. The travelling by the plaintiff without excuse on the Sabbath was not an offence against the town, and it cannot excuse its wrong done to him, if wrong it be, by recrimination. The allegation of a wrong done by a plaintiff to a third party never furnished a defendant a good legal answer for a wrong done by himself to that plaintiff. Several of the cases cited by the plaintiff sustain and illustrate this proposition. There may be cases in which a party injured through the insufficiency of a highway while engaged in an unlawful act, could not recover, and in which the unlawful act would be the remote cause of his inability to recover. It may be questionable whether a criminal party, like a thief, robber or kidnapper, who should be injured while using a highway in transporting and securing the fruits of his crime, could recover for such injuries (though occasioned by the insufficiency of the highway) of the town ordinarily responsible for such insufficiency. In all such cases, I apprehend, his unlawful act would not bar the criminal party from sustaining an action which had once attached against the town, but that no such right of action would arise, because the town would be under no obligation to furnish him a safe highway for any such purpose. I think it is quite clear that the decisions against the right of the plaintiff to recover in such cases, if sustainable, must rest upon some other ground. While I am quite ready to yield my assent to the reasoning of the learned judge who delivered the opinion in the case last cited, I am not so well satisfied that the opinion meets the real point raised for decision. As heretofore

remarked, the question is not, Is the plaintiff debarred from recovering for injuries sustained through the insufficiency of a highway, and which he would otherwise be entitled to recover, because he was at the time he received the injuries engaged in an unlawful act? but, Was the town under a legal liability to furnish him a safe highway to travel on, at a time when he was, by law, forbidden to travel on it? The liability of towns for the sufficiency of their highways is wholly imposed by statute. The right of the traveller to recover for injuries sustained through self insufficiency is also conferred by statute. No such liability or right existed at common law. The duty and liability of towns in regard to their highways are due only to travellers, to that class who have the right to pass and repass thereon, and continue only so long as they are in the exercise of that right. When one ceases to use a highway for the purpose of passing and repassing thereon, the duty and liability of the town toward him in regard thereto cease. This has been repeatedly decided: *Spencer v. City of Salem*, 3 Allen 374; *Richards v. Enfield*, 13 Gray 344; *Blodgett v. City of Boston*, 8 Allen 237; *Stimson v. Gardiner*, 42 Me. 248; *Orcutt v. Bridge Co.*, 53 Me. 500; *Baxter v. Winoski Turnpike Co.*, 22 Vt. 124; *Abbott v. Walcott*, 38 Vt. 666; *Sykes v. Pawlet*, 43 Vt. 446; *Hayward v. Rutland*, unreported.

We do not think any good lawyer would contend that a town would be liable for damages sustained through the insufficiency of one of its highways, by a circus performer who might chance to pitch his tent and establish his ring on the highway, and who should happen to be injured while performing his feats of horsemanship or of lofty tumbling. In such a case a town would not be liable, because it would not be under any legal duty to provide him a highway for any such purpose. Many cases might be supposed in which the town would not be liable to one injured through the insufficiency of one of its highways, because the one receiving the injury would not be using it for a purpose contemplated by the statute, and hence the town would be under no duty toward him. As a town is liable for such injuries only by force of the statute, its liability must be limited to those cases in which the statute has imposed the duty upon it to provide a safe highway for the injured party in the particular use to which he was, when injured, putting it. It is competent for the legislature when creating this duty and liability, or subsequently, to prescribe the limitation thereof. It may be limited to a par-