

which it is legally bound to keep in repair, to one who is unlawfully travelling on such highway or travelling on the Sabbath without a legal excuse. The question is not whether the plaintiff is barred from recovering damages, which he would otherwise be entitled to recover, because he was at the time he received the injury committing an unlawful act, or travelling at an unlawful rate of speed, but, whether the town was under a legal duty to furnish him a safe highway to travel over, when at that precise time he was forbidden by law to travel over the highway?

The precise question is now for the first time presented to this court for decision. In *Abbott v. Walcott*, 33 Vt. 686, a question somewhat analogous was decided. The plaintiff in that case was injured from the springing of a bridge while he was trotting his horse upon it. The bridge was of such construction that, by law, the plaintiff was forbidden to drive faster than a walk thereon. The plaintiff might lawfully travel on the bridge, but not at the rate of speed he used. It was held he could not recover. The decision is put upon two grounds. First, that the plaintiff's illegal act in driving faster than a walk must have contributed to the springing of the bridge, and so contributed to the happening of the accident which caused the injury. Second, if this was not so, that inasmuch as it was conceded that "the bridge was good and sufficient except in the matter of its springing when driven upon on the trot," and as the plaintiff had no right to use it in that manner, the town was under no legal obligation to provide a bridge for such use; in other words, that the town had fully discharged its duty towards the plaintiff, in that it had provided as good a bridge as the law required, and that the accident happened, and the injury was occasioned, by the unlawful act of the plaintiff, or of one Carlyle who was at the time also trotting his horse on the bridge, and not from any failure of the town to discharge its duty in the premises.

The question at bar has arisen in other states, but the courts of those states have not been so fortunate as to arrive at the same solution of it. The courts of Massachusetts and Maine have repeatedly decided that a plaintiff could not recover under such circumstances: *Jones v. Andover*, 10 Allen 18; *Bosworth v. Swansey*, 10 Metc. 353; *Hinchley v. Penobscot*, 42 Me. 89; *Bryant v. Biddeford*, 59 Me. 193. In some of the other states, it has been held that the fact that the plaintiff was travelling on the Sabbath in violation of law, did not relieve the

town from its liability for damages sustained through the insufficiency of its highway. So far as I have had access to such decisions, they assume that the town was liable to the plaintiff for the insufficiency of its highway, and proceed to consider whether the unlawful act of the plaintiff relieved the town from such liability. *Sutton v. Wauwatosa*, 29 Wis. 21, is one of the latest decided cases of this kind, and one on which the plaintiff especially relies. It therefore, demands some consideration. In the opinion which was delivered by C. J. Dixon, very many of the cases are reviewed. It assumes that the decision of the cases against the right of the plaintiff to recover, rests either upon the ground that the plaintiff's illegal act of travelling on the Sabbath contributed to the happening of the accident, and for that reason deprived him of the right of recovery, or, that the fact that he was engaged in an unlawful act at the time he received the injury bars his right of action.

Both of these grounds are combated earnestly, and I think successfully.

It is difficult to maintain that the traveller's illegal act, in such cases, contributed to the happening of the accident. The insufficiency of the highway remaining the same, and the traveller being at the place of the insufficiency under the same circumstances, on any other day of the week, the same accident and injury would have befallen him.

A contributory cause is one which under the same circumstances would always be an element aiding in the production of the accident. The fact that the traveller is unlawfully at the place of the accident does not contribute to the overturn of his carriage, or to the production of the accident. The same forces and causes would have overturned the carriage or caused the accident as well on a week-day as on the Sabbath, as well when the traveller was lawfully at the place of the accident as when unlawfully there. It is sometimes asserted that if the injured party had not been unlawfully travelling he would not have been at the place of the insufficiency and would not have received the injury. The same is true of all injuries on highways. The same causes and forces produce the accident in the one as in the other case; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident. Hence the decisions against the traveller's right of recovery must rest upon some other basis than that his