such case be the buyer of the goods, or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading."

Now, here, by the terms of the bills of lading, the goods were deliverable at Philadelphia, to the order of the shippers, A. Lavino & Co. The plaintiffs voluntarily put the bills of lading, indorsed in blank by A. Lavino & Co., into the hands of E. J. Lavino & Co., of Philadelphia, and thus clothed the latter with the apparent absolute ownership of the goods, and enabled them to obtain advances upon the bills of lading from the defendant.

The rulings of the court at the trial of the present case were in harmony with the recent decision of the circuit court of appeals for the First circuit in the case of Pollard v. Reardon, 13 C. C. A. 175, 65 Fed. 848, 852. It was there well said by Judge Putnam:

"There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

The principle that, where one of two persons equally innocent of actual fraud must suffer from the tortious act of a third, he who gave the wrongdoer the means of perpetrating the wrong must bear the consequences of the act, has often been enforced by the courts against a party who, by documentary evidence of title or otherwise, has clothed his agent or any other person with the apparent absolute ownership of personal property, and thus enabled him to deal with it as if he were the owner. Steamboat Co. v. Van Pelt's Adm'r, 2 Black, 372; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Robertson v. Hay, 91 Pa. St. 242; Miller v. Browarsky, 130 Pa. St. 372, 18 Atl. 643. The motion for a new trial is denied.

McMULLEN v. HOFFMAN.

(Circuit Court, D. Oregon. June 23, 1896.)

No. 2,204.

1. CONTRACT OBTAINED BY IMMORAL MEANS—ACCOUNTING BETWEEN CONTRACTORS.
   The fact that parties have, by immoral means, obtained an award of a joint contract with a city for the construction of a public improvement, will not prevent one of them from maintaining a suit against the others for his share of the profits made by performance of the contract. 69 Fed. 509, reversed.
2. CONTRACTS FOR PUBLIC IMPROVEMENTS—BIDS BY CONTRACTORS.
   One bidding for a contract to be let by a city is under no obligation to give the city the benefit of knowledge acquired at his own expense by obtaining the estimates of competent engineers as to the cost of constructing the proposed work, even if the means of such knowledge is not within the city's reach.
3. SAME—ATTEMPTED FRAUD.
   Two contractors, by previous agreement, made a bid for their joint benefit, in the name of one of them and a third person, for the construction of certain city improvements, and the contract was awarded

to them. One of them, with the other's knowledge and consent, had made a separate bid, at a much higher figure, which was not seriously intended. The city engineer's estimate was higher than the latter bid, and there were three other bids still higher. *Held* that, even if the second bid was put in for a fraudulent purpose, there was, under the circumstances, no room for the inference that it had any influence in the making of the award; and, as the attempted fraud was therefore unsuccessful, it could furnish no ground for refusing to compel one of the contractors to account to the other for his share of the profits made under the contract.

4. SAME—ACCOUNTING—CONTRACTOR'S SALARY.
Where two contractors, by a joint bid, secured a contract to construct a pipe line for the water supply of a city, and one of them failed to furnish his part of the capital, so that the other was obliged to raise all the money needed, and also had the entire charge and supervision of the work, *held*, the profits being $140,000, that the latter was justified in crediting himself with $1.000 per month as salary.

This was a suit in equity by John McMullen against Lee Hoffman to compel an accounting for profits made by the parties on a joint contract, under which they constructed a pipe line for the city of Portland.

L. B. Cox and H. Percy Wright, for plaintiff.
Rufus Mallory, for defendant.

BELLINGER, District Judge. This is a suit for an accounting for the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. The water committee representing the city having advertised for bids to construct the line, the parties hereto entered into an agreement by which the defendant, on their joint account, bid for the work in the name of Hoffman & Bates. The complainant, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some $49,000 higher than the bid of the defendant, and was not seriously made. The contract having been awarded to the defendant, a written agreement was entered into by the parties for the execution on joint account of the contract to be entered into by the defendant with the city. The contract awarded on defendant's bid was formally entered into by the city water committee, of the one part, and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly $140,000. The defendant refused to account to the plaintiff for any part of these profits, upon the ground that the agreement for a joint bid tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and therefore will not be enforced in equity, and upon the further ground that the complainant wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with complainant was made. In this case the contract was in fact the joint contract of these two parties. However immoral the means by which the award of that contract was secured to them, it does not lie in the mouth of either to dispute

upon such grounds the right of the other to share in the profits of that contract. This principle has been applied where the contracts were to do what was forbidden by law or by public policy, and were executed, although in this case the contract was to do a lawful thing. It is only when the fund is the result of an immoral transaction that contribution between the wrongdoers will not be enforced. If the means by which this contract was procured are immoral, this would be a good ground for a refusal by either party to proceed with it, or for a refusal by an injured party to abide by its conditions. Nor is it a case where one party seeks to enforce an illegal agreement for a share in the profits of a contract held by another, as was my conclusion when the case was considered upon exceptions to the answer. The contract with the city was, as between the parties, the contract of McMullen and Hoffman. It makes no difference in whose name it was taken, although in fact it was taken in the name of neither, but in that of Hoffman & Bates, for the benefit of Hoffman and McMullen. The case is not in the least different from what it would be if the suit was by Hoffman against McMullen for a division of moneys received from the profits of this contract by the latter.

When these questions were considered by me on the exceptions to the answer (69 Fed. 509), I was of opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the court is asked to compel, by its judgment, the very thing prohibited by public policy, while in the other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal rights is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy. Moreover, the case on the facts differs materially from that presented on the exceptions to the answer. It is alleged in the answer that the plaintiff was prepared to bid, and, but for the secret agreement alleged to have been made, would have bid, for the work, at a figure some $40,000 less than that at which the contract was let. This put the plaintiff in the position of seeking to recover in the suit for withholding a lower bid, by which the work was made to cost much more than it would otherwise have cost, and brought the case within the principle of Atcheson v. Mallon, 43 N. Y. 150, cited and relied on by defendant. In that case each of the parties had intended to make a proposal on his own account, but, by an agreement between them to share equally in the profits of an award made to either, one of them had been removed from the number of earnest bidders, thus lessening competition, to the public detriment. Folger, J., in delivering the opinion of the court, said:

"If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any con-

sideration for the parties to it, but because its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing in effect an interested rival, tended to affect Mallon's action. While Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

In this case the uncontradicted fact is that McMullen did not intend to bid for the work in question otherwise than jointly with Hoffman; that he came from San Francisco to bid with Hoffman, not to compete with him; and that this was in pursuance of an understanding had between the parties long before. The agreement was merely to secure co-operation between the parties, and, so far from tending to lessen competition, it tended to increase the number of bidders, since it does not appear that either of the parties intended to bid or would have bid on his own account. However this may be, it does appear that the effect of the agreement was to cause, through McMullen's influence, a very much lower bid than Hoffman would have made had he bid on his own account. Hoffman stated to one of the witnesses in the case that McMullen "made him come down between $40,000 and $50,000" in the bid upon which the contract was awarded. It appears that McMullen had procured from his engineer in New York estimates of the cost of the work, and that the amount of such estimate was $416,088, and there was testimony tending to show that this estimate included $80,500 as profits. It also appears that Hoffman's engineer at Portland, upon careful estimates, concluded that the work could be done for $420,000. What, if anything, was allowed for profit in this estimate does not appear. The defendant's counsel argues from these facts that the knowledge of each of these parties that this work could be done at a figure far below the bid agreed on, and yet leave a large margin for profit, would have caused them to make much lower bids if they had been bidding in competition than the joint bid made in the name of Hoffman & Bates. But it does not follow that, in the absence of an agreement to bid jointly, any such several bids would have been made, or that estimates would have been procured; nor is it a ground of complaint that the parties had the advice of capable engineers, and were able to know beforehand that the work could be done for $416,000, and leave a profit of at least $80,000. They were under no moral obligation to lower their bid because of the information they had procured, nor in any manner to give the city the benefit of the knowledge they had acquired at their own expense, even if the means of such knowledge was not within the city's reach.

There is nothing to criticise in what was done by the parties, unless their conduct in presenting a second bid in the name of the San Francisco Bridge Company operated as a fraud on the committee. When this matter was considered on the exceptions to the answer, I was of the opinion that this was the effect of the second bid. It appeared from the pleadings that the profits from the con-

tract at $465,667 amounted to nearly $140,000, and it seemed a necessary inference that a bid by a company such as the one in question, based presumably upon careful estimates, to do the work for $514,664, influenced the award that was made. But this view cannot be sustained. An attempt to deceive must be successful in order to operate as a fraud. If the second bid in this case was in effect a misrepresentation made with a fraudulent intent, it must, in order to avail the defendant, appear to have been acted upon by the committee,—to have influenced their action to the public detriment. However reprehensible the act of the parties was in making the second bid, there is no presumption of fraud arising from it, and it does not appear from the evidence in the case that the water committee was in any degree influenced by it in awarding the contract. On the contrary, the testimony of the chairman of the committee is that the bid of the San Francisco Bridge Company did not have the slightest influence with him, and it appears that the engineer of the water committee had, some three months previously, made for the information of the committee an estimate of the cost of the work covered by these bids, and that such estimate was higher than the bid of the San Francisco Bridge Company. That bid, as already stated, was $514,664. How much higher the city engineer's estimate was than this figure is not stated. But with this estimate, higher than the second bid, and nearly $50,000 higher than the bid of Hoffman & Bates, before them, there is, without the testimony referred to, no room for an inference that the committee was influenced by the second bid, or consulted it. Moreover, it is in evidence that there were three higher bids than that of the San Francisco Bridge Company before the committee when the contract was awarded to Hoffman & Bates.

In the accounting, the only question of serious contest is as to the amount to be allowed Hoffman for his services in conducting the business of the parties under their contract. Hoffman claimed and credited himself at the rate of $1,000 per month for his services. In fixing the amount to be allowed on this account, the responsibility assumed by Hoffman is to be considered. McMullen wholly failed to contribute his share or any share, above a plant, valued at $2,000, to the work being carried on. Hoffman made repeated and urgent appeals to McMullen for the money that the latter was in duty bound to provide. To these appeals McMullen had always the same answer, which was that he did not have the money then, and could not obtain it. On one occasion he suggested that Hoffman should stand the creditors of the partnership off, and he suggested at different times the means by which Hoffman might raise the needed money on their joint note. It is argued for McMullen that Hoffman had credit at the banks, and could borrow what money was needed, but that does not excuse McMullen for failure to fulfill the obligations he was under. Hoffman was not required to use his own credit for McMullen's benefit. McMullen was a nonresident. His company was insolvent. He was without credit, and it is not against Hoffman that his own credit was good. McMullen's name upon a joint note would be of no assistance to Hoffman in procur-

ing needed funds, which, after all, must be had upon Hoffman's credit.

There was such an entire failure on McMullen's part to fulfill his obligations in the contract that Hoffman would, in my judgment, have been justified in treating the contract as abandoned by McMullen; and this was threatened. It is only from the fact that Hoffman continued to recognize McMullen's relation in the business, by regularly charging for his own services, that I am justified in treating the partnership relation as having continued. The entire burden was upon Hoffman, and it involved not only the conduct of the business of constructing the work, but all the money responsibility that attached to it; and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged.

THOMAS et al. v. ROSS.

(Circuit Court of Appeals, Fifth Circuit. June 15, 1896.)

No. 481.

NEGLIGENCE—MASTER AND SERVANT—SAFE PLACE.

One R. was employed by the foreman in charge of the track hands on a railroad operated by a receiver, and was taken, with other track hands, to a cut on the line of the road, and set to shoveling dirt onto a flat car. On the day before R. was employed and set to work, the bank at the side of the cut had been undermined for two or three feet, and wedges had been driven into the earth at the top of the bank, in order to throw the earth down. The bank had been left in this condition overnight, during which rain had fallen. No notice was given to R. of the condition of the bank, and it could not be discerned from the place where he was working. Shortly after R. began work, the bank of earth fell upon him and killed him. *Held*, that leaving the bank in such dangerous condition was negligence, for which the receiver was liable.

Appeal from the Circuit Court of the United States for the Southern District of Georgia, Western Division.

Marion Erwin, for appellants.

T. E. Ryals and Wm. T. Stone, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. The appellee, Sarah Ross, by intervention, sued the receiver of the Central Railroad & Banking Company of Georgia for the value of the life of her husband, one Lawyer Ross. She alleged in her petition that on or about October 26, 1892, her husband was engaged in the service of the receiver, as a track hand, and that he was working in a cut called "Blue's Cut," about a mile and a half from Macon, Ga.; being one of a squad of hands employed in loading a construction train with dirt. Appellee alleged that the cut was about 15 feet deep, and that the side of the cut, on the day preceding her husband's death, had, under the direction of the agents of the receiver, been undermined at the bottom to the depth

of 2½ to 3 feet, and two crowbars had been driven in from the top, at about 3 or 4 feet from the brink of the cut, to loosen the dirt on the side of the cut. Appellee further alleged that on the night preceding her husband's death a rain had further loosened the dirt at the place where the crowbars had been driven in, and that, while her husband was engaged in shoveling dirt from the bottom of the cut, the side of the cut, because it had been undermined and loosened as stated, fell down upon her husband, and killed him. Appellee further alleged that her husband was entirely free from fault, that he had been employed by the agent of the receiver only on the day of the accident, and that he was in total ignorance of the condition of the side of the cut, and was in no way apprised of the dangerous character of the work which he was directed to do. The petition further charges that the accident was the result of the failure on the part of the receiver's agents to exercise ordinary and reasonable care, and that the undermining of the side of the cut, and the driving in of the crowbars at the top of the cut, without due caution, and the requiring appellee's husband to work at the bottom of the cut after the rain of the preceding night, and without in any manner apprising him of the dangers of the situation, constitute gross negligence on the part of the receiver's agents. Thomas & Ryan are the purchasers of the railroad, and they have assumed the liabilities of the receivership.

The general method of operating the cut was as follows: The men would undermine the bank. Iron wedges, about four feet long, would be driven down in the top of the bank about three feet from the brow of the bank, and in that manner great blocks of earth would be thrown down. From these blocks the hands would shovel the dirt upon the flat cars, which would be standing very near to, and parallel with, the bank. The custom was for the regular hands to assemble in the morning at the tool house in Macon. They would load the picks and shovels on the flat cars in Macon, and the hands would then ride out to Blue's Cut on the cars. When the cars would reach Blue's Cut, it was not unusual for a number of men to be found there, awaiting the arrival of the cars, in the hope of securing work.

The first point of contention is whether Lawyer Ross was employed by the receiver's agent, the foreman. After carefully considering the evidence on that point, we are satisfied that Ross was employed by the foreman. Virtually, the only testimony for appellants on that part of the case is the evidence of the foreman. The general effect of his testimony on our minds is that he had no clear recollection on the subject of Ross' employment, and that in testifying he relied mainly on his general custom in employing hands. While a few of his statements might, if standing alone, have force as contradicting evidence, yet his evidence, taken as a whole, impresses us only in the manner stated. As against this quasi negative testimony, we find the positive evidence of several witnesses who testify that Ross was engaged at the tool house in Macon before the cars left that place. This evidence is fortified by other circumstances established in the case. As it was the foreman's general custom to employ new hands at the cut, his mind seems to have been mainly directed to the question whether he engaged Ross at the cut. But appellee's contention is that Ross

was engaged in Macon. Neither the foreman nor the conductor nor the fireman (the only witnesses for appellants) could say that Ross did not ride out on the cars with the regular hands. It seems perfectly clear that Ross did ride with the regular hands. Several witnesses so state directly, and it is not denied. Nor is it denied or questioned that Ross, when he was dug out from the earth which had fallen on him, was found with one hand grasping a shovel; and there is direct testimony that he was shoveling dirt when the bank fell. The foreman testified on cross-examination that he had a man on the cars who watched the tools when the cars reached Blue's Cut. We are clear that Ross was in the employ of the receiver, and we are equally clear that the receiver was liable by reason of the fault of his agents.

Ross was engaged by the foreman on the morning of the accident. He had reached the cut but a few minutes when he was killed while in the act of shoveling dirt. The preceding evening, the iron wedges had been driven down into the top of the bank. No reason is attempted to be given for leaving the work overnight in such dangerous condition. It rained during the night. No warning of any kind, or intimation of the danger, was given Ross. It was a physical impossibility for him to see the iron wedges driven down into the bank above him. He knew nothing of the dangerous condition brought about by the driving down of the wedges, and he could not have known it, under the circumstances, by the exercise of due care. The flat cars were drawn up a few feet from the bank, rendering escape almost impossible if the earth should fall. Under such circumstances, the receiver was liable. We find here no application for the doctrine of the nonliability of the master for an injury to one of his servants resulting from the negligence of a fellow of the injured servant. Nor does the doctrine of the assumption of risks come into play. A very different case would be presented if Ross had previously participated in the work, and knew the manner in which the work was being carried on, or if Ross had known, or should have known, of the danger. The danger was not a patent one, with knowledge of which Ross was chargeable; for we find that the proximate cause of his death was the driving down of the iron wedges, in connection with the time which had elapsed since they had been driven down, the undermining, and the rain which fell during the night. The concurrence of these circumstances constituted a highly-dangerous situation, which Ross did not know. The decree of the lower court is affirmed.

RICKERSON ROLLER-MILL CO. et al. v. FARRELL FOUNDRY & MACHINE CO.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1896.)

No. 386.

1. CORPORATIONS—ISSUE OF STOCK—SALE BELOW PAR.
When a corporation, not for the purpose of restoring its capital, impaired by losses in business, but for the purpose of providing new capital to carry on or extend its business, issues and sells stock at less than its par