

became inattentive to his business. The physician who attended him after these symptoms intervened could not discover that he was sick, and testified that there was no organic trouble, that he was physically in usual good health, and that "the greatest trouble I had with him was to convince him that he was not sick"; that "he was always all right when I left him, but I always found him in a melancholy mood." Several days before his death he attempted to commit suicide by taking laudanum. The night of his death, after the family with whom he lived had retired, he left his room in his night clothes, proceeded to the back yard of the premises, and there gashed himself on his wrists and neck in several places with a razor, and, although bleeding profusely, went back to his room, and thence, a considerable distance, to the Arkansas river, where he drowned himself.

Notwithstanding there was evidence to show that he was rational in his conversation, and perhaps preponderating evidence tending to overthrow the theory of his insanity, we cannot doubt that the case presented a fair question for the decision of the jury, and that the trial judge was not only justified in submitting it to them, but that it would have been error if he had refused to do so.

Error is assigned of the refusal of the judge to instruct the jury, as requested on behalf of the defendant, that the opinion of a physician, a witness for the plaintiff, who had testified that the deceased was insane, but that the opinion was wholly founded upon the fact of suicide, should be disregarded by the jury. The court had previously instructed the jury that suicide was not, of itself, evidence of insanity. To have granted the instruction would have been, in effect, but to repeat the instruction which had already been given. Under the circumstances, the disposition of the request was matter which rested wholly in the discretion of the court.

We find no error in the rulings at the trial, and the judgment is accordingly affirmed.

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UNITED STATES, to Use of SHOLENBERG, v. DIXEY et al.

(Circuit Court, E. D. Pennsylvania. January 28, 1896.)

1. CONTRACTS—PERFORMANCE—AFFIDAVIT OF DEFENSE.

A contractor for certain government work, being sued on a subcontract, under which a part of the work was to be done, set up, by affidavit of defense (according to the Pennsylvania practice), that the work specified in the subcontract had not been completed according to the plans and specifications of the government architect, and had not been accepted by the government. *Held*, that the affidavit of defense was insufficient, in that it did not aver that the work was not done according to the contract between plaintiff and defendant.

2. SAME.

An affidavit of defense, by a government contractor to the suit of a subcontractor; that the work undertaken by the latter was not completed according to the specifications of the government architect, and was not accepted by the government, *held* insufficient, for not stating that it was not completed according to the contract between the contractors.

Harvey K. Newitt and Wm. W. Smithers, for plaintiff.  
Benj. F. Hughes and David Jay Myers, Jr., for defendants.

DALLAS, Circuit Judge. The defendant Mattie S. Dixey, having contracted to do certain work for the United States, entered into an agreement with William H. Sholenberg, by which the latter undertook to do a certain specific part of it for her. Upon this latter agreement this action is brought. The plaintiff's statement avers performance on his part, and claims recovery of the agreed compensation. The separate affidavits of the respective defendants set forth, among other things:

"That, by the terms of said agreement, the contract is an entirety, and nothing whatever is due thereunder until the work specified is completed according to the plans and specifications of the architect of the government of the United States; that said work is not completed and has not been accepted by the government, as required by the said plans and specifications, which are made part of plaintiff's contract with defendant."

The meaning of this allegation seems to be that the work specified in the agreement between Dixey and Sholenberg has not been completed according to the plans and specifications of the architect of the government, and has not been accepted by the government, and that, therefore, nothing is due under the agreement of Dixey with Sholenberg. This appears to be the construction put upon this clause of the affidavits by the defendants' counsel upon the argument, and, at all events, it is the only admissible understanding of its terms. If it had been intended to assert that Sholenberg had not completed his undertaking under his agreement with Dixey, irrespective of the contract of the latter with the government, that assertion should have been plainly, and not so ambiguously, made. Evasive affidavits of defense have frequently been adjudged insufficient. They should leave nothing to inference. *Bardsley v. Delp*, 88 Pa. St. 420. And "when the defense set up involves an issue of fact, the affidavit must state facts necessary to constitute a substantial defense. General averments of matters which are, in themselves, legal conclusions, from facts not stated, are insufficient; as, for example, payment, fraud," etc. *Kaufman v. Mining Co.*, 105 Pa. St. 537. It has, however, been contended that the contract of Dixey with the government was, in this regard, incorporated with the agreement between Dixey and Sholenberg; and that, therefore, unless and until approved and accepted under the former contract, the work done under the latter was not to be paid for. I am unable to accede to this view of the agreement sued upon. There is nothing to warrant the importation into it of any such condition.

The other matters alleged in the affidavits are not, in my opinion, sufficient to constitute a valid defense to this action. The plaintiff's rule for judgment for want of a sufficient affidavit of defense is made absolute.

## TYLER MIN. CO. v. LAST CHANCE MIN. CO. et al.

(Circuit Court, D. Idaho, N. D. December 14, 1895.)

No. 21.

## 1. MINES AND MINING—RIGHT TO FOLLOW DIP—MAKING NEW END LINES.

When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance. 4 C. C. A. 329, 54 Fed. 234 and 9 C. C. A. 613, 61 Fed. 557, followed.

## 2. SAME.

Even if the locator does not actually so draw in his end line, and abandon what lies beyond, a new end line will be considered as drawn at that point, and will have the same extralateral rights as if the claim had been so located in the first instance. 4 C. C. A. 329, 54 Fed. 284, and 9 C. C. A. 613, 61 Fed. 557, followed.

## 3. SAME—FOLLOWING DIP—PRIOR LOCATION.

The owner of a location having extralateral rights cannot follow the dip within the side lines of a prior location, which has the vein passing through both of its side lines, so that they are to be considered as end lines.

This was an action by the Tyler Mining Company against the Last Chance Mining Company, the Idaho Mining Company, and the Republican Mining Company.

John R. McBride, for plaintiff.

W. B. Heyburn, for defendants.

BEATTY, District Judge. The first trial of this cause in this court resulted in a judgment on April 11, 1892, in favor of defendant the Last Chance Company, which, on error to the circuit court of appeals, was reversed because of the admission in evidence of a prior judgment. 4 C. C. A. 329, 54 Fed. 284. Upon a new trial had in pursuance of the judgment of the appellate court, the plaintiff, on March 6, 1893, recovered judgment against all the defendant companies, which, on error to the circuit court of appeals, was affirmed (9 C. C. A. 613, 61 Fed. 557), whereupon the cause was taken to the supreme court by certiorari, where the action of the lower courts in excluding as evidence the judgment above referred to was held error, and the cause was remanded for a new trial (157 U. S. 683, 15 Sup. Ct. 733); and it is now, at the October term, 1895, again submitted to this court, upon an agreed statement of facts. By such statement it is provided that the diagram of the premises found on page 331, 4 C. C. A., and page 285, 54 Fed., may be treated as a part of the statement, a substantial copy of which is as follows: