

CROSSMAN AND OTHERS V. PENDERY AND  
OTHERS.

*Circuit Court, D. Colorado.*

April, 1881.

1. MINERAL IN  
PLACE—DISCOVERERS—LOCATORS—TITLE.

Priority in discovery gives better title to mineral in place than priority in location and continuous possession.

*T. A. Green*, for plaintiffs.

*Wm. Harrison*, for defendants.

MILLER, Justice. This cause is submitted upon an agreed state of facts, to the effect that the ground in controversy is covered by the surface lines of the Orion claim, located by plaintiff, and also of the Pendery claim, located by defendant; that both locations are regular 694 as to form; that the Orion was first located, surveyed, and staked; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery, located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy?

It is the opinion of the court that inasmuch as the plaintiffs allowed, the defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof, without protest, the defendants now have the better right. But the plaintiffs might have protected

their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.

A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail, and in this case judgment must be for the defendants.

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