

**Chapter 7**  
**The Business Of Mining:**  
**Claims & Counterclaims, Miners' Codes, Costly Litigation**

Analysis of the emergence of mining on the Comstock in the first quarter century of its history demonstrates not only how cyclical mining was but also how corporate it became. A prospector with a few clothes and tools and a mule or two crisscrossing streams and valleys in search of ores may well have launched the Comstock era, but he gained little of the wealth that the Lode yielded up. As lode mining replaced placer mining, large firms with officers, managers, accountants, stockholders and hundreds of employees came to dominate the industry. Small operations did not completely disappear, but they occupied a minor niche. This had happened as well in California a decade earlier and across Spanish America centuries before. In the last instance despite heavy state intervention success in mining depended on grand entrepreneurs like Antonio López de Quiroga in Peru and Pedro Romero de Terreros in Mexico.<sup>1</sup> Despite its egalitarian roots mining in the New World evolved into large-scale operations that gave the industry a visibly oligopolistic if not monopolistic character. By probing the rather extensive archives of company records as well as legislative reports, newspaper articles and local histories one can draw a fairly detailed picture of how well companies organized and managed their resources in order to conquer the Comstock and perhaps advance some explanations why some companies performed better than others.

Thousands of people poured first into the Nevada section of the Utah Territory as news of ore discoveries spread across the west and beyond. They came to a region that had few political institutions or public officials. In a matter of months the entire Comstock Lode and beyond had been claimed. Any contemporary map of the Comstock mining claims will show that the Lode and the region adjacent to it were divided up among hundreds of claimants. One would assume from these maps that ore existed everywhere when in fact the ore was confined primarily to a ledge that started on the north end of Virginia City and continued for several miles through Virginia City and into the hamlet known as Gold Hill. Some ore deposits were found south of Gold Hill and in a few other locations east of the Lode, but they never became important mining sites. With so many claimants and so few procedures in place to monitor their activities disputes over boundaries and titles were common and sometimes deadly. In addition to claim jumpers and location errors there was the simple matter that few if any of the earliest miners, who were making these claims, understood how the ore was distributed through the Comstock. Several years would pass before the engineers and geologists were finally able to come up with a reasonably accurate map of the topography and geology of the Comstock. If the ore been evenly distributed at all depths along the Comstock, the task of managing the Comstock might have been made easier. Certainly more claimants would have enjoyed some benefits. But these ore bodies, wrote Grant Smith “were thinly scattered through the wide Lode [up to 1,000 feet] ‘like plums in a charily pudding’, as [John] Mackay expressed it, and nearly all of them were found in the wide upper section and along or

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<sup>1</sup> Peter Bakewell, *Silver and Entrepreneurship in Seventeenth-Century Potosí, The Life and Times of Antonio López de Quiroga* (Albuquerque, NM: University of New Mexico Press, 1988) and Edith Couturier, *The Silver King, The Remarkable Life of the Count of Regla in Colonial Mexico* (Albuquerque, NM: University of New Mexico Press, 2003).

near the east wall [away from Mt Davidson].”<sup>2</sup> The upshot of the peculiar formation of the Comstock Lode along with the obvious disorder that arose out of so many claim seekers and claim jumpers was endless litigation. Consuming millions of dollars in legal fees Smith blamed his own profession: lawyers who “flocked” to the Comstock “like buzzards after carrion and engaged in an orgy of litigation over mining claims, much of it incubated in blackmail and reeking with perjury.”<sup>3</sup> The other great observer of the Comstock era was Eliot Lord, whose well-regarded *Comstock Mining and Miners* devoted two chapters to the litigation issues. He found that the 12 most important companies prior to 1867 were involved in 245 suits, 168 in which they were plaintiffs and 77 in which they were defendants. Many of these suits had to do with claim jumpers, and claim jumping had to do with how boundary lines were drawn and how far those lines extended relative to the dips and turns of the ore ledge underground. Many of the rules governing the apportionment of ore fields were by tradition drawn up by the miners themselves, and the rules for Gold Hill and Virginia City, the two principal Comstock districts, were no better or worse than the rules of other districts. Lord was not impressed by this argument for local control and responsibility. He summarily dismissed it as “vague, inadequate, and blundering.” They protected the “working miner” as much as “the speculator and the sluggard”, and they ignored several centuries of mining legal experience in colonial Spanish America.<sup>4</sup> Twenty years after the initial claims had been declared, lawsuits over rightful ownership were still being launched. It should not be ignored, of course, that while the scores of lawsuits and counter-suits were costly in money and time, they did not ever really threaten to shut down the Comstock. A colossal nuisance, no doubt, but not much more than that.

At the time of the California gold rush no federal mining code existed, and few were of the opinion that such a code was needed. Indeed a decade later, as the Comstock was becoming America’s new “gold rush”, still no code had been enacted. Comstock land and the wealth that it contained belonged to the public domain, for which the national government was the responsible agent. What was adopted in California and then in Nevada in the absence of formal national regulations was the “doctrine of prior appropriation”. What this meant with respect to mineral (and water) rights was that the discoverers or “locators” of valuable mineral deposits had the right to exploit them if done so in a diligent and timely manner. To give substance to this doctrine miners created their own mining districts and wrote their own rules governing the discovery, possession and exploitation of the minerals within their districts. They were also known to have written into their mining codes regulations concerning business and personal conduct. This approach fit the nineteenth-century ideal of self-governing localities but did not always work well. Drafting appropriate legislation was far less interesting and remunerative than searching for ore. Besides no matter how serious-minded local officials tried to be the claimants on the Comstock and in other camps were still technically trespassers on federal lands, and as such their claims could be declared invalid. This was especially troublesome to mining companies whose titles to properties, either purchased from original locators or reclaimed from abandoned sites, could be

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<sup>2</sup> Smith, *The Comstock Lode*, 75.

<sup>3</sup> Smith, *The Comstock Lode*, 66.

<sup>4</sup> Lord, *Comstock Mining and Miners*, 177-178.

called into question. As mining companies assumed control of ore production and in the process enriched their officers and stockholders, they became targets for lawsuits. Anyone with a whiff of a claim over or near a profitable ore body had little to lose by filing a lawsuit. Local codes and procedures were simply inadequate for the task. This led Lord to conclude that local codes drawn up by local claimants were “[i]napplicable, inadequate and rudely framed” and while the codes might have been useful had they been enforced properly, they were in fact ignored with regularity. He described this adventure in self-government “as a concession to some imagined necessity for a formal prelude to their foray upon the ledges – a sop, as it were, to an invisible dragon of legal fiction guarding the golden fleece.”<sup>5</sup>

In 1865 and 1866 at the behest of Nevada Senator William Stewart the Congress enacted legislation that dealt with some of the unresolved legal questions. Stewart was also a Comstock lawyer whose clients were prominent mining companies. The 1865 Act, known as “Law of Possession”, addressed the issue of trespass in areas like the Comstock. The Act declared whenever state or federal litigation occurred over possession of property, once part of the public domain, it “shall [not] be affected by the fact that the paramount title to the lands in which such mines lie is in the United States, but each case shall be adjudged by the law of possession.”<sup>6</sup> The importance of this provision was that the local codes, drawn up by the miners themselves, would determine possession of a claim so long as the codes were adhered to in locating the claims. A company could lose its right of possession but only if the facts relative to the locating of a claim required that company’s rights be terminated. For a site to be disputed was not in and of itself sufficient grounds to disqualify a company’s claim. A year later Congress passed additional mining legislation, known as the 1866 Lode Act and drawn up as well by Stewart. One provision, extraordinarily important to the mining companies, exempted lands containing minerals from federal public auctions. Rather these lands and their minerals could be acquired through private sales. Some Congressmen tried to gut this article so that mining companies would be forced to bid for land that they wished to develop. Public auctions on lands thought to be rich in minerals could push up prices far beyond what companies wanted to pay and in the past had paid.<sup>7</sup> It is not clear that in post-Civil-War America where the business of mining was viewed as instrumental to the recovery of the economy that the public-auction approach ever had much chance of success against the corporate interests championed by congressmen like Stewart.

Equally important to Comstock miners were the provisions of the 1866 Lode Act that established how claims should be organized. Later legislation, The 1870 Placer Act and The General Mining Law of 1872, addressed further the matter of mining claims. Mining regulations from the earliest years in Spanish America sought to limit how much of a vein a single person could claim. Local mining codes in California and now in Nevada included the same limitations. But drawing a boundary on the surface, as was done in placer mining, did not necessarily describe the course of the vein underground. The crucial measure was the length of the claim along the vein. In federal legislation the

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<sup>5</sup> Lord, *Comstock Mining and Miners*, 45.

<sup>6</sup> Act of 27 February 1865, Chapter 64, Section 9, 13, Statute 441. Available on-line.

<sup>7</sup> The 1866 Lode Law is discussed by Earl Hill, Esq., under the title “A Brief History of the Nevada Law of Mining” on the following web page, [www.library.lp.findlaw.com](http://www.library.lp.findlaw.com), dated.7/21/2003, 3.

length was fixed at 200 feet. The width was not fixed, however. Under the so-called “apex” or “extra-lateral” doctrine the claimant was entitled to follow the dips and spurs of a vein underground wherever they went so long as they did not cross either end of the 200-foot boundaries and the apex of the vein was within his claim. One change in the 1872 law was that if any additional veins were discovered within an existing claim they fell under the original claim (so long as the previously noted restrictions were met). This was important because the locator was limited to a single claim along a identifiable vein, and if a second vein appeared within his boundaries he could not claim it without this provision. Another change in the 1872 law was that the word “valuable” was inserted before mineral deposits in the opening sentence to distinguish between deposits that had value and those that did not. Increasingly the quality of the ore came to play a role in whether or not claims would be validated. Federal legislation broke no new ground. In general it simply legitimized prevailing local rules along with all the problems that those rules had created. With respect to quartz or lode mining federal legislation embraced the basic provisions of the Comstock mining codes, not a surprising development given Stewart’s authorship.<sup>8</sup>

Untangling the claims and counterclaims in the Comstock’s early years is not directly germane to this study. The litigation that these property disputes spawned, however, became an integral part of the Comstock’s economic life. Although the volume of lawsuits declined over time, as court rulings and private dealings served to impose recognizable boundaries on Comstock mining properties, the invocation of a lawsuit remained the weapon of aggrieved claimants as well as scheming opportunists. At times it was difficult to separate the legitimate claims from the fraudulent ones simply because legal documentation (deeds, transfers, conveyances) was unclear and incomplete. One such case was known as *Kinney et al. vs. Consolidated Virginia and California Mining Companies* (the Mackay-Fair-Flood-O’Brien behemoth). After more than a decade of controversy that predated the actual incorporation of Consolidated Virginia and California Judge Lorenzo Sawyer of the United States Ninth Judicial Circuit (district of California) issued a ruling against Kinney and in favor of Consolidated Virginia and California that also carried a warning.

To conclude, then, after a thorough examination of this case, having gone through the entire testimony from beginning to end, and having read all the material parts, two or more times over, not relying on the abstract of counsel, I think I understand it, and the more thoroughly I examine and comprehend it, the better satisfied I am, that this case is utterly barren of any equities to sustain the claim set forth in the bill.

And then after summarizing the defects in the petition by Kinney and his attorneys – who, he acknowledged, argued with “zeal” and “ability” – Judge Sawyer wrote:

This case I presume will go to the Supreme Court.

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<sup>8</sup> The 1870 Placer Act and The General Mining Law of 1872 are discussed in the previously cited web site, [www.library.lp.findlaw.com](http://www.library.lp.findlaw.com), dated.7/21/2003, 4-6. See also Joseph Tingley, *Mining Districts of Nevada*, 2<sup>nd</sup> ed. (Nevada Bureau of Mines and Geology Report 47, Mackay School of Mines, University of Nevada, Reno, 1998) for additional discussion of legal foundations for Nevada mining districts.

The amount involved – complainants aver, that twenty millions of dollars have been extracted from the premises of which they pray an account – is such that if the parties have any confidence in their claim, they will be very likely to carry it further.

Despite his diligence he closed with the observation that every jurist understood: the record could be read differently from how he read it.

I am very glad to know that there is such a tribunal to correct my errors, if I have fallen into any. If I have made any mistakes, it is certainly unintentional. I have endeavored to get to the merits of this case, to the bottom – to the “bed-rock” – to use a mining phrase appropriate to the occasion....The Supreme Court tries the case *de novo* without any regard to my decision or rulings, and it will give such judgment as the law and evidence appear to that Court to require.<sup>9</sup>

In cases like this the evidence could be a combination of verbal and documentary evidence. Judicial (written) records dated from the early 1860s, when Nevada was a territory and Kinney and other property owners were parties to several suits over claims and boundaries before the Storey County First District Court. They were included because both Consolidated Virginia and California were created out of these properties plus several adjacent properties. The original claims, however, may have been based on *paroles*, that is, spoken agreement (after the French verb to speak), rather than written deeds. Sawyer made note of the “parol” custom. “In the case of *420 Mining Company* against the *Bullion Mining Company* (3 Sawyer 658-9), I held that a parol partition followed by possession acquiesced in in accordance with the parol partition, is a valid contract of partition at all in a mining claim.” Since Sawyer was convinced that prior partitions had occurred by way of parols and more importantly had been acquiesced in, the Court would have to accept the parols as valid. “Any other ruling upon parol transfers, followed by possession, would disturb many old and highly valuable titles on the Comstock Lode. There was no necessity then for a deed at the time, if there was an actual transfer of the possession, and an occupation in pursuit thereof acquiesced in.”<sup>10</sup> The key was the acquiescence on the part of the parties and in a general sense of the mining community at large. The problem with parols was that transfers could be accomplished without conveyances ever being recorded. Written records were obviously preferred, and indeed when miners established their districts and wrote their codes, they often included a provision that urged the recording of the transactions in the Deed Book.

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<sup>9</sup> The Court’s ruling plus the documentation is available in a folder of documents entitled Legal Suits, NC99/4/2, Special Collections, Library, University of Nevada, Reno. The above quotes appear in “Opinion of the Hon. Lorenzo Sawyer, Judge of the United States Circuit Court, delivered in open Court, on Thursday, Nov. 1<sup>st</sup>, A. D. 1877”, concerning case of Kinney *et al.* vs. The Consolidated Virginia Mining Company *et al.* 39-40. It is not clear that the case was appealed or if appealed a review was granted by the Supreme Court. What is clear is that Consolidated Virginia and California did not lose the contested property or pay the sum demanded by the plaintiffs.

<sup>10</sup> The parol in question here involved Kinney himself, and since it had been granted and accepted, it could not be dismissed because it was a verbal contract “Opinion of L. Sawyer”, Legal Suits, NC99/4/2, 39, Special Collections, Library, University of Nevada, Reno.

But many parols were never so recorded, and judges had to approach the matter pragmatically, since any disavowal of the parol system would hardly moderate the wrangling over claims. Three-fourths of the original Comstock titles, according to Sawyer, were verbal transfers, although such a number is hard to verify. Californians had abandoned the contentious parol system after the mining boom subsided. Since early Nevada miners, mainly from California, were working in an environment without much civil government, they naturally reverted to a procedure that they had known in California. As the riches of the Comstock became more and more obvious, staking a claim as quickly as possible was paramount. *Parole*, so widely used in California's Gold Rush, filled a legal void. The Kinney case also raised the issue of opportunism. Parol conveyances aside the Circuit Court file revealed that in an earlier case (1865) between Kinney and Central #2 Mining Company (one of the properties folded into the new California Mining Company) Kinney had gone to court over the same plot of land, about 10 feet by 20 feet, and had lost. Kinney may well have known that he was skating on thin ice because in one of his final court filings he reminded the court that he was among the Comstock's original locators, and while fame and fortune had eluded him (as had his memory), he deserved to be rewarded if only symbolically for his efforts. A decade later when that piece of land was part of a multi-million dollar bonanza mine his plea went unheeded again.<sup>11</sup>

When a Californian J. Ross Brown, soon to be the United States Commissioner of Mines visited the Comstock in the summer of 1860, he declared that the rush to stake out every square inch of the Lode had resulted "in a mess of confusion"<sup>12</sup> The mess occurred even though from the earliest days as prospectors proceeded northward from the Carson River into the Virginia Range they seemingly understood the need to create a elementary legal and civil framework to manage their disputes and protect their claims. To his end they met in January 1858 at Carson City to organize a mining district known as Columbia. Columbia had a short life because, as miners pushed further north into ground around Silver City, Gold Hill and Virginia City, they set about creating new districts to deal with local circumstances. By the end of the summer 1859, after the discovery of the quartz vein that came to be known as the Ophir Diggings, the Comstock had two districts: Gold Hill on the southern branch of the Lode and Virginia on the northern branch.<sup>13</sup> Deed Books or Record Books, as they were called in the documents, were opened in both Gold Hill and Virginia City. Since the Gold Hill was organized before Virginia claims such as the Ophir Diggings (in Virginia City rather than Gold Hill) were originally recorded in the Gold Hill Record Book and then at a later date re-recorded in the Virginia District

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<sup>11</sup> The Kinney file contained a long brief that included copies of decisions from earlier trials. Copies and summaries of the 1865 trial may be found in attachments to "Opinion of L. Sawyer", Legal Suits, NC99/4/2, 456-457 in NC99/4/2, 39, Special Collections, Library, University of Nevada, Reno.

<sup>12</sup> At least according to Lord, *Comstock Mining and Mines*, 52, who found this phrase in an article or pamphlet entitled "A Peep of Washoe".

<sup>13</sup> Some confusion exists over the establishment of these districts. The original districts were American Flats, Gold Hill and Virginia. Sometimes these districts plus several others were known jointly as the Comstock District. Joseph Tingley declares that Virginia was the first district, but I have not been able to verify that. Gold Hill organized on 11 June 1859, and indirect evidence suggests that Virginia organized a few weeks later. There is no doubt that from the summer of 1859 claims, deeds, transfers, etc were entered into what were called Record Books maintained by each district. See Tingley, *Mining Districts*, also on-line through the Nevada Bureau of Mines and Geology.

Record Book.<sup>14</sup> The mere existence of mining districts and deed books did not constitute sufficient order and authority to avoid the mess that Brown lamented during this visit. While mining districts could lay down certain rules and regulations that all miners agreed to abide by, the confusion arose in the field where the procedures by which claims were laid out were hardly precise and reliable. Even if one ignored the chicanery that ensued over claims and boundaries, one was still confronted with rather primitive techniques for staking a claim, marking the boundaries and giving notification. Whatever procedures were enacted, they depended for enforcement on the claimants themselves whose own self-interest could override any adherence to the rules and regulations.

A mining code was first approved in Gold Hill on 11 June 1859 and is worth further examination. There was nothing unique about the code. Its provisions reflected customs and traditions practiced in other mining regions. With respect to lode mining the most important features were: a quartz claim could not exceed 300 feet in length to include “depths and spurs”; each claimant was entitled to one additional claim on all veins so discovered; retaining a claim required work equal to \$15 per share within 90 days; registering a claim should be completed in 30 days; and no person shall hold more than one claim along a vein [with the exception of the aforementioned bonus]. The Gold Hill miners revised their code on 4 March 1860. The single-claim provision was reiterated, but the length of the claim was reduced to 200 feet to include all dips, angles and spurs. Quartz claims had to be registered in five days, and they were identified by a stake at each end “where the ledge is visible” with the names of the locators and the number of feet. Where the ledge was not visible, the stake with relevant information should be as close as possible to the ledge. A claimant had to show that work was done for at least three days per month or in the amount of \$50.<sup>15</sup> During a meeting of Virginia District miners on 14 September 1859 they too ratified a code that embraced some of the provisions of the June version of the Gold Hill code but also contained changes that would appear later in an amended Gold Hill code. It is not clear whether the Virginia District was revising a prior code, and if a prior code existed whether or not it preceded the initial Gold Hill code. In the September version of the Virginia code the length of the quartz claim was fixed at 200 feet. The right to an additional claim remained. Stakes with appropriate information on the parallel end lines was required. To legitimize the claim it had to show work for 3 days a month or a yield of \$10 in a month, and if the owners could show \$40 he was exempt from working the claim for six months. All claims had to be registered 10 days after they had been located.<sup>16</sup>

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<sup>14</sup> See Lord, *Comstock Mining and Miners*, 59 and footnotes 2 and 3. A document attached to a court file concerning the incorporation of Consolidated Virginia and California in the 1870s refers to a claim, originally recorded in Gold Hill and then re-recorded in the Virginia District in October 1859: “Virginia City Utah Territory October 12<sup>th</sup> 1859. In accord with the mining laws recently passed the undersigned for themselves and the other owners hereby re-record three hundred feet of mining at Ophir Diggings located as follows. . . .” NC99/4/1/3, 4, Special Collections, Library, University of Nevada, Reno.

<sup>15</sup> Copy of the Minutes of the Gold Hill Miners, NC99/4/1/1, Special Collections, Library, University of Nevada, Reno. Also Lord, *Comstock Mining and Miners*, 42-44.

<sup>16</sup> Lord, *Comstock Mining and Miners*, 91-92. I have not found an original version of the Virginia District code. Plats and Surveys do exist among Carson County Records, according to James, *The Roar and the Silence*, footnote 28. I have not seen these documents.

Writing the rules and then applying them were two different and not always complementary activities. The codes, even in the hands of angels, were insufficient in their written form to anticipate and settle all the issues that could arise among claimants. Whether any authority could have written a satisfactory code remains an open question. Lord believed that Spanish colonial mining law was superior to the law emerging in the American West because it provided for more scrutiny and care in the staking and registering of a claim. He was quick to point out the flaws in the Spanish colonial system, but he left no doubt that in the absence of a similar approach the Comstock had created for itself a legal mess. Lord's knowledge of the Spanish colonial code was largely based on his reading of the *Los comentarios de las ordenanzas de minas...*, published by the Mexican Creole jurist, Francisco Javier Gamboa in 1761. This is not the place to discuss the pros and cons of Gamboa's famous work, but let it suffice to say that Lord, the staunch laissez-faire advocate, was using Gamboa to argue for stricter central authority in the enactment and administration of mining-property codes. It is worth pointing out that the laws contained in Gamboa's commentaries had evolved over two centuries since the silver discoveries at Zacatecas in Mexico and Potosí in Peru (Bolivia today). In the first decades of the colonial industry, for the same reason - absence of formal governmental institutions - as in Nevada, disputed claims abounded. Unlike the United States political system, Spanish colonial institutions and officials were the political extension of the royal government. By the middle of the eighteenth century, when Gamboa wrote the *Comentarios*, the codes and practices governing mining operations were well established and understood, although disputes continued to percolate into the public forum until the end of the colonial period. What drove the mining ordinances was the Crown's determination to regulate the business and to protect its interests, especially its financial interest, in that business. The Nevada miners might have benefited from more central authority and governmental intervention but hardly on the level practiced in eighteenth-century Mexico. Lord's diagnosis of the cause of the "mess of confusion" was probably correct, but his remedy of more governmental inspection and control, if ever enacted, was probably unacceptable to the majority of Nevadans and westerners.<sup>17</sup>

For Lord confusion began the day after the Gold Hill miners had approved their code. The claim of Peter O'Reilly and Patrick McLaughlin (the so-called Ophir Diggings) that had pushed the miners to assemble in Gold Hill came to include Henry Comstock and Emanuel Penrod, who had bullied their way into a partnership. The claim measured 1,500 feet (300 feet x 4 locators plus a bonus 300 feet for discovery) along the ledge or the outcropping of the vein from the point near where O'Reilly and McLaughlin had made their discovery. According to Lord, while the measurement was certainly within the spirit of the code, the locators failed to follow through. There was no evidence that the stakes with the appropriate information on measurement and ownership were placed on the end lines, and the claim had ever been registered. It was possible of course that the stakes were properly placed but then discarded or stolen and the claim was

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<sup>17</sup> Lord, *Comstock Mining and Miners*, 52-55. Gamboa, *Comentarios a las Ordenanzas de Minas...* (Madrid, 1761). Gamboa wrote the book to highlight what he and others thought was a Mexican mining recession or depression and to advocate a larger role for merchants in owning and operating mining companies. Technically they were forbidden to do so, but in fact they were deeply involved in mining and entrepreneurs like Antonio López de Quiroga and Antonio Romano de Terreros were merchants before they became miners. The production downturn was a modest affair, one of many in the eighteenth century.

properly registered but lost. Claimants were known to remove and replace stakes in order to get the best possible piece of ground, and of course competing claimants were known to engage in nefarious behavior. And since the “public officials” were the miners themselves and the “public offices” were the shops and saloons of the camps, records could easily disappear. Within days other claims were made north and south of the O’Reilly-McLaughlin-Comstock-Penrod claim, and many of those claims were improperly measured or registered and even worse occupied or impinged upon land that had been stake earlier, not as quartz claims but as hill or ravine claims that were measured in square feet rather than in length.<sup>18</sup>

Except for the first few months after the Gold Hill miners approved their initial codes the 200-foot limit on the length of the claim was in effect. If several locators were working together, they could each claim 200 feet without interruption. Many initial claims were sold to mining company who would legally acquire all the claims of the original discoverers. The width did not need to be prescribed on the assumption that the locator would be entitled to the width of the vein whatever that was within the confines of the end lines. Where to place the end lines could be a problem because the outcroppings – the surface manifestations of the underground veins - did not always move in straight lines. Should the measurement of 200 feet (by rope) follow the contour of the outcroppings or be laid down in a straight line from the first stake to the second stake? With all staked measurements, of course, there were risks of the stakes being changed, removed or hidden and the measurements being in error. The width of claims proved to even more troublesome. In the early months claimants had little knowledge of the shape and behavior of the Lode below the surface. Much debated was the question of whether the Lode consisted of a single ledge of ores and other non-mineral-bearing substances (rock, porphyry, clay, etc.) or several distinct ledges? If a single ledge, then the various outcroppings and parallel veins geologically belonged to one structure. If, on the other hand, the Lode consisted of several independent substructures the outcroppings and veins could have several sources. At 500 feet the answer was manifest. The Lode was a single v-shaped ledge - wide at the top and narrow at the bottom. The outcroppings and veins rising from the wedge were in effect connected, even though they were surrounded and separated by matter that contained little or no ore. In brief, what this meant was that many claims from the earliest months were invalid because the original legal locator of a plot 200 or 300 feet long was entitled to the full width of the plot, as measured from the footwall to than hanging wall (west to east). In some cases the width reached as much as 1,000 feet. In the rush to claim as much of the Comstock as fast as possible, many side-by-side claims of 200 or 300 feet in length had been registered. Even before the single-ledge theory was finally adopted many overlapping claims had to be settled. Not only did

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<sup>18</sup> Lord, *Comstock Mining and Miners*, 52-55. Various publications summarized Spanish-American mining laws, but Lord was particularly interested in Francisco Xavier Gamboa’s *Comentarios a las Ordenanzas de Minas...*, published in Madrid in 1761. Gamboa was a Creole jurist who was asked to review the codes in terms of a depressed mining economy in mid-eighteenth-century Mexico. It is held to be a solid evaluation of the legal code, although Gamboa himself recommended changes that would have benefited the merchant class for which he served as an advocate. Clearly Lord was impressed with work of Gamboa and the effectiveness of the colonial mining code, and while he did not recommend that the code be adapted to Nevada he did believe that there were lessons to be learned by studying the way in which the Mexican had evolved.

side-by-side quartz miners argue over the width of claims, but they also had to deal with the claims of placer miners who may have registered or staked on the surface in square feet part of a hillside or a ravine. That miners and governments were less conscientious about the distribution of property along the Comstock than a retrospective view might suggest was needed, they were both ill prepared to institute more orderly procedures. For the miners time needed to work out better procedures was time taken away from the task at hand, and for governments a laissez-faire approach was a natural response until circumstances demanded something else.<sup>19</sup>

Despite the litigious character of many mining camps, miners devised their own strategies to resolve disputes over claims. Some in the tradition of western lore were settled at the poker tables and in the city streets, but since these activities were seldom recorded in official documents, except perhaps for personal testimonies in later court proceedings, the number is simply a matter of speculation. A common strategy was for disputing claimants to set up partnerships, as O'Reilly & McLaughlin and Comstock & Penrod had, so that work on the claim could proceed without further delay. This quartet may have earned as much as \$100,000 in the remainder of 1859 before they began to sell off their shares. O'Reilly may have held out the longest and eventually realized \$40,000 for his share. By the spring of 1860 the Ophir Mining Company, organized by San Francisco investors, had assumed control of the vein, which had by now reached 1,400 feet. None of the original locators was involved in the new company, but several of those who had bought their shares were members of the new company. How many of these "arranged" partnerships succeeded to the same degree is not known. The fact was that within a year after the first discoveries many original locators, unprepared for the financial, technological and managerial burdens imposed by quartz mining, either sold their shares or abandoned their claims. The first phase and perhaps the most colorful in the history of the Comstock had come to an end shortly after it had begun.<sup>20</sup>

The preoccupation with Comstock litigation by contemporaries and historians is understandable. Vast sums spent by some of the Comstock's most colorful entrepreneurs made for good reading. The fascination as well as the dismay for journalists and historians of the Comstock arose from the numbers themselves. Smith stated that nine companies were involved in 359 suits of which one half were filed against adjacent claim-holders<sup>21</sup> Although their figures cannot be compared, Lord cited the "district court" records to show that until 1867 a dozen companies with important Comstock claims were involved in 245 suits. These companies were aggressive plaintiffs in that they initiated 168 suits or 69 percent of the total. Five companies - Ophir (28), Yellow Jacket (24), Savage (22), Gould & Curry (20) and Overman (18) - initiated 112 lawsuits or 67 percent of the total plaintiff cases. These same companies were defendants in 36 suits or 47 percent of that category. The ratio of plaintiff/defendant suit was three to one. Three

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<sup>19</sup> Several different sources can be consulted concerning the ledge theory. Smith presents a readable summary in Chapter 9, *The Comstock Lode*. A more technical discussion appeared in George Becker's monograph, "A Summary of the Geology of the Comstock Lode and the Washoe District" in *Geology of the Comstock Lode and the Washoe District* (Washington: Department of the Interior, United States Geological Survey, 1882), 314-319.

<sup>20</sup> Smith, *The Comstock Lode*, 15-19.

<sup>21</sup> Smith, *The Comstock Lode*, 66, although no source was cited.

companies – Chollar (7 vs. 10), Potosi (7 vs. 8) and Hale & Norcross (2 vs. 7) - found themselves to be defendants more often than plaintiffs. What was not revealed in these figures was how many times the same companies were involved in suits against each other. Without citing precise figures Lord averred that the heavy plaintiff activity concerned suits of “ejectment [sic]...to dispossess ‘jumpers’ or to quiet title.” The list would have been longer, he speculated, except other companies had “nothing worth wrangling for” even though their rights were no “less questionable.” The most litigious companies had claims of “recognized value” and yet they also had among the strongest titles to be recorded in those hectic first years, and yet their “trustees made unusual exertions to secure the most perfect titles possible.”<sup>22</sup> District codes, laudable though they be as a reaffirmation of the American individualistic spirit, simply made the chaos worse. The “Interminable Litigation”, the chapter in which Lord discussed these matters, arose from a long delayed construction of a “well framed National or State code.” For him, and perhaps him alone, a devout disciple of laissez-faire economics, the democratic spirit embodied in the miners’ district councils was excessive and often counterproductive. Lord even suggested that all the early claims that came under the purview of the district councils should be renounced and they should be reassigned on the basis of a more rational set of rules and regulations. Some centralizing order, as Spanish-American mining evidenced, would serve the region and the industry well.<sup>23</sup>

A more sanguine although still critical view came from Smith, a lawyer by training, who thought that the situation was less bleak than Lord’s critique implied. In some circumstances such as the smaller Gold Hill claims where “their stopes and other mine workings were constantly joined, the owners worked together harmoniously, often using each other’s shafts...the only mines along the Lode not involved in a welter of litigation...”<sup>24</sup> In the second half of the first decade and the in the second and third decades cooperation was patently evident as mining companies whose ore bodies never materialized or were exhausted but whose underground infrastructure - shafts, ventilation and drainage systems and tunnels – could assist adjoining operations made deals to do so. In the early years, however, competition and animosity were far more fashionable than cooperation and harmony. And often lost in the discussion is that many of the companies pursuing lawsuits had the resources to do so, no matter how expensive, inefficient and unnecessary they may have been. The mitigation in “to sue or be sued” outlook came not because there was a wave of altruism swept across the Comstock. In his 1865 Legislative Mining Survey the Surveyor-General, who characterized the legal scene as “a Kilkenny cat fight,” estimated that a fifth of the Comstock’s ore production through 1865 was eaten up in legal fees and courts costs. He further observed that the litigation phase simply “exhausted” itself.<sup>25</sup> Stockholders had seen assessments replace their dividends, and the

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<sup>22</sup> Lord, *Comstock Mining and Miners*, 177-178.

<sup>23</sup> Lord, *Comstock Mining and Miners*, 178-180.

<sup>24</sup> Smith, *The Comstock Lode*, 98.

<sup>25</sup> “Annual Report of the Surveyor-General of the State of Nevada for the Year 1865” in *Senate Journal and Appendix*, 3<sup>rd</sup> Legislative Session (1867), 28. His estimate more or less agreed with figures proposed by Lord and Smith. Of the \$40 to \$45 million in output a fifth would have amounted to \$8 to \$9 million. Lord cited the Surveyor-General and a figure of \$9 million, and Smith, without citing his source, said between \$9 and \$10 million were spent. Lord, *Comstock Mining and Miners*, 172, and Smith, *The Comstock Lode*, 70.

downturn in production in 1864 accompanied by a run on Comstock stocks at the San Francisco Exchange had emptied the companies' coffers. Lawsuits were no longer had much appeal. Not only were many companies, some of the largest, close to bankruptcy but they also lacked targets. Perhaps at an inordinate and unnecessary cost the boundaries got fixed and the disputes got settled. The claims that show up in Comstock surveys and maps to be published over the next two decades will vary little from how the Comstock looked in the mid-1860s.

Smith observed that among the hundreds of suits filed (many of which were never litigated) only four achieved high profile status. The four were Ophir vs. Burning Moscow, Gould & Curry vs. North Potosi, Chollar vs. Potosi and Yellow Jacket vs. Princess and Union.<sup>26</sup> Two of these, Chollar vs. Potosi and Ophir vs. Burning Moscow, surely reached the level of absurdity. Chollar and Potosi had side-by-side claims, each 1,400 feet in length and 400 feet in width. Potosi first found ore in 1861 that dipped into Chollar and then Chollar found ore that dipped into Potosi. Chollar won the first suit and Potosi the second, although both decisions were confusing and tainted. After spending four years in litigation, which, according to Smith, "shook the Comstock to its foundations" and cost an estimated \$1.3 million the two companies agreed to merge in 1865.<sup>27</sup> In Ophir vs. Burning Moscow there may have been an opportunity early to avoid a dispute. In the fall of 1859 Melville Atwood, a quartz miner from Grass Valley California, notified the Ophir owners that the footwall along Mt Davidson would turn to the east and so too would the Lode. While the outcroppings appeared to dip to the west where the company had concentrated its operations these surface features should be seen as only temporary. He advised Ophir to buy up a small claim held by Burning Moscow to the west along the footwall to forestall the possibility that as the footwall turned east Burning Moscow could contest Ophir's claim to that part of the Lode. But Ophir ignored his advice. In 1865 after four years of litigation and an expenditure of \$800,000 to \$1,000,000 a settlement was reached, although to the very last moment the parties wrangled over the details. Ophir agreed to pay \$70,000 for 800 feet that then had a market value of \$50,000.<sup>28</sup> If \$8 to 10 million dollars were spent on lawsuits in the early 1860s, then a fourth or fifth of the total was consumed in these two cases. Whatever the

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<sup>26</sup> Smith, *The Comstock Lode*, 70. One can follow both the legal and political ramifications of these lawsuits in Russell Elliott, *Servant Power, A Political Biography of Senator William M. Stewart* (Reno, NV: University of Nevada Press, Nevada Studies in History and Political Science, # 18, 1983), Chapter 2. Elliott wrote that Stewart "was a central figure in the Comstock legal wars, which climaxed with the case of the Chollar Mining Company against Potosi Mining Company....It was the basis, also, of the quarrel between Judge John W. North, which began as a difference of legal opinion and ended as a political contest that brought Stewart into the United States Senate and ended North's career in Nevada." (21). Elliott relied heavily on Eliot Lord's rendering of the dispute between Chollar and Potosi Mining Companies.

<sup>27</sup> Smith, *The Comstock Lode*, 88. See also "Annual Report of the Surveyor-General...1865" in *State Journal and Appendix*, 3<sup>rd</sup> Legislative Session (1867), 28

<sup>28</sup> Smith, *The Comstock Lode*, 65-67; Lord, *Comstock Mining and Miners*, 177-178. The \$1 million figure is from the "Annual Report of the Surveyor-General...1866" in *State Journal and Appendix*, 3<sup>rd</sup> Legislative Session (1867), 28. In the Ophir-Burning Moscow case Lord complained that "No further commentary is needed to disclose the folly of the laws which allowed a locator to follow the dips, spurs, and angles of the ledges anywhere." [177] "Peculiar" is how Smith described American mining law that allowed one claimant to follow his dip even as it "penetrated" under an adjoining claim. Laws in other countries allowed for vertical side boundaries that prevented a claimant from entering adjacent property unless he purchased it. [66].

actual total legal costs in the wake of the discoveries they do not appear in retrospect to add much value to the business of mining and processing the ore.

The extravagance of the companies' judicial skirmishes, even if they had some positive consequences in settling boundary disputes, was part of a general pattern of financial misdirection and mismanagement. Historically mining fortunes could be destroyed almost as quickly as they were made. They were particularly vulnerable in the earliest years. On the Comstock, for example, Gould & Curry hardly exhibited a sober and frugal attitude toward finances. Gould & Curry was the merged claims originally located by Alva Gould and Abraham Curry. A group of San Franciscans organized the company on June 1860 with a length of 1,200, and all became rich. In 1862 through its D Street tunnel somewhere about 40 feet below the surface Gould & Curry uncovered the richest deposit yet. Its stock price rose from \$500 per share to \$1,050 per share and finally to \$2,500 per share. It probably produced about \$14 million worth of ore up to 1865, and of that amount it paid out nearly \$4 million in dividends. In 1864 it allotted \$1.5 million to construct a new mill. The timing could not have been worse because the ore grades dropped to less than \$15 per ton, and within a year or so the ore bodies disappeared completely. The mill with 80 stamps to crush the ores and 40 pans for amalgamating the ore and mercury had capacity that exceeded what the mine could produce. Even Smith recognized (with less virulence than Lord was capable of) that this "was a showy period; wealth was expected to make a display."<sup>29</sup> Such lavishness was not unique to the Comstock or to Gould & Curry. For Gould & Curry the cost of 27 lawsuits during this litigious period may not have posed a short-term financial burden since the mine had ores yielding as much as \$50 to \$100 a ton. When the litigation craze came to an end a few years later, it was not because the company ran out of money but because it ran out of profitable ore. If it had practiced greater thrift, could it have extended its life and at the same time could it have satisfied its stockholders? Perhaps, but even if it had managed both it could not have changed the ultimate outcome. A more intriguing question is what would the company have done with its surplus if it had been more frugal and less lavish? Numerous options come to mind from investing in other mining properties to donating to many needy causes. There was no economic incentive to change course or conserve capital since underlying all "gold and silver rushes" was the presumption, reinforced by popular and expert opinion, that the bonanzas might never end. Of course it was always possible the newly enriched stockholders and owners found many ways to make worthy investments, just not in Nevada. What may appear to be rational or irrational in retrospect may simply miss the point. Vast sums of money earned from mining were spent in ways that may defy common sense or fiscal probity but not necessarily economic choice.

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<sup>29</sup> Smith, *The Comstock Lode*, 84-86.