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THE BEGINNINGS OF LAW IN COLORADO

By JAMES GRAFTON ROGERS



James Grafton Rogers, President of the Colorado State Historical Society since 1949, first suggested the celebration of the Gold Rush Centennial. A graduate of Yale, Dr. Rogers also holds degrees from Denver University, the University of Colorado, University of Pennsylvania and Colorado College. He has been a law professor at Yale, and law dean at both the University of Colorado and the University of Denver. In addition he has held several high posts in the federal government and has published many books, papers and addresses. Dr. Rogers is a past president and honorary life member of the Colorado Bar Association.

Law began in Colorado in 1859. It took the form of legislation, courts and trials set up and administered by many little local governments created by the gold miners themselves. There was no authority whatsoever for the creation of these governmental units except the will and proceedings of mass meetings held in the mountains on the call of a group of prospectors, but many of them flourished, lasted for years, adopted and enforced elaborate codes of law, gave judgment in civil cases and punished criminals. The origin, form and influence of these miners' commonwealths have invoked considerable study and writing by historians.

The local governments were called "districts" almost invariably but the word district did not mean merely an area. It meant a local sovereignty. It meant this to the miners. A district operated as a commonwealth, with all the emblems of power and force. It elected officers, executives, judges and police, and paid them. Many a district had a treasury and extensive written files and property records. Some had lengthy codes of judicial procedure, as well as civil and criminal substantive law.

Besides the mining districts, a number of agricultural or urban government units were formed by the same means and on the same pattern as the creation of the miners and were sometimes also called "districts," but more often "claim clubs."

There were several hundred mining districts which operated in Colorado. One authority lists 575 but there is duplication and the real number he records seems about half that total. Another lists 132 and yet another authority, the noted mountaineer Clarence King, prints quite fully the records and minutes of seventy-nine districts. It seems likely that a thorough search of court house vaults in Colorado, of the rare book shelves in the world's great libraries, and of the journals of early travellers would produce

records of about three hundred mining districts in Colorado and about twenty-five imitations in the form of claim clubs. In short none of the compilations mentioned approaches completeness.

The first district set up in Colorado seems to have been "Mountain District No. 1, Nebraska Territory" which was created in the spring of 1859 at Gold Hill in Boulder County. The district which had the greatest prestige and influence as a model for others was the Gregory District born at a mass meeting on June 8, 1859, at what is now Central City and Black Hawk. Districts were organized as late as 1880. However, after Colorado Territory was effectively launched under federal authority late in 1861, most of the parentless little local governments surrendered their law making and enforcement to the territorial officials. For about three years, 1859 through 1861, the creation and enforcement of law in Colorado depended almost wholly on the mining districts. Today, after the lapse of a century, one town in Colorado preserves the structure of a mining district.

When one states that in the area we now call Colorado, the machinery of law, the mechanics of legislation, of judicial procedure, of trial, sentence and judgment did not exist before arrival of the Gold Rush of 1859, and that legal procedures were then adopted and operated by mining districts, he should not forget that several national ensigns had flown over the area long before that date. Spain, France, Mexico, the United States and perhaps even Great Britain and the Republic of Texas claimed sovereignty over this

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part of the Rocky Mountains and the apron of prairie-land which stretched eastward to the Missouri River. Spanish soldiers had carried the banners of Spanish monarchs into this area centuries before the Gold Rush. We have no record of any courts held here by Spanish officials unless it be some trivial case of a soldier being tried by his officers or a runaway slave being whipped by his captors in the name of the law. No judicial officer of France or even of Mexico ever swaggered in the Rockies. Pike unfurled the American ensign in our southern valleys and he punished some of his soldiers, but neither flags nor military discipline are law. We have no record of a judge who sat on a bench or of a legislator who made law in this region before the miners took charge.

It is true also that for a few years—not many—before the Gold Rush, the tract now called Colorado had by legislation in Washington been divided among four territories. Utah Territory had been created west of the continental divide in 1850; and Kansas, Nebraska and New Mexico in 1854 south and east of the divide. None of these paper authorities had sent an officer, opened an office, levied a tax, established a court or in short made an appearance in the Colorado region. Kansas, which ran along the plains as far north as modern Boulder, had called its western edge Arapahoe County and other counties but no officer had approached the area. There were of course no towns in Colorado at the eve of the Gold Rush, except some tiny Mexican villages in the San Luis Valley. There seem not to have been more than a dozen English-speaking men residing in the Colorado region. Most of these men had Indian wives. The area was a wilderness. There were no legal operations and no reason for any.

It is to be noted also that while the mining districts in 1859-1861 were the effective and numerous sovereignties which announced legal principles, protected property and regulated behaviors, other and even rival organizations were set up to assert authority. As we have seen, some of the claim clubs on the plains or along the foothills adopted legislation and held court. A good example is the Bergen District, a little government set up in 1860 by ranchmen who ran a road stop on the route to the mines at the place we now call Bergen Park, west of Denver. This and its sister claim clubs were simply imitations of the mining districts for local purposes and frankly so.

Here and there over the Colorado area another expression of law appeared now and then. This took the form of "people's courts." These were nearly always temporary expedencies created by popular anxiety about violence. They arose from mass meetings or vigilante committees. These "people's courts" were quite different in purpose, atmosphere and operation from the courts of the mining districts. The latter were permanent in a sense. They applied legislative codes for the most part and were responsible to formal authority. Some of the districts allowed a litigant who had been defeated in the miners' court, where the judge of the district presided, and particularly a criminal convicted in this trial court, to appeal his case to popular vote. The miners were then assembled in a mass meeting. Indeed they were usually already on hand as important trials attracted many spectators from all the gulches. The case was

not retried before the mass meetings however. Most of the audience had already heard the evidence. Usually the appealing litigant or his lawyer made a plea for mercy or forgiveness. The victorious side, which in criminal cases was the district itself, replied. The issue was put to a vote. These appeals were seldom successful. This type of procedure was not that of a "people's court." It was purely appellate and never was a trial of the facts. It was much more nearly akin to an application for pardon than to a rehearing of the issues.

As we have seen, the Territories of Kansas, Nebraska, New Mexico and Utah were the legitimate, and the only legitimate, governments with authority in Colorado during the Gold Rush but none of them asserted themselves, or even appeared on the scene. There is some indication that a sheriff for Arapahoe County, Kansas, appeared or was expected to appear but if such an officer arrived at all he took no part in law enforcement. The first code of procedure adopted for the Gregory District mentioned this sheriff and appointed him the agency to enforce the judgments of its miners' court. "The Sherriff of Arapaho County shall be Exofficio Sherriff of this District" they announced—thus calmly calling on the lawfully begotten authorities to adopt and enforce the district's own illegitimate legal offspring. A few months later the miners at Gregory in another of their mass meetings provided for electing a sheriff of their own. In general it is clear that neither Kansas nor Nebraska played any role in law making or law enforcement. The first mineral discoveries were all in these two sovereignties. By the time the prospectors crossed the boundaries of Utah and New Mexico in any numbers these last units had been superseded by establishment of the Territory of Colorado.

There was, however, one pretender to the throne which was at least a prospective rival of the mining districts in the assertion of juristic power. This was the "Territory of Jefferson." This also was a "boot-strap" government set up late in 1859. It had no ancestry except a series of conventions held to forward some sort of central government for the region and a submission to popular vote of its constitution. Jefferson Territory never really succeeded in getting into operation. It asserted authority over an area much larger than the present state of Colorado and had a full regalia of officers, laws and even taxes, but beyond a trial or two held by its "Provisional Court" it seems never to have had any influence on law or order.

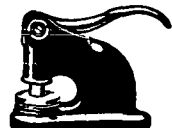
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Indeed Jefferson Territory during its brief life seems to have been more the creature of some ambitious politicians than of any solid public demand or opinion such as supported the mining districts. The Territory is only one of a lot of similar self-born "states" or "territories" which sprang up on the frontier as the nation moved west and none of them came to much. The governor chosen under its constitution surrendered the power he never achieved and dissolved the government that never really existed by issuing a dramatic and quite winning proclamation on the arrival of Gilpin, the first territorial governor appointed by the President. The best hour of Jefferson Territory was that of its demise.

It was the mining districts, then, which introduced the machinery of law to Colorado. They filled a vacuum. For two or three years they were the effective organs of government. It was more than twenty years before they all ceased to legislate, adjudicate civil cases and enforce law and order.

This they did in a curiously uniform pattern. No two districts were exactly alike. Dozens died aborning. Hundreds reached maturity and operated effectively. A few like Gregory District at Central City and Griffith District at Georgetown became highly organized, complex and active local governments. Combined, the districts not only reigned and ruled in the mountains, but created principles and practices which became permanent jurisprudence.

The districts nearly always originated from mass meetings called by a group of prospectors after discoveries of mineral deposits in a new valley, gulch or hillside led to an influx of miners. The callers were usually earlier arrivers anxious to protect their holdings against invasion and disorder. The procedure was to elect a chairman and secretary as soon as a crowd gathered, listen to an orator or two and pass a series of resolutions. This form of legislation by resolution was followed in all subsequent meetings of the miners but the text of the resolutions adopted were promptly referred to as "laws." In the later proceedings of the more mature districts, amendments, revisions and even lengthy codes were drafted by committees appointed by popular vote and given time to report at an adjourned session. No legislative body was ever set up. The referendum was to the miners and in some districts many meetings were held over the years. The minutes were kept in writing, usually in ink but sometimes in pencil, usually in a note book or small blank ledger but sometimes on loose sheets. A few districts printed their laws on broad sheets or in leaflets or had them published in full in local newspapers. The original records, written or printed, were in later years supposed to be deposited in the court-houses. Masses of them survive in county vaults but district minutes are considered treasures by collectors, bring high prices and have been sold by purloiners to many museums and libraries. The spelling and grammar in them is often atrocious. In other cases we find expert draftsmanship and fine penmanship.

The first resolutions presented to an initial mass meeting usually adopted a name for the district or tacitly accepted one already current. Most of these names are geographic, such as California Gulch Mining District, Red Mountain or Pleasant Valley but many take the name of the first discoverer like Buckskin Joe or the

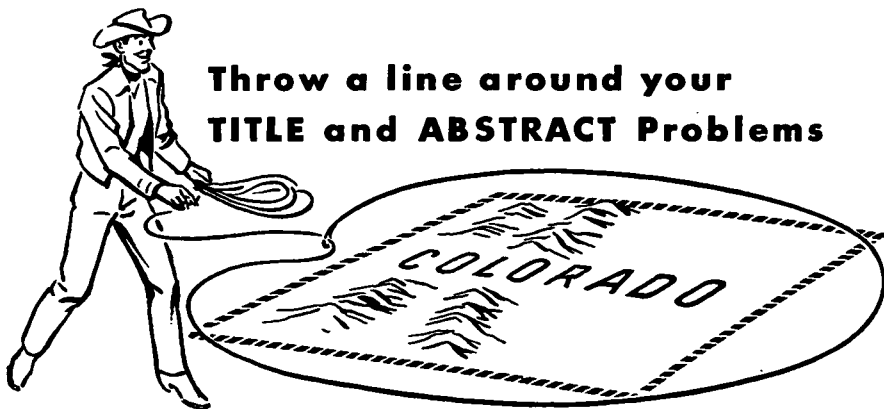
two districts mentioned above, Gregory and Griffith. A few are playful like Tincup, Shirttail or Mosquito. A few are sophisticated like Argentine or Oro Fino.

Boundaries were then established for the district by reference to streams, divides or other existing districts but often very vaguely at first attempt. The resolutions then proceeded to adopt rules regarding claims, the size of gulch (placer) and lode holdings, or tracts to be used for mills and even ranches, and announced how many claims a man could own and how each must be staked, recorded and worked to be held.

The first motive of the miners in organizing was nearly always to evidence and regularize their possessory rights on the public domain. The first officer set up by the resolutions was therefore that of a recorder, usually so entitled. His compensation in fees was often prescribed but sometimes tacitly assumed to be the familiar practice, *e.g.*, fifty cents for each claim copied in his record book.

Sometimes at the first mass meeting, but nearly always at an early session, the office of judge of the miners' court was created and someone elected to fill it, for it was not long after a gulch was alive with men that disputes arose or a rowdy element appeared, drinking, fighting and stealing. The third essential was an arm of the court. The post of sheriff or constable was created and filled.

Only one other officer was essential, namely the chairman of meetings of miners. At first each session was likely to adopt a chairman and secretary *ad hoc* but soon the recorder became not only secretary but also treasurer, *ex officio*, of the district and the office of chairman or president was combined with that of judge.



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As chairman this officer had no executive powers. These powers tended to adhere to the judgeship. The reason for this is historical and will be noted later. Sometimes there was only a judge, sometimes a combined president and judge under either name, and sometimes both a president and judge. In this last case the president was required to serve also as judge whenever needed. The tendency was to combine the executive and judicial functions but with the judge in predominance—a breach of Anglo-Saxon tradition.

Sometimes at the first meeting but always at an early session codes of substantive and adjective law began to take shape. Crimes were defined and penalties provided. The first special legislation was likely to forbid nuisances, that is to say the pollution of streams and fouling of cabins by sewage, offal and garbage. Most of the districts seemed to assume that any offense commonly punished in "the States," as the miners called the Mississippi Valley, was within the scope of a miners' court without expressly so providing; but wrongs peculiar to outdoor life in mountains, such as rolling rocks down hill and setting fire to woods, were defined and penalized. In one case it was decreed unlawful either "to put out or set a fire." It would seem that vandals were raiding cabins or camps in the absence of the miners and extinguishing the fires under the slowly simmering kettles of beans or letting ovens cool in wintry weather. The cutting, removal and use of timber was often regulated in great detail and the obstruction of roads forbidden. In the more complete codes, lists of many familiar and common offenses were made and penalties attached, as for murder, manslaughter, grand and petit larceny, forgery and perjury. Hanging, banishment, lashing and fines were the usual punishments. Jails were almost unknown, so confinement is seldom mentioned. Justice moved swiftly and bail seems never to have been allowed.

On the procedural side, some of the codes are unexpectedly elaborate. Here and there a district forbade the appearance of lawyers in courts but in general the procedure was framed in words of art and only a lawyer would grasp the meaning. The jargon of the Field Codes of civil procedure was generally employed. There are references to summonses, complaints and terms of court for example. The courts, as a rule, were given both civil and criminal jurisdiction. Written pleadings were often required. Trial was to a jury unless waived by agreement, usually a jury of three, and in the typical district appeals were allowed to the miners' meeting or sometimes to a second and larger jury. Sometimes a jury was authorized to punish any offense it deemed proper, whether listed or not, and to fix the penalty. The juries seem to have done this regardless of authorization.

The mining districts were utilitarian and that only. This mass of lengthy legislation and detailed procedure was not adopted for intellectual amusement or in imitation of affairs at home in "the States" and seldom even of other and older districts. We find preserved very little in the way of court dockets and records as contrasted with the volume of minutes, legislation and claim records which has come down to us, but litigation must have been frequent in the districts or the work of enactment, revision and codification would not have been undertaken so often nor in so many widespread localities. The machinery of law introduced by the districts

Finally, and in general, the typical district contained several square miles, all usually in one valley. In rich mineral areas like the counties of Clear Creek, Gilpin, Lake, Summit and San Juan, districts were clustered like cells in a honeycomb. So far as numbers of residents are concerned there are accounts of about two thousand votes being cast at a district election. A count of two or three hundred is much more common.

Turning now for a moment from the description of these little governments to their origin and posterity, their roots and fruit so to speak, we find that mining districts were set up at one date or another in eleven states west of the Mississippi. King, in a volume of census reports, prints proceedings copied from 332 in the whole West showing California with the largest number and Colorado second. A later authority estimates 1,479 for the whole West. These figures are without doubt too small and besides do not contain the agricultural claim clubs which for our present purposes are equally important. There must have been close to 2,000 of these organisms set up in America between 1848 and 1890.

The pattern originated in California in the Gold Rush of 1849. While California had been long settled and resembled little the wilderness invaded by prospectors in Colorado ten years later, the forty-niners found minerals in localities where the territorial government recently set up to replace the Mexican regime had no officer, in short where law had not reached. They faced also the fact that neither Spanish nor American custom or legislation provided a framework for mining of the sort they were entering. They therefore agreed on rules and set up the mechanism of law and order by mass meetings. The Spanish legal system had presided over California for centuries and in it the miners found two or three legal principles which seemed convenient. One was the ancient Spanish principle that minerals belonged to the Crown and not to the surface land owner. Under this principle exploration was encouraged, the first discoverer having a superior right. The forty-niners found in these doctrines a justification for invasion of the public domain and the rule that first in time was first in right which they promptly applied to the acquisition of both minerals and water.

Another institution of Spanish jurisprudence was found among the local inhabitants and promptly borrowed also. This was the office of "alcalde." Towns and villages in California as elsewhere in the former Spanish empire were governed by alcaldes who combined executive, judicial and legislative powers, serving as judges, business managers and chairmen of the councils in towns. The title is Moorish in origin as is so much of Spanish custom and language. It means judge. It is a form of the word "cadi" which appears often in tales of *The Arabian Nights* and modernly denotes a village judge in Arabia and Turkey. The office of alcalde, found nearby in the native California settlements, met exactly the needs of the miners for a stern and dictatorial chieftain to preserve order in the placer valleys and enforce the rules of the game. The mining districts in California when organized by the mass meetings first adopted rules to govern claims, then appointed a secretary or recorder to register their holdings, and when the need developed set up a miners' court headed by an officer they sometimes called the alcalde and some-

times the judge—in any case one who was a combined judicial, executive and presiding functionary such as the miners observed in the nearest market town.

When gold was found a decade later in the so-called Pikes Peak Diggings, the same problems arose here as in California, but if anything in a more extreme form, for there was no trace of law in the Rocky Mountain wilderness. Moreover the migration of prospectors was faster and into rougher and more isolated terrain. Among the early prospectors in Colorado were many men who had taken part in the California Gold Rush, and had returned forlorn and disappointed but still itching with hope and the love of adventure. In fact these former forty-niners almost predominated among the successful leaders. They could distinguish gold from mica or iron pyrites, which most of the argonauts could not do, and they knew the craft and custom of mining. These men imported much of the vocabulary, tools and skills of the California goldfields and with them the model and tradition of the mining district. This governmental institution was elaborated in Colorado and costumed with many Anglo-Saxon and Midwest American political ideas, but the office of *alcalde* was preserved and employed, the title being translated into "Judge of the Miners' Court" or "President."

The districts were governed in Colorado as they had been in California by an officer who was primarily a judge but who also served as chairman of meetings and as executive, in a fashion unknown to British or American communities and denounced by their doctrinaires but quite familiar and congenial in Spain and Arabia. The analogy can be pressed too far, for the mining districts in Colorado grew away from the Spanish tradition in time and became more and more Virginian and Missourian. However much grafted, the root grew from the *alcalde*.

The mining districts are gone. They served the cause of law and order well but briefly. Our main inheritance from them is the framework of American mineral law and the law of water in the western states. The federal government in 1866 legitimized the miners' customs and property claims. Our federal and state legislation and court decisions are permeated with the doctrines of the mining districts.

One other inheritance also survives. In Colorado the form of the mining district is preserved in the government of the quaint mountain municipality of Georgetown. It seems to be the only mining district surviving in America. It operates under a special charter passed by the Territorial Legislature of Colorado in 1869 and very little altered. The town has no mayor. Its chief officer is the police judge to whom the charter assigns the usual duties of mayor somewhat enlarged in authority, and also the chairmanship of the council, called now the Board of Selectmen. Georgetown was originally the Griffith Mining District. A number of provisions of its charter are copied directly from the text of district laws, as for example that any office whose incumbent is absent from the town for sixty days is deemed vacant. The district originally was headed by a "Judge of the Miners Court" and had no president. Later the chief officer was called "President & Judge of the Miners Court." When the town charter was adopted the title of president was ob-

viously inappropriate for a town so the Georgetown leaders reverted to the word "judge" and as the court was no longer a miners' court but a municipal magistracy, they added the prefix "police." It is evident that the "Police Judge" in Georgetown is the "Judge of the Miners Court" in the Griffith Mining District who was in turn the alcalde preserved in the California mining districts and originally derived from Arabia. The establishment of law in Colorado was the achievement of the miners but their ways and means were ancient of days.

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