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LAW ON THE OREGON TRAIL

By Chet Orloff

To measure the law-mindedness of ordinary mid-nineteenth century Americans, there may be no more revealing historical saga than that of the overland trail, which stretched from the Missouri River to the Pacific Ocean. It is no exaggeration to describe the trail as a great laboratory, not merely for testing the respect ordinary citizens showed for the rights of others but for determining the extent to which they understood law and could premise legal behavior on the expectation that strangers traveling the same route understood and respected it as well. To say there was no law on the Oregon Trail, after all, may be to say nothing more than that there were no lawyers from whom advice could be obtained and no courts to resolve disputes.

Without attorneys to advise them, emigrants on the overland trail were able to distinguish between private, company, partnership, and other concurrent methods of property holding. They acted on this knowledge, not only to guide their conduct toward property but in dealing with fellow emigrants. To a greater extent than has been thought, the habits, actions, and values of nineteenth-century Americans moving west were formed by a legal culture.

Devising Contracts

During the westward movement, people on the Trail were likely to find themselves beyond the reach of formal institutions—police, courts, and lawyers. Yet they continued to behave as if they were controlled by law.

Contracts provide one example. Hundreds of overland travelers, even while claiming to be in lawless terri-



Supporting every exchange of goods on the Trail was the remembrance of legal principles enforced east of the Missouri River. Oregon Historical Society neg #OrHi3576.

tory, made agreements to bail animals, transferred property on the promise of future payment, and sold their personal services on the reliance of executory obligations. Emigrants who said there was no law on the Oregon Trail yet negotiated agreements expecting they would be honored were doing more than creating moral obligations. They were relying on a tradition of shared legal notions—expecting that the other party shared their values, understood a contract in the same sense they did, and believed that promises, mutually exchanged, created obligations.

Conducting Criminal Trials

Evidence from the Trail not only reveals a legal culture of shared definitions, but of shared procedures. An example is the criminal trial.

What we know about trials on the overland journey comes largely from accounts of prosecutions against men accused of deliberate homicide. Once

basic generality can be gleaned from these cases—the emigrants did not attempt to create institutions *sui generis*. Instead, they duplicated or imitated the courts and judicial procedures remembered from back home. If two lawyers were present, one might be appointed to prosecute, the other to defend. Someone served as prosecutor for minor as well as major offenses. A defendant might be permitted to hire a lawyer, even a stranger passing by in another train.

Choosing Juries

Most telling of all was the emigrants' insistence that the triers of fact duplicate the function of the jury in American criminal law. To the untrained eye of the nonlawyer, it might on first glance appear that emigrants had a different model in mind. In noncapital cases the whole wagon-train company sometimes decided

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President's Message by Katherine O'Neil



Katherine O'Neil

We're going to have a picnic—in the country—on an island—adjacent to an historic farm home, the Bybee-Howell House on Sauvie Island. That much you knew from our last newsletter. However, I now need to report that we have changed the date—to the afternoon of September 12, from 1 to 6 p.m.

There have been precious few signs of picnic weather this summer, but by September 12 I'm sure the weather will have changed and we'll all be ready for the picnic of the year! In fact, we'll make this an annual "Indian Summer" event so that all society members can look forward to it as the last picnic of season. For those of you who want to make a day of it, why not plan to walk or cycle on the island before the picnic?

Speaking of recreation, we're planning a baseball game, volleyball, and age-appropriate games for children. We'd welcome your suggestions and also the use of your equipment. Please call me at 222-4545, or leave a message with my secretary, Ardis Schroeder. We'll also offer tours of the Bybee-Howell House.

Invitations will go out about a month in advance of this family event. We'll request an RSVP (and a little money to pay for the barbecue).



The board—through the Book Committee—chose Brad Williams and the Ninth Judicial Circuit Historical Society as distributor for *The First Duty*. That society has several publications of its own on legal history (see the book review in this issue). Thanks to Tom Booth of Far Corner Books, who helped us evaluate various distributors and helped us negotiate our new relationship with the Ninth Circuit Society.

To promote our book, Brad has begun to contact appropriate publications and ask for reviews. He routinely attends conferences of historians as an exhibitor and will include *The First Duty* in his displays—acknowledging, of course, that the book is the product of our society.

Brad will also handle sales to wholesalers, who in turn will distribute to bookstores. Meanwhile, we will continue to fill individual orders through the fine efforts of Kirk Hall and his assistant, Marvis Gillnet.

As of June 11, Kirk and Marvis had shipped out 114 books. Among those ordering were three law schools (Northwestern of Chicago, St. Thomas of Miami, and Harvard); three public schools (Siuslaw High, Gardner Middle School, and Bend-LaPine); and the special education specialist at Boys and Girls Aid Society. The last four had written to ask for additional copies—apparently after deciding the free copies they had received as part of our educational effort in the schools would not be enough. Now that's a range of buyers and readers to make us proud!



Speaking of pride, I'm very proud that our district court will soon have its first woman magistrate. Janice Stewart comes on board October 1, 1993, upon the retirement of Magistrate Judge George Juba. The judges chose Janice from a short list screened by a committee of practitioners chaired by Judge Anna Brown. There were 37 applicants.

The road from Klamath Falls, where Janice attended high school, to the federal bench wound through Stanford University (honors graduate) and the University of Chicago Law School. Janice is a charter member of our society and also of Oregon Women Lawyers. She has practiced in the federal courts since 1976 and is known as a thoughtful, careful, and very competent trial attorney. She is a senior partner in a firm of major litigators—McEwan, Gisvold, Rankin & Stewart—which was founded in 1886 as Cake & Cake. (For the firm's history, see the Fall 1990 issue of our newsletter). Given the tenor of their times, the founders, Harry and William Cake, would no doubt have been intrigued with the idea of a woman partner—especially one who went on to become the first woman magistrate in the U.S. District Court for Oregon. Welcome, Janice!

Law on the Oregon Trail continued

guilt or innocence, and it was not unknown for a murder prosecution to be settled by vote of every emigrant present—whether witnesses, companions, or strangers.

In a sense these trials depart from the Anglo-American norm, but the departure is not basic. The overland emigrants did not do what logic might have dictated—they did not go back to the early English pattern and entrust the decision to those who knew the facts. With a small population, no regular tribunals, no police, no rules of evidence, and an uncertain supply of lawyers, it would have made sense to have asked the truth of those possessing the truth. Instead, the general rule—especially in homicide situations—was to select a jury of 12 men and, after presenting evidence through witnesses, entrust the decision to them.

That overland juries were close copies of common-law juries should be greeted with surprise, not dismissed as inevitable. Not only were overland jurors not required to know the circumstances of the alleged crimes, they did not have to come from the company of the accused. Legal theory on the trail took for granted that "stranger emigrants" could render a fair verdict, much as in an established American court of law, by hearing evidence from witnesses, weighing arguments, and reaching decisions.

Thus, one caravan tried a man accused of homicide with "a jury of men out of another train and witnesses out of our train." Another man was tried by "tribunal representatives of over 200 wagons in the neighborhood," while a third panel was selected from 50 men "collected from both front and rear trains."

Had the emigrants thought about the question, they should have adopted the medieval English model of the jury, with the triers

of facts drawn from those with knowledge of the facts. But they were not thinking so much as behaving. They followed the nineteenth-century model of the uninformed, impartial jury because that was what their shared experience told them was "law."



Without attorneys to advise them, emigrants were able to distinguish between various methods of property holding and to devise the means of dealing fairly with others on the Trail.

Dealing With Questions of Property

The emigrants' lawmindedness is perhaps most salient when we recall the nature of property on the Trail: it was fluid and transitory, requiring constant repair, husbanding, replenishing, and protection. Whether in the form of draft animals, wagons and carts, or provisions, property served two primary purposes: to insure survival and to provide a minimum degree of comfort.

Those who traveled the Oregon Trail faced a dilemma: property was needed for survival, but too much property could mean disaster. Emigrants needed enough food for the trip, as well as supplies for "getting started" once they arrived in the Willamette Valley; but too much weight, too many things, could weigh and slow them down. We can all conjure up images of furniture, trunks, and other items—what has been eloquently described as "valueless wealth"—jettisoned along the Trail. Such items, when damaged or used up, had to be replaced by exchanges, cash, contracts, bargain and sales, or bailments.

The experience of Enos Ellmaker is a case in point. Enos, his wife, five children, and three hired men traveled in two wagons that had been ironed "with careful exactness" in Iowa. Somewhere on the Plains, one of the wagons had to be abandoned, and the other was taken through to Oregon. Ellmaker found a replacement for his lost property. He "hitched on to another one, which was much lighter, that had been left by some person whose team had died or given out."

What was not free, Ellmaker had to buy. In his diary he writes:

I purchased 26 head of the largest, and finest, steers that I could find in Iowa—two of which died from alkali water. I also exchanged two yokes, on the Plains for two yokes of fresh and fat cattle that had been kept at trading posts on the Plains. I having to pay \$50 a yoke and giving a yoke, costing me for two yokes of fresh cattle \$100 and two yokes of cattle.

When emigrants like Enos Ellmaker moved westward over the Oregon Trail, they not only brought American civilization to the Pacific, they carried it with them as they went along. Their practices of contracting with their hired men for labor, bargaining for the use of new wagons, and the like show that they understood the law of property, were able to distinguish between various types of ownership and exchange, and respected the rights of their fellows.

The Significance of Law on Trail

The legal behavior of the Oregon Trail emigrants is of great significance, revealing that nineteenth-century Americans and, particularly, these emigrants were much more lawminded than is generally appreciated. From the civilization of the eastern states to the wilderness of the Blue Mountains, they carried a nineteenth-century legal culture—a taught, remembered, respected, and shared legal behavior.

On the long, dangerous trail to Oregon, it was this legal behavior that shaped conduct. It settled disputes without acts of violence. It allocated precious resources according to shared notions of property rights, rather than by force. And when crime occurred, it dealt with offenses, not by summary drumhead procedures but with the trappings of a remembered judicial process.

Chet Orloff is executive director of the Oregon Historical Society and co-editor of *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*. This article is based on a speech delivered at the June meeting of *Queen's Bench in Portland*. Material in the article is taken from the work of John Phillip Reid, specifically *LAW FOR THE ELEPHANT*, Huntington Library, 1981; *"Replenishing the Elephant: Property and Survival on the Overland Trail,"* Oregon Historical Quarterly 79: 64-90; and *"Some Lessons of Western Legal History,"* Western Legal History 1: 3-21.

History in the Making

STEWART IS OREGON'S FIRST WOMAN DISTRICT COURT MAGISTRATE

When George E. Juba retires as federal magistrate on September 30, 1993, he will be replaced by Portland attorney Janice M. Stewart—the first woman magistrate in the history of the U.S. District Court for Oregon. Stewart has been a partner in the firm of McEwen, Gisvold, Rankin & Stewart since 1981 and a member of the firm since 1976.

Stewart, who has twice been a finalist for a magistrate post, was among four finalists who were interviewed for the current opening. She was selected at the beginning of July by the magistrates and judges with whom she will work.

The new magistrate was born in Medford and attended Stanford University, where she received her B.A. with honors and distinction. She earned her law degree at the



University of Chicago. From 1988 to 1992, she was a master in the Gus J. Solomon Chapter of the American Inn of Court and since 1990 she has been a lawyer representative to the Ninth Circuit Judicial Conference. In addition, she has served on numerous professional boards, committees, and task forces and has been a frequent speaker for the Oregon State Bar and other sponsors of legal education seminars.

Stewart is married to attorney F. Gordon Allen III and has two children.



U.S. District Court Historical Society's Executive Committee at work.

