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Law for the Elephant: Property and Social Behavior on the Overland Trial

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LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRIAL. By *John Phillip Reid*. San Marino, Calif.: The Huntington Library. 1980. Pp. x, 437. \$18.50.

John P. Reid's *Law for the Elephant* examines the legal values held by American pioneers of the 1840s and 1850s on their treks west across the overland trail to California, through a wild region where all knew that they were " 'out of reach and beyond the arm of law and order . . . and [that] the only law we had was that formulated unto ourselves' " (p. 9). Reid asks how well these emigrants understood and respected property rights; he finds that their internal "law-mindedness" in fact prevailed and guided their conduct not only toward property, but toward their fellow travelers as well. This research, Reid believes, provides a clue to how significantly "the habits, actions, and values of nineteenth-century American society were formed by a behaviorism based on law" (pp. 10-11).

"To see the elephant," in nineteenth-century parlance, meant generally to gain experience through hardship or to encounter the realities of a severe or unbelievable situation first-hand (p. ix). More particularly, the phrase was applied to the California gold rush of

1849. Reid has adopted it as a metaphor for the overland trek itself; the law prevailing on that trek thus becomes "law for the elephant."

Most of the participants in the overland trek were not strong, silent frontiersmen but greenhorns, surprised and appalled to find themselves sleeping on the ground and collecting "buffalo chips" — the chief form of fuel on the Great Plains. These emigrants shared many similar attitudes concerning liquor, travel on the Sabbath, and respect for one's mother. They also shared a desire to transplant these values of the East to the rocky soil of the overland trail.¹ Yet, they were poorly prepared for the hardships that might lie ahead. At the beginning of the trail, wagons were generally overloaded, sometimes carrying almost three thousand pounds of "necessities" like diving bells, jewsharps, and India rubber clothes. Once on the trail, however, emigrants quickly found that such loads heavily burdened their draft animals. As livestock weakened from overwork, lack of forage, and alkali poisoning, travelers first discarded unnecessary luxuries, then useful and even vital supplies. Later in the trip, money became necessary to replace jettisoned provisions (p. 71).

Much of the personal property used on the overland trail was held concurrently by a partnership, "mess,"² or joint stock company. These sophisticated forms of ownership, the emigrants' writings reveal, were well understood (p. 147). Concurrent ownership furnished social cohesiveness as well as legal coercion in binding groups on the trail (p. 160). Frequently, however, partners or company members decided to dissolve their associations and divide their property. Such transactions were simple when money or divisible property was at stake (although personal rancor between partners could cause irrational results, like sawing a wagon in half lengthwise to split it between two stubborn brothers) (p. 203). In general, Reid finds, "the overland trail was not a place of conflict. More accurately, it was a place of settlement" (p. 213). Property could be divided reasonably and peacefully, he argues, only because the emigrants shared common concepts of property law.

One of the primary shared concepts was a clear distinction between possession and ownership. A possessor could convert property to his exclusive use only if it had been abandoned. An owner whose goods had been lost or whose animals had strayed expected his property to be returned, no matter how long it had been missing (p. 259). Third parties felt free to act on behalf of an owner in demanding the return of property they believed found or stolen. Pos-

1. Other historians have noted the pioneers' loyalty to the values and culture of the East. See R. BILLINGTON, *The Frontier and American Culture*, in *AMERICA'S FRONTIER CULTURE* 51 (1977).

2. A "mess" was a small group of travelers united by contract or by shared property. Within a single mess, some members could have a contractual right to share in the mess property, while others had a proprietary interest in the same property. P. 132.

sessors generally relinquished the property that they had taken without protest; indeed, the abstraction of "ownership" was articulated strongly enough to override even the claim of a good-faith purchaser (p. 274).

The pioneers also considered property rights to be absolute. No overland writer appears to have questioned an owner's right to destroy needed property, even out of pure "cussedness," to prevent others from using it (p. 289). In the desert, no one questioned the legal right of an "owner" to hoard water and refuse to share it with his messmates. Despite widespread shortages and imminent starvation, neither the hungry nor the well-fed seem to have doubted the sanctity of property rights (pp. 337-38).

Along the reaches of the overland trail, these property rules were not imposed from above by an elitist legal profession; the emigrants "needed guidance of neither trained bar nor legislature" (p. 335). They avoided formal legal procedures. Few partnerships were established by written contracts, and the most complicated property dissolution that Reid describes was accomplished by ad hoc arbitration (pp. 192-97). Although observers noted many lawyers among those traveling west, few emigrants sought their legal counsel.³ Instead, law survived on the trail as "the taught, learned, accepted customs of a people" (p. 362).

In *Law for the Elephant*, the overland trail is treated as an historical laboratory for testing whether ordinary citizens understood property law and obeyed it despite the absence of legal machinery. Because Reid draws his data from the pioneers' own accounts, his study is an engrossing human drama, as interesting to the amateur as to the legal historian. Yet the book may be faulted for its attempt to say too much. After suggesting in his introduction that the violence and lawlessness often considered characteristic of the American West have been exaggerated, Reid attempts to dispel those popular misconceptions. But his demonstration that property rights were observed on the treks to California says nothing about whether respect for the law continued thereafter. And his book is not, as its publisher claims, the first examination of the overland trail by a legal

3. This may have been wise since the lawyers' writings quoted by Reid suggest that lawyers misunderstood the legal implications of the transactions that they reported more often than did the average pioneer. Addison Crane, a lawyer from Indiana who became a trial judge of Alameda County, California, seems to have been particularly confused. In separate journal entries, he mistakenly stated that members of a joint-stock company could not own property individually and that Indians had no legal right to charge tolls. Pp. 141, 325.

Reid has commented elsewhere on the negligible influence that emigrant lawyers exerted on traveling companies' constitutions. He concluded that "[m]ost attorneys traveling the overland trail showed surprisingly little interest in legal or constitutional matters." Reid, *Governance of the Elephant: Constitutional Theory on the Overland Trail*, 5 HASTINGS CONST. L.Q. 421, 425-26 n.25 (1978).

historian.⁴

One may question, moreover, whether property rights *were* carefully observed by the emigrants. Although Reid relies cautiously on the letters, diaries, and memoirs, pointing out when a diarist or letter writer may have slanted events for personal reasons, generalizations from such sources are dangerous. Those emigrants who left no records of their travels may not have shared the general respect for property rights. And the beliefs displayed by emigrants on the overland trail may not, as Reid assumes, perfectly represent the views of all Americans of the period. Despite its flaws, however, *Law for the Elephant's* imaginative exploration of one aspect of legal behaviorism in nineteenth-century America is a significant addition to the legal literature.⁵

4. See Langum, *Pioneer Justice on the Overland Trail*, 5 W. HIST. Q. 421 (1974).

5. *Law for the Elephant* has also been reviewed by Hall, Book Review, 1981 DET. C. L. REV. 243 (1981).
