

THE TANNERS ON TRIAL



Concerning Stolen Documents,
The Mormon Underground and
The Question of Copyright Violations

By Jerald and Sandra Tanner

THE TANNERS
ON
TRIAL

By Jerald and Sandra Tanner

1984
(Digital Edition 2023)



**Attribution-NonCommercial 4.0
International (CC BY-NC 4.0)**

This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.

<https://creativecommons.org/licenses/by-nc/4.0/>

Contents

The Strange Trial.....	1
Deseret News Errors	2
Prejudice?.....	4
Only One Page?	5
Injunction Removed.....	6
Judge Very Upset	8
Reputation Damaged?.....	13
Clayton’s Secret Writings Uncovered (Excerpt).....	16-19
Truth Not Suppressed.....	20
Unreasonable Claims	21
Testimony Unfair	23
Destroy the Church?	25
Reason for Suit.....	28
Repressive Measures.....	29
Too Many Typewriters	30
Mysterious Typescript.....	32
Cover-up Breaks Down.....	40
Dr. Allen “Miffed”	43
Unclean Hands?	46
Soft on Perjury?	46
An “Illicit” Typescript.....	53
Just Checking Entries?.....	55
Combined Notes?.....	60
Ehat in Underground.....	66
Important Exchange.....	80
Defense for Libel	82
Scholars Embarrassed	84
Manuscript History	90
Films Recalled	92
A Stolen Thesis	96
Unable to Link to Theft.....	98
Compelled to Change.....	100
Like Pentagon Papers.....	101
Investigations	102

Copyright Violation?.....	104
Archivist Can't Answer.....	105
Without Asking Sandra	110
Quinn's Speech	113
Fair Use.....	116
Madsen Confused.....	118
Apostles' Threats.....	119
Kingsbury Journal.....	121
Protects Archives	121
Miscarriage of Justice	122
Why Not Sue Palmer	124
Why the Long Delay?	130
No Permission to Print.....	130
"That's Very Private"	131
Prophecy Missing.....	134
All Kinds of Damages.....	135
Tanners' Tax Papers	138
Church Involvement?.....	141
Light Still Shining.....	142

Tanners Prevail in Lawsuit

THE TANNERS ON TRIAL

On April 28, 1983, the Mormon scholar Andrew Ehat filed a lawsuit against us (Jerald and Sandra Tanner) in an attempt to stop publication of some extracts from the diaries of Joseph Smith's private secretary, William Clayton. Because these diaries contain embarrassing material on the origin of polygamy and other matters, they have been suppressed in the vault of the First Presidency of the Mormon Church. In 1979–80 Mr. Ehat gained access to a copy of the diaries and made the revealing extracts. Ehat tried very hard to keep the material from falling into the hands of critics of the Mormon Church, but a member of a bishopric in Provo surreptitiously duplicated the material and it was widely circulated by Mormon scholars at Brigham Young University. These extracts subsequently found their way into our hands, and we printed them in the book *Clayton's Secret Writings Uncovered*.

We felt the law did not support Ehat's charge of copyright violation and cited the following from Section 103(b) of Title 17, United States Code:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.

Since Mr. Ehat's notes are composed of extracts from "preexisting" material (i.e., the diaries of William Clayton), he cannot claim copyright protection.

A STRANGE TRIAL

On March 21, 1984, Judge A. Sherman Christensen commenced a trial which ended in a very unexpected way. On March 25 the Judge announced that we were correct in saying that Mr. Ehat had no copyright in the Clayton material: "2. That the plaintiff has no copyrightable interest in the so-called Ehat notes nor their ideas nor content, and that plaintiff's claim against the defendants for copyright infringement should be dismissed with prejudice" (*Court Ruling*, page 17). Instead of dismissing the case, however, Judge Christensen apparently felt that we should be punished in some way for printing the material. He, therefore, awarded \$16,000 for what he said was "unfair

competition" and damage to Ehat's reputation. In addition to this, Judge Christensen said he was going to stop our publication of the Clayton material: ". . . *Clayton[s] Secret Writings Uncovered* . . . cannot lawfully be continued to be sold and distributed by the defendant and those acting under them" (*Court's Ruling*, page 16).

Just four days after making this statement, Judge Christensen began to have doubts about the wisdom of his decision to enjoin *Clayton's Secret Writings Uncovered*, and on April 10, he held a hearing and completely reversed his decision with regard to the injunction. Although we have won the battle as far as the continued publication of this book is concerned, we still feel Christensen's decision concerning "unfair competition" is completely wrong, and we are appealing it to the 10th circuit court where it will be reviewed by a panel of three judges. We will even consider going to the U.S. Supreme Court if we feel that it is necessary to vindicate the rights of freedom of the press guaranteed to us in the Constitution.

Christine Rigby, who was present at the trial, wrote the following:

The atmosphere in the courtroom was electric. Many of the big guns in Mormon history were there. They would finally be testifying in a case against Jerald and Sandra Tanner, the notorious anti-Mormon publishers. . . . For years the Mormon historical establishment has chafed under the Tanners' continued publishing of sensitive Mormon documents and private letters, on many of which some historians complained the Tanners had violated copyright restrictions.

There is something about seeing an enemy face to face, seeing the whites of his eyes, that can transform perceptions. As the plaintiffs sat in the courtroom watching the Tanners talk to their lawyer, it was a shock to confront two rather ordinary looking, mild-mannered and soft-spoken individuals. . . .

Mormon historians for years have talked about suing the Tanners, but have not, possibly to avoid bringing more attention to the Tanners and to avoid having to discuss embarrassing historical documents under oath. . . . The judge appeared to view the case as a black-and-white incident of theft, but the nuances and complications in the case are many.

The Tanners on Trial

Ehat sued the Tanners for violating copyright and for unfair competition. He said he had lost money in buying back copies of the notes, and that his master's thesis now might not be publishable because the Tanners had published documents central to it. The Tanners contended that Ehat had no copyright claim . . . Christensen threw out the copyright claim. He found the Tanners guilty of unfair competition, though . . .

Ehat shared his notes with his former collaborator Lyndon Cook, and the notes were stolen from Cook's office . . . Copies were circulated in a widening circle that finally reached the Tanners, who published the notes (minus Ehat's editorial comments) in June 1982 . . . The Tanners felt that the notes were in the public domain because they had been widely circulated, and they felt the diaries' significance to Mormon history justified their decision to publish the notes. In effect, they felt the notes were "newsworthy."

The Tanners plan to appeal the decision, and their attorney Brian Barnard, says, "Judge Christensen is wrong, as far as we're concerned. He is creating a new type of unfair competition here. He is using it as a substitute for a copyright violation, and that is prohibited by the 1976 Copyright Act that Congress passed. He awarded the same kind of relief as if it were a copyright violation—a rose by any other name is still a rose. I think the judge felt the Tanners did something wrong, so he looked for some way to punish them." . . .

In the final analysis, students of Mormon history, whether professional or non-, Mormon or anti-, doubtlessly find many of the primary documents the Tanners publish interesting. People who are not part of the "historical club" might not get to read some of those fascinating documents except for the work of two people who Barnard says are viewed by some Utahns as "practically carrying the mark of Cain"—Jerald and Sandra Tanner. (*Utah Holiday*, May 1984, pages 13–14)

DESERET NEWS ERRORS

On March 30, 1984, the Mormon Church's *Deseret News* carried an article about the trial which seriously misrepresented how we obtained the Clayton extracts. The account in the *Deseret News* would lead the reader to believe that we stole the notes from Ehat's office:

U.S. District Judge A. Sherman Christensen has awarded \$15,960 in damages to Andrew F. Ehat, Carbondale, Ill., for unfair competition exercised against him by Jerald and Sandra Tanner, 1350 S. West Temple.

Ehat filed against the Tanners after learning that notes he intended for use in writing a master of arts thesis on early Mormon history had been used by the Tanners for their own profit.

Court documents show that the Tanners obtained the notes in an office on Brigham Young University campus, where Ehat had placed them.

Although the reporter who wrote this story claimed to get the information from "Court documents," we know that the Court records contain no evidence that we took the notes from an office at BYU. Court documents, in fact, show clearly that the notes were taken from Lyndon W. Cook's office and surreptitiously photocopied by a member of a Mormon bishopric in Provo. They were subsequently circulated all over the Brigham Young University campus by both students and faculty alike. Judge Christensen himself said that, "in May or June, 1982, the defendants received an exact copy of the stolen Ehat notes consisting of the 88 pages exactly as plaintiff had recorded them including this said interpolation and the comments of plaintiff from one Kent Walgren, a Salt Lake attorney. Neither defendant—defendants nor Kent Walgren were involved in the original theft of the Ehat notes" (*Court's Ruling*, page 10).

The *Deseret News* also said that "In 1981, the Tanners came in contact with Ehat's notes, . . ." This, of course, is contradicted by the Judge's statement that we received them in "May or June, 1982," which was about eight months after the original distribution was made at Brigham Young University. There were a large number of copies circulating and a number of prominent Mormon scholars had copies before we obtained ours. We have traced copies into at least five other states besides Utah. In his testimony at the trial, Kent Walgren said he believed there were hundreds of copies in circulation. Speaking of a conversation he had with Mr. Ehat, Walgren said:

THE WITNESS: No, my recollection of our conversation in May was that by that time he had given up trying to retract—get them back because there were—there were basically hundreds of them around, and I him [am?] sure I told him at that time that I had a copy of it. (*Andrew F. Ehat, v. Jerald and Sandra Tanner*; Case No. C83-0593C, page 423, referred to hereafter as the "Trial Transcript.")

Noel Reynolds, who was appointed by Brigham Young University to investigate the circulation of unauthorized material, could not make any definite statement as to the number of copies of the Ehat notes in existence at the time of our publication, but he said: "I assume there were hundreds out there. Copy machines are too convenient" (*Deposition of Noel Reynolds*, page 50). Scott Faulring testified that "Andy had created such a

1 AND, I WILL ENTER A FORM OF JUDGMENT ACCORDINGLY,
2 SUBSTANTIALLY AS FOLLOWS:

3 THIS CASE, HAVING BEEN TRIED, ARGUED, AND SUBMITTED
4 TO THE COURT, AND THE COURT HAVING MADE AND ENTERED ON THE
5 RECORD AND IN OPEN COURT HIS FINDINGS OF FACT AND CONCLUSIONS
6 OF LAW IN ACCORDANCE WITH RULE 52(A) OF THE FEDERAL RULES
7 OF CIVIL PROCEDURE, AND HAVING AMENDED ITS CONCLUSIONS
8 AFTER HEARING IN OPEN COURT AND ON THE RECORD WITH RESPECT
9 TO INJUNCTIVE RELIEF FOR REASONS STATED AT SUCH HEARING,
10 IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED THAT PLAINTIFF DOES
11 HAVE AND RECOVER JUDGMENT AGAINST THE DEFENDANTS FOR THE
12 SUM OF \$15,960, WITH INTEREST FROM DATE OF JUDGMENT AT THE
13 RATE PROVIDED BY LAW.

14 NO ATTORNEYS FEES OR COSTS ARE TO BE AWARDED EITHER
15 PARTY IN VIEW OF ALL OF THE CIRCUMSTANCES OF THE CASE,
16 EXCEPT TAXABLE COSTS WILL GO TO PLAINTIFF AS THE PREVAILING
17 PARTY.

18 INJUNCTIVE RELIEF AGAINST FUTURE SALES, PUBLICATION,
19 OR DISTRIBUTION OF PLAINTIFF'S NOTES IN QUESTION IS HEREBY
20 DENIED WITHOUT PREJUDICE THROUGH THE RECOVERY BY THE
21 DEFENDANT OF FURTHER DAMAGES -- BY THE PLAINTIFF OF FURTHER
22 DAMAGES AGAINST THE DEFENDANT IN THE EVENT OF SUCH FUTURE
23 SALES, PUBLICATION, OR DISTRIBUTION.

24 I MAY SAY THAT I HAVE BEEN INFLUENCED TO A DEGREE BY
25 THE SUGGESTION OF COUNSEL FOR THE DEFENDANT THAT THIS MIGHT

stir by collecting it up, it was a very hot item. Everybody wanted a copy. People that probably wouldn't even have cared about it, wanted a copy of it then" (*Deposition of Scott Faulring*, page 24). On pages 20–21 of the same deposition, Scott Faulring said that copies "went to the four winds . . . there were hundreds of people at BYU that were active in this type of stuff."

For the *Deseret News* to say that "the Tanners obtained the notes in an office . . . where Ehat had placed them," is about equivalent to us charging that the editor of the *Deseret News* stole the Pentagon Papers just because that paper printed portions of them (see *Deseret News*, June 14 and 24, 1971). The *Deseret News*, of course, had nothing to do with the theft, but only printed what it obtained from its news sources. In any case, when we told the Managing Editor of the *Deseret News* we were displeased with the paper's charge that we had taken the notes, an inquiry was made and it was discovered that the reporter who wrote the story had obtained the information from hearsay rather than the court documents. We were given a nice apology and offered a retraction of the incorrect statements. (The *Deseret News*, of course, could have been charged with libel if it did not make a retraction.) We chose, however, to rebut the charges in a large paid advertisement which was published by the *Deseret News* and the *Salt Lake Tribune* on April 29, 1984.

PREJUDICE?

We feel that Judge Christensen's decision is a serious blow to freedom of the press and could have some implications as far as freedom of religion is concerned. A number of people have asked us if Judge Christensen is a member of the Mormon Church and whether this would have had an influence on his decision. While we do not know whether his religion had anything to do with the verdict, the book *Who's Who in the West*, page 131, states that A. Sherman Christensen is a Mormon and that he attended the Church's Brigham Young University. In 1971, Judge Christensen wrote an article entitled "Justice and Mercy." It was published in the Church's official organ, *The Ensign*, in November 1971 (see pages 29–31). In this article Christensen quoted from the Church's *Book of Mormon* and the *Doctrine and Covenants* to uphold his position.

While it is true that we were not directly battling the Mormon Church in this case, Judge Christensen was called on to decide whether the original Clayton diaries would be available for our defense. The Church's attorney, Wilford W. Kirton, vigorously opposed our attempt to subpoena the diaries. Mr. Kirton argued:

The church, Mormon Church, has now been subpoenaed through its principal officer, Spencer W. Kimball, to appear and produce the original documents referred to as diaries, or the diary of William Clayton, . . . I'm here representing a third party who is required by subpoena duces tecum, unless the court gives protective order which we seek, to produce documents from its archives which have not heretofore been published in order to satisfy what the defendant conceives to be an issue in this case . . .

Now, this is a matter of some serious moment as far as we are concerned; and we call the court's attention to those authorities that have been cited to it in support of this motion, and particularly at this time to *McCormick on Evidence* at section 77. I will very briefly read, "It is evidence that for many people, judges, lawyers and laymen the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants." . . . suddenly we find ourselves being subpoenaed [*sic*] to come in to court and make public certain writings, which up to the present time remain unpublished . . . the defendants . . . are self-appointed critics of the church that I represent, seek to find from whatever sources they can matters that they think are important in their minds enough to make public a part of their general criticisms [*sic*] of the church. ("Hearing to Quash Subpoena Duces Tecum and Objections Before the Honorable A. Sherman Christensen, Tuesday, September 6, 1983," certified copy, pages 4, 5, 7)

On page 20 of the same hearing, the Church's attorney stated: ". . . I represent an organization that is very concerned about parties attempting to frame issues through which its own private materials may be discoverable. It has no desire to submit to the scrutiny of the parties."

Judge Christensen took the matter "under advisement" and on September 16, ruled that the Church would not have to produce the diaries.

Whether Judge Christensen was right or wrong in his decision to keep the diaries suppressed, we feel that he should have withdrawn from the case because it involved a matter where he would have found himself directly opposing the wishes of his Church's leaders if he had ruled in our favor. While our lawyer and a number of other people feel that Judge Christensen is a good judge and attempts to be impartial in his decisions, his religion could have been a factor in his decisions. Moreover, the fact that the scandal over the notes occurred at the Church's university, where he had attended, probably did not help our case. Andrew Ehat's lawyer, Gordon A. Madsen, apparently felt that he could capitalize on the religious issue, and in the depositions he took from

us, he asked questions to make it clear that we had left the Mormon Church and were publishing sensitive Church documents. This, of course, could create a great deal of prejudice towards us in the mind of a believing Mormon. We will never know, of course, whether there was religious prejudice involved, but we would have felt much better about the matter if the case had been heard before a non-Mormon judge or decided before an impartial jury. Actually, our lawyer did request “that the above captioned matter be tried before a jury” (“Jury Demand,” July 11, 1983). The Judge, however, scheduled “a non-jury trial” (“Scheduling Order,” page 2). Later he said that it was “scheduled to be tried before a jury . . .” (“Ruling on Motion to Quash Subpoena Duces Tecum,” September 16, 1983). As it turned out, no jury was involved and Judge Christensen made all the decisions.

ONLY ONE PAGE

According to *Who’s Who in the West*, page 131, Judge Christensen was born June 9, 1905. This would make him close to eighty years old. Although the Judge seemed to still be very sharp on some matters, a number of times we had the feeling that he was having a difficult time following what was going on. For example, at first Judge Christensen believed that the suit involved only a few statements on one page of the Introduction to *Clayton’s Secret Writings Uncovered* rather than the 88 pages which followed. He probably became confused over this matter because Ehat’s lawyer, Gordon A. Madsen, only filed three pages of the Introduction to the book with his complaint. Although Madsen made it very plain in paragraph 10 of the complaint that it was the entire “book” Ehat was suing us for, Christensen noticed that only one page of the Introduction had Clayton extracts marked with a felt tip pen and mistakenly concluded that this “highlighting” marked the only material which the suit involved. Since the Judge was convinced that all of the offending quotations appeared on one page of the Introduction, he could not understand why we had subpoenaed all three volumes of the original Clayton diaries. In the hearing, which was held on September 6, 1983, Judge Christensen’s confusion became very evident:

THE COURT: Just a minute. You’re contending here that since part has been released you have a right to discover the [w]hole?

MR. BARNARD: My understanding the whole has been released to Mr. Ehat.

THE COURT: Do you think because it’s been released to him and not published otherwise that gives you the right on discovery to have it released to you?

MR. BARNARD: Yes, when we’re being sued for having published his notes.

THE COURT: But if there’s no dispute as to what portions of the notes that are being sued for publication, what portions, how will it help you to have the entire publication or the entire journal turned over to you?

.
MR. BARNARD: . . . The entire journal has been released by the church to Mr. Ehat. He had access to the entire journal, and notes which he has which were generally published are of the entire journal.

THE COURT: But he is not suing Mr. Tanner for disclosure of the results of his research except with regard to specific statements which are contained in a single page. That’s the subject matter of the lawsuit; is that right?

MR. BARNARD: I don’t think that’s correct.

MR. MADSEN: I don’t think so. I think we’re suing for the publishing of his whole notes, all of the notes, tried to black out what was his original writings. They still have published his whole research without authority.

THE COURT: But you’re suing upon the basis of the publication already defined in the pleading; is that right? (*Hearing to Quash Subpoena . . .*, pages 14–17)

Although lawyers for both sides disputed Judge Christensen’s statement that the suit was only over quotations “contained in a single page” of the Introduction, Judge Christensen never got the point. In his ruling on September 16, 1983, he denied our request and referred again to the one page which had the “highlighting” of the “Journal quotations”:

The marked copy of defendants’ publication attached to the complaint further reveals its gravamen by highlighting Journal quotations including dates (which are a form of quotation), the only comment marked by plaintiff being de minimis. (*Ruling on Motion to Quash . . .*, page 4, footnote 2)

While we do not know exactly when Judge Christensen first realized that he was dealing with more than the quotations which appeared on one page of the Introduction, he admitted in the trial that he had been dealing with the case “for months on motions” but had never seen anything but the Introduction. After about two-thirds of the testimony had been completed, the judge became concerned that he had never seen the actual publication. These revealing comments appear in the transcript of the trial:

THE COURT: Now, do we have in evidence now not only the Tanner Introduction but the notes as published?

.....

THE COURT: I didn't want to proceed on the rather paradoxical situation we have been dealing with this case for months on motions and so forth, and as far as I know, I have never seen as evidence the document in question here. I have seen the introduction, I have heard a lot a talk about it, and I thought it was about time we get the document before the Court before we decide the case.

.....

THE COURT: . . . I have seen the introduction. What I am wondering is there anything attached to the introduction that was published or not?

.....

THE COURT: Can't we find someplace a copy of the publication as it was published without going all over a lot of what we're talking about?

MR. MADSEN: Your Honor.

THE COURT: If we can't let's proceed. (*Trial Transcript*, pages 325, 327–329)

THE COURT: May I ask this, Mr. Tanner, have you available a copy of your publication *Clayton's Secret Writings Uncovered* as it was published by you and distributed?

MR. MADSEN: We can have one by the time we resume this afternoon.

THE WITNESS: The price is three dollars. (*Ibid.*, page 354)

The statement, "The price is three dollars," of course, was said in jest, and we ended up giving the court the copy that was entered as evidence.

INJUNCTION REMOVED

In the original complaint against us, Mr. Ehat asked that we be ordered by the court "to deliver up on oath for destruction all infringing copies of said notes, together with all plates, molds, matrices and other means for making such infringing copies" (page 7). In the *Court's Ruling*, pages 15–16, Judge Christensen wrote:

18. The Court finds that unless an order is issued enjoining the defendants from continuing to publish and/or sell or circulate the Ehat extracts as such is or as they are printed in the Tanner publication, *Clayton[s] Secret Writings Uncovered*, received in evidence in this case, the defendants will continue to do so to the irreparable damage of the plaintiff, and the defendants in so doing would be unjustly enriched, and thus I find it reasonably necessary and appropriate to enjoin the defendants, their agents, and employees, and those acting under their direction or in concert therewith

from publishing said Ehat extracts in form as thus appropriated. I have no disposition nor intent in any way to impede the dissemination of the knowledge or the ideas, but the very thing that has been thus misappropriated cannot lawfully be continued to be sold and distributed by the defendant and those acting under them.

Although the Judge said that it was absolutely necessary to issue an order "enjoining the defendants from continuing to publish and/or sell or circulate the Ehat extracts," he forgot to actually do it. On page 27 of the *Ruling*, Mr. Madsen had to remind him of the oversight:

MR. MADSEN: If the Court would rather have us do this subsequently, I don't believe the Court in its conclusions made reference to injunctive relief.

THE COURT: To what?

MR. MADSEN: To injunctive relief, the restraining order.

THE COURT: I'm sorry I should include and order the conclusion that the Court should in effect enter judgment enjoining and restraining the defendants and all those acting for or in concert with them or under their control from publishing hereafter or hereafter distributing or circulating or selling or marketing the Ehat notes in the form I have held they were physically appropriated by the publication of the defendant's in evidence or in any other publication.

On April 10, 1984, Judge Christensen wrote: "But, when it came to my conclusions, I, in the first instance, omitted any injunctive relief. And, it wasn't due to my perception, I know. I candidly recognize that, because I just didn't think of it, and counsel reminded me of it" ("Partial Transcript of Proceedings," April 10, 1984, pages 3–4).

We, of course, complied with the injunction and immediately ceased selling *Clayton's Secret Writings Uncovered*. As we indicated earlier, however, just four days after the Judge announced the injunction, he began to have doubts about the wisdom of his decision. On April 10, he held a special hearing about the matter. In this hearing he made this comment to Mr. Madsen: "When I got to thinking how I could formulate an injunctive relief, I didn't quite know, and I expected your assistance to show me how that could be done" ("Transcript of Proceedings," page 3). On page 10, Judge Christensen pointed out:

Let's assume that someone else wanted to come and utilize the public record with regard to that document, knowing that it had been published as the result of misappropriation and known receipt of stolen material.

1 we'll ask this witness about it.

2 Q. Dr. Anderson I hand you Exhibit P8 and ask you to
3 look at that briefly if you would.

4 THE COURT: I didn't want to proceed on the rather
5 paradoxical situation we have been dealing with this case for
6 months on motions and so forth, and as far as I know, I have
7 never seen as evidence the document in question here. I have
8 seen the introduction, I have heard a lot a talk about it, and
9 I thought it was about time we get the document before the
10 Court before we decide the case.

11 MR. MADSEN: I appreciate that, your Honor. Part of that
12 was obviated by the fact that in the pleading the defendant
13 admitted and answered that they did indeed published it, that
14 indeed --

15 THE COURT: Published it?

16 MR. MADSEN: This particular document, and the copy of
17 that document was in fact I think attached to the or should
18 have been attached with the original interrogatories.

19 THE COURT: Again, depositions, interrogatories, are not
20 before the Court as evidence except for the very limited
21 purpose of ruling on motions for summary judgment. They are
22 not a part of the trial record unless you introduce them.
23 Proceed.

24 BY MR. MADSEN:

25 Q. Dr. Anderson, could you identify that exhibit?

A photograph of the transcript of the trial, page 327. The Judge says he has been dealing with the case for months but has not seen the book itself.

Would it be necessary for the Court to enjoin that use, and if it does, where does the line between it suppressing an idea and protecting appropriate right occur? There are all kinds of imponderables there, once you launch off on the theory that you have a continuing right to prevent the sale by someone else of his material.

Mr. Madsen argued that there should be a permanent injunction issued:

THE COURT: For how long would an injunction continue? Forever?

MR. MADSEN: I think it ought to in this instance.

.....

THE COURT: Indefinite?

MR. MADSEN: Indefinite. (Ibid., page 12)

As it turned out, Judge Christensen completely reversed his original decision with regard to the injunction. He seemed willing, in fact, to admit that he had made a bad decision which could “enter into the forbidden domain of restrictions on freedom of speech and of the press”:

THE COURT: It’s been said by a perceptive judge and repeated endlessly, that hard cases make bad law. This is not an easy case.

It would be a misfortune that what I regard as good law in my conclusions, if I may use that term, that sound law in my view would be engulfed by the very nature of this case as a hard case by some poor law dealing with injunctive relief. I did find that it was reasonably necessary in order to protect the defendant’s work product, the thing itself, against misappropriation to enjoin the defendant’s from continuing to publish and distribute it in the form misappropriated. . . . But, my problem arose when I began to think about formulating injunctive relief. . . . While I’m persuaded that in order to more adequately protect the plaintiff from the misappropriation found, injunctive relief would be necessary. The exercise of an equitable power involves not only that consideration, but other balancing considerations, and those militate, I think, against injunctive relief. These considerations include the problem in enforcing such an injunction.

In view of the present availability of the material on the public record, the consideration that an open-ended injunction would be difficult or impossible to enforce to protect against further damage, because no matter what was done with regard to the Tanners and those acting in concert with them, there would be no assurance at all that any damages not compensated for now could be avoided.

Another consideration, and most importantly, is because the rights of researchers to be protected against stealing and misappropriation and publications directly based thereon, already has been substantially vindicated in the interest of the public, and particularly in the interest of the plaintiff. And while the result isn’t personal from the plaintiff’s standpoint, to go beyond this by granting injunctive relief may unavoidably transcend the rationale and legitimate basis of the Court’s judgment and enter into the forbidden domain of restrictions on freedom of speech and of the press, and areas preempted by the copyright law. . . . while my findings will remain unchanged, that it is necessary in order to fully protect the plaintiff to resort to injunctive relief, my conclusions are that this cannot be done without impinging upon other values and limitations, the recognition of which was essential to the Court’s other conclusions for the reasons I’ve indicated. . . .

Injunctive relief against future sales, publication, or distribution of plaintiff’s notes in question is hereby denied without prejudice through the recovery by the defendant of further damages — by the plaintiff of further damages against the defendant in the event of such future sales, publication, or distribution. (“Partial Transcript of Proceedings,” April 10, 1984, pages 3–6)

JUDGE VERY UPSET!

On April 29, 1984, we published our advertisement in the Salt Lake City newspapers. In this article we criticized Judge Christensen’s handling of the case and told that he had reversed his decision on the injunction. We also stated that *Clayton’s Secret Writings Uncovered* “is still available for \$3.00 a copy.” This article set off a chain of circumstances which led us back before the Judge. Gordon A. Madsen was very upset over the matter and filed a “Motion to Alter or Amend Judgment.” In this motion he asked the Court to reinstate “a restraining order as encunciated [*sic*] by the Court March 23, 1984.” He included a “Memorandum in Support of Motion to Alter or Amend Judgment,” in which he argued:

. . . the defendants proceeded to publish an advertisement in the *Salt Lake Tribune* in the Sunday, April 29, 1984, edition. A tenor of said advertisement among other things, views the Judgment entered herein as a license to the defendants to continue publication of the work, *Clayton’s Secret Writings Uncovered*. The final sentence thereof indicates that the same is still available for sale at the defendants’ place of business. A copy of the advertisement is attached to the Affidavit of Jay T. Ball and incorporated therein by reference. On the 30th

The Tanners on Trial

day of April, 1984, Mr. Ball purchased a copy . . . which is also attached and incorporated in said Affidavit as set out in more detail in said Affidavit. . . the undersigned submits that at the very least this Court could, if it is unwilling to issue a restraining order, at least order the defendants to produce the copies heretofore printed and as yet unsold by the defendants to the Court to be destroyed, so as to prevent the recurring violation originally adjudged by this court as unlawful.

Strange as it may seem, Judge Christensen granted Ehat's lawyer a hearing concerning the matter. This, of course, ran up our legal costs even higher. It is our belief that he only granted the hearing so that he could rebuke us for criticizing his judgment in the newspapers. At this hearing Judge Christensen made some remarkable statements which clearly showed his prejudice against us:

THE COURT: At the time this matter was before me for final decision with respect to injunctive relief, I was persuaded that an injunction would involve too many problems of enforcement and First Amendment rights to commend to the Court its issuance. . . .

The other thing that persuaded me was my assumption that Mr. Tanner was acting in good faith, was a law abiding citizen to—or according to his life and according to his understanding. And I really assumed that in view of the Court's determination that further publication would be unlawful, and its express holding that his prior publication for the reasons stated was an unlawful act, he would not even render it necessary, an injunction. . . . I assumed that until, if at all, a decision was changed, there would be compliance with the spirit of the decision. I really didn't expect that Mr. Tanner would insist upon continuing to commit what was adjudged to be an unlawful act, and in precisely the same way as furnished the basis for the adjudication of his prior conduct.

According to the showing before the Court, not only did he do that, but as I read the article, the advertisement that they published (referring to the defendant's collectively) he really misrepresented the decision of the Court and flaunted his defiance of it. I anticipated that if I did execute an injunction with the limits that a proper injunction would have to incorporate, it would have been almost impossible, among other things to enforce that, the substance of the injunction, by a reason of the possibility that substance of the Ehat's could be published with substantially the same effect as far as damage was concerned.

And supposing that the defendants would be content with their rights of free speech, which the court has no disposition to restrain in any and perhaps to avoid that setup as straight, it leaned over backwards. I did certainly assume that the circumspection of the

Court toward the defendants would be respected. I see, however, that the Tanners not only insisted upon the continuation of the unlawful acts, but tried to capitalize on the court's circumspection toward them by stating, among other things, as follows:

Judge Christensen said he was going to stop our publication of the Clayton material: “. . . Clayton[s] *Secret Writings Uncovered* . . . cannot lawfully be continued to be sold and distributed by the defendant and those acting under them.”

And that purported to be a subquotation from me.

And then Mr. and Mrs. Tanner go on in their advertisement and say:

Just four days after making this statement, Judge Christensen began to have doubts about the wisdom of his decision to enjoin *Clayton's Secret Writings Uncovered*, and on April 10, he held a hearing and completely reversed his decision with regard to the injunction.

That's so carefully crafted, I would suspect that counsel may have had a hand in framing that, because the statement proceeds first with my holding that it was — that Mr. Tanner could not lawfully continue to sell and distribute the notes, and then immediately following it said I completely reversed my decision with regard to injunction. If it hadn't had the term “with regard to injunction” added, it would have been completely false. But the impression given was that the decision with regard to the unlawfulness of the publication was completely reversed because that was the only quotation from my decision which immediately preceded the statement of complete reversal.

Did you happen to draft this carefully crafted advertisement, sir?

MR. BARNARD: I would represent to the Court I did not read that advertisement. I did not discuss the content of that advertisement other than in a general sense with my clients prior to their publication.

THE COURT: Well, I am relieved to hear that an officer of the Court would not be connected with the obvious attempt to deceive in the public advertisement.

. . . .

I had assumed that the principle damage accruing to the plaintiffs, as I indicated in my rulings and comments preceding the judgment, which is a part of the findings, had accrued. I felt that the matter having been declared to be unlawful and found to be unlawful with expectation that there would be really no further publication, . . . it is appropriate for me to notice, however, that damages of a nature far beyond what were awarded heretofore could well flow from the crafted, misrepresentation of the Court's judgment by way of justification and self-protection, and then contrary to the expressed holding of the Court, flaunting and emphasizing by apparently

The Tanners on Trial

a prepared publication the very situation that gave rise to the prior damages; that is, the facsimile reproduction, and thus the misappropriation and unlawful publication of the very notes that were stolen and received by the Tanners as stolen property. And beyond that, the invitation to the public by a public announcement to come in and buy additional copies and to accentuate the damage that I thought the case was limited to by prior action of the Court in vindication of plaintiff's rights.

So what to do? I think my original judgment denying injunctive relief was sound. I think that had I, at the close of the trial, enjoined the Tanners as their disposition now appears from causing further damage to the plaintiff by the marketing, unlawfully, of the Ehat notes as such, there well could have been similar, although not as great, damage by paraphrasing the notes or publishing the public stance or otherwise handling the matter within the rights of free speech.

The Tanners weren't content with their rights under the First Amendment, weren't content with simply violating those rights subsequently by unlawful acts, but had to advertise through misrepresentation their violation and invite the public to contribute to that violation. I guess I'm a little naive. I'm not used to dealing with the kind of people when I accord consideration on balance in faith that there would be at least an attempt to comply with the Court's ruling. I'm not used to people advertising their noncompliance and heralding it to the world that they want money for the very same property that they unlawfully misappropriated.

In my judgment, an injunction now won't do any good. . . . If my judgment is right, I think the solution is still clear to deny injunctive relief. It certainly won't do any good now. The Tanners have done about as much as they can to flaunt the judgment of the Court to appropriate further, or for their own gain, plaintiff's declared right. I don't see that they can do very much else unless they want to publish another advertisement to try and market the matter. But if they do there is relief here. . . . In my judgment, the amount of damages as a result of this additional publication under the circumstances I have mentioned may well be immeasurably more than the damage that was suffered by the plaintiff up to the time of the judgment.

And moreover, if there were a case for punitive damages that could be made out, the Tanners have done about as well as they could do to justify punitive damages. . . . if the plaintiff suffered in the magnitude of \$15,000 for the unlawful misappropriation and publication, the damages could well exceed that by many times because of the emphasis that hadn't applied before through this public announcement and the Tanners' flaunting and misrepresentation of the judgment of the Court as if it were approving their publicatio[n] as if determining that the Court completely

reversed itself in holding that it was unlawful. . . . If and when the case is affirmed, I assume the Tanners can be brought in and a full accounting made as to what other sales they have made which were unlawful. . . . The Tanners will be liable as a matter of law for such damages including punitive damages as may have been additionally caused by their unlawful act. ("Partial Transcript of Proceedings," May 8, 1984, pages 3-11)

While Judge Christensen pretended that he was very shocked that there was "further publication" of *Clayton's Secret Writings Uncovered*, his original *Court's Ruling*, pages 15-16, plainly shows that he knew we were going to go on printing the book: "The Court finds that unless an order is issued enjoining the defendants from continuing to publish . . . the defendants will continue to do so to the irreparable damage of the plaintiff. . ." The Court records clearly show that we never entered into any kind of an agreement to cease publication. In fact, at the Hearing on April 10, 1984, our lawyer, Brian Barnard, argued:

MR. BARNARD: . . . that goes to why I believe that an injunction is inappropriate, that those documents, based on what the Tanners have done, and based upon what other people have done, and based upon this Court record, are now public documents. And to enjoin the Tanners from distributing copies of those documents, . . . I think is inappropriate.

And, if, in fact, Mr. Ehat suffers further damage because of the distribution, that 45 cents a copy has been determined by the Court to be an appropriate compensation. And, I'd suggest that that would be the compensation that he should receive in the future if the Court would determine there was any liability. (pages 20-21)

That the Judge accepted Barnard's argument is evident from his statement that Ehat could recover further damages "in the event of such future sales, publication, or distribution. I may say that I have been influenced to a degree by the suggestion of counsel for the defendant that this might be appropriate in lieu of injunctive relief" ("Partial Transcript of Proceedings," April 10, 1984, pages 6-7).

In light of these facts, we find it impossible to believe that the Judge would be unaware that we were likely to continue publication of the book. Furthermore, we do not accept the Judge's claim that he "leaned over backwards" to try and protect our "rights of free speech." On the contrary, we believe that he only lifted the injunction because he found out that we were appealing the case and that he would look very bad if his decision were overturned. The Judge's attempt to make us appear to

1 AND MOREOVER, IF THERE WERE A CASE FOR PUNITIVE DAMAGES
2 THAT COULD BE MADE OUT, THE TANNERS HAVE DONE ABOUT AS
3 WELL AS THEY COULD DO TO JUSTIFY PUNITIVE DAMAGES. I
4 WONDERED WHETHER THE JUDGMENT SHOULD BE AMENDED TO EXPRESSLY
5 AUTHORIZE PUNITIVE DAMAGES, BUT I THINK IN EFFECT, THE
6 JUDGMENT DOES NOT.

7 IT READS: "WITHOUT PREJUDICE TO THE RECOVERY OF
8 FURTHER DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF OF
9 FUTURE PUBLICATION, THE FURTHER DAMAGES IN MY JUDGMENT
10 WOULD AUTHORIZE CONSIDERATION OF PUNITIVE DAMAGES." WHETHER
11 THEY WOULD BE AWARDED BY A FACT FINDER OR JURY I WON'T
12 TRY TO DECIDE BECAUSE THAT'S NOT BEFORE ME. BUT WITH
13 REGARD TO THE ADEQUACY OF THIS RELIEF, IF THE PLAINTIFF
14 SUFFERED IN THE MAGNITUDE OF \$15,000 FROM THE UNLAWFUL
15 MISAPPROPRIATION AND PUBLICATION, THE DAMAGES COULD WELL
16 EXCEED THAT BY MANY TIMES BECAUSE OF THE EMPHASIS THAT
17 HADN'T APPLIED BEFORE THROUGH THIS PUBLIC ANNOUNCEMENT
18 AND THE TANNERS' FLAUNTING AND MISREPRESENTATION OF THE
19 JUDGMENT OF THE COURT AS IF IT WERE APPROVING THEIR PUBLICATIO
20 AS IF DETERMINING THAT THE COURT COMPLETELY REVERSED ITSELF
21 IN HOLDING THAT IT WAS UNLAWFUL.

22 IF THE PLAINTIFF IS NOT CONTENT WITH MY DENIAL OF
23 INJUNCTIVE RELIEF, SO BE IT. HE HAS THE SAME RIGHT AS
24 THE TANNERS TO CROSS APPEAL -- OR APPEAL THAT DENIAL.
25 IF AND WHEN THE CASE IS AFFIRMED, I ASSUME THE TANNERS

ic

A photograph of "Partial Transcript of Proceedings," May 8, 1984, page 10.
Judge threatens damages "many times" the \$16,000 awarded.

be without principles seems rather ridiculous. While it is true that he ruled that the publication was unlawful, he certainly does not have the final word about the matter. We completely disagree with his decision and feel that we have every right to continue selling the book until we are told not to by the 10th Circuit Court or the Supreme Court of the United States. If Judge Christensen really felt that it was an “unlawful” publication and that Mr. Ehat was going to suffer irreparable damages if we were allowed to continue publishing the book, he should have had the courage to stick by his original decision concerning the injunction. Actually, we seriously doubt that the Judge feels that continued publication will damage Mr. Ehat. In the hearing in which Christensen reversed his decision, he seemed to be arguing that continued distribution would not hurt Ehat:

THE COURT: What would you — what would damage, which was suffered that you have not already been compensated for if, for instance, one other book was sold by the Tanners or a dozen other books, or a hundred other books that you haven’t already suffered?

MR. MADSEN: . . . I believe the Court also ruled the damages increased by the way of diminution of the market for the master thesis with its expanded copies of the notes as an appendix in it which with each additional sale of another of these versions reduces that market continually and would be a continuing damage.

THE COURT: Would it really reduce the market, the matter having been made public through the Court records and through the publications to date?

It’s all a neat little package to say, “Well, each sale would cause other damages.”

Perhaps I erred in denying a hundred-dollar item based not on damage to your client, but profit to the other side. . . . Be that as it may, after having received that compensation and compensation with regard to the effect upon reputation and the effect upon the saleability of the manuscript, can you relate irreparable damage to a sale of one, two, or a hundred more copies of that unless you begin to say, “Well, we want to go beyond the protection of the thing itself and protect the idea,” which encroaches upon the preempted area of the Copyright Act or upon First-Amendment considerations.

Those are some of the things that I’m concerned about with this idea of injunctive relief. (“Transcript of Proceedings,” April 10, 1984, pages 6–7)

We feel that Judge Christensen was not really as concerned about Ehat’s rights as he was about the fact that we had questioned his ruling and told how he had to reverse his decision on the injunction. On page 10 of the “Partial Transcript of Proceedings,” May 8, 1984, it became rather clear that our supposed “flaunting and

misrepresentation” of Judge Christensen’s decision was the thing that really upset him:

. . . if the plaintiff suffered in the magnitude of \$15,000 from the unlawful misappropriation and publication, the damages could well exceed that by many times because of the emphasis that hadn’t applied before through this public announcement and the Tanners’ flaunting and misrepresentation of the judgment of the Court . . .

It would appear from this that Judge Christensen is trying to intimidate us through threats of awarding vast sums of money to Mr. Ehat just so we will not publicly question his decision. On page 9 of the same document, he said that if we were to publish another advertisement, “there is relief here.” His statement on page 10 that he would award “many times” the “\$15,000” (actually \$16,000) is certainly difficult to interpret. One might get the impression, however, that he is talking of hundreds of thousands of dollars. On page 9 he refers to the amount as “immeasurably more” than the original judgment, and on page 7 he says that “damages of a nature far beyond what were awarded heretofore could well flow from the crafted, misrepresentation of the Court’s judgment . . .” On pages 11–12, the Judge stated:

THE COURT: Well, you can tender an order, or one of you can tender an order. Or, I may draw it myself so if Mr. Tanner misrepresents the Judge or the Court any more, the order itself can stand.

At the bottom of the same page, Judge Christensen commented: “Damages in my judgment here will far exceed those damages that have already been awarded.”

We view these threats as nothing less than an attempt to keep us from exercising our freedom of speech, and feel that it is deplorable that a judge representing the United States Government would stoop to such methods to keep us from questioning his decisions. We feel that this is not the American way, and we do not intend to be intimidated by his threats.

Judge Christensen’s claim that we misrepresented his decision has absolutely no basis in fact. Our report of what happened is completely accurate. The Judge did hold a “hearing and completely reversed his decision with regard to the injunction.” In the article we made no attempt to claim that the Judge had changed his mind with regard to our guilt. In fact, we plainly stated that “we still feel Christensen’s decision concerning ‘unfair competition’ is completely wrong and we are appealing it to the 10th circuit court” (*Salt Lake Tribune*, April 29, 1984). Judge Christensen refers to a quote which we

took from him as follows: “And that purported to be a sub-quotation from me.” We do not know why he used the word “purported” because it is an exact word-for-word quotation from page 16 of the *Court’s Ruling*. In any case, after severely rebuking us, the Judge ended up denying the motion to restore the injunction, and in a document prepared May 14, 1984, he wrote: “IT IS NOW HEREBY ORDERED that the motion of the plaintiff to alter or amend the judgment by granting injunctive relief as against the defendants is hereby denied, . . .” He did, however, amend the Court’s judgment to say that “punitive” damages could now be assessed against us. In the *Court’s Ruling*, page 15, he had previously said that “punitive damages within the discretion of the Court will be denied.”

Judge Christensen’s inability to deal properly with our criticism of his decision clearly demonstrates that he is unable to rule objectively with regard to this particular case.

REPUTATION DAMAGED?

We feel that one of Judge Christensen’s greatest mistakes occurred when he awarded Andrew Ehat \$12,000 for loss of reputation:

6. The plaintiff’s entitled to a judgment for compensatory damages against the defendant in the sum of \$960 representing profits made by the defendants for the unlawful publication of the Ehat notes, for the sum of \$3,000 for the reduction by defendants unlawful acts of the potential market value of the publication of plaintiff’s master’s thesis, for the sum of \$12,000 for damage to plaintiff’s reputation as a scholar and researcher; . . . (*Court’s Ruling*, page 24)

The Judge does not seem to make it clear whether we have actually hurt Ehat’s reputation or merely deprived him of being the first scholar to publish the Clayton material. On page 14 of the *Ruling*, however, Judge Christensen said:

15. I further find that because of defendant’s publication of plaintiff’s notes, plaintiff’s access to private repositories is impaired to a degree.

Christine Rigby was far more observant than the Judge. In *Utah Holiday*, May 1984, page 14, she wrote:

. . . on Ehat’s loss of reputation, he testified that he had not once been denied access to private repositories since the incident. Yet, the judge made a finding of fact that “plaintiff’s access to private repositories is impaired to a degree.”

This testimony was given by Mr. Ehat at the trial:

Q. Has anyone in any library, archive, or repository said to you, “You let your notes be distributed, your notes from the Clayton journal, therefore, you can’t have access to any book or materials in our library?”

A. No. (*Trial Transcript*, page 100)

Q. Do you feel you have been damaged by the publishing of your extracts by the Tanners?

A. Yes.

Q. In what way?

A. I feel for one thing that the publication of my masters thesis . . . may be reconsidered for publication with all that I envision for it to do.

.
Q. In what other ways?

A. The possibility of some concern that I was simply indiscriminately passing out documents to other people that might affect my future access to private repositories.

Q. Have you had any experience that would suggest to you that perhaps your access has been limited since their act?

A. Nothing specific, but one can’t read the minds of the individuals who make the decisions. (*Ibid.*, pages 47–48)

In his deposition Andrew Ehat gave the following testimony:

Q. Seventh East Press quoted you as saying that wide publicity of the matter would almost certainly prevent further access to any other material by you. Did you make any comment like that to the Seventh East Press?

A. Perhaps I did. A matter of speculation.

Q. Has that in fact happened? Has anybody told you that you can’t have access to materials because of this incident?

A. Well, I can’t read others’ minds or know that if I’m denied access to something it’s a result of this. I can’t say that I’ve been denied any access.

Q. Nobody has specifically told you they won’t let you have access because of the incident?

A. That’s correct.

Q. And since the incident in ‘81, has it—has a situation ever arisen where you have asked for access and somebody said no for any reason?

MR. MADSEN: Are you limiting it to the LDS Church or—

MR. BARNARD: Let’s start with the LDS Church?

MR. MADSEN: Or Library of Congress?

THE WITNESS: I don’t know that I have been restricted from seeing anything. I may have asked for something, but for different reasons they would give me a no, but I don’t recall any occasions.

1 restricted from seeing anything. I may have asked for
2 something, but for different reasons they would give me a
3 no, but I don't recall any occasions.

4 BY MR. BARNARD:

5 Q. Okay. That's with regard to the LDS Church?

6 A. That was with regard to the LDS Church and any
7 other repository.

8 Q. So you haven't been refused, to your recollection,
9 since 1981 to have access to materials by anybody?

10 A. To my recollection, yes.

11 Q. You were quoted in the Seventh East Press as also
12 saying that you had wasted or spent twelve weeks of
13 valuable study time tracing down the copies, something to
14 that effect. I'm on the introduction page there,
15 right-hand side, third paragraph down, last three lines. I
16 lost twelve weeks of my life trying to track down all the
17 people who had copies.

18 A. Oh. Yes, I -- substantially that's -- I don't
19 know about twelve weeks. Nine to twelve weeks, something
20 like that, where I spent a good deal of my time in inquiry
21 and other things.

22 Q. Okay?

23 A. Intermittently, but it's over the course of that
24 time. It wasn't constant.

25 Q. But that's more or less an accurate quote of what

LISA ARMSTRONG --- CAPITOL REPORTERS

A photograph of the *Deposition of Andrew Ehat*. Mr. Ehat admits that he has never been denied access to documents because of the problem over his notes being circulated.

The Tanners on Trial

BY MR. BARNARD:

Q. Okay. That's with regard to the LDS Church?

A. That was with regard to the LDS Church and any other repository.

Q. So you haven't been refused, to your recollection, since 1981 to have access to materials by anybody?

A. To my recollection, yes. (*Deposition of Andrew Ehat*, pages 115–116)

In spite of Mr. Ehat's testimony to the contrary, Judge Christensen ruled that the "plaintiff's access to private repositories is impaired to a degree." We always thought that court decisions were supposed to be based on solid evidence. It would appear, however, that in this case the judge was acting on emotion rather than evidence.

Brigham Young University professor Richard Anderson testified that Mr. Ehat was very concerned that people would think he allowed the Clayton material to be published:

A. Essentially, Mr. Ehat expressed surprise and disappointment that his materials had been taken in an unauthorized way and sold on the public market. He was I think more concerned with the personal professional loss of face and the very greater damage to his reputation as a scholar in allowing—appearing to allow those things to be published. (*Trial Transcript*, page 332)

Dr. Anderson indicated, however, that when people learned the truth concerning how the material got out, there was no damage to Ehat's reputation:

A. . . . The people that knew the circumstances didn't think ill of Andy because they knew it wasn't his volition that contributed to the dissemination of the materials, but I would say anybody who didn't know the inner facts would certainly think less of Andy Ehat. (*Ibid.*, pages 336–337)

The important question, then, with regard to Mr. Ehat's reputation is whether we told the truth concerning how the Clayton notes got out. If we tried to make it appear that Ehat had deliberately leaked a sensitive Church document to us for publication, this would have hurt his reputation as far as access to Church Archives is concerned. If, on the other hand, we indicated that he was opposed to the publication of the material, there would have been no damage to his reputation. Because of the importance of this matter, we have decided to include the entire Introduction to *Clayton's Secret Writings Uncovered* in this book. Those who will take the time to read the Introduction will see that we have told the entire truth about the matter. There is nothing in this Introduction which could damage Ehat's reputation in any way.

The four pages which follow were taken from *Clayton's Secret Writings Uncovered*.

INTRODUCTION

For 140 years the Mormon Church has been suppressing the Nauvoo diaries of Joseph Smith's secretary William Clayton. These diaries have been hidden in the vault of the First Presidency. Recently, however, quotations from these diaries leaked out, and this has caused great consternation among the General authorities and officials at Brigham Young University. In an article entitled, RESTRICTED CHURCH DOCUMENT 'STOLEN,' the *Seventh East Press* reported the following (the names David Brown and Tom Wilson "are pseudonyms," according to this paper):

A BYU graduate student has accused a member of a bishopric of stealing copies of materials which the student obtained from the vault of the First Presidency.

In doing research in LDS Church history, Andrew F. Ehat, . . . obtained permission to examine the restricted Nauvoo diaries of William Clayton and make notes. He gave a copy of his notes to BYU religion instructor Lyndon Cook, who kept them in his campus office. The notes were taken without permission and photocopied by David Brown, a member of a bishopric which uses Cook's office. In September Brown lent his copy to Tom Wilson, a BYU religion instructor, who in turn lent them to a history student, Scott Faulring.

Faulring had already made five copies for various individuals when Ehat discovered that his notes were being copied without his permission. Ehat spent much of the remainder of fall semester trying to recover all the copies that had been made.

The notes represent approximately 90 typed pages of excerpts from the personal diaries of William Clayton, . . .

Some time ago, Andrew ("Andy") Ehat obtained permission through the Historical Department of the Church to examine the Clayton diaries. Ehat made a copy of his notes for Lyndon Cook, with whom he was working to produce the book *The Words of Joseph Smith* which appeared in early 1981. . . . In an interview, Ehat implied that he had made copies for others as well, but declined to mention any names. . . .

After borrowing the copy from religion instructor Tom Wilson, Scott Faulring made five copies for student and faculty acquaintances. A few days later, Faulring had the notes in a campus office when Andy Ehat, who was present, happened to recognize Lyndon Cook's handwriting in the margins of the photocopy. Ehat bolted to his feet and demanded to [k]now where the copy had come from. Faulring was reluctant to cooperate at first, but was willing to help when he learned the notes had been copied without permission. Individuals present report that Ehat was extremely upset and at one point said, "If this gets out it could destroy the Church." . . .

Ehat says he was able to obtain the five copies Faulring made within about 12 hours, but that three of the people who turned in copies had secretly made extra copies and kept them back for themselves and others. . . .

Another person to obtain a copy was Hal Palmer, a former student who drop[p]ed out of BYU near the end of fall semester. . . .

Palmer reports that he was surprised to see Andy Ehat on his doorstep as he left for school early one morning last November. Ehat asked for Palmer's copy and, according to Ehat, "reasoned with him from every possible way I could conceive of: ethically,

morally, and so forth. And he was unwilling to cooperate." Palmer states that Ehat followed him from his apartment to his class on campus and that the two were "screaming and yelling and I was swearing at him the whole way. People kept turning and looking at us." According to Palmer, Ehat implied that he (Palmer) could be excommunicated if the notes weren't returned. . . .

Angry with Ehat's approach, Palmer gave copies to Special Collections libraries at both BYU and the University of Utah. Ehat has since retrieved both of these copies. At one point, Ehat phoned Elder Boyd K. Pa[c]ker of the Council of the Twelve Apostles to ask for advice in the situation. Ehat declined to comment on that conversation.

To this date, Palmer's copy has not been returned, and it appears that other copies are still being circulated by various individuals, a situation which has left Ehat frustrated. Ehat explains that Brown's actions "cost me getting a master's degree here at the university in the sense that I lost twelve weeks of my life trying to track down all the people who had copies." . . .

While Ehat initially stated that information in the Clayton diaries "could destroy the Church," he has since given very different explanations for wanting to keep the material confidential. Ehat told the *Seventh East Press* that his concern in this matter was "the fact that the diaries (i.e., his notes) were stolen and . . . that wide publicity of this matter would almost certainly prevent further access to any other materials," . . .

Ehat also believes that use of the diaries should be limited out of respect to William Clayton, who "in a different sphere is still living." . . .

Others, however, see different reasons for not wanting to see the diary made public. Lyndon Cook for example, says the diary contains some "very sensitive entries which may not do us too well if the anti-Mormons got a hold of them." . . .

Cook says the diary gives a lot of information concerning the secret practice of polygamy in Nauvoo and says that for a time Emma Smith was unaware that it was being practiced by her husband Joseph. He also feels that publishing the diary "may injure some who are of weaker faith." (*Seventh East Press*, January 18, 1982, pages 1 and 11)

This whole episode led BYU President Jeffery Holland to call for an investigation:

President Jeffery Holland has appointed Vice-president Noel Reynolds to investigate the recent unauthorized circulation of restricted research materials concerning Church history. . . .

Reynolds thinks that incidents such as those surrounding the circulation of the Clayton material may "destroy our credibility as a research institution with the Church archivists." . . .

Palmer . . . denies that he has acted irresponsibly, saying that he would never give information to anti-Mormons. Palmer asserts that he has "an undying testimony of the gospel" . . .

Bill Seavey, another student contacted by Reynolds, feels that while irresponsible students in the underground may contribute to the tightening of restrictions in the Church Historical Department, it is equally likely that the reverse is true: the tightening of restrictions encourages students to participate in the underground. (*Seventh East Press*, January 18, 1982, pages 1, 10, 11)

The Tanners on Trial

Andrew Ehat went to “BYU security and the Provo Police Department,” to try to stop the circulation of the material, but neither organization could help him because no actual physical property was missing: “The Police, reports Ehat, weren’t concerned about what was on the papers that were taken, only the cost” (Ibid.). The *Seventh East Press* also reported that Ehat told the man who had made the original copy “that if he was unwilling to coopera[t]e with us completely, that I did not have any qualms about recommending and charging ecclesiastical action as well as civil action.” In spite of all the pressure applied by Ehat and BYU officials, they were unable to stop the circulation and copying of the excerpts. Many copies were spread around Provo, Salt Lake City and even to different parts of the United States by “the Mormon underground Xerox press” (a group composed mostly of liberal Mormon scholars). Most of those who received copies were very careful to see that they did not fall into the hands of critics of the Church. As we have already shown, the *Seventh East Press* told of a man who had a copy but said “he would never give information to anti-Mormons.” Nevertheless, several months after Mormon scholars began circulating the typed extracts, we were given permission to make a copy. At first we were reluctant to print the material. Andrew Ehat was vigorously opposed to anyone publishing the material. In fact, one man who was preparing to print it, received a letter from Ehat’s lawyer which threatened legal action if he did not desist. We tried to weigh the right of the Mormon people to know the truth about the diaries their leaders had suppressed against Ehat’s desire to keep the extracts out of the hands of the public. From what we were able to learn, Ehat could not copyright the material taken from Clayton’s diaries. However, he could possibly claim a copyright on his own comments which appear in the manuscript. Comments of Lyndon Cook also appear in the margins. To solve this problem we have cut off the sides of the photocopies and blacked out Ehat’s notes which appear in the text. Therefore, we have a photographic printing of the document which does not violate Ehat’s manuscript rights. Although Ehat’s notes are helpful to those reading the extracts, they are not essential. The important part is that which was written by William Clayton. In any case, we feel we have arrived at a good solution to the problem.

While Ehat would like to keep some of the more devastating material from the public, he and Lyndon Cook have already published some portions of the diaries in their book, *The Words of Joseph Smith*. (Compare, for instance, pages 6–9 of this manuscript with pages 168–171 of *The Words of Joseph Smith*.) James B. Allen, formerly Assistant Church Historian under Leonard Arrington, published some extracts from Clayton’s Nauvoo diaries in an excellent article which appeared in *Journal of Mormon History*, Vol. 6, 1979, pages 37–59. A note at the beginning of Ehat’s extracts indicates that the portions of the manuscript which are underlined have been published by Allen.

Unlike many of the early pioneer journals, the extracts from Clayton’s diaries have all the earmarks of material written at the time the events occurred. For instance, under the date of May 20, 1843, Clayton records that Joseph Smith “says Jackson appears a fine & noble fellow . . .” (page 42). Just three days later, however, he reports that Smith said that “Jackson is rotten hearted” (page 43). If the material had been written at a later time, it is unlikely that Clayton would have recorded Smith’s favorable comment concerning Jackson. Many other things lead us to believe this is a contemporary record—not something written at a later date.

PLURAL MARRIAGE

The William Clayton diaries certainly confirm our research concerning the deceitful way plural marriage was introduced by the Mormon Prophet Joseph Smith. For instance, in *Mormonism—Shadow or Reality?* pages 206–207, we quote Emily Dow

Partridge (a faithful Mormon) as telling how Joseph Smith deceived his wife Emma:

. . . the Prophet Joseph and his wife Emma offered us a home in their family, . . . I was married to Joseph Smith on the 4th of March 1843, . . . My sister Eliza was also married to Joseph a few days later. This was done without the knowledge of Emma Smith. Two months afterward she consented to give her husband two wives, providing he would give her the privilege of choosing them. She accordingly chose my sister Eliza and myself, and to save family trouble brother Joseph thought it best to have another ceremony performed. Accordingly on the 11th of May, 1843, we were sealed to Joseph Smith a second time, in Emma’s presence, . . . From that very hour, however, Emma was our bitter enemy. . . . things went from bad to worse until we were obligated to leave the house and find another home. (*Historical Record*, page 240)

In William Clayton’s diary, he tells of Joseph Smith having a problem with Emma over the Partridge sisters. He indicates that Joseph deceived her by telling her he would “relinquish all” for her sake when he really didn’t intend to “relinquish any thing”:

Wednesday 16 . . . This A.M. J.[Joseph] told me that since E. [Emma] came back fro[m] St Louis she had resisted the P. [Priesthood?] in toto & he had to tell her he would relinquish all for her sake. She said she would given [*sic*] him E. & E. P [Emily and Eliza Partridge] but he knew if he took them she would pitch on him & obtain a divorce & leave him. He however told me that he should not relinquish any thing O. God deliver thy servant from iniquity and bondage. (William Clayton’s Diary, August 16, 1843, typed excerpts, page 24)

On May 24, 1843 (page 43) William Clayton told of Joseph Smith holding the door shut when he was in a room with one of the Partridge girls and that this made Emma very “irritated”:

Prest. stated to me that had had a little trouble with sis E. he was asking E. Partridge concerning Jackson conduct during Prest. absence & E came up stairs. he shut to the door not knowing who it was and held it. She came to the door & called Eliza 4 times & tried to force open the door. Prest. opened it & told her the cause &c. She seemed much irritated. He says Jackson is rotten hearted.

In *Mormonism—Shadow or Reality?* page 245, we show that while Joseph Smith secretly lived plural marriage, he denied it publicly and even published a statement that “Hiram Brown” had been “cut off from the church” for “preaching polygamy, and other false and corrupt doctrines, . . .” (*Times and Seasons*, Vol. 5, page 423). According to William Clayton, Joseph Smith was willing to go so far as to initiate a fake excommunication to cover up the practice of polygamy:

Thursday 19. . . . Prest. J . . . began to tell me that E. was turned quite friendly & kind. she had been anointed & he also had been a. K. He said that it was her advice that I should keep M [Clayton’s plural wife Margaret] at home and it was also his council. Says he just keep her at home and brook it and if they raise trouble about it and bring you before me I will give you an awful scourging & probably cut you off from the church and then I will baptise you & set you ahead as good as ever. (Ibid., October 19, 1843)

William Clayton’s diaries paint a very unattractive picture of polygamy in Nauvoo. Clayton was continually having family problems because of plural marriage. He tells, for instance, of a problem he encountered when he wanted to sleep with both of his wives at the same time:

The Tanners on Trial

Thursday 24. . . At night I asked mother if M might sleep with Ruth & me she appeared very rebellious & would not consent but said we might do as we had a mind. (Ibid., August 24, 1843, page 25)

Clayton does not indicate how his wives felt about this situation, but it is obvious from the diary that Margaret was really in love with another man. She had been engaged to this man but had been counseled to marry Clayton instead. Clayton felt very bad and asked Joseph Smith if he had done wrong in taking Margaret away from the man she really loved. Smith “answered no you have a right to get all you can” (Ibid., August 11, 1843). Joseph Smith really seemed to believe in that philosophy. At one time he and Clayton were both interested in Lydia, the sister of two of Clayton’s wives. He claimed, therefore, that God gave him a special revelation showing it would be wrong for Clayton to have her:

Friday 15th. . . Prest. J. told me he had lately had a new item of law revealed to him in relation to myself. He said the Lord had revealed to him that a man could only take 2 of a family except by express revelation and as I had said I intended to take Lydia he made this known for my benefit. to have more than two in a family was apt to cause wrangles and trouble. He finally asked if I would not give L to him I said I would so far as I had any thing to do in it. He requested me to talk to her. (page 25)

William Clayton’s diaries certainly throw light on the bad relationship Joseph Smith had with his wife Emma. Most of the problems seemed to stem from the doctrine of plural marriage. Clayton records the following under the date of July 12, 1843:

Wednesday 12th This A.M. I wrote a Revelation consisting of 10 pages on the order of the priesthood, showing the designs in Moses, Abraham, David and Solomon having many wives & concubines &c. After it was wrote Prests. Joseph & Hyrum presented it and read it to E. who said she did not believe a word of it and appeared very rebellious. (page 20)

On August 21, 1843, Emma was “vexed and angry” because of correspondence she found between Joseph and one of his plural wives. Two days later she treated Joseph so badly that “he had to use harsh measures to put a stop to her abuse but finally succeeded.”

Joseph Smith feared that Emma would become involved in the same type of conduct in which he was engaged. At one time he even suspected William Clayton of using “familiarity” with her:

Monday 29 This A.M. prest J. told me that he felt as though I was not treating him exactly right & asked if I had used any familiarity with E. I told him by no means & explained to his satisfaction. (Ibid., May 29, 1843, page 44)

On June 23, 1843, William Clayton recorded this strange entry in his diary:

Friday June 23rd. This A.M. Prest J. took me and conversed considerable concerning some delicate matters. said [a mysterious character appears at this point in the manuscript which Mormon scholars interpret as “Emma”] wanted to lay a snare for me. He told me last night of this and said he had felt troubled. He said [the character representing “Emma” appears again at this point] had treated him coldly & badly since I came . . . and he knew she was disposed to be revenged on him for some things she thought that if he would indulge himself she would too. He cautioned me very kindly for which I felt thankful. He said Thompson professed great friendship for him but he gave way to temptation & he had

to die. Also bro Knight he gave him one but he went to loose conduct and he could not save him. Also B.Y. [Brigham Young] had transgressed his covenant & he pled with the Lord to spare him this end & he did so, other wise he would have died. B. denied having transgressed He said if I would do right by him & abide his council he would save my life while he lived. (pages 19–20)

Taken as a whole Ehat’s extracts from William Clayton’s diaries cast early Mormonism in a very bad light. In *Mormonism—Shadow or Reality?* page 245, we quoted the Mormon Apostle John A. Widtsoe as saying: “The Church ever operates in full light. There is no secrecy about its doctrine, aim, or work.” Widtsoe further proclaimed that “From the beginning of its history the Church . . . has fought half-truth and untruth.” William Clayton’s diaries certainly show that Apostle Widtsoe was incorrect in these statements. The Church was certainly not operating in “full light” and there was a great deal of “secrecy about its doctrine.” Furthermore, Clayton makes it clear that Joseph Smith used “untruth” as a tool to advance his work. Not only was he deceiving the outside world, but he was deceiving his own wife and other members of the Church.

DISCREDITS SMITH’S HISTORY

In *Mormonism—Shadow or Reality?* pages 126–142D, we show that the *History of the Church*, which was supposed to have been written by Joseph Smith himself, is filled with serious problems and that over 60% of it was actually compiled after Smith’s death. The Mormon leaders plagiarized from diaries, newspapers and oral accounts of other people to complete the history. To make it appear that the history was written by Joseph Smith, these accounts were changed to the first-person. The extracts from Clayton’s diaries throw important light on this subject. Even a superficial examination reveals that Clayton’s writings were the source for entries attributed to Joseph Smith in the *History of the Church*. For instance, under the date of May 1, 1843, Clayton recorded this statement concerning the Kinderhook plates in his diary: “Prest J. has translated a portion and says they contain the history of the person with whom they were found & he was a descendant of Ham . . .” (page 18). In the *History of the Church* this has been falsified to make it appear that Joseph Smith was the author: “I have translated a portion of them, and find they contain the history of the person with whom they were found. He was a descendant of Ham, . . .” (Vol. 5, page 372).

On May 16, 1843, Clayton wrote: “Before we retired the Prest. gave bro Johnson & wife some instructions on the priesthood. He put his hand on my knee and says . . .” (page 40). This has been rewritten as follows in the *History of the Church*, Vol. 5, page 391: “Before retiring, I gave Brother and Sister Johnson some instructions on the priesthood; and putting my hand on the knee of William Clayton, I said: . . .”

The extracts from William Clayton’s diaries not only provide evidence that third-person sources were changed to appear that Joseph had authored them, but they also cast doubt upon one of Joseph Smith’s most famous prophecies—the prediction that Steven A. Douglas would “aspire to the presidency of the United States.” This prophecy appears in Joseph Smith’s *History of the Church*, Vol. 5, page 394, under the title, “The Great Prophecy on the Head of Steven A. Douglas”:

Judge, you will aspire to the presidency of the United States; and if ever you turn your hand against me or the Latter-day Saints, you will feel the weight of the hand of Almighty upon you; . . .

The Tanners on Trial

The Mormon historian B. H. Roberts made the following comment concerning this prophecy:

Two great prophecies by Joseph Smith belong to this period. The first was in relation to the removal of the saints to the valleys of the Rocky Mountains; the other was a most remarkable prediction concerning Steven A. Douglas, . . . (*A Comprehensive History of The Church of Jesus Christ of Latter-day Saints*, Vol. 2, page 181)

In his book *Prophecies of Joseph Smith and Their Fulfillment*, Nephi Lowell Morris maintained that the prophecy concerning Steven A. Douglas provides “incontrovertible evidence to the divine mission and inspiration of Joseph Smith” (page 215). On pages 201–202 of the same book, Morris argued that “At the time of the event, Steven A. Douglas was in his thirtieth year and though a bright and promising young man, he was scarcely known outside of his own state.”

In the *History of the Church* a note appearing in brackets on page 393 of Vol. 5 indicates that this prophecy was actually taken “from the journal of William Clayton, who was present.” In other words, it was supposed to have been copied from Clayton’s diary into the “Manuscript History” of the Church. Since Ehat’s extracts from Clayton’s diary cover the same day, one would expect to find the prophecy recorded there. An examination, however, reveals that while the diary does mention Douglas, the prophecy concerning him is not included. Joseph Smith is quoted as saying the following on May 18, 1843:

“ . . . I prophecy in the name of the Lord God that in a few years this government will be utterly overthrown and wasted so that there will not be a potsherd left” for their wickedness in conniving at the Missouri mobocracy. The Judge appears very friendly & acknowledged the propriety of the pres. remarks. (William Clayton’s Dairy, May 18, 1843, typed excerpts, page 42)

The account published in the *History of the Church* is about 160 words longer than the one found in Clayton’s diary. It differs in two very important aspects: One, additional words appear in Joseph Smith’s prophecy that the United States would be “utterly overthrown.” These words change the prophecy to make its fulfillment conditional upon the performance of the United States Government. Two, the entire prophecy concerning Douglas has been inserted. In the quotation from the *History of the Church* which is printed below we have marked the important additions with italics:

“ . . . I prophesy in the name of the Lord God of Israel, *unless the United States redress the wrongs committed upon the Saints in the state of Missouri and punish the crimes committed by her officers that in a few years the government will be utterly overthrown and wasted, and there will not be so much as a potsherd left, for their wickedness in permitting the murder of men, women and children, and the wholesale plunder and extermination of thousands of her citizens to go unpunished, thereby perpetrating a foul and corroding blot upon the fair fame of this great republic, the very thought of which would have caused the high-minded and patriotic framers of the Constitution of the United States to hide their faces with shame. Judge, you will aspire to the presidency of the United States; and if ever you turn your hand against me or the Latter-day Saints, you will feel the weight of the hand of Almighty upon you; and you will live to see and know that I have testified the truth to you; for the conversation of this day will stick to you through life.*

He [Judge Douglas] appeared very friendly, and acknowledged the truth and propriety of President Smith’s remarks. (*History of the Church* 5:394)

Instead of confirming the famous prophecy concerning Douglas, William Clayton’s diary seems to provide evidence against it. All it contains is the false prophecy that the United States will be destroyed. Joseph Smith’s private diary for May 18, 1843, is also silent concerning the prophecy. The manuscript for the *History of the Church* cannot be used as evidence for the prophecy because this portion was NOT written during Joseph Smith’s lifetime. In an article published in 1971, Dean C. Jessee, who was serving on the staff of the Historical Department of the Church, published a chart which shows that this portion of the *History of the Church* was not written until 1854 or 1855 (*Brigham Young University Studies*, Summer 1971, page 441). This, of course, would be 10 or 11 years after Joseph Smith’s death! If the prophecy concerning Douglas was made up in the 1850s, as the evidence seems to indicate, then it has no real value. By the middle of that decade it was well known that Douglas wanted to be President of the United States. T.B.H. Stenhouse informs us that in 1856 “Senator Douglas was a candidate for the Presidency” but that his party (the Democrats) chose James Buchanan to represent them. In 1860 Douglas finally received the nomination of the convention but was defeated by Abraham Lincoln in the election (*The Rocky Mountain Saints*, pages 347–48). Since Douglas died shortly after his defeat, Mormon historians seem to feel that God punished him for turning against the Church. These same apologists do not seem to realize that this type of reasoning could be used against Joseph Smith. In *Mormonism—Shadow or Reality?* pages 416–17, we show that Smith also aspired to be President of the United States. In 1844 he announced himself a candidate and the Elders of the Church were sent out to “electioneer for Joseph to be the next President” (*History of the Church* 6:325). Before the election ever took place, however, Joseph Smith was murdered in the Carthage Jail. B. H. Roberts maintained that Douglas died “while yet in the prime of manhood—forty-eight years of age . . .” (*Ibid.*, page 396). For those who are not already committed to the defence of Mormonism, this does not provide any evidence that God was judging Steven A. Douglas for opposing the Church. After all, Joseph Smith was ten years younger than Douglas when he was murdered. If Douglas died in the “prime of manhood,” what can be said about Joseph Smith? B. H. Roberts claimed that Joseph Smith’s prophecy concerning Douglas “is one of the most remarkable prophecies either in ancient or modern times” (*History of the Church* 3:395). When all of the evidence is examined, however, it becomes clear that this purported prophecy does not furnish any evidence favorable to Mormonism.

In reading the extracts from the Clayton diaries the reader should be aware of the fact that some material is repeated and that it is not copied in chronological order. For instance, it starts out in 1843 and moves on to 1845. Then it jumps back to 1843 and proceeds again to 1845. Since this type of problem continues throughout the manuscript, the reader should watch the dates carefully to avoid confusion.

For those who are interested in a thorough study of Mormon history and doctrine we recommend our book *Mormonism—Shadow or Reality?*

Jerald and Sandra Tanner
Modern Microfilm Company
June 16, 1982

TRUTH NOT SUPPRESSED

We would like to call the reader's attention to the fact that on the first page of the Introduction to *Clayton's Secret Writings Uncovered* we reported that Andrew Ehat did everything in his power to stop the dissemination of the Clayton notes, and then on the second page we very clearly stated that he was vigorously opposed to the publication of the extracts:

Andrew Ehat was vigorously opposed to anyone publishing the material. In fact, one man who was preparing to print it, received a letter from Ehat's lawyer which threatened legal action if he did not desist. We tried to weigh the right of the Mormon people to know the truth about the diaries against Ehat's desire to keep the extracts out of the hands of the public.

On page 109 of his deposition, Mr. Ehat indicated that his reputation was hurt because we reprinted certain comments about him from the *Seventh East Press* in the Introduction to *Clayton's Secret Writings Uncovered*:

I felt that it reflected — that in reproducing in this introduction things that I considered wrong as published in the *Seventh East Press* article and representing certain things about me as if they were the truth and that I considered wrong as suggestions of things that detract from my personal reputation as a scholar and historian.

We do not see how Mr. Ehat could blame us for anything which appeared in the *Seventh East Press* because he never made any effort to correct the supposed misstatements. On page 113 of his deposition, Ehat testified:

Q. Did you ever ask the *Seventh East Press* to correct the misstatements that they made in that article?

A. No. I just decided that it would — that to ask for a retraction there was — would serve me no purpose . . .

From what we have been able to determine in taking depositions, the article in *Seventh East Press* seems to be a good account of what actually took place. We suspect that Ehat was just angry because the article embarrassed him. For example, the *Seventh East Press* reported that, "In an interview, Ehat implied that he had made copies for others as well, but declined to mention any names." In his deposition, pages 117–118, Ehat criticised the *Seventh East Press* as follows:

I think implicit in their language that "Ehat implied he had made copies for others as well but declined

to mention any names," unquote, that in fact I was concealing the names of the individuals. I didn't think it was any of their business to know inasmuch as one individual had had them confiscated from his files. Perhaps by naming the others, some other persons might want to do the same.

We cannot see how the article misrepresented Ehat on this matter. He admitted that he wouldn't give the names, although he said he had a good motive. Ehat does claim that he was misquoted concerning one matter (we will deal with this later), but most of his criticisms do not amount to anything.

In any case, Mr. Ehat not only failed to ask for any corrections in *Seventh East Press*, but he never advised us there was anything wrong with the citations we used in our Introduction until November 23, 1983—some two years after *Seventh East Press* published its article. It is also interesting to note that when Ehat was specifically asked if he was suing us because we reprinted portions of *Seventh East Press*, he made it clear that that had nothing to do with the suit:

Q. Okay. Was one of the reasons that you sued the Tanners in this action because they reprinted the Seventh East article which contained those misstatements or the statements that made you look bad? Your answer is—

A. No. (*Deposition of Andrew Ehat*, page 121)

If Mr. Ehat felt his reputation was damaged in any way, he could have sued *Seventh East Press*. We fail to see any way that his reputation would have been damaged by our publication, and we do not see how an unbiased judge could award him damages.

Now, while Andrew Ehat did not suffer any damage to his reputation because of our publication *Clayton's Secret Writings Uncovered*, he will probably suffer a great deal of damage because of the things that came out in the depositions and the testimonies which were given at the trial itself. As we will demonstrate later, the testimony shows that Mr. Ehat took an active part in the Mormon Underground (a group composed mostly of liberal Mormon scholars who secretly disseminate documents that have been suppressed by the Mormon Church), and this information could very well impair his access to documents owned by the Church. In addition, Mr. Ehat made contradictory statements in his sworn testimony as to how he gained access to the Clayton material. If this information damages Mr. Ehat's reputation, he can only blame himself. After all, he was the one who filed the lawsuit.

UNREASONABLE CLAIMS

Andrew Ehat claimed that our publication of his notes hurt him in a number of different ways. He indicated that it was an infringement of his copyright on the book, *The Words of Joseph Smith*. In addition, he stated that he had prepared a thesis he intended to publish in which he used the Clayton material. He also claimed that he was going to use it in his “intended doctoral dissertation.” While the Judge rejected the claims of damage on the published book, he did award Ehat \$3,000 for “reduction of the potential market value” of his master’s thesis, “Joseph Smith’s Introduction of Temple Ordinances and the 1844 Mormon Succession Question.” We felt that Judge Christensen was swayed by some unreasonable testimony given by Professor Truman G. Madsen of Brigham Young University. Dr. Madsen could hardly be considered an unbiased party in the suit. He has been a director of the Religious Studies Center at Brigham Young University. This is the organization which published Ehat’s book, *The Words of Joseph Smith*. In a letter to Ehat’s lawyer, dated March 6, 1983, Truman G. Madsen stated: “It is our understanding that you are undertaking a lawsuit on behalf of Andrew F. Ehat for copyright violations pertaining to the William Clayton manuscript utilized in *The Words of Joseph Smith*, . . . We sponsored the volume mentioned above. We hereby officially endorse your action.”

In his testimony, Truman Madsen said that Ehat was his research assistant for a number of years:

For a period of nearly five years he was my research assistant and did in fact bring to me documentary materials that he had found access to and copied in my behalf. (*Trial Transcript*, page 193)

In the Acknowledgments section of his thesis, page iv, Mr. Ehat commented: “Truman G. Madsen has never been just an employer. On that day in 1971 when he employed me as his research assistant, he changed my life and unknowingly became my mentor.” In addition to all this, Truman G. Madsen is the brother of Ehat’s lawyer. At the trial Gordon A. Madsen questioned Truman G. Madsen concerning his relationship:

Q. And to avoid any confusion and since I have you under duress, are we related?

A. We are related.

Q. What is that relationship?

A. You are my brother.

Q. That’s under oath, your honor. I want to take some note of that. (*Trial Transcript*, page 186)

At any rate, Dr. Madsen testified that the Religious Studies Center had discussed the possibility of printing Ehat’s thesis. He claimed, however, that because we printed 2,000 copies of the Clayton material, 2,000 people might not buy the thesis if it were published:

MR. MADSEN: . . .

Q. Dr. Madsen, did you or do you, while being involved with the Religious Study Center, obtain the possibility of printing the master’s thesis of Mr. Ehat?

A. We have discussed that possibility several times.

Q. Has a decision yet been made?

A. No.

Q. Are there any reasons why it has not been published?

A. Yes, our original enthusiasm for publishing was diminished when we learned that the material—a large portion of the material included in the thesis has in fact been published by the Tanners.

Q. And if in fact you were given the additional factor that about 2,000 of the Tanner publication have been printed and sold, how would that affect the market for the thesis?

A. Well, if those who have now published [purchased?] the material through the Tanners were not therefore interested in purchasing the thesis, that would be 2,000 less sold, and that would mean a royalty less of about \$3,285. (*Trial Transcript*, pages 188–190)

Gordon A. Madsen used the same type of fallacious reasoning as his brother:

. . . since the Tanners have printed approximately 2,000 copies, sold approximately 2,000 of their publication, that would presumably reduce by approximately 2,000 the copies of the thesis to be sold, . . . (*Ibid.*, page 10)

We find this reasoning to be absolutely absurd. Would Dr. Madsen have us believe that we have exactly the same 2,000 customers that the Religious Studies Center has? Actually, only about one-fifth of the people on our mailing list live in Utah. The others are scattered throughout the United States and in other countries. Most of the people on our mailing list would probably never come in contact with books published by the Religious Studies Center. Furthermore, most of our customers are non-Mormons and ex-Mormons and would not be interested in any book published by the Religious Studies Center. Although Truman G. Madsen is proclaimed to be one of the Church’s greatest philosophers, his reasoning with regard to this matter appears to be very faulty. His statement would lead one to believe that the Mormon people are buying an incredibly high percentage of their books from us.

The Tanners on Trial

In his testimony, Dr. Madsen also said that Mr. Ehat probably would have received the same royalty on the published thesis as on the book *The Words of Joseph Smith*. Madsen maintained that this royalty was 15 percent” (*Trial Transcript*, page 190). This statement is certainly inaccurate. We have obtained a photocopy of the “MEMORANDUM OF AGREEMENT,” which Truman Madsen himself signed on December 29, 1980. *The Words of Joseph Smith* was actually compiled by two men (Andrew Ehat and Lyndon W. Cook) and each of them were to receive “five percent” of the retail price on all printings after the first. If the book had been compiled by Ehat alone, we presume he would have made 10 percent, but this would have only been paid on copies sold “subsequent” to the first printing. The agreement states that “the printer will pay each of the Authors a royalty of Thirty-four Cents (\$0.34) on each copy sold from the first printing of the book.” It appears, then, that Dr. Madsen’s statement that Ehat would have received “\$3,285” in royalties on the 2,000 sales he says he would have lost is an exaggerated claim and not based on his own signed statement for the Religious Studies Center.

Even if we were to accept the fantastic claim that our 2,000 sales were all to the same people who would have bought Ehat’s thesis, we still could not accept the claim that Ehat’s sales would be harmed by our publication. We have examined Ehat’s thesis and found that only about 2 to 3 percent of the material is taken verbatim from the Clayton diaries in question. Although it is true that Ehat claims he was going to add an appendix containing additional material taken from Clayton’s writings, this appendix was not in the thesis when it was approved and he has produced no evidence that this plan predated the publication of *Clayton’s Secret Writings Uncovered*. In any case, since 97 to 98 percent of the thesis is not copied from the diaries, we feel that Ehat would not lose sales because of our publication of the extracts. On the other hand, the free publicity which we have given him in the *Salt Lake City Messenger* and *Clayton’s Secret Writings Uncovered* would have tended to increase the sales on his thesis.

At one point, Ehat’s lawyer made the fantastic claim that “the Clayton notes made up about 40 percent of the thesis and the appendix to that thesis that would have been part of that book, . . .” (*Trial Transcript*, page 10). Later when Ehat gave his testimony, Gordon A. Madsen realized that he had “misunderstood” the situation (*Ibid.*, page 40). Ehat claimed that “13.6 percent of the manuscript was cited from in my master’s thesis” (*Ibid.*), and that he intended to include an additional “28 percent in the appendix” (page 42). This would make over 40% of the extracts—not 40% of the thesis, as

Madsen originally stated. We, of course, had no way to check Ehat’s claim that he intended to include 28% of the extracts in the appendix to his thesis, but we were able to check his claim that 13.6% was included in the thesis itself. In going through the thesis we could not find enough material to come anywhere near the figure claimed by Ehat. Upon careful examination, however, we came to realize that when Ehat said he had “included in the thesis . . . 13.6 percent of the Clayton Diary entries” (*Ehat Deposition*, page 14), he did not mean that he had literally quoted this much material in the thesis. Many times he would only mention or paraphrase material from the diaries. A good example of this might be the entry in Clayton’s diary for June 23, 1843. In this portion of the diary, Clayton seemed to imply that Joseph Smith had told him that Brigham Young was guilty of adultery:

He said Thompson professed great friendship for him but he gave way to temptation & he had to die. Also bro Knight he gave him one but he went to loose conduct and he could not save him. Also B.Y. had transgressed his covenant & he pled with the Lord to spare him this end & he did so, other wise he would have died. B. denied having transgressed. (*Clayton’s Secret Writings Uncovered*, page 19)

When Ehat wrote his thesis he used this entry, but he did not literally quote it:

Ironically, while Joseph was on his trip away from Nauvoo, while the Pratts were so anxious, he spoke quite frankly with William Clayton of three individuals who in 1841, two years before, were in danger of violating their covenants in plural marriage because they became over anxious when the Prophet did not seal wives to them. (“Joseph Smith’s Introduction of Temple Ordinances and the 1844 Mormon Succession Question,” M.A. thesis, Brigham Young University, December 1982, page 69)

As we said before, only about 2 to 3 percent of the material in the thesis was taken verbatim from the Clayton diaries. Ehat claims that he has a large number of references to the Clayton diaries. It is interesting to note, however, that ten of his footnotes to the William Clayton diaries do not directly cite the diaries but refer to an article about Clayton by James B. Allen which appeared in the *Journal of Mormon History* in 1979. In our opinion Mr. Ehat also weakened his position somewhat when he claimed that it was his ability to deal with the notes rather than the notes themselves which made his thesis so valuable:

Q. Okay. So it’s conceivable that James Allen or Richard Anderson could have used quotes in their materials and published them before you did?

A. I believe, however, my master's thesis demonstrates that there were insights I had from my own research that happen — perhaps they may never have come to because of my unique experience with the documents. And because of that unique experience, as demonstrated by the value that they believe my master's thesis was (that was already written before the publication of these notes in which they expressed how valuable they thought that was). And in particular, of course, the way I was able to construct the William Clayton Diary entries, not simply reproduce in what a historian would refer to as merely “annals—,” simply presenting Clayton Diary entries—but in the fact of my unique perspective and interpretive abilities based on my other research I placed those diary entries in a brand new, previously unpublished, previously undiscovered, context that was new to both of those men. (*Deposition of Andrew Ehat*, page 128)

We, of course, did not have Mr. Ehat's important “insights” and “unique perspective” in the material we printed. We feel, therefore, that his claim of unfair competition is very weak. However this may be, we do not think that Judge Christensen could have given the verdict he did against us if he had taken the time to examine how much material was actually quoted in the thesis. He apparently just relied on the testimony of Andrew Ehat and statements made by his lawyer.

TESTIMONY UNFAIR

We feel that Truman G. Madsen's testimony was not only nonsensical but it was also introduced in an unfair way. In taking Mr. Ehat's deposition, we had specifically asked him what damages he had suffered. He did not mention anything about the Religious Studies Center having an interest in his thesis. Madsen's testimony came so late in the trial that we did not have any real chance to rebut it. If we had heard of the matter sooner, we could have taken depositions to find out if the thesis was ever actually submitted to the board of the Religious Studies Center and if the other directors believed that our printing of 2,000 copies of the notes would reduce their sales by such an amount that they would lose interest in the thesis. Our lawyer argued as follows: “I think the damages that Mr. Ehat has testified to are speculative. . . . I asked six months ago for some hard figures as to the damages he suffered, and the first time they gave me any hard figures was yesterday morning in their proposed findings. And I think that we should have been entitled, if he was claiming those kinds of damages to know that some time ago, know the elements of those proofs and be able to do discovery and check into those things. So

I think we have been disadvantaged by it, but I think the evidence that he has presented has been speculative . . . (*Trial Transcript*, pages 480–481)

On pages 4 and 5 of the same document, Brian Barnard made these comments:

MR. BARNARD: . . . By way of discovery in this matter, we submitted interrogatories to the plaintiff, we also took his deposition. In the interrogatories we specifically asked him to set forth the harm or damages that he suffered as a result of the conduct of the defendants as claimed in his complaint. We also specifically asked him to set forth any possible dollar amounts representing that harm. In the answers to interrogatories that he gave us, October and November of last year, he said that he did not know the answer to that. He said, “The full answer to this interrogatory is contingent upon plaintiff's completing his discovery in this matter.” February 9th of this year I sent a request to Mr. Madsen pursuant to the Federal Rules asking him to update the interrogatory, his answers to the interrogatories. The rule specifically provides that after an interrogatory has been answered, if the situation changes, upon request they are obligated to provide additional answers.

Mr. Madsen has not provided me any additional answers in that regard. . . . Since Mr. Madsen and Mr. Ehat has not provided us any evidence, have not answered that Interrogatory, I think they should be precluded from introducing any evidence at this time with regard to the special damages.

Judge Christensen seemed to feel that we had a point with regard to this matter:

THE COURT: Mr. Madsen, what do you say to the demand of the defendant for you to update your answers to Interrogatories where before the completion of the discovery your client has said that he wasn't in a position to give further information, there was subsequent to that time a demand that discovery having been completed, you furnish your specification. Apparently you ignored that. Now many courts have held that there is a continuing obligation to update depositions where new facts are reveal — I should say interrogatories when new facts are revealed within the purview of the Interrogatories without any special demand. The defendant now made demand, and you choose to simply ignore that, at least inviting this very question here by your own failure to respond.

MR. MADSEN: Yes, your Honor. I have no particular reason other than to suggest that I presumed that the information we had given him, I already put him on notice as to the areas and elements of damage. I don't know that we had in fact as of the time he made the demand, done the final computation. I believe—

THE COURT: Well, it was time for him to begin to think about the fact that you had been requested to do that very thing, I don't know his words, but in general request to update discovery having been completed, and on the basis of whatever you had at the end of discovery. You just complicate your position when you proceed somewhat cavalierly in that respect. (*Trial Transcript*, pages 11–12)

Although the Judge questioned Mr. Madsen's negligence with regard to the matter, he allowed him to go ahead and present the "evidence."

If the Religious Studies Center really lost interest in Ehat's thesis, as Truman G. Madsen contended, it must have been for some other reason than our publication of the notes. We sincerely believe that the influence of Ezra Taft Benson would have had more to do with a loss of interest than anything we could ever do. Andrew Ehat's writings fall into the category of what has been called "New Mormon History," and Benson (who is next in line to be President of the Church) dislikes this type of history because it is too frank. One of the witnesses at our trial was former Assistant Church Historian James B. Allen. Allen and Glen Leonard authored a book entitled, *The Story of the Latter-day Saints*. In many respects this book appears to be more temperate than Ehat's thesis, yet President Benson worked to suppress it. In a letter dated June 23, 1978, Benson said: "The book, *The Story of the Latter-day Saints*, will not be republished" (see photograph of this letter in *Mormonism—Shadow or Reality?* page 13C).

Another witness at our trial was Davis Bitton, who also had served as Assistant Church Historian. In an article published in *Dialogue: A Journal of Mormon Thought*, Autumn 1983, Professor Bitton told of the opposition of Benson and other Church leaders to "New Mormon History":

Between 1972 and 1982 I was part of the team of historians located in the Church Office Building under the direction of Leonard J. Arrington. It was a golden decade—a brief period of excitement and optimism—that someone has likened to Camelot. But it came to an end. . . . there is a downside to this story, what I might refer to as the "decline" of the History Division. The remainder of this essay will mention some aspects of that gloomy episode—We were puzzled and dismayed when an outspoken General Authority criticized us for including the entire text of a Brigham Young letter alluding to a Word of Wisdom problem. . . .

It did not help that the decade of our existence was a time when Jerald and Sandra Tanner were publishing a variety of works with the specific purpose of refuting or embarrassing the Church. Those ex-Mormons had begun their publishing activity before the Historian's Division was ever created, and they would continue it long after. But the two activities were going on simultaneously. Some of the documents they published left the archives in unethical ways. We were not responsible for that. We did not sympathize with the Tanners. But in a very vague and general way one can imagine how "the troubles of our Church history" could be seen in terms of both fronts. I was dismayed when an honor's thesis produced by a University of Utah student lumped the work of the historians of the History Division (for which he showed little appreciation) together with the publications of the Tanners. For him, it was all "the New Mormon History." Guilt by association is a devastating thing, as we discovered.

There were other straws in the wind. With the publication of *The Story of the Latter-day Saints*, the generally favorable reception was tempered by criticism. When Elder Ezra Taft Benson addressed a meeting of institute teachers, he mentioned three deficiencies in that work without mentioning it by name. . . . These criticisms, however, oblique in not mentioning the title of the book, were far more formidable than anything earlier. They came from a highly placed apostle and were delivered to educators of the Church. . . .

One of my personal disappointments was the lack of mutual respect and a willingness to discuss. Never were our critics willing to sit down and talk over matters with us. . . . I may be pardoned a personal suspicion that critics, especially those who have not put in the same back-breaking research in the archives, are afraid to discuss such matters across the table with historians who have done their homework. But civilized standards would presumably find room for some such discussion if differences of opinion arose.

I can state objectively that the decision was made . . . to sharply circumscribe the projects that were approved, to reject any suggestions, however meritorious, for worthy long-range projects, to allow the division to shrink by attrition, and finally to reassign the remaining historians to a new entity, the Joseph Fielding Smith Institute of Church History, which would be affiliated with Brigham Young University. . . .

Leonard J. Arrington was called as Church Historian in 1972. He was sustained at general conference that year and for the next couple of years. In 1975 he was named "Director" of the History Division but was not released as Church Historian. . . . Finally, in 1982, he received a letter honorably releasing him. That same year Elder G. Homer Durham . . . was named Church Historian.

If you visit the East Wing of the Church Office Building you will find in the hallway a gallery of portraits. These are the Church Historians, from Oliver Cowdery to G. Homer Durham. But where is Leonard Arrington? Nowhere to be seen. The official explanation is that to be a Church Historian one has to be a General Authority. A brief period of our history, awkwardly embarrassing to someone, is thus erased. Orwell's Truthspeak did not have to wait for 1984. (*Dialogue: A Journal of Mormon Thought*, Autumn 1983, pages 1, 16–19)

In the same article, Professor Bitton tells how the History Division was planning a sesquicentennial history of the Church which he felt would be “a superior history,” but that Church leaders decided “to scuttle the sixteen-volume history” (Ibid., page 18). Since Ehat's thesis deals with sensitive issues like the introduction of temple ordinances and polygamy, it would not be the type of study some Church leaders would want to see printed. Professor Bitton related the following:

On one occasion Leonard and I were advised to leave a chapter on polygamy out of our book. . . . Polygamy is a large and important part of our history. Questions continue to be raised about it. Thinking that we could render a service by producing a concise, low-key treatment of the subject, we proposed such a work to our superiors. They declined . . . polygamy is such a sensitive subject that some General Authorities preferred to avoid mentioning it at all. Church magazines were not supposed to mention the practice. Books produced by Deseret Book studiously avoided it. (Ibid., page 13)

DESTROY THE CHURCH?

When we printed *Clayton's Secret Writings Uncovered* we certainly had no idea that Ehat would claim “unfair competition” with his thesis. In fact, we had every reason to believe that he wanted the material suppressed. On January 18, 1982, *Seventh East Press* reported:

. . . Faulring had the notes in a campus office when Andy Ehat, who was present happened to recognize Lyndon Cook's handwriting in the margins of the photocopy. Ehat bolted to his feet and demanded to [k]now where the copy had come from. . . . Individuals present report that Ehat was extremely upset and at one point said, “If this gets out it could destroy the Church.”

When we took Ehat's deposition on November 23, 1983, he said that he did not make that statement. He claimed that he merely explained “that I felt that in the hands of competent individuals it could be damaging to

the faith of those that are weak in the Church” (pages 110–111). He also said, “I sat with them and discussed what I felt could be done if the material were placed in others' hands who only had as an object the—to try to bring some negative reaction to the Church, . . .” (Ibid., 111–112). When Lyndon Cook was questioned about Ehat's purported statement, he gave this testimony:

Q. Did he ever tell you that he said anything along those lines, that it would destroy the Church?

A. He undoubtedly said something along those lines. I am not exactly sure what he said. He did indicate he was not happy with the phraseology that they'd used. And those were exactly his words. (*Deposition of Lyndon Cook*, page 54)

As we indicated before, on page 113 of his deposition Ehat was asked if he ever requested *Seventh East Press* to correct any statements he felt were in error. His reply was “No.” Although Ehat would now have us believe that he was planning on eventually publishing almost all of his notes, the information we obtained from *Seventh East Press* indicated just the opposite. In the last column on page 11, we find the following:

Ehat also believes that use of the diaries should be limited out of respect to William Clayton, who “in a different sphere is still living.” Ehat feels that “we owe it to him” to observe certain restraints, even though he admits that there is nothing in the journal that explicitly requests it never be made public. Ehat says that Clayton “poured out his soul in there and . . . he's going to face all of us again some day and we're going to be associates with him too, and he didn't write those things necessarily to expose himself to the world,” . . .

At the trial Gordon A. Madsen questioned one of the authors (Jerald) about this quotation from *Seventh East Press*:

Q. From that I take it you mean that because he made efforts to try to retrieve his notes that was equivalent to your view that he was attempting to suppress them; is that correct?

A. No, there is a statement in the 7th East Press that they interviewed him and he is quoted as saying we should keep these things private, William Clayton is dead but we are going to have to face him some day and we should be careful what we do with his diary.

Q. And you say you attended his deposition; is that correct?

A. Yes, I did.

Q. And you heard him respond to the questions about that supposed quote that it was not in fact a correct quote of anything he said, you remember that?

The Tanners on Trial

A. I believe I remember something to that affect.
(*Trial Transcript*, pages 393–394)

After the trial we carefully reexamined Ehat’s deposition and found nothing to substantiate Madsen’s assertion that Ehat had claimed “it was not in fact a correct quote.” Although Ehat denied the quotation concerning the diaries destroying the Church and tried to cast doubt upon some other things in the article, he made no attempt to discredit this portion of the article.

Lyndon Cook, who originally obtained the notes from Ehat and helped him with the book *The Words of Joseph Smith*, also indicated that the diaries should remain unpublished:

Others, however, see different reasons for not wanting to see the diary made public. Lyndon Cook for example, says the diary contains some “very sensitive entries which may not do us too well if the anti-Mormons got a hold of them.” . . .

Cook says the diary gives a lot of information concerning the secret practice of polygamy in Nauvoo and says that for a time Emma Smith was unaware that it was being practiced by her husband Joseph. He also feels that publishing the diary “may injure some who are of weaker faith.” (*Seventh East Press*, January 18, 1982)

Andrew Ehat now tries to play down the idea that the Clayton diaries were highly restricted. *Seventh East Press* referred to the diaries as “the restricted Nauvoo diaries of William Clayton.” Ehat, however, made this comment on page 117 of his deposition: “They say that ‘the restricted Nauvoo diaries of William Clayton.’ I don’t know how they draw the conclusion it was restricted.” Lyndon Cook was certainly more forthright about the matter in his deposition:

A. . . . I knew that Andy had told me that he had not had all the freedom he wanted to copy everything, and no one gets everything. . . .

Q. Okay. Back to something you said at the beginning of that answer, that he had told you he had been restricted in some way. What restriction was that?

A. He had been restricted what he had been giving permission to copy them?

Q. Right. You said “restricted” or “limited,” something like that.

A. It was under special permission he had received them and that we were not to flaunt these to the world. That—or to the public that he had been given access to use them. But under—we should ask permission to publish them, is kind of what he told me. Not that we should go out and have them copies for sale or to give them to anyone else, okay?

I understand the diary to be a diary of much importance and that it had been a private diary. And that we shouldn’t go copy it and give copies to everyone else.

Q. And Andy Ehat conveyed those restrictions to you?

A. He told me that I should not copy it.

Q. Did he also convey all those other restrictions that you just told me?

A. Yes. I think I understood it, whether he told me in those words or not, I understood that he had a copy, which was a very special document in Church history and that it would be unwise to copy it and give copies to the people. (*Deposition of Lyndon Cook*, pages 18–19)

A. I knew that if Andy had a copy of them, that number one, his copy would be responsible and accurate. And I knew that the fact that there had been so much caution taken by certain men in the Church Historical Department about this diary, that if he had received access, he’d received it with permission. Because I knew that Jim Allen had had it, Richard Anderson had had it, and Dean Jessee. And I [k]new that they had received it under special circumstances and only limited access for a few days. (*Ibid.*, page 20)

Q. We have taken the deposition of Scott Faulring. In his deposition he said that . . . Ehat said something to the effect that James Allen, Dean Jessee and you would or might get in trouble because of that distribution. Do you have any knowledge as to why Andy Ehat would say something to that effect?

A. I didn’t know that Ehat ever said that. We had all been told that we should be very cautious and careful with the material. And so I assume if he in fact said that, probably thinking that maybe these men who had been given special permission, and if they had allowed their copies to be distributed, they would perhaps be limited on their access later on. I don’t know. (*Ibid.*, page 51)

At the trial Professor Truman G. Madsen acknowledged that the Clayton diaries were restricted:

Q. Do you have any documents in your collection which are restricted historical documents?

A. Specifically, I have the Clayton materials you have indicated and they, I understood, were given under the circumstances given, . . . (*Trial Transcript*, page 196)

Professor Richard Anderson testified that Ehat had a scholarly obligation not to circulate the Clayton extracts:

. . . the second concern was trying to gather these Xerox copies so they would not be in the hands of the public and he could fulfill his scholarly obligation and his commitment not to circulate those materials, . . . (*Trial Transcript*, page 332)

1 A IT WAS UNDER SPECIAL PERMISSION THAT HE HAD RECEIVED
2 THEM AND THAT WE WERE NOT TO FLAUNT THESE TO THE WORLD. THAT
3 -- OR TO THE PUBLIC THAT HE HAD BEEN GIVEN ACCESS TO USE THEM.
4 BUT UNDER -- WE SHOULD ASK FOR PERMISSION TO PUBLISH THEM, IS
5 KIND OF WHAT HE TOLD ME. NOT THAT WE SHOULD GO OUT AND HAVE
6 THEM COPIES FOR SALE OR TO GIVE THEM TO ANYONE ELSE, OKAY?

7 I UNDERSTAND THE DIARY TO BE A DIARY OF MUCH
8 IMPORTANCE AND THAT IT HAD BEEN A PRIVATE DIARY. AND THAT WE
9 SHOULDN'T GO COPY IT AND GIVE COPIES TO EVERYONE ELSE.

10 Q AND ANDY EHAT CONVEYED THOSE RESTRICTIONS TO YOU?

11 A HE TOLD ME THAT I SHOULD NOT COPY IT.

12 Q DID HE ALSO CONVEY ALL THOSE OTHER RESTRICTIONS
13 THAT YOU JUST TOLD ME?

14 A YES. I THINK I UNDERSTOOD IT, WHETHER HE TOLD ME IN
15 THOSE WORDS OR NOT, I UNDERSTAND THAT HE HAD A COPY, WHICH WAS A
16 VERY SPECIAL DOCUMENT IN CHURCH HISTORY AND THAT IT WOULD BE
17 UNWISE TO COPY IT AND GIVE COPIES TO THE PEOPLE.

18 Q OKAY. BUT YOU WERE OBVIOUSLY AWARE THAT EHAT HAD HAD
19 SOME ACCESS TO THE CLAYTON JOURNALS?

20 A WELL, WHEN HE SHOWED ME THIS COPY I WAS, OF COURSE,
21 AWARE. I KNEW THAT HE HAD ACCESS TO THE DIARIES, BECAUSE WHERE
22 WOULD HE COME UP WITH ALL THIS INFORMATION IF HE HADN'T?

23 Q OKAY. HE DIDN'T TELL YOU THAT HE HAD HAD ACCESS TO A
24 TYPESCRIPT OF THE DIARIES?

25 A NO, HE DID NOT. I NEVER PUSHED HIM ON IT.

In addition to the testimony given at the trial, the reader will remember that the Church vigorously opposed the production of the Clayton diaries when we subpoenaed them. All the evidence, therefore, indicates that the Church did not want the Clayton diaries made available to the public. In a “Motion to Quash Subpoenas,” dated December 16, 1983, the Church’s lawyer Bruce Findlay wrote: “The Church considers the Clayton diaries to be confidential.” In light of these facts, Ehat’s attempt to make it appear that the diaries were not restricted appears to be rather ridiculous, and his claim that he was planning to publish most of the material seems questionable.

Because the extracts from the diaries appeared to be so damaging to the Church, we felt that no good Mormon would want to make them public. We had no idea that Ehat would later claim that he intended to print the majority of the material.

REASON FOR SUIT

In the *Salt Lake City Messenger* for June 1983, we made these observations:

Although Ehat claims in the suit that he will suffer “irreparable harm, damage and injury” if we are allowed to continue printing the Clayton material, we feel that there are probably other reasons for his actions. The devastating nature of the material in the diaries probably has a great deal to do with Ehat’s attempt to sue us. . . . Ehat felt a personal responsibility to keep this embarrassing material from getting into the hands of critics of the Church. . . . Mr. Ehat is probably deeply troubled because his notes have caused so much embarrassment to the Church. It is possible that one of Ehat’s motives for filing the suit is to vindicate himself in the eyes of the Church leaders.

From the outset, it appears that Mr. Ehat was more concerned about protecting Mormon scholars’ access to the documents than he was about his own manuscript rights. The *Seventh East Press* quoted him as saying, “that wide publicity of this matter would almost certainly prevent further access to any other materials,” an explanation he also gave to David Brown and Ernest Strack. In his deposition, pages 71–72, Scott Faulring testified that,

There was almost a desperation to get them back to salvage what had happened. You know, to keep himself from losing access.

When something like that happens, it tends to make you look very irresponsible to—there are people in Salt Lake that watch things like that.

Scott Faulring had received a copy of the Ehat material, but he was not aware that it had been stolen. He relates what happened when Ehat found out that it was being distributed:

And so we were sitting there talking, and Ken Cannon asked Jay how many copies of that order form he had. And he said he only had one.

And Ken saw he had about 90 pages of material, so he peeled back the order form and across the top and down the sides were handwritten notes on the typescript.

And Andy was sitting at about a hundred-and-eighty-degree angle from where the typescript was, and he was at the typesetting machine.

And he looked at it and kind of leapt out of his seat and grabbed it from Jay’s hand and said, “Where did you get this?”

And then he went into a rage. He was weird.

At that moment, I knew something was wrong, but Andy was prone to emotion sometimes. . . . I guess his whole life was passing before him or something, because he was muttering, you know, “If this gets out, so and so is going to be in trouble” or something. . . .

But Andy went in and called Lyndon and Lyndon wanted to talk to me, so I went in and—at that point, I didn’t really—it’s not that I didn’t feel sorry for him, it’s just that I didn’t know what was going on, and he was throwing a fit about something. I couldn’t figure it out.

So I got on the phone with Lyndon. . . . Lyndon said, “. . . Can you tell me the name of the person that had given it to you and said he had gotten it from me?” . . .

So I can’t remember if I called Lyndon back or told Andy. But Andy was going to go out and punch his nose or something—beat him up for stealing it or something. He was going to call the cops. And he was acting like a lunatic, to say the least. (*Deposition of Scott Faulring*, pages 15–18)

In his testimony at the trial, Andrew Ehat seems to have inadvertently admitted that his main reason for taking “such vigorous action” when the material got out was not to protect his manuscript rights but rather to protect Mormon scholars’ access to material:

Q. On September 21st, 1981, . . . did you make a comment at that time to the effect that because those were in circulation Lyndon Cook, Dean Jessee, and James Allen could get in trouble?

A. I don’t believe I said something like that.

Q. Did you say anything to that effect?

A. I may have said something to the effect that the individuals like them who had access to First Presidency materials might be—and their—and that they were eventually going to publish some things from First Presidency materials, . . . that it could cloud their opportunity to recheck what they might need to check in the future if the—if the individuals who control such an archive were to consider from me taking no action. . . . that I would just simply wish for it to be promiscuously copied and carried around the countryside, and that’s the reason why I took such vigorous action. And I believe I made an explanation to them to that affect, and that’s the source of Scott Faulring’s alleging that I said that they could get in trouble. (*Trial Transcript*, pages 115–116)

This court testimony by Mr. Ehat certainly lends support to our theory that “one of Ehat’s motives for filing the suit is to vindicate himself in the eyes of the Church leaders.”

Christine Rigby reported that,

Insiders among Mormon historians saw the publishing of the Clayton material as a blow to their work. It would allow the most conservative general authorities to argue that the church archives should remain closely guarded, rather than open, so “enemies of the church” can’t get such material. Some historians feel this event was a significant setback to the professional History Division of the Church Historical Department, which was subsequently reassigned to the Brigham Young University campus, away from the archives. (The History Division was founded in 1972 and transferred in 1982.) (*Utah Holiday*, May 1984, page 14)

Actually, the transfer of the History Division was announced long before the Ehat affair took place. On July 3, 1980, the *Salt Lake Tribune* reported:

PROVO (AP) — The history research division of the Mormon church’s historical department will move to Brigham Young University, officials announced Wednesday. . . .

Most of the division’s personnel will be transferred to BYU, where they will become part of the faculty and staff.

While it is clear that the transfer was a means of getting the scholars away from the documents, it was announced over a year before the Clayton material was stolen. It is true that a more restrictive policy was implemented at the Historical Department following the Ehat affair, but this occurred months before we published the extracts. While Mr. Ehat maintained that there were no restrictions implemented at the Church Archives after

his notes were taken (*Deposition of Andrew Ehat*, page 121), Lyndon Cook testified as follows:

Q. Have you noticed any kind of restrictions on your access to historical documents as a result of the copying and taking of Ehat’s notes from your office?

A. For two weeks after the Seventh East Press released their story of the taking of the notes from my office, the Historical Department did limit the access for about two weeks. And then it returned to normal.

Q. Okay. How did you become aware of that limitation by the Historical Department for two weeks?

A. When I went to research and work, I was informed that there had been some restrictions placed on us.

Q. You say placed on us?

A. Placed on researchers.

Q. It was researchers in general? Not particularly you or Ehat?

A. That’s right.

Q. And what were those restrictions?

A. Oh, we had to ask for permission from Don Schmidt to get things that we had been able to obtain earlier without that permission. (*Deposition of Lyndon Cook*, pages 51–52)

REPRESSIVE MEASURES

It was only about a month after *Seventh East Press* reported on the Ehat affair that it became evident that the Mormon leaders had implemented some very repressive measures to keep sensitive material from coming to light. James L. Clayton, a historian from the University of Utah, became very disturbed about the matter, and in a speech delivered February 25, 1982, he protested:

More recently, indeed, just within the past few days, I understand that the archives of the LDS Church have been closed to all research in the diaries, the letter books and other sensitive materials of the First Presidency and the Quorum of the Twelve back to the 1830s—diaries and letters long open to and currently used by scholars. Many projects of considerable worth are now stymied or will be finished with incomplete sources.

In his deposition, Church Archivist Donald Schmidt said that James L. Clayton was “incorrect” in his statement about the Historical Department, but he admitted that some documents had been “reclassified”:

MR. MADSEN: . . . I’m just trying to say has there been any substantial reclassification of the Church Archives?

A. The word “substantially,” the answer is no. At about the time that the speech was given, again I go back to the fact that most archives look at what the

problems are and so we decided that there were a few collections, a few I add emphatically, were reclassified and for good reasons.

MR. MADSEN: Could you give us an example?

A. Yes. I could give you, probably the best example has to do with letter press copies of First Presidency's correspondence.

Q. That is in your care?

A. Yes.

Q. Whether it is in the First Presidency's vault?

A. Yes. Some of it was restricted, some was not.

We decided that the proper thing to do, the cut-off date was wrong because of a matter of privacy.

Q. What was the cut-off date?

A. Somewhere in the 40s, and I don't remember the exact year.

Q. 1940s?

A. Yes.

Q. And what was the change?

A. The change was that the restrictions for matter of privacy have to apply to that as it does for other things. Usually, for our purposes, about 100 years to make sure that there are no living individuals identified in those letters.

.....

Q. What were some other examples of collections that were reclassified?

A. There were some diaries in that same general category because of a matter of privacy. We have a lot of sensitive material, sensitive in the sense any individual's contacts with the Church for one reason or another. (*Deposition of Donald Schmidt*, pages 80–81)

When Brian Barnard questioned Donald Schmidt concerning the exact date when the reclassification of the documents occurred, he replied: "That is not one of the things I want to remember, you know" (*Ibid.*, pages 90–91).

At a meeting of the Mormon History Association, David Whittaker, Archivist at the BYU Library, admitted that the Church has tightened up its policy as far as access to documents is concerned:

... It's clear that there are collections closed, presidential collections for example, now closed in Salt Lake. It's clear that there are some collections closed. Some scholars see it as closing the barn door after the horse is gone. ... I was one of those for a number of years that had pretty full access. ... like most private libraries, those who criticize much of the policies of both BYU, for example, or the Church archives, fail to see that they're basically private libraries. ... It's obvious that there are a lot of collections that from my point of view ought to be open. Part of the criticism has to do with material in the vault. For example, the first

presidency. Which material has never been available. It was never available even in the sixties. (Eighteenth Annual Meeting of the Mormon History Association, May 6, 1983, typed copy)

The evidence which we have presented shows that the restrictive policies at the Church Historical Department were implemented sometime after the *Seventh East Press* printed its article (January 18, 1982) but before the day James L. Clayton gave his speech (February 25, 1982). Since we printed *Clayton's Secret Writings Uncovered* in June 1982, it is clear that our publication had nothing to do with the new policy at the Church Archives.

TOO MANY TYPEWRITERS

In the *Salt Lake City Messenger*, June 1983, we wrote the following:

One thing about Ehat's notes which really interests us is that they appear to have been typed on four different typewriters. The typewriter styles change frequently throughout the manuscript. It is possible, of course, that Ehat typed all the pages on different typewriters, but there is reason to suspect that at least some of them came from a different source or sources. One Mormon scholar claims that the manuscript is actually a compilation of material from three individuals—Andrew F. Ehat, Lyndon W. Cook and James B. Allen. Allen, who formerly served as Assistant Church Historian, used some of these quotations in an article on William Clayton which was published in *Journal of Mormon History*, Vol. 6, 1979, pages 37–59. ... We will probably get to the bottom of this when we take the depositions of Ehat, Cook and Allen. In any case, the book by Ehat and Cook contains a footnote which could destroy Ehat's entire case. It seems to indicate that the quotations used in *The Words of Joseph Smith* really came from James B. Allen:

"23. William Clayton 1842–1846 Diaries. Citations from these diaries are used by permission and were provided by Dr. James B. Allen, professor of history at Brigham Young University, Provo, Utah. In sharing with us these quotations, Dr. Allen has substantially assisted this work. (Hereafter cited as William Clayton Diary.)" (*The Words of Joseph Smith*, page 263)

In answering questions concerning the different typewriters, Mr. Ehat admitted that there were five different typewriter styles in his notes. He said that he "owns three of the typewriters" (*Answers to Interrogatories*, November 21, 1983, page 11), and that he used another typewriter "in the Church Archives."

The Tanners on Trial

"Journal by Wm. Clayton 1842-5."

Tuesday 7th. /March 1843/ A.M at the office. Afterwards went to prest Josephs & commenced settlement with those who have claims on city Lots. Er B. Young called me on one side & said he wants to give me some instructions on the priesthood the first opportunity. He said the prophet had told him to do so & to give me a favor which I have long desired. For this again I feel grateful to God & his servant, and the desire of my heart is to do right and be saved.

Sunday 12th. At the Council Hall. Er H.C. Kimball preached. He used many figures to illustrate his ideas amongst the rest when speaking of the unwillingness of the saints to abide the laws of exaltation. He said that the church was like a swarm of Bees, who when they want to

Sunday 23. ... M. appears dissatisfied with her situation & is miserable O that the Lord will bless my house and deliver us from every evil principal & feeling that we may be saved. For I desire to do right. O Lord make my heart and my affection: right and pure as it shall please thee that I may enjoy the blessing of peace and happiness even so Amen. Hyrum preached A.M and Joseph P.M. Evening I had some more talk with M. & find she is miserable which makes me doubly so. I offered to her to try to have her covenant released if she desired it but she said she was not willing

2.3.1844... P.M. was permitted to the ordinance of washing and anointing, and was received into the Quorum of Priesthood. This is one of the greatest favors ever conferred on me and for which I feel grateful. May the God of Joseph preserve me & mine house to walk in the paths of righteousness all the days of my life & oh that I may never sin against him or displease him For thou oh God knowest my desire to do right that I may have eternal life.

Four different typewriter styles that appear in Ehat's notes. The samples are taken from pages 1, 13, 22 and 53 of the published book. A fifth style is found in 12 pages furnished by James B. Allen.

The Tanners on Trial

With regard to the fifth typewriter style, Mr. Ehat frankly confessed that James B. Allen had typed this part of the manuscript:

Dr. Allen typed from his own notes and furnished to the plaintiff a typescript of those discourses recorded by Clayton. After receiving the quotations from Dr. Allen plaintiff interleaved them with his own typescript . . . (Ibid., page 4)

In his deposition, James B. Allen said that he had actually typed twelve of the pages we printed in *Clayton's Secret Writings Uncovered*:

Q. Would you tell us what documents you brought?

A. One thing that is the most relevant, . . . at one point Andy Ehat and Lyndon Cook asked me if I had in my notes on William Clayton various sermons on particular dates and I shared with them my transcription of those sermons on those particular dates and I brought a copy of what I shared with them from my notes and this is a Xerox of what I had at that time.

Q. How many pages are there that fit into that category?

A. I would have to count them. Twelve.

Q. Are those the same pages that were interleaved with Andy Ehat's extracts from the Clayton Journals?

A. As far as I can tell. (*Deposition of James B. Allen*, pages 8–9)

A. Well, . . . I felt that, . . . I had kind of a moral obligation not to indiscriminately let my notes out. . . . I asked Mr. Ehat specifically . . . that when you put this in your book, *The Words of Joseph Smith*, please cite me as the source because I don't want any questions about anything. And, of course, I was not aware at that point that Mr. Ehat had any other access to anything. So I said, cite me as the source because I've had legitimate access and everyone knows I've had legitimate access to the diaries. (Ibid., page 29)

A. . . . those pages that I handed you are in the materials that Andy had and it was subsequently published by the Tanners . . . I really don't know where he got the other material but I knew that those 12 pages came directly from me. (Ibid., page 37)

Dr. Allen gave the same testimony on pages 225–227 of the transcript of the trial. Andrew Ehat confirmed Allen's statements at the trial:

Q. Okay. When James Allen gave you those notes, did he place any restrictions on you, specific, oral statements or written statements to you so as to what you could do or couldn't do with those 11 [12] pages?

A. Yes.

Q. What did he tell you?

A. He wished to have credit for his courtesy in providing us those notes. (*Trial Transcript*, page 66)

It must have been difficult for Mr. Ehat to admit to us that the 12 pages he used in *The Words of Joseph Smith* were really typed by Dr. Allen. A reading of the original complaint against us would lead one to believe that Ehat actually took these pages from the original diaries:

4. The plaintiff is a research historian . . . having received a Master's Degree from Brigham Young University . . . During the course of said graduate historical research, plaintiff was given permissive access to the private, heretofore-unpublished Nauvoo Journals of one William Clayton then deposited with the Office of the First Presidency of the Church of Jesus Christ of Latter-day Saints, from which he permissively extracted certain notes, quotes and extracts.

5. From said notes plaintiff, in collaboration with one Lyndon W. Cook, produced a book titled "The Words of Joseph Smith," the proprietary interest and copyright interest of which were assigned by Ehat and Cook to the Religious Studies Center, an agency of Brigham Young University, . . . At no time has the plaintiff given the defendants, or either of them, any permission to publish or print any notes taken by him from the William Clayton Journal. (page 2)

MYSTERIOUS TYPESCRIPT

Andrew Ehat's admission with regard, to the 12 pages was only the beginning of some very embarrassing confessions he had to make. When we originally questioned Ehat about how he obtained his notes from the diaries, he said that he was given access to a typed copy at the Church Historical Department from which he made his extracts:

In doing research in early LDS history in 1979 plaintiff approached Don Schmidt, Church Archivist, and inquired about some entries in William Clayton's Journal in which he was interested. He ultimately received permission to read all three of the journals noted above. While reading he made notes of the dates of the journal entries in which he was primarily concerned. In 1979 and 1980 he was given permission to type out from a complete reproduction (a typescript) of those three diaries the extracts he had earlier noted. (*Answers to Interrogatories*, November 21, 1983, pages 3 and 4)

1 me if I had in my notes on William Clayton various
2 sermons on particular dates and I shared with them
3 my transcription of those sermons on those particular
4 dates and I brought a copy of what I shared with
5 them from my notes and this is a Xerox of what I
6 had at that time.

7 Q How many pages are there that fit into
8 that category?

9 A I would have to count them. Twelve.

10 Q Are those the same pages that were interleaved
11 with Andy Ehat's extracts from the Clayton Journals?

12 A As far as I can tell.

13 MR. MADSEN: That were ultimately printed
14 by the Tanners, you mean?

15 MR. BARNARD: Right, that were printed
16 by the Tanners or that was produced by Richard Anderson
17 today?

18 A I did not have access to the Tanners'
19 material until late last year sometime and once I
20 was aware that all of this came up then I made a
21 comparison and it appears to me that they are the
22 ones that are interleaved with the Tanners' material.

23 MR. MADSEN: Off the record.

24 (Discussion held off the record.)

25 MR. BARNARD: What do you have on top

A photograph from the *Deposition of James B. Allen*. Dr. Allen claimed that he gave Ehat 12 pages of the Clayton notes.

The Tanners on Trial

It was plain from this that Mr. Ehat's extracts came from a typed copy rather than the original diaries. In taking Ehat's deposition, Brian Barnard asked him who had given him permission to see the typescript. Ehat replied that it was Donald Schmidt, the Church Archivist:

Q. Who gave you the permission to see that typescript copy? Did Don Schmidt do that?

A. Yes.

Q. Was anyone else involved in giving you permission to see that typescript that you're aware of?

A. No, not that I'm aware of. (*Deposition of Andrew Ehat*, page 43)

After this testimony was given, we subpoenaed Donald Schmidt. The Church's lawyers fought the matter and filed a motion to quash the subpoena. They apparently realized, however, that we would win and withdrew their objection. In his testimony, Schmidt not only denied that he had given Ehat access to a typescript, but he claimed that he was not even aware of a typescript of the Clayton diaries:

Q. He's indicated in his deposition that after that time he had access to a type script of the Clayton Journals and that he acquired access to that type script from you.

A. From me?

.....

MR. BARNARD: Okay. Prior to 1979, had you heard that there was a type script of those volumes of the Clayton Journals?

A. No.

Q. The deposition of Andrew Ehat, page 43, indicates that Andrew Ehat was given permission by you to see a type script copy. You have no recollection of that?

A. Not of those diaries. It is possible that he is confused with some type script which we have of other Clayton material.

.....

Q. And to your knowledge there is no type script of those three volumes?

A. I'm not aware of any type script other than very recently.

Q. . . . you indicate that he had access for a period of several days in 1979 and then he never again talked to you about having access to the Clayton Diaries; is that right?

A. That's correct.

Q. And he never talked to you after that period of time to seek your permission to see a transcript of those three Nauvoo journals?

A. No, sir.

Q. He indicated in his deposition that sometime after 1979, January of 1979, that he came back to the

Church Archives, had access to that type script and spent a considerable period of time making extracts from that type script of the Nauvoo journals. Are you aware of him coming back and spending any considerable period of time after January of '79 and making extracts from any Clayton materials?

A. I am not but then he could go to the Archives search room without my knowing it.

Q. In his deposition he had reference to this type script as being a photocopy of a type script rather than an original type script. Are you aware of any photocopies of type scripts?

A. I am not.

Q. Other than your suggestion that he may be referring to type scripts of other Clayton materials, are you aware of what he might have been talking about or might be confused with?

A. I do not know. (*Deposition of Donald Schmidt*, pages 20-24)

The Church's lawyer, Bruce Findlay, indicated that he was the first one to tell Mr. Schmidt about the typescript: "I might interject I think he heard it from me in connection with this case" (Ibid., page 21).

We took the deposition of Professor Richard L. Anderson of Brigham Young University. Anderson claimed he had examined the original diaries but was unaware of a typescript. The truth about the typescript finally came out when we were taking the testimony of James B. Allen, who served as Assistant Church Historian during the 1970s:

Q. Okay. Are you aware of any type script of those journals?

A. Well—.

Q. A verbatim type script of those three journals?

A. Yes, I'm aware of a verbatim type script of the journals.

Q. Okay. And when was the first time you were aware of that?

A. When I made one.

.....

Q. The type script that Andy Ehat had access to he described as being approximately 300 pages long of double-spaced typing.

A. Mine could possibly fit into that category, yes.

.....

MR. BARNARD: Did Andy Ehat ever have access to that type script?

A. Andy Ehat did not have access to that type script and I do not think Andy Ehat knew I was preparing the type script. . . . and certainly he did not have access to it. . . . when I left at night I . . . locked the material I was making in my own desk and put the key in my pocket and went home. So I don't know of any way that Andy could have had access to my type script.

.....

1 MR. MADSEN: By format you mean typed script.

2 BY MR. BARNARD:

3 Q. Typed and written chronologically, that sort of
4 thing?

5 A. No.

6 Q. Okay. How does the format differ?

7 A. Only that there is also handwriting.

8 Q. Who gave you the permission to see that typescript
9 copy? Did Don ^{Schmidt}~~Smith~~ do that?

10 A. Yes.

11 Q. Okay. Was anybody else involved in giving you
12 permission to see that typescript that you're aware of?

13 A. No, not that I'm aware of.

14 Q. And after you made your notes when you had access
15 to that typescript, where did you keep the notes after that?

16 A. I kept them in my possession, either -- if I took
17 them with me somewhere, I had them in my possession or I
18 kept them at home in Orem, Utah.

19 Q. Okay. Did you ever leave them, those original
20 notes of yours, in an office or any place other than at
21 your home?

22 A. No.

23 Q. When did you make copies of those notes --
24 photocopies of those notes?

25 A. For my own purposes to facilitate my research

A photograph from the *Deposition of Andrew Ehat*. Mr. Ehat claimed that Donald Schmidt gave him permission to use the typescript.

1 you heard that there was a type script of those volumes
2 of the Clayton Journals?

3 A No.

4 Q The deposition of Andrew Ehat, page 43,
5 indicates that Andrew Ehat was given permission by
6 you to see a type script copy. You have no recollection
7 of that?

8 A Not of those diaries. It is possible that
9 he is confused with some type script which we have
10 of other Clayton material.

11 Q Which Clayton materials do you have that
12 are type script?

13 A There are a number of items of William
14 Clayton including other diaries, some of which have
15 been published, as a matter of fact, of which we have
16 type scripts.

17 Q But to your knowledge there is no type script
18 of the--, well, maybe we should pin that down. The
19 journals that he had access to in January of 1979,
20 can you tell me exactly which those journals are?

21 A His deposition gives the specific date
22 and he knows more than I, and those are specifically
23 ~~they~~ ^{what} we termed the Nauvoo diaries. The exact dates
24 he'll give you there.

25 Q And to your knowledge, well, let's see,

A photograph from the *Deposition of Donald Schmidt*. Mr. Schmidt maintained he did not show Ehat the typescript of the diaries.

The Tanners on Trial

MR. BARNARD: Did you tell Don Schmidt?

A. I did not tell Don Schmidt although I'm sure Don Schmidt was aware that I was taking very extensive notes but I considered what I was taking to be my own particular scholarly property and that is the way it remained. (*Deposition of James. B. Allen*, pages 20, 22, 24 and 25)

At the trial, Donald Schmidt firmly maintained that he had not given Ehat access to a typescript and that he had never even heard of a typescript until he was called upon to give a deposition:

A. I knew nothing of a typescript . . .

Q. Are you aware now that there is a typescript of the Clayton journals?

A. Yes.

Q. When did you first discover that?

A. When was my deposition?

Q. November of last year, approximately. (*Trial Transcript*, page 154)

Q. When you said you learned for the first time of the Clayton typescript last November, did you learn who had such a typescript at that same time?

A. Yes.

Q. Who was or were the party or parties that had such typescripts?

A. At that time I was told James B. Allen had one. (*Ibid.*, pages 164–165)

In his deposition, Dr. Allen admitted that there was one other person who had helped prepare the transcript and had a copy of it, but he did not want to reveal the name. The lawyer from Brigham Young University, in fact, instructed him not to tell who the other person was:

A. Well, as I said, I made two photocopies and then there was one other person who was aware of what I was doing in the office and—

Q. Does he have a copy?

A. Yes, and this other person worked with me and has a copy.

Q. And is that the other person that was made aware you were making a type script?

A. That's right.

Q. Well, you know, all you've done is made me more curious who that other person is.

A. I know. That becomes a little sticky and, you know, is it reverant or not relevant?

A. It is relevant because that may be the photocopy that Andy Ehat got access to.

MR. MADSEN: I have considered the possibility of impeachment here and I, as far as I'm concerned, and I don't know this has to be on the record . . .

(Discussion off the record.)

A. . . . I did share that copy with one other person in the History Department . . .

MR. BARNARD: Well, I'm going to flat out ask you who that person was.

MISS PARK: I'll instruct him not to answer.

MR. BARNARD: Okay. You're going to take your attorney's advice and not answer that question?

A. Yes.

Q. Do you know if that person has made any distribution of copies of those, copies of the copy that you gave to that person?

A. To my knowledge he has not and my firm assumption is that he is the kind of person that would not have but I do not have personal knowledge. That is a strong assumption on my part.

Q. When would you have given that type script to that person?

A. It would have been right at the time that I was doing it myself. In fact, he helped me with the process. (*Deposition of James B. Allen*, pages 26–28)

We already suspected that the person who had the other copy was Dean Jesse, a noted Mormon scholar. In Scott Faulring's deposition, he testified that when Ehat first found that his notes had been duplicated, he went into "a rage" and mentioned the names of different people who would get in trouble if the notes fell into the hands of critics of the Church:

A. . . . I don't recall his exact words, whether he said it could destroy the Church; but the essence of what he was saying was that. That, Oh, if the artis get hold of this "X," "X," and all those guys are going to be "shot," or something.

Q. Who was it that he mentioned—

A. He mentioned James Allen and Lyndon Cook, and I think I even heard Dean Jesse's name. . . .

Q. Did Ehat [*sic*] ever make a statement that Dean Jesse would somehow get in trouble because of the distribution of the extracts?

A. Like I said, he mentioned if those notes got out—you know, he said those three names, Allen and Dean Jesse and Lyndon Cook, the four of them would be in trouble. And I never figured out why he mentioned Dean Jesse. (*Deposition of Scott Faulring*, pages 70, 72)

1 as to whether or not you shared your research notes
2 with him and whether or not he was allowed to make
3 extracts from your research notes. If I was to place
4 such a question before you, would you answer it?

5 MISS PARK: I instruct him to say no.

6 A No.

7 MR. BARNARD: Do you understand the question?

8 A Yes.

9 Q If I were to ask you if you shared those
10 research notes with anybody else, with James Allen,
11 with Lyndon Cook or anyone else, during that same period
12 of time--.

13 MISS PARK: What time period, Counsel?

14 MR. BARNARD: After Andy Ehat gave you that
15 green notebook sometime in 1981.

16 MISS PARK: Again, I instruct him not to
17 answer that. I object on the grounds of relevancy.
18 I think we're dealing with a time period--, there is
19 the identity between the 1981 notes of Ehat and the
20 notes that the Tanners published. Anything that happened
21 beyond that period seems to be irrelevant.

22 MR. BARNARD: And Dr. Anderson, I assume
23 you're going to take the advice of your Counsel.

24 A Yes.

25 Q Okay. Apparently you also do have some

20

A photograph from the *Deposition of James B. Allen*. Dr. Allen felt that Ehat could not have had access to his typescript.

The Tanners on Trial

1 access to the Clayton journals, the originals, would you have
2 been able to give him access?

3 A. No.

4 Q. And if Andrew Ehat had asked you that after that date
5 would you personally have been able to give him access?

6 A. No.

7 Q. After January of 1979, if Dean Jessee asked you for
8 permission to allow Andrew Ehat to see the Clayton journals,
9 could you have given Dean Jessee that permission?

10 A. Would you restate the question, please.

11 Q. If after January of '79 Dean Jessee had asked you for
12 permission to allow Andrew Ehat to see the Clayton journals,
13 could you have given that permission to Dean Jessee?

14 A. In the original, the answer is no.

15 Q. Could you have given permission at that time to Dean
16 Jessee to allow Andrew Ehat to see a typescript of the journals?

17 A. I knew nothing of a typescript -- the question does
18 not -- I can't answer the question because it is not germane to
19 what I do.

20 Q. Are you aware now that there is a typescript of the
21 Clayton journals?

22 A. Yes.

23 Q. When did you first discover that?

24 A. When was my deposition?

25 Q. November of last year, approximately.

154

A photograph from the transcript of the trial. Donald Schmidt stood by his previous testimony that he did not know of a typescript of the Clayton diaries.

When James B. Allen was asked if he had any reason to know why Dean Jessee would be in trouble if the Clayton extracts were distributed, he replied: “Only if Dean Jessee were the person I refused to name a little while ago and that would only be for the same reason that I said in terms of his own feelings” (*Deposition of James B. Allen*, page 46). Finally, after a great deal of discussion, Dr. Allen had to identify “Dean Jessee” as the man. It is interesting to note that the BYU lawyer and Ehat’s lawyer helped back James B. Allen into a corner. The BYU lawyer apparently discussed Jessee’s role with Allen in private before the deposition and felt that he had actually admitted it while the deposition was being taken:

Q. Did Dean Jessee have any part in your preparation of your type script of the Clayton Journals?

MISS PARK: I think he testified to that already, Counsel.

A. Wait a minute. Rephrase the question and then I want to hear her objection.

MR. BARNARD: Did he have any part in the preparation of the type script that you prepared?

A. Is that relevant?

MISS PARK: Didn’t you already answer that?

A. What did I answer before?

MISS PARK: My understanding is he said yes.

MR. MADSEN: I thought you let the cat out of the bag a little later, Mr. Allen. I think she heard it too; didn’t you?

A. I think what he said is when he asked me if Dean Jessee would get in trouble I said only if Dean Jessee were the person but what are you referring to?

MISS PARK: My recollection is you, at one time, stated earlier when you were talking about preparing it that Dean Jessee helped you out in some way or somehow collaborated with you. Just to a minor or major extent you didn’t say.

A. If I said that, that is true but I don’t remember saying that. Did I say it today?

MR. MADSEN: Off the record just a minute. (*Deposition of James B. Allen*, pages 57–58)

MR. BARNARD: Earlier in the deposition when I inquired of you as to who the extra copy of your type script went to you declined to answer that. I’m now back to the same topic and asking you a somewhat related question and ask if basically if that person is Dean Jessee? You indicated some reluctance to answer that question earlier.

A. Yes.

Q. If I were to ask you specifically and say is that person Dean Jessee would you answer that question?

A. Could I answer it with just a little explanation here?

Q. Surely.

A. . . . I think I said earlier in the deposition that Dean Jessee did assist me in the preparation of the type script and that is true. And I think I implied that Dean in that context, had a copy. . . .

Q. And is he that person you declined to identify earlier?

A. Sure. May I say that simply because Dean is a good friend I didn’t want him being identified without my having told him . . . but I also am not going to perjure myself in any way and that is why I’m trying to make sure this is clear. . . . it is my personal belief of Dean Jessee he would not share anything of that sort without absolute permission from someone higher than him and I know that he’s much more careful even than I am about giving things to anybody of the sort that I share with my personal friends . . . (Ibid., pages 63–65)

We were sorry to see Dr. Allen in such a difficult predicament, and we must say that we were very impressed with the honesty of his answers and the way he handled himself during his testimony. As a result of Allen’s testimony we found it necessary to subpoena Dean Jessee. Mr. Jessee testified that Ehat wanted access to the typescript “to check some dates on some information that he didn’t have and wanted to double-check or whatever. And so he used it in that setting” (*Deposition of Dean Jessee*, page 26). On the same page, Jessee stated: “I don’t know what all his eyes looked at because I wasn’t right there with him.”

COVER-UP BREAKS DOWN

In the March 1984 issue of the *Salt Lake City Messenger*, we pointed out that,

Mr. Ehat now finds himself in a real dilemma. In his *Answers to Interrogatories*, he has sworn that he did not use material from Jessee:

9. In preparing your notes . . . did you use or have access to any notes or other writings regarding or taken from the William Clayton diaries by (a) Lyndon Cook (b) Dean Jessee, . . .

ANSWER: (a) no, (b) no, . . .

If Mr. Ehat did not copy the material from Jessee’s copy of the transcript, then the only other alternative would be that it was purloined from Allen.

At the trial, Andrew Ehat finally revealed that he had obtained the Clayton material from Dean Jessee:

A. Well, sometime later, since I did not take complete notes, I had a discussion with Dean Jessee.

Q. Who is Dean Jessee?

A. He was with the History Division of the LDS church archives at that time.

.

The Tanners on Trial

Q. And what was the content of that discussion?

A. That I didn't have sufficient time with the original diaries to have made extensive notes, and he was willing to let me look at a copy of a typescript that he had.

.....

Q. In a subsequent time did he give you permission to see the notes?

A. Un-huh.

.....

Q. And having seen that typescript, what did you then do?

A. I made — I made notations from the dates that I had previously noted that I wanted to take copies of.

Q. And how many pages of typewriting manuscript did that amount to?

A. Approximately 77 pages.

.....

THE COURT: You thought that was simply property of the archives or the church, or did you assume it was Mr. Jessee's own property?

THE WITNESS: Given that there was limited access to the original diaries in the first place, I assumed that this was his personal photocopy of a typescript.

(*Trial Transcript*, pages 31–33)

The reader will remember that in his deposition, Ehat testified he got permission from Donald Schmidt to use the typescript, and when he was asked if anyone else was involved in giving him permission, he replied, "No." One can only speculate as to why Ehat would go to such lengths to cover up the involvement of Jessee. Since Jessee was not the Archivist and had no real authority to show him Church documents, it is obvious that it would be better to say that Schmidt gave him permission. When Mr. Ehat was examined by Brian Barnard, he admitted that he had previously testified that Donald Schmidt gave him permission to see the diaries:

Q. You still have the copy of your deposition in front of you. I would ask you to look at page 43. And I would ask you if, when I took your deposition in November of last year, if the following questions were asked and if at that time those were your answers. Beginning at line 8 on page 43:

Q. Who gave you the permission to see that typescript copy. Did Don Schmidt do that?

A. Yes.

Q. Okay, was anybody else involved in giving you permission to see that typescript that you are aware of?

A. No, not that I am aware of.

Q. Is that your testimony when I took your deposition?

A. Yes.

(*Trial Transcript*, page 69)

On page 94 of his deposition, Ehat was asked specifically if there was anyone else besides Allen, Anderson and himself who had seen "the three volumes or the typescript." He replied that he was not aware of anyone else having access to the original volumes or the typescript:

Q. Do you know of anybody else other than yourself and Richard Anderson who since 1979 have had access to the three volumes or the typescript of those three volumes?

A. Well, I believe that James Allen had access.

Q. Okay. Are you familiar with anybody else besides you, Allen and Anderson?

A. No, not that I'm aware of.

(*Deposition of Andrew Ehat*, page 94)

In the written interrogatories, Mr. Ehat was asked the following question: "21. In compiling your notes which are the subject matter of this action did you use any material from the William Clayton diaries which came directly or indirectly from (a) Dean Jessee, (b) James B. Allen or (c) Lyndon Cook?" (*Answers to Interrogatories*, page 10). The only names Andrew Ehat mentioned in his answer were "Donald Schmidt" and "James Allen," and Allen's name was only mentioned with regard to the twelve pages he had given Ehat for the book *The Words of Joseph Smith*.

Up to the time of the trial, Ehat seems to have kept Jessee's name from almost everyone. The question of where he obtained the Clayton material came up when he gave the copies of his notes to Cook, Anderson and Madsen. Lyndon Cook testified:

Q. When Andrew Ehat told you that he had had access to the Clayton journals and made notes, did he tell you who had given him access to those notes?

A. No, he did not name the individual. . . .

(*Trial Transcript*, pages 272–273)

On pages 68–69 of the transcript of the trial, Mr. Ehat testified:

Q. You didn't say to those three professors, Dean Jessee let me look at a typescript and I made notes and that's where I got them?

A. That's correct, I did not.

Q. Did any of them ask you that?

A. They wanted to know.

Q. What did you say?

A. No, I wouldn't tell them, I mean.

.....

Q. You did not — they asked you where you had taken your notes from and other than saying from the diaries you declined to answer any further?

A. That's correct.

1 BY MR. BARNARD:

2 Q. Double-spaced?

3 A. Um hmm (affirmative).

4 Q. So most of your notes are single-spaced. So would
5 it be correct to say that your notes represent one-half or
6 approximately one-half of what was in the typescript?

7 A. I don't know for sure. I really don't.

8 Q. Would it be in that neighborhood?

9 MR. MADSEN: You've got your answer.

10 BY MR. BARNARD:

11 Q. What's your best estimate as to the percentage
12 that you copied out of that typescript?

13 A. I really don't know for sure. I mean, it's not
14 like the calculations I gave to you earlier in terms of
15 statistics. I just couldn't say for sure.

16 Q. Do you know of anybody else other than yourself
17 and Richard Anderson who since 1979 have had access to the
18 three volumes or the typescript of those three volumes?

19 A. Well, I believe that James Allen had access.

20 Q. Okay. Are you familiar with anybody else besides
21 you, Allen and Anderson?

22 A. No, not that I'm aware of.

23 Q. You indicated earlier that because of some
24 markings or other things in the copies that the Tanners
25 have reproduced you are able to trace that back to the

A photograph from the *Deposition of Andrew Ehat*. Mr. Ehat hides Dean Jessee's involvement with the typescript.

DR. ALLEN "MIFFED"

James B. Allen claimed on page 25 of his deposition that the typescript was "my own particular scholarly property." Although he apparently made the typescript on his own authority, he claims that he was given special permission by the First Presidency of the Mormon Church to use the diaries for a biography of William Clayton and that it was his understanding that other scholars were not allowed to use them. He claimed, in fact, that he was "miffed" when he learned that Ehat had material beyond the 12 pages he had supplied him with:

A. . . . I do remember asking Don questions like where did he get it and Don was not, he didn't tell me. I don't remember what he said but I remember my concerns at the time as I talked with other people was where did Andy Ehat get access to this material. That was my concern. And I remember talking with several people, Don Schmidt and other people up in the Historical Department and people at BYU like Noel Reynolds and others and I was miffed. I didn't know where he got access to it and that was the nature of the conversations I had with anyone.

Q. Did those conversations—, you just used the word "miffed"?

A. Yes.

Q. Those conversations with regard to you being miffed, did those occur after the notes were taken from Cook and distributed or did those occur before that time?

A. Mostly they occurred after that time. There was one point before that time when Lyndon Cook had written a paper that had a quotation from the William Clayton Diaries in it and I had asked Lyndon Cook where did you get it, because I know that is not anything I shared with you. And he said words to the effect, well, we had permission. And that was all that I heard of that. Other than that I think all the conversations took place after I became aware of the unauthorized taking and distribution of the material.

Q. Okay. That quotation that you just mentioned that you discussed with Lyndon Cook, is that in a joint publication authored by Ehat and Cook?

A. No. It was in a term paper that Cook turned in to me in a history class at BYU and I don't know, I don't think that has been published since then. In fact, I advised Lyndon to be careful about publishing material that he wasn't sure he had permission to publish but it was in a term paper that he gave me.

Q. After the notes were taken from Cook and distributed and you described yourself as being miffed were you miffed because you discovered the extent of Ehat's notes?

A. Yes, I think so. It was a surprise to me to know that he had that much verbatim material from the Clayton Diaries. I knew he had what I gave him and I, of course, knew he had things from here and there but I was not aware that he had that much from the Clayton Journals and that is why I was miffed, if that is the proper word. Surprised.

Q. And I take it from your previous testimony that the reason you were surprised or miffed was because you thought you had been given some sort of special permission or exclusive permission to have access to those diaries?

A. That's correct.

Q. Did anybody ever inquire of you how Ehat had gotten access to the Clayton Journals?

A. Oh, I think several people inquired of me and my answer was always, I don't know.

Q. Do you recall who made those inquiries of you?

A. Well, I say there were several people. I know, at least I believe when Noel Reynolds was investigating the situation he asked me some questions . . . all of my colleagues at BYU were asking the same questions. So in general conversation it was just there and I believe that Noel Reynolds asked me specifically as part of his efforts to find out.

Q. Have you ever told anybody that the Clayton Diaries were not available for others to do research in?

A. I assume that I have because that was my understanding.

Q. And you described your access to the Clayton Diaries as being special permission; is that correct?

A. That was my understanding that it was by special permission, yes.

Q. Is there a special connotation to that term?

A. There is no special connotation except that again, as I indicated before, I made the request after I had exhausted all of the other resources and it was on the basis that it would be too bad for me to write a biography and do the things I was going to do without having had access to the only body of material that I knew was available, or the only remaining body of material that I knew was available. And in that sense I felt that the diaries were being given to me by a, or I was being allowed to use them at a time when no other scholars would have been allowed to use them, or at least on a very, very limited basis.

(Deposition of James B. Allen, pages 79–83)

1 with regard to that situation with Don Schmidt?

2 A Yes, I'm sure I did.

3 Q What was the nature of those discussions?

4 A Well, now this again is, I can't remember
5 the nature and specific conversations but I do remember
6 asking Don questions like where did he get it and Don
7 was not, he didn't tell me. I don't remember what
8 he said but I remember my concerns at the time as I
9 talked with other people was where did Andy Ehat get
10 access to this material. That was my concern. And
11 I remember talking with several people, Don Schmidt
12 and other people up in the Historical Department and
13 people at BYU like Noel Reynolds and others and I was
14 miffed. I didn't know where he got access to it and
15 that was the nature of the conversations I had with
16 anyone.

17 Q Did those conversations--, you just used
18 the word "miffed"?

19 A Yes.

20 Q Those conversations with regard to you being
21 miffed, did those occur after the notes were taken
22 from Cook and distributed or did those occur before
23 that time?

24 A Mostly they occurred after that time. There
25 was one point before that time when Lyndon Cook had

A photograph of the *Deposition of James B. Allen*. Dr. Allen says he was "miffed" when he found that Ehat had access to so much material from the Clayton Diaries.

The Tanners on Trial

At the trial Dr. Allen tried to smooth over the matter somewhat by saying he was “not offended” at Mr. Ehat. Nevertheless, he testified as follows:

A. Well, I was miffed when I discovered that those extensive notes that he had taken, and you are quoting from my deposition, I think, were being circulated, I was also surprised to know the extent of his particular notes. I was not aware of the extent of the notes he had taken or where he had received permission to see them.

Q. And why were you surprised or why were you miffed?

A. Well, partly because I was simply not aware of the—of the extent to which he had seen the notes, and you remember you asked me that question in the deposition, and I can’t even remember what I answered.

.....
Q. Okay. Did you discuss with Don Schmidt the fact that Dean Jessee had given Andrew Ehat access to the typescript?

A. I asked Don Schmidt if he knew how Andy Ehat had access to the journals, and as I remember it, and I am very hazy on this, but Don Schmidt was not sure at least in terms of what he told me. I was not aware until the day of the deposition was taken that Mr. Jessee had given Andy Ehat access to the journals or had permission to read them. (*Trial Transcript*, pages 239, 241–42)

When Noel Reynolds investigated the distribution of the Clayton notes for Brigham Young University, one of his concerns was whether Ehat had obtained them surreptitiously (*Deposition of Noel Reynolds*, page 12). He even inquired of James B. Allen, and Allen “told me that he did not know how Andy got access to the journal . . .” (*Ibid.*, page 35). When Dr. Reynolds asked Mr. Ehat, Ehat only told him that he had permission:

Q. Okay. Did Ehat ever tell you how he got access to the Clayton Journals?

A. No.

Q. Did you ever inquire of him?

A. When I said no, what I meant is I don’t know the actual process or individuals involved. He told me he had them with permission. That’s all I know. (*Ibid.*, page 42)

In compliance with a subpoena, Noel Reynolds turned over to us a note he had written concerning a conversation he had with a BYU professor who had obtained a copy of Ehat’s notes:

I began by explaining . . . the nature of the charge made against him by Andy Ehat, that is, that he had received and retained research materials which were stolen from a doctoral candidate. He indicated immediately 1) the concern that Andy may not have acquired the materials legitimately himself, . . .

When we questioned this professor concerning the matter, he said that it was his understanding that Ehat would not tell BYU officials where he had obtained the Clayton material.

That Ehat was aware that he was copying from Allen’s typescript without his permission seems obvious from the testimony we have obtained. We have already quoted Scott Faulring as saying that when Ehat learned the notes were circulating, he became very emotional and said that Allen, Cook and Jessee “are going to be shot.” The fact that Ehat would make the statement that Allen would get in trouble if the notes were distributed can only be explained if Ehat knew he had copied material from Allen’s typescript. At the trial Ehat admitted that “James B. Allen was the principal individual that had initial access to the Clayton diaries” (pages 37–38), and that this was the reason he sought to obtain the 12 pages of material from Allen for the book *The Words of Joseph Smith*. When we took James B. Allen’s deposition, we learned that Ehat had also given him a “series of questions” about the William Clayton diaries. Dr. Allen was going to give us access to this material, but Ehat’s lawyer objected and we were never able to see it:

A. . . . At one time Andy did give me a list of questions in which he said, is this in the journal and is that in the journal, and I responded with yes or no or partly, those kinds of answers, and if that material is relevant I have that with me today too. But it is very sketchy kind of material.

.....
Q. . . . What was the nature of those questions or—, you brought those questions and answers with you?

A. Right, and I do not see any problem with giving these—, do you want to look at them?

MR. MADSEN: If they are my client’s, I guess so.

.....
MR. BARNARD: Dr. Allen, could you tell me, describe in more detail what those notes are that you brought?

A. Well, at some point, and again I don’t remember the date, he asked me a series of questions in writing that related specifically to William Clayton and I replied in writing at that time. The questions were of the nature as to with regard to his relationship to Willard Richards on 10–December, 1842.

MR. MADSEN: You don’t have to read them all.

A. No, I’m only going to read one as an example. . . .

.....
MR. MADSEN: And, for the record, I had better now interject my objection to it being produced or inspected . . . until the Judge tells me I’m wrong I would

object to the production interspersed with Mr. Ehat's questions and Mr. Allen's answers and I would object to that part that is Ehat's contribution. I would not consent to its being discovered or inspected or copied.

MISS PARK: I'm going to instruct him not to turn it over.

MR. BARNARD: Dr. Allen could you characterize those notes?

A. That we're discussing?

Q. That we're discussing, as notes or comments dealing in any way with the Clayton Diaries?

A. They are notes or comments that deal in a general way, well, in a specific way, with what is or is not in it in response to specific questions about specific dates but they are not questions

.....

Q. You brought those with you today, your attorney has apparently instructed you not to show them to me.

A. For whatever reason she has.

Q. For whatever reason. Are you going to take your attorney's advice?

A. I shall take my attorney's advice. (*Deposition of James B. Allen, pages 29–33*)

UNCLEAN HANDS?

Although Mr. Ehat accused us of "unfair competition," the evidence shows that he secretly used James B. Allen's typescript of the diaries and later tried to cover up the matter. Ehat's lawyer, Gordon A. Madsen, claims that we have "unclean hands." We feel, however, that it is his client that has unclean hands. Our actions were done openly; Mr. Ehat, on the other hand, secretly gained access to Allen's typescript, used it and then gave false testimony to cover up his actions. We will leave the reader to judge who has "unclean hands." In our opinion the cover-up and false statements made concerning the way Ehat obtained the Clayton material tend to make the whole matter absolutely ridiculous. Ehat accused us of causing him "irreparable damage" because we used his scholarly work product. The truth of the matter, however, is that he never even made the transcription from the handwritten diaries. Instead, he relied upon the Allen-Jessee transcript, which Dr. Allen calls "my own particular scholarly property." This, of course, was done without Allen's permission or knowledge.

If anyone is guilty of "unfair competition" it is Mr. Ehat. We openly announced that we were publishing material typed by Andrew Ehat. Ehat, on the other hand, surreptitiously appropriated notes from James B. Allen's typescript for his own purposes. Dr. Allen specifically made this typescript for a biography he is preparing

on William Clayton. We know that Ehat was aware of Allen's plans for publication because he made this statement on page 49 of his deposition:

Dr. Allen was preparing to publish both a biography of William Clayton and an article on William Clayton.

How Ehat could have been involved in all this and then bring a suit against us is very difficult to comprehend. That Judge Christensen would award damages is even more unbelievable.

SOFT ON PERJURY?

Although Judge Christensen took the strongest possible stand against the publication of "stolen documents," he appeared to be very soft on perjury. He seemed to be oblivious to the obvious cover-up and false statements made under oath. Perhaps this was because he was having a difficult time following the testimony. In any case, statements made by the plaintiff's witnesses concerning the diaries were so contradictory that it was obvious that someone was not telling the truth. Besides the conflicting testimony given by Andrew Ehat and Donald Schmidt, there is a glaring contradiction concerning how Dean Jessee got access to the diaries to help prepare the transcript. James B. Allen gave this testimony concerning Jessee's involvement in the preparation of the typescript:

A. Okay. I got access to the journals in January, if I am correct, of 1969.

Q. '79 you mean?

A. 1979—1979, yes. Thank you. And my understanding is that the period of time that I would have access to them would be a limited period of time. My understanding at the time was that I would only have them through January, and so I began to take very extensive paraphrasing notes, but it was taking so much time for me to decide what to paraphrase because my particular purpose was to do a biography, not to do some other study which he was involved, that when I became aware that Dean Jessee also had access to these and had a similar purpose, he and I decided together that a proper thing for us to do would be to simply make a verbatim typescript that we would share with each other only. . . .

.....

Q. Did you in fact copy the whole journal all three volumes?

A. Yes.

.....

Q. How did you work out the workload in doing that?

A. . . . The way it worked is that I would come to work from Orem on the days that I came, which

The Tanners on Trial

was only every other day. I would get access to the journal from Don Schmidt, who kept it in the Historical Department vault, and I assume that that's the way that Dean Jessee had access to the same things. So I would work on one volume while he was working on another volume. There were three volumes to the journal, and I can't tell you exactly the proportion of who copied how much. (*Trial Transcript*, pages 222–223)

The reader will notice that Dr. Allen only assumed that Jessee got the diaries from Schmidt. On page 234, Allen was asked if he was “ever present when Dean Jessee got those journals from Don Schmidt?” His reply was, “I don't think so.” As we have already shown, in his deposition, page 27, Allen said that his “understanding” was the Jessee “had permission also to see the Clayton Diaries. But I did not know that of sure knowledge that he had permission to see the Clayton Diaries. I got that from him.” In his deposition, Dean Jessee maintained that Church Archivist Donald Schmidt gave him permission to use the diaries:

Q. Did you receive any oral permission from anybody to have access to those?

A. Yes.

Q. Who?

A. The Church archivist.

Q. Who's that?

A. Don Schmidt.

.....

Q. (By Mr. Barnard) Did you approach Don Schmidt and say, “I want to see them”?

A. That's right.

.....

Q. Why did you approach Don Schmidt and ask for access?

A. Because he's the Church archivist.

.....

Q. Why did you have to ask Don Schmidt for permission?

A. Well, . . . in order to get the thing out of the vault it was necessary to go talk to him.

.....

Q. Over what period of time did it take you to make the typescript?

A. Oh, it was probably two or three weeks, I imagine. I can't tell exactly.

.....

Q. You asked Don Schmidt. He said that they could be made available to you. . . . how much later was it that you were provided access to those journals?

A. Probably immediately after that.

Q. Did Don Schmidt actually deliver those journals to you, or did anybody else?

A. Yes.

Q. When he delivered those to you did he tell you not to share them with anybody else or place any restrictions on them?

A. None.

(*Deposition of Dean Jessee*, pages 14, 16, 17, 19, 20)

On page 57 of his deposition, Donald Schmidt was questioned with regard to Jessee's access to the Clayton Diaries:

Q. Do you know if Dean Jessee has ever had access to the Clayton Journals?

A. I don't know that.

At the trial, Dean Jessee emphatically maintained that Donald Schmidt personally handed the diaries to him every day for two or three weeks:

Q. Did you ever get permission to see the original?

A. Yes.

Q. From whom?

A. From the Church Archivist.

Q. Whose name is?

A. Don Schmidt.

.....

Q. Where was the diary located when you had access to it?

A. I picked it up from the archivist each day.

Q. And where did you pick it up?

A. In his office.

.....

Q. Over what time period did you pick it up and have access to it?

A. Well, I imagine two or three weeks. (*Trial Transcript*, pages 298–299)

Q. Now, you indicate that Don Schmidt gave you access to the originals of Clayton journal for you to make your extract; is that correct?

A. That's correct.

.....

Q. How many times would he have done that?

A. I didn't count them.

Q. Once, twice?

A. At least I can't recall now. It was over a period two or three weeks that I was making my copy.

Q. So, would that have been on a daily basis over two or three weeks?

A. Yes.

Q. And there is no question in your mind that it was Don Schmidt that personally handed those to you each day?

A. That's right. (*Ibid.*, pages 310–311)

The Tanners on Trial

1 Q. But is it -- well, how does it break down between
2 research and teaching?

3 A. I teach two classes per year.

4 Q. And the rest of the time is devoted to --

5 A. Research and writing.

6 Q. Are you acquainted with the William Clayton 1842 to
7 1846 diary?

8 A. Yes.

9 Q. Did you ever get permission to see the original?

10 A. Yes.

11 Q. From whom?

12 A. From the Church Archivist.

13 Q. Whose name is?

14 A. Don Schmidt.

15 Q. When was that permission given?

16 A. It was about the time that I obtained access to it, I
17 think it was about 1979.

18 Q. Did you get access alone or accompanied with someone
19 else?

20 A. With Jim Allen.

21 Q. Where was the diary located when you had access to it?

22 A. I picked it up from the archivist each day.

23 Q. And where did you pick it up?

24 A. In his office.

25 Q. Is his office adjacent to any storage facility or

298

A photograph from the transcript of the trial. Dean Jessee says that Donald Schmidt gave him access to the Clayton Diaries.

At the trial (pages 133–134), Donald Schmidt was asked, “Did anyone else see the Clayton journals to your knowledge besides Mr. Ehat and Dr. Allen?” Schmidt replied, “Not that I know of.” On pages 134–135, however, Schmidt testified that about two years after the diaries were returned to the First Presidency’s vault he became aware that Jessee had seen them:

Q. Had you discussed that at all with Dean Jessee? Do you know whether he had seen the diary?

A. I have not discussed it with Dean Jessee.

Q. Do you know whether or not he had seen the diaries?

A. It was my understanding he has seen them, yes, in another connection.

Q. When did you first come to that knowledge?

A. Probably 1981.

The reader will remember that it was in 1981 that Ehat’s notes were taken, and it is possible that an internal investigation led to the discovery that Ehat got the notes from Jessee. However this may be, Donald Schmidt stood firmly by his testimony that he did not allow Jessee to see the diaries:

Q. My understanding also is that Dean Jessee never discussed with you gaining access to the Clayton journals; is that correct?

A. That’s correct.

Q. And you never gave him permission either to see the journals or a typescript of the journals?

A. That’s correct. (*Trial Transcript*, pages 137–38)

Q. During that six-week period of time in January of ‘79 when those journals were under your control, did you at any time give permission to Dean Jessee to look at or extract any materials from those?

A. Not that I recall.

Q. Did you have permission from anybody to do that, to allow Dean Jessee to see those?

A. Not that I know of. (*Ibid.*, page 155)

The discrepancy between the testimony of Jessee and Schmidt is certainly not a minor matter. Jessee says that Schmidt personally handed him the Clayton diaries day after day for two or three weeks (which would seem to imply that he also received them back at closing time), but Schmidt maintains that he never showed the diaries to Jessee at any time. It seems obvious from this that someone is very concerned that they will be in trouble with the Church leaders if they tell the truth about the matter.

There is also a major discrepancy between the testimony of Professor Richard L. Anderson and Donald Schmidt. When we took Anderson’s deposition, he was very reluctant to reveal the details of how he got access to the Clayton diaries:

Q. Have you personally ever seen the William Clayton Diaries that Ehat extracted and are the subject matter of this lawsuit?

A. Do you want me to answer that, Pam?

MISS PARK: Would you repeat the question?

MR. BARNARD: Have you ever, personally seen the Clayton Journals that were extracted by Ehat, the extracts of which are the subject of this action?

MISS PARK: Have you seen the actual, original journals?

A. Is that a relevant question?

MISS PARK: It sure is.

A. Yes.

MR. BARNARD: Under what circumstances did you see them and when?

A. Is that a relevant question?

MISS PARK: Yes, it is.

A. Okay. I saw them in the Historical Department of the Church.

.....
Q. Who did you apply to for permission?

A. I applied to the Historical Department.

Q. Was there a specific person at the Historical Department?

A. Don Schmidt is the archivist.

Q. How did you make that application?

A. By conversation and—, is this relevant?

MR. MADSEN: I don’t think so but I’m not your counsel.

A. This is the entire workings of the Historical Department. I’m not sure it’s all that relevant. I think they consider it privileged information.

MR. BARNARD: Let me tell you—

A. I think I have a relationship of trust with them and how things are. I mean, I don’t think there is any—, the Tanners seem to operate on the theory that they’re giant conspiracies but they’re business practices to me and, I mean, if this is all relevant to the case that’s fine with me, it doesn’t matter.

MR. BARNARD: Let me tell you, we talked to Don Schmidt three days ago. Don Schmidt indicated to his knowledge you never had access to the originals of the journals.

MR. MADSEN: I’m not sure he so testified. I’m not sure that is a fair characterization. I’m not sure he was asked specifically about this witness, as I remember. I’m sorry, my memory and yours don’t coincide.

MR. BARNARD: That’s why we’re inquiring. We’re inquiring as to the standard practice. How people got access, how he Ehat got access. That’s why we’re inquiring of you how you got access.

A. How Ehat got access may be relevant but how I got access I fail to see how it is relevant. I don’t want to give you a hard time. It doesn’t really matter. I would probably tell my mother about it.

The Tanners on Trial

1 A. November of last year.

2 Q. 1983?

3 A. That's right.

4 Q. During that six-week period of time in January of '79
5 when those journals were under your control, did you at any
6 time give permission to Dean Jessee to look at or extract any
7 materials from those?

8 A. Not that I recall.

9 Q. Did you have permission from anybody to do that, to
10 allow Dean Jessee to see those?

11 A. Not that I know of.

12 Q. Are you aware of any restrictions that were placed
13 upon James Allen when he gained access to the Clayton journals
14 in January of '79?

15 A. All I know is here, your document here.

16 Q. That which you --

17 THE COURT: Plaintiff's Exhibit 7.

18 Q. Are you aware of any privileges that were granted to
19 James Allen beyond that document with regard to the journals?

20 A. Dr. Allen and Elder Durham discussed the matter with
21 the diaries, it was not my -- I was not in on the discussion.
22 I don't know that.

23 Q. During the time that you have worked for the
24 Historical Department, have you ever had occasion to make a
25 complete verbatim typescript of an historical document?

155

A photograph of the transcript of the trial. Donald Schmidt maintains that he did not give Dean Jessee access to the Clayton Diaries.

The Tanners on Trial

Q. That is the purpose of my question.

A. I did get regular access by going through Don Schmidt and Brother Durham and these people are the Historical Department executive managers, or Don Schmidt. I assume Don answers to Earl Olsen although Earl is a defacto person to work through and Don Schmidt consulted with Brother Durham and that is the ultimate authority of the Historical Department.

Q. Is there any written documentation as to you being authorized to see those journals?

A. No, I don't think so. . . . I do not think anybody is going to find a letter authorizing me to do this.

Q. Again, I would indicate that when Don Schmidt was here he had a letter which authorized James Allen to have access and we inquired of him as to whether or not there was any written documentation for anybody else to have access and he indicated no.

A. I don't think I've ever had a letter authorizing me to see anything anyway. The practice is simply to go see it. In fact, I generally don't have to ask permission.

Q. Did you actually see those volumes at the Church Library?

A. Yes.

(*Deposition of Richard L. Anderson*, pages 9–13)

At the trial Professor Anderson gave the following testimony:

Q. Have you seen the originals?

A. Yes.

Q. Under what circumstances?

A. By permission of the LDS Historical Department.

Q. Who specifically?

A. The provisional permission was given by Don Schmidt. I can go into further detail if you ask.

Q. Would you please.

A. Yes, I wrote an application for permission to use the journals to G. Homer Durham, the Managing Director of the Historical Department. He cleared the permission and telephoned me and told me at what dates I could see the journals, and Don Schmidt had administered the supervision of my seeing the journals.

Q. What were the dates or date?

A. The dates, I put them on a piece of paper, Friday, a Monday, a Tuesday, I think it was March 8th and then March 10th and 11th.

Q. Of what year?

A. Of the year 1979. . . .

. . . .

THE COURT: Unless you think it is vital, it is March 10th rather than March 11th and so forth, let's go on.

THE WITNESS: That is within one day, March 7th I assume is Friday, 8th and 9th Saturday and Sunday, March 10th and 11th, I think that's exact.

. . . .

Q. Was anyone there, you have indicated Don Schmidt was the supervisor, was he present at all times while you were so working?

A. No, he was not present at all times. He simply got the journals for me each morning, let me do my typing, and I turned the journals into him at noon when I left, and in the evening when I left. (*Trial Transcript*, pages 320–322)

Q. . . . you had actual physical access to the original journals; is that correct?

A. Correct.

Q. And on those three or four days in March of '79 when you had access, was it actually Don Schmidt that handed them to you?

A. Yes.

Q. And each of them handed back to Don Schmidt?

A. Correct.

Q. Not the secretary or anybody else for him?

A. Right. (*Ibid.*, page 337)

Donald Schmidt, on the other hand, claimed that he never gave Richard L. Anderson access to the diaries:

Q. Are you aware of whether or not Dr. Richard L. Anderson from BYU had seen the Clayton diary, these same Clayton diaries?

A. I do not know that at all.

Q. You had nothing to do with that?

A. I had nothing to do with it.

Q. If indeed it happened following January, February of '79 you have no knowledge about that?

A. I have no knowledge of Richard Anderson seeing the diaries. (*Ibid.*, page 134)

Q. Mr. Schmidt, my understanding from your testimony is that Richard Anderson never asked you, and you never gave him permission to see the William Clayton Journals; is that correct?

A. That's correct.

Q. Did he ever talk to you or did you ever give him permission to see a typescript of the diary?

A. No, sir. (*Ibid.*, page 137)

Professor Anderson's claim that he copied from the diaries on March 7, 10 and 11 presents a real problem because Donald Schmidt maintained that the diaries had been returned to the First Presidency's vault in February.

The Tanners on Trial

Memorandum

To: Elder G. Homer Durham
From: Francis M. Gibbons
Re: Diaries of William Clayton

Date January 3, 1979



Dear Elder Durham:

I have been asked to inform you that the brethren have approved your request that Brother James B. Allen be permitted to review the journals of Elder William Clayton, covering the period 1841-1845, in connection with a manuscript on the life of William Clayton which he is preparing.

The diaries are handed to you herewith. It is understood that, according to your letter, they will be returned to the Office of the First Presidency in a month.

Sincerely yours,

FMG/co

Receipt is hereby acknowledged of the above described diaries.

Historical Department

By Beth Rasmussen
rec'd three volumes only
dated 1842-1845.

Received 2-9-79

A photograph of a memo from the Office of the First Presidency of the Church which shows that the Historical Department only had the diaries for about five weeks.

(The Historical Department is located at the new Church Office Building at 50 East North Temple, whereas the First Presidency's vault is in the granite building at 47 East South Temple.) Schmidt's testimony is as follows:

Q. . . . How long were they retained in your custody in your vault?

A. I believe the documents say about six weeks.

Q. Were they returned at the end of that six weeks?

A. Yes.

.

Q. Now. Did anyone else see the Clayton journals to your knowledge besides Mr. Ehat and Dr. Allen?

A. Not that I know of.

Q. Do you know whether the journal ever came back to your repository after this six-week period in January and February of 1979?

A. No, they did not.

(*Trial Transcript*, pages 129, 133–134)

In response to a subpoena, Donald Schmidt brought a memorandum from Francis M. Gibbons, secretary to the First Presidency, to G. Homer Durham of the Historical Department. This memorandum seems to give support to Schmidt's testimony. It is dated "January 3, 1979," and says that the diaries "will be returned to the Office of the First Presidency in a month" (Plaintiff's Exhibit P-7). A handwritten note by Francis M. Gibbons at the bottom of the page seems to indicate that the First Presidency received the diaries back on "2-9-79"—a month before Anderson says he copied from them at the Historical Department. We feel that there is evidence to show that Richard L. Anderson obtained material from the Clayton diaries, but whether he copied it directly from the original diaries seems to be contested by Schmidt. While we would not like to pass judgment on who is telling the truth, it is obvious that either Anderson or Schmidt has perjured himself with regard to this matter.

We always thought it was a serious matter to give false testimony under oath. We wonder if the Judge would have been so lenient with us if we had made false statements and covered up how we obtained the Clayton extracts?

AN "ILLICIT" TYPESCRIPT

In the *Court's Ruling*, page 5, Judge Christensen maintained that "Jessee and Allen collaborated in making a complete typescript of said journals, and by a preponderance of the evidence the Court finds that that was with the acquiescence and consent of the Mormon Church." While we are certainly glad that Allen and Jessee made a complete typescript of the Clayton diaries, we find nothing to support the Judge's claim that it was

by "acquiescence and consent of the Mormon Church." On the contrary, the evidence clearly shows that the typescript was made without permission. Christine Rigby pointed out that "Until 1979, the diaries were kept in the most restricted repository the Mormon Church has—the first presidency vault. . . . Without obtaining express permission to make a verbatim typed copy of the entire diaries, Jim Allen and Dean Jessee, another scholar employed by the church, did so" (*Utah Holiday*, May 1984, page 14).

In his testimony, Church Archivist Donald Schmidt made it clear that typescripts of entire documents cannot be made at the Historical Department without permission:

Q. Is one of those rules an unwritten rule that a scholar can't go into the library and make a complete verbatim typescript copy of a historical document in the possession of the LDS church archives?

A. Not without permission. (*Trial Transcript*, page 138)

Schmidt further testified that if any typescripts were made for the preservation of documents, they belonged to the Historical Department:

Q. And those typescripts that you have made or directed people to do, are those typescripts the property of the individuals that make the typescripts?

A. No.

Q. Whose property are those?

A. They are employees of the Historical Department and therefore ours. (*Ibid.*, page 156)

At the trial, Dr. Allen did not pretend to have had any permission to make the typescript:

Q. Did you, during that time period that you were making that verbatim typescript, did you tell anyone besides Dean Jessee that you were making a verbatim transcript?

A. I don't think so.

Q. Did anybody give you permission to do that?

A. Not in specific terms.

Q. Did you ask anybody for permission?

A. Not in specific terms.

Q. Why didn't you make a Xerox copy of the Clayton journals rather than spending the time typing them?

A. That's a good question . . . I suppose we felt it might have looked unusual for us to be running into the Xerox room and making Xerox copies. Another answer though is that the diaries themselves . . . are not the kind of thing that if you open them up and put them under a Xerox copy they would stand that very well. . . .

Q. One of those reasons that if you had run in and out of the Xerox room making copies people would have wondered what you were doing?

The Tanners on Trial

A. Sure and I was not particularly concerned or eager to have people come to me and want copies of my copies of things.

.....

Q. Would it have been contrary to the rules of your employment and to the Historical Department and archives for you to Xerox the Clayton journals when you had access to that?

A. I think it would have and you remind me of another answer I could have given to another question, because I believe the Historical Department does have a policy against Xerox copies of documentary material.

.....

Q. When you left the employment of the Church Historical Department, who was your immediate supervisor?

A. Leonard Arrington.

Q. Did you ever inform Mr. Arrington that you made a complete typescript of the Clayton journals?

A. No, I did not.

Q. Did you have to leave that complete typescript with Mr. Arrington or with the Historical Department?

A. No, I did not.

(Trial Transcript, pages 236–238, 242–243)

While Donald Schmidt testified that verbatim typescripts were forbidden except for archival use, Dean Jessee claimed that he didn't see any need to tell anyone about the typescript:

Q. Did you tell Don Schmidt at that time that you intended to make a typescript of the journals?

A. I don't think I did. I have never told people—Once an archivist or a head of a depository has given me access to a document, I've assumed that they understood that I would make a copy of it in the best way possible. So . . .

.....

Q. Why didn't you simply make a photocopy rather than making the typescript, as you did?

A. Because I preferred to type it.

.....

Q. Could you have taken those journals and made photocopies rather than typing it?

A. Possibly could.

Q. Was Don Schmidt ever aware that you were making a typescript?

A. I don't know. He should have been.

MR. MADSEN: You're asking this witness to give his opinion of somebody else's condition of mind.

MR. BARNARD: I'm asking your personal knowledge, you know whether—

THE WITNESS: I don't know what he knew.

.....

Q. Since that time, since 1979 when the typescript was made, had you ever told Don Schmidt that you made a typescript?

A. I don't know that I ever had occasion to.

Q. Did you ever provide Don Schmidt with a copy of that typescript?

A. He didn't ever ask me for one.

Q. Okay, whether he asked you for one or not, did you ever provide him one?

A. I don't go around giving people copies of things that they don't ask me for.

.....

Q. Where is that typescript right now?

A. It's in my possession.

.....

Q. To your knowledge, does G. Homer Durham or did G. Homer Durham know at the time that you were making that typescript that you were making a typescript?

A. I don't know that he did.

.....

Q. Have you ever conveyed to anybody other than Andy Ehat and James Allen the fact that you made a complete typescript?

A. I don't think I have.

(Deposition of Dean Jessee, pages 20, 21, 24, 31)

Q. The typescript that you had that you let Ehat see, was that your personal property?

A. Is it now?

Q. Is it now and was it in 1979?

A. Yes.

.....

Q. That typescript that you and James Allen prepared, has that ever belonged to the LDS Church?

A. Well, only in the sense that we were employed there and it's, you know, I don't know what you mean by belong to.

.....

Q. Earlier you said that you considered that to be your own private property.

A. I took it for my own research purposes and it's like anyone who goes into an archives and takes down notes. Those are regarded as his own. Whether those notes are complete copies of the item or whether they're just extracts, it matters not.

Q. And after you left your employment in the Church historical department, you never—you did not leave a copy of that typescript with the Church?

A. No.

Q. And you never informed your supervisor or anybody above you that you had that typescript or you took that typescript with you when you left?

A. I've got probably fifty million other things I haven't informed them that I have, either. In other words, they haven't stood right over me watching what I've done. And, as a research historian, I've collected material from all over the country and I don't think I've given copies of any of it to people I got it from. *(Ibid., pages 70, 73–74)*

The Tanners on Trial

At the trial, Dean Jessee testified as follows:

Q. And when you made the extracts of the Clayton journals you were on company time being paid by the Historical Department?

A. That's right.

.....

Q. When you left the employment of the Historical Department, did you take other typescript documents and notes with you that you had prepared during your employment?

A. I took all of my files.

Q. And when you took those, did you give any kind of a inventory or an itemization at all to your supervisors or to the Historical Department as to what you had and what you took with you?

A. None.

Q. And did you in your deposition tell me that you probably took 50 million other things with you from that employment that you didn't tell them about?

A. Probably jest.

Q. How many did you actually take?

A. I have never counted them.

Q. Something less than 50 million?

A. Probably.

(*Trial Transcript*, pages 312–314)

Davis Bitton, who served as Assistant Church Historian under Dr. Arrington, testified that if he had made a typescript of a lengthy manuscript he would have left a copy with the Archives. Bitton also said that he never discussed the typescript of the Clayton diaries with either Allen or Jessee:

Q. And had you done that during that period of time, would those notes have been yours personally to take with you when you left the church employment or would those have been property of the Church Historical Department which you would have left with the church when you left their employment?

A. Had I done that? I think if I had copied or had a secretary copy a lengthy manuscript like an entire diary or something of that kind, that would have been regarded as a project of the division, done on their time with their employees, but if it were a shorter document for my own research needs, it would have stayed in my files.

.....

Q. Have you ever discussed with Dean Jessee or James Allen the fact that they made a complete verbatim typescript of the William Clayton journals?

A. No, I did not. (*Ibid.*, pages 210–212)

While Judge Christensen claimed that the typescript of the Clayton diaries was made by permission of the Church, our lawyer argued that it was an “illicit copy”:

I would suggest to the Court that Mr. Ehat comes to this Court with unclean hands. His conduct as is before the Court with regard to his access to historical documents indicates that he has participated in this Mormon underground distribution and collection of historical documents. Mr. Ehat also lied or was deceitful in the way that he gained access to the original William Clayton journals. From his deposition and from his answers to interrogatories, up until the time of this trial, Mr. Ehat had told me that he got access to the journals and to the typescript through Don Schmidt. Don Schmidt denied that. From the witness stand, Mr. Ehat now says he got access from Dean Jessee. . . . I think that if Mr. Ehat asks this Court to do equity, he must show that he comes to this Court with clean hands.

I think there is serious question as to how that original typescript was created, . . . And what I would suggest to the Court is that Dean Jessee and James Allen surreptitiously created an illicit copy without notifying their supervisor, without telling the church what they were doing, they made a copy which apparently is consistent with this whole practice within this Mormon underground network of document distribution, they made a copy and they let Ehat have access to a copy. (*Ibid.*, pages 458–459)

JUST CHECKING ENTRIES?

The evidence shows that Andrew Ehat obtained his material from the Clayton diaries in a very clever way. To begin with, he approached Donald Schmidt and told him that he wanted to check an entry or entries which he already had against the original diaries. Schmidt testified:

Q. Do you know if anybody else did have access during that period of time other than James B. Allen?

A. Yes.

Q. Who was that?

A. Andy Ehat.

Q. And what was the nature of his access to them during that period in January of '79?

A. One specific instance in which he said I have a specific entry that I know is in the Clayton Diaries could I see the Clayton Diaries to verify the entry.

.....

Q. Okay. He told you he wanted to verify one entry in the diary?

A. The term could have been entries. At this point I don't remember that exact terminology, whether it was one or more than one.

Q. What did you respond to that?

The Tanners on Trial

A. I said, I see no objection to that since he already has the entry or entries.

.....

Q. Did you give him permission to look through or read all of the journals?

A. He said he had some specific entry or entries he wanted to look at and I did not question him as to whether he was going to look at other things or not. It is not my—

Q. So you didn't give him specific permission saying, you may read all of them?

A. No.

Q. Were you present when he had physical access to those diaries?

A. You mean the entire time he looked at them?

Q. Or any part of it?

A. No. I obviously, I was there when I gave them to him but I did not stand there and look at him or watch what he did.

.....

Q. After he returned those journals, the actual original journals to you, did he ever have access to those journals again, to your knowledge?

A. Not to my knowledge.

(Deposition of Donald Schmidt, pages 16, 17, 19, 20)

At that time Mr. Ehat began reading the diaries and copying the dates of entries he was interested in. In his deposition, we find the following:

A. I took down the date of every entry that I had interest in that was related to the subjects that I was to research on.

Q. Okay. You took down the date, and did you also write down—

A. I wrote some notes.

Q. —the nature of the entry?

A. Yes, some notes. Not in every case.

.....

Q. But from what you've described it sounds like it was a summary saying you want to go back and eventually look at those entries in more detail; is that correct?

A. Yes.

.....

Q. Why did you simply take a summary or lift dates when you initially had access to the journals?

A. I was limited for my reading purpose.

Q. Limited by?

A. Not limited but — well, limited in the sense of I would be reading the diaries and noting the things that were of importance to me.

Q. Okay. Were you told that you'd have later access to the journals?

A. At that time, no. Not really.

.....

Q. Okay. After that initial date or the initial time when you physically had three volumes, were you ever

again given physical possession or custody of those three volumes to look at?

A. No, I don't think so.

(Deposition of Andrew Ehat, pages 29, 30, 32, 33)

At the trial, Mr. Ehat gave the following testimony:

Q. Okay. They are simply dates and brief summaries of what the entry was?

A. In most cases no brief summary, just a couple of cases where I have a few words of the diary, and there is another sheet I guess where I have piece of shorthand, but that's—I guess it would be these two pages on one sheet plus a half sheet of shorthand.

(Trial Transcript, page 91)

The fact that Mr. Ehat only copied the dates of entries he was interested in leads us to believe that he was formulating a plan to gain access to the entries at a later time. Brian Barnard suggests that Ehat may have already been aware of the typescript at the time he approached Donald Schmidt:

Andrew Ehat is a scholar, an historian, he's working on the Nauvoo period. He has access to the William Clayton journals previously unpublished for a few hours of time. What does he do with that? He simply reads through it and writes down dates. He doesn't take any extracts, he doesn't make any long paraphrases. He simply writes down the dates. There is no indication from Don Schmidt that Andrew Ehat is going to have access to those journals at some later date. For that short period of time, Don Schmidt said it was a few hours on an afternoon, he has access to these historical documents of great significance, and he writes down dates.

I would suggest to the Court that at that time when he had permissive access, that when he saw fit only to take dates out, that he knew that there was in process an illicit, surreptitiously made copy of verbatim typescript, and he knew that he could talk to Dean Jessee and get access through Dean Jessee to make further extracts for those particular dates.

This simply doesn't make sense for this man to go in and simply extract dates. And I would suggest to the Court that because Dean Jessee has been hidden by Andrew Ehat, since Dean Jessee has been hidden by James Allen . . . that in fact that's what was going on, that Andrew Ehat was a party to this illicit copy, this illicit typescript. *(Trial Transcript, pages 461–462)*

As Mr. Barnard has indicated, after getting the dates from the original diaries, Ehat approached Dean Jessee about seeing the typescript. According to Jessee, Ehat didn't say anything about copying material from it but only indicated that he wanted to "check the dates" for Clayton material he "already had copies of":

The Tanners on Trial

Q. Did you ever have occasion to have a conversation with Mr. Ehat about the Clayton journals?

A. Yes.

.....

Q. And what was the substance of that conversation?

A. He had — he had had access to the Clayton diary material, and as a number of researchers and historians have done, they would occasionally come into my office and discuss aspects of their research. In the process of that, a question arose as to checking some of the dates. It was convenient for him to check the dates of the Clayton material I had, and he did so.

Q. Did you obtain any permission from anyone before giving him access to your typescript?

A. He already obtained access to the diaries and I—

Q. The question was, did you contact anyone to—

A. Did I? Yes.

Q. Who?

A. It was the church archivist.

.....

Q. What did you do after that. What was the nature of the conversation with Don Schmidt?

A. I don't remember the exact wording of it, but I came away with the understanding that there wouldn't be any problem with his using or looking at the material that I had for those dates.

Q. Did you ever tell Don Schmidt you had a complete typescript of the Clayton journal?

A. I didn't have to.

THE COURT: The question was, did you ever tell him?

THE WITNESS: No, I didn't.

.....

Q. And did he so far as you know make copies of material therefrom?

A. My understanding was that he was to — he was going to check some dates. He already had copies of whatever he needed. And.

Q. Did you watch over his shoulder as he did it to see what he was doing?

A. No, I did not.

(Trial Transcript, pages 301, 302, 304)

Q. Did Andrew Ehat ask you if he could make a photocopy of your photocopy?

A. He didn't say anything about that. He wanted to check some dates.

Q. Okay. Did he tell you that he wanted to take verbatim extracts of a quarter of your 300 page typescript?

A. I don't know that he did that, he already had the material when he came to me.

Q. Did he show you the material that he had when he came to you?

A. Substantial amount of it.

Q. Okay. What was the nature of the material he showed you?

A. It was extracts from the Clayton material. (Ibid., page 308)

When Donald Schmidt was asked if he ever gave Jessee permission to allow Ehat to see further extracts from the Clayton diaries, he testified:

Q. After he had seen the diaries, did you ever have a discussion with him thereafter in terms of copying further extracts?

A. Further extracts?

Q. Yes.

A. No.

.....

Q. Do you remember having discussing with Dean Jessee about allowing Mr. Ehat to look at notes from the Clayton manuscripts?

A. Not to my knowledge. (Ibid., page 131)

In his deposition, Dean Jessee made this statement concerning Ehat's use of the typescript:

A. So eventually he saw—I guess he saw the whole thing. I don't know what he saw because I wasn't right there holding his hand while he did it. (*Deposition of Dean Jessee, page 27*)

On page 41, Jessee said that he knew that Mr. Ehat "had taken some material" from the transcript, but he apparently never actually saw Ehat copying anything:

Q. Did you ever see him actually taking information out?

A. May have seen him look at it.

On pages 64–65 of Jessee's deposition we find the following:

Q. (By Mr. Barnard) Andy Ehat said he never got any documents from you regarding that typescript or regarding the Clayton journals.

A. He said he never got any?

Q. That's right.

A. Maybe he didn't take them from me then. Maybe he got it all from the other. Maybe he just checked dates. I don't know what he did with it because I didn't stand there and watch what he did.

The Tanners on Trial

1 Q. And did he so far as you know make copies of material
2 therefrom?

3 A. My understanding was that he was to -- he was going
4 to check some dates. He already had copies of whatever he
5 needed. And.

6 Q. Did you watch over his shoulder as he did it to see
7 what he was doing?

8 A. No, I did not.

9 Q. Have you ever been involved in the sharing, other
10 than in this instance with Mr. Ehat, the sharing of documents
11 or extracts from your own suits with other historians?

12 A. When a person does research on a particular topic, he
13 usually tries to find someone who is -- has had some expertise
14 in that particular area. He will also attempt to become
15 acquainted with the archivists, the people that take care of
16 the documents for whatever insight they can give him into his
17 research in that capacity. Having worked in the archives, and
18 having done work in the area of Joseph Smith and that early
19 period of LDS church history, occasionally people will contact
20 me and professional people, and I would discuss their questions
21 with them and occasionally if necessary, I would, if it was
22 appropriate, I would give them a copy of something I may have
23 had, but I didn't make it a -- it wasn't a common, you know,
24 generally speaking, I kept my files to myself and people that
25 used them would or used material would get their own

304

A photograph from the transcript of the trial. Dean Jessee says that Ehat only wanted to "check some dates" in the typescript.

The Tanners on Trial

When we took Dean Jesse's deposition in February 1984, he was willing to admit that he had let Mr. Ehat see the typescript a number of times:

Q. Can you recall giving him access to all three of those folders?

A. I think he probably had access to it.

Q. Over what period of time?

A. Oh, probably—within a couple of weeks, I imagine, various times that he came by. (page 27)

By the time of the trial, Dean Jesse had changed his mind; he claimed that he had only shown the typescript to Ehat on one occasion. When Mr. Ehat's deposition was taken, he was asked how long it took him to make the typescript. He replied:

A. Length of time it took me to make my typescript? It was a few, a couple of days, I guess. Three days, four days, five days. I don't know. Something like that, . . . (Deposition of Andrew Ehat, page 35)

At the trial, Mr. Ehat testified that "it took me four or five, maybe six days, nearly all day doing it" (*Trial Transcript*, page 81). On pages 84–85, he stated:

A. I'm not absolutely sure when within the time frame of '79–'80 that I actually saw the diary in a block of time, you know, a fairly, you know, within a 14-day period I saw it for six days, you know, something like that, . . .

At the trial, Dean Jesse testified as follows:

Q. How long did Mr. Ehat have access to your photocopy of the typescript?

A. It was a brief time, probably—part of an afternoon or something like that.

Q. And that's all?

A. Yes.

Q. One occasion, one afternoon he has access?

A. As I remember, it wasn't very long.

Q. It couldn't have been a period of six days spread out over a period of 14 days?

A. No. (Ibid., page 309)

In Andrew Ehat's *Answers to Interrogatories*, page 18, we find the following:

49. What restrictions, if any, were placed upon plaintiff when he was given permissive access to the Clayton diaries by the Office of the First Presidency of the Church of Jesus Christ of Latter-day Saints? Please describe in detail.

ANSWER: None.

Now that we are aware of the truth about Ehat's access to the diaries, we know that the First Presidency

never put any restrictions on his use of the diaries because they never knew he had access to them. At any rate, Andrew Ehat's deposition would lead one to believe that there were no restrictions placed upon him with regard to the typescript:

Q. Okay. When you had access to that typescript, were you told that you could only make extracts from that rather than making a verbatim copy of the typescript?

A. No.

Q. Why didn't you simply make a photocopy or have a photocopy made of that typescript of the journals?

A. Repeat your last question then. I misunderstood it then.

Q. Okay. Well, my inquiry is that somebody had already put into typewritten form the journals into the typescript that you had access to?

A. Um hmm (affirmative).

Q. Why didn't you simply make a copy of that rather than making extracts as you've done?

A. I just took extracts of the entries that I was interested in. (Deposition of Andrew Ehat, pages 92–93)

At the trial, however, Mr. Ehat indicated that he was not at liberty to either photocopy or make a complete typed copy of the transcript:

Q. Did you ever ask anybody if you could make a photocopy of that photocopy?

A. No. I just assumed that — I just assumed that I should type out whatever I wanted, not make a photocopy of it. I didn't deem it, since it was Dean's photocopy, I didn't deem it my right to simply photocopy it. . . .

Q. Did you ask Dean Jesse if you could make photocopies of the pages of the entries that you were interested in?

A. I think he just didn't want me to have a photocopy of the photocopy he had, but I — I didn't, I complied with his either unstated or stated request that I take my notes by typing.

THE COURT: You draw a distinction in terms of propriety between your photocopying Dean Jesse's photocopy and your copying it verbatim in your own handwriting?

THE WITNESS: Had I made a photocopy I would make a distinction, yes. If I didn't make a photocopy.

THE COURT: Well, in determining whether you would or not, did you draw a distinction?

THE WITNESS: Oh, yes.

THE COURT: What is the distinction then if it's in your own handwriting, with exactly the same words, that might be permissible in accordance with the custom or ethics of the research community, whereas precisely the same words but represented by a photocopy of the photocopy would not be, is that what you are telling me?

THE WITNESS: Well, given that it was a presumption that I didn't get a photocopy of the original, that there was a distinction by me making the work plus the fact that I had already read them, taken the dates down, some notations on diary entries, and that therefore I was combining work products, typing up from this typescript plus the dates that I had already collected on a previous reading, the original diaries. The combination of those two things is why my typescript is my work product.

THE COURT: I see.

(*Trial Transcript*, pages 79–81)

It is obvious, of course, that if Ehat merely photocopied the typescript, it could be traced back to the typewriters used by Allen and Jessee.

Later in his testimony, Ehat indicated that he had to be true to his word to only take extracts from the portions he already had dates for from the original diaries:

THE WITNESS: Yeah, based on the fact that I had copied down all of the dates I wanted based on the specific research I was doing at the time I read the diaries originally, and I was going to be true to my word about only getting these entries, I just went to those dates, only copied these entries even though there were other things I would have liked. And in the process of typing it out, I didn't have to think about being tempted to get other entries or anything like that; I just simply copied these entries and that was it. (*Ibid.*, page 82)

A. I felt that my access to the diary on the conditions of seeing it for a specific original access to it still controlled my later access to a photocopy of the original. I therefore only took the extracts for which in my original reading I had taken dates down on and I believed that I did take only those extracts and I felt that that was what I should have taken. (*Ibid.*, page 107)

It would appear that Ehat believed that if he only had the date for the entry he wanted, he was free to copy it. According to Jessee's testimony, however, Ehat apparently gave him the impression that he "already had the material" for the dates he was interested in and was only going to "check some dates" in the transcript. (*Trial Transcript*, pages 301, 304, 308)

COMBINED NOTES?

When we issued a subpoena to Noel Reynolds (the man who conducted the investigation for Brigham Young University), he turned over a document to us which may throw important light on the origin of Mr. Ehat's notes.

The memo is apparently a summary of a conversation that Dr. Reynolds had with someone who was well informed on the Ehat situation. Reynolds, however, could not remember who had given him the information. In any case, the memo reads as follows:

1) William Clayton — Journal

– 1st Pres.

– uncirculated

– available for 10 years through Nauvoo Restoration via an Institute teacher

Andy Ehat combined notes

– Nuttall

– Anderson

– Allen

– Church Archives unofficially

without permission made 2 copies for others

Andy is trying to trace it down, but one copy must still be out there

Strack did return his copies

– but we do not know how he got it

∞ one more copy out there

The reader will notice that the memo says that Ehat "combined notes" made by "Nuttall," "Anderson," "Allen" and "Church Archives unofficially." The name "Nuttall" probably refers to L. John Nuttall. At the trial Ehat gave this information about Nuttall:

A. Well, John Nuttall, the secretary of the First Presidency in 1880's went through the William Clayton diaries while they were in possession of the church and made extracts of those diaries regarding the Council of 50. (*Trial Transcript*, page 35)

In *Brigham Young University Studies*, Spring 1980, Mr. Ehat cited some material from these extracts. We do not know whether any of this material appears in *Clayton's Secret Writings Uncovered*.

The reference to "Anderson" certainly is of interest to us. We believe that this refers to Professor Richard L. Anderson of Brigham Young University. The reader will remember that Mr. Ehat testified that with the exception of the 12 pages furnished by Allen all of the pages in the notes which we printed came from his copy of the Allen-Jessee typescript (*Trial Transcript*, pages 33, 34). Ehat also swore under oath that he received nothing from Richard L. Anderson:

Q. Is there any material in that volume that was printed by the Tanners that you received from Richard L. Anderson?

The Tanners on Trial

A. Nothing. Not a single item.

Q. Did in fact Richard L. Anderson give you some materials that he had extracted from the Clayton journals?

A. Yes.

Q. Is it duplicated in that volume?

A. Of the things he gave me?

Q. Yes.

A. No. There aren't anything.

(*Trial Transcript*, pages 439–440)

The reader will notice that even though Mr. Ehat denied that he included any of Anderson's material in the 88 pages of extracts, he does admit that Anderson gave him material. When Mr. Ehat originally learned that the diaries had been transferred to the Church Historical Department, he claimed that he informed Anderson:

Q. You said that you gave a copy of your notes to Richard Anderson. Who is Richard Anderson?

A. Richard Anderson is a professor at Brigham Young University.

.....

Q. And to your knowledge, had he had access to the three volumes of the Clayton Diary that we're concerned with?

A. I was the first one to inform him of their availability. He made inquiries, and from what I understand he also saw the original diaries.

.....

Q. Do you have any idea of what kind of notes, if any, he took either from the typescript or from the journals?

A. No. The — what kind of notes or —

Q. Right. The extent of his notes or the nature of his notes in those journals?

A. He's indicated to me that, you know, he took notes and in the process of talking on occasions I learned that he didn't have entries that I had, and so they weren't, you know — they didn't cover some things I covered, and so I shared with him my notes so his understanding would be complete. (*Deposition of Andrew Ehat*, pages 91–92)

We feel that Mr. Ehat was probably trying to cultivate Dr. Anderson as a source for more extracts from the diaries. Lyndon Cook, who helped Ehat with his book *The Words of Joseph Smith*, commented:

And we wanted to benefit from anyone who had had access to them if we could, and knew Jim Allen had had access. I knew Richard Anderson had had access too. And from all of them, perhaps it would give us a more complete account of Joseph Smith's discourses than just, say, one diary. (*Deposition of Lyndon Cook*, page 18)

Cook says that Anderson was very reluctant to share the Clayton material with him:

Q. (By Mr. Barnard) So did Richard Anderson give you another entry?

A. Richard Anderson was very, very careful as well. And did not let me Xerox his notes, but asked me to tell him days that I was interested in and specific topics I was interested in and he shared with me, somewhat reluctantly, certain notes on certain days. And it wasn't that he couldn't share them with me but he just felt an obligation to be very careful and to copy the material and who took to material and so on.

Q. Okay. You have said earlier that you got the impression that James Allen had an extensive set of notes or typescript because he always had an answer when you asked him. Was Richard Anderson in that same situation when you made inquiries of him?

A. No. Either Richard told me or somehow I knew that Richard told me that his access had been limited; that he just flew through them, timing or something. He wasn't allowed the time he'd like and so he wasn't — Richard doesn't type fast. And he just took brief notes, and I could — for example on an entry that Richard — I think I also asked Don Schmidt if we could use Richard Anderson's notes. And when — anything he shared with us, they were just real brief little notations. And so I knew that whatever he had was not complete.

Q. Okay. With regard to this notation of yours on page 30 of the notes that you got from Andy Ehat, did you copy something from Richard Anderson in addition to making this little note on the margin here?

A. Did I copy something from him?

Q. Right. Or did he give you a copy of the entry for that date?

A. Yes. I believe he did. But he blocked out everything else but that entry on the — when he Xeroxed it, he blocked — he gave me three or five entries and he blocked everything out on the page except that entry. (*Ibid.*, pages 21–23)

When we took Richard L. Anderson's deposition on January 27, 1984, he emphatically denied that any of the notes which he took from the Clayton diaries appeared in our publication *Clayton's Secret Writings Uncovered*:

Q. Those notes that you've taken from those journals, did you ever give Andy Ehat access to those notes?

A. Is that a relevant question?

MR. MADSEN: I don't think so but I'm not your counsel.

The Tanners on Trial

MISS PARK: Go ahead and answer and explain the circumstances.

.....

MR. BARNARD: Okay. My question that I asked you can simply be answered yes or no. Have you ever let Andy Ehat see your notes?

A. I don't think that it can be answered yes or no. That's why I personally don't like the, you know, the question because the question to me of your case is whether you've copied the Ehat—, whether the Tanners have copied the Ehat notes. My notes are not in question.

Q. Well, yesterday—?

A. Any research notes are my own work product and nobody is even concerned with that in the case, I assume.

Q. We are and let me tell you why. Noel Reynolds, we talked to him two days ago, he brought with him a note in his investigation of the Ehat thing. That note suggest that Andy Ehat combined notes and then a notation, "Nuttall, Anderson, Allen, Church Archives unofficially." And we're trying to find out if Andy Ehat's notes that you brought with you are, in fact, some sort of a combination of notes from other people or exactly what went on and there is an indication here that somehow Andy Ehat combined notes and there is the name Anderson.

MR. MADSEN: . . . I think I want to register an objection to his further asking this witness to indicate either where he got those notes that he now has of his own or with whom he shared them. That is beyond the scope of this trial, in my view. If you want to ask this particular witness what Ehat did by way of amalgamation, this witness is not competent to answer that question . . . I further want the record to show that Ehat himself explicitly testified where he got those notes, when and from what source, and that has been corroborated by Don Schmidt. I just want that in the record.

MR. BARNARD: Now that we've all talked and recorded this stuff I still get to go back and ask you those questions.

MISS PARK: Mr. Barnard, let me interpose and say, would it be better if we asked it this way: At the time you received the notes, Dr. Anderson, from Ehat, had he at any time, to your knowledge, had knowledge of any extract you made from the Tanner (*sic.*) diary? Could the question be asked that way? Clayton diary.

MR. BARNARD: Sure.

A. Unqualified no. He had no access to any of my notes at the time he gave me the material that is in that green notebook.

MR. MADSEN: Or thereafter?

A. Well, that is the question she's framing.

MR. BARNARD: Well, obviously, Mr. Madsen and I are both interested in thereafter. After he gave you those notes did he then have access to some of your research materials?

MISS PARK: I would ask the relevance of that. . . . what relevance does anything that happened afterward have to the source of Mr. Ehat's notes?

MR. BARNARD: Well, it appears from that that somebody suggested that somehow Andy Ehat had combined notes. If, in fact, he combined notes sometime after this then we can find that out and eliminate the speculation as to what this means. So if, in fact, he had access to your notes after he gave you this, that might give us an explanation as to what that means.

A. Well, if you're asking me whether any of my notes appeared in the Tanner publication, absolutely not.

Q. All right. You've answered that. I'm trying to find out what that notation meant that Noel Reynolds brought us.

A. I don't know anything about that. I don't even know the process that Andy used to get the green notebook. . . . I have never asked Ehat where he got that material and I know that he didn't get it from me because I had never shared a thing with him until he gave me that notebook.

MISS PARK: I think you're trying to get him to explain Dr. Reynolds' notations.

MR. BARNARD: No, I'm trying to ask him whether or not he shared his research notes with Andy Ehat.

MISS PARK: And you've never yet established why it is relevant and I'll challenge you on that ground.

MR. BARNARD: Are you going to instruct him not to answer?

MISS PARK: Yes.

MR. BARNARD: Dr. Anderson, . . . My inquiry is, as I say as to whether or not you shared your research notes with him and whether or not he was allowed to make extracts from your research notes. If I was to place such a question before you, would you answer it?

MISS PARK: I instruct him to say no.

A. No.

MR. BARNARD: Do you understand the question?

A. Yes.

Q. If I were to ask you if you shared those research notes with anybody else, with James Allen, with Lyndon Cook or anyone else, during that same period of time—.

.....

MISS PARK: Again, I instruct him not to answer that. . . .

MR. BARNARD: And Dr. Anderson, I assume you're going to take the advice of your Counsel.

A. Yes.

(*Deposition of Richard L. Anderson, pages 14–20*)

1 as to whether or not you shared your research notes
2 with him and whether or not he was allowed to make
3 extracts from your research notes. If I was to place
4 such a question before you, would you answer it?

5 MISS PARK: I instruct him to say no.

6 A No.

7 MR. BARNARD: Do you understand the question?

8 A Yes.

9 Q If I were to ask you if you shared those
10 research notes with anybody else, with James Allen,
11 with Lyndon Cook or anyone else, during that same period
12 of time--.

13 MISS PARK: What time period, Counsel?

14 MR. BARNARD: After Andy Ehat gave you that
15 green notebook sometime in 1981.

16 MISS PARK: Again, I instruct him not to
17 answer that. I object on the grounds of relevancy.
18 I think we're dealing with a time period--, there is
19 the identity between the 1981 notes of Ehat and the
20 notes that the Tanners published. Anything that happened
21 beyond that period seems to be irrelevant.

22 MR. BARNARD: And Dr. Anderson, I assume
23 you're going to take the advice of your Counsel.

24 A Yes.

25 Q Okay. Apparently you also do have some

20

A photograph from the *Deposition of Richard Anderson*. Dr. Anderson was instructed not to answer whether he shared his extracts from the Clayton Diaries with Mr. Ehat.

The Tanners on Trial

Although Dr. Anderson was “absolutely” certain that none of “my notes appeared in the Tanner publication” when he gave his deposition, he was no longer sure of that matter when the case came to trial. He conceded, in fact, that he had given Ehat a “transcript” of an address that may have found its way into *Clayton’s Secret Writings Uncovered*:

Q. Have you given Andrew Ehat copies of your notes and your research and historical documents that you have digested or copied?

A. I think all historians share transcripts if there is — if there is relevance, but I think there is a very limited sharing. . . .

Q. Okay. My question —

A. Nobody is welcome to come in and copy all my files or Dean Jessee’s 50 million documents, wherever they are.

Q. My question to you, though, is, have you shared historical documents in your notes and research on certain topics with Andrew Ehat?

A. Yes, I answered that.

.

Q. All right. What have you shared with him?

A. What have I shared? I specifically remember when he was doing the book that I think was introduced into evidence yesterday, *The Words of Joseph Smith*, which is a collection of the discourses in Nauvoo of Joseph Smith, and I knew that he had by his work of the Historical Department approximately 95 percent of the discourses of Joseph Smith, and he said, do you have any materials from the Clayton journal that would bear on Joseph Smith’s discourses, and there is one discourse that is in its responsible form only in the Clayton journal to my knowledge, the last discourse of Joseph to the Legion in June of 1844, and I said, Andy I will be glad to give you the transcript because I think that would — your book would be incomplete without it. And I considered that I was participating in a significant scholarly endeavor by contributing that.

.

Q. Okay. Does that quotation from that day that you gave Mr. Ehat appear in what the Tanners published?

A. Yes, I assume it does. I haven’t really looked. I am not even sure. You better strike my answer because I don’t know.

Q. Okay. But that appears in the Ehat book?

A. It appears in *The Words of Joseph Smith*. (*Trial Transcript*, pages 340–341)

The “last discourse of Joseph to the Legion” (June 18, 1844) is found in *The Words of Joseph Smith*, pages 383–384. It appears in two different places in the notes we published as *Clayton’s Secret Writings Uncovered*. The first copy appears on pages 59–60 and the second

is found on page 61. The copy on pages 59–60 has been identified in Mr. Ehat’s *Answers to Interrogatories* (page 2) as material provided by James B. Allen. The copy on page 61 must have come from Richard L. Anderson, because it is not as complete as the one which Allen furnished. Dr. Anderson claimed that after he gave the discourse to Andrew Ehat, Ehat obtained “fuller transcripts” from James Allen:

Q. Did you tell Andrew Ehat when you gave him that quote for that particular date that he had to cite you as the source?

A. No. But we would have possibly talked about that afterward. I understand in sequence that he went to Jim Allen and was able to get fuller transcripts because Jim had had fuller notes.

.

Q. What else have you given Andrew Ehat besides that speech of 1844?

A. Other material from the Clayton notes, such as Joseph Smith letter material. (*Trial Transcript*, pages 342–343)

The evidence, then, seems to indicate that page 61 of *Clayton’s Secret Writings Uncovered* actually came from Richard L. Anderson’s notes. The typewriter used to type this page appears to have also been used for more than twenty pages of material which are scattered throughout Ehat’s notes. These pages are double-spaced like Allen’s pages, whereas Ehat says that “the majority of mine is single-spaced” (*Deposition of Andrew Ehat*, page 93). They do, however, resemble the style of typewriter used by Ehat in making corrections for his deposition. In any case, we cannot help but wonder if all of these pages were typed or photocopied from Richard L. Anderson’s notes. Dr. Anderson admitted that he had about 45 pages of notes:

Q. Approximately how many pages of notes did you thereby compile?

A. I would estimate 45 pages. (*Trial Transcript*, page 323)

We will never get to the bottom of this matter because Richard L. Anderson refused to obey our subpoena to turn over any notes from the Clayton diaries which he had in his possession:

Q. Okay. Apparently you also have some personal notes and extracts you’ve taken from the Clayton Diaries.

A. Well, yes, I guess that is obvious.

Q. Okay. We requested that you bring thsoe [*sic*] pursuant to that subpoena.

(18 June 1844)

. . . . After Phelps got through Genl. J. Smith addressed the multitude. He briefly explained the object of the mob and showed that they waged a war of extermination upon us because of our religion. He called upon all the volunteers who felt to support the constitution from the Rocky Mountains

59

(18 June 1844) cont.)

to the Atlantic Ocean to come with their arms, ammunition & defend the constitution. He called upon them as the Lieutenant General of the N. L. and Illinois Militia in the name of the Constitution of the U.S. the people of the State of Ill. and the citizens of Nauvoo. He called upon the Citizens to defend the lives of their wives & children, fathers and mothers, brothers & sisters from being murdered by the mob. He urged them in strong terms not to shed innocent blood.--not to act in the least on the offensive but invariably in the defensive and if we die--die like men of God and secure a glorious resurrection. He concluded by invoking the Great God to bless the people.--

. . . . In the above address he advised all to arm themselves those who had no rifles, get swords, scythe and make weapons of some kind He informed them that he had 5000 Elders minute men who would come with volunteers as soon as he would inform them. He said there were many from Iowa waiting to come when requested. ~~xxxxxx~~

18 June 1844 (Tuesday Noon). Front of Mansion House.

William Clayton Journal

This A.M. the Legion is ordered to parade.... At 11 he rode to the parade ground & after staying a short season the whole legion marched down to the Mansion Judge Phelps there read the preamble and resolutions of the mob in which they threaten extermination to the whole Church in Nauvoo. after Phelps got through Gen. J. Smith addressed the multitude He briefly explained the object of the mob and showed that they waged a war of extermination upon us because of our religion. He called upon all the volunteers who felt to support the constitution from the Rocky Mountains to the Atlantic Ocean to come with their arms, ammunition & provisions to defend us from the mob & defend the constitution. He called upon them as the Lieutenant General of the N.L. and Illinois Militia in the name of the Constitution of the U.S. the people of the State of Ill. and the citizens of Nauvoo He called upon the citizens to defend the lives of their wives & children. for their [fathers?] and mothers, brothers & sisters, from being murdered by the mob. He urged them in strong terms not to shed innocent blood--not to act in the least on the offensive but invariable in the defensive and if we die--die like men of God and secure a glorious resurrection. He concluded by invoking the Great God to bless the people.--

A photographic comparison of the bottom of page 59 and page 60 with page 61 of *Clayton's Secret Writings Uncovered*. The reader will note that pages 59-60 contain the same material as page 61 (the hands point to where the duplication begins). Pages 59 and 60, which contain Joseph Smith's address to the Nauvoo Legion, were given to Mr. Ehat by James B. Allen. Page 61 fits the description of the material Richard Anderson says he gave to Ehat.

MR. MADSEN: We would have objected to them being furnished not being within the scope of the order previously entered by Judge Christiansen.

MR. BARNARD: Did you realize when you received that subpoena that we were asking for you to bring those notes?

A. I think one of the categories seemed to cover it.

Q. And why did you not bring those today?

A. Because I don't think my private notes are relevant to this case.

(Deposition of Richard L. Anderson, pages 20–21)

If we had known that Professor Anderson was going to modify his testimony about when he gave Ehat material from the Clayton diaries, we would have tried to force him to comply with the subpoena. As it turned out, however, we didn't learn about this until the trial was almost over, and by then it was too late.

EHAT IN UNDERGROUND

As we indicated earlier, Mr. Ehat's lawsuit brought out material which will undoubtedly tend to damage his reputation as far as the Mormon Church is concerned. We have already dealt with his cover-up and false statements with regard to his use of the Allen-Jessee typescript. At this point we want to discuss his role in the Mormon Underground.

Since the Mormon Church has tried very hard to keep many of its documents secret, a person can easily understand why Ehat participated in the Underground. Many prominent Mormon scholars have become involved in the Underground because they feel that the Church's policy concerning documents is too restrictive. A number of the documents which we have printed have leaked out through Mormon scholars. Scott Faulring gave this revealing testimony concerning the Mormon Underground and what was going on at the Mormon Church's Brigham Young University when he attended there:

A. . . . There was a rather large group of faculty, students, even non-students, that were kind of trading—kind of like baseball-card-type trading—xerox copies of documents, typescripts, things like that, dealing with Mormon history.

(Deposition of Scott Faulring, page 11)

Q. (By Mr. Barnard) You have mentioned or used the word "underground" at BYU. What do you mean by that?

A. It's an unorganized group of people that have similar interests in Mormon history documents and things relating to Mormon history. They xerox—you know, it's just like trading baseball cards. It's almost a hobby.

There are those that are participating in it that are students. There are professors that are doing research on things that can't get materials other ways. So they have students or people that work for them, research assistants, and have—I won't say they have clearance, but they know people who have something that they want. And sometimes it goes for a trade and sometimes it's just, "Can I copy this," and the person just lends it to you and you make a copy.

Q. And this underground or this exchange, what documents were being exchanged?

A. There's thousands of documents. Anything that—if it's a holograph, if it's a handwritten type thing, or something out of the archives in Salt Lake, that has more of an interest than something that you can go to the Utah State Historical Society and get a copy of, because it's an open policy there.

If it's something from the Church—to use an example, something out of the Joseph Smith collection—you can't go up there and look at a Joseph Smith letter that they have a copy of, and get a copy of it. They won't let you get a copy. You can write it down in longhand or type it out, but they won't let you xerox it. And, you know, especially those that are real interested in history would rather have a xerox copy of a holograph, or a handwritten copy, than having a typescript of it. But if they can't get the handwritten copy, they will go for the typescript. *(Ibid., pages 25–26)*

Q. Are you aware of any professors at BYU that have dealt with this underground or this distribution of documents that you talked about?

A. Well, I know a few, but there are more on the receiving end. They don't really contribute, because of their position. Because they work at the University, they are happy to receive something but—well, some—I have had professors approach me and ask me if I knew something about a certain thing or to keep an ear out for it. But most of them, they're in a position where they can't really go out and deal with it. But most are happy to receive things.

Q. Did you know of any professors who have been distributing documents down there?

A. Again, I'm not quite sure how you define "distributing."

I have had professors give me things. Say, "Here, would you like to xerox this?"

I don't know if you'd call that "distributing."

Q. Which professors and what kind of things?

A. I would rather not mention. That's kind of personal.

Q. What kind of things?

A. They would be things that they had legitimately xeroxed through the archives in Salt Lake in a better

The Tanners on Trial

day when things like that were allowed to be xeroxed. Materials out of the Joseph Smith Collection and things like that.

Q. Do you know why this underground or this distribution system that you talked about exists or started?

.....

A. I'm not sure why it was created. Like I say, when I first got to BYU, I didn't even know it was there. And then I started meeting more and more people that were involved and it had probably been going on before then. But it seems like from about '79 to '81, things were really in high gear . . . if you were to ask most of the people that were participating what their major reason was that they would trade things like that, it was because Salt Lake was sitting on things up there. . . .

They would allow professors that worked in the Religion Department to copy something up there in the archives of the Church, but they wouldn't let somebody else copy it. It was like an exclusive group.

I don't know if it was in protest or rebellion or what, or if it was just that those people had a reputation, and we didn't. . . .

And then when Grandpa—Ernest Strack—when he started his bookstore and started a kind of clearinghouse of these things, people were contributing and receiving from Ernest; then things started really going into full swing. I never knew what was going on all the time.

Q. And you said that Salt Lake was restrictive?

A. Yes, the Church Archives.

Q. Are you aware of any consistent policy as to what documents are restricted and what documents aren't?

A. It was referred to as a "dart policy." They kind of just throw a dart and whatever collection it is that week, it's under restriction. I mean, if a collection gets enough attention—if something B. H. Roberts wrote a hundred years ago starts getting attention, immediately they lock it away . . . I don't know who makes the decisions, but it's a one-way communication. They communicate their policy to the users. The users don't really have any input on what materials they can see.

Things were a lot freer when Leonard Arrington—when the professional historians were in there working. There was kind of a transition in organization and the professional historians got moved out and things started getting more restrictive. They started getting very cautious.

I think it was kind of a reaction to what the Tanners were doing and the underground activity; but, like I say, I wasn't there around the early to mid-'70's to see what was going on.

.....

Q. Are you aware of any restrictions placed on George Q. Cannon's diaries?

A. The diaries for the 1880's and maybe even the 1890's are rumored to be in the First Presidency's vault. A person who—I am trying to think, was it Andy or someone else—told me they had gotten a peek into them and they dealt with some of the financial dealings of the Church, and manifesto issue that was going on at that time, but that they had been restricted.

It's one of those things that a lot of historians have talked about, if they could have one wish, they would want to see the George Q. Cannon journals. (*Deposition of Scott Faulring*, pages 40–45)

Kent Walgren, who gave testimony at the trial, said that "the reality of the situation is that there are copies of this stuff out floating around and it's just a matter of waiting long enough and one will come into your lap" (*Trial Transcript*, page 421).

Noel Reynolds, who investigated the Ehat matter for Brigham Young University, claimed that this was only "a very minor" part of his investigation:

A. The Ehat incident was a very minor thing. We had, at the university, concern about the integrity of our own collection in the University Library and this was, this concern arose at the same time as the incident with Ehat's manuscripts and I had been asked by possibly, I think it was the president, I'm not sure at this point, but I think it was the president of the university, to look into that matter and to make a recommendation to him about the future of that library collection and how it should be protected. The report that you've asked about is a report on that subject and this early draft of the report from which I've taken this excerpt does mention the Ehat incident. The final report did not. I left that out completely because it wasn't, the incident with Ehat concerned documents from the Church Archives, not from the BYU Library. And I just found it to be peripheral and not that important in the final version.

.....

Q. What was the situation that gave rise to the need for your report with regard to the BYU collections?

MR. MADSEN: I'm not sure, for the record, I'm going to register an objection that this is peripheral of any issue in this lawsuit . . .

A. Well, that's my response. It gets into other things that I don't think are relevant to this.

.....

Q. Okay. One of the things though that relates to the Tanners and Ehat matter is, well, I think there is some reference in the 7th East Press article about the Mormon Underground and distribution network of restricted documents. Did your investigation and your report and recommendation delve into that at all?

The Tanners on Trial

A. That underground would have been a concern. We would not want materials in the University Archives to show up in the Underground, as it were.

Q. Okay.

A. That's why we were considering giving broader public access to the materials to depreciate their value for the Underground.

Q. Did you ever receive any information from anybody that Andrew Ehat was a participant in this Mormon Underground distribution of restricted documents?

A. I can't be sure. Anything I would have heard would have been hearsay. I didn't personally pursue any of those kinds of allegations either about Ehat or others.

Q. In your investigation what generally did you find out about this Mormon Underground and distribution of documents?

A. Seems to me that goes—, well, I think I could say generally I discovered there was an Underground and that it was not something I was interested in finding out about.

.....

Q. And what did each of those people tell you about that circulation of documents?

A. You've seen how much trouble I have reconstructing my notes. It is a little embarrassing not to have a better memory but, I mean, I came away with a view that there was a large underground and it was evasive but that is, at this point I could say this: From my memory I would be able to reconstruct stories about individuals that stole particular things or sold particular things. (*Deposition of Noel Reynolds*, pages 24–29)

Q. Okay. And without further broadening the inquiry about the Underground, nonetheless, with regard to that report you made, an allusion to making more broad the public access to your library archives as a means of diffusing the value of such items to an Underground, was that, in effect the thrust of your recommendation?

A. Yes. (*Ibid.*, pages 55–56)

In the "Defendants' Trial Brief," Brian Barnard argued:

15. Within the Utah community of historical scholars and historians, both professional and amateur studying the early history of the LDS Church there is a great deal of interchange and exchange of historical documents and research. Much of that interchange and exchange is done privately and quietly and often clandestinely between scholars, because many such historical documents are not accessible to the public or equally to all scholars and historians. . . .

16. The plaintiff has participated in the interchange and exchange of historical documents within the local community and has acquired copies of many restricted historical documents that are not in general public circulation and are not available to most historians. Some of the documents that the plaintiff has in his possession are [have?] been surreptitiously copied and distributed against the wishes of the custodians of the original documents. (pages 8–9)

The plaintiff and his evidence will show that such an interchange is supposed to be restricted to those persons whom the plaintiff and his co-horts considered to be "responsible" scholars. But all of the scholars involved in such exchanges know that there is no control over a document once shared (other than the parties' own code) and documents initially shared with another "responsible" scholar often find their way into wide distribution beyond the initial select few.

The plaintiff has in his possession many documents that are not [in] general public circulation; through this document interchange the plaintiff has acquired copies of historical documents that have been surreptitiously copied and distributed.

The very typescript of the Wm Clayton Journals that Ehat copied his extracts from is a prime example of the clandestine operations of this hidden and secret document collection and exchange program. Dean Jessee and James B. Allen as employees of the LDS Church Historical Department gained access to the Wm Clayton Journals, and without seeking specific permission and without informing their superiors, they made a complete verbatim copy of those journals. . . .

Under the plaintiff's theory of this case the LDS Church Historical Department could take action against Dean Jessee and James B. Allen for their conduct as unfair competition. However, it appears that such clandestine conduct and the hidden interchange of documents is common place amongst local scholars and historians of the LDS Church. Such conduct is not the fraud, the illegal, nor the malicious conduct contemplated in the economic tort of "unfair competition"; it is rather the accepted conduct within this scholarly community.

Ehat shared his Extracts with a few "responsible" scholars; other "responsible" scholars Richard VanWagoner and Kent Walgren acquired copies of the Extracts and shared them with Jerald Tanner and Sandra Tanner as "responsible" scholars. The Tanners then felt that based upon the importance of these documents that they should be shared more broadly with other scholars. (*Ibid.*, pages 30–32)

At the trial, Mr. Ehat admitted that he had an extensive collection of LDS material:

The Tanners on Trial

Q. What's the nature of your collection?

A. It's a collection primarily of early LDS manuscripts and documents and publications.

Q. Such things as typescripts of handwritten journals?

A. Handwritten extracts, typewritten extracts, photocopies of polygraphs [holographs?], photocopies of typescripts.

Q. Microfilm copies of journals?

A. Yes.

Q. How extensive is your collection?

THE WITNESS: What do you mean by extensive?

BY MR. BARNARD:

Q. Did it fill a room, does it fill a file cabinet?

A. Oh, of actual manuscript material, two filing cabinets and of five drawers each and a legal size box.

Q. How many different manuscripts or documents do you have in that collection? Thousands?

A. Oh, yeah.

Q. And is there any general method by which you have collected those documents or manuscripts?

A. Doing research and having shared notes with people.

Q. What do you mean by shared notes with people?

A. Well, people have shared notes with me of their research. (*Trial Transcript*, pages 61–62)

Lyndon Cook made the following statements on pages 55–56 of his deposition:

Q. Are you aware of Andy Ehat — well, I will back up. Are you aware of a group of people referred to as the Mormon Underground that circulates historical booklets?

A. I don't know of any organization with that title.

Q. Are you aware of people that fall into that category that circulates historical documents?

A. I understand there are those people.

Q. Do you know whether or not Ehat has been active in trading historical document[s] with other people?

A. No, I do not. I assume perhaps at some point anyone who has — there have been those who have come to my office, a student or faculty member — and I don't know if I'd call them underground but, they have a study. They may have information that is historical research. I am certainly willing to ask them if I may have a copy of it, perhaps what we all do in the academic world, is to share information.

.....

Q. Are you aware of Ehat doing similar things with others, distributing other copies of document similar to what he did with his notes of the Clayton journals, to you and to Anderson?

A. I wouldn't call it distributing, but certainly Andy as well as all of us, would share information for historical purposes.

Q. And have you received any other historical document from Ehat other than these notes?

A. I would think so, yes.

Q. Do you know if Ehat has given other people copies of historical document?

A. I don't know what he has given other people, really. I never asked him those things.

Q. I think you said earlier that you assumed he would do things like that.

A. I assume he would share, I would share. Certainly that is what we would like to do, is share so we can further our research.

At the time our deposition was taken, Mr. Ehat encouraged his lawyer to point his finger at us and accuse us of printing "stolen documents." We feel that this is very hypocritical because the evidence shows that Ehat himself was part of the Underground. While professing to be a faithful Mormon historian, Andrew Ehat was involved in the dissemination of underground documents. Mr. Ehat was not only a participant in the Underground, but was receiving materials from some of the worst enemies of the Church—i.e., the Mormon "Fundamentalists." The Fundamentalists believe in the present-day practice of polygamy and in the Adam-God doctrine. They are excommunicated from the Mormon Church when they are discovered. Two Fundamentalists who admit to having dealings with Ehat are Robert Black and Fred Collier. Both of these men have been excommunicated, although only Collier actually practices polygamy. In an unpublished paper, Richard Steven Marshall reported that, "Robert Black was converted to the Church of the Firstborn by Fred C. Collier" ("The New Mormon History," A Senior Honors Project Summary, University of Utah, May 1, 1977, page 79). We first became aware of Ehat's participation in the Underground when we questioned Scott Faulring over the phone. We subpoenaed Mr. Faulring and on December 22, 1983, we took his deposition. On page 114 of this deposition, Faulring said that after talking to us he called Andrew Ehat and informed him we had asked about receiving documents from him. According to Faulring, Ehat "got mad at me when I told him that Gerald had asked if I had ever received any material from Andy, and I told him 'Yeah, I had gotten the microfilms.'" "And he said, 'You didn't have to tell him that.'" (*Deposition of Scott Faulring*, page 114)

The Tanners on Trial

On pages 28–31 of his deposition, Faulring testified:

Q. Have you ever acquired any copies of documents of this underground nature from Andrew Ehat?

A. Yes. When we were in that class together at BYU, I had some copies of Wilford Woodruff’s diary. So I showed them to Andy one day and asked if this was Wilford Woodruff’s handwriting.

And he said, “No, it was some other general authority, but it was Wilford Woodruff’s diary.”

And I said, “Are you sure?”

And he said, “Yes, I have got the microfilm of it.”

So he . . . allowed me to borrow his copy of the microfilm—of the journal.

Q. Of which journal?

A. Of Wilford Woodruff’s. Two reels, I’m almost sure. I can’t remember if I borrowed both reels or just one.

Q. Did he tell you where he had acquired that microfilm?

A. No, and I didn’t really ask. In the underground, you rarely ask, because, one of two things. The person’s not going to tell you because it’s a secret—everybody’s got a secret—or they got it from somebody who had stolen it or received it dishonestly.

Q. Do you know where the originals of those journals are?

A. The originals—from what I know, the Church Archives holds the originals.

Q. Do you know if they’re restricted?

A. Yes. I spent a year working for a publisher here in Salt Lake that the family had assigned the rights to publish them, and in trying to do my job to make a transcription of the journals, I was restricted from seeing them in Salt Lake.

Then—I can’t remember if I got permission from Don Schmidt—The initial people up there at the archives, you know, when you fill out your slip and hand it to them, they wouldn’t let me look at them. They said I had to see Don Schmidt, so I had an interview with Don Schmidt.

And I think, but I’m not sure, he allowed me to look at them once or twice.

I did most of my work at the BYU archives at that time—not BYU archives—well, I did my work at Special Collections at BYU, because they had a copy of the film . . .

I had made a copy from when Andy had lent me his film. I had made a copy of his copy, so I already had a copy. But it was more convenient to work with BYU’s copy, because even though it wasn’t as good as quality, I couldn’t bring my microfilm into the library and take it out or I might be accused of stealing somebody’s copy or something.

Q. Did you acquire any other documents or microfilm from Andy Ehat?

A. I am fairly certain that he also lent me a copy of the Heber C. Kimball journals on microfilm.

Q. When would that have been?

A. Sometime in the spring of 1981. I can’t remember the exact month. February or March.

.....

Q. Have you made copies of those microfilms?

A. Of which?

Q. The ones you got from Andrew Ehat?

A. Yes, I have.

Q. Have you made additional copies?

A. Yes, I have.

On pages 50–52 of the same deposition we find the following:

Q. . . . Did you ever talk to Andy Ehat about his participation in the distribution of documents in this underground?

A. On one occasion—or on several occasions when I was pursuing this Joseph Smith Collections, a better copy of it, he mentioned that Fred Collier, who was a fundamentalist, a polygamist, had a fairly good copy.

And so I asked Andy if he would contact him or give me his number, so I could see if I could borrow the film and make a copy of it.

And I am sure I asked him that on several occasions, and he was kind of reluctant, and then finally he gave me Fred Collier’s number. And rumor had it—and this is only rumor—but the gossip mill down there said that Andy had received documents from Fred Collier and another person who was a friend of Fred Collier—Robert Black—had some sort of exchange of documents.

Q. Did Andrew Ehat ever tell you that he got documents or microfilms from Robert Black?

A. On the Wilford Woodruff and Heber C. Kimball—and there’s another film, the revelations Collection—I am almost sure Andy lent it to me, but I can’t say for sure. And one of these four or five microfilms, he may have said he had gotten it from one of those guys. But I can’t really say for sure that he said that, because, like I say, most of the time, I never asked.

I figured Andy wasn’t going to steal it, so I wasn’t going to pry into it, because most people don’t want to tell you.

Q. What microfilms was it that he let you copy?

A. He hadn’t let me. He just lent me the films and I, without his knowledge, copied them. Well, I think he knew. The two reels of the Wilford Woodruff journal and the Heber C. Kimball, are three definite films, and the Revelations Collection, which are two reels. And Andy may have those all on one. And I am almost sure he lent me that one.

The Tanners on Trial

Scott Faulring went on to tell that material Ehat had typed showed up in material Ernest Strack received from Robert Black: “Ernest Strack, who was amassing all these materials, had received a lot of material from Robert Black. And in this material that he got from Robert Black was stuff that Andy had claimed he had typed typescripts of things” (Ibid., page 62). With Scott Faulring’s statements in mind, we approached Robert Black. We found that he was very open and honest about the whole affair. He said that the microfilms of the Wilford Woodruff Journals and the Joseph Smith Revelations Collection were copied from films located in the Brigham Young University library. Without the permission of the library, these films were taken to a microfilm company many miles from Brigham Young University, duplicated and returned before anyone knew they were gone.

Mr. Black also told of Andrew Ehat’s dealings with the Mormon Underground. He claimed that Ehat used “intermediaries” to shield his activities because Collier and himself were known as apostates from the Church. Mr. Black admitted that he was at one time associated with “the Lebaron Movement,” although he doesn’t have an alliance with any fundamentalist group at the present time. He said that he once printed under the name of “The Mormon Underground Press.” Mr. Black identified Mr. Ehat’s “intermediaries” by name. We have done some research concerning these individuals and their involvement in the Underground. According to Black, there were two men and a woman who had contact with him. Two of these individuals have worked for Brigham Young University professors. In any case, Robert Black said he traded the Wilford Woodruff Journals and the Joseph Smith’s Revelations Collection and possibly the Heber C. Kimball diaries for a copy of some material taken from the Nauvoo Temple records. Black claimed that on another occasion Ehat wanted a copy of a Second Anointing Ceremony he had and offered a copy of the Nauvoo Record of Anointings in exchange. As it turned out, a 70’s Record Book from the Nauvoo period was sent instead. Black would not take this, however, because he was only interested in the Nauvoo Record of Anointings. Nevertheless, he allowed the intermediary to take the Second Anointing Ceremony for Mr. Ehat. Black maintained that this intermediary had also been used in dealings between Andrew Ehat and Fred Collier and that Mr. Collier got “a lot of things” from Ehat. Black received a great deal of “second anointing” material from Collier, and later when the intermediary came to Black’s house, he pointed out the things that came from Ehat. Black also felt that Mr. Ehat had dealt directly with Fred Collier.

We asked Mr. Black to testify at the trial, but because of the lack of time and the Judge’s growing impatience with matters not relating directly to the Clayton notes, we were unable to call him. A very strange thing happened, however; Fred Collier, who has always been opposed to our work, showed up in the audience. This apparently caused some consternation among some of the Mormon scholars who were present. From what we were able to learn, Ehat was not the only one who had been secretly dealing with Collier. At least one of the so-called “reliable” Mormon scholars who testified against us was concerned that Collier was going to testify on our behalf.

At any rate, we can only imagine what was going through Andrew Ehat’s mind when he went to the witness stand and saw Fred Collier sitting in the audience. He must have had a vivid recollection of his attempt to conceal his use of Allen’s typescript and how we eventually found out what really happened. This was really the moment of truth for Mr. Ehat, and when he was asked how he had obtained the microfilm of the Wilford Woodruff Journals, he replied that he had received it from Fred Collier:

Q. Now, with regard to the collection that you have that you described as filling a couple file cabinets of historical documents, do you have in that collection copies of any historical documents that are restricted or held in libraries to which the general public or most historians don’t have access?

A. Yes.

Q. And what are the nature of those documents that you have? Do you have microfilm copies?

A. Yes.

MR. MADSEN: Your Honor, what is the relevance of this? We are not talking about microfilm or documents being printed.

THE COURT: Is that an objection, Mr. Madsen?

MR. MADSEN: It’s an objection as to relevance, your Honor.

THE COURT: Overruled. He may answer.

BY MR. BARNARD:

Q. Do you have microfilm copies of the Wilford Woodruff journal?

A. Yes.

Q. Is that a restricted document?

A. No.

Q. Do you have copies of the Joseph Smith revelation collection?

A. Yes.

Q. Is that a restricted document?

A. No.

Q. Where is the original of those documents, if you know?

A. Would you explain what you mean by original.

Q. The original handwritten copy of the Wilford Woodruff journal, do you know where it is?

A. Yes.

The Tanners on Trial

- 1 A. Would you explain what you mean by original.
- 2 Q. The original handwritten copy of the Wilford Woodruff
- 3 journal, do you know where it is?
- 4 A. Yes.
- 5 Q. Where?
- 6 A. Church archives.
- 7 Q. If an historian was to go to church archives today
- 8 and say, may I see the original copy of the Wilford Woodruff
- 9 journals, would they be granted access?
- 10 A. Depending on the nature of their request.
- 11 Q. You have a complete microfilm copy of that?
- 12 A. That's correct.
- 13 Q. Where did you acquire that?
- 14 A. I obtained a copy from -- of the Woodruff from Fred
- 15 Collier.
- 16 Q. Okay. Who is Fred Collier?
- 17 A. He's an independent publisher and researcher.
- 18 Q. And is he involved in the dissemination of historical
- 19 documents regarding the LDS church?
- 20 A. He possesses documents of the LDS church.
- 21 Q. Did he tell you how he got that microfilm copy of the
- 22 Wilford Woodruff journal?
- 23 A. No.
- 24 Q. Did you ask?
- 25 A. Yes.

71

A photograph from the transcript of the trial. Mr. Ehat admitted that he obtained a copy of the Wilford Woodruff journals through the Underground.

The Tanners on Trial

- Q.** Where?
A. Church archives.
Q. If an historian was to go to church archives today and say, may I see the original copy of the Wilford Woodruff journals, would they be granted access?
A. Depending on the nature of their request.
Q. You have a complete microfilm copy of that?
A. That's correct.
Q. Where did you acquire that?
A. I obtained a copy from — of the Woodruff from Fred Collier.
Q. Okay. Who is Fred Collier?
A. He's an independent publisher and researcher.
Q. And is he involved in the dissemination of historical documents regarding the LDS church?
A. He possesses documents of the LDS church.
Q. Did he tell you how he got that microfilm copy of the Wilford Woodruff journal?
A. No.
Q. Did you ask?
A. Yes.
Q. What did he say in response?
A. He said he wouldn't like to say.
Q. I'm sorry?
A. He said he wouldn't like to say.
Q. Okay. And did you pursue his source beyond that?
A. Yes.
Q. And what did you find out his source was?
A. He still wouldn't say.
(*Trial Transcript*, page 69–72)

When Ehat was questioned about the film of the Joseph Smith Revelations Collection, he responded that he had also obtained it from Fred Collier

- Q.** Do you have copies of any other restricted documents?
A. Yes.
Q. What are they?
A. What are they?
Q. Yes.
A. Oh, I don't know that I can enumerate all of them because I had to know — access to enormous number of restricted access documents.
Q. Do you have a copy of a document known as Joseph Smith revelation collection?
A. Yes, but that's not restricted.
Q. Where did you acquire that?
A. From Fred.
Q. Okay. Where is the original housed?
A. Original is housed in the church archives.
Q. Why didn't you go to church archives and get a copy of them instead of dealing with Fred Collier?
A. I didn't deal with Fred Collier.
Q. How did you get it?
A. He offered it to me.

- Q.** What other documents have you received from Fred Collier?
A. I believe that's about it. (*Ibid.*, pages 72–73)

Mr. Ehat confessed that he had also obtained a copy of the microfilm of the Heber C. Kimball Journals. He claimed, however, that it came from a noted Mormon historian rather than Robert Black. He also maintained that it was not a restricted document:

- Q.** When did you acquire that?
A. 1973.
Q. And in 1973 was that journal a restricted document?
A. I don't think it was processed in the church archives at the time so it wouldn't have been in a restricted access mode.
Q. Was the original of that in 1973 in the possession of Church Historical Department?
A. Yes. (*Ibid.*, pages 75–76)

When Mr. Ehat talks of the films not being restricted, he apparently means that trusted scholars could see them—not that the Church would allow copies to be made. On pages 105–106 of the *Trial Transcript*, we find the following:

- Q.** With regard to the Wilford Woodruff diary, I think you stated that that which you had a microfilm of —
A. Yes.
Q. You said it was unrestricted.
A. Yes.
Q. What do you mean by unrestricted?
A. Qualified researchers who have access to church archives material might gain access to it if they asked for it.
Q. Was that true at the time you got your microfilm?
A. Yes.
Q. Is it true now?
A. Yes.
Q. What about the Joseph Smith revelation collection?
A. Yes, same, same applies.
Q. Could someone see the Joseph Smith revelation manuscripts?
A. Not without express permission.
Q. But what about the microfilm of those same manuscripts?
A. That would be easier to obtain for a researcher. They would prefer the use of a microfilm to the original manuscripts in every case.

In his deposition, Church Archivist Donald Schmidt testified that there were restrictions on making copies of the films Andrew Ehat obtained through the Underground:

The Tanners on Trial

MR. BARNARD: Are the journals of Wilford Woodruff in your collection?

A. Yes.

Q. Has Andrew Ehat ever had access to those, to your knowledge?

A. I don't know that.

.....

Q. Do you know whether or not he's ever been authorized to make copies of those journals?

A. Not to my knowledge.

Q. And if I refer to a collection of the Revelations collection, do you know what I'm talking about?

A. Not specifically because we don't use that term.

Q. It is a Joseph Smith Revelation collection or documents with regard to his revelations.

A. All right.

Q. Do you know, is that in your collection?

A. Yes.

Q. And do you know if Andrew Ehat ever had access to that?

A. I don't know that but he could have.

Q. Do you know if he's ever been authorized to make copies of those?

A. Not to my knowledge.

Q. And with regard to each of those, the Kimball Journal and Woodruff Journal and the Joseph Smith collection, are there restrictions on making copies?

MR. MADSEN: You mean now?

MR. BARNARD: Right. And is that the same restriction we talked about earlier that applies to documents in your collection that people are simply not authorized to make copies of them?

A. Basically true.

(Deposition of Donald Schmidt, pages 63–64)

In his testimony, Andrew Ehat made the astounding claim that Donald Schmidt authorized him to make a copy of Collier's microfilm of the Wilford Woodruff Journals:

Q. To your knowledge has the LDS Church Historical Department that has possession of the original copy authorized anybody to make copies and distribute them?

A. Yes.

Q. Okay. Who is that?

A. Well, they gave me authorization to have the copy I have from Fred.

Q. Did you get that permission before or after you got it from Fred?

A. Before.

(Trial Transcript, page 72)

Q. And you somehow asked permission from someone in the church to get a copy from Mr. Collier; is that correct?

A. No, after I received from Fred Collier, since he offered it to me, the copy of the microfilms of the Wilford Woodruff journal, I asked the Church Archivist about it, whether I could have a copy.

Q. Did you then get a second copy?

A. I duplicated Fred's copy, the copy he had and returned back to Fred his original after securing the authorization.

Q. Who did you get that permission from?

A. Don Schmidt.

Q. When?

A. I think it was in late 1978.

Q. Did you initiate that conversation with Don Schmidt?

A. Oh, yes.

Q. Did you tell him what you had gotten from Fred Collier?

A. Yes.

Q. Did you describe it to him in detail?

A. Yes, I showed it to him. I had the microfilm with me.

Q. What did you give Fred Collier in return for that microfilm?

A. Nothing.

Q. Did you give him any money?

A. No. *(Ibid., pages 109–110)*

When Donald Schmidt was asked concerning this matter, he gave this testimony:

A. My recollection of that is he said, "I know where there is a microfilm copy of the diary." I said, "I would like to see it." And he did show it to me.

Q. Okay. And where did he show it to you?

A. In my office.

Q. And was that on microfilm?

A. Yes.

Q. And after you examined it, did you verify that was a correct copy of the microfilm of the Wilford Woodruff Journal?

A. Yes.

Q. Did you then give Andrew Ehat permission to make a copy of that for him to keep himself?

A. Not directly.

Q. Okay.

A. It is not my copy.

Q. Did you and Andrew Ehat discuss at all the propriety of him making a copy of that microfilm and keeping it for himself?

A. I don't recall that we did.

Q. Did you ever tell him that it was okay with you if he made a copy of that microfilm and kept it himself?

A. I don't recall those words, using that exact words.

The Tanners on Trial

Q. Anything to that affect?

A. No.

Q. Did you feel that it was your position to give him permission to make a copy of that or not to give him permission?

A. Neither.

Q. Do you know whether or not he made a copy of that?

A. I don't know that.

Q. Did he tell you where he had gained that microfilm copy?

A. Yes.

Q. What was that source?

A. Fred Collier. (Ibid., pages 140–141)

Andrew Ehat's lawyer, Gordon A. Madsen, conceded that the microfilm of the Wilford Woodruff Journals was "stolen" and that Mr. Ehat had obtained "a copy" of it through the Mormon Underground. He claimed, however, that this was helpful to the Church. The Church Archivist could use the information obtained from Mr. Ehat to trace the source of the theft:

I think it's peripheral, but with reference to the taint or lack of taint with regard to the Wilford Woodruff Journals, Mr. Ehat's testimony was when he learned Collier had a copy, and it had been stolen, he got a copy, took it to Don Schmidt, and said, "What about them?"

Schmidt was interested in them to see whether or not they could buy using — and find out the source of the theft [*sic*]. ("Transcript of Proceedings, April 10, 1984," page 25)

According to Andrew Ehat's own testimony, he went to Schmidt and told him that Fred Collier was circulating the microfilm of the Wilford Woodruff Journals. While Ehat may have enhanced his own reputation by reporting to Schmidt concerning how documents were getting out of the Church Archives, his actions following this conversation with Schmidt clearly demonstrate that he was a part of the Mormon Underground. He obtained copies of the microfilm for himself and then allowed them to be borrowed, knowing that they probably would be duplicated and spread further by the Mormon Underground (see *Deposition of Scott Faulring*, pages 28–31).

Mr. Ehat probably paid at least \$20 to duplicate the two rolls of microfilm of the Wilford Woodruff Journals. We can't believe that he would spend this much money unless he intended to use the films. It is interesting to note that the Wilford Woodruff Journals are cited from extensively in the *Words of Joseph Smith* and are also used in Ehat's master's thesis. Brian Barnard suggested that Ehat may have used the "stolen" microfilm to prepare his published book:

He indicated that he had received documents from Fred Collier. Apparently Fred Collier has been band[banned?] from the LDS Historical Department, and apparently is not a legitimate source to receive documents from. Ehat received a microfilm copy from Fred Collier. He calls Don Schmidt and says, I have what apparently is an illicit copy of the Wilford Woodruff journals, and he shows that to Don Schmidt and Don Schmidt verifies that in fact it is an illicit copy. Mr. Ehat says then he asks permission from Don Schmidt to make a copy or keep a copy. Don Schmidt says, no, I wasn't in a position. I wouldn't have given permission. I had no right to give permission or not to give permission.

But apparently Mr. Ehat clearly knew that that Wilford Woodruff journal microfilm that he got from Fred Collier was an illicit, surreptitiously made copy. In the book *The Words of Joseph Smith* that Andrew Ehat and Lyndon Cook co-edited and co-compiled, there are extensive quotations from the Wilford Woodruff journal. Mr. Ehat has indicate[d] that he had made a copy of that illicit microfilm and he kept it. I would suggest that in doing that, again Mr. Ehat has shown that it is acceptable for him as an historian to engage in that kind of conduct, and to use those kinds of materials. (*Trial Transcript*, page 460)

Davis Bitton, who served as Assistant Church Historian under Dr. Arrington, felt he could make a distinction between what we had done and Ehat's use of the microfilms of Wilford Woodruff's Journals:

Q. If the situation was that Mr. Ehat gained access to a microfilm copy of the Wilford Woodruff journals knowing it to be an illicit improper copy and then took that journal, the microfilm copy, and quoted extensively from that illicit copy in a publication that he made, isn't Mr. Ehat guilty of the same thing that you are blaming the Tanners for?

A. No, I would make a distinction.

MR. MADSEN: Objection, your Honor, as being both argumentative and not being supported by any facts thus far.

THE COURT: He has a hypothetical there . . . It's really not this case, but we've exercised considerable latitude here and he may answer this question. But remember the subject matter of the case. Proceed.

THE WITNESS: The distinction I would make is publication. The Tanners publish and sell. Using the microfilm copy of the Woodruff material I think is not on the same level of impropriety, and what I think the person should do is go back to the Church Historical Department and use the originals that were there on an unrestricted basis. I don't see that as the same as publishing.

1 MR. MADSEN: I THINK WE'D HAVE TO START OVER AGAIN
2 WITH A NEW LAWSUIT AND GET A -- TO ATTEMPT TO GET AN
3 INJUNCTION OR A SEPARATE MULTIPLICITY OF LITIGATION, YOUR
4 HONOR. I THINK WE'D HAVE TO DO THAT, AND I SUPPOSE I'M
5 NOT SUGGESTING THAT OTHER THAN TO SAY THAT THIS ORDER IS
6 LIMITED -- IT'S LIMITED TO THIS OF DEFENDANTS AND ANYONE
7 ACTING IN CONCERT WITH THEM AS IT RELATES TO THIS FORM.

8 THE COURT: THANK YOU, SIR.

9 MR. MADSEN: I WOULD LIKE TO MAKE ONE FAST COMMENT.

10 I THINK IT'S PERIPHERAL, BUT WITH REFERENCE TO
11 THE TAINT OR LACK OF TAINT WITH REGARD TO THE WILFORD
12 WOODRUFF JOURNALS, MR. EHAT'S TESTIMONY WAS WHEN HE LEARNED
13 COLLIER HAD A COPY, AND IT HAD BEEN STOLEN, HE GOT A COPY,
14 TOOK IT TO DON SCHMIDT, AND SAID, "WHAT ABOUT THEM?"

15 SCHMIDT WAS INTERESTED IN THEM TO SEE WHETHER
16 OR NOT THEY COULD BUY USING -- AND FIND OUT THE SOURCE OF
17 THE THFFT. AND EHAT HIMSELF SAID, "THEY WERE NO GREAT
18 CONSEQUENCE TO ME BY WAY OF DESIRING BECAUSE I ALREADY HAD
19 ACCESS TO THE ORIGINAL WILFORD WOODRUFF JOURNALS IN THE
20 ARCHIVES AND MADE MY OWN NOTES FROM THOSE JOURNALS PREVIOUSLY."

21 I THINK THERE IS JUST NO SIMILARITY.

22 THE COURT: THANK YOU.

23 (WHEREUPON, THE RULING OF THE COURT
24 WAS PREVIOUSLY TRANSCRIBED.)

25 * * * *

A photograph from the *Transcript of Proceedings*, April 10, 1984. Ehat's lawyer admits that his client obtained a copy of a "stolen" microfilm.

BY MR. BARNARD:

Q. Okay the document that's in front of you, the Words of Joseph Smith, do you consider that a publication?

A. That's a publication.

MR. BARNARD: I have nothing further. (Ibid., pages 214–215)

In questioning Dr. Bitton, Gordon A. Madsen tried to make it appear that the publication of the extracts preceded Ehat's gaining access to the microfilm:

Q. If in fact, Mr. Bitton, Dr. Bitton, Mr. Ehat had permissive access to the original Wilford Woodruff journal, and if in fact his quotation from it were indeed printed before he saw any supposedly purloined microfilm, would that constitute a matter of unethical conduct in the same realm as you were talking about pertaining to Tanner?

A. No, it wouldn't. (Ibid., page 215)

This explanation will not hold any water, however, because Ehat testified that he probably obtained the microfilms "in late 1978" (Ibid., page 110), whereas the book *The Words of Joseph Smith* was not published until "February of 1981" (Ibid., page 20).

In his deposition, page 67, Scott Faulring said that Fred Collier "has been excommunicated from the Church. I think he's barred from even stepping foot in the Church Office Building." At the trial, Andrew Ehat was questioned concerning Fred Collier's reputation:

Q. Are you familiar with Fred Collier's reputation within the historical scholarship community?

A. Yes.

Q. What is his reputation?

A. Well, that he's been very interested in early LDS history, and that he's been very interested in acquiring documents of various repositories for his individual research and publication.

Q. Does he have a reputation for obtaining copies of restricted documents and distributing them?

A. Yes.

Q. Do you know any other documents that he's obtained copies of and distributed?

A. I think I remember some.

Q. Do you know what those are?

A. I think he had a — wait a minute, did you ask again restricted access materials?

Q. Right.

A. I don't know of anything that he has that was restricted access. I'm sorry. You asked the question with that, and I wasn't catching you asked that key word.

(*Trial Transcript*, pages 74–75)

Q. Mr. Ehat, you indicated that you make a judgment with regard to who you will share your documents with; is that correct?

A. Yes.

Q. Is it correct to say that you will only share your documents with reputable scholars?

A. No.

Q. Will you share your documents with some people that are not reputable scholars?

A. Yes.

Q. Do you make a judgment as to who you will get documents from?

A. Sure.

Q. And do you make it a practice to not get documents from people who have a representation for stealing documents?

A. Yes.

Q. Have you ever gotten any documents from people who have a representation for stealing documents or making illicit copies of documents?

A. To my knowledge the people who — well, no.

Q. Do you know if Fred Collier has access to Church Historical Department and their archives to see documents and manuscripts in their possession?

A. I believe he doesn't now.

Q. Why doesn't he?

A. They have never informed me why he doesn't have access.

Q. You indicated to me that you got from Fred Collier a copy — a microfilm copy of the Wilford Woodruff journals; is that correct?

A. Yes. (Ibid., pages 108–109)

When Donald Schmidt was questioned concerning Fred Collier, he made these statements:

Q. . . . has Fred Collier had access to historical documents in the Historical Department at the archives?

A. Yes.

Q. Does he at this time?

A. No.

Q. Why not?

A. Basically we are a private institution. We have the right to deny access to our material of individuals whom we identify that may be using material against the church.

Q. And does Fred Collier fit into that situation?

A. Yes.

Q. And at this time he is banned from going into the history department and the archives of the LDS church; is that correct?

A. And use the material, the answer is yes.

(Ibid., pages 141–142)

The Tanners on Trial

Q. Just a couple questions, Mr. Schmidt. First with regard to the fact that you indicated when someone uses the materials obtained from the archives against the church that then terminates his access, thereafter you mentioned Mr. Collier being one of that number; is that correct?

A. Yes. (Ibid., page 163)

Ehat's lawyer must have been unaware of the fact that his client had been dealing with the "Fundamentalists." When he questioned Scott Faulring on December 22, 1983, he made some very interesting statements in his attempt to refute Faulring's accusations:

Q. You made reference to Ernest Strack and you also made reference to Mr. Collier and Mr. Black, and you made allusion to the fact that Mr. Strack had more than one wife. Are you aware that all of those men, in one way or the other, believe in polygamy?

A. Yes.

.....

Q. Aren't there documents in the collection at Yale that you cannot make copies of microfilms, or the Huntington Library?

A. I have a copy out of the Chicago Historical Society that says "Do not copy. Do not reproduce."

But under a provision of the copyright, it says my interpretation is that as long as it's for scholarship—I'm not making any gain or a profit or even making a cent on it. It's for my own scholarship. And if I lend the film to someone else and they do the same thing, that would have to be something to be taken to court and decided there.

Q. Is that the rationale that you used in making distribution in the underground? That this is all for scholarship and, therefore, also free game?

A. My rationale back then, I guess, was a bit immature, a bit zealous. It's kind of a, almost a moral—not a moral decision—you're kind of between a rock and a hard place. . . .

Q. The question is the "rationale."

A. Okay. My rationale.

At that time I saw nothing wrong with xeroxing—taking that folder right there—

I mean, I worked for a professor. When he hired me, the day he hired me he said he had had problems with researchers in the past doing that. Taking the folder and xeroxing it without his permission. I gave my word I would never do it and I never did. . . . I had enough ethics or morals, or whatever. I believe my religion enough not to do that.

But if you have that file and you say, "Are you interested in this?"

"Go copy it."

I see nothing morally wrong or ethically wrong in any shape—in doing that. I pay my nickel; I get my copy.

Q. How do you square that with the testimony that you have given earlier that you make it a point not to ask the party who gives you the underground document what his source was, because you were afraid that it may well have been stolen?

A. I didn't deal with Fred Collier or Robert Black or people like that that have reputations to purloined or stolen things.

And I— In dealing with Ernest Strack, Ernest was not out stealing these things. Ernest ran a business and he got the stuff given to him.

Q. Well, he was in a bookstore business called "Grandpa's Books"; was he not?

A. Yes, that's what he did.

Q. Did he ever give you those documents free or were they sold?

A. He just acted as a holding person. You would come to him, take the material—he would not even copy it. He would allow you to borrow it and go copy it.

Q. Did you ascertain whether Ernest Strack was dealing with the Blacks or with Mr. Collier?

A. He gave me the impression that he was dealing with Robert Black and Fred Collier.

Q. Did it bother you that you might have been getting records from Strack that you said you didn't want to get from Collier or Black?

A. Yes, it did bother me.

Q. But you nonetheless did get documents from Ernest Strack—

A. Yes, it did bother me. It bothered me that I had to buy things from the Tanners. I went through probably a two-year period where I would not buy anything from the Tanners, whether it was the Joseph Smith journal or anything else; even if I wanted it and needed it, I wouldn't buy it. Same thing with dealing with Ernest Strack.

But then it got to the point where you would go up to the archives and you would pull your hair out in frustration trying to get any work done, because they were so slow. They were throwing blocks. I mean, they did that to everybody, just about, unless you were one of their favorites or one of their persons who had been there for 100 years. . . .

.....

Q. With regard to what you contend that rumor had it that Ehat traded with Black and Collier, you indicated, I think, that Andy specifically denied that; is that correct?

A. Andy, that one time when I was asking about contacting Fred Collier about the films that I wanted, he didn't really want to deal with them directly. He wanted to—

Q. And he finally gave you Collier's number?

A. He finally gave me the number.

Q. And he didn't deal directly for you with them?

A. I think he was moving away from that.

Q. And thereafter you said you got the impression from Andy that he dealt with them. What did he ever actually say that gave you that impression?

A. He had received certain materials indirectly. I don't think Andy ever directly dealt one-on-one with either Fred Collier or Robert Black. I think he used intermediates.

Q. You don't have any direct knowledge of that; right?

A. Well, no. Just documents I have seen that have come from Black that have—I don't know—they're Andy's materials or productions.

Q. That is the reverse direction.

A. Yeah, I know.

Q. You are aware that Ehat did some documents that you are now certain came to you, at least, through Collier and Black?

A. Uh-huh (affirmative).

Q. How Collier and Black got them, you do not know, I take it; is that correct?

A. Well, I suppose—now I know. You know, recently, I have found out that they took them from the archives or from BYU.

Q. Not from Ehat?

A. No.

But you asked the question about Ehat receiving materials from Black or Collier. The Revelations Collection, the Wilford Woodruff diaries, I am almost certain came from Robert Black through Andy Ehat.

Well, Ehat gave them to me and he got them from Robert Black; indirectly or directly, I don't know.

I don't know if that answers the question or not.

Q. So you have no direct knowledge of any dealings between Black and Collier and Ehat?

A. I did not witness any, no.

MR. MADSEN: I think that is all.

(*Deposition of Scott Faulring*, pages 100, 105–111)

Mr. Madsen referred contemptuously to Scott Faulring as “a dealer, a trafficker of underground material” and tried to make him look very immoral. He must have been somewhat embarrassed when his client confessed that he had underground dealings with Fred Collier. While Mormons who do not believe in the divine authenticity of the Church and are aware of the restrictive policies at the Church Historical Department may not condemn Mr. Ehat for dealing with Fred Collier or Robert Black, true believers would probably view this as very sinful behavior—almost like dealing with the Devil himself. After all, what could be worse than dealing in the Underground with some of the Church's worst

enemies? Receiving documents from these individuals would be bad enough, but if important Church documents were turned over to them, as Robert Black maintains, it would be considered by some as an act of treason against the Church.

Robert Black charged that Ehat, acting through his “intermediary,” offered a copy of the “Nauvoo Record of Anointings,” but sent a Seventy's Record Book instead. He also maintained that Ehat sent a list of disparities between the Nauvoo Temple Record of Sealing and Adoptions with the copy made by Joseph F. Smith in 1860 in exchange for the illicit microfilms. The testimony of Lyndon Cook seems to show that Ehat did have temple material from the Nauvoo period:

Q. Has Ehat ever talked to you about a historical document that he had access to with regard to the Nauvoo Temple Records of Anointing?

A. Yes.

Q. Has he ever told you that he had a list of disparities between the official record and the copy that Joseph M. [*sic*] Smith played [*made?*] in 1960 [*sic*]?

A. I think we have talked something like that.

Q. Did he ever tell you w[h]ere he got access to those documents?

A. The Nauvoo Temple Anointing? He got it from the Church Historians Office. I have actually seen the document myself.

Q. How about the copy of the Joseph M. Smith—

A. I don't know if I have seen that myself. I don't know where he might have gotten that. Perhaps the same place. (*Deposition of Lyndon Cook*, page 53)

In his testimony, Andrew Ehat never admitted to actually giving any money or exchanging documents for the underground microfilms. He said, for instance, that he “didn't deal with Fred Collier.” All of the items seemed to come gratuitously — nothing was required in exchange (see *Trial Transcript*, page 110). Some people, however, noticed that material typed by Ehat showed up in the hands of the “Fundamentalists.” Scott Faulring testified:

Q. I may have asked you this before, but did Ehat tell you at any time that he had received any kind of documents from Robert Black?

A. Well, he never told me directly. Ernest Strack, who was amassing all these materials, had received a lot of material from Robert Black. And in this material that he got from Robert Black was stuff that Andy had claimed he had typed typescripts of things.

(*Deposition of Scott Faulring*, page 62)

Robert Black claimed that he obtained a great deal of Second Anointing material from Fred Collier and that this material was apparently typed by Ehat. Black said that when Ehat's "intermediary" visited him, he examined this collection and pointed out the material that came from Ehat's typewriter. In *Utah Holiday*, May 1984, page 14, Christine Rigby said that, "Perhaps the most interesting testimony concerned the trading of documents among Mormon historians, and showed that there is a roundabout flow of documents between the two camps, Mormon and anti-Mormon."

IMPORTANT EXCHANGE

In his *Answers to Interrogatories*, page 6, Mr. Ehat said that he did not receive any payment from "any of" the people he gave copies of the Clayton material to—i.e., Anderson, Madsen and Cook. When Richard L. Anderson was asked in his deposition if he gave Ehat anything in return for the Clayton extracts (referred to as the "green notebook"), he refused to answer:

Q. When Andy Ehat gave you that green notebook in 1981 did you give him anything in return or did he ask anything in return?

A. He asked nothing in return.

Q. Did you give him anything in return?

MISS PARK: Again, I'll challenge on the ground of relevance.

MR. BARNARD: Your Counsel having done that, I still get to ask the question.

MISS PARK: I'll instruct him not to answer or to say no. Not to answer.

MR. BARNARD: I assume you're going to take your attorney's advice.

A. Yes.

(Deposition of Richard L. Anderson, page 27)

At the trial, Lyndon Cook was also asked the question of whether he gave anything in exchange for the Clayton material. Strange as it may seem, Mr. Cook was asked this question by Ehat's own lawyer, who must have felt that the answer would be a firm "no." Instead, Cook confessed that he had given Ehat a copy of the William Law Diary. This confession led to some very embarrassing moments for Cook and Ehat:

Q. Did you give Mr. Ehat anything in exchange for receiving from him his portion of those Clayton notes? Was it a matter of trading?

A. Was it a matter of trading?

Q. Yeah, was it a matter of you giving something in return for his sharing those extracts from the William Clayton journal?

A. I don't — I didn't feel that I had to give him anything.

Q. Did you in fact give him any specific document or copy of a manuscript?

A. Yes, I remember almost simultaneous I believe I gave him a copy of my typescript of the William Law diary at the time.

Q. Is that right? Was that a project that you were then working on.

A. Yes, it was.

Q. Do you know whether or not that had any bearing on Mr. Ehat's own research in any projects?

A. Yes, it was quite important to Mr. Ehat at the time.

.....

BY MR. BARNARD:

Q. You mentioned that you have notes or extracts from the William Law diary?

A. Yes.

Q. And where is the original of the William Law diary?

MR. MADSEN: Your Honor, again I object as to materiality here, going on a —

THE COURT: Overruled. If you know.

THE WITNESS: I do know but I received them in confidence.

MR. MADSEN: May I ask on voir dire, your honor?

THE COURT: What do you claim for this?

MR. BARNARD: Simply again, the practice, your Honor, Mr. Cook acquired access to a historical document. He doesn't want to reveal the source and he is sharing those with Mr. Ehat. It's the situation that I think is the construction of the case, that there is a sharing of secret documents. Once Mr. Cook gains access to them he has no problem giving them to Mr. Ehat.

THE COURT: You may ask whether the original is in the archives of the church.

BY MR. BARNARD:

Q. Are they —

A. It's not in the archives, it has never been owned by the church and is not in the state of Utah.

Q. You gained permission from the owner to make the extracts; is that correct?

A. No, that's not true.

Q. Okay. How did you gain permission to make the extracts?

A. From someone else who had had that permission.

Q. So, did you make the extracts from that other person's notes?

A. I received a copy from another person.

Q. A copy of what?

A. Of a typescript of the original.

Q. So from that typescript then you made verbatim quotes?

A. This typescript was a verbatim typescript of that diary, and I was able to copy that.

Q. You made a complete copy of that typescript?

A. Yes, I did.

1 with them an entry.

2 Q. Have you done that with other documents that you have
3 in your collection? Have you shared those other documents with
4 other historians or scholars?

5 A. In a limited way I have, yes.

6 MR. BARNARD: Thank you.

7 REDIRECT EXAMINATION

8 BY MR. MADSEN:

9 Q. Did you give Mr. Ehat anything in exchange for
10 receiving from him his portion of those Clayton notes? Was it
11 a matter of trading?

12 A. Was it a matter of trading?

13 Q. Yeah, was it a matter of you giving something in
14 return for his sharing those extracts from the William Clayton
15 journal?

16 A. I don't -- I didn't feel that I had to give him
17 anything.

18 Q. Did you in fact give him any specific document or
19 copy of a manuscript?

20 A. Yes, I remember almost simultaneous I believe I gave
21 him a copy of my typescript of the William Law diary at the
22 time.

23 Q. Is that right? Was that a project that you were then
24 working on?

25 A. Yes, it was.

A photograph from the transcript of the trial. Lyndon Cook admits that he gave Mr. Ehat a copy of the Law diary at the time he received Ehat's notes.

Q. Did you give Mr. Ehat a complete copy of that typescript?

A. I think so.

Q. Did you get permission from the owner of that document to give Mr. Ehat a copy of that typescript?

A. I had permission from the individual who gave it to me to do it.

THE COURT: By “him” you don’t represent that the one that gave it to you was the owner?

THE WITNESS: I do not.

THE COURT: He simply had a typescript?

THE WITNESS: That’s right.

THE COURT: And you mention some representation with regard to his authority, did you have some representation from the one who gave it to you with regard to his authority if any?

THE WITNESS: I don’t think I understood your question.

THE COURT: I understood — I may not have understood your answer. I —

THE WITNESS: When I did receive the typescript, I understood that I could use it as I saw fit.

THE COURT: All right, you understood that from whom?

THE WITNESS: From the person who let me take a copy.

THE COURT: And did he state what his authority was for giving you that understanding?

THE WITNESS: No, he did not.

THE COURT: So simply you relied upon the one who had the typescript and who was not the one in possession of the journal itself as to his authority to give it to you?

THE WITNESS: That’s right, I didn’t.

THE COURT: All right.

BY MR. BARNARD:

Q. And you cite extensively from that journal in your article or Mr. Law?

A. Extensively, I don’t know extensively in terms of a percentage. I would say I used 50 percent of the entries. I would have used less than 50 percent of the entries, perhaps 30 percent.

Q. How long is the article on Mr. Law?

A. 20 pages, 15, 20 pages.

(*Trial Transcript*, pages 282-86)

On pages 469–470 of the transcript of the trial, Brian Barnard made some interesting observations regarding the William Law Diary:

MR. BARNARD: I don’t think under any circumstances theft as you have described it should be encouraged.

THE COURT: Should it be discouraged?

MR. BARNARD: I believe it should be discouraged. However, it seems to me that that academic community, that group that we’re going

— that we’re talking about setting a standard for has already defined some of those standards themselves, and I think that some of the professors and historians that have testified have indicated what those standards are. That it’s acceptable, it’s within their standards for Lyndon Cook to make a verbatim typescript from a verbatim typescript without permission of the owner of the William — William Laws journal. It’s okay for Mr. Cook to do that, and then to give Mr. Ehat a copy of that without permission from the owners. And I think that is the standard that has already been set up that although Mr. Cook is not a thief, it is acceptable and it is a standard within that community for him to do that without seeking permission.

In his master’s thesis, “Joseph Smith’s Introduction of Temple Ordinances and the 1844 Mormon Succession Question,” Andrew Ehat used the William Law Diary. In footnote 268, on page 270 of his thesis, Mr. Ehat said that this diary was in private custody: “William Law, ‘Record of Doings at Nauvoo in 1844,’ undated entry after 28 June 1844 entry, in private custody.” William Law was a member of the First Presidency of the Mormon Church, who became disillusioned with the Church and “legally charged Joseph Smith with adultery . . .” (*BYU Studies*, Winter 1982, page 68). His diary would undoubtedly throw important light on the subject of Smith’s involvement in polygamy. It may be for this reason that Cook and Ehat want to keep it out of the hands of the critics of the Church.

DEFENSE FOR LIBEL

Although Andrew Ehat was secretly involved with the Mormon Underground, he was apparently able to convince the Church leaders that he was able to keep the secrets of the Church out of the hands of critics. Richard L. Anderson testified:

MR. BARNARD: Have you received any information from any source at all to the effect that Ehat was involved in trading historical documents with other people?

A. Andy’s told me he was not involved in that.

Q. When did he tell you that?

A. In discussion of this document getting out.

Q. So that would have been when?

A. When was he trying to recover all of these lost copies, a year ago? Year and half ago?

Q. The information we had probably would have the fall or December of ‘81?

A. I just want to say that Andy’s permission to work in the historical department is strictly contingent upon his professionalism in not sharing material and we would not do that. I mean, he would be cutting

himself off at the pockets as a scholar if he went out and indiscriminately gave information everywhere else. So in no way do I believe that Andy Ehat freely and indiscriminately gave copies out. I know he wouldn't do it.

Q. What was the situation when he told you that he was not into that kind of trading? You say it was after the lawsuit, after the distribution. How did it come up and under what circumstances did he tell you?

A. I don't remember exactly the conversations but I simply remember that he said, he discussed an abhorrence of the fact so many things were circulating and he did not want to be a party to that. I mean, you can go to the underground book stores and buy this, that and the other and he simply said he didn't, he wasn't a part of that process. (*Deposition of Richard L. Anderson*, pages 37–38)

Ehat testified that the trust that the officials at the Church Archives had in him grew as time went on:

A. Well, from my trust — the trust that I have they have had in me of course has grown over the years from '72 on.

Q. And have you by virtue of that trust been given access to other restricted documents?

A. Yes.

Q. In that archive?

A. Yes.

(*Trial Transcript*, page 118)

Dr. Truman G. Madsen gave the following testimony in Ehat's behalf:

Q. Okay. When Mr. Ehat was your employee and he would get you historical documents, would he tell you what the source of those documents were?

A. Yes, generally he would.

.....

Q. Did he ever tell you that he had gotten documents that he had provided you from Fred Collier?

A. Not to my recollection, no.

Q. With every document that he provided you, did he tell you the source?

A. I think that's — that would be an exaggeration. In most instances he did, yes.

Q. Okay.

A. He and I had a trust relationship with the Historical Department of the church. They knew that he was my representative and vice versa.

Q. What percentage of the documents did he tell you —

A. Again, please.

Q. What permission, you said most, is that 51 percent or 90 percent?

A. Well, there was a trust relationship I repeat, and I would say that 80 percent of the time when we discussed a specific document, he would say this is the source, this is where it came from, I'm leaving out of account some that I simply took unaware fully of their sources, but I trusted that they were likewise legitimate documents for which he had obtained permission.

Q. You didn't inquire as to that, you simply assumed that they were legitimate documents that he had permission to make copies of?

A. I am saying that there is honor among non-thieves. (*Ibid.*, 195–196)

Scott Faulring claimed that at the Church Historical Department Ehat "was treated differently than myself and other people. . . . he was given access to other materials I probably would not have seen or would not have had access to (*Deposition of Scott Faulring*, pages 7–8).

As we indicated earlier, it is certainly possible that Andrew Ehat's reputation will be hurt by the revelations which came forth in the depositions and at the trial. He only has himself to blame, however, because none of this would have come to light if he had not filed the lawsuit. If Mr. Ehat should feel that we have in any way misrepresented his actions in this publication, he has a right to file a lawsuit against us for libel. We feel, of course, that truth is a perfect defense for libel. In the book *Risks and Rights*, by Samuel Spring, page 66, we read: "The most important defense in defamation is that the statement involved is true. Usually truth is an absolute defense." If Mr. Ehat were to file a suit, we would take sworn depositions from Ehat's friends and associates (including Professor Truman G. Madsen and those who are purported to have acted as "intermediaries") and find out how he obtained all of his documents and what he gave in exchange. Such a lawsuit could help us settle some of the questions raised in this suit. For instance, the reader may have noticed that there was a conflict between Robert Black's claim concerning how Ehat got the illicit microfilms and what Ehat testified to in court. Black maintained that Ehat received them from him through an "intermediary," whereas Ehat testified he received them directly from Fred Collier. At this point we are inclined to believe Black's version of the story. After the trial, Collier did not deny he had dealt with Ehat in the Underground, but he insisted that Ehat had obtained those particular microfilms from Black. While it may be possible that Ehat deliberately changed the story so that he would not have to reveal the name of the intermediary (as he did in the case of Jesse), we think it is more likely that he just made a mistake. According to Ehat's own

testimony, he has a very large collection of rare Mormon documents, and it is possible that he confused these films with other films or material he had received from Collier. In any case, Mr. Ehat finds himself in a real dilemma. To deal with either Black or Collier would make him look very bad in the eyes of the Church leaders.

In doing our research with regard to Andrew Ehat, we learned a great deal about the Mormon Underground which we did not know before. We have discovered that a number of the most prominent professors and historians in the Church have participated in it, and that some of those who seem to be the most bitter against us are deeply involved in the process. This animosity towards us may very well stem from the fact that our publication of sensitive Church documents calls the Church leaders' attention to this underground activity. We, of course, regret that this causes them trouble, but we feel that it is much more important that the average member of the Church knows the truth about these documents.

SCHOLARS EMBARRASSED

As we pointed out earlier, Ehat and his lawyer tried very hard to prove that we have a history of printing documents which were stolen from the Mormon Church. Gordon A. Madsen made these comments at the beginning of the trial:

I think it's going to come down to a matter of fact as to what their conduct was, whether it was repetitious, habitual. That was gone into at great length in the defendant's own deposition where we asked him repeatedly about other documents that he had printed that had in fact been stolen from the LDS Church archives, et cetera, and our testimony will be from several witnesses that indeed this particular incident with regard to the plaintiff's notes is not an isolated transaction, but one of repeated violations by the defendant and that would give them the factual basis at least that we are asking for punitive damages. (*Trial Transcript*, pages 14–15)

It would appear that Ehat's lawyer was trying to create prejudice against us in the mind of the Mormon Judge and to publicly embarrass us. As it turned out, however, his client and some of those he called as witnesses against us were the ones who were humiliated by the proceedings.

In the deposition of one of the authors (Jerald), Madsen seemed very concerned about how we obtained Heber C. Kimball's 1845-46 diary, which we published under the title, *Heber C. Kimball's Journal, November 21, 1845 to January 7, 1846*:

Q. With regard to the earlier documents, we have not asked about one other, and that is the journal of Heber C. Kimball, that you printed, I think, also in 1982, wasn't it?

A. Probably.

Q. How did you get that document?

A. From a source that I don't wish to name.

Q. Do you know whether it was stolen or taken without permission from the Church Archives or not?

A. I understand from the individual I got it from that he bought it at Zion's Bookstore.

Q. That was an already—preprinted document?

A. No. It wasn't printed; it was a Xerox.

Q. Xerox copy?

A. Yes.

Q. It had been reproduced in many quantities of Xerox, you mean?

A. I don't know about the quantities, no.

Q. That was obtained from Zion's Bookstore from your source? That's what your source told you?

A. That's what my source told me, yes.

Q. Which you don't wish to disclose.

Q. [*sic*] No, I don't.

Q. It didn't matter to you whether or not — you didn't inquire as to where its original source was, I take it.

A. It didn't matter to me. Well, I think the original source was the Church Archives. Yes, it was the Church Archives, in fact.

Q. Do you know whether or not —

A. I don't know how it got out, no. I have no idea. (*Deposition of Jerald Tanner*, pages 100–102)

While we felt that we had the same right to protect our sources as an investigative reporter for a newspaper, by the time of the trial it became clear that this would work to our disadvantage with a Mormon judge. Our silence might lead him to believe that we had been involved in a conspiracy to steal documents from the Church. Consequently, we decided to reveal all the sources we were asked about at the trial. On pages 359–360 of the *Trial Transcript*, the following statement by Jerald appears:

A. In my deposition, when you asked me these questions, I indicated that I didn't like to reveal my sources, that is like a good newspaperman, and so on that I wouldn't. But I feel there is an issue here now of my credibility, and [an] issue of freedom of press and freedom of religion, and I feel that I will now reveal my sources.

Further on in the same testimony the following information about the source of the Heber C. Kimball diary was given:

The Tanners on Trial

Q. Have you ever received other historical documents from Kent Walgren?

A. Yes, I have received one other item that I can remember. I received a copy of Heber C. Kimball's 18—1845 diary that he told me he purchased at Zions Book Store. (Ibid., page 384)

Q. With regard to the Heber C. Kimball diary you say you printed sometime around 1981 —

A. Or '82, I said I'm not sure.

Q. Whenever it was, and your source again was from whom?

A. Kent Walgren who obtained it from Zions Bookstore, who told me, it's hearsay on my part to say but that's what he told me where he obtained it.

Q. Was it already printed and did it have some author's name attached to it?

A. It was a Xerox copy.

Q. That were just purchased at a book store?

A. Yes, un-huh.

Q. Did you make any effort to ascertain who had originally supplied that to the bookstore?

A. To Zions Bookstore?

Q. Yes.

A. No, I did not.

Q. Did you make any effort to determine what right or ownership Kent Walgren had in that document before you printed it?

A. No, that would be in public domain so I didn't inquire. (Ibid., pages 388–389)

Kent Walgren verified this testimony when he was called as a witness:

Q. Have you ever come across a copy of the Heber C. Kimball journal for the year 1845?

A. Yes. I have actually more than one.

.....

Q. We're talking about the Heber C. Kimball journal?

A. Okay. . . . the other one I saw at Sam Weller's Zions Bookstore.

Q. Okay. When would you have seen it there?

A. It would have been after I saw the one that I saw at Black's, I guess 1981, . . .

Q. And where was that book that you saw in Sam Weller's Zions Bookstore?

A. He has a kind of vault where — he keeps up on his second floor where he keeps his more expensive books, and it was in there; I was just looking through. I love old Mormon books and regularly go there, and Sam and I deal back and forth.

Q. Okay. The copy that you saw at Sam Weller's Bookstore, what kind of copy was it? Was it bound?

A. . . . it was in a binding, . . . it was Xerox copies of a lot of documents. As I recall there were extracts from Wilford Woodruff's journal. There was Heber C. Kimball journal, and I am quite sure also there was a photocopy of a paper on the law of adoption by Andy Ehat, which was one thing bound with it. So there was a number of photocopies and no indication of who had sold it to Sam.

.....

Q. Was that book for sale by Sam Weller?

A. Yes.

Q. Do you remember the price?

A. My best recollection is \$150.

Q. Did you buy that?

A. No, . . . I think what I did is ask him . . . if he would basically lease it to me for a few days in return for a book that I had had in my last catalog that he needed for a client that was worth about 20 dollars or something. . . .

Q. . . . Sam Weller then let you physically take that book from his store for a period of time?

A. Yes.

Q. What did you do with the book during that period of time?

A. I photocopied the parts of it that I was interested in. . . . the Heber C. Kimball journal was the main thing I was interested in.

Q. After you made that photocopy of the Heber C. Kimball journal, have you distributed that to anyone?

A. I think a couple of people have looked at it and as you are well aware, at some point I mentioned to Jerald Tanner that I had a copy of it that I had obtained, and he asked me if he could look at it, and I let him.

Q. To your knowledge did he make a photocopy of that when you loaned it to him?

A. I don't know whether he did or not. I would assume he did based upon what I have heard since. (Ibid., pages 400, 402–404)

In his deposition, Scott Faulring said that this restricted Heber C. Kimball journal was being "circulated on the underground. There was a typescript and xerox copy . . ." (page 54). When we took Lyndon Cook's deposition, we questioned him concerning this typescript. He admitted that he probably had a copy and that he may have received it from Mr. Ehat:

Q. . . . So, are you aware that is that volume 1845, 1846 Heber C. Kimball journal. Is it restricted in any way?

A. I think it is, yes.

.....

Q. Do you know if there is any typescript of that volume available?

A. Yes. I think I have a typescript of that volume.

The Tanners on Trial

Q. Do you know anybody else that has a typescript of that volume?

A. No.

Q. Your answer was that you don't know anybody else that has a copy of that typescript or a copy of that journal?

A. Andy may have one, if that is why you are asking. I might. I don't know if I have seen it or not.

Q. How did you get a copy?

A. I don't know. I really don't know. I believe the copy that I have is a Church Historical Department typescript, if I am not mistaken. But I don't know where I received it. I really don't. Maybe Andy could have given it to me or Richard Anderson or anyone. I don't know where I received it.

Q. From what you have told us, It sounds like you have a vast collection of historical documents.

A. Well, I have several things, yes.

Q. And how would you have acquired most of those?

A. Hours and hours and hours and hours of trips in Salt Lake City.

Q. Do you have . . . a file cabinet full or five file cabinets full?...

A. Mines is probably modest in comparison to other so . . . File cabinets certainly.

(Deposition of Lyndon Cook, pages 60–61)

As we have already shown, Mr. Ehat obtained a microfilm copy of the Heber C. Kimball Journals through the Mormon underground. At the trial, his lawyer was making a point of the fact that the most sensitive diary (the 1845–46 diary which we printed) was not on his client's microfilm. The following exchange between Ehat and Madsen is found on page 106 of the *Trial Transcript*:

Q. The microfilm, that's what I wanted to get at. What diary did you have on microfilm?

A. Well, there are several diaries on the microfilm but it does not include 21 November 1845 to 7 January 1846 diary. That diary is restricted, but the other diaries that are on the microfilm — well, the other diaries of Heber C. Kimball are on the microfilm and they are not in restricted status.

Q. With regard to the part that is not on the microfilm, does that involve what the Tanners printed?

A. The thing that isn't on the microfilm the Tanners did publish.

Q. But you don't have that on microfilm?

A. I do not have that on microfilm.

Unfortunately for Mr. Madsen, his victory was very short-lived. When Mr. Ehat was directly confronted with the question of whether he had a typescript of the diary, he had to make what was obviously a very painful confession:

A. Okay, you are referring to the Heber C. Kimball journal kept by William Clayton that is not in the Heber C. Kimball microfilm.

Q. That is not in the microfilm that you have?

A. That's correct, it is not.

.....

Q. Do you have a typescript of that journal in addition to the microfilm?

A. Which journal?

Q. The Heber C. Kimball kept by William Clayton.

A. I think I do. I started making one myself.

Q. Okay. Do you have a typescript of that Heber Kimball journal from any other source than the typescript you were making from the microfilm?

A. Yes.

Q. Where did you get that?

A. Historical department —

Q. Of —

A. — has typescripts of it.

.....

Q. And that's the typescript of the same things that the Tanners published; is that correct?

A. Well, typescripts of things that are in both the microfilm and the diary. So —

Q. My inquiry goes to the typescript that you have—

A. Un-huh.

Q. That you acquired from the church?

A. Un-huh.

Q. Which is similar to what the Tanners printed?

A. Yes.

Q. When did you acquire that?

A. Somewhere in '78 or '79, I think.

Q. Was that prior to the Tanners publishing the Heber C. Kimball journal?

A. Yes, yes.

.....

Q. The typescript that you got, who did you get it from, specifically?

A. Someone in the church archives.

Q. Who?

A. I think Ronald Esplin.

Q. What was the last name?

A. Esplin, E-s-p-l-i-n.

Q. And did that man give you the typescript and say, here you can make a copy of it and keep it for your own?

A. I think so. I — I don't recall whether he explicitly stated that or not.

Q. And the photocopy that you made, where did you make that photocopy?

A. Which photocopy?

Q. The photocopy that you have in your possession of the Heber C. Kimball journal?

A. I don't remember right now. It may have been in the church archives building or it may have been in the — may have been at BYU, I don't remember.

The Tanners on Trial

1 A. Un-huh.

2 Q. Are those entries in that typescript?

3 A. Yes.

4 Q. And that's the typescript of the same things that the
5 Tanners published; is that correct?

6 A. Well, typescripts of things that are in both the
7 microfilm and the diary. So --

8 Q. My inquiry goes to the typescript that you have --

9 A. Un-huh.

10 Q. That you acquired from the church?

11 A. Un-huh.

12 Q. Which is similar to what the Tanners printed?

13 A. Yes.

14 Q. When did you acquire that?

15 A. Somewhere in '78 or '79, I think.

16 Q. Was that prior to the Tanners publishing the Heber C.
17 Kimball journal?

18 A. Yes, yes.

19 Q. And the copy that you got, the typescript is that the
20 same as what the Tanners printed?

21 A. They printed a photomechanical reprint of the
22 holograph whereas typescript isn't what they printed.

23 Q. The typescript that you got, who did you get it from,
24 specifically?

25 A. Someone in the church archives.

113

A photograph from the transcript of the trial. Mr. Ehat confesses that he had a copy of the Heber C. Kimball Diary.

The Tanners on Trial

Q. Okay. Did you get any permission from anybody other than Mr. Esplin to make a photocopy of that typescript of the Heber C. Kimball journal?

A. I don't recall. I may have, but I don't remember. (*Trial Transcript*, pages 111–114)

Although Mr. Ehat tried to make it appear that the Church Historical Department “has typescripts of it,” when Donald Schmidt testified it became obvious that it was another unauthorized typescript:

Q. Are you aware of a typescript of the Heber C. Kimball 1845 journal?

A. At what period of time?

Q. Okay. Are you aware of a typescript of that today?

A. Today?

Q. Yes.

A. Yes.

Q. When did you first become aware of that?

A. Several years ago, not in 1973, though.

Q. So several years after 1973?

A. Yes.

Q. And how did you become aware of that typescript?

A. I don't remember that, to be right honest with you.

Q. Do you know who prepared that typescript?

A. No, I don't.

.....

Q. And was that typescript cataloged in 1974 as being in the church archives Historical Department?

A. No, sir.

Q. Was that to your knowledge in the physical possession of the Historical Department archives at that time?

A. No, sir.

Q. Do you know who had physical possession of it at that time?

A. Who had it at that time?

Q. Yes.

A. I do not know that.

Q. When you first became aware that that typescript existed, who had physical possession of it?

A. First time I was told about it, and I did not at that time know who had it.

Q. Did you — have you actually seen it?

A. No.

Q. Have you been told who has physical possession of it?

A. I heard it today. (Ibid. pages 147–149)

We had heard sometime ago that Donald Schmidt was investigating the underground circulation of this typescript of the Heber C. Kimball Journal. At the trial, Davis Bitton, who had served as Assistant Church Historian, was asked about the typescript:

Q. Were you — are you aware of a typescript ever having been prepared of the Heber C. Kimball 1845 diary?

A. No, not before today. (Ibid., page 211)

The reader will remember that before Ehat confessed that he had a typed copy of the 1845–46 Heber C. Kimball Journal, he said: “That diary is restricted, . . .” (Ibid., page 106). After he made the confession, he tried to make it appear that this journal was not restricted:

MR. MADSEN: Once again regarding the Heber C. Kimball journal printed by the Tanners that you now have indicated you have a typescript of, was that journal restricted?

Q. The one that is not on the microfilm, was that journal restricted?

A. At the time?

Q. Yes.

A. [*sic*] At the time when you got your typescript?

A. When I received it I don't believe it was on restriction.

Q. But was that housed in the church archives in the Historical Department?

A. Yes, Yes. (Ibid., pages 116–117)

Ehat's claim that the 1845–46 Kimball journal was not restricted not only flies in the face of his earlier testimony but also that given by Lyndon Cook. Furthermore, former Assistant Church Historian Davis Bitton wrote:

5. “The Journal of Heber C. Kimball.” Restricted volume. Entries from 21 November 1845 to 7 January 1846. Much of this volume concerned with temple ceremonies, including names of those who received ordinances in the Nauvoo Temple. (*Guide to Mormon Diaries & Autobiographies*, Brigham Young University, 1977, page 194)

Page 2 of our reproduction of the 1845–46 Journal has a handwritten note which says that it is, “Very Confidential.”

We suspect that typescripts of many other Church documents are circulating among Ehat's friends. Dean Jessee testified that he “copied a number of things, probably in toto” at the LDS Church Archives and elsewhere (*Trial Transcript*, page 303). We have already quoted his statement concerning the “fifty million other things I haven't informed them that I have, either.” He, of course, claimed that he said this in jest, but he could not be pinned down as to how many typescripts he had actually made:

The Tanners on Trial

1 existed, who had physical possession of it?

2 A. First time I was told about it, and I did not at that
3 time know who had it.

4 Q. Did you -- have you actually seen it?

5 A. No.

6 Q. Have you been told who has physical possession of it?

7 A. I heard it today.

8 Q. Are there photocopying machines available to scholars
9 in this research area that you talk about in the Historical
10 Department archives?

11 A. May I make an explanation of that, sir?

12 Q. Yes.

13 A. Photocopying machine is not available to the scholars
14 themselves. It's a room off of the area that is fenced off
15 from the scholars. In other words if they want to do any
16 copying, they have to give it to an attendant who will then do
17 the work. Scholars do not do their own.

18 Q. So -- and was that procedure still in effect or in
19 effect in January of 1979 through 1980?

20 A. Yes.

21 Q. So that if Andrew Ehat was at the Historical
22 Department looking at the typescript of the Clayton journals
23 and he wanted a photocopy of a page of that, he couldn't
24 personally have done that; is that correct?

25 A. Not on that machine there.

149

A photograph from the transcript of the trial. Donald Schmidt said he learned who had the unauthorized copy of the Kimball Diary after hearing Ehat's testimony.

The Tanners on Trial

Q. During the time that you served as a Church historian did you on any other occasions make typescripts of historical documents, verbatim typescripts?

A. Oh yes, uh-huh.

Q. Did you do that as specific assignments in your work?

A. Well, it was part of my job. In research I've always made copies of things.

Q. In making those typescripts—well, how many times were you called upon during the time that you served as a research historian to make typescripts like that?

A. Called upon?

Q. Uh-huh.

A. I've never been called upon. I just do it on my own volition when I see the need for it.

Q. How many times did you on your own volition see the need and do it?

A. I didn't ever count them.

Q. Give me a rough guess.

A. There's no way I could tell.

Q. When you've made typescripts like that in the past have you ever taken those typescripts and given them to Don Schmidt or your supervisor and said, "Here's a typescript; it will be easier for us historians in the future to read this typescript rather than the original document?"

A. I don't think I have. I've always kept my own research and let other people take care of theirs pretty well.

Q. Is there any kind of a practice that you're aware of in the Church Historical department or the archives where illegible documents are made into typescripts so that historical research can be made easier?

A. Well, there might be. I think some of that has been done, but I haven't done it.

(*Deposition of Dean Jessee*, pages 38–39)

Mr. Jessee indicated that some of the other historians were probably making typescripts:

Q. How about with regard to existence of a typescript of what's known as the Joseph Smith Revelations Collection?

A. I don't know. I would imagine the people doing research in those things would make copies of them, that there's typescripts in existence on all that stuff. It's just the nature of research would cause that to be— (*Ibid.*, page 53)

In Lyndon Cook's deposition we read of other copies of documents which Ehat and Cook apparently have:

Q. Do you know if Andy Ehat has a copy of . . . Willard Richard's diaries or a photocopy of them?

A. A certain segment of them or all of them?

Q. Either.

A. Yes, he should have.

Q. Do you know how he acquired it? Has he ever told you?

A. I don't remember how he might have received them. He might have received them from the Historical Department.

Q. Have you ever done a typescript of any minutes from the Kirtland High Council?

A. Yes, I have.

Q. Have those been copied and distributed?

A. I copied those and distributed them to some very close colleagues of mine for research purposes.

Q. Do you know if those ever ended up in Ernest Strack's possession?

A. I don't know if they have. Someone may have told me that. (*Deposition of Lyndon Cook*, pages 46 & 49)

MANUSCRIPT HISTORY

In our publication *Falsification of Joseph Smith's History*, we published some photographs and quotations from the original "Manuscript History," Book A-1. This is the original handwritten manuscript of Joseph Smith's *History of the Church*. Mr. Madsen directed the following questions to one of the authors (Jerald):

Q. What manuscript unpreviously published documents from the LDS church archive went into that publication, if any, *Falsification of Joseph Smith History*?

A. Did I say Book A-1 yesterday, I thought I said that, Book A-1 of the History of the Church. Is that what you want?

Q. Had that book ever been published before?

A. No, that had never been published before.

Q. Did you get any permission from the archive, the representatives of the church to print it?

A. No, I didn't.

Q. Where did you obtain it?

A. Wesley P. Walters sent me the copy. . . .

(*Trial Transcript*, page 364)

While we obtained a complete microfilm copy of Book A-1 of the "Manuscript History" from Mr. Walters and used it extensively in our research for *Falsification of Joseph Smith's History*, we might also add that later we were loaned photocopies which a man had made in California from another copy of the film. These photocopies were included in the book as well as a picture from the "Manuscript History," Book D-1, which Wesley P. Walters had obtained when he went to the Mormon Visitor's Center in Nauvoo, Illinois. In stating

that Mr. Walters provided us with a microfilm of Book A-1, we did not mean to imply that Walters had taken the film from the Church. On the contrary, on page 4 of *Falsification of Joseph Smith's History*, we made it very clear that it was a Mormon scholar who was responsible for the film getting out: “. . . another Mormon, who was doing research in the Church Historian's Office, became very disturbed with the Church's policy of changing and suppressing the records. In some way he gained access to the microfilm copy of 'Book A-1,' and a number of duplicate copies were made from this film. The Mormon leaders were, of course, very disturbed over this matter, and we understand that this man is now denied access to all material in the Church Historian's Office.” This man was not only upset by the Church's policy of changing and suppressing the records, but he also charged that his research notes were taken from him and the officials at the Archives did not keep their word to him. In retaliation he walked off with the microfilm. Copies of this film soon found their way into the hands of both Mormon and anti-Mormon scholars. This man later decided that “two wrongs don't make a right,” and even though the Historian's Office had mistreated him, he felt that he was wrong in retaining the film. The original film, therefore, was returned to the Church Historical Department. At any rate, not long after Wesley P. Walters sent us a copy of the microfilm, we received a call from a very prominent Mormon historian, a man who has served as President of the Mormon History Association. He said that he asked one of the officials in the Church Historian's Office (a man who is still employed there although the name has since been changed to Church Historical Department) if he could have a copy of the “Manuscript History,” Book A-1. He was told that Church policy would not allow this, but he was given instructions on how to obtain a copy of the pilfered film. In a conversation we had with him later, he said that he had obtained the film in the manner the official from the Church Historian's Office had suggested. Other copies went to some who are currently serving as professors at Brigham Young University. One Mormon scholar told us that he extracted hundreds of words from a copy of the pilfered film for an article published in *Brigham Young University Studies*.

We feel that the whole story concerning this film raises some serious questions about the Church's restrictive policy with regard to documents. If Church officials had been open and honest about their documents in the first place, they would not have alienated one of their own scholars to the point where he would walk off with the film. This same policy forced an official at the Church Archives to recommend that a prominent Mormon historian seek a copy through the Underground.

Furthermore, other noted Mormon historians had to obtain their copies in the same way. The whole truth about this matter would be very embarrassing to the Church.

Ehat's lawyer thought he was going to embarrass us by asking how we got this film. As it turned out, however, one of his star witnesses ended up being completely humiliated over this matter. This was Professor Richard L. Anderson, who is probably one of the most respected and prolific defenders of the Mormon faith. On page 337 of his court testimony, Professor Anderson had denied that there was any network among Mormon historians to distribute documents:

Q. Have you ever talked to Andrew Ehat about the Mormon historians' distribution network of historical documents?

A. I have not because I don't think that exists in terms of your question. I do not think that there is a network among Mormon historians to distribute documents. I think that was the thrust of the testimony yesterday, any network that exists is almost by definition not among historians.

As we indicated earlier, at the time we took Richard L. Anderson's deposition, we subpoenaed any notes he had taken from the Clayton diaries. Instead of bringing his own notes, however, he brought the copy of the notes which Ehat had given him and our printed copy of *Clayton's Secret Writings Uncovered*. This led to a series of questions at the trial which finally ended with Professor Anderson confessing that he had purchased an illicit copy of the “Manuscript History,” Book A-1:

Q. The copy of the Tanner's publication that you used to compare to the notes that Mr. Ehat had given you, did you purchase that directly from the Tanners?

A. I don't know. I asked my secretary to get a copy, and I don't think it was purchased from the Tanners. I think Scott Faulring was selling some copies around BYU.

Q. Do you own copies of any of the other publications or works by the Tanners?

A. Yes.

Q. How have you acquired those?

A. Often by purchase from the Tanners. By writing out a check and putting a stamp on my envelope.

Q. And are any of those works that you purchased from the Tanners copies of restricted historical documents not in general circulation?

A. Yes.

Q. And when you purchased those from the Tanners were you aware that those had been reprinted by the Tanners without permission from the owners of the originals?

The Tanners on Trial

A. Yes, but the Tanners always write introductions which are important to look at, if you try to keep up-to-date in Mormon studies as I do. I have always had access to LDS historical documents, and I have not relied upon the Tanners for my historical information.

Q. Have you ever received microfilm or photocopies of historical documents subsequently been found—been informed that the documents at the microfilm were stolen or illicit in some way?

A. Yes, the case that you just talked about.

Q. Okay. Other than that case, have you received any other documents subsequently found out that they were improper copies of stolen documents?

A. No, not subsequently found out.

Q. Okay. Have you obtained any documents knowing that they were stolen or purloined or improperly copied from any source other than buying them from the Tanners?

A. I did buy one microfilm that an individual had purchased ultimately from Reverend Walters. I wanted to check out what he had done. He had microfilmed the entire manuscript history of the church in the first couple of volumes. I reported that to the Historical Department. I put it on my shelf because it was a very worthless copy. It was so poor that it could not have been read. I don't know what I would have done with it if it had been readable. I can go look at the same thing, a better copy in the LDS Historical Department, I mean in the BYU library, and if the library had asked for that, I would have immediately given it to them.

Q. Do you still have that copy?

A. It's somewhere gathering dust. It has never been operational.

Q. Who did you purchase that from?

A. I think I purchased it from Chad Flake at the BYU library, I think that, I am not even positive. Somebody had given him a couple of copies and he had an extra. He said, "They are on the market, I have an extra one." And I think I said, "What's your cost?" and I took it and put it in the microfilm reader and thereafter didn't use it.

Q. Is Chad Flake—well, what is Chad Flake's title with the BYU library?

A. Well, he might be called archivist. He's in charge of the special collections.

Q. Is he the person—

A. He certainly wasn't selling these on the open market. I want to correct any impression. It was a surplus copy and I don't know how he ever got it, and I am not sure I got it from Chad. I do not remember clearly. I remember how bad the microfilm copy was.

Q. Is Chad Flake the person that you would go to and ask permission to see the good copy of the microfilm on file at BYU?

A. Yes. (*Trial Transcript*, pages 343–345)

Although Dr. Anderson's excuse that he obtained the copy of the film to "check out" what had been done seems rather weak, we must commend him for his honesty in making the confession. We feel that he must have obtained the film of Book A-1 for research and writing. The reader will notice that Anderson says the microfilm was "a worthless copy" and then remarked: "I don't know what I would have done with it if it had been readable." He admits also that he still has the copy "somewhere gathering dust." His testimony would certainly lead one to believe that there was a network at BYU circulating unauthorized material.

In his deposition, Scott Faulring claimed that a copy of the illicit film was used in the library at Brigham Young University:

Q. Do you know whether or not there has ever been an unauthorized copy of Book A-1 of that manuscript history at BYU library?

A. If I am not mistaken, it's a microfilm—Book A-1 and part of B-1 or all of B-1.

But it was—I guess it was stolen. It wasn't even borrowed. It was stolen from the Church Archives in the late '60's by a patron. He just walked off with it.

Q. And do you know if a copy was on file at BYU?

A. What had happened was a person had taken it and given it to another person and that person allowed it to be copied. And somehow a copy found its way to the BYU manuscript collection.

It is kind of cataloged in a funny way. You couldn't find it under "Manuscript History." I think it's under "History of the Church." (*Deposition of Scott Faulring*, pages 84–85)

A few years after the film of Book A-1 was taken, the Church Archives allowed BYU Library to have a complete microfilm copy of the "Manuscript History" of the Church. This was a superior copy and was probably what Richard L. Anderson was referring to when he said the library had "a better copy."

FILMS RECALLED

Scott Faulring related that BYU Library made a copy of the films he had obtained from Mr. Ehat, and that he obtained permission from the library to have a copy of the Joseph Smith Collection, the Joseph Smith Revelations Collection, and the entire Manuscript History—"11 or 12" rolls of microfilm in all:

1 are important to look at, if you try to keep up-to-date in
2 Mormon studies as I do. I have always had access to LDS
3 historical documents, and I have not relied upon the Tanners
4 for my historical information.

5 Q. Have you ever received microfilm or photocopies of
6 historical documents subsequently been found -- been informed
7 that the documents or the microfilm were stolen or illicit in
8 some way?

9 A. Yes, the case that you just talked about.

10 Q. Okay. Other than that case, have you received any
11 other documents subsequently found out that they were improper
12 copies of stolen documents?

13 A. No, not subsequently found out.

14 Q. Okay. Have you obtained any documents knowing that
15 they were stolen or purloined or improperly copied from any
16 source other than buying them from the Tanners?

17 A. I did buy one microfilm that an individual had
18 purchased ultimately from Reverend Walters. I wanted to check
19 out what he had done. He had microfilmed the entire manuscript
20 history of the church in the first couple of volumes. I
21 reported that to the Historical Department. I put it on my
22 shelf because it was a very worthless copy. It was so poor
23 that it could not have been read. I don't know what I would
24 have done with it if it had been readable. I can go look at
25 the same thing, a better copy in the LDS Historical Department,

A photograph from the transcript of the trial. Professor Anderson admits that he obtained an illicit copy of Book A-1.

The Tanners on Trial

Q. Have you ever given copies of any documents on microfilm to BYU Special Collections?

A. Well, in a strange—it wasn't really a deal— . . . While I was a student there, I would give them things. There was so much stuff going around in the underground that BYU library didn't have, that most of us thought they really ought to have them, and so I'd just donate them is what I'd do. And then they would catalog them—or sit on them for awhile and then catalog them.

And in the process of doing this and in the process of dealing with these other people in the underground, I had gotten film copies of the Joseph Smith collection that weren't good quality prints, so I approached Chad Flake at BYU to ask him if he would act as liaison between myself and Don Schmidt—because I showed him—

I brought in the films and I said, "Look, I've got copies—three of the four reels of the Joseph Smith collection, I've got this other stuff. You've got copies of those films that are a better copy than I've got, they're closer to the original. Would you get permission for me or would you"— . . . he said, "Well, I will ask Don Schmidt." . . .

The next day he saw me in the library and he said, "I have talked to Don Schmidt and he said it would be all right for you to copy those films on the condition you don't publish them."

So I then made copies of those films.

But in the process of all this happening, I had been donating things—I mean, they would occasionally take and xerox them, because if it was a rather lengthy transcript or something like that, they would copy it.

As far as microfilms, they wanted a copy of the Heber C. Kimball journals—I told them about that and they said they wanted a copy of that. And I told them I had a copy of the Wilford Woodruff journals and they said it was better quality than what they had, so they wanted to make a copy of that.

So I would recall them making three microfilms of mine, but they xeroxed other things that they later cataloged.

Some of the things, I just gave to them, because they were only a hundred or so pages. So I would just xerox them and then donate them. But other things, they would pay the xeroxing on, because it was more expensive. (Ibid., pages 31–33)

We have seen told that these "11 or 12" rolls of microfilm were duplicated by different individuals until copies fell into the hands of a son of one of the Twelve Apostles of the Church. This may well have been the event that triggered the Reynold's investigation at Brigham Young University. The reader will remember that Noel Reynolds himself testified that,

The Ehat incident was a very minor thing. We had, at the university, concern about the integrity of our own collection in the University Library and this was, this concern arose at the same time as the incident with Ehat's manuscripts and I had been asked by . . . I think it was the president of the university, to look into the matter and to made a recommendation to him about the future of that library collection and how it should be protected. (*Deposition of Noel Reynolds*, page 24)

Reynolds, of course, refused to tell us exactly what had taken place to cause this investigation. In any case, Scott Faulring was called in to see Reynolds:

Q. As a result of you having and copying the Ehat extracts, were you ever interviewed or talked to by Noel Reynolds?

A. Yes, I was. He called Larry Porter, who I was working for, one day just before lunch and said he would like to—Noel Reynolds would like to see me. So I went over there—

. . . .

Q. And you went over to Noel Reynolds' office?

A. Uh-huh (affirmative).

Q. And what was the nature of that conversation?

A. . . . he wanted to get my side of the story in dealing with the Clayton—and I had also been involved with those films that had been copied. And BYU was concerned about that, also, because the library had allowed those microfilms to be copied.

And I don't think they understood the whole picture. They saw me as receiving some microfilms and then copying them, but I don't think they saw the other side of it. That BYU—I mean, they do it all the time. They borrow things and copy them.

And I was called in for my irresponsible actions, which I think, at that time—Well, I think now that they were correct, it was irresponsible for me to do it, . . .

. . . .

Q. Did you explain to him how you had gotten copies of the microfilm that you talked about from the BYU library?

A. Yes.

Q. And what did he say in response to that?

A. He was—everybody was real quiet about that. I couldn't figure it out for the longest time. People were spreading rumors that I had stolen them from the archives or snuck them out of Special Collections.

And when I told them that Chad Flake had allowed me to copy them—as a matter of fact, they, themselves, had carried them down to the copy center of the library—Well, a few months later, Chad Flake admitted to me that he had gone out on a limb for me and allowed me to copy them without—

The Tanners on Trial

Don Schmidt says there was a misunderstanding. I, to this day, don't know what happened. All I know is Chad told me that Don Schmidt had approved it. And what Chad did or said to Don Schmidt, I don't know.

But for the longest time there, everybody was dealing with that like it was embarrassing or something. I think they might have called Chad on the carpet for that and reprimanded him. (*Deposition of Scott Faulring*, pages 36–40)

Scott Faulring went on to relate that professors in the Church History Department at Brigham Young University had obtained copies of these films and had to turn them back in:

Q. How many copies of the Joseph Smith Collection have you made and distributed prior to getting the letter from Don Schmidt?

A. Let me first—it wasn't— It was the Joseph Smith Collection and the Revelations Collection, and the manuscript histories, and it totaled about 11 or 12 microfilms. And in almost a years' time—not even a year, I guess, seven or eight months, there was a dozen or so copies made from those films—people that made copies from them.

Q. Do you know if those people have subsequently made copies and distributed copies of those?

A. One person I know for sure has. Hal Palmer, who is a friend of mine, made his copy available to other people and they have made copies from that, of all those films.

Q. And are you aware of any problems that have arisen because of the distribution of those?

A. No real problems, other than Don Schmidt wrote a letter to one individual out in California and offered to explain about the questionable origin of these microfilms.

And the person wrote back noncommittally saying, "Thanks for the advice."

Again, Don Schmidt gave it as his unofficial opinion that he not make distribution of these microfilms. . . .

Q. Had you talked to Ehat at all about getting copies of the Joseph Smith Collection?

A. I told him I had them, and at one time they were—I had three sets—I had a negative set and two positive sets, and one of the positive sets had a flaw in several feet. And I was going to let him have that for less than cost, because I was going to throw it away.

And so he said he was interested—I somewhat offered that to him. He didn't come begging me for it, but he did give an interest in it.

And then they tried to collect all those up, so I turned in the two positive copies.

MR. MADSEN: To whom?

THE WITNESS: The microfilms were recalled by Larry Porter. I think it was delegated to him to see that several of the copies—because there were professors at BYU who had made copies—the Church History Department at BYU had made copies—

And all in all, I think 12 or 13 copies were made, maybe. Only about half, maybe, were turned in, but they're the ones people count, because they didn't—

You know, the material was out. They didn't feel they should give it back. They had paid their money for it and the stuff was out floating around everywhere.

Q. You mentioned a professor, Larry Porter. He was a professor that you were working for?

A. At the time, the department chairman for the Church History Department at BYU. He was my boss.

And when this Clayton situation happened, and microfilms—Rumor had gotten started that Brigham Young's Collection was out on microfilm, and that got a person investigating. And when he found out it was not the Brigham Young Collection, but Joseph Smith Collection, then I got pegged.

Again, I think that was about the same time Noel Reynolds called—It may have been just a week or two before, . . . Well, he wanted to know who I had given them to, or who had made copies of these films, and I was reluctant to tell him, because they were professors.

There were certain professors in his department and in the religion area that had copies and they went and collected them up. And other people that couldn't be intimidated or pressured didn't give them up. So about half the copies were returned.

Q. And those were the copies that—

A. —that had come from my negative that I had gotten from Chad. (*Ibid.*, pages 58–61)

Ehat's lawyer's brother, Truman G. Madsen, apparently found himself in the middle of this embarrassing situation. Although he was very unclear as to what the films were that he received, Professor Madsen admitted that he had to return some "illegitimate" microfilms to Larry Porter:

Q. My question however goes to documents beyond the extracts. Do you have in your collection that you have described any other documents that you know that the original sources are restricted?

A. I am not aware of having any such documents.

Q. Have you ever had a collection of documents known as the Joseph Smith collection?

A. I don't know what that refers to.

. . . .

The Tanners on Trial

Q. Has anybody ever contacted you or discussed with you the possibility that you might have in your collection of historical documents copies of illicit or improperly purloined and copied documents?

A. Yes, I recall an instance of having someone phone me and suggest that I could have some microfilm materials. I don't recall their exact character, and I shortly received word that these had been purloined, and I returned them.

Q. Okay. You did receive the microfilm copies and then returned them. Where did you return them to?

A. Returned them back to the original sources as I was told which was the Historical Department of the church.

Q. Who did you get those purloined documents from?

A. I'm vague on that, but somebody phoned me and said copies were being made of some early Kirkland materials that had bearing on the life of Joseph Smith and that I was welcome to copies for X amount. I said I would like a copy. They were delivered, and then I learned as I have explained that they were not legitimately gained and I returned them.

Q. Okay. You paid money for the copies?

A. I would have but I did not. I was—I would have paid money for the cost of their reproduction.

Q. Okay. When you say you returned them to the original source, is that the institution from which they were purloined?

A. Yes.

Q. When did this occur?

A. My recollection is about three years ago.

Q. And what institution were those documents taken from?

A. They were taken from the Historical Department from the church.

Q. And who contacted you and told you that those were stolen and in circulation?

A. I can't recall. Yes, I can. The person who called me and said that they were illegitimate was Larry Porter of the BYU College of Religious Instruction.

Q. And then you verified that with the Church Historical Department?

A. Uh-huh.

THE COURT: You will have to answer audibly.

THE WITNESS: Yes, I did.

(*Trial Transcript*, pages 197, 199–201)

A STOLEN THESIS

For many years we have been accused of stealing Paul Chessman's thesis from the BYU Library to obtain the "Strange Account" of Joseph Smith's First Vision. In the *Deposition of Jerald Tanner*, pages 30, 31 and 33, Mr. Madsen pressed very hard with regard to that matter:

Q. *Joseph Smith's Strange Account of the First Vision* was obtained by you from what source?

A. Originally?

Q. Yes.

A. It was obtained from a thesis written at BYU.

Q. By a Paul R. Chestman?

A. Yes.

Q. Did you talk to Mr. Chestman about reprinting the extract from that thesis?

A. No, I didn't.

Q. Did you consider that by virtue of the fact that it was in a thesis it was now in the public domain?

A. Well, I felt the document was in the public domain.

Q. From which he had quoted in his thesis?

A. Yes. Just the same as if I would have reproduced it; I felt that anybody would have had the right to use it.

.....

Q. With regard to the *Joseph Smith's Strange Account* and the quote of Paul R. Chestman's thesis, you didn't make any effort to get permission from him to reproduce what you quoted?

A. No. I made no effort. And I understand that he said I stole it, which I did not. Someone may have stolen a copy later on, but I had nothing to do with it.

Q. How did you get it? If you didn't steal it, how did you get it?

A. A student at BYU gave me a photocopy of it. He copied it in the library.

Q. Do you know that student's name?

A. Yes. But I am not going to reveal my sources.

At the trial, Mr. Madsen asked again about the Chessman thesis:

A. You want me to answer yes or no that that's a stolen document?

Q. Did you print it?

A. I did print it or was it stolen?

Q. I will get to the question. Did you print it?

A. I printed it, yes.

Q. And was that—where did that document—where was it originally?

A. At the Brigham Young University — where was the document, the document that was encompassed in the Paul Chessman thesis?

Q. Yes.

A. It's in the Church Historical Department.

Q. Did you get any permission for from Paul Chessman to print that document?

A. No, I received no —

The Tanners on Trial

1 Q. Who did you get those purloined documents from?

2 A. I'm vague on that, but somebody phoned me and said
3 copies were being made of some early Kirkland materials that
4 had bearing on the life of Joseph Smith and that I was welcome
5 to copies for X amount. I said I would like a copy. They were
6 delivered, and then I learned as I have explained that they
7 were not legitimately gained and I returned them.

8 Q. Okay. You paid money for the copies?

9 A. I would have but I did not. I was -- I would have
10 paid money for the cost of their reproduction.

11 Q. Okay. When you say you returned them to the original
12 source, is that the institution from which they were purloined?

13 A. Yes.

14 Q. When did this occur?

15 A. My recollection is about three years ago.

16 Q. And what institution were those documents taken from?

17 A. They were taken from the Historical Department from
18 the church.

19 Q. And who contacted you and told you that those were
20 stolen and in circulation?

21 A. I can't recall. Yes, I can. The person who called
22 me and said that they were illegitimate was Larry Porter of the
23 BYU College of Religious Instruction.

24 Q. And then you verified that with the Church Historical
25 Department?

200

A photograph from the transcript of the trial. Dr. Truman G. Madsen testifies concerning some "illegitimate" microfilms.

Q. Did you get any permission from any agency of the LDS church to print that document?

A. No, I didn't feel I needed any permission.

Q. What was your source of that document, who furnished it to you?

A. . . . It was James Cox of the Brigham Young University. He was a student there.

Q. Did I get a name through that?

A. James Cox.

Q. And did he tell you where he got it?

A. He told me he copied it on the Xerox machine at the Brigham Young University library. (*Trial Transcript*, pages 359–360)

This testimony should put to rest the claim that has been circulated for many years that we stole Paul Cheesman's thesis.

Another thing that Mr. Madsen wanted to know is where we obtained a copy of Joseph Smith's 1831 revelation which instructed the Mormons to marry Indians to make them a "white and delightsome" people (see *Deposition of Jerald Tanner*, pages 57–60). This revelation had been suppressed by the Mormon Church for over 140 years. Andrew Ehat encouraged Mr. Madsen in this inquiry. We learned later, however, that Ehat himself had received a copy of this document when he obtained the unauthorized microfilm of the Joseph Smith Revelations Collection. After Scott Faulring told about Ehat having a copy of this microfilm, he testified that it contained the 1831 revelation:

Q. And does that microfilm include the 1831 Revelation with regard to Mormons marrying Indians?

A. There is a section on the second reel entitled "Unpublished Revelations," and I think it's one of the first documents in there. There are two copies in there, and I think it's got both—two copies of the manuscript and then typescripts of both. (*Deposition of Scott Faulring*, page 55)

Mr. Madsen even tried to make an issue with regard to a letter purported to have been written by Book of Mormon witness Martin Harris in 1830. Although we were not sure this letter was authentic, we published a few extracts from it in the *Salt Lake City Messenger*, March 1984. This letter had been purchased by Steven Christensen and was valued at many thousands of dollars. Mr. Madsen claimed that he was going to call Mr. Christensen as a witness to prove that we were guilty of theft or misappropriation:

This deliberateness of defendants is further emphasized by the testimony of Christensen and the defendants that the printing of stolen and unpermissive material has been, and is, a habit with these defendants and is

highlighted by the most recent issue of defendants' publication, *The Salt Lake Messenger*, in which they both advertise the continued sale of the Clayton publication and print excerpts from Mr. Christensen's letter without permission, knowing full well who owned the document, that the same has not been previously published, and completely disregarding the rights of Mr. Christensen. (*Trial Brief*, page 14)

Before the trial began, we obtained permission to reveal the name of the individual who had given us the quotations from the purported Martin Harris letter. If Mr. Madsen had asked us where we obtained our material, we would have revealed our source. From what we understand these quotations were obtained in a legitimate manner. Mr. Madsen, however, never furnished any proof that the material was stolen and he did not call Mr. Christensen to testify. If Christensen had been called as a witness, our lawyer would have questioned him concerning the authenticity of the letter and about his own involvement in the "network" which distributes Mormon documents. From the evidence that we have obtained, it appears that he has a vast collection of Mormon material, including microfilms and other copies of rare documents which are in the Church Archives.

UNABLE TO LINK TO THEFT

While Mr. Madsen would have been delighted to find evidence that we were linked to the theft of his client's notes, no such evidence was encountered. On the contrary, all the testimony pointed in the other direction. On page 384 of the *Trial Transcript*, we find the following in the testimony of Jerald Tanner:

Q. Mr. Tanner, were you in any way involved in 1981 with the taking of Mr. Ehat's extracts from the office of Lyndon Cook at BYU?

A. No, I knew nothing about it. The first thing I can remember is reading the 7th East Press article that it had been taken.

Q. When did you acquire a copy of the Clayton extracts done by Mr. Ehat?

A. Probably May or June of 1982.

Q. And who did you receive them from?

A. Kent Walgren.

Lyndon Cook was asked if he had "any information at all to the affect that Jerald or Sandra Tanner were involved" in the taking of "those documents from your office?" He replied: "I don't have any knowledge, no" (*Ibid.*, page 271). When he was asked if Kent Walgren "was involved," he stated: "I don't know. I don't have any knowledge."

The Tanners on Trial

In his testimony, Kent Walgren confirmed that we had obtained the notes from him:

Q. What's the nature of your employment?

A. I'm an Administrative Law Judge.

Q. What section do you work for?

A. The Department of Business Regulations.

.....

Q. Do you engage in any other business pursuits besides your employment as an Administrative Law Judge?

A. I have a small part-time used and rare book business which specializes in old and rare Mormon books and also Utah authors.

Q. When was the first time that you saw extracts from the William Clayton journal?

A. Extracts, probably the first time I saw extracts were, you know, in published sources like BYU Studies.

Q. Have you seen extracts that were not in published form that were in typewritten form?

A. I would — my best recollection is the one from — that I got from Richard Vanwagoner is the first time that I probably ever —

Q. When would that have been?

A. I think, and I am basing this on — reason I know I got that from him is I went out to his business place. He's an audiologist, to get a copy of his book signed. A book that he co-published called *A Book of Mormons* which contained biographical sketches that came out right at that time, and it was just off the press. And I looked at the copyright in that book and it was 1982, and it seems to me it was in the spring. So my guess would be the spring of 1982.

Q. And what was the nature of these extracts that you saw that were in the possession of Richard Vanwagoner?

A. I think what he did is we just — he was a student of Mormon history also and we just talked, and he probably just told me that he had copies of them, and I asked him if I could have a copy. And he probably just made a copy. I don't remember the details.

.....

Q. Okay. And did he tell you the source of that copy —

A. No.

.....

Q. Is it your practice when you acquire copies of historical documents or historical documents to inquire as to the source that the person selling them or giving them to you got them from?

A. The only time I think I would do that is if I had a question about authenticity. . . . Basically the milieu in which all of this happened is these things were floating around here and there, and there was trading going on with them, and some people tried to get substantial amounts of money for them, and —

Q. How long has this milieu that you referred to been in existence?

A. Well, . . . I don't know the last few years if that still continues. But from the early '70's until about 1981 or '82, when I stopped being as serious about Mormon history as I was before.

Q. Were you in any way involved in the taking of Andrew Ehat's notes from Lyndon Cook's office at BYU in 1981?

A. No, no.

Q. Do you have any reason to believe that Richard Vanwagoner was involved in that taking?

A. I have no reason to believe that he was. But I don't — I don't know. I have no reason to believe either way.

(*Trial Transcript*, pages 399, 400, 404–408 and 410)

When Kent Walgren was cross-examined by Gordon A. Madsen, he indicated that it was probably May of 1982 when he allowed us to use the Clayton material:

Q. Now fit into that time frame when you delivered the copy of the whole Clayton manuscript to Mr. Tanner, would you? When did that happen in relation to what you have just described?

A. I probably — I don't know, probably at or about the time of the Mormon History Association meeting I assumed, but I don't know.

Q. Is that usually in May each year?

A. I think this year it's in May, and my recollection is spring, around May.

Q. Was it around the time then of the discussion with Andy that you had delivered a copy to the Tanners?

A. I — again I have no independent recollection, but my best guess would be yes, sometime around that time.

THE COURT: Around May of 1982?

THE WITNESS: Yes.

.....

BY MR. MADSEN:

Q. Did you tell Mr. Ehat in other discussions in May of '82 that you were going to give a copy of the Clayton material to the Tanners?

A. I don't know if it even came up. I don't even know if it came up.

Q. You did not specifically so tell him?

A. No, but I would have let any — any historical person look at the copy that I had.

Q. Do you know what giving it to the Tanners implied? Did you suggest to him or suggest to them that they could print it or any discussion about publishing what you were delivering to them?

A. No.

Q. Did you intend that they publish it?

A. No, I don't think I intended either way.

The Tanners on Trial

Q. You just furnished them a copy of it?

A. Yes.

Q. Without any reservations as to what they would do with it?

A. Yes.

Q. Were you aware that in the past they had published early church documents that had been furnished them from various sources?

A. Yes, I was aware of that.

(Ibid., pages 417–419)

On pages 427–428 of the *Trial Transcript*, Kent Walgren commented:

A. . . . I thought of both the Heber C. Kimball and Clayton journals as information as just basically historical source information that was available to some scholars and by quirks in the system not available to some others that couldn't pay a lot of money for them. And, I mean, I'm a Mormon, I'm a member of the Mormon Church. I was raised a Mormon. I went on a Mormon mission, and I thought that was — it was basic information about the history of my church that went back to my roots and that I as a competent historian, had as much right to look at that information, those extracts. If someone adds their own interpretation to it that's completely different. But just as basically historical source information. I thought any responsible historian should have a right to look at it.

In his deposition, Andrew Ehat indicated that he and Kent Walgren were friends:

Q. Do you know Kent Walgren?

A. Yes, I know him.

Q. What's the nature of your acquaintance with —

A. Friendship and mutual interest and research.

(*Deposition of Andrew Ehat*, page 84)

At the trial (page 97 of transcript), Mr. Ehat was asked if he ever “exchanged documents” with Kent Walgren. He replied, “If you include books in the term documents, yes, I have sold him some books since he's a proprietor of a book firm.”

The following testimony of Jerald Tanner appears on page 385 of the *Trial Transcript*:

Q. Did Kent Walgren tell you where he had received his copy of the Clayton extracts by Mr. Ehat?

A. No, I have no recollection. He did later, he did not at the time. He told me a few weeks ago I guess it was.

Q. At the time that he gave you that copy, did he give you any explanation at all as to where he had received that copy?

A. No, he did not.

Q. Did you have any reason to believe at that time that the copy you were receiving from Kent Walgren was a stolen copy?

A. I had no real idea because the 7th East Press said Mr. Ehat had made a distribution besides the one that had been stolen, so I had no idea which copies were which. I knew some should be stolen, but I had no idea of the genesis of that copy.

As we indicated earlier, the *Seventh East Press* said that, “Ehat implied that he had made copies for others as well, but declined to mention any names.” In his deposition, Mr. Ehat said that he had made copies for three individuals—Lyndon Cook, Richard L. Anderson and Truman G. Madsen. Lyndon Cook claims that he “never allowed anyone to copy” Ehat's notes, but he conceded that he may have allowed someone to borrow his copy:

Q. Okay. Have they ever been out of your possession? You say a colleague, have you ever given them to a colleague, a colleague has had possession and given them back to you an hour or a day or a week later?

A. Prior to June of '82?

Q. Yes.

A. Perhaps. Perhaps.

(*Deposition of Lyndon Cook*, page 14)

In the “network” which circulates Mormon documents, if a person allows someone else to borrow a document, it is often copied.

When Mr. Ehat was asked if he put “specific restrictions” on the three individuals he shared his notes with, he replied: “Yes” (*Trial Transcript*, page 65). Professor Richard L. Anderson felt that there was an “implied restriction” on the notes, but when he was asked if Ehat actually “put any restrictions” on them, he replied: “. . . my answer is that no, he didn't. I don't recall his actually saying don't give them to anybody else” (*Deposition of Richard L. Anderson*, page 28).

COMPELLED TO CHANGE

The testimony given in the depositions and at the trial proved beyond all doubt that it was a member of a Mormon bishopric who stole Ehat's notes from Cook's office. Lyndon Cook himself testified:

Q. Now, then tell me what has happened to those notes?

A. The notes were kept in my office at the university, and it turns out that a bishopric on the campus was using my office to interview on Sundays, and on Tuesdays.

Q. Is that a common practice?

A. Yes, it is.

Q. Are there a number of bishoprics and student wards organized on campus?

A. That's a very common thing to occur.

.....

Q. What happened as it relates to the notes in that connection?

A. One of the individuals using my office spent some of the time going through my files.

Q. Were your file drawers locked or was it a locked type cabinet?

A. No, they were not.

Q. And after going through them, what did he do?

A. He took as relates to the William Clayton notes, he took those notes from my office to a copy machine someplace and copied them, and then returned my notes back or the notes that I had back to the file.

(*Trial Transcript*, pages 262–263)

Andrew Ehat testified that the man who took the notes taught Mormon “seminary” and was “a member of a BYU bishopric” (*Deposition of Andrew Ehat*, page 57). Mr. Ehat also blamed a professor at Brigham Young University, who had knowledge of the theft, for helping distribute the Clayton notes. On page 76 of his deposition, he claimed that all “subsequent copies that are out” came from this professor’s copy.

As we indicated before, when the Church’s *Deseret News* printed the story concerning our trial, it erroneously claimed that “the Tanners obtained the notes in an office on Brigham Young University campus, where Ehat had placed them.” When we prepared our rebuttal to this article, we stated: “Court documents, in fact, show clearly that the notes were taken from Lyndon W. Cook’s office and surreptitiously photocopied by a member of a Mormon bishopric in Provo.” In order to run the article we were forced to remove the word “surreptitiously” and to change the word “taken” to “obtained.” The portion of the article read as follows in the April 29, 1984 issue of the *Deseret News*: “Court documents, in fact, show clearly that the notes were obtained from Lyndon W. Cook’s office and photocopied by a member of a Mormon bishopric in Provo.”

Although the evidence clearly showed that the material was “surreptitiously” taken from Cook’s office, it was apparently felt that it would be improper to make this comment concerning “a member of a Mormon bishopric.” It is interesting to note, however, that even Judge Christensen stated that the notes were “surreptitiously removed from the files of Professor Cook, . . .” (*Court’s Ruling*, page 9)

LIKE PENTAGON PAPERS

The following testimony was given by Jerald Tanner at the trial:

Q. Have you ever printed stolen documents before Mr. Tanner?

A. Well, in the same sense that the Church News has printed the Pentagon papers in July of 1971, yes, I have in the same sense. I have not printed originals, of course, but I have printed copies of stolen documents. (*Trial Transcript*, page 358)

By way of clarification we should state that the words “Church News” refer to the Church’s newspaper, *The Deseret News*, and the date “July of 1971” should be changed to June of 1971. The Pentagon Papers, of course, were classified documents which were printed by many papers after they were stolen. The *Deseret News* printed extracts from them on June 14 and 24, 1971. In any case, Mr. Madsen tried to defend the Church’s paper by asking if we felt the documents we had printed “have the same kind of impact and importance in terms of national news that the Pentagon Papers did?” (*Deposition of Jerald Tanner*, page 102). While we admit that the documents we publish do not have the same “impact and importance in terms of national news,” they are extremely important to those who are trying to decide whether Mormonism is true, and we feel that they should not be kept from the Mormon people.

The question concerning the printing of stolen documents is a question which many publishers have faced. Investigative reporters are confronted with this problem quite often. Scholars who write about Mormon history find themselves in the same dilemma. From the evidence which we have gathered it appears that a large number of Mormon scholars, including Mr. Ehat, either knowingly or unknowingly, have acquired copies of stolen documents which they have in their collections. We feel, however, that the blame for this should not be laid on the scholars but on the Church which suppresses the documents. We agree with the following statement printed in the *Seventh East Press*:

Palmer also feels that the archivists and policies governing access to documents in the Historical Department are overly restrictive, and that such restrictiveness prompts people such as himself to seek out copies of historical documents through the “underground” . . .

Some Mormon “Fundamentalists,” who have been involved in the Underground, believe that they are doing a religious service when they bring the early records of the Church to light. One man used the Book of Mormon

to justify his actions. Those who are familiar with the Book of Mormon will remember that Laban owned the brass plates on which the Jewish Scriptures were recorded. Nephi, however, felt that it was absolutely essential for his people to have the Scriptures and tried to purchase the plates from Laban. Laban did not accept the offer and chased Nephi and his brethren away and kept their property. Later Nephi found Laban “drunken with wine,” and the Lord commanded Nephi to “Slay him.” Nephi, therefore, cut off Laban’s head with his own sword, broke into “the treasury of Laban” and took “the plates of brass” (1 Nephi, Chapters 3 and 4). The Book of Mormon claims to be filled with a great deal of material from the plates of brass which were taken from Laban’s treasury. In any case, the Mormon Fundamentalist identified himself with Nephi. He claimed that there was a great deal of important religious material which is hidden in the Church Archives (which he likened to Laban’s treasury) and that he had a mission from God to get it out to the people.

While we acknowledge that we have printed documents which have leaked out of the Church Archives, we have never stolen any documents nor have we offered a bounty on them. The charge that we have stolen documents or films from the Church Archives is without foundation in fact. We have never stolen any document or film, neither have we encouraged, advised or conspired with any person to steal from the Mormon Church. We disapprove of this type of thing, and have obtained all of our material in an honorable way. In fact, in one instance a member of the Mormon Church told us that it would be very easy for him to “borrow” a very important film from the Church Archives, and that it could be duplicated and returned without anyone knowing what had happened. As much as we wanted a copy of this film, we told him that this would not be right and advised him against doing this. We felt that no matter how much we wanted copies of these documents, we could not encourage anyone to remove them from Church property without consent. The following testimony of Jerald Tanner appears on page 391 of the *Trial Transcript*:

A. I mean that I wouldn’t approve of theft. No, I would never at any time approve of any theft of any document from the church archives.

On June 29, 1982, a well-known Mormon scholar spoke at the University of Utah. In a question and answer time which followed, this scholar said that she was very much opposed to our work. One of the reasons she gave was that we had “stolen” documents from the Mormon Church Archives. We felt that this was a very serious

charge to be making against us in the presence of a large group of people, and we could have taken her into court for slander if she refused to retract the statement. In one respect it would have been beneficial to us for this matter to go into the courts. We are sure that no witnesses against us would show up because they would not want to perjure themselves in court. The outcome would certainly have silenced those who are making these false and malicious charges against us. While this would have proved to be a real victory for us, we did not feel that it would be the proper course to follow. The costs to the defendant would undoubtedly have run into thousands of dollars, and since we had no desire to return “evil for evil,” we chose not to go into court. We have no personal animosity towards this scholar, and although she made a slanderous accusation at the meeting, we feel that she really believed what she said. In other words, we believe she received false information from our enemies and had accepted it without bothering to thoroughly check into the matter. When we questioned her about this after the meeting, she was unable to point to any specific incident of theft, and merely said she received her information from a source or sources which she would not identify. She indicated, however, that those who worked in the Church Historical Department had the evidence against us.

INVESTIGATIONS

After Ehat filed his suit and we learned that we would be questioning Church Archivist Donald Schmidt, we decided to put this question about accusations of theft directly to him. This, of course, would be a very dangerous thing to do if we were involved in a conspiracy to steal the Church’s documents. Since we raised the issue, he would be free to bring forth any evidence he had against us and it would become a matter of public record. Donald Schmidt, of course, would be the man who should know the most about the matter because of his position in the Church Archives. In his testimony, Schmidt admitted that both the Historical Department and Church Security conducted investigations as to how material was leaking out of the Archives:

Q. During the time that you’ve been the director has there been investigations with regard to those unauthorized copies being made and distributed?

A. Would you identify what you mean by investigation?

Q. Looking for the source, looking for the person that broke the rules and made those copies and distributed them.

A. Yes.

The Tanners on Trial

Q. And who conducted those inquiries?

MR. FINDLAY: I'll object to it on the grounds it is getting a little far afield.

MR. BARNARD: My goal in that is to find out if those investigations ever involved the Tanners and that in those investigations there was any checking up on the Tanners to see if they were involved.

A. That I don't know.

Q. Who conducted the investigations?

MR. FINDLAY: That is a question I object to but I'll withdraw the objection. Go ahead.

A. Both the Historical Department as well as Church Security did.

.....

Q. Were any of those investigations triggered by or directed towards publications made by the Tanners?

A. You're making me think of something that was not originally—

Q. That's a legitimate answer too.

MR. FINDLAY: Let me talk to my witness for a minute.

(Break from 10:30 a.m. to 10:35 a.m.)

(Discussion off the record.)

(Question, lines 2 and 3 read back by the recorder.)

A. I don't know directly but at least probably out of curiosity, as to whether or not that was true.

Q. I don't understand.

A. Well, there were a number of publications and not a specific publication or not a triggering specific thing, but since there were a large number of them being published that would be possible that we may want to investigate to see whatever source that they were using that we may find out.

Q. And who would have, if anybody, would have records of those investigations?

A. I do not have them.

Q. Do you know whether or not Church Security would have?

A. I do not know that.

Q. Do you know who I would inquire of in Church Security? Was there some person in Church Security that was involved in those investigations that I could inquire of?

A. The person who talked to me at the time is no longer an employee of the Church.

Q. And that was somebody from Church Security?

A. Yes.

(*Deposition of Donald Schmidt*, pages 29, 30, 32, 33)

Although Mr. Schmidt acknowledged investigations had been made by both the Historical Department and Church Security, he admitted that he was not aware of any evidence that we were involved in a conspiracy to steal documents:

Q. Do you have any personal knowledge or any information that would lead you to believe the Tanners

have ever been involved in unauthorized access to materials either at the Church Archives or at BYU Library?

A. Would you repeat that question for me?

Q. Do you have any personal knowledge that either Sandra or Jerald Tanner have ever been involved in personally gaining unauthorized access to documents either at the BYU Library or at the LDS Church Archives?

A. I have not, personally.

Q. Do you have any information from any other source other than your personal knowledge that they have been involved in such conduct?

A. Second handed in either, their own writings are some indication, you know. I read their material. Not personally.

Q. I want to differentiate between or maybe divide that question up. They have published some materials which have been, which may have been taken without authorization and the distinction in my question is do you know whether or not they have taken the materials themselves because they readily admit that they have published materials that have come out unauthorized, in an unauthorized manner. Do you know whether or not they have ever been involved in taking materials unauthorized?

A. I do not know that.

Q. Do you have any information that would show that they were involved in that taking?

A. Not really.

Q. Has anybody ever told you that they were personally involved in unauthorized taking of documents like that?

MR. MADSEN: Did they, meaning the Tanners?

MR. BARNARD: Right.

A. Not that I know of.

Q. And I assume by your answer that you have also never told anybody that they were involved in such unauthorized taking, given the fact that you have no knowledge?

A. Not that I'm aware of.

Q. One last question in that area. Have you, are you aware of any involvement by the Tanners with other people who have taken the documents in an unauthorized way other than the fact that they've ended up publishing the documents? By that I mean, have the Tanners been encouraging people to take the documents or anything like that? Are you aware of anything along those lines?

A. I'm not sure.

.....

Q. Are you aware of the Tanners being involved in any way in the access to those unauthorized documents by encouraging other people to make copies or encouraging people to steal them or anything like that?

A. I don't know of anything in that regard, personally, no.

(*Ibid.*, pages 26–29)

James B. Allen, who had served as Assistant Church Historian, was also unable to produce any evidence against us (see his deposition, pages 72, 73, 82, 83). Although Mr. Madsen accused us of printing stolen documents, he offered nothing to prove that we had been involved in a conspiracy to steal them. If any evidence had been available, we feel certain that it would have been used against us.

COPYRIGHT VIOLATION?

While Madsen produced no evidence that we had been involved in stealing the Church's documents, he tried very hard to prove that we were guilty of numerous copyright violations when we printed them. The fact that Mr. Madsen was not very well acquainted with the copyright laws became evident when he took our depositions and at the trial. The reader will remember that Madsen filed the suit under the copyright laws. Judge Christensen, however, said that, "Plaintiff's complaint is not a model of clarity or certainty and talks in general of copyrighted works completed or to be completed, and of the notes from the Clayton Journals upon which these publications have been or will be based that have fallen into the hands of defendants and which have either been republished or he fears will be republished by them" ("Ruling on Motion to Quash Subpoena Duces Tecum," Sept. 16, 1984, page 2).

From the very beginning we maintained that Mr. Ehat could not copyright the extracts. In the *Salt Lake City Messenger*, June 1983, we commented:

We feel that this suit cannot be successful because it is based on an erroneous assumption—i.e., that Ehat can copyright the writings of William Clayton. We find the following plainly stated in Section 103(b) of Title 17, United States Code:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.

Since Ehat's notes are composed of extracts from "preexisting" material (the diaries of William Clayton), he cannot claim copyright protection. If Mr. Ehat had made a unique compilation or translation of Clayton's words, he could have sought protection under the copyright law. The notes which we have published do not meet either of these requirements. They are only typed quotations which are not organized for publication. They could not, therefore, be considered

to be a manuscript prepared for publication. Although they are typed out, they would only be considered to be equivalent to photocopies of a document.

Because Mr. Ehat was able to put a copyright on the book *The Words of Joseph Smith*, he seems to feel that he has the exclusive rights to the quotations from William Clayton's diaries. Using the same reasoning, we could maintain that Moody Press (the publisher of our book *The Changing World of Mormonism*) holds a copyright on the recently discovered sheet containing characters which were supposed to have been taken from the gold plates of the Book of Mormon. We could argue that a photograph of the document appears in the book, and since the book has a copyright at the front, it must cover this important document. We could also put a copyright on the three Joseph Smith diaries we have published and claim we have the exclusive rights to these diaries. Such claims, of course would be ridiculous and would never hold up in court. If such a thing could be done, it would have some serious implications for the Mormon Church. For instance, an ex-Mormon by the name of Chuck Sackett has recently published the Mormon temple ceremony with a copyright at the front of the pamphlet. According to Ehat's reasoning, this would mean that a non-Mormon now owns the literary rights to the temple ceremony. It is, of course, true that Mr. Sackett can copyright his own introduction, comments, footnotes, etc., but the text of the ceremony is in the public domain.

In the "Defendants' Trial Brief," page 16, Brian Barnard argued:

Copyright protection subsists only in original works of authorship. . . . An *author* is he to whom anything owes its origin, the originator or the maker thereof. A copyist is not an author; a mere copy of another's work is not an original work that can be copyrighted. Originality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying.

As we have already shown, Judge Christensen agreed with us that Ehat's notes did not fall within the protection of the copyright laws:

11. The quotations from the Clayton journals themselves were not a product of any literary effort of accomplishment by plaintiff nor any creativity and were not subject to copyright or any copyright interest in plaintiff's favor, but plaintiff's rights in the Ehat notes as a physical matter and property was of a nature and character different in kind from any copyrightable interest there may have existed in said original writings comprising the Clayton journals, and were and are not within the scope or purpose of rights established under the copyright laws of the United States or any equivalent. (*Court's Ruling*, page 9)

The Tanners on Trial

From these findings of fact the Court now draws the following conclusion of law.

.....
2. That the plaintiff has no copyrightable interest in the so-called Ehat notes nor their ideas nor content, and that plaintiff's claim against the defendants for copyright infringement should be dismissed with prejudice. (Ibid., page 17)

On page 20 of the same document, Judge Christensen stated: "It is clear that the Ehat notes were not copyrightable as I have indicated, nor is recovery permitted under any equivalent theory . . ."

Mr. Madsen seemed to be laboring under the assumption that the Church Archives or individuals who own old manuscripts automatically have the manuscript rights. A letter which we received from the Copyright Office, dated April 10, 1978, says that "The basis rule is that, unless the literary property rights have been transferred, the author or his heirs have the exclusive right to decide when and how his letters and other personal writings should be published for the first time."

Samuel Spring informs us that

Recently a collector bought the manuscript of an unpublished story written by Mark Twain. The collector decided to publish it. The heirs of Mark Twain objected, because Mark Twain had concluded that the story wasn't finished or good enough to be published. His heirs still honored Mark Twain's wishes. The court held that though the collector had gotten good title to the manuscript he had not thereby obtained the right to publish it. . . . the court held that the facts do not show that Mark Twain or his heirs had sold, or intended to sell, their common-law copyright. The collector therefore had the right to keep the manuscript forever, but never to publish it. (*Risks & Rights*, page 76)

Although manuscript rights may technically stay within the family, it would seem rather ridiculous for descendants of people who lived a hundred years ago to even think of trying to suppress publication of something that old. There would be so many descendants that it would make the matter very difficult. This would be especially true among descendants of Mormon polygamists who might have hundreds or even thousands of descendants.

In any case, Gordon A. Madsen seemed to maintain that Steven Christensen had the manuscript rights to the purported letter of Martin Harris which was supposed to have been written in 1830. The following appeared in his examination of Jerald Tanner:

Q. Indeed the forepart of that same Messenger has some quotes in it from a letter that hasn't yet been printed that you acknowledge is owned by Mr. Steven Christensen, doesn't it?

A. It has quotations from a letter, but that has not been stolen.

Q. But your quotations from it were without any permission from Mr. Christensen, were they?

A. I did not need permission from Mr. Christensen because the owner[ship] of the document is in the family, and it's the family rights would be the descendant of Martin Harris.

Q. You say in your own article that Christensen is the owner of that document, do you not?

A. Yes, but if you would read the copyright law there is a difference between ownership of the document and ownership of the manuscript rights.

Q. What effort did you make to determine who owned the copyrights in that Christensen letter?

A. I'm sure that it's been so long that no one would. (*Trial Transcript*, pages 391–392)

Even if Steven Christensen had had the manuscript rights to the so-called "Salamander Letter," we quoted only a few sentences from it in the March 1984 issue of the *Messenger*. This would fall well within the limits of "fair use," and would not therefore be considered a violation of copyright.

ARCHIVIST CAN'T ANSWER

When we were examined concerning the Clayton diaries, we maintained that they were in the "public domain"—i.e., that they could be printed by anyone:

Q. Now, you indicated when asked on what authority you did the printing, you contended that the Clayton material was all in the public domain; is that correct?

A. The Clayton material, yes, un-huh.

Q. Is that still your position?

A. Yes, it's strengthened now that we have talked to Don Schmidt and he would not tell us that there was a copyright. It is strengthened now. (*Trial Transcript*, testimony of Jerald Tanner, pages 357–358)

When we took Church Archivist Donald Schmidt's deposition, the Church's lawyer would not let him give an opinion as to whether the Church held any literary rights in the Clayton diaries?

Q. So with regard to the Clayton Diaries, it is the position of the Historical Department that they have the literary rights in those diaries?

A. I defer to my legal counsel.

MR. FINDLAY: We would object to him stating in any binding sense what our ultimate decision would be because number one, we think the question is that the foundation is inadequate to show the details. The law of copyright is not as simple as just a matter of assignment or a matter of possession. There's a lot more

to be taken into account. And we object to, you know, we don't want to have to advocate our copyright in this lawsuit one way or the other but we can see that maybe whether we have a copyright is germane to the lawsuit. So with that remark I suppose you know the nature of the objection.

MR. MADSEN: I suppose I ought to also object. This is beyond the scope of any of the issues of this lawsuit and not subject for matter of discovery. Whether or not the Church has copyright is not the issue before this court with regard to these notes having been published.

MR. FINDLAY: Let me state this: As a legal matter I would object to him stating whether or not—, well, the thing that is troubling me is that I don't believe we're bound by this in terms of whether we really do have a copyright or not, number one. So I'm impelled by that to say go ahead and answer but number two, if he says we don't have a copyright that would be possibly admissible in evidence against us if we ever tried to establish a copyright because that is a sensitive issue with us. Number three, I don't see the issue of whether we have a copyright per se as being relevant because the statute says that in a work that is made up of material taken from other copyrighted work the copyright in the derivative work is neither enhanced or enriched, it is not affected one way or the other. Or the copyright in the one work is not related to the copyright in the other work. So for that reason I would object to him testifying about our contentions with respect to whether we have a copyright and instruct him that it would be my—, instruct him not to disclose our position in terms of our contentions about what our copyright is in this particular item.

MR. TANNER: Can't he just give an opinion?

MR. FINDLAY: I don't want him to and it is not relevant and could be used by someone else at another time in ways that we can't foresee now. So I would rather he not venture a guess on that. (*Deposition of Donald Schmidt*, pages 41–43)

On page 8 of his deposition, Donald Schmidt testified as follows:

A. To my knowledge there is no document specifically stating that the diaries were given to the Historical Department.

In the “Memorandum in Support of Defendants’ Motion for Summary Judgment, pages 15–17, Brian Barnard argued:

A copyright vests initially in the author or creator of a document or writing; this is the case, under current law whether the work is published or unpublished.

. . . A copyright may pass to the heirs of an author or may be assigned or transferred to others. . . . Unless shown otherwise, since Wm Clayton was the author and there is no showing of any transfer of ownership or copyright to the LDS Church, it must be assumed that the ownership of those original journals, their contents and its copyright belong to the heirs of Wm Clayton.

Don Schmidt, the LDS Church Archivist pursuant to subpoena was required to bring with him to his deposition any documentation showing that the Wm Clayton Journals belonged to the LDS Church, that they had been willed to the Church by Wm Clayton or his heirs or had in some other fashion been transferred to the LDS Church, etc. . . . At his deposition Don Schmidt stated that there is no such documentation and there is no written evidence that the LDS Church owns the Wm Clayton Journals or any copyright thereon. . . . Further, at his deposition both Don Schmidt and his legal counsel, Bruce Findlay refused to take any position as to whether or not the LDS Church owned the journals or any copyright interest in them. . . . G. Homer Durham, the supervisor of Don Schmidt has refused to have his deposition taken thus preventing defendants from further discovery as to the ownership of the journals and their copyright.

Pursuant to . . . the copyright laws since Andrew A. Ehat is neither the legal nor beneficial owner of any exclusive right or copyright he cannot institute an action for an alleged copyright violation by the defendants herein. . . . any transfer of copyright ownership must be in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. There is no written documentation showing that the LDS Church received from Wm Clayton or his heirs any ownership in the Wm Clayton Journals or their copyright, thus the LDS Church cannot claim ownership or a copyright in those journals. Further, because there is no written document, the LDS Church could not have transferred a copyright interest (assuming it had any) to Andrew Ehat, the plaintiff.

Plaintiff has no protected copyright in the Wm Clayton Journals and thus no standing to maintain this action.

Andrew Ehat was asked in his deposition, pages 56–57, if he had received any permission from the Clayton family to print his extracts:

A. By asking for permission to publish the extracts from William Clayton that I have, I presumed that I'm getting permission from the Church to publish those extracts; that they have determined that the Church had the literary property rights on that and had been relinquished by the family.

1 answer but number two, if he says we don't have a
2 copyright that would be possibly admissible in evidence
3 against us if we ever tried to establish a copyright
4 because that is a sensitive issue with us. Number
5 three, I don't see the issue of whether we have a
6 copyright per se as being relevant because the statute
7 says that in a work that is made up of material taken
8 from other copyrighted work the copyright in the
9 derivative work is neither enhanced or enriched, it
10 is not affected one way or the other. Or the copyright
11 in the one work is not related to the copyright in
12 the other work. So for that reason I would object to
13 him testifying about our contentions with respect
14 to whether we have a copyright and instruct him that
15 it would be my--, instruct him not to disclose our
16 position in terms of our contentions about what our
17 copyright is in this particular item.

18 MR. TANNER: Can't he just give an opinion?

19 MR. PINDLAY: I don't want him to and it
20 is not relevant and could be used by someone else
21 at another time in ways that we can't foresee now.
22 So I would rather he not venture a guess on that.

23 MR. BARNARD: We were talking a minute
24 ago about literary rights. When you used the term
25 literary rights were you also, I mean, is that

A photograph from the *Deposition of Donald Schmidt*. The church's lawyer would not let him answer the question of whether the church has a copyright on William Clayton diaries.

The Tanners on Trial

Q. Okay. You couch that in terms of a presumption; is that correct?

A. Obviously.

.....

Q. Have you gotten any permission from heirs of William Clayton to publish extracts from his journals?

A. No.

Q. Why not?

A. Based on the answer I gave to you before, I inquired of the Church Archives for permission to publish with the understanding that if they did not possess the literary property rights that they would refer me to the heirs.

Q. Okay. And obviously they didn't refer you to the heirs?

A. Yes.

From what we were able to determine, although the Mormon Church has physical possession of the Clayton diaries, it does not have any literary rights. If anyone actually owned the literary rights, it would have been the family, but since the diaries are so old and there are so many descendants, it would be very difficult to enforce these rights. Church Archivist Donald Schmidt feels, and we tend to agree, that the rights on diaries tend to dissolve over a long period of time:

MR. FINDLAY: Would you read back the question?

REPORTER: Q. And as a general question with regard to journals such as the Clayton journals that the Historical Department acquires, does the Historical Department consider themselves to have the right to publish those journals once they have possession of them?

MR. FINDLAY: Go ahead and answer. I would object too. There is an aspect of the question that is asking him for a legal opinion but I don't perceive that—, you're saying, as I understand it, you are saying something about whether they infer from possession some right to publish; isn't that it?

MR. BARNARD: Right.

MR. FINDLAY: I don't see any reason why he can't venture an opinion on that, although it'll be to some extent an opinion about the law.

MR. BARNARD: Do you understand my inquiry?

A. Yes. I'm not a lawyer, as you can see I have two of them. For the msot [*sic*] part, the Historical Department considers that we have literary rights for those items which we have. Specifically we'll have some in which we have a document which says the donor has given literary rights to the Historical Department.

Q. And if the Historical Department has possession but no document saying that they have literary rights, what is the policy of the Historical Department then?

A. We then take the stand that depending upon how long we've had the material that we do have it. In other words, we've had the Clayton Diaries for a hundred years or more. The family has never claimed them.

(Deposition of Donald Schmidt, pages 40–41)

It seems obvious from this that Donald Schmidt is claiming that a family's literary rights to a diary dissolve as time goes on and that the Church feels free to publish that diary without obtaining any special permission. This, of course, would mean that the diary is in the "public domain" and that anyone could publish it.

Ehat's lawyer was convinced that we had violated copyright when we published the diaries of Joseph Smith which are in the possession of the Mormon Church:

Q. And it purports to be the 1835–36 diary of Joseph Smith; is that correct?

A. Yes.

Q. And the title page says "NEVER BEFORE PUBLISHED." Is that so?

A. Yes.

.....

Q. What I want to call your attention to, Mrs. Tanner, is some stamped print —

A. Yes.

Q. —on both of those two pages. Would you read what that stamped print says, if you can, please.

A. "Copies may be made only by permission of the Church Archivist. Literary property rights are reserved by the Historical Department, The Church of Jesus Christ of Latter-day Saints."

Q. Was that print on the original photocopy? What did you print from? A photocopy or the original?

A. We had a photocopy that we made this copy from. (Indicating.)

Q. And that photocopy had that stamp printed on it, I take it.

A. Yes.

Q. So when you reproduced it, the stamp still shows.

A. That's right.

Q. And did you note that stamp being there when you did the printing?

A. Yes. We were fully aware of the stamp. We don't feel they had any right legally to the document, so the note meant nothing.

Q. It didn't mean a thing to you?

A. No.

Q. Did you discuss it at all with your husband?

A. Yes.

Q. And was that your joint conclusion?

A. Yes.

(Deposition of Sandra Tanner, pages 7–8)

The Tanners on Trial

In the *Deposition of Jerald Tanner*, pages 63–64, we find the following:

Q. (By Mr. Madsen) Handing you next a document titled *Joseph Smith's 1832–34 Diary* —

A. Yes.

Q. —You published that also in 1979, did you not?

A. Yes, I did.

.....

Q. And he [Michael Marquardt] did the actual transcribing that you printed there? (Indicating.)

A. Yes. It's transcribed by H. Michael Marquardt. I'm sure they were authentic documents.

Q. Did you or he, to your knowledge, get permission from the Archives or—

A. No. This document is in the public domain, 100 years or more, 1832. It's far in the public domain.

Q. Had it previously been published?

A. Just portions of it.

Q. Which portions?

A. I couldn't tell you exactly.

Q. And the fact that portions of it had been published, you say the whole thing is—

A. No, No. It's in the public domain because it is a Smith family document, and it's in the same public domain — the same reason the letters to Sandra's great-grandfather are in the public domain.

Donald Schmidt also felt that we violated copyright when we printed Joseph Smith's diaries:

Q. Are you aware of any situations where the Tanners have been involved in copyright violations or what you perceive to be copyright violations?

A. Yes.

.....

MR. BARNARD: What is the nature of their conduct?

A. A specific document that you want to know?

Q. That's correct?

A. The specific document, and I guess I don't remember the title they put on it, they published one in which we had specifically identified a stamp which said that the copyright belonged to the Church Historical Department.

Q. Do you know the nature of that document that they published?

MR. MADSEN: It's already been discussed in depositions. 1836 Joseph Smith Diary.

A. Thank you.

MR. BARNARD: Correct, the 1836 diary. That is your answer?

A. Yes.

.....

MR. BARNARD: You've indicated one document that you're aware of that they published that there was a copyright on. Are you aware of any other documents that are similar that they published?

A. In my estimation?

Q. Yes.

A. Yes, I think there are others.

Q. Could you tell me what those are?

A. The other Joseph Smith Diary, for example.

Q. And which one was that?

A. 1832–34.

(*Deposition of Donald Schmidt*, page 36)

At the trial, however, Donald Schmidt testified that he knew of no document transferring the literary rights from the Smith family to the Mormon Church:

Q. With regard to the Joseph Smith diary 1832–1834, that's in the physical possession of the LDS church; is that correct?

A. Yes.

Q. Do you know if there is any document showing that Joseph Smith transferred copyright interest in that journal to the LDS church?

A. No, I don't know that.

Q. And that same question with regard to the heirs of Joseph Smith, have they transferred copyright interest to the church?

A. Not that I know of.

Q. With regard to the 1835–1836 Joseph Smith diaries, those are in the physical possession of the church?

A. Yes.

Q. And do you have any written documentation that Joseph Smith transferred a copyright interest to the church?

A. No.

Q. And is there any documentation that his heirs did that?

A. No.

(*Trial Transcript*, page 145)

The stamp on the photocopies of pages from Joseph Smith's diaries which claims to reserve literary rights for the Church does not amount to anything because the Church has no literary rights in those diaries. The General Authorities of the Church were very disturbed when we began publishing Joseph Smith's diaries in 1979, but so far they have not even threatened legal action. The Church legal department must know that if there are any literary rights on these diaries, they would belong to Joseph Smith's heirs. Since his family rejected Brigham Young and joined the RLDS Church, it is doubtful that any descendants would contest the publication of the diaries.

While the Church undoubtedly holds manuscript rights on many manuscripts, we feel that it has used misunderstanding of the copyright law to try to prevent its members from learning the truth about its origins. In other words, the bugbear of possible legal action has been used to keep people in the dark. Lest our position be misunderstood, however, we should say that we do not believe that all of the current records should be published. The excommunication records, for instance, should not be revealed to the world except in very exceptional circumstances. Their contents could destroy marriages and cause needless pain.

Some people felt that we went too far in publishing *Joseph Smith's Egyptian Alphabet and Grammar*. Even though the Church owns the original manuscript, we question the claim that it has the literary rights. Although we have no way of verifying it, we have heard that Church officials did not believe they could win a suit over this publication. In any case, we would have been willing to go into court over this publication.

We have been told that the Church threatened both Ed Decker and John L. Smith with lawsuits over what we believe were trivial matters. Although we have received threatening letters from Mormon Apostles, we have never received an official letter from the Church's legal department. In his deposition, Donald Schmidt was asked concerning this matter:

Q. That is fine. Do you know whether or not there's ever been any legal action taken against them, against the Tanners as a result of those copyright violations?

A. I do not know of any.

Q. Have you ever been privy to any discussions about taking action against them?

A. I have not.

Q. And are you aware of anybody else within the Church that has considered legal actions like that?

A. I do not know of any.

.....

Q. Are you aware of any publication or any statement by the Church accusing the Tanners of copyright violations or manuscript violations?

A. I am not aware of any.

(*Deposition of Donald Schmidt*, pages 37 and 39)

WITHOUT ASKING SANDRA

Gordon A. Madsen seemed to be very concerned about us using material from an old pioneer journal without permission. We pointed out, however, that the Church does this very thing:

Q. And you claim no permission for so doing and your claim is that they are in the public domain because of their ancientness?

A. Well, because of the fact that he had so many descendants, I don't know how you would ever figure out who actually owns it. How would you do it?

Now, take Sandra's grandfather — great-great-grandfather Brigham Young. He has had so many descendants that the Church never consulted us when they published Brigham Young's writing.

Q. Do you think they should?

A. Well, if I should, then they should.

(*Deposition of Jerald Tanner*, pages 26–27)

Q. Now, Mr. Tanner, back to the question, and that is: do you take the position in the publications that you have of previously unpublished documents that they are, number one, in the public domain?

You can answer that first, so he won't claim that I am compound.

A. Well, which documents?

Q. Well, we have talked about several: the Manuscript History, the Joseph Robinson Diary and —

A. Yes.

Q.—some other documents that you have published about the Joseph Smith vision.

A. There is much in the public domain, such as the letters of Sandra's great-grandfather, which the Church published without consulting any of the descendants.

.....

A. I don't know how far the public domain would extend. That would be a legal question I couldn't answer.

I understand that some of Mark Twain's descendants objected to a publication of his manuscript that was — I don't know — maybe not too long after his death. They prevailed in that.

Q. You understand all that, but you nonetheless consider that having gotten the number of heirs — such as your wife being a descendant of Brigham Young — automatically makes the document in the public domain at some point?

A. Rephrase it. I don't know what the point is.

But I have called the Library of Congress and all over, and they can't seem to tell me where that point would be. And I have never seen anything that could tell me exactly.

.....

THE WITNESS: I assume that the letters of Sandra's great-grandfather have passed into the public domain, and that's why the Church didn't contact her to have those published.

Q. (By Mr. Madsen) Were those letters published?

A. Yes

Q. By Whom?

A. The Mormon Church, Dean Jessee in the Mormon Church Historical Department.

Q. Dean Jessee's publication *Brigham Young's Letters To His Sons*?

The Tanners on Trial

A. Yes. Some of her other relatives, they don't know anything about anybody being consulted either.

So since the Church feels it is in the public domain, I feel the same way as the Church, that after a period of time, it becomes in the public domain.

I couldn't tell you where this crossed. I would rather think that maybe a person's son would still maintain rights, but I don't know how far that would extend.

.....
Q. Were there any original documents in this *The Strange Marriages of Sarah Ann Whitney* that were published?

A. Yes, I believe there were. There was a Kingsbury history that he—

.....
Q. (By Mr. Madsen) There were some letters in connection with that between Joseph Smith and Neil K. Whitney that were also part of that publication.

A. I remember one.

.....
Q. Did you make any effort to get permission or to find out whether it had —

A. No. It was obviously a letter written back in 1842; obviously in the public domain. Much more so than Sandra's great-grandfather's letters that the Church published.

Q. You keep saying "The Church published." You are talking about a book that Dean Jessee wrote; is that correct?

A. Yes. He wrote it with the approval of the Historical Department, as I understand it.

Q. What evidence do you have?

A. I don't have the book here, but I think you would see that the Church did publish it. I believe they printed it on their press.

(*Deposition of Jerald Tanner*, pages 44, 45, 48–50, 54, 56–57)

Now that we have the book *Letters of Brigham Young to His Sons* before us, we can see that it is "Published by Deseret Book Company in Collaboration with the Historical Department of the Church of Jesus Christ of Latter-day Saints." The Deseret Book Company is, of course, the Church's official press. The title page says that it is "Edited and Introduced by Dean C. Jessee," and Church Historian Leonard J. Arrington is listed on page viii as the "General Editor." From this it becomes very clear that the book is an official publication of the Church itself.

Gordon Madsen must have been bothered by the implications of this because in the *Deposition of Sandra Tanner*, pages 11–14, he continued to pursue the matter:

Q. Now, have you ever seen the letters of your great-grandfather or your great-great-grandfather to your grandfather? Have I got that correct?

A. Right. I saw the printed book that the Church Historical Department published.

Q. Do you know who holds the copyright on that book?

A. The — I assume the Church Historical Department does under the Church Office.

.....
Q. And the book we are talking about is *Brigham Young's Letters to His Son* by —

A. That's right.

Q. — Dean Jessee, J-e-s-s-e-e?

The question was: Have you ever seen any of the original letters your great-grandfather—

Your great-grandfather was Brigham Young, Jr.?

A. That's right.

Q. And his father was Brigham Young.

A. That's right.

.....
Q. And you were refused access to the Brigham Young papers?

A. That's right. . . . I was not allowed access to any of his papers.

Q. Did you ever complain either to Mr. Jessee or anyone else at the Church of the publication of those letters?

A. No.

Q. Did you know whether any of your intervening ancestors had given those documents to the Church Archives?

A. I don't know who gave them to them. But I know the family — none of my relatives that I have ever talked to were consulted for permission for publishing.

That says to me the Church did not recognize the family's right, that they didn't feel they needed to ask anyone.

Q. How many of your relatives did you consult?

A. Well, Brigham Young, Jr.'s son, Walter, had nine children, eight of whom are living. And as far as I have ever heard, none of them were consulted.

Q. Did you check with all of them?

A. Not personally, but I have asked several and they have expressed no knowledge.

.....
Q. And you don't have any knowledge as to whether anyone in that line had given or delivered those, in fact, to the Historian's Office?

A. It was my understanding that when documents by families are placed in the Church Archives, they were supposedly still accessible to the family, with the Church acting solely as a depository for preservation.

I don't know how it got there.

Q. And you have no independent knowledge of any family action taken with regard to those letters?

A. No. I don't feel that — I am not saying that the Church violated anyone's rights. I am saying at this point in time nobody could claim rights to them . . . I don't think a court would uphold any family member as having those rights. I don't think anyone has rights to things of that age. I don't think you could prove someone owned a right.

The reader will remember that we have a letter from the Copyright Office which says that the basic rule is that "unless the literary property rights have been transferred, the author or his heirs" retain these rights. Samuel Spring also states that "on death of the writer copyright passes to his heirs, . . ." (*Rights & Risks*, page 80). In his deposition, page 62, Dean Jessee said that he did not obtain permission from the heirs before printing the book *Letters of Brigham Young to His Sons*:

Q. Did you in that publication of that book, Brigham Young's Letters to His Sons, did you get permission from the heirs of any of the parties involved?

A. Well, I got permission from the people that hold—that have the original materials there.

Q. Which would be the LDS Church?

A. That's right.

Former Assistant Church Historian Davis Bitton said that Brigham Young, Jr. wrote "30 vols." of diaries which are now in the Church Historical Department (*Guide To Mormon Diaries & Autobiographies*, page 398). Church Archivist Donald Schmidt claimed that descendants generally have access to diaries and can even publish them, but when Schmidt was asked about Sandra Tanner's access to her great-grandfather's diaries, the Church's lawyer would not allow him to answer:

A. The general statement as far as that is concerned, I assume it would apply to the Clayton Diaries, is that if the de[s]cendent comes in and wants to look at the diary and do something with it we're happy to accommodate them the best we can.

Q. That is the general rule. You're not aware of any provision that would prevent that general rule from governing the Clayton Diaries?

A. But, you understand, I don't have the Clayton Diaries in my control.

Q. We're talking about diaries that are in your control.

A. That is the rule which we use.

.....

Q. And with regard to the access of heirs or decedents to journals, would there be restrictions on those heirs from making copies or publishing those journals as a general rule, general policy?

A. Would there be restrictions on whether they could publish them?

Q. Right. We're talking about the journals you have in your Historical Department. You said that if an heir or decedent came in and said I would like access you would give them access. If that same heir came in and said I want to make photocopies of these journals, as a general rule would you allow that?

A. I think we could say as a general rule. That is not true of all but that is a general rule, uh huh.

Q. And with regard to publishing those journals that you have in your possession by an heir or decedent, are there any restrictions on that?

A. As a general rule again it would be the same thing. He may make a photocopy, he may publish for that matter.

Q. And you say that is a general rule. What is outside that general rule?

A. You usually have to establish who the individual is and whether or not he represents the family, a family association, a family group or whatever else it is. If it is an individual who wants to do so to harm the rest of the family you have a problem, of course, that you have to settle one way or the other.

(*Deposition of Donald Schmidt*, pages 45–48)

Q. Are the journals of Brigham Young, Jr. kept in your collection?

A. Yes.

Q. And do they fall under that general policy that you described earlier that heirs could have access to journals?

A. The general policy will apply to all journals.

Q. And is there any specific restrictions on access to the journals of Brigham Young, Jr.?

A. Off hand I don't remember them but I would have to go look. I can't remember each one individually.

Q. If Sandra Tanner was to establish that she was a decedent of Brigham Young, Jr. and she approached you, could she have access to those journals?

MR. FINDLAY: I'll object to it on the grounds it is calling for irrelevant information. Instruct him not to answer that. He already testified what the policy is. (*Ibid.*, pages 67–68)

We are happy that the Church has published some of the papers of Brigham Young and his son, Brigham Young, Jr., and we really wish that it would print them all. On the other hand, we feel that the Church is violating literary rights when they suppress the documents so the descendants cannot gain access to them. It is impossible,

of course, for descendants to exercise their literary rights when the Church is suppressing the original documents. Although it is claimed that the Church makes the diaries available to descendants, there have been a number of cases where this rule has not been followed. The reader will remember that in the case of the Clayton diaries, the Church kept the diaries suppressed to the point that the descendants were not even aware of their existence. In another case, the noted Mormon scholar Hugh Nibley located a copy of his great-grandfather's diary and turned it over to the Church Historian Joseph Fielding Smith. Smith locked the diary "in a safe" (Letter from Hugh Nibley, March 8, 1961), and when Dr. Nibley asked to see it at a later time, he was not given access. In a letter dated March 21, 1961, he wrote: "Actually, the last time I asked permission to see the Journal, I was refused. Any attempt to reproduce it at this time is out of the question."

As we have already pointed out, Andrew Ehat had an unauthorized copy of the Wilford Woodruff Journals. In his deposition, page 53, Dean Jessee was asked if there were typescripts of the Wilford Woodruff Journals. He replied, "Well, I presume there are because Signature Books is publishing it right now." A person should not get the impression that the Church cooperated in the publication of these important journals which were written by the fourth President of the Mormon Church. The following is what really happened: Signature Books obtained permission from the Wilford Woodruff Family Association to print the journals, which amount to thousands of pages. In his deposition, page 47, Scott Faulring was asked if the "LDS Church cooperated with the publication of those journals?" He replied:

A. From what I know, in no way, shape or form did they cooperate. They put everything in neutral. They neither cooperated or not cooperated. They didn't do anything.

On page 50 of the *Deposition of Scott Faulring* we read:

Q. While you were working on the Woodruff journals for Signature Books, do you know whether or not Signature Books asked the LDS Church for a copy or microfilm of the Woodruff journals?

MR. MADSEN: I object as to the form.

THE WITNESS: I would rather not answer that one, seeing it's not really relevant to what we're discussing.

We have learned from another source that Signature Books made two attempts to get the Church to provide good copies of the journals but did not achieve success. The reader may remember that Faulring testified:

... in trying to do my job to make a transcription of the journals, I was restricted from seeing them in Salt Lake. . . . The initial people up there at the archives, you know, when you fill out your slip and hand it to them, they wouldn't let me look at them. They said I had to see Don Schmidt, . . . And I think, but I'm not sure, he allowed me to look at them once or twice. . . . I did most of my work . . . at Special Collections at BYU, because they had a copy of the film . . . (pages 29–30)

The Church should have allowed complete access to the original diaries or at least provided good photocopies. Instead, however, poor quality microfilms had to be used to make the typescript. We understand also that the Church's legal department began a study into the legality of the publication. The Church's lawyers, however, must have determined that Signature Books was operating within the copyright laws. Seven volumes of the journals have now been printed, and no legal action has been taken.

QUINN'S SPEECH

Earlier in this book we spoke of a Mormon scholar who accused us of stealing documents from the Church Historical Department. This same woman claimed we were guilty of copyright violations. When we asked her what evidence she had, she admitted that she was not really versed in the law and had only been told this by others. She did, however, cite two specific examples where she believed we were in violation of the law. The first accusation stemmed from our publication of Michael Quinn's speech, *On Being A Mormon Historian*. (This is an attack on the suppressive historical policies of the Church by a noted Mormon historian.) The woman felt that we had violated Dr. Quinn's rights when we printed this speech without his permission. Actually, we were very careful not to infringe upon his manuscript rights. On November 18, 1981, the *Seventh East Press* printed portions of Dr. Quinn's speech and indicated that it had been "reported that Quinn's remarks are scheduled to appear in the November–December issue of *Sunstone Magazine*." We were excited to hear this report, but when we contacted *Sunstone*, we were informed that it was an inaccurate report. It appeared to us, therefore, that the speech was so controversial that no one wanted to publish it. In any case, Dr. Quinn began to sell copies of the speech to anyone who was interested. We have a copy and the envelope in which it was mailed. It was sold for \$1.50, and the woman who received it is willing to testify on our behalf. The envelope was mailed from Dr. Quinn's office on February 27, 1982. We have no idea how many copies Quinn sold, but we were told that he was giving it to everyone who requested it. Since Dr. Quinn did not

give any instructions about limiting its circulation, we assumed that he hoped it would be widely circulated by what is known as “the Mormon underground Xerox press.” In his deposition, pages 68–69, Scott Faulring testified as follows concerning the distribution of Quinn’s speech:

Q. Are you familiar with a man named Michael Quinn?

A. I know him from BYU. He’s a professor down there.

Q. Are you aware of a speech he gave called “On Being a Mormon Historian”?

A. Yes.

Q. Are you aware of copies of that speech being distributed through the underground system?

A. Several versions of it.

Q. Several versions of that speech?

A. Yes. There were two copies of it. One was an early draft, and the other was a final. The one that the Tanners published was the final copy.

Q. Have you ever talked to Quinn about whether or not he had approved distribution of copies?

A. When the Tanners had published it—or when I had heard that the Tanners were going to print it—I mentioned it to a friend of Mike Quinn. . . . I am almost sure that he had shared copies with faculty members at BYU.

I know of several copies that he gave to people at BYU.

We felt that since Dr. Quinn sold the speech without a copyright notice, he wanted it to be in the public domain. (As we have already indicated, when a work is in the public domain anyone is free to reproduce it.) Samuel Spring informs that “The making and issuing (i.e., sale or giving away copies to the public) is the common-sense practical definition of publication. . . . The making of copies and the sale, or gratis giving of the copies, to the public, is the pith of publication” (*Risks & Rights*, pages 110–111). Howard Walls also maintained that “The sale or other public distribution of a work without a copyright notice amounts to a dedication to the public” (*The Copyright Handbook for Fine and Applied Arts*, New York, 1963, page 50).

Under the old copyright law an author completely lost all rights to a manuscript as soon as copies of it were sold without a copyright notice. The new copyright law of October 19, 1976, is more lenient on those who do not include the notice. It does seem to allow “a relatively small number of copies” to be distributed without the complete loss of copyright protection (Section 405 of Title 17, United States Code), but the author must still register his work with the Copyright Office before taking

any action. The new law, of course, still requires that a copyright notice appear on copies that are distributed to the public:

(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. (United States Code, Title 17, Section 401)

Now, if Dr. Quinn feels that he has distributed “no more than a relatively small number of copies” and still desires copyright protection, he can register his work and inform us of this fact. So far we have received no notice concerning this matter. In any case, if this were tested in court we would seek to be identified as the “innocent infringers” mentioned in Section 405, Title 17, United States Code:

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice.

One thing which we would have to establish, of course, is that Michael Quinn actually published the speech without the copyright notice. In the new 1976 copyright law, publication is defined as follows:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. (United States Code, Title 17, Section 101)

Alan Latman comments that

while the statute uses “copies” and “phonorecords” in the plural, the committee reports state that under this definition “a work is ‘published’ if one or more copies or phonorecords embodying it are distributed to the public.” (*The Copyright Law: Howell’s Copyright Law Revised and the 1976 Act*, Washington, D.C., 1979, pages 141–142)

William S. Strong says that “circulation of copies within a limited group, for limited purposes” does not “count as publication” and that copies of a manuscript can be sent to a publisher without a copyright notice.

He claims, however, that “Publication is the act of offering copies to the public. . . . The size of the public is irrelevant; handing out one or two copies can constitute publication” (*The Copyright Book: A Practical Guide*, Cambridge, Massachusetts, 1981, page 55). It seems clear, then, that Dr. Quinn has “published” his speech without a copyright notice. In a House Report on the new copyright law, we find the following:

In addition to the possibility that copyright protection will be forfeited under section 405 (a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 405. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice has been omitted from a large number or from a “relatively small number” of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Under section 405 (b) an innocent infringer who acts “in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted,” and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to “any infringing acts committed before receiving actual notice” of registration. (“House Report,” as cited in *U.S. Copyright Documents: An Annotated Collection for Use by Educators and Librarians*, by Jerome K. Miller, Littleton, Colorado, 1981, page 220)

We feel that Michael Quinn would have a very difficult time establishing that he desired copyright protection for his speech. As we have already pointed out, he seems to have wanted the speech to be widely distributed by “the Mormon underground Xerox press.” Quinn used this very method to circulate an anonymous attack he made against our work in 1977. In the Introduction to his booklet, we find the following: “This publication has not been copyrighted, so that it can be reproduced and distributed freely by others, if they feel that the contents have value” (*Jerald and Sandra Tanner’s Distorted View of Mormonism: A Response to Mormonism—Shadow or Reality?*). Since Dr. Quinn was distributing his talk, *On Being a Mormon Historian*, without any copyright notice or restrictions, we concluded that he also wanted it to be “reproduced and distributed freely by others.” That Michael Quinn was aware of the importance of including a copyright notice in a work he wished to protect is evident from the following. In his unpublished dissertation written at Yale University (“The Mormon Hierarchy, 1832–1932:

An American Elite”), the following appears on the title page: “Copyright by Dennis Michael Quinn 1976.” At any rate, we certainly had no intention of depriving Dr. Quinn of any of his manuscript rights when we printed his speech.

In our investigation of Michael Quinn’s pamphlet, *Jerald and Sandra Tanner’s Distorted View of Mormonism*, we learned that it was planned in the Church Historical Department of the Mormon Church and that Church Historian Leonard Arrington was involved in its distribution (see *Answering Dr. Clandestine: A Response to the Anonymous Historian*). Donald Schmidt was questioned about this matter in his deposition, pages 68–69:

MR. BARNARD: Are you familiar with a publication called . . . Jerald and Sandra Tanner’s Distorted View of Mormonism? Are you familiar with that booklet or publication?

A. Yes.

Q. Do you know who published that document?

MR. MADSEN: That is totally afiel of any issue of this lawsuit. . . .

MR. BARNARD: My question is if you know who published that?

A. I do not know.

MR. BARNARD: Do you know who authored that?

A. No.

Dean Jessee was also asked about this anonymous rebuttal:

Q. Are you familiar with a booklet entitled “Jerald and Sandra Tanner’s Distorted View of Mormonism”?

A. I think I’ve seen that.

Q. Do you know who authored that booklet?

A. No.

MISS PARK: Counsel, we’ve gone into this before. I’ll instruct him not to answer.

MR. BARNARD: He’s already answered. He said no. Is that correct?

THE WITNESS: That’s right.

(*Deposition of Dean Jessee*, page 67)

In his deposition, page 77, James B. Allen was asked if he knew who was the author of the booklet:

A. Well, I prefer not even to answer yes or no because in the document itself it is very clear that whoever that historian is he doesn’t want his name known. And I, for a variety of reasons, respect that. So I prefer simply not to answer the question if that is possible.

MISS PARK: I will have you answer yes or no and then we’ll argue about it.

A. Yes. I’m aware of who the author of that is.

MR. BARNARD: If I were to ask the next question as to the identity of that author, you would take your attorney's advice and decline to answer that question?

A. That's right.

At the trial, Dr. Allen was asked again if he knew who authored the anonymous rebuttal:

Q. Do you know who wrote that?

A. I am aware of who wrote it, yes.

Q. Who wrote it?

MR. MADSEN: Your Honor, I again object. He asked this question in the deposition. I think it is far afield.

THE COURT: It is far afield, but he may answer.

THE WITNESS: Your Honor I would like to decline to answer because the author of that volume is not himself—does not want his name known.

THE COURT: Was it anonymous?

MR. MADSEN: He wrote it in anonymous capacity.

THE COURT: Is it anyone connected with this case.

THE WITNESS: No.

THE COURT: Sustained.

(*Trial Transcript*, page 248)

FAIR USE

The second charge of violating copyright laws which the Mormon scholar made against us stemmed from the fact that we made extensive quotations from *Seventh East Press*. The answer to this accusation is very simple: The issues which we quoted (Nov. 18, 1981 and Jan. 18, 1982) did NOT have a copyright notice on them. Even if these issues had been copyrighted, however, we could have used some of the material found in them without violating copyright laws. In our book *Mormonism—Shadow or Reality?* we use many quotations from books which are still protected by copyright. This has disturbed some of our readers who are not acquainted with “fair use” in copyright law. Margaret Nicholson gives this information about fair use:

How much can he quoted without the specific permission of the copyright owner?

Probably no other question besets publishers—and the Copyright Office—so frequently. In a form letter the Copyright Office says cautiously, but not very helpfully, “One must use his own best judgment”—which is exactly what the quoting author and publisher want to avoid.

The Copyright Act is silent, the Copyright Office is noncommittal, and for the most part the courts have been

evasive in defining just what “reasonable quotation” is. . . . The courts have conceded that there is a fair use of quotation from copyright works. For material quoted for critical, satirical, discursive, incidental, and scholarly purposes, permission is the exception rather than the rule, and most scholars and publishers welcome it as free publicity. It stimulates rather than competes with the sale of the work from which it is quoted (unless it is adverse criticism, and sometimes even then). . . . It is not necessary to ask permission for what is obviously fair use, and to do so may result in embarrassment. (*A Manual of Copyright Practice*, New York, 1965, page 154)

In the U.S. Government publication, *Copyright and the Librarian*, Circular R21, page 2, we read:

The fair use provision of the new law is, of necessity, general and is not susceptible to either precise definition or automatic application. Each case must be considered and decided on its own merit.

Many publishers put a statement in the front of a book which would seem to indicate that no part of it can be reproduced. Samuel Spring shows that such statements are completely meaningless as far as the law is concerned:

. . . a provincial custom has arisen among United States publishers (including many prominent ones) of inserting a notice at the beginning of the book which either denies entirely the right of fair comment and fair use (without express consent in each instance by such publisher) or attempts drastically to limit the right of fair use. A typical example of such notices is:

All rights reserved. No part of this book may be reproduced in any form without the permission of the publisher (names).

Other forms in common use, permit short quotations only in critical reviews published in newspapers and periodicals. Evidently they attempt to prohibit critical use by quotation in factual books or as background material in books.

This purported limitation is contrary to the law of copyright, and annoying because unfounded in legal right. An insertion of such a useless notice in a book is as undignified as it is futile. . . . no publisher has ever dared rely upon a notice denying or limiting the right of fair comment in any reported litigation. . . .

The right of fair comment, in short, is imposed by the courts upon copyright proprietors who sell to the public, in order to protect the public's interest. Since the right is implied in law and in order to carry out the Constitutional provisions, in the public interest, it cannot be negated by notice harming the public interest. Once a book is published and copyrighted, the law imposes the right of fair comment in the public as

against the copyright proprietor. It is for the court, not the copyright proprietor, to define the extent and limits upon fair comment and fair use. . . .

No court, by any decision or opinion, has ever given the slightest hint that the right of fair comment can be denied to the public by the copyright proprietor, through a notice denying it. Neither has any court ever suggested that the copyright proprietor has the right to define and so to limit the public right of fair comment and fair use. All cases indicate that the definition of fair use and fair comment is for the court, acting in the public's interest, not for the publisher as the copyright proprietor. Thus the use of such futile notices could well be dispensed with. (*Risks & Rights*, pages 178–180)

Charles H. Lieb says that the

copyright proprietor by statute has the exclusive right to print, reprint, publish, copy and vend the copyrighted work. That right, nevertheless, is subject to the right of others to make “fair use” of the work. The fair use doctrine is an equitable rule of reason. John Schulman has likened it to the golden rule—that one should not copy from someone else what he would not want copied from himself. Its application depends on the facts. Broadly speaking, the criteria by which fair use is determined are the purpose of the use, the nature of the copyrighted work, the quantity and value of the materials used and the degree in which the use may prejudice the sale or diminish the profits or supersede the objects of the original work. (*Copyright—The Librarian And The Law*, New Brunswick, N.J., 1972, page 27)

Although we have made extensive quotations from certain books, we feel that we have been careful not to “diminish the profits” of any of the authors cited. We feel, in fact, that we have actually helped the sale of a number of books through our quotations. We have been very careful to give the title of each work cited and to avoid plagiarism.

Some people have expressed concern because we have photographically reprinted many old books which were once printed by the Mormon Church or its critics. Actually, most of the books we have printed are over a hundred years old. If they ever had a copyright, it has expired long ago. In a U.S. Government publication, *Duration of Copyright Under the New Law*, Circular R 15e, we find the following:

Under the law in effect before 1978, . . . the copyright lasted for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. If renewed, the copyright was extended for a second term of 28 years.

Since the copyright was only renewable once, books more than 56 years old (except in some instances where

“the second term was extended beyond the 28 years by special legislation”) are no longer protected and are in the public domain. Samuel Spring says that

The technical term “public domain” is used as descriptive of what may freely be used. . . . Literary and artistic creations created in the past, before copyrights existed, and which were never copyrighted, belong to everyone and are in the public domain. Also copyrighted literary, musical, and artistic works of any kind upon which copyrights were taken out are in the public domain after these copyrights have expired by lapse of time. . . .

Any created expression once in the public domain can not thereafter be copyrighted and withdrawn from the public domain. (*Risks & Rights*, pages 122–123)

Under the new copyright law, published works receive protection “lasting for the author’s life, plus an additional 50 years after the author’s death.” The new law, however, provides no protection for works “already in the public domain.” The reader can see, therefore, that we are not violating any copyright laws when we reprint the old books about Mormonism. Now, while it is true that the Mormon Church puts copyright notices in the *Book of Mormon, Doctrine and Covenants* and Joseph Smith’s *History of the Church*, these notices do not amount to anything. These works all passed into the public domain many years ago. The Mormon Church can only copyright “additions, changes, or other new material appearing for the first time in the work. There is no way to restore copyright protection for a work in the public domain, even by including it in a new version. And protection for a copyrighted work cannot be lengthened by republishing the work with new matter” (*The Copyright Handbook*, page 54).

From this it is plain to see that the entire text of Joseph Smith’s works mentioned above is in the public domain and can be reprinted without any fear of legal action.

The subject of copyright is extremely complex. We feel, therefore, that those who oppose us should be very careful about making accusations which they cannot prove. They should also remember that it would be very difficult for us to obtain permission to quote from or reproduce any document owned by the Church or any book published by a faithful Mormon. When we were working on *The Changing World of Mormonism*, we sought permission from a number of authors to quote from their publications. We received excellent cooperation from non-Mormon publishers, but two Mormon authors stubbornly refused to allow us to use their material. We would have been willing to pay for this privilege, but they flatly refused to cooperate. They were obviously using the copyright law to obstruct our work. This type of attitude, of course, makes it almost impossible for us

to negotiate with the Church or its writers concerning copyright matters. In any case, we have tried to keep ourselves within the boundaries of the copyright law even though these boundaries are often very hard to distinguish. We have certainly not tried to take advantage of anyone's rights. Everything we have done has been done publicly and nobody has even suggested that we plagiarized their work.

MADSEN CONFUSED

Ehat's lawyer not only wanted to show that the "Manuscript History, Book A-1," was a stolen document, but he also desired to prove that we violated copyright laws when we printed portions of it. Since the Manuscript History is the source of the printed *History of the Church*, and since the copyright on the *History of the Church* expired many years ago, we do not see how we could have violated copyright laws. Mr. Madsen, however, must have felt that the printed *History of the Church* was only a small part of the Manuscript History. Perhaps he was confused with the "Journal History"—a vast collection of both published and unpublished material kept at the Church Archives. Dean Jessee, who is certainly an authority on the Manuscript History, makes it very clear that it is the source of the published history:

The six-volume manuscript of Joseph Smith's History (labeled A-1 to F-1) covers events recorded in the first six volumes of the printed *DHC* to the entry of June 28, 1844, . . . (*Brigham Young University Studies*, Summer 1971, page 472, footnote 106)

Mr. Madsen's misunderstanding led to a great deal of confusion in the *Deposition of Jerald Tanner*:

- Q.** We will get to the suppression part in a moment. But the question was: You had not, in fact, had permission from the LDS Church to print those documents.
- A.** No, I did not.
- Q.** You didn't seek such permission.
- A.** No, I did not. And I didn't think it was necessary.
- Q.** And you were aware at the time you printed them that they had not been previously published.
- A.** Yes. By the way, that is in the public domain; the History has been published. That's in the public domain.
- Q.** How do you contend that that manuscript is in the public domain?
- A.** Because it's a published work, then it comes into the public domain when the copyright expired on the History.
- Q.** That's your understanding as to the copyright law?

A. Yes, absolutely. You cannot maintain a copyright on a manuscript after the copyright expires on the printed document.

.....
Q. (By Mr. Madsen) You did not, yourself, go to the Church Archives and get the copies of Manuscript History?

A. No, I did not.

Q. And you have some claim that by your printing them, they become in the public domain?

A. They were public domain before.

Q. On what theory?

MR. BARNARD: I would object to that as asking for a legal conclusion.

MR. MADSEN: Well, he has indicated before, and I want to know what his reasoning is. And I think I am entitled to that.

THE WITNESS: I believe what I said before was that it was public domain because the History of the Church has been published back in 1902. The copyright has expired, and therefore the document it was taken from is in the public domain.

Q. (By Mr. Madsen) Whether that document had ever been published or not.

A. Are you saying the document was not supposed to have been published as the History of the Church?

Q. Do you keep a daily journal, Mr. Tanner?

A. I do not.

Q. Supposing that you did and supposing that your daily journal makes a reference to some historical event that occurred like the airing of the television program about the atomic bomb—The Day After, I think, by title. You make some reference in your journal about that event.

The mere fact that the television program had been aired and that you made an allusion to that in your journal, do you suppose that your journal will therefore become public domain by virtue to this allusion to an event that was later, in fact, otherwise published?

A. You are changing the thing. The History of the Church is supposed to be taken from the Manuscript History.

And in your case, of course, you would be right in saying that it wouldn't be in the public domain.

In the case of the History, as I understand the law, it becomes in the public domain as soon as the copyright expires on the publication. Both the publication and the manuscript fall into the public domain.

Q. You are suggesting—

A. Now, there are changes in the History of the Church, and maybe on some basis of the falsifications of the History of the Church, they might claim some copyright on falsifications. But they could not on the manuscript that was published.

And if it's an accurate publication, then certainly it's in the public domain. And the only thing that could be copyrighted is the falsifications.

The Tanners on Trial

Q. All of which begins on the premise that the published History exclusively relied on the unpublished manuscript.

A. That is what the claim is.

Q. Correct. Well, that is what you assert the claim is. . . .

Q. You have, in fact, published works that you will say have been previously quoted, say, for example, in the LDS Church History, such as this Manuscript History, correct?

A. Such as the Manuscript History? But that is the History of the Church.

Q. The question is yes or no. Do you quote the Manuscript History and say it has been referred to by the published LDS Documentary History?

We are going at it a step at a time because your counsel objected to the compound nature of the question.

A. I still don't know as I understand the question.

Q. All right. Backing up to your publication titled *Falsification of Joseph Smith's History* —

A. Yes.

Q. — It refers to several photocopies of sheets of the Manuscript History of the Church, correct?

A. Yes.

Q. That Manuscript History of the Church, you say, was alluded to in the Documentary published History of the Church.

A. I didn't say it was alluded to. It was published in there.

Q. And you say that the Mormon Church's position is that they are one in the same.

A. Yes. The Manuscript History.

Q. And therefore, any discrepancies between the two shows, as you call it, falsifications, correct?

A. Yes.

Q. (By Mr. Madsen) If, in fact, the Documentary published History quotes the Manuscript History, does that make the quoted part of the Manuscript History public domain?

Is that simple enough?

A. Yes. After the copyright expired, it threw it into the public domain.

Q. The question is: only the part quoted would be public domain, or is that —

A. I'm not sure, though, that I could answer on that because I don't know the legal — I mean, they claim they published the whole thing, exactly as in the manuscript, the most accurate history ever published. Either it was or it wasn't.

Q. And you are assuming, I mean, that they published the whole thing.

A. So therefore —

Q. Mr. Tanner, I am not here to argue the merits of your arguments on the Mormon Church. I am here to try to get your understanding as to what is or what isn't copyrightable, what is or isn't in the public domain. Do you understand? I am not here to be involved in an argument either for or against the Mormon Church. Do you understand that? (*Deposition of Jerald Tanner*, pages 23, 24, 35, 36, 37, 40–43)

Mr. Madsen could hardly have picked a poorer example to try to base a claim of copyright violation on. We certainly had not planned for this type of questioning, and when we got home we realized that his argument was even weaker than we had thought. In the 1840's the Church began publishing the *History* in both the *Times and Seasons* and the *Millennial Star*. Since it appeared in these publications without copyright, it has been in the public domain since that time. The copyright that was added in the 1902 printing, therefore, does not amount to anything. Furthermore, even if a copyright could be put on the falsified portions of the *History*, our limited reproduction would certainly fall within "fair use." If the Mormon Church had filed a suit on this document, we believe we would have won it without any trouble.

APOSTLES' THREATS

Although the Church itself has never threatened us with a lawsuit, two of the Apostles have sent us threatening letters. On February 13, 1965, the Mormon Apostle Mark E. Peterson threatened to sue us for printing his speech, *Race Problems—As They Affect The Church*. In his letter to us he warned: "This letter to you is to notify you that unless you cease and desist from such publication, and recall the copies which you have circulated, that legal action will be instituted against you." At the time we published this speech we believed that it was in the public domain. In any case, we went on printing the speech, and Apostle Petersen never carried out his threat.

On December 20, 1961, we received a letter from the Mormon Apostle LeGrand Richards. In this letter, Richards threatened us as follows:

. . . I note that contrary to my instructions, you obtained permission from the Genealogical Department to read my great grandfather's Journal and that you have made excerpts therefrom, according to your own statement which you intend to use hereafter.

I am advised by legal authority that while the Journals belong to the organization or library, the literary rights belong to the descendants, and that if any one descendant objects, no one has the right to copy and print anything from such journals. . . .

The Tanners on Trial

This, therefore, is to advise you that if you quote from my great grandfather's journal in any of your future writings, you lay yourself liable to a suit for damages, since you have no permission and since I, as one of the descendants, positively object to your so quoting.

Even though we continued to use Apostle Richards' great grandfather's journal in *Mormonism—Shadow or Reality?* he never pressed the suit. He must have realized that he did not have the slightest chance of winning.

Gordon A. Madsen apparently felt that Apostle Richards had a good case against us. The following appears in the *Deposition of Jerald Tamer*, pages 24–28:

Q. Calling your attention to the 1965 *Salt Lake City Messenger*, No. 3, you make reference to a LeGrand Richards threat letter and other phrases out of print, both of which Joseph Smith Begins His Work.

Does that refresh your memory? I realize I am asking you to remember back to early publications.

A. LeGrand Richards letter where he threatened to sue me?

Q. Yes.

A. Yes.

Q. Do you remember what that threat was relating to?

A. The Joseph Lee Robinson Journal. I think it's his great-grandfather's journal. He maintained he could stop me as one of the descendants.

Q. Had that journal previously been published?

A. I don't know that it had been published. No. I wouldn't call it "published."

Typescripts had been made of it.

Q. Were you aware of a typescript?

A. Yes. We saw a film of the typescript in the Genealogical Society.

Q. In the Church Genealogical Society?

A. Yes.

Q. Did you get any permission —

A. Yes.

Q. You did, in fact —

A. Yes. Mr. Richards took me over to see it.

Q. Who took you over to see it?

A. LeGrand Richards, Apostle.

Q. He took you over to see the document?

A. Yes.

Q. Did he give you permission to print the document?

A. No.

Q. Did anyone at the Genealogical Library give you permission to print the document?

A. No.

Q. Did you, in fact, print the document?

A. Yes.

Q. Did you get permission from any source to print it?

A. Any source?

Q. Anybody.

A. No. I never printed the whole document. I just printed a few extracts from it.

Q. How many is "a few extracts"?

A. I can't tell you exactly. It's not very much.

Q. Three or four paragraphs? A page? What do you mean by "not very much"?

A. It was a number of paragraphs. I can't tell you exactly. I would have to —

Q. Did you claim that any of those paragraphs were in the public domain?

A. In the public domain?

Q. Yes.

A. I feel that they were in that it was written clear back in Nauvoo times and on up. And there would be so many descendants. I have never found anyone who could tell me who owned writings of that age.

Q. Did you make an effort?

A. No, I didn't, but I did inquire about other documents of that age.

.....

Q. (By Mr. Madsen) After you got Mr. LeGrand Richards letter, you nonetheless published the Robinson extract; is that correct?

A. Yes, I did. And he didn't sue. I think it showed that he had no legal hold on the document.

Q. But you ignored the fact that he suggested to you that you should not do so?

A. I thought it was more beneficial to people that they should have the information: that outweighed his objection.

.....

Q. Well, is it generally your theory, just as you say in reference to these *Clayton's Secret Writings Uncovered*, that you weigh the interest of the public's right to know against the supposed publication rights of the individual and take the former against the latter?

A. No. I don't think Mr. Richards had any special publication rights to it.

After carefully examining this testimony, we find that we should make two corrections: (1) It was a microfilm of the original journal that LeGrand Richards showed us at the Genealogical Library; he had previously shown us a typed copy in his office. (2) Although Richards said that Robinson began writing the journal in Nauvoo, we later discovered evidence that it was not written until the 1880's.

Although we did not officially seek the opinion of a lawyer concerning this matter, we did obtain some free legal advice about the matter. After receiving the threatening letter from LeGrand Richards, we went to James Wardle's barber shop. To our surprise, Apostle Richards' brother-in-law came in for a haircut. In the

course of the conversation, he informed us that he was a lawyer and that Apostle Richards didn't have a leg to stand on as far as the law was concerned. He said, in fact, that if his brother-in-law followed through with the suit, he would defend us. We, of course, felt that if it came right down to it, this lawyer would not challenge his own brother-in-law, who also happened to be an Apostle in the Mormon Church. Nevertheless, it was comforting to get his opinion.

KINGSBURY JOURNAL

At the trial, Ehat's lawyer tried very hard to find examples of copyright violations. He questioned Jerald as follows:

Q. And with regard to that publication — well, moving on. The next I would like to ask about, is what archival or manuscript material did you use in the printing of the document called *The Strange Marriages of Sarah Ann Whitney*. Do you remember that document that you printed?

A. What archival material?

Q. Yes, manuscript, previously unpublished material?

A. I believe there was some extract from the Kingsbury journal.

Q. Joseph Kingsbury?

A. Yes, Joseph Kingsbury, and there was a letter from Joseph Smith where he tell us the his — one of his plural wives that Emma wasn't there.

Q. Do you remember where the original Kingsbury journals were on deposit?

A. They are now housed I believe in the University of Utah.

Q. Were they at the University of Utah at the time you did your printing?

A. Yes, they were — they were at the time in my opinion, yes.

Q. In which collection at the University of Utah? Do you know?

A. In the special collections.

Q. Restricted collections?

A. Well, restricted in what way, I imagine I could go in and see it.

Q. Did you in effect go the University and get any permission to print the portions of the Kingsbury journal you printed?

A. No, what happened is it was H. Michael Marcourt's [*sic*], is the one that wrote the pamphlet, and Mr. Marcourt went before it was turned over to the University of Utah and asked permission to obtain that extracts out of it.

Q. What evidence do you have of that?

A. Can I get my exhibit?

Q. Do you have any written exhibit that shows that permission? Would you please get that. (*Trial Transcript*, pages 364–366)

If Mr. Madsen had carefully read the pamphlet, *The Strange Marriages of Sarah Ann Whitney to Joseph Smith The Mormon Prophet, Joseph C. Kingsbury and Heber C. Kimball*, he would not have fallen into an embarrassing situation. Footnote 16 on page 21 makes it very clear that the material was obtained by permission of one of the Kingsbury descendants:

The excerpts which appear here were copied from the original by H. Michael Marquardt on January 17, 1973, at the home of Mr. and Mrs. Ronald L. Kingsbury. They donated the "History" to the Western Americana at the University of Utah on March 8, 1973. The original now at the Western Americana is under the heading "Diary" of Joseph C. Kingsbury; with this is a typed transcript with footnotes.

PROTECTS ARCHIVES

As we indicated earlier, Gordon A. Madsen seemed to be trying to prejudice the Mormon judge against us by bringing up the fact that we had printed sensitive Church documents without permission. He was really attempting to try us for a large number of cases rather than the one he filed the suit over. Judge Christensen eventually concluded that the thing was getting out of hand:

THE COURT: Mr. Madsen; I am not sure I understand the purpose of these inquiries. . . . We're going quite far afield on different publications. Indeed counsel on both sides have done that, when we have here pretty well the state of facts which isn't subject to a dispute. If we have to deal with the general problem of permission to publish in the case of numerous other documents to be meaningful at all, there will have to be inquiry establishing some relationship between the circumstances of those cases and these particular circumstances. It has taken us now a day and-a-half to deal with the particular circumstances here which we have before us. By multiplying the inquiry into five or six other subject matters, we can spend a couple of weeks here. Can you indicate the purpose of this inquiry a little better than I guess I understand it.

MR. MADSEN: Certainly. All that I hold for this line of questioning, your Honor, is that the question of intent, the deliberateness with which the defendant printed the particular —

THE COURT: . . . if you go into it, then counsel on the other side will be able to do that and we'll be trying a half dozen other cases. . . . I don't know where the end of the case will occur if we have to measure intent in each particular situation. . . . Each side insists upon trying to broaden it.

On the one hand the right of the LIDS church to hold material or to release it or to keep it or to — whether it's copyrighted or not, and on your ground the right of the Tanners to publish enumerable other publications which we don't have before us. I don't know whether I can constrain the case against such a — some gargantuan efforts to broaden it. (*Trial Transcript*, pages 366–368)

Judge Christensen made some attempt to limit the trial to the case at hand. Nevertheless, we feel that Madsen's questions at the trial and in the depositions had a real effect on him. Although the judge proclaimed on the second day of the trial that, "We're not dealing with a right of repositories to protect their information" (*Ibid.*, page 367), by the time he gave his ruling he seemed to be very troubled about the matter. While we cannot prove that Judge Christensen was specifically trying to protect the Mormon Archives by his decision, he spoke against the "underground" distribution of "historical documents," and indicated that he was very concerned that "private archives" be protected (see pages 21–23 of his *Ruling*). It would appear to us that A. Sherman Christensen became so concerned about this matter that he tried to act as a legislator rather than a judge. On page 21–22 of the *Court's Ruling*, he said:

... I have inquired of myself whether it must be held that our legal system has painted itself and its citizens into a corner where private archives can no longer honestly acquire, process, study, and publish manuscripts which have not already entered the public domain and exercise over them a proprietary right or permit others to do so in private under limited permission until within that permission they are made a part of the public domain.

He went on to say that he feared that unless something was done, "every depository from the east coast to the west coast would have to revise its basic principles and be victims without legal remedy to anyone who directly or indirectly steals their physical property, and with knowledge or with knowledge of theft publishes it contrary to their claimed rights and against their will" (*Ibid.*, pages 22–23).

We certainly can not understand the Judge's reasoning in this matter. There are already laws against theft and burglary, and the new copyright laws would cover all documents not in the "public domain." Those who owned manuscript rights could sue anyone who published documents which are not in the "public domain." We feel that what the Judge is actually trying to do is to help suppress documents that are in the "public domain" already—i.e., documents in which the archives have no literary property rights.

Judge Christensen seems very zealous to protect "private archives" like the Church Historical Department, but he does not consider the other side of the question—that "private archives" may be preventing those who have literary rights from exercising them. For example, the Church Archives suppressed Clayton's diaries so that the family was not even aware of their existence. After we published the Ehat extracts, some members of the family obtained copies from us and seemed to be happy that we had printed them. It appears to us that Judge Christensen is actually trying to repress the rights that the American people have been granted in the copyright laws.

MISCARRIAGE OF JUSTICE

Judge Christensen's attempt to apply the law concerning "unfair competition" just because he wanted to make an example of us seems to be a miscarriage of justice. The day before giving his verdict, the Judge said that he had found an important case that related to the suit at hand:

THE COURT: Mr. Madsen, before you take your place. Have you considered any problem of whether your action is substantially the same in kind and deals with the same subject matter and objectives as the copyright act, and that having failed on the copyright act and in view of section 301 —

MR. MADSEN: About the attorneys' fees, your Honor?

THE COURT: Which deals with preemption, similar action, similar in kind, even though not in degree or quality are barred, in other words, if you are claiming something akin to a copyright protection in saying that Mr. Tanner cannot publish this material, he be enjoined if he could, if there were a violation of copyright, and my attention has been called by my research assistant to Schuchart, I believe that's the pronunciation, and Associates, Professional Engineers versus Solo Serve Corporation, a report in 540 F. Supp. at 928, being from the Western District of Texas, and written by Judge Sessions, who I know to be a very fine judge, barring recovery under state rule or common law principles for copying architectural which were protected by a patent because they fell within the same scope, and the relief would be similar in kind to copyright relief. (*Trial Transcript*, pages 455–456)

On page 457 of the transcript, Judge Christensen commented:

THE COURT: Why don't you read this case overnight, and I'll give you an opportunity tomorrow to address this particular point. Very well. Thank you.

The Tanners on Trial

Our lawyer came back the next day prepared to argue the matter. The Judge, however, did not allow any discussion. He merely read the verdict that we were guilty of “unfair competition.” In his decision, however, Judge Christensen admitted that it was a case supporting our position:

. . . Schuchart and Associates, Professional Engineers Incorporated vs. Solo Serve Corporation, . . . I think is a case perhaps most strongly supporting defendant’s contention of pre-emption and written by one whom I know personally to be an excellent judge. (*Court’s Ruling*, page 19)

The argument in this case is that Section 301 of the Copyright Act (“Preemption with respect to other laws”) makes it clear that “unfair competition” is preempted by copyright law:

On motions to dismiss and/or summary judgment and partial summary judgment, the District Court, Sessions, Chief Judge, held that: . . . firms’ claim of unfair competition was preempted by Copyright Act; . . . (*540 Federal Supplement*, pages 928–29)

On page 931 of the same publication, we read:

Architectural and engineering firms’ unfair competition cause of action for misappropriation was preempted by Copyright Act, . . .

Preemption analysis established by section of Copyright Act preempts state-created actions that enforce rights that are equivalent of exclusive rights of copyright and therefore statute expressly preempts those state-created actions that are redundant of copyright protections. 17 U.S.C.A. §§ 106, 301.

On pages 944–945, we find the following:

Comparing the essence of Plaintiff’s claims for copyright infringement and unfair competition, and comparing the elements of the two causes of action in the context of the specific facts in the case at bar, the Court concludes that Plaintiffs seek to enforce in their unfair competition claim rights that are substantially equivalent to the exclusive rights within the general scope of copyright. That an action for unfair competition might under different facts protect different rights, does not answer the directive of Section 301. Accordingly, the Court finds that summary judgment in behalf of the Ingram Square Group Defendants is appropriate with respect to Plaintiffs’ claim of unfair competition for the reason that said claim is preempted by the Copyright Act of 1976.

If Judge Christensen had followed the decision in this case, we could not have been found guilty of “unfair competition.” When the copyright claim failed, the whole case against us would have been dismissed.

On page 931 of *540 Federal Supplement*, we find that one of the elements for a case of “unfair competition” is that the “plaintiff created his product through extensive time, labor, skill, or money; . . .” We cannot see how Ehat’s notes meet any of the criteria mentioned. Ehat’s lawyer appealed to the case, *Grove Press Inc., v. Collector’s Publication Inc.*, but our lawyer, Brian Barnard, demonstrated that this case does not provide support for a claim of “unfair competition” against us:

In *Grove Press*, supra, the Court in granting relief against unfair competition by the publication of an exact copy of an uncopyrighted book stated:

In view of Plaintiff’s expenditure of substantial sums in setting type and engraving plates, it would constitute unfair competition for Defendants to appropriate the value and benefit of such expenditure to themselves by photographing and reproducing Plaintiff’s book through the offset-lithography process, thereby cutting their own costs and obtaining an unfair competitive advantage. [emphasis added]

In *Grove Press*, the plaintiff had taken a public domain book and set it into book form in excellent, easily read type at a cost of about \$26,000 and expended many thousands of dollars addition in printing, distributing and advertising that book. What the Court protected in *Grove Press* under the theory of unfair competition was not the uncopyrightable book but the substantial investment and expense that *Grove Press* had made toward the marketing of that “unprotected” book.

The case of *International, Capitol* and *Grove Press* all involve the expenditure of great sums of money and time by the plaintiffs in creating something different and protected from an uncopyrighted work. That is not the case at bar. Andrew Ehat did not even expend time and energy in reading the hand-written original journals in typing up his notes. He used the work of another, the typed Allen/Jessee transcript and made his notes. He spent several hours in doing so. What he did was the work of a photocopying machine; which, but for the fact that one was not easily available, he probably would have used. Any one with access to a photocopy machine could have done what Ehat did. Ehat’s contributions to the uncopyrighted Wm Clayton Journal extracts are not of the nature or substance to warrant protection under *International, Capitol* or *Grove Press*. (*Defendants’ Trial Brief*, pages 26–28)

Ehat's lawyer argued that because "it was a direct copy from the original production of that work by Grove Press, Inc., there was indeed unfair competition . . ." ("Memorandum in Opposition to Defendants' Motion For Summary Judgment," page 22). This seems to be a very poor argument to support Ehat's case. The notes which we reproduced were certainly not going to be the final product put out by Mr. Ehat. We didn't photographically copy any of the typesetting in his book *The Words of Joseph Smith*, and the quotations in his master's thesis were retyped in a far more presentable form. We would assume that if his thesis had been printed by Religious Studies Center, it would have been typeset like his other book. If we had photographically reproduced typeset material, then the Grove Press case would have applied. As it is, however, we can see no just cause for a judgment against us.

Brian Barnard gave this additional information concerning "unlawful competition" in the *Defendants' Trial Brief*, pages 17–18:

The United States Supreme Court held in two patent infringement cases (*Sears v. Stiffel*, . . . and *Compco vs. Day-Brite*, . . .) that state law regarding the tort of unfair competition could not be used to protect an unpatentable device from copying and competition. In both of those cases involving electric lighting devices the lower Courts determined that the devices were non-patentable but held that there was a quasi-property right in the makers of those devices which could be protected through a claim of unfair competition against the copying competitors.

The Supreme Court rejected that concept of a protectable quasi-property right holding that when an article is unprotected, state law cannot prevent or prohibit the copying of that unpatentable or uncopyrightable article, since to do so would conflict with the exclusive federal patent and copyright laws.

The plaintiff in this action seeks to have this Court ignore the rulings of *Sears* and *Day-Brite* and grant him a quasi-property right in spite of the federal copyright law.

We were under the impression that if Ehat's lawyer failed in his attempt to prove a copyright violation, the entire case would fail. It seems that Mr. Madsen also held this view at the time of the hearing regarding the request for the Church to produce the original diaries:

THE COURT: Suppose the defendant is correct though that with regard to quotations from the journal, they are not subject to your client's proprietary interest? Suppose that were held?

MR. MADSEN: Then it wouldn't matter whether some parts are blacked out or not blacked out, matters why he would be entitled to publish.

THE COURT: He would be entitled to publish not only the extractions but the commentary of your client concerning them?

MR. MADSEN: They make an argument in their memorandum if he isn't successful in all blacking out what notes are left are exempt under fair common notion of copyright. They also —

THE COURT: You're not responding to my question.

MR. MADSEN: I'm sorry. Maybe I misunderstood your question.

THE COURT: Do you concede that if the law is that the quotations of your quotation from the journal doesn't violate any proprietary interest of your client that your case fails?

MR. MADSEN: I think it does. I think if they can say this is not copyright material and they therefore are at liberty to print it. ("Hearing to Quash Subpoena Duces Tecum and Objections," Sept. 6, 1983, pages 10–11)

In his complaint, Mr. Madsen clearly stated that "This action is brought under the Copyright Laws of the United States, Title 17, United States Code" (page 1). The words "unfair competition" do not appear until the middle of page 5 of the complaint, and this is only in reference to an injunction being issued to stop the sale of our book:

12. The unauthorized and infringing use therefore by the defendants of the copyrighted work, . . . will cause, unless enjoined, irreparable harm, damage and injury to plaintiff, will constitute unfair competition and unjust enrichment of the defendants . . .

Judge Christensen himself noted that "the question of unfair competition" was "raised by plaintiff in connection with his claim for injunctive relief; . . ." ("Ruling on Motion to Quash Subpoena Duces Tecum," Sept. 16, 1983, pages 5–6, footnote 3). Instead of granting the injunction, the Judge turned the whole thing around and tried the entire case on "unfair competition." The whole argument concerning "unfair competition" appears to be based on a very sandy foundation, and we cannot see how it will stand up in the Tenth Circuit Court of Appeals.

WHY NOT SUE PALMER?

We also feel that it is very unfair that Andrew Ehat would allow hundreds of copies of the notes to circulate without taking any legal action and then finally bring a suit against us. We have already quoted Noel Reynold's statement that he assumed "there were hundreds" of copies of Ehat's extracts in existence (*Deposition of Noel Reynolds*, page 50). Kent Walgren testified that "there were basically hundreds of them around" (*Trial*

The Tanners on Trial

Transcript, page 423). Speaking of Ehat's attempt to retrieve the copies, Walgren said: ". . . by that time it had just basically been an utter failure, and there were so many of them around . . ." (*Ibid.*, page 416). Writing in *Sunstone Review*, April 1984, page 7, Cecelia Warner commented:

Legal, ecclesiastical, and even academic threats employed by Ehat in his attempts to reclaim all copies of the purloined notes were to no avail as literally hundreds of copies circulated throughout the United States. One such copy ultimately landed in the hands of Utah State Administrative Law Judge and book store proprietor Kent Walgren.

We have previously quoted Scott Faulring as saying, "as far as the proliferation, they kind of went to the four winds . . . there were hundreds of people at BYU that were active in this type of stuff" (*Deposition of Scott Faulring*, pages 20–21). Faulring went on to give this testimony concerning the distribution of Ehat's notes:

. . . Andy thought—at Christmastime that year, he was still hunting down copies—and he thought he had it all under control.

I kind of laughed at him and said, "Andy, you're never going to get control of those things, because every time you collect one, three more copies are made."

And there were people that had them that were still quietly distributing them during the winter—I mean, by December—I could have just reached out any time from a day or two after Andy had thought he had gotten them all from mid-September until—you know, a week before the Tanners published it, they were still copying it. People were still keeping it. (*Ibid.*, page 22)

. . . Ernest Strack who runs a used bookstore there in Provo, had a copy anonymously delivered to him. And he was kind of a clearing house for xerox copies of things, and he started making distribution. He did it in kind of a quiet way at first. He didn't, you know, flaunt it or anything, but if someone came in and asked for it, he would give it to them and they could go and xerox it; and they would just bring it back.

So within three weeks after that—you know, Andy had created such a stir by collecting it up, it was a very hot item. Everybody wanted a copy. People that probably wouldn't even have cared about it, wanted a copy of it then. (*Ibid.*, pages 23–24)

On page 77, Faulring related:

Q. Do you know whether or not Ernest Strack continued after that conversation to allow people to make copies?

A. He did.

Q. And did Ehat ever talk to you about filing any legal action against Strack?

A. Nothing that I recall.

Lyndon Cook admitted that they finally gave up trying to retrieve the many copies that were being circulated:

Q. And did you retrieve any copies?

A. Yes, we did. But it seems as many as we could retrieve, we found that someone else had copied—made multiple copies and it was almost a never ending process.

Q. Did you ever abandon that effort?

A. We did after several months, we gave it up. (*Trial Transcript*, pages 266–267)

Q. Now you indicated there came a time when you and Mr. Ehat gave up trying to retrieve copies . . . When was that?

A. I don't remember, but it would have been the Fall semester of 1981, . . . I'm not sure of the actual date.

Q. And the reason that you gave up trying to retrieve those was because there were so many in circulation you didn't think you could retrieve them all?

A. That's right. (*Ibid.*, page 272)

Andrew Ehat claimed that after the distribution of copies began, a professor at Brigham Young University obtained one and that he was the "source for the copies that are now out, at that point I had been — I was no longer making inquiries of him or any other individuals regarding the action since it was already out, and there was nothing I could do about it" (*Deposition of Andrew Ehat*, page 77). Mr. Ehat testified that he knew Ernest Strack had a copy and asked him to give it up, but Mr. Strack "wouldn't do it" (*Ibid.*, page 88). Ehat also related that there were even different versions of his notes which were being circulated:

A. I'm aware that Ernest Strack was rearranging the diary notes into a chronological fashion. I'm also aware that somebody interleaved a photocopy of my published article of separate William Clayton Journal extracts, . . .

.
Q. Apparently there's four versions. Tanners, the eleven-page extract, Strack's, and this one where your other article was interleaved?

A. Um hmm (affirmative). Okay. Sure.

Q. Is that all you are familiar with, just those four versions and the one I named, someone putting a typesetting. You haven't seen that, though?

A. No, never seen it. (*Ibid.*, pages 87, 90)

The Tanners on Trial

If Mr. Ehat was going to sue someone, it should have been Hal Palmer, who had been a student at BYU. Noel Reynolds, who was appointed by the university to investigate the distribution of restricted material, met with Palmer on December 8, 1981, in an attempt to stop the circulation of the notes. The following is taken from a note in Reynold's file:

Today I met for a half hour with a former student, Hal Palmer, to encourage him to return his copies of the William Clayton material . . . I argued that the defiance of individuals such as himself in securing and protecting these kinds of materials will be a major obstacle for me in trying to persuade the Brethren to make the materials more available to the public. Palmer professed to be able to understand each of these arguments, but not to accept them. He did not find it compelling. He feels he has a moral duty to make the truth available to the Church and feels fully willing to take responsibility of that decision upon himself in spite of my arguments that maybe the Brethren have that stewardship. His position is quite an emotional one and I am doubtful that we can find a way of convincing him to surrender his copies. He did indicate that, if the Brethren would promise to publish the materials, he would give up his (of course not a helpful position at all and one that is certain to be unattractive to anyone in Salt Lake). He also indicated that if President Hinckley, or the First Presidency, would call a meeting of all interested persons on this subject and discuss the thing in an open forum, that then maybe he could be persuaded to surrender his materials, but would not promise that if the First Presidency asked him for his materials, that he would surrender them. Again, I am personally doubtful that he would and I certainly don't have enough confidence either in his maturity or his good judgment to think it would be worth taking the time of the Brethren to discuss this matter with them which they have doubtless discussed with countless others of similar persuasion on other occasions.

Scott Faulring testified as follows concerning Palmer's involvement in the distribution of the notes:

Q. Do you know what kind of distribution Hal Palmer had made of those?

A. Well, he made rather wide distribution. He made— His first heyday was where he put a copy at BYU Special Collections, and then sent a copy up to the University of Utah Special Collections here in Salt Lake. He also sent an anonymous copy to Ernest Strack. And who knows what other copies he made?

He was not keeping it for himself. He was sharing it with everyone and everybody. And I think it was his reaction to what Andy had done. His confrontation that morning . . . They had him quoted to say he would never give them to the anti-Mormons. Well, he never did that directly.

Q. Do you have any idea how many copies Hal Palmer made and distributed?

A. Probably more than 20 during—I guess you would have to give me limits, because from about a week after, until he left here about Christmas time, he probably made 20 or more copies.

Q. So within two and a half months after the mid-September confrontation with Ehat, you are aware of Hal Palmer making 20 copies?

A. Yes, at least.

Q. Did Ehat ever talk to you about suing Palmer?

A. No. He mentioned that he was going to try to get him excommunicated. That would have been better, Andy thought.

(Deposition of Scott Faulring, pages 73–75)

In some way Ehat's lawyer learned that a security guard for the Mormon Church had been given a copy of Ehat's extracts. When Madsen questioned Faulring concerning the matter, Faulring said that Palmer had given the guard a copy "as kind of security" or "a safety copy" in case Ehat was able to get the other copies back (*Ibid.*, pages 93–95).

In his deposition, Mr. Ehat admitted that he knew Palmer was distributing his notes, yet he took no legal action against him:

Q. And the copy that Hal Palmer had in 1981 has never been returned to you?

A. No, not that I know of.

Q. And Hal Palmer made at least two photocopies of his copy; is that correct?

A. I know that he made at least three copies.

.....

Q. Okay. You approached Hal Palmer and asked him to return his copies; is that correct?

A. Yes.

.....

Q. Okay. And what was his response?

A. He refused to give it up.

Q. And did he say why?

A. He said that it was his right to have a photocopy.

Q. Okay. Did you threaten to take any legal action against him?

A. I said to him that I would be willing to take whatever action would be necessary that might be available to me in order to retrieve the copy if he weren't willing to give it back to me on the same offer that I made to the other individuals.

The Tanners on Trial

Q. And what did he —

A. He refused that. He ignored the — my request.

Q. Have you — have you other than that request of him and his refusal, have you had any other dealings with him trying to get the copies back?

A. No. I ceased attempting to get the copy back after that.

.....

Q. And other than the copies that we talked about and the distribution that we've talked about, are you aware of anybody else that had copies?

A. By "had", what do you mean?

Q. That had — well, had or still have in their possession copies?

A. Okay. That's what I thought. Yes, I know a lot of people who have copies now.

Q. Okay. And how do you know that?

A. They've told me.

Q. And who has those copies?

A. Oh, it's so many.

Q. I mean, are you talking a dozen or a hundred.

MR. MADSEN: Are you separating those who have copies, not the Tanners' publication?

BY MR. BARNARD:

Q. Not the Tanners' publication?

A. Well, I have no idea whether it's the Tanner publication or copies from Hal Palmer.

Q. Okay. Do you have an estimate of the number of people?

A. Oh, no.

(Deposition of Andrew Ehat, pages 79–82)

Mr. Ehat acknowledged that he discussed the matter with Apostle Packer, and that Packer advised him no further action was necessary:

Q. You also indicated in your answers to interrogatory that you talked to a man named Packer about Hal Palmer; is that correct?

A. Yes.

.....

Q. Why did you approach Packer?

A. Don Schmidt was out of town and so was his supervisor in the historical department, Elder Durham, and I believe Elder Packer was his supervisor. And, so, I did want to inform him of what I had done and if he had any advice that I should do regarding retrieving the copy from Hal Palmer, and he just advised me not to do anything else. That was the end of that.

.....

Q. Did you talk to Packer about bringing any kind of legal action against Palmer?

A. I just asked him generally about what I could do, if he had any advice.

Q. And what was the nature of his advice?

A. Just to leave it alone and things would work out all right.

.....

Q. Did you explain to him that other people had had copies besides Palmer and that you retrieved them?

A. Yes, I explained to him basically the story and just wondered if there was anything else I should do, and he advised me there was nothing else I needed to do.

Q. Now, you also indicated that you talked to Provo City Police the last week of September, 1981, about the taking of your notes?

A. Um hmm (affirmative).

.....

Q. Okay. And what did the police say in response?

A. Basically that the theft would amount to the value of the sheets of paper that were taken and not anything to do about the intrinsic historical value of what might be on the paper.

.....

Q. And you also spoke to BYU security about the incident?

A. Yes. . . .

.....

Q. What did they say?

A. Well, they were a little more interested because it was on BYU campus property, and the — but as far as I know, they didn't do much more about it and simply gave me the same advice about what I could do legally.

Q. And what was that?

A. That is that the theft amounted to simply the paper itself. (Ibid., pages 100–104)

On pages 105–107 of his deposition, Ehat said he felt that it would be "fruitless" to take any action against Palmer:

Q. Why have you not taken any legal action against Hal Palmer, for instance?

A. There didn't seem to be any legal action I could take.

Q. Have you discussed with an attorney the possibility of taking any legal action against Hal Palmer to force him to return the copy that he has or to guarantee that he doesn't distribute copies in the future?

A. I've never talked to legal counsel about doing that because I've felt that was just fruitless. It was distributed and whereabouts of which — it would do nothing to retrieve his copy. I mean retrieve the results of his copy.

Q. Okay.

A. . . . had I been able to obtain Hal Palmer's copy and been assured he had not further distributed it, but he — he would have refused to do that. So there was nothing I could do in order to retain, that individual copy as the single copy.

Q. But in this lawsuit that you filed against the Tanners you've asked for a court order ordering them not to distribute copies in the future. Couldn't you have brought a lawsuit against Palmer asking for that same sort of court order?

MR. MADSEN: I think I am going to object to this line of questioning as not being subject to discovery. . . . You can ask him whether he did take such action, but when you ask him why or why he didn't, I don't think that's material.

BY MR. BARNARD:

Q. You still got to answer? Do you know? Did you make a conscious decision not to sue Hal Palmer to seek a court order to prevent further distribution by him?

A. No, I did not.

Q. And have you — you haven't discussed that with legal counsel?

MR. MADSEN: Not that specific.

THE WITNESS: Well, not that specifically, or if I have, I have dismissed it as a remedy to the proliferation of the — of the document.

At the trial, Ehat testified as follows:

A. . . . once I realized that there was no way that the individual, Hal Palmer, was going to return that copy to me, I ceased making any effort to prevent proliferation of the documents among acquaintances since there was no way I could determine whom had talked to whom about it. (*Trial Transcript*, page 88)

Kent Walgren, the man who gave us the Ehat notes, testified that Ehat had given up trying to get the copies back:

If Andy had come to me, if we had talked about it and I said I ended up with a copy of this and he wanted it back, I would have given it to him. But by the time we talked, it was so far beyond that that he knew he was never going to get them back, and didn't care anymore at that — I think at that point he was probably thinking of suing someone for it rather than trying to retrieve all of the copies because there were probably hundreds of them floating around by then; and by that point he had no interest in trying any further, and I suspect he was looking at suing, probably, to get some redress, but — (*Ibid.*, page 428)

Kent Walgren thought he had told Ehat he had the copy of the notes that he gave to us. Judge Christensen, however, found it very hard to believe that Ehat would not try to retrieve the copy:

THE WITNESS: No, my recollection of our conversation in May was that by that time he had given up trying to retract — get them back because there were — there were basically hundreds of them around, and I him [am?] sure I told him at that time that I had a copy of it.

THE COURT: But you had every reason to believe, did you not, that the copy you had resulted from the theft of a copy which Ehat was trying to keep private, did you not?

THE WITNESS: Not at that time. At that time he was not trying to keep it private anymore.

THE COURT: He wasn't?

THE WITNESS: No. That's what my recollection of our conversation was, that by that time he had given up and was basically telling me, there was no way now because I think this was four or five months later —

THE COURT: That he was willing to have it distributed?

THE WITNESS: It's not a matter of being willing.

THE COURT: Well, did he tell you that in substance or fact that he was willing to have you dispose of it to someone who would publish it?

THE WITNESS: He didn't tell me that but he also —

THE COURT: Did you assume that from what he said, that he had surrendered any right, if he had any, to privacy and was willing to have his journal notes published?

THE WITNESS: Yes. I did assume that in that he did not ask me for my — the copy I had of it. I assumed he would have said, when I told him that I had a copy of it, he would have asked for it back. But by then —

THE COURT: You told Mr. Ehat that you had in your possession a copy of his original notes?

THE WITNESS: I don't have an independent recollection of that, but I assume I would have probably. Andy Ehat —

THE COURT: All right. And then you also had read that of — Professor Ehat had tried to locate all copies?

THE WITNESS: That's right.

THE COURT: And that he had been unsuccessful in doing so?

THE WITNESS: I don't know if I read that. I think that probably came from our conversation.

THE COURT: And thought it was important that all copies being secured by him?

THE WITNESS: At one point.

THE COURT: That had been outstanding?

THE WITNESS: Right.

THE COURT: Now you want to tell us, I guess you have or have you, that when you had a conversation with Mr. Ehat in May of 1982, he told you in substance

The Tanners on Trial

or effect — well, first, did you tell him in substance or effect that you had one of these copies that he had been trying unsuccessfully to find?

THE WITNESS: I believe I would have.

THE COURT: Now do you swear to that under oath?

THE WITNESS: Well, again I can tell you I don't have an independent recollection of that, but I suspect I would have in the conversation. It would have been.

THE COURT: But I want to find out whether you can state that under oath?

THE WITNESS: Well, I can't state — I am stating under oath the truth, which is that I don't have an independent recollection.

THE COURT: That's all I want to know, whether you have an independent recollection. So, it is possible that you didn't tell him you had one of these copies that you knew he had been trying to locate?

THE WITNESS: It's possible, but unlikely. (Ibid., pages 423–426)

On page 410 of the *Trial Transcript*, Mr. Walgren testified that he also had an abbreviated version of the extracts which Ehat borrowed from him:

... I said I had a copy of a short copy ... and he said, "Well, I don't have a copy of that, would you mind if I took a copy of that?" ... I got it and brought it back and gave it to him, and he took it and he said he would mail it back to me. And I don't recall ever having gotten it back.

Andrew Ehat testified that he did "borrow" the abbreviated version and intended to return it:

Q. Okay. Has Kent Walgren ever given you any documents other than books?

A. I remember him giving me his copy of the abridged version of the William Clayton extracts.

.....
Q. So, that would have been prior to the Tanner's publication?

A. Yes.

Q. And do you remember the circumstances under which Kent Walgren gave you that?

A. Well, I had asked — he volunteered the fact that he had a copy of the set of abridged extracts and I said, "Well, I have never seen those, and I have been trying to collect all the copies. At this point it's just a matter of interest if you wouldn't mind letting me see what it looks like." And he let me borrow it to use.

Q. You borrowed it and you made a photocopy of it for yourself?

A. I never photocopied it.

Q. You still have it in your possession?

A. I still have it, but when — I intended to give it back to him, but when I came out for depositions I felt it would be awkward inasmuch as I discovered he was the one that gave the Tanners the entire document. (Ibid., pages 97–98)

While it is true that at first Ehat was trying desperately to get the copies back after he was unable to persuade Strack and Palmer to surrender their copies, he finally just gave up. Although Judge Christensen could not seem to believe this, it is very clear from Ehat's own testimony. In his deposition, he tells of being approached by two different individuals who wanted to publish the extracts and admits that he made no attempt to get them to yield up their copies:

A. ... I think it's Robert Smith but I'm not sure, who also approached me, too, that he wished to publish it. Another individual who asked me if he could publish it, and I said I wouldn't allow him to. I didn't want him to, I mean.

Q. Who was that?

A. Fred C. Collier.

Q. Prior to those inquiries with you, had they already had copies of the manuscript?

A. Apparently. I don't know.

Q. Okay. And you are simply assuming that each of those individuals had copies of your manuscript?

A. Yes, I assume, because I didn't see the copies.

Q. And did either of those individuals tell you that they had copies?

A. They probably did. I don't remember.

(*Deposition of Andrew Ehat*, pages 7-9)

In his testimony at the trial, Mr. Ehat told of a third person who approached him about publishing the extracts:

A. ... I learned from you, my lawyer, Gordon A. Madsen, that a Robert Black wished to publish my extracts.

Q. And what did you do in that connection if anything?

A. I engaged you to indicate to him that it was not my desire that he publish my notes.

Q. Do you know whether I sent a letter to Mr. Black?

A. Yes, I received a copy of the letter you sent to Mr. Black.

(*Trial Transcript*, page 46)

Robert Black told us that after he received the threatening letter from Gordon A. Madsen, he called Madsen and told him that Ehat owed him some favors in trading documents. He felt, therefore, that Ehat should allow him to publish the extracts. Black claimed that Mr. Madsen admitted that the material was being spread

all around by the Mormon Underground and that they (Ehat and Madsen) were making no effort to stop the circulation. Nevertheless, they didn't want it to appear in published form. Black contacted a lawyer who told him that Ehat didn't have a case, but he felt it would be too costly to fight a lawsuit over the matter.

WHY THE LONG DELAY?

In the complaint against us, it was claimed that Andrew Ehat would suffer "irreparable harm, damage and injury" if we were allowed to continue printing the extracts. If this matter were really so important to Mr. Ehat, we wonder why he allowed almost a year to go by before he filed a suit against us. Mr. Ehat's *Answers to Interrogatories*, pages 17–18, led us to believe that he didn't even know about our publication until six months after it appeared;

47. When did plaintiff first learn of defendants' reproduction of his notes and from what source?

ANSWER: Some time in December of 1982 from a friend.

We felt that it seemed very unlikely that Mr. Ehat would not know of the publication of *Clayton's Secret Writings Uncovered* for six months. In his deposition, Ehat said that this was a mistake:

Q. In their deposition yesterday the Tanners indicated that they published your notes and manuscript in June of '82. Do you have any reason to believe that that's it an accurate statement?

A. No. I have no —

Q. Okay. When did you first learn that they had published them?

A. It wasn't too long after that.

.....

Q. Okay. In your answers to interrogatories you indicated that you didn't discover that the Tanners had published your manuscript until December of '82.

MR. MADSEN: Which answer is that counsel? Do you have it here?

MR. BARNARD: Number 47 on page 17 and 18.

MR. MADSEN: That may be a typo.

THE WITNESS: That's an error. Sorry.

BY MR. BARNARD:

Q. So your recollection now is that probably sometime in the summer of '82 is when you —

A. Oh, well, yes. June of 1982.

MR. MADSEN: May we for the record amend that, that December to June or July.

THE WITNESS: Yes, I just missed that typo.

.....

Q. Okay. Your lawsuit was filed in April of 1983 and you indicated that you knew that the Tanners had published this in June or July of '82. Why that delay?

MR. MADSEN: You ought to be asking me that question, not him, Mr. Barnard. (*Deposition of Andrew Ehat*, pages 122–124)

Mr. Madsen went on to explain that "in doing the preparing of the lawsuit it was discovered that the volume *The Words of Joseph Smith* had not been formally registered with the copyright office. The delay therefore in filing the action was a matter of getting that matter taken care of, and the application previously served on you and attached to the complaint shows its date" (*Ibid.*, pages 139–140).

While it appears that the copyright had not been filed, we do not think this is an adequate explanation for the long delay.

NO PERMISSION TO PRINT

Mr. Ehat seemed to feel that it was very important to obtain permission from the Church to publish the Clayton material he copied. In his deposition, however, he admitted that he hadn't yet obtained permission to print the majority of the notes:

THE WITNESS: I said that I asked for permission to publish the James Allen's notes, James Allen notes, in the book *Words of Joseph Smith*. Implicit in my previous access was to use my notes as I felt free to do or as I wished to do.

BY MR. BARNARD:

Q. So you've never asked permission of Don Schmidt to publish your own notes?

A. Except as it occurs with my master's thesis, and as it occurs with the 10 March 1845 entry.

.....

Q. So you never asked Don Schmidt for blanket permission to publish all of the notes that you took?

MR. MADSEN: To date you mean?

MR. BARNARD: To date. What you described just now sounds like piecemeal that when you prepared an article and used quotes, then you have gone to Don Schmidt and said I intend to print these; do I have your permission. Or, I intend to publish these; do I need your permission?

THE WITNESS: Yes. Um hmm (affirmative).

.....

Q. But you don't have any permission for any other publication of your notes from him?

A. Implicit in my access I have permission to use them in preparing manuscript for publication.

Q. In addition to that implicit permission, it sounds like you've gone in and got express permission also?

A. Yes.

Q. Okay. And following your practice, if these quotations from your notes were to show up in some future publication of yours, you would go in again and get specific permission from Don Schmidt?

A. Yes. (*Deposition of Andrew Ehat*, pages 52–54)

We feel that it is very unlikely that the Church Archivist would have approved Mr. Ehat’s publication of all the sensitive material he copied. The reader will remember that in the note Noel Reynolds made concerning a meeting with Hal Palmer, he reported that Palmer said he would give up his copy if the Church would print the Clayton material. Dr. Reynolds, however, felt that this “is certain to be unattractive to anyone in Salt Lake.” Reynolds means, of course, that none of the General Authorities would consent to having this material published. In another paper that Reynolds furnished in response to our subpoena, he wrote that the Clayton journals “have been kept secured for many years, apparently because there are some sensitive passages in them.”

It appears, then, that Ehat has sued us for publishing material that he may not have been able to print himself. The charge of “unfair competition,” therefore, seems to be a matter of speculation since Ehat did not really know that the Church would grant his request for permission to print the notes.

“THAT’S VERY PRIVATE”

We have already furnished a great deal of information which shows that access to the Clayton diaries was highly restricted. In the *Deposition of Donald Schmidt*, page 12, we find this information:

Q. In other depositions they’ve been referred to as being kept in a vault, the First President’s collection. Is there literally a vault, a safe those are kept in?

A. Yes.

In the *Deposition of Richard L. Anderson*, page 36, Professor Anderson testified that “Ehat . . . knew the original was inaccessible or difficult to get at.” Anderson further stated that those who received the extracts from Ehat were not to even tell that they had obtained the material from him: “**A.** And every one of those professors would be under strict professional courtesy and in no way, shape or form even to discuss that Ehat gave the material to them, let alone share it with other people” (*Ibid.*, page 32). Although Andrew Ehat claimed he didn’t know where *Seventh East Press* got the idea the diaries were restricted, we have quoted a number of statements from Lyndon Cook showing that they were highly restricted. Lyndon Cook also testified as follows concerning his contact with James B. Allen:

A. He indicated to me that I was not given permission to have whatever he copied; that it had been a special permission granted to him to use those diaries and that he was to be very careful and cautious how he used them and to whom he would give notes.

That is why I had to ask Don Schmidt for permission to actually even call Jim Allen because, as I understand it, Don Schmidt gave Jim Allen the permission to use the diaries. So, no, I never did ask him to copy them. It would have been a foolish question because he was only given permission because — for special purposes.

.....
Q. And did James Allen tell you there was this special permission specifically?

A. Yes. At least that is what I understood. I don’t know if he told me that in those exact words, but I understand it was special permission and they were only to be used under certain conditions, with the approval of the Church or the Church Archives. (*Deposition of Lyndon Cook*, pages 11–12)

The following appeared in the *Deposition of James B. Allen*, page 66:

Q. Have you ever discussed with anybody whether or not the Ehat copying and distribution, I mean the unauthorized copying of the Ehat notes and distribution has affected the availability of those Clayton Journals to other scholars?

A. No. My impression is they were unavailable to other scholars anyway without any reference to this and that at the time I received them I thought this was via special dispensation and perhaps Richard Anderson’s was the same way. So my impression has always been they would be unavailable to scholars whether or not this had ever happened.

When James B. Allen published some extracts from the William Clayton diaries, he was careful not to reveal the fact that the diaries were in the First Presidency’s vault. In a footnote, he said they were in private custody: “William Clayton, November 1842 to January 1846 (in private custody and used here by special permission)” (*Journal of Mormon History*, Vol. 6, 1979, page 42). In his deposition, Dr. Allen was questioned about this matter:

Q. In that article, in that journal on page 42 you make reference to the Clayton Diaries being in private custody.

A. Yes.

Q. When you made that reference did you, in fact, know that they were in custody of the collection of the First Presidency?

A. Yes.

Q. Why did you refer to them as being in private custody rather than divulging they were in the possession of the First Presidency’s collection?

A. Because it seemed to me at the time—

MR. MADSEN: I object to the question as presupposing the possession of the First Presidency isn't private. I'm not sure—that is the implication of your question and I'm not sure that is a fact. You imply he somehow made a mistake.

A. No, that's very private.

MR. MADSEN: That is the best line for the day, isn't it.

MR. BARNARD: Dr. Allen, if in any of my questions I imply something that is not correct would you feel free to correct me?

A. Sure.

Q. Why did you use the term, "in private custody" rather than in the custody of the First Presidency?

A. Well, again, after talking with, I guess, several people in the area it seemed to me that since—, at that time in my mind, it was not generally known where those diaries were and I felt I had some special access to them and that it probably would be, in fact, a compliment to the First Presidency if I simply stated it's in private custody, which is true, but not get other people running to the First Presidency to bother them the same way I had bothered them. I don't know whether that is stating it exactly accurately but that is kind of the attitude that went through my mind.

Q. Yes, it sounds like you're saying if you revealed that they were in the First Presidency's collection other people would go to the First Presidency and ask for access.

A. Right, and that would tend to bother them more. The First Presidency did not ask me to say that. I have nothing of that nature. So that was my own decision.

Q. That was going to be my next question. Nobody told you not to say where they were?

A. No, but as I said, I counseled with several people and just finally came to that decision. (*Deposition of James B. Allen*, pages 48–50)

Andrew Ehat completed his master's thesis in December 1982. This, of course, was over a year after the notes had been taken and about six months after we printed them. One would think that after all the controversy, Mr. Ehat would identify the location of the diaries. Instead, however, he merely said: "Private Custody. Clayton, William. Journals, 1842–1846. Author's extracts" ("Joseph Smith's Introduction of Temple Ordinances and the 1844 Mormon Succession Question," page 301).

The reader will notice that Mr. Ehat did not mention the fact that he made the extracts from a typed copy prepared by Allen and Jessee. In light of what happened at the trial, this is very interesting. In an attempt to

discredit us, Mr. Ehat's lawyer called Dean May as a witness. Dr. May is Assistant Professor of History at the University of Utah. As it turned out, some of Dr. May's testimony made Mr. Ehat look bad:

A. Yes. My own judgment as to our code of ethics in my profession as historian and scholar is that notes taken in an archive represent to a considerable extent, once they have been taken, the property of the person who takes the notes. That is for two or three reasons. One is that there is considerable investment of time in going through sometimes hundreds and hundreds of pages in order to extract the notes that one wishes to take. It would be unfair for someone then to lift any portion of those notes and to use them as if they had seen the original document thereby profiting from the labor essentially that someone else has vested in the project.

Q. There is a simple word for that, what is it?

A. I would call it stealing.

Q. Go on.

A. Well, having then taken the notes, I think most responsible historians hope that they have done so accurately and in a way that reflects the nature of the original document and does not discount it, but I think also most responsible historians cannot say for sure that they have done that. So if someone else uses those notes they may be put in jeopardy by any carelessness or mistakes that the person who originally took the notes might have made. So therefore it seems to me that it is not only not ethical to use someone else's notes without their permission but it is also hazard did you say my own experience is I do not use someone else's notes without going back to the original source. (*Trial Transcript*, pages 169–171)

Dean May went on to state: "I think it would be a very unprofessional thing to cite a document as if one had seen it when in fact one had not seen the document and was working from someone else's notes" (*Ibid.*, page 171).

The reader will notice that Dr. May said, "It would be unfair for someone to lift any portion of those notes and use them as if they had seen the original document . . ." This would seem to apply more to Ehat than to us. We never claimed that we took our material from the original document. Instead, we stated that we printed extracts made by Andrew Ehat. Mr. Ehat, on the other hand, wanted people to believe that he personally copied the material from the original diaries. It was only after we began to question Ehat that he admitted he had used a typescript, and it took several more months to bring out the truth about who gave him access to that typescript.

Dean May says that it is “not ethical to use someone else’s notes without their permission . . .” While we have admitted that we did not ask permission to use Ehat’s notes, he certainly did not seek Dr. Allen’s permission to use his notes. Dr. May also says that he does not “use someone else’s notes without going back to the original source.” Ehat, of course, did not go back to the original source because it was not available to him. Dr. May further states that it “would be a very unprofessional thing to cite a document as if one had seen it when in fact one had not seen the document and was working from someone else’s notes.” While it is true that Mr. Ehat had looked at the original diaries, he did not copy the entries from them. Obviously, he did not have a photographic memory and therefore had to borrow “someone else’s notes” to make his extracts.

In Brian Barnard’s cross-examination of Dr. May, we find the following:

Q. So if in fact . . . an historian wrote a compilation and in that compilation work he quoted from Wilford Woodruff journals from a microfilm copy that he got knowing to be illegally taken and he quotes extensively from that illegally taken microfilm copy in a compilation book that he had, that would fall in the same category of misconduct that you had described earlier?

A. If he knew that the document was illegally taken and did not appropriately cite the source of that document, I think the answer to that question would be yes.

.
Q. Would . . . a person be a responsible historian if they followed a practice of collecting microfilms of documents knowing that they were illegally or improperly taken from BYU’s library or LDS church library.

A. . . . I think that the thrust of your question, would that be responsible conduct as far as historians’ code of ethics concerned and if they knew that they were stolen documents, I think that would not be appropriate.

Q. Now, with regard to the sharing of documents that you indicated that you were aware of, does that sharing of documents also include allowing other people to make photocopies of research or of historical documents?

A. It can. But the important point is that the person who took the notes be cited whenever any publication is made which arises — which uses those documents.

Q. Okay. So from what you have just answered, would it be true that if some historian was to gain access to a complete typescript of an historical document and they were to make notes from that typescript, and then

they were to use their notes in their own publication, that that historian would cite the typescript and the authors of the typescript rather than the journal or the original work?

A. I think that a normal procedure if they had confidence in the person who took the — who made the typescript and assumed them to be a responsible person, the proper procedure would be to cite the typescript, and then if they had an opportunity to check the original document to also cite the original source of the typescript and location. Of course the whole point is to help other people find the materials if they are doing research and the typescript, may and may not lead them back to the original materials.

Q. Okay. Now when you say lead them back, do you mean lead them back to actual physical access to the originals?

A. Yes.

Q. So, if we had a situation where an historian had access to the original document, glanced through those original documents for a few hours and from those original documents simply withdrew dates, said these are dates that are of interest to me, and that was the only access that that historian or scholar had in the original document and then subsequently had access to a typescript, based on your expertise and your opinion would that historian cite the typescript or the original?

A. Well, if he is quoting from — if in his historical publication is quoting material that is in the typescript which is not seen in the original, he must cite the typescript.

Q. Excuse me?

A. He should cite the typescript case.

Q. And it would be unprofessional to cite the original work rather than typescript in a situation like that?

A. My own judgment is that I would prefer wherever possible to avoid citing material I had not seen with my own eyes.

Q. That’s because there is a possibility of errors in preparing the typescript?

A. That’s true.

(Trial Transcript, pages 173, 174, 176–178)

In the *Deposition of Jerald Tanner*, pages 94–96, we find the following exchange with Mr. Madsen:

Q. (BY MR. MADSEN) Do you deny that Mr. Ehat could have a proprietary ownership interest in those notes apart from copyright?

A. Absolutely. I feel he has no interest whatsoever in the notes, and I feel we are going to prevail in this suit.

And I want to go right down to the end, as I said before. And I will take it, if I have to, to the Supreme Court. I feel that I have a very good case.

Q. And he has no proprietary interest?

A. None whatsoever.

Q. It doesn't phase you at all that someone else had done the research to extract those notes and then you have made full use of them?

A. Now, it appears that Mr. Ehat even typed it out from a typed copy, so he hasn't even made the transcriptions, so I don't think he has any —

Q. What do you mean by that?

A. Someone had to transcribe it from the diary, which takes quite a bit of work. I don't think that would be copyrightable, but now we find that he didn't copy from the diary. He copied from a typed transcript.

Q. And that somehow makes it not his work product?

A. It makes it no more his work product than a xerox copy of a typed manuscript.

Q. Well, isn't that the same argument to suggest that you had no right to publish publications from someone else's typescript?

A. I had full rights, I feel, to publish that. As I told you, the work was in the public domain, and I feel that I have full rights.

Q. You mean, the minute someone types from someone else's typescript, that makes it public domain?

A. Let me qualify that. Like I told you before, if he had written a manuscript on William Clayton that was his writing, then he would have a copyright.

The reader will remember that James B. Allen used the Clayton diaries in "preparing a biography of William Clayton" (*Deposition of James B. Allen*, page 15) and "considered what I was taking to be my own particular scholarly property" (*Ibid.*, page 25). At the trial, Dr. Allen testified:

Q. You indicated that your notes you consider your own property; is that correct?

A. Yes. (*Trial Transcript*, page 231)

Dr. Allen also testified that he considered the 12 pages he gave to Ehat "to be his," but when he was asked about the other pages, he replied: "Well certainly I feel, if I understand your question correctly, that I have some proprietary interest in them" (*Ibid.*, page 232).

Brian Barnard argued that,

With regard to Mr. Ehat's extracts from that typescript, I would suggest that he did not use any expertise in doing that. . . . all Andrew Ehat did was function as a photocopy machine and if he had had access to a photocopy machine, he could have in his own testimony made a complete copy in a few minutes and thrown out what he didn't want. . . . if Andrew Ehat made a

photocopy anywhere near the Historical Department, . . . it would become public knowledge as to the conduct of James Allen and Dean Jessee, and that Andrew Ehat didn't want that knowledge made public, . . . by taking those verbatim extracts from somebody else's extracts as he did, he didn't have to look at the original journals, he didn't have to decipher the handwriting. He simply went to a typewritten copy of someone else's, which again shows that he didn't put in much work. He didn't use the original research trying to read those diaries. (*Ibid.*, pages 462–463)

On pages 479–480 of the *Trial Transcript*, Mr. Barnard pointed out that

if in fact the Court is concerned that historians take someone else's notes as the Tanners did, and use them for their own gain and their own profit, I would suggest to the Court that that is exactly what Mr. Ehat did with regard to James Allen's typescript. He made that typescript of his own work product. He had made arrangements that it cannot be shared with anybody else and somehow [Ehat] by telling Dean Jessee that he wants to look at a couple dates, by deception, Andrew Ehat has gotten access to James Allen's work product and used that for his own benefit, for his own gain. He's done exactly what's he's in Court today complaining about the Tanners and saying it is misconduct on the part of the Tanners, and again I think that goes back to his unclean hands, to the fact that he doesn't expend any time, any money, any real energy in creating his notes, that he is as guilty as the Tanners are if they are guilty of taking somebody else's work product without their permission, copying it, and using it for his own gain. Thank you.

As we pointed out earlier, we find it hard to believe that Mr. Ehat would have the audacity to sue us for "unfair competition" after what he did with the Allen transcript.

PROPHECY MISSING

Fortunately, the fact that the material which Ehat obtained did not come directly from the diaries does not invalidate its authenticity. Former Assistant Church Historian James B. Allen has checked our publication, *Clayton's Secret Writings Uncovered*, and found that it is an accurate reproduction of the original diaries:

I can stipulate this: That whatever I have obviously, in the copy that I made, and the material that the Tanners published is just almost verbatim. There is little, tiny differences here and there but almost verbatim of that . . . (*Deposition of James B. Allen*, page 27)

On page 92 of his deposition, Dr. Allen testified:

A. So far as I could tell, and I spent quite a bit of time, a good part of the day trying to make comparisons and the only difference I found is very minor in terms of a period or punctuation mark here and there that is natural in transcribing.

In the Preface to *Clayton's Secret Writings Uncovered* (which is reproduced in this book), we demonstrated that Joseph Smith's famous prophecy concerning Steven A. Douglas, which was supposed to be taken from Clayton's diary, is completely missing from the May 18, 1843, entry in Mr. Ehat's extracts. In his deposition, Ehat testified that his entry was complete and that he could only speculate that the prophecy might be found in some other manuscript:

Q. Okay. Specifically with regard to what's been called the Steven Douglas prophecy, are you aware of an entry in the three volumes that you saw that talked about that prophecy?

A. Yes.

Q. Are you aware of any kind of an entry in any of these other volumes that talks about that prophecy?

A. Other volumes?

Q. The other volumes that we were talking about other than the three volumes of the or — the journal that you had access to?

A. I have no evidence that in the other diary — oh. You just changed the question. In terms of the journals that are available, there isn't anything in terms of the one or possibly two other manuscripts that I'm referring to that I have evidence of, I believe there's some likelihood that there may be something there, but it's mere speculation on my part.

Q. And those are volumes or diaries that you don't know where the originals are?

A. I don't know anyone who knows where they are.

Q. Okay. With regard to the Steven Douglas prophecy and the entry that you have in your notes, is that a full and complete copy?

A. Mine is a complete copy of what was in that particular diary entry that day. (*Deposition of Andrew Ehat*, pages 24–25)

Although Ehat's testimony might be questionable because we do not know how closely he examined the original diaries, Dr. Allen also testified that the prophecy which appears in the *History of the Church* was missing in the diary and that he did not know of any written source from which it might have been taken:

Q. Are you familiar with the quotations in the Ehat notes that the Tanners published that describes that Douglas Prophecy?

A. . . . as I remember there is a general prophecy that is ascribed to Douglas that was supposed to come from the William Clayton Diaries. In my transcription of that particular date, and I think this is reflected in the material the Tanners published, what is in the Clayton Diaries is not what is said in other publications to have been in the Clayton Diaries. It is much shorter and more terse reference to Douglas. I'm not sure but I believe that is also not the Ehat transcript; is that correct?

Q. Yes.

A. Okay. And that is not the same statement, it is not a direct quotation. That is, whatever was published elsewhere in the Deseret News or whatever is not a direct quotation from the Clayton Diaries. Is that what you're after?

Q. Right. That is the — You know the reference I'm talking about?

A. Yes. In fact, I think, if I didn't refer to that in this article in the Journal I'll be referring to that in my own biography.

Q. Are you familiar with or do you know any other source for that more extended prophecy other than the Clayton Journals?

A. I do not know a primary source for that. . . . I don't know why all of this is relevant. (*Deposition of James B. Allen*, pages 90–91)

From Dr. Allen's testimony, it is clear that the Douglas prophecy, which appears in the *History of the Church*, Vol. 5, pages 393–394, is not based on anything that was written in Clayton's diary in 1843. The claim in the *History* that it was taken "from the journal of William Clayton," therefore, appears to be spurious.

ALL KINDS OF DAMAGES

In the complaint against us, Mr. Ehat asked for damages of up to "the sum of \$50,000," and the costs of the action to the plaintiff, which would, of course, amount to thousands of dollars. When Ehat found that he would not win the battle on copyright, he tried to find every conceivable way he could think of to obtain more damages. For instance, he listed expenses which he admitted were "prior to the Tanner publication":

. . . I went through the expense of purchasing back copies made of my notes . . . amounting to \$23.10. . . . Travel expenses to recover copies, I made a trip to Springville which I estimate was \$8. Three trips to the University of Utah, which I estimated to be approximately \$48 worth of expense. I made numerous trips around Provo and Orem to help me check out rumors, but I can't now estimate how many trips there were, so I don't give a figure regarding that. Miscellaneous expenses from September to December of 1981, I estimate that I lost work of approximately

Speaking of eternal duration of matter he said. There is no such thing as immaterial matter. All spirit is matter but is more fine or pure and can only be discerned by purer eyes. We cant see it but when our bodies are purified we shall see that it is all matter. The gentleman seemed pleased & said he should visit Nauvoo immediately.

Thursday 18th. We left Macedonia about 8 $\frac{1}{2}$ and arrived Carthage at 10. I asked the Prest. wether children who die in infancy will grow. He answered "no, we shall receive them precisely in the same state as they died is no larger. They will have as much intelligence as we shall but shall always remain separate and single. They will have no increase. Children who are born dead will have full grown bodies being made up by the resurrection.

At Carthage we paid some taxes &c. Dined at Backenstor's with Judge Douglas who is presiding at Court. After dinner the Prest. & Judge had conversation concerning sundry matters. The Prest. said "I prophesy in the name of the Lord God that in a few years this government will be utterly overthrown and wasted so that there will not be a potsherd left" for their wickedness in conniving at the Missouri mobocracy. The Judge appears very friendly & acknowledged the propriety of the prests. remarks.

We left Carthage about 2 & arrived home at 5 $\frac{1}{2}$. my family all well.

May 20th 1843. ... Rode on prairie with prest. J Jackson bro Oakley & others to look lands P.M. rode out with Jackson to shew lands. prest. Smith tells me he has appointed Jackson to sell lands and relieve me of their burthen. He says Jackson appears a fine & noble fellow but is reduced in circumstances. The prest. feels disposed to employ him & give him a chance in the world. Jackson says he shall be baptized ere long.

Sunday 21. Prest. J. preached on 2 Peter chapter 1 to a very full house. P.M. we had sacrament administered Evening I took a walk with my wife M. to H Kimballs & thence to the post office

into Adam his spirit [i. e. Adam's spirit]* or breath of life; but when the word "rauch" applies to Eve, it should be translated lives.

Speaking of eternal duration of matter, I said:
There is no such thing as immaterial matter. All spirit is matter, but is more fine or pure, and can only be discerned by purer eyes. We cannot see it, but when our bodies are purified, we shall see that it is all matter.

The priest seemed pleased with the correction, and stated his intention to visit Nauvoo.

A conference was held in the Columbia Hall, Grand Street, New York, where fifteen branches, six high priests, thirty-six elders, nineteen priests, sixteen teachers, five deacons, and three hundred and eighty-seven members were represented. Forty-nine have been baptized since last conference; many have removed to Nauvoo; and twenty-eight have been excommunicated. Four elders and one priest were ordained.

Thursday, 18.—We left Macedonia about half past eight a. m., and arrived at Carthage at ten.

[The following brief account of the prophet's visit with Judge Douglas while at Carthage is from the journal of William Clayton, who was present:]

The Great Prophecy on the Head of Stephen A. Douglas.

Dined with Judge Stephen A. Douglas, who is presiding at court. After dinner Judge Douglas requested President Joseph to give him a history of the Missouri persecution, which he did in a very minute manner, for about three hours. He also gave a relation of his journey to Washington city, and his application in behalf of the Saints to Mr. Van Buren, the President of the United States, for redress and Mr. Van Buren's pusillanimous reply. "Gentlemen, your cause is just, but I can do nothing for you;" and the cold, unfeeling manner in which he was treated by most of the senators and representatives in relation to the subject. Clay saying, "You had better go to Oregon." and Calhoun shaking his head solemnly, saying, "It's a nice question—a critical question, but it will not do to agitate it."

The judge listened with the greatest attention and spoke warmly in

* Doctrine and Covenants, section 131: 7-8 The interpretation implied in the words in brackets is justified by the following from the Book of Abraham: "And the Gods formed man from the dust of the ground, and took his spirit (that is, the man's spirit) and put it into him, and breathed into his nostrils the breath of life, and man became a living soul." Chap. v: 7, 8.

depreciation of the conduct of Governor Boggs and the authorities of Missouri, who had taken part in the extermination, and said that any people that would do as the mobs of Missouri had done ought to be brought to judgment: they ought to be punished.

President Smith, in concluding his remarks, said that if the government, which received into its coffers the money of citizens for its public lands, while its officials are rolling in luxury at the expense of its public treasury, cannot protect such citizens in their lives and property, it is an old granny anyhow; and I prophesy in the name of the Lord God of Israel, unless the United States redress the wrongs committed upon the Saints in the state of Missouri and punish the crimes committed by her officers that in a few years the government will be utterly overthrown and wasted, and there will not be so much as a potsherd left, for their wickedness in permitting the murder of men, women and children, and the wholesale plunder and extermination of thousands of her citizens to go unpunished, thereby perpetrating a foul and corroding blot upon the fair fame of this great republic, the very thought of which would have caused the high-minded and patriotic framers of the Constitution of the United States to hide their faces with shame. Judge, you will aspire to the presidency of the United States; and if ever you turn your hand against me or the Latter-day Saints, you will feel the weight of the hand of Almighty upon you; and you will live to see and know that I have testified the truth to you; for the conversation of this day will stick to you through life.

He [Judge Douglas] appeared very friendly, and acknowledged the truth and propriety of President Smith's remarks.*

We then rode home, where we arrived about half-past five p. m., and found my family all well.

Mr. Joseph H. Jackson, who professed to be a Catholic priest, was at my house awaiting my arrival.

At six p. m., I called at my office for Arlington Bennett's letter.

Friday, 19.—I borrowed of Orson Hyde fifty dollars, which I paid to Mr. Eric Rhodes, and which he is either to repay in cash or let me have lumber.

I rode out with Mr. Jackson in the afternoon.

Told Brother Phelps a dream that the history must go ahead before anything else.

Elder George P. Dykes writes:

* See note at end of chapter.

To the left is a photograph which contains Andrew Ehat's extract from William Clayton's diary for May 18, 1843. Notice that the circled portion contains only 78 words. The two pages to the right are from Vol. 5 of *History of the Church*, printed by the Mormon Church. These pages quote the entry for the same day "from the journal of William Clayton." Notice, however, that they contain 456 words and include the famous prophecy concerning Stephen A. Douglas which is not found in Ehat's version.

The Tanners on Trial

\$287.50. I made phone calls . . . The Berger call was \$5 and the Sariavey call was 73 cents. I — the day that I had found out that this stuff had been stolen was the day for late fees or for add-drops, and since I couldn't do it because I was engaged in this, I lost \$3 for a late fee, to engage in a late fee.

Legal efforts that I took prior to the Tanner publication or phone calls I made with you that I spent, \$16.42. Making a total of \$312.65 worth of expense prior to the Tanner publication.

After the Tanner publication, the amount is approximately \$1,900 — \$1,918.50. I can itemize it if you wish.

Q. Would you please.

A. Phone calls to you, Gordan Madsen, \$53.50. Trips to Utah, one for deposition in November of '83 at \$349. Now adding at this time for Court, the same amount \$349. Expenses that I incurred on this trip during the deposition period approximately \$45. Now at this time I estimate about \$50. Loss of work, November of 1983 approximately \$560, and at this time I estimate that my loss of work will be about \$400. I do have one item that I should have put on the — prior to the Tanner publication, it's loss of work that occurred in May of 1982 of \$112.

Q. All of those total up about what?

A. The total there is about \$2,310.25. (*Trial Transcript*, pages 54–55)

The reader will notice that Mr. Ehat listed a loss of "approximately \$560" for "Loss of work, November of 1983." When we took his deposition on November 23, 1983, he claimed that he was unemployed:

Q. And who do you live there with?

A. My wife and my four children.

Q. Are you currently employed?

A. No, I'm not employed.

Q. What's your current source of income?

A. I'm a graduate student. I've had a fellowship and G I Bill. (*Deposition of Andrew Ehat*, page 5)

At the trial, however, he testified that he had been earning about \$600 a month as "a researcher." Although this may be what he was referring to, we still find it hard to understand why he would claim the loss of almost a full month's earning (\$560) when the depositions only took two days plus his travel time to and from Salt Lake City. In any case, Mr. Ehat also claimed that he lost "ten months of my school time," and therefore should be reimbursed because his degree was delayed:

A. In the effort to forestall the publication of my extracts and the continued publication of the extracts by the Tanners, I have taken ten months of my school time.

I have not gone to school for ten months so that the time I would otherwise have gone to school — I didn't want to compromise that time by having to be engaged in this lawsuit and taking lengthy times out of school time in order to do this and be backlogged in work.

Q. And if you had pursued your doctoral dissertation without the Tanners having published those Clayton notes, how nearly completed was your doctoral dissertation?

A. I would be ten months closer to completion.

.

Q. Are you earning any earnings now as a graduate student?

A. As a researcher, yes.

Q. And do you have — have you made any examination or inquiry as to what the beginning Ph.D. historian is paid in the industry or profession?

A. Considering my background, my publications, what I would settle for as an initial thing, yes.

Q. What would that figure have been?

A. Approximately 24,000.

Q. Per year?

A. As a conservative estimate per year.

.

Q. What are your earnings as a researcher now?

A. If I had been in school uninterrupted during this period of time and unengaged in this lawsuit at about 20 hours a week, put in approximately \$6,000 or so.

Q. That you would have been able to earn, so by virtue of being delayed essentially a year, teaching a year, the difference between what you are earning and might have been able to earn had you completed the degree is the difference between the 6,000 and the 24,000?

A. Yes.

.

THE COURT: . . . As I understand it, your theory is that if you hadn't been diverted by this lawsuit, you would have been able to complete your preparation and secure employment that may have brought during all or a portion of the time compensation of some \$24,000, and that the difference between that and your opportunity for employment at the rate of \$6,000 a year would represent damage which you claim as a part of your overall damage, is that a fair statement of your theory?

THE WITNESS: Yes. I assume that when I did start employment I would have been delayed at the time I didn't start employment by approximately ten months.

THE COURT: That ten month lag would furnish the basis of the application of this differential between \$6,000 and \$24,000?

THE WITNESS: Yes.

(*Trial Transcript*, pages 50–53)

The Tanners on Trial

Our lawyer argued as follows:

MR. BARNARD: Well, with regard to the damages that they have alleged, Mr. Ehat was clear that he said ten months of his life had been disrupted, and he hasn't been able to work or go to school on a full time basis because of this lawsuit. Not because of what the Tanners did but because he was involved in this lawsuit. I don't think that's compensable. With regard to his itemization as to expenses that were incurred before the Tanners published, . . . he shouldn't be talking to us. I don't think that's compensable from the Tanners. (Ibid., page 480)

While Judge Christensen did not award any damages for these unusual claims, his judgment of \$12,000 for "damage to plaintiff's reputation" is almost as absurd.

In his original ruling, given on March 23, 1984, judge Christensen stated that "in view of the fact that each of the parties succeeded in part and failed in part on the claims asserted in the complaint, no taxable costs shall be awarded" (*Court's Ruling*, page 25). By April 10, 1984, Judge Christensen either changed his mind or forgot what he had written in his original ruling. He stated: ". . . taxable costs will go to plaintiff as the prevailing party" ("Partial Transcript of Proceedings," April 10, 1984, page 6). The "taxable costs" are, of course, in addition to the \$15,960 which Christensen already awarded.

TANNERS' TAX PAPERS

In the *Pre-Trial Order*, page 14, we find a list of "Plaintiff's exhibits" for the trial. The seventh item which Gordon A. Madsen wanted was the "1982 and '83 tax returns and financial computation of profit of the defendants regarding the publication *Clayton's Secret Writings Uncovered*; . . ." In the *Deposition of Jerald Tanner*, pages 106–107, the following appears:

A. Well, I took my income tax form for 1982, and I grossed \$64,374.49. And my total income after all the expenses is \$9935.83. Now, that is all that I've gotten on sales. I received gifts besides that, but this is the sales, all the books I have done together.

Q. 9,000 subtotal revenue from book sales?

A. Yes. That also includes my royalty from Moody Press, . . .

Q. (BY MR. MADSEN) So I understand this: 9900 in addition to the 64,000 of total income?

A. No. This is what I grossed on the receipts, but what I am telling you is: the business expenses amounted to everything but —

Q. You mean, the 9,000 was the net from the 64,000 gross?

A. Well, let me see. I guess the total deductions, okay — what was left net profit 9,935 after all my deductions of depreciation.

Q. When you say "deductions," you mean business deductions as opposed to personal deductions?

A. Yes.

Q. You had a gross income of 64,000 which included your royalties from Moody?

A. Yes.

Q. And then you had a net profit of just under 10,000 —

A. Yes.

On pages 122–123 of the same deposition, Mr. Madsen asked questions concerning our non-profit corporation, Utah Lighthouse Ministry:

Q. In other words, would there be an expense for Clayton coming from the corporation to you personally in the course of printing additional copies of this work?

A. An expense from the Clayton — can you explain.

Q. From the corporation to you personally or your wife.

Are you getting any kind of compensation, fees?

A. No.

Q. Typing?

A. No, nothing I can think of.

Q. Renumeration?

A. All the money goes into the corporation.

Q. So, in effect —

A. I get my salary.

Q. —If we look at the corporation's tax return for 1983, all of the expenses in connection with the printing of *Clayton's Secret Writings Uncovered* would be reflected; is that correct?

A. All the money would be reflected, yes.

Q. And the only thing that would be coming out of that —

A. Would be my salary and Sandra's board allowance.

Q. And you are getting paid a salary out of the corporation?

A. Yes.

Q. And they are also paying your health and accident and your life insurance?

A. Yeah. I think it does have a little life insurance.

Q. Is it paying your wife a salary?

A. She receives no salary. She receives \$30 a year for attendance at one board meeting, but she works for free otherwise.

The following testimony was given by Jerald Tanner at the trial:

1040 Department of the Treasury—Internal Revenue Service **1982** (3)
U.S. Individual Income Tax Return

For the year January 1–December 31, 1982, or other tax year beginning . . . 1982, ending . . . 19 . . . OMB No. 1545-0074

Use IRS label. Other-wise, please print or type.

TR 529-42-8799 560-54-9804 529 3
 JERALD D & SANDRA L TANNER
 1350 SO WEST TEMPLE
 SALT LAKE CITY UT 84115

net name
 I R S

Your social security number
 529:42:8799

Spouse's social security no.
 560:54:9804

Your occupation ▶ PUBLISHER
 Spouse's occupation ▶ "

Presidential Election Campaign ▶ Do you want \$1 to go to this fund? Yes No
 If joint return, does your spouse want \$1 to go to this fund? Yes No
 Note: Checking "Yes" will not increase your tax or reduce your refund.

Filing Status
 Check only one box.

1 Single
 2 Married filing joint return (even if only one had income)
 3 Married filing separate return. Enter spouse's social security no. above and full name here ▶
 4 Head of household (with qualifying person). (See page 6 of Instructions.) If the qualifying person is your unmarried child but not your dependent, enter child's name ▶
 5 Qualifying widow(er) with dependent child (Year spouse died ▶ 19). (See page 6 of Instructions.)

For Privacy Act and Paperwork Reduction Act Notice, see Instructions.

Exemptions
 Always check the box labeled Yourself. Check other boxes if they apply.

6a Yourself 65 or over Blind
 b Spouse 65 or over Blind
 c First names of your dependent children who lived with you ▶ DENNIS
 TERESA
 Enter number of boxes checked on 6a and b ▶ 2
 Enter number of children listed on 6c ▶ 2

d Other dependents:	(1) Name	(2) Relationship	(3) Number of months lived in your home	(4) Did dependent have income of \$1,000 or more?	(5) Did you provide more than one half of dependent's support?	Enter number of other dependents. Add numbers entered in boxes above ▶
						4

e Total number of exemptions claimed

Income
 Please attach Copy B of your Forms W-2 here.
 If you do not have a W-2, see page 5 of Instructions.
 Please attach check or money order here.

7	Wages, salaries, tips, etc.	7	
8	Interest income (attach Schedule B if over \$400 or you have any All-Savers interest)	8	
9a	Dividends (attach Schedule B if over \$400)	9a	
9b	Exclusion	9b	
9c	Subtract line 9b from line 9a	9c	
10	Refunds of State and local income taxes (do not enter an amount unless you deducted those taxes in an earlier year—see page 9 of Instructions)	10	
11	Alimony received	11	
12	Business income or (loss) (attach Schedule C) ▶	12	9,935 83
13	Capital gain or (loss) (attach Schedule D)	13	
14	40% capital gain distributions not reported on line 13 (See page 9 of Instructions)	14	
15	Supplemental gains or (losses) (attach Form 4797)	15	
16	Fully taxable pensions, IRA distributions, and annuities not reported on line 17	16	
17a	Other pensions and annuities. Total received 17a	17a	
17b	Taxable amount, if any, from worksheet on page 10 of Instructions	17b	
18	Rents, royalties, partnerships, estates, trusts, etc. (attach Schedule E)	18	
19	Farm income or (loss) (attach Schedule F) ▶	19	
20a	Unemployment compensation (insurance). Total received 20a	20a	
20b	Taxable amount, if any, from worksheet on page 10 of Instructions	20b	
21	Other income (state nature and source—see page 10 of Instructions) ▶	21	
22	Total income. Add amounts in column for lines 7 through 21 ▶	22	9,935 83

Adjustments to Income
 (See Instructions on page 11)

23	Moving expense (attach Form 3903 or 3903F)	23	
24	Employee business expenses (attach Form 2106)	24	
25	Payments to an IRA. You must enter code from page 11 (.....)	25	
26	Payments to a Keogh (H.R. 10) retirement plan	26	
27	Penalty on early withdrawal of savings	27	
28	Alimony paid	28	
29	Deduction for a married couple when both work (attach Schedule W)	29	
30	Disability income exclusion (attach Form 2440)	30	
31	Total adjustments. Add lines 23 through 30. ▶	31	

Adjusted Gross Income
 32 Adjusted gross income. Subtract line 31 from line 22. If this line is less than \$10,000, see "Earned Income Credit" (line 62) on page 15 of Instructions. If you want IRS to figure your tax, see page 3 of Instructions ▶

32 9,935 83

1040 Department of the Treasury—Internal Revenue Service **1983** (a)

For the year January 1-December 31, 1983, or other tax year beginning 1983, ending 19 OMB No. 1545-0074

Use IRS label. Otherwise, please print or type.

TR 529-42-8799 560-54-9804 529 3811
 JERALD D & SANDRA L TANNER
 1350 SO WEST TEMPLE
 SALT LAKE CITY UT 84115

Last name: TANNER
 Your social security number: _____
 Spouse's social security number: _____
 Your occupation: _____
 Spouse's occupation: _____

Presidential Election Campaign Do you want \$1 to go to this fund? Yes No
 If joint return, does your spouse want \$1 to go to this fund? Yes No
 Note: Checking "Yes" will not increase your tax or reduce your refund.

Filing Status

1 Single
 2 Married filing joint return (even if only one had income)
 3 Married filing separate return. Enter spouse's social security no. above and full name here.
 4 Head of household (with qualifying person). (See page 6 of Instructions.) If the qualifying person is your unmarried child but not your dependent, write child's name here.
 5 Qualifying widow(er) with dependent child (Year spouse died ▶ 19). (See page 6 of Instructions.)

Exemptions

6a Yourself 65 or over Blind
 b Spouse 65 or over Blind
 c First names of your dependent children who lived with you: TERESA
 Enter number of boxes checked on 6a and b ▶ 2
 Enter number of children listed on 6c ▶ 1
 Enter number of other dependents ▶
 Add numbers entered in boxes above ▶ 3

d Other dependents:	(1) Name	(2) Relationship	(3) Number of months lived in your home	(4) Did dependent have income of \$1,000 or more?	(5) Did you provide more than one-half of dependent's support?

Income

Please attach Copy B of your Forms W-2, W-2G, and W-2P here.
 If you do not have a W-2, see page 5 of Instructions.
 Please attach check or money order here.

Line	Description	Amount
7	Wages, salaries, tips, etc.	18,200.00
8	Interest income (also attach Schedule B if over \$400 or you have any All-Savers interest)	24.37
9a	Dividends (also attach Schedule B if over \$400)	
9b	Exclusion	
9c	Subtract line 9b from line 9a and enter the result	
10	Refunds of State and local income taxes, from worksheet on page 10 of Instructions (do not enter an amount unless you deducted those taxes in an earlier year—see page 10 of Instructions)	
11	Alimony received	
12	Business income or (loss) (attach Schedule C)	1,652.96
13	Capital gain or (loss) (attach Schedule D)	
14	40% capital gain distributions not reported on line 13 (See page 10 of Instructions)	
15	Supplemental gains or (losses) (attach Form 4797)	
16	Fully taxable pensions, IRA distributions, and annuities not reported on line 17	
17a	Other pensions and annuities, including rollovers. Total received	
17b	Taxable amount, if any, from worksheet on page 10 of Instructions	
18	Rents, royalties, partnerships, estates, trusts, etc. (attach Schedule E)	2,377.82
19	Farm income or (loss) (attach Schedule F)	
20a	Unemployment compensation (insurance). Total received	
20b	Taxable amount, if any, from worksheet on page 11 of Instructions	
21	Other income (state nature and source—see page 11 of Instructions) Payment for Sandra Tanner's attendance at Board Meeting	30.00
22	Total Income. Add amounts in column for lines 7 through 21	22,285.15

Adjustments to Income

(See Instructions on page 11)

Line	Description	Amount
23	Moving expense (attach Form 3903 or 3903F)	
24	Employee business expenses (attach Form 2106)	
25a	IRA deduction, from the worksheet on page 12	
25b	Enter here IRA payments you made in 1984 that are included in line 25a above ▶	
26	Payments to a Keogh (H.R. 10) retirement plan	
27	Penalty on early withdrawal of savings	
28	Alimony paid	
29	Deduction for a married couple when both work (attach Schedule W)	
30	Disability income exclusion (attach Form 2440)	
31	Total adjustments. Add lines 23 through 30	

Adjusted Gross Income 32 Adjusted gross income. Subtract line 31 from line 22. If this line is less than \$10,000, see "Earned Income Credit" (line 59) on page 16 of Instructions. If you want IRS to figure your tax, see page 3 of Instructions. **22,285.15**

Q. Let me show you what has been marked Defendant's Exhibit C, which is identified as a lease and ask if you have seen that lease before?

THE WITNESS: . . . Yes, this is a lease agreement for Utah Lighthouse to lease three rooms in the house and also the garage, 1600 AB Dick printer, roll binding equipment, paper cutter and also all other printing and binding equipment found on premises.

BY MR. BARNARD:

Q. Is that a lease agreement that you personally entered into with Utah Lighthouse Ministry with regard to lease of space to Utah Lighthouse Ministry?

A. Yes, for \$175 a month.

.....

Q. Is that lease still in effect?

A. No, this lease is not in effect. The lease we have now is for only \$100 a month.

.....

Q. Let me show you what has been marked Defendant's Exhibit D, and ask if you can identify that?

A. This is two documents here, photocopies of two documents, one is from the Moody Bible Institute royalties of \$1,422.91 paid in 1983. The other is a W-2 form for a wage of \$18,200 which was paid to me in 1984 by Utah Lighthouse Ministry.

Q. And does that document accurately represent the income that you received during the year 1983 from Utah Lighthouse Ministry?

A. There would be, I think, about \$1,600 that we received on all payments of bills that were done under the name of Modern Microfilm Company the same year which we used to pay off loans.

.....

Q. Let me show you what has been marked Defendant's Exhibit B and ask if you can identify that?

A. This is my individual income tax for, federal tax form and state taxing form for 1982.

Q. Is that filed jointly with your wife?

A. Yes, it was.

.....

Q. And do those income tax returns accurately reflect your income for the year and your wife's income for the year 1982?

A. Yes, they reflect all of our income. (*Trial Transcript*, pages 380-382)

While some Mormon apologists have accused us of making vast sums of money through the sale of our publications, our tax records certainly do not support this malicious accusation. On our 1983 income tax return we reported an adjusted gross income of \$22,285.15. Since we both worked full-time for Utah Lighthouse Ministry, this would amount to just over \$11,000 each. Considering the amount of hours we have to work and the stress that comes from this type of ministry, we do not feel that we are taking advantage of the public.

CHURCH INVOLVEMENT?

A number of people seem to feel that the Church itself may in some way be involved in Ehat's suit. While it is true that Brigham Young University's Religious Studies Center seemed to be encouraging the suit, we have no evidence that the Mormon Church wanted Ehat to file the suit. We have been told, in fact, that the Church's legal department had nothing to do with the matter and there was an attempt to discourage Madsen from taking legal action. However this may be, we seriously doubt that the Church would become involved in a suit which would bring them so much embarrassment. Once the suit was under way, of course, the Church felt it had to resist our efforts to subpoena the original diaries or obtain the testimony of its personnel. We have already told of the attempt to stop us from taking the deposition of the Church Archivist Donald Schmidt. At the same time we had requested Apostle Boyd K. Packer's testimony. In the "Motion to Quash Subpoenas," dated December 16, 1983, we read:

On December 7, 1983, defendants served subpoenas on the undersigned law firm directed to Boyd K. Packer, a member of the Council of the Twelve of the Church of Jesus Christ of Latter-day Saints (hereinafter the Church) and Donald T. Schmidt, Director of the Archives of the Church Historical Department, requiring them to appear for their depositions . . . these deponents move for an order that the requested discovery not be had and that the subpoena duces tecum be quashed on the grounds that the requested documents are not relevant or necessary to the issues of this case, that the Church and these deponents deem the materials requested to be confidential, and that justice requires an order forbidding the requested discovery to protect the Church and deponents from annoyance and oppression,

.....

The Church's lawyers apparently realized that Donald Schmidt's testimony was so relevant that they could not possibly win. They, therefore, offered a compromise. In a letter from Church lawyer Bruce Findlay, dated January 9, 1984, the following was stated:

If you are willing to withdraw your subpoena of Elder Packer, we will withdraw our objection to your taking Donald T. Schmidt's deposition and we will thereby resolve the issues pending in our motion to quash both the subpoena of Elder Packer and the subpoena of Mr. Schmidt which are now outstanding.

Since Judge Christensen had already ruled against us obtaining access to the original diaries and since depositions are so expensive and time consuming, we decided to agree to this proposed settlement. We also requested the testimony of Church Historian G. Homer Durham because Donald Schmidt had testified that he had discussions with Durham concerning the Ehat matter (*Deposition of Donald Schmidt*, pages 59–60). Mr. Durham probably would have had some important testimony to give concerning the whole affair. Unfortunately, however, the Church decided to fight us on this matter. In the “Motion to Quash,” dated February 9, 1984, we find the following:

Q. Homer Durham, whom the Defendants have subpoenaed . . . hereby moves . . . for an Order quashing the said subpoena, on the grounds and for the reason that here are no issues in the within case on which he has relevant evidence; . . . an Affidavit of Andrew F. Ehat will be filed herein showing that Andrew F. Ehat does not contend that he obtained any authority to publish materials from the movant or ever directed any request regarding the publication of said materials to movant; that movant needs the relief requested herein to protect himself from annoyance, embarrassment or oppression; and on the ground that the correspondence between himself and the office of the First Presidency of the Church, described earlier in the Affidavit of Donald T. Schmidt, is irrelevant to the issues of this case although it might arguably fall within the outlines of the documents requested in the subpoena, and is unnecessary to the decision of the issues presented herein.

As it turned out, the Church made a wise move in delaying Durham’s deposition. Time ran out on us, and we were unable to take his deposition. The Judge, therefore, never had to give a ruling on this important matter.

Although the Church fought our attempt to obtain information from its personnel, we do not feel that this shows it was supporting the suit. We have not found any evidence of Church involvement in the matter. We should probably also say that we found the Church’s lawyer, Bruce Findlay to be very well-mannered. Even though we have some real differences with the organization he represents, we cannot help but respect him.

LIGHT STILL SHINING

Although some people felt that Ehat’s suit might put the light out at Utah Lighthouse Ministry, we are happy to report that it is still shining brightly. God has answered the prayers that have been offered on our behalf in a marvelous way. While the legal fees have mounted to over \$22,000, and another \$10,000 may be expended in the appeal, we have already received an incredible amount of help. If we lose the appeal we will have to pay the \$16,000 judgment. (This amount of money has been set aside in an account awaiting the outcome of the appeal.) We feel, however, that we will prevail in the end.

Although fighting this lawsuit has cost many thousands of dollars and a great deal of time, we feel that it will all work out for our good. The publicity surrounding it has already helped our work a great deal. Some of those who oppose our work have been hoping that the suit will drive us into bankruptcy, but we feel that it will have just the opposite effect. As Joseph told his brothers who had sold him into Egypt, “. . . ye thought evil against me; but God meant it unto good, to bring to pass, as it is this day, to save much people alive” (Genesis 50:20). In Romans 8:28 we read: “And we know that all things work together for good to them that love God, to them who are the called according to his purpose.”

The Lord willing, the light from *Utah Lighthouse Ministry* will become even brighter in the future.
