Salt Lake City Messenger
UTAH LIGHTHOUSE MINISTRY
PO BOX 1884, SALT LAKE CITY, UTAH 84110
Issue No. 54 **September 1984**

TANNERS FOUND GUILTY!

JUDGE THREATENS DAMAGES "MANY TIMES" $16,000

"The atmosphere in the courtroom was electric," wrote Christine Rigby. "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 documents and private letters, on many of which some historians complained the Tanners had violated copyright restrictions" (*Utah Holiday*, May 1984, page 13).

The Mormon scholar Andrew Ehat filed this lawsuit against us on April 28, 1983, 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.*

Injunction Removed

Mr. Ehat claimed that we had violated the copyright law when we printed the Clayton notes. We argued, however, that Ehat could not possibly have a copyright interest in material taken from Clayton's diaries and refused to settle out of court.

Judge A. Sherman Christensen commenced the trial on March 21, 1984, and on March 25 he 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 the plaintiff's claim should be dismissed with prejudice" (*Court's Ruling*, page 17). Instead of dismissing the case, however, Judge Christensen apparently felt that we had to 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 that 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.

Prejudice?

We believe 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 31, 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. Christensen took the matter "under advisement" and on September 16, 1983, ruled that the Church would not have to produce the diaries. Whether he 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 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 this case. Moreover, the fact that the scandal over the notes occurred at the Church's university, where he had attended, probably did not help us any. 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 could, of course, create a great deal of prejudice against us in the mind of a Mormon judge. We will never know 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.

Judge Very Upset!

On April 29, 1984, we published an 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."

Much to our surprise, 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 . . . 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, . . .
>
> According to the showing before the Court, not only did he do that, but as I read the article, the advertisement . . . he really misrepresented the decision of the Court and flaunted his defiance of it. . . . supposing that the defendants would be content with their rights of free speech, which the court has no disposition to restrain . . . it leaned over backwards. . . . 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 . . .
>
> I had assumed that the principle damage accruing to the plaintiffs . . . had accrued . . . 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 a prepared publication the very situation that gave rise to the prior damages; . . . 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 . . .
>
> The Tanners weren't content with their rights under the First Amendment, . . . but had to advertize 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 . . . The Tanners have done about as much as they can do 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 went 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. . . . 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," 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. On the contrary, at the hearing on April 10, 1984, our lawyer, Brian Barnard, argued "And to enjoin the Tanners from distributing copies of those documents, . . . I think is inappropriate. . . . 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 knew he would look very bad if his decision were overturned. The Judge's attempt to make us appear to 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.

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 the 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.

We view Judge Christensen's 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. 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, . . ."

Hurt Reputation?

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)

In his deposition Andrew Ehat gave the following testimony:

> **Q.** . . . 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?
>
> . . . .
>
> **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.
>
> **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.

With regard to the damage to Ehat's reputation, Professor Richard L. Anderson testified: "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 these 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: "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, . . ." (*Ibid*., page 336).

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. A careful examination of the introduction to *Clayton's Secret Writings Uncovered* clearly demonstrates we reported that Mr. Ehat did everything in his power to stop the dissemination of the notes. On the second page of the Introduction, we stated that, "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."

"Stolen" Microfilms

Now, while Andrew Ehat did not suffer any damage to his reputation because of our publication, 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. 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.

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 documents which we have printed have leaked out through Mormon scholars. 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 when 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. In our new book, *The Tanners On Trial*, we show that Mr. Ehat was not only a participant in the Underground, but that he was receiving material 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

In his deposition, a former Brigham Young University student told of his undergound dealings with Mr. Ehat. He claimed that Ehat allowed him to borrow illicit microfilm copies of important Church documents, which he in turn duplicated and distributed to other people in the Mormon Underground. When Andrew Ehat was being questioned at the trial, his lawyer did his best to prevent us from learning the source of these unauthorized microfilms:

> **Q.** Now, with regard to the collection that you have . . . 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. (*Trial Transcript*, pages 69-70)

Because the Judge overruled Madsen's objection, Mr. Ehat was forced into telling the source of three microfilms we knew he had in his possession. He frankly confessed that two of these were received directly from the Mormon "Fundamentalists." In the "Transcript of Proceedings," April 10, 1984, page 25, Mr. Ehat's lawyer conceded that Ehat "got a copy" of a microfilm that "had been stolen."

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.

False Testimony

Another thing that will hurt Andrew Ehat's reputation is the fact that he gave false testimony under oath about how he obtained the Clayton material. The original complaint against us seemed to indicate that Mr. Ehat copied the material directly from the original Clayton diaries. We had reason to believe, however, that at least some of the material came from a different source. In his *Answers to Interrogatories*, November 21, 1983, Mr. Ehat admitted that he had been given 12 pages of the extracts by James B. Allen and that he had copied the rest from a typescript. 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? 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 also claimed that he was not even aware that the Historical Department had a typescript of the Clayton diaries in question:

> **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. (*Deposition of Donald Schmidt*, pages 21-23)

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).

The truth about the transcript finally came out when we were taking the testimony of James B. Allen, who served as Assistant Church Historian during the 1970s. When Dr. Allen was asked when he first became aware of the typescript, he replied: "When I made one" (*Deposition of James B. Allen*, page 20). Allen claimed that he was given special permission by the First Presidency to use the diaries for a biography he was writing on William Clayton. He admitted that he made the verbatim typescript without the Church's permission and did not tell Donald Schmidt about it. When he was asked whether Ehat had access to it, he answered as follows:

> **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. (*Ibid*., page 22)

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. We already suspected that it was Dean Jessee, 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 that Allen, Jessee and Cook would get in trouble if the notes fell into the hands of critics of the Church.

Although Dr. Allen did his best to protect Dean Jessee, he finally found himself backed into a corner. He then stated that rather than "perjure" himself he would admit that "Dean Jessee" was the man. 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).

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:

> **Q.** 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 Jessie, . . .
>
> **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.** . . . I had a discussion with Dean Jessee.
>
> **Q.** In a subsequent time did he give you permission to see the notes?
>
> **A.** Un-huh.
>
> **Q.** . . . 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. (*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." At the trial, Brian Barnard asked Mr. Ehat if he had previously testified that Schmidt had given him permission to use the typescript and that there was no one else involved, Ehat replied: "**A.** Yes" (*Ibid*., page 69). On page 94 of the *Deposition of Andrew Ehat*, Mr. Ehat was asked point-blank if there was "anybody else besides you, Allen and Anderson" who had had access to the original diaries "or the typescript of those three volumes?" To this Ehat replied: "**A.** No, not that I'm aware of." 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*.

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 access to the diaries were so contradictory that it was obvious that someone was not telling the truth. In our new book, *The Tanners On Trial*, we have more material on the question of false testimony at the trial. 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 under oath and covered up how we obtained the Clayton extracts?

"Miffed"

James B. Allen claimed on page 25 of his deposition that the typescript was "my own particular scholarly property." Although he made a complete transcript without permission from the General Authorities of the Church, a memorandum from the First Presidency's office confirms the fact that he was given access to the diaries so that he could prepare his biography of William Clayton. Dr. Allen testified 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 . . . 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.** . . . you just used the word "miffed"?
>
> **A.** Yes.
>
> . . . .
>
> **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 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. (*Deposition of James B. Allen*, pages 79-81)

At the trial, Dr. Allen testified:

> **A.** Well, I was miffed when I discovered that those extensive notes that he had taken . . . 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. (*Trial Transcript*, page 239)

That Ehat was aware that he was copying from Allen's typescript without his permission seems obvious from the testimony we have obtained. Scott Faulring, for instance, said 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.

Although Mr. Ehat accused us of "unfair competition," the evidence shows that he secretly used James B. Allen's typescript of the dairies 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 typescript 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 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 him damages is even more unbelievable.

Very Unfair

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 claim 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 BYU—the organization that published Mr. Ehat's book. In his testimony at the trial, Truman Madsen said that for "nearly five years" Ehat "was my research assistant and did in fact bring to me documentary materials that he had access to and copied in my behalf" (*Trial Transcript*, page 193). Dr. Madsen also said that he was the "brother" of Ehat's lawyer, Gordon A. Madsen (*Ibid*., page 186). At any rate, 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:

> **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. (*Ibid*., page 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 the Madsen brothers 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. While it is true that a large percentage of the customers that actually come to our store are from Utah, the majority of our sales are through the mail. 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 who would not be interested in any book published by the Religious Studies Center. While we find it flattering that Ehat's lawyer would argue that the customers from the Religious Studies Center frequent our establishment in droves, we feel that it is very far from the truth.

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.

Anyone who has ever written a thesis knows that there is far more to it than just quoting material from one source. It is the scholar's organization of materials and observations that make the thesis of value. One noted Mormon scholar has made the interesting observation that it must show something concerning the quality of Ehat's master's thesis if our use of only the material copied from the Clayton diaries completely destroys a market for it.

If Judge Christensen had taken the time to carefully examine how much material was actually quoted in the thesis, we doubt that he would have found us guilty of "unfair competition." He apparently just relied on the testimony of Andrew Ehat and statements made by his lawyer.

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. Although he 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:

> 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,". . . (*Seventh East Press*, January 18, 1982)

Although Ehat questioned some other parts of the article in *Seventh East Press* when we took his deposition, he made no attempt to deny the words which we have quoted.

Judge Wrong

In our new book, *The Tanners On Trial*, we tell of a case in Texas where a supposed copyright violation was linked with "unfair competition." It was successfully argued in this case 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 motion 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)

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:** 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," September 6, 1983, page 11)

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. When Mr. Ehat was unsuccessful in proving an infraction of copyright law, the Judge should have dismissed the entire case.

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 can not 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] (supra, 607).
>
> 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 additional in printing, distributing and advertizing 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 of 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 . . ." 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 he used 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.

In our new book, *The Tanners On Trial*, we present a great deal of evidence to show that Judge Christensen's verdict was completely wrong. We also include many extracts from court documents which reveal the false testimony and cover-up which was used by the opposition. Some very important testimony is given on the Mormon Underground and how it functions. Andrew Ehat's participation in this underground is detailed with an abundance of testimony showing that he has copies of "stolen" and unauthorized material obtained from the Church Historical Department. The testimony of some of the Church's top historians is also included, as well as information on the suppression of documents and the "decline" of the History Division. We show how James B. Allen and Dean Jessee made the unauthorized typescript of the Clayton diaries and Ehat's clever method of gaining access to it. Information concerning Noel Reynold's investigation into the distribution of illicit copies of documents at BYU is also presented. The question of copyright violation on other Church documents is dealt with, and even testimony concerning our tax returns for 1982-83 is included This book has well over 100 large pages with many photographs of the original court documents. It is filled with fascinating material. *The Tanners On Trial* is available from Utah Lighthouse Ministry for only $5.95 a copy (add 10% for postage and handling).

Light Not Out

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 We still have a great deal of faith in our system of justice.

This is certainly a critical time for Utah Lighthouse Ministry. Because of some large bills which the corporation is trying to pay off, we haven't received any salary for four weeks. We do hope that many of our readers will hold us up in prayer and that some will consider contributing so that we will be able to effectively continue publishing the truth to the Mormon people. UTAH LIGHTHOUSE MINISTRY is a non-profit organization and all donations are tax- deductible.

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. 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 continue to shine and become even brighter in the future.

Good Letters

The Lord is beginning a real work among the Mormon people. We have been receiving letters and phone calls from all over the country. We recently received a letter which contained the following:

> After having read (in part) *Shadow or Reality*, read much of the New Testament and prayed an awful lot my husband and I have come to believe the L.D.S. church is untrue. It is a painful realization but we now feel the Lord working in our lives bringing us to a true understanding of Him and what we are to do . . .
>
> The work you're doing is such a blessing to us since we don't have access to the documents etc. you have. Your work is one of courage and I know the Lord is working through you continually to bring about His purpose. . . .
>
> We would like to obtain your book *A Look At Christianity* . . .
>
> Thank you again for your work — it is a divine work and it has blessed our family immensely. (Letter from Ohio, dated July 5, 1984)

The following appeared in another letter.

> Your book *Changing World of Mormonism* is "dynamite" to the church if key people got a hold of it. I am a Mormon 14 yrs. I've been RS pres — I dare not tell my husband what I have found out . . . I have turned this huge problem over to the Lord who I love dearly & want to serve. (Letter from Kansas)

EMBARRASSING LETTERS

During the past few months there have been a great many rumors circulating concerning the discovery of important letters proving that the Mormon prophet Joseph Smith was involved in the money-digging business and that he used magical practices in finding buried treasures. It is reported that there are three or four important letters concerning the subject. The first letter has recently been published by the Mormon scholar Dean Jessee in his book, *The Personal Writings of Joseph Smith*, 1984, pages 358-59. A photograph of the letter is included in Jessee's book. According to Jessee, it is in the handwriting of Joseph Smith and is addressed to his brother Hyrum. Jessee says that it was mailed from Far West, Missouri to Plattisgrove on May 25, 1838. The text is very short:

> Verily thus Saith the Lord unto Hyrum Smith if he will come strateaway to Far West and in=quire of his brother it shall be shown him how that he may be freed from de[b]t and ob=tain a grate treasure in the earth even so Amen

Jessee says that this letter is stored in the "LDS Church Archives." It was supposed to have been written just after Joseph Smith explored some mounds. His *History of the Church*, vol. 3, page 37, indicates that he believed these mounds contained treasures:

> . . . I returned to camp . . . We discovered some antiquities about one mile west of the camp, consisting of stone mounds, . . . These mounds were probably erected by the aborigines of the land, to secrete treasures.

The reader will note that this is more than just a letter; it actually purports to be a revelation from "the Lord." This appears to be the second false revelation Joseph Smith wrote concerning the location of hidden treasures. The other revelation is actually canonized in the Mormon Church's *Doctrine and Covenants*, Section 111:1, 2, 4;

> "I, the Lord your God, am not displeased with your coming this journey, . . . I have much treasure in this city for you, . . . I will give this city into your hands . . . and its wealth pertaining to gold and silver shall be yours."

(For a more complete treatment of this revelation see *Mormonism—Shadow or Reality?* page 49)

The second letter has never been published. It was sold to the Mormon Church by Mark Hofmann. Although its existence has been known by Mormon scholars for months, the Church has never publicly announced that it has possession of it. This is rather remarkable since it would be the earliest known letter of Joseph Smith. We have been told that Dean Jessee confirmed its existence, and when he was asked why he did not publish it in his book, *The Personal Writings of Joseph Smith*, he said that it would take an entire volume to explain the letter. In any case, the text of the document has leaked out. A number of scholars received typed copies in the mail. The letters were sent anonymously from New York City. Although we were not sent a copy, we were able to obtain one from a friend. The letter was supposed to have been written to Josiah Stowel and reads as follows:

> Canandaigua, New York
> June 18, 1825
>
> Dear Sir:
>
> My father has shown me your letter informing him and me of your success in locating the mine of which you told me, but we are of the opinion that if you have not ascertained the particulars, you should not dig for it till you first discover if any valuables remain. You know the treasure must be guarded by some clever spirit, and if such is discovered, so also is the treasure. So do this. Take a hazel stick, one yard long, being new cut, cleave it just in the middle and lay it asunder on the mine so that both inner parts of the stick hang up one right against the other one inch distant. If there is a treasure, after a while it will draw them both together unto themselves. Let me know how it is that you were here. I have almost decided to accept your offer. If you should make the decision to come this way, I shall be ready to accompany you if nothing happens more than I know of. I am,
>
> Respectfully yours,
> JOSEPH SMITH, JUN.

Since the spelling and punctuation are too good for Joseph Smith, we conclude that they have been corrected by the person who made the typescript. Although we cannot say that this typescript is 100% accurate, we know from very good sources that it gives the substance of the letter.

As far as the historical setting of the letter is concerned, we see no obvious problems. Joseph Smith acknowledged in his *History* that "in the month of October, 1825, I hired with an old gentleman by the name of Josiah Stowel, . . . He had heard something of a silver mine having been opened by the Spaniards . . . After I went to live with him, he took me, with the rest of his hands, to dig for the silver mine, . . . Hence arose the very prevalent story of my

having been a money-digger" (*History of the Church*, vol. 1, page 17).

In his 1826 trial Joseph Smith admitted that he had "a certain stone" he used to help Stowel locate buried treasures. There is also evidence linking him to the use of a hazel rod. We have a great deal of material on these matters in *Mormonism—Shadow or Reality?* chapter 4.

Although we can see no obvious historical problems with the letter to Stowel, we will withhold judgment concerning its authenticity until we obtain more information concerning it.

The third letter was supposed to have been written by Book of Mormon witness Martin Harris in 1830. In the last newsletter we published a few extracts from it. The most important portion is the following account of how Joseph Smith obtained the gold plates of the Book of Mormon (Harris is quoting Smith):

> . . . I found it 4 years ago with my stone but only got it because of the enchantment the old spirit come to me 3 times in the same dream & says dig up the gold but when I take it up the next morning the spirit transfigured himself from a white salamander in the bottom of the hole . . . (Letter purported to have been written by Martin Harris to W. W. Phelps, dated October 23, 1830, typed extract)

After our newsletter appeared, Steven Christensen acknowledged that he had the original letter. In a press release, dated March 7, 1984, he wrote:

> It is true that I am the owner of a letter written by Martin Harris to William W. Phelps, dated October 23, 1830. . . . Before I will release transcripts or photographs of the document to the public, I wish to first determine the document's historicity . . . I look forward to the time when I will be able to offer a more complete presentation to the public and the media.

Five months have passed and no further statement concerning the document has appeared.

Recently we received a complete transcript of the letter. One thing about this letter that really surprised us is that it doesn't mention anything about God or angels. This is certainly very strange. An interview with Harris published in 1859 in *Tiffany's Monthly*, is filled with material on this subject. For instance, Harris quoted at least five portions of the Bible. He used the words *revelation*, *Moses*, *Scripture* and *Christ* at least once. He used the word *prayed* twice, and mentioned the *devil* four times. The word *angel* or *angels* appears five times. *God* is mentioned seven times, and the word *Lord* appears ten times. In the Salamander letter, however, all of these words are absent. In fact, there is nothing we can find concerning religion. Spirits are mentioned many times in the letter, but they are never linked to God in any way. Instead, they are linked to money-digging. This total lack of religious material seems to be out of character for Martin Harris. A person might try to explain this by saying that Harris was more interested in religion in 1859, but the evidence shows that he was always that way. One suggested reconciliation is that Phelps was a money-digger and this is why Harris emphasized this aspect of the story and suppressed the divine element.

We have learned that Mark Hofmann originally tried to sell this letter to the Mormon Church for a large sum of money. When his offer was turned down, he sold it to Steven Christensen. One of the most important things in determining a document's authenticity is finding its pedigree. We have tried to find out where this letter came from but have not achieved any success. Hofmann claims that he has told the buyer (Christensen) the source, but cannot tell anyone else. We do hope that Christensen will reveal this important information soon. While we have expressed some doubts about the authenticity of the letter, they are based strictly on the text itself. The results of tests on the document as well as the establishment of a pedigree could alter our conclusions. We do hope that this will be the case. More information is found in our preliminary report, *The Money-Digging Letters*. Price: $1.00

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