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"A Revelation Given to Oliver Hyram Josiah & Joseph . . . Ye Shall Go to Kingston"

by

STEPHEN KENT EHAT[1]

Abstract: Sometime in late 1829 or early 1830, the Prophet Joseph Smith received a revelation for Oliver Cowdery, Hiram Page, Josiah Stowell, and Joseph Knight. The revelation was given in Manchester, Ontario County, New York and directed Cowdery, Page, Stowell and Knight to "secure" the Book of Mormon copyright "upon all the face of the Earth" and to go to Kingston in Upper Canada where they might "sell a copyright . . . for the four Provinces if the People harden not their hearts against the enticings of my spirit & my word . . . ." The four emissaries went to Kingston and, according to the only account written by one of the participants, Hiram Page (in an 1848 letter to "Wm" —apparently William McLellin), "there was no purchaser" in Kingston. I believe Page meant there was no purchaser in Kingston willing to purchase a copyright; I do not believe that Page meant that there was no possible purchaser in Kingston. Clearly, there were publishers in Kingston at the time who were active in the publishing trade. Page also stated in his letter that no one was "authorized at Kingston to buy rights for the province" and that "little York was the place where such business had to be done." I believe that by this phraseology, Page may possibly have been reporting a mere "thanks-but-no-thanks" reception printers, publishers or others in Kingston gave to the Prophet's emissaries; I believe the statement otherwise neither accurately reflects what copyright law applicable to Upper Canada provided at the time nor accurately reflects what the act of selling and buying a copyright in Upper Canada at that time would entail.

With the recent publication of the *Manuscript Revelation Books*,[2] we now have available to us the earliest known copy of the text of an unpublished revelation on securing the copyright of the Book of Mormon in all the world and selling a copyright for the Book of Mormon in Canada. Prior to now, our knowledge of the contents and dating of that revelation, of the identities of the persons to whom it was directed, and of the circumstances surrounding it have relied on secondary, after-the-fact sources. From David Whitmer's 1886 and 1887 accounts many have inferred that the revelation promised success in selling the copyright. Speaking of the sale of a copyright there, Hiram Page, on the other hand, recalled that "we were to go to Kingston where we

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[2] Jensen, Robin Scott, Robert J. Woodford, and Steven C. Harper, eds. *Manuscript Revelation Books*. First volume of the Revelations and Translations series of *The Joseph Smith Papers*, edited by Dean C. Jessee, Ronald K. Esplin, and Richard Lyman Bushman. Salt Lake City: Church Historian's Press, 2009.

were to sell *if* they would not harden their harts."[3]

Hiram Page was a participant in the trip to Kingston. Page's 1848 account (with spelling, punctuation, and capitalization here standardized) reads as follows:

> Joseph heard that there was a chance to sell a copyright in Canada for any useful book that was used in the States. Joseph thought this would be a good opportunity to get a handsome sum of money which was to be (after the expenses were taken out) for the exclusive benefit of the Smith family and was to be at the disposal of Joseph. Accordingly Oliver Cowdery, Joseph Knight, Hiram Page and Josiah Stoel were chosen (as I understood by revelation) to do the business; we were living from 30 to 100 miles apart. The necessary preparation was made (by them) in a sly manner so as to keep Martin Harris from drawing a share of the money. It was told me we were to go by revelation, but when we had assembled at Father Smith's, there was no revelation for us to go, but we were all anxious to get a revelation to go; and when it came we were to go to Kingston where we were to sell if they would not harden their hearts; but when we got there, there was no purchaser, neither were they authorized at Kingston to buy rights for the Province; but little York was the place where such business had to be done. We were to get 8,000 dollars. We were treated with the best of respects by all we met with in Kingston—By the above we may learn how a revelation may be received and the person receiving it not be benefitted.[4]

On September 8, 1872, William McLellin, apparent recipient of the above 1848 letter and not a participant in the trip (he did not join the Church until August of 1831), wrote a short, derogatory account of the matter twenty-four years after receiving Page's letter:

> Joseph had a revelation for Oliver and friends to go to Canada to get a copy-right secured in that Dominion to the Book of Mormon. It proved so false that he never would have it recorded, printed or published. I have seen and read a copy of it, so that I know it existed.[5]

An October 9, 1886 Richmond, Missouri account of an interview with non-participant David Whitmer reports that he disparagingly said that the Prophet Joseph Smith:

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[3] Page to McLellin, February 2, 1848, Fishing River, Missouri, photocopy, Community of Christ Library-Archives ("CCLA"), Independence, Missouri (emphasis here supplied).

[4] *Ibid.*

[5] McLellin to Joseph Smith III, commenced July 1872, CCLA. McLellin's account was retold in a letter by J. L. Traughber written in or shortly after 1881 to a German correspondent (*see* Dan Vogel, *Early Mormon Documents*, Vol. 5, page 333).

> manifested an alarming disposition to get revelations to cover every exigency that would arise, and in this he was eagerly urged on by some of his associates, who would frequently come to him with the request that he "ask the Lord" about this thing or the other. The first striking instance of it, and one that gave rise to grave apprehensions in the minds of David Whitmer and others of his kind, occurred in connection with the publishing of the first edition of the Book of Mormon. Martin Harris was a well-to-do farmer, and he was expected to mortgage his property for the purpose of raising the necessary funds for the printing of the book. His seeming reluctance to act in the matter, which Mr. Whitmer attributes to the cautious business-like manner in which he did everything, offended some of the brethren, and Hyrum Smith, the "Patriarch," proposed that some of them take the manuscript to Canada, and there sell the copyright for sufficient money to enable them to get out the publication. A
>
> REVELATION WAS PROCURED
>
> "to order" and "warranted to fit," a thing which occurred with remarkable frequency afterwards and which caused it to be a matter of foregone conclusion that whatever the desires of the favored few expressed, or the pressing emergency of the hour demanded, it would be admirably embodied in the "message from heaven." Thus "the word of the Lord came," directing that two of the brethren go to Canada as suggested. They went. They also returned, but they brought no money with them, and no promise of any.[6]

In the year after the above interview, in his *An Address to All Believers in Christ* (1887, p. 30-31), Whitmer wrote as follows:

> Brother Hyrum thought they should not wait any longer on Martin Harris, and that the money [to print the Book of Mormon] should be raised in some other way. Brother Hyrum was vexed with Brother Martin, and thought they should get the money by some means outside of him, and not let him have anything to do with the publication of the Book, or receiving any of the profits thereof if any profits should accrue. He was wrong in thus judging Bro. Martin, because he was doing all he could toward selling his land.
>
> Brother Hyrum said it had been suggested to him that some of the brethren might go to Toronto, Canada, and sell the copy-right of the Book of Mormon for considerable money: and he persuaded Joseph

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[6] *The Omaha Herald*, October 10, 1886; *Des Moines Daily News*, October 16, 1886; *Chicago Inter-Ocean*, October 17, 1886; *Philadelphia Press*, October 17, 1886; *The Salt Lake Daily Tribune* (vol. XXXI, no. 3), October 17, 1886.

> to inquire of the Lord about it. Joseph concluded to do so. He had not yet given up the stone. Joseph looked into the hat in which he placed the stone, and received a revelation that some of the brethren should go to Toronto, Canada, and that they would sell the copyright of the Book of Mormon. Hiram Page and Oliver Cowdery went to Toronto on this mission, but they failed entirely to sell the copyright, returning without any money. Joseph was at my father's house when they returned. I was there also, and am an eye witness to these facts. Jacob Whitmer and John Whitmer were also present when Hiram Page and Oliver Cowdery returned from Canada.
>
> Well, we were all in great trouble; and we asked Joseph how it was that he had received a revelation from the Lord for some brethren to go to Toronto and sell the copyright, and the brethren had utterly failed in their undertaking. Joseph did not know how it was, so he enquired of the Lord about it, and behold the following revelation came through the stone: "Some revelations are of God: some revelations are of men: and some revelations are of the devil." So we see that the revelation to go to Toronto and sell the copyright was not of God, but was of the devil or of the heart of man.[7]

Ever since, historians commenting on the subject have given their views of the revelation and perceived circumstances surrounding it, seeking to explain why the reported "failure" of the revelation does or does not make Joseph Smith a "fallen prophet." Brigham H. Roberts, for example, doubted David Whitmer's account because Whitmer may not have recalled all of the details correctly (which we now know is the situation). Nevertheless, Roberts stated (at a time prior to when Page's account had been discovered, with Roberts thus unaware of the conditional nature of the revelation):

> [W]hile the possibility and even probability of misapprehension by Whitmer is great, still the incident must be considered as it is presented by him, since his testimony may not be set aside.
>
> In that view of the case we have here an alleged revelation received by the Prophet, through the "Seer Stone," directing or allowing men to go on a mission to Canada, which fails of its purpose; namely, the sale of the copyright of the Book of Mormon in Canada. Then in explanation of the failure of that revelation, the Prophet's announcement that all revelations are not of God; some are of men and some even from evil sources. The question presented by this state of facts is: May this Toronto incident and the Prophet's explanation be accepted and faith still be maintained in him as an inspired man, a Prophet of God? I answer unhesitatingly in the affirmative. The

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[7] Whitmer, David. *An Address to All Believers. By a Witness to the Divine Authenticity of the Book of Mormon* (Richmond, Missouri: David Whitmer, 1887), pp. 30-31.

> revelation respecting the Toronto journey was not of God, surely; else it would not have failed; but the Prophet, overwrought in his deep anxiety for the progress of the work, saw reflected in the "Seer Stone" his own thought, or that suggested to him by his brother Hyrum, rather than the thought of God. Three things are to be taken into account in all mental phenomenon, at least by theists, and especially by Christian theists. One is the fact that the mind of man is an intelligent entity, capable of thought, of originating ideas; conscious of self and of not self; capable of deliberation and of judgment—in a word, man is a self-determining intelligence. But while man is all this, and has power to will and to do things of himself, still he is also susceptible to suggestion; to suggestions from his associates, and all Christians believe, susceptible to suggestion and impressions from God through the Holy Spirit: "There is a spirit in man: and the inspiration of the Almighty giveth them understanding." (Job 32:8); and to those who believe in the Bible account of the fallen angels—"who kept not their first estate" (Jude 6, 9; also II Peter 2:4); and whose chieftain, satan, "deceiveth the whole world," (Rev. xii 7-10); to those it is not incredible that these reprobate spirits also at times should, by thought-power, make evil suggestions to the mind of man. These are the principles recognized in the answer—"some revelations are of God; some revelations are of men; and some revelations are of the devil"—of Joseph Smith to his questioning disciples; and in this instance of the Toronto journey, Joseph was evidently not directed by the inspiration of the Lord. Does that circumstance vitiate his claim as a prophet? No; the fact remains that despite this circumstance there exists a long list of events to be dealt with which will establish the fact of divine inspiration operating upon the mind of this man Joseph Smith. The wisdom frequently displayed, the knowledge revealed, the predicted events and the fulfilment thereof, are explicable upon no other theory than of divine inspiration giving guidance to him.[8]

While Roberts refers to the incident as "the Toronto misadventure,"[9] he gives no support for his assertion that the "testimony" of Whitmer "may not be set aside." Apparently, Roberts believed Whitmer's assertion that he was "there also" and was "an eye witness to these facts." But we now know that Whitmer's "eye witness" "testimony" of "facts" was limited to the return of two brethren (not all four who went) from "Toronto" (not from Kingston where they went). And in any event, Roberts makes no mention of the conditional nature of the revelation; hence, his verdict it "failed."

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[8] B. H. Roberts, *A Comprehensive History of The Church of Jesus Christ of Latter-day Saints*, 6 vols. (Salt Lake City: Deseret News Press, 1930), 1: 162 - 166.

[9] *Ibid*.

Marvin S. Hill, in his *Quest for Refuge* (p. 20-21) states:

> Joseph Capron wrote that Smith hoped his volume would "relieve the family from all pecuniary embarrassment." There is evidence from Mormon sources to confirm Capron's recollections. Smith himself admitted in his unpublished history that "he sought the plates to obtain riches."
>
> Hyrum Smith wrote to his grandfather, Asael, that he believed that service to the Lord would bring the family their long-awaited prosperity. In October 1829, Joseph wrote excitedly to Oliver Cowdery that Josiah Stowell had a chance to obtain five or six hundred dollars and that he was going to buy copies of the Book of Mormon. Lucy Mack Smith said that when it was finally published in March 1830 the family had to sell copies of the book to buy food.
>
> The economic situation of the Smith families was so desperate at this time that Joseph tried to sell the copyright of the Book of Mormon. Hiram Page wrote with bitterness years later that the prophet heard he could sell the copyright of any useful book in Canada and that he then received a revelation that "this would be a good opportunity to get a handsome sum." Page explained that once expenses were met the profits were to be "for the exclusive benefit of the Smith family and was to be at the disposal of Joseph." Page indicated that they hoped to get $8,000 for the copyright and that they traveled to Canada covertly to prevent Martin Harris from sharing in the dividend. Smith evidently believed that Harris was well enough off while his own family was destitute. When Page, Cowdery, and Knight arrived at Kingston, Ontario, they found no buyer. Martin Harris apparently learned of what was done, and Joseph guaranteed him in writing that he would share in any profits made from the subsequent sales of the book. In the spring of 1830 Harris walked the streets of Palmyra, trying to sell as many copies of the new scripture as he could. Shortly after Joseph Smith and Jesse Knight saw him in the road with books in his hand, he told them "the books will not sell for nobody wants them."

With the proliferation of self-publishing in the Internet age, various parties have set their hand to the keyboard in an effort to delve into the niceties of the story, to raise issues about the various accounts telling alleged aspects of the story, and specifically either to bolster Whitmer's and McLellin's accounts or to discount them. Don Bradley, on the Mormon Apologetic & Discussion Board,[10] for example, sides with those who "argue that failure to sell the copyright does not make

[10] http://www.mormonapologetics.org/topic/45410-the-canadian-copyright-revelation/ (last accessed on October 31, 2009).

the revelation a failure because it was conditional in the first place," and adds that "on this issue, the case may simply be closed." Bradley also immediately observes:

> But there is a second issue, raised by one of the revelation's recipients, Hiram Page, in an 1848 letter to William McLellin. Page reported that when he and the others sent to Canada arrived they found that they had been sent to the wrong city:
>
> . . . we were to go to Kingston where we were to sell if they would not harden their hearts; but when we got there, there was no purchaser, neither were they authorized at Kingston to buy rights for the Provence; but little York was the place where such business had to be done.

With that, Bradley states:

> Page's account would suggest that the revelation did "fail." If Page was correct, the revelation's conditional clause would not cover the cause of the failure. The problem would not be one of potential buyers "hardening their hearts." Whether their hearts were hard or soft, it would have been impossible for them to buy the copyright at the time because one could only be secured hundreds of miles west in "Little York" (Toronto), whereas the revelation had sent Page, et al. north, to transact the business in Kingston.
>
> There are two questions we need to ask to know whether Page was correct and the revelation did indeed "fail" in this way:
>
> First, was Page's recollection correct? Did the revelation send them specifically to Kingston to secure the copyright?
>
> Second, was it true that a Canadian copyright could not be secured in Kingston but only in Toronto?

After quoting the text of the newly available text of the revelation, Bradley states:

> This text confirms Hiram Page's recollection that the group was sent specifically to Kingston—he had even recalled the exact phrase: "go to Kingston." It also confirms his memory of the incident generally, verifying his account on several points, including Martin Harris being frowned on, the identity of the men sent to Kingston, the sale being conditioned on the Canadian audience not hardening their hearts, etc.
>
> That the revelation's promise of a sale—even conditionally—and its direction to go specifically "to Kingston" were later seen as problematic is evident from the fact that editing marks on the revelation indicate that these elements (along with the negative judgment on Martin) were to be omitted from the (anticipated) published version. Stricken from the revelation were Martin's name,

> the statement that the copyright sale was "expedient," the phrase "to Kingston," and all of the last five lines, with an "Amen" being added to terminate the text before the revelation's original ending.
>
> The second question—of whether the copyright could have been secured in Kingston—remains open. Those sent to Kingston were given the understanding that they could not copyright the book there. And the editor of the revelation's text in the Book of Commandments and Revelations appears to have shared or accepted this understanding, and therefore removed elements promising that a copyright could be secured and sold in Kingston. That this editor saw the revelation as problematic is further evidenced by his removal of even its conditional clause. If he thought that clause eliminated any problems with the revelation, he would have had motivation to retain the promises and their conditional clause, rather than removing it all. But noting the understandings of those involved in and aware of the revelation does not answer the fundamental question. Legal research is needed to determine whether it a copyright [*sic*] could have been secured in Kingston. If so, then, despite the understandings of those involved, the revelation could have been fulfilled, perhaps through greater diligence on their part or greater receptivity on the part of their Canadian audience. If not, then the revelation would appear to have promised the impossible, which would suggest that Joseph Smith's reported response to the apparent failure was quite appropriate: "Some revelations are of God: some revelations are of men: and some revelations are of the devil."

Bradley's post was made on 23 September 2009. In private correspondence he states his preliminary analysis is not offered in the spirit of criticism. And it is not. But within a month later, on October 18, 2009, a poster on the "alt.religion.mormon" group on Google Groups picked up on the issue, and transformed it into a "Serious Dilemma" because, said the poster, "in 1829, there was no such thing as a Canadian copyright" (!) and "British law provided the only copyright law that applied" and "the only way that an operative copyright for Canada could have been secured would have been by obtaining a British copyright—and herein lies the dilemma."[11] (!)

The purpose of this present paper is to provide some modest beginning to some of the "legal research" that Bradley invites; to show how in reality a "Canadian copyright," if it existed at all at the time (and it did) indeed *was* a British copyright (and, indeed, was a common-law, pre-publication copyright *the Prophet already possessed*); and to discuss the historical setting in which the law of copyright applicable in "the four provinces" fits. The discussion briefly overviews the concept of "copyright" and briefly mentions how that concept was dealt with in the various laws of the United

[11] http://groups.google.com/group/alt.religion.mormon/msg/8d0da7a1c6d8a023 (last accessed on October 31, 2009). The poster identifies himself or herself only as "RetroProphet."

States and Britain at the time. The discussion will distinguish between "*the* copyright" (a term employed by a number of commentators and used in two places in the revelation) and "*a* copyright" (the term used in one other place in the revelation and in Hiram Page's account). The discussion will distinguish between "securing" the copyright and "selling" a (or even "the") copyright, which some commentators confuse. Some analysis of the date of the revelation and the date of the emissaries' travel to Canada will be made. The questions of who went, whither and whence they went, and why and how will also be discussed.

Statement of the Issues

Elder Marlin K. Jensen, Church Historian and Recorder refers to the "unpublished revelation on securing a copyright for the Book of Mormon in Canada" and explains:

> David Whitmer, after he left the Church, recalled that the revelation promised success in selling the copyright, but upon return of the men charged with the duty, Joseph Smith and others were disappointed by what seemed like failure. Historians have relied upon statements of David Whitmer, Hiram Page, and William McLellin for decades but have not had the actual text of the revelation. Revelation Book 1 will provide that.
>
> Although we still do not know the whole story, particularly Joseph Smith's own view of the situation, we do know that calling the divine communication a "failed revelation" is not warranted. The Lord's directive clearly conditions the successful sale of the copyright on the worthiness of those seeking to make the sale as well as on the spiritual receptivity of the potential purchasers.[12]

That effectively closes the matter. However, not content with that, Bradley states that "Page's account would suggest that the revelation did 'fail.'" Bradley asserts that "it would have been impossible" for Cowdery, Page, Stowell and Knight to *sell* and for anyone in Kingston to *buy* the copyright at the time "because one could only be *secured* hundreds[13] of miles west in 'Little York' (Toronto)." Is it a non-sequitur to conclude that it was "impossible" to *sell* and *buy* a copyright in Kingston if one purportedly could only be *secured* in York? Did Page state that a copyright could only be *secured* in York? No. Bradley asks: "Did the revelation send them specifically to Kingston to *secure* the copyright?" The revelation answers: No. Bradley further asks: "Was it true that a Canadian copyright could not be *secured* in Kingston but only in Toronto?" The answer, discussed below, is No. A careful reading of Page's statement shows clearly he was not at all speaking of *securing* a copyright in Kingston (Page does not use the word "secure" or any form of the word or even mention the concept of securing a copyright; he speaks *only* of selling one):

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[12] Marlin K. Jensen, "The Joseph Smith Papers: The Manuscript Revelation Books," *Ensign*, July 2009, 46–51.

[13] Emphasis here supplied. The distance from York (Toronto) to Kingston is 162 miles (260 km).

> we were to go to Kingston where we were to *sell* if they would not harden their hearts; but when we got there, there was no *purchaser*, neither were they authorized at Kingston to *buy* rights for the Province; but little York was the place where *such business* had to be done. We were to get 8,000 dollars.[14]

What was the nature of the copyright the Prophet sought to secure and sell? What source of law granted him such a copyright? Was the possibility of effectuating a sale somehow limited to consummation in a specific place? Were there formal steps required for a sale? The discussion below addresses these and related questions in preliminary historical and legal perspective.

What, if Anything, Was or Were the Sources of the Law of Copyright Applicable to the Four Provinces of Canada in 1830?

As shown below, common law and the Statute of Anne 1709 (8 Anne c. 19 (enacted in 1710)) provided for copyright protection in Upper Canada, Lower Canada, New Brunswick and Nova Scotia, the "four provinces"[15] of Canada as they are referred to in the revelation. When in 1497 Sebastian Cabot discovered the area situated on the southwest of the St. Lawrence River, he was holding a commission from Henry VII of England. However, for 262 years, until 1759, the territory, which in 1830 would be known as "Canada," had been in the possession of and governed by France, distinguished by the name "La Nouvelle France." Only during a short three-year period, from 1629

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[14] Page to McLellin, February 2, 1848, Fishing River, Missouri (emphasis here added).

[15] Although from 1713 to 1867 and 1784 to 1867, respectively, they were *colonies* in the British Empire, it was not uncommon to refer to Nova Scotia and New Brunswick as "provinces." For example, in 1791, at St. John, New Brunswick there was published *A Collection of Papers and Facts Relative to the Dismission of William Sandford Oliver, Esq., from the Office of Sheriff of the City and County of Saint John, in the Province of New Brunswick*. And in 1805, John Howe & Son printed in Halifax, Nova Scotia, Richard John Uniacke's *Statutes at Large Passed in the Several General Assemblies Held in His Majesty's Province of Nova Scotia. From the First Assembly Which Met at Halifax the Second Day of October in the Thirty-Second Year of His Late Majesty Geo. II., A. D. 1758, to the Forty-Fourth Year of His Present Majesty Geo. III., A.D. 1804*. In June 1819 there was published by the Chronicle Printing Office in Halifax, Nova Scotia and 1820 there was republished by the Upper Canada Gazette Office in York, Upper Canada, a book entitled *Province of Nova Scotia—Proceedings of the General Assembly Upon the Convention Concluded Between His Majesty and the United States of America*. With time, such usage made its way into legislative language. Whereas in and after 1778, British statutes distinguished among "his Majesty's colonies, provinces, and plantations in North America" (*see* 18 Geo. III, c. 12, paragraph I (1778) and 31 Geo. III, c. 31, paragraph XLVI), and in 1822 trade was encouraged "between Canada and his majesty's colonies of Newfoundland, Nova Scotia, New Brunswick, and Prince Edward's island" (3 Geo. IV., ch 69 (1822), paragraph XIII) (generally, "Canada" meant the provinces of Upper Canada and Lower Canada; Newfoundland, Nova Scotia, New Brunswick, and Prince Edward's island were designated "his majesty's colonies"), by 1826 reference was made even in British legislation to "the provinces of Canada, Nova Scotia, or New Brunswick. . . ." (6 Geo. IV. c. 59 (1826) paragraph XIII). By 1830, of course, the revelation to the Prophet Joseph Smith was not at all out of place in employing the term "four provinces" for which a copyright would be sold.

to 1631, had the English taken control of the area. But in 1759, General Wolfe was dispatched to the area to conquer it, seeking to take it from under the dominion of France. By September of that year, he had defeated the French troops and pursuant to the Articles of Capitulation signed on 18 September 1759, the Articles of Capitulation signed on 8 September 1760, and the Treaty of Paris, signed on 10 February 1763, the Canadas were ceded to "His Brittannic Majesty" and the area passed forever into the realm of Great Britain, an area soon to be known as the Province of Quebec. Later that same year, on 7 October 1763, His Majesty issued a proclamation. As explained by Pierre de Sales LaTerrière, a Canadian historian writing in 1830:

> Both by the capitulation above mentioned, and the treaty of Paris, the inhabitants of Canada were contemplated under the character of British subjects; in conformity with the understanding which led to such contemplation, the proclamation of the King was issued. No distinction was made between the old and newly-acquired subjects of His Majesty, in this document; so, that we may safely conclude that no distinction was intended. The whole of the inhabitants were considered as an out-lying portion of the English people, inhabiting a territory for which the King was, by the nation at large, allowed to legislate.
>
> After certain regulations respecting the administrative portion of the Government, came certain articles, providing—
>
> 1. That the English criminal and civil code of law, with the laws of the Admiralty, should have full force within the province.[16]

By the Act of the Imperial Parliament, passed in 1791, the old province of Quebec was divided into the two new provinces of Upper Canada and Lower Canada, "to extend British laws and customs, rather than Quebec's French civil law, to Loyalists who had settled west of Montreal and along the shores of Lake Ontario. . . ."[17] The Imperial Parliament also conferred both upon Upper Canada and upon Lower Canada a representative form of self-government, imitating in form the constitution of the mother country, with a legislative body, administrative body and judicial body for each. The *legislative body* was composed of **(1)** the Governor (analogous to the King in British government but appointed by the English Ministry and removable at their pleasure and having both the power to give, or refuse, his assent to laws passed by the other two branches of the legislature and the power to reserve his assent to, or dissent from, any law, in order to learn the King's pleasure), and **(2)** both **(a)** the Legislative Council (supposed to be established, as nearly as possible, on the same principle

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[16] LaTerrière, Pierre de Sales, *A Political and Historical Account of Lower Canada; With Remarks on the Present Situation of the People, as Regards Their Manners, Character, Religion, &c. &c.* (London: William March and Alfred Miller, 1830), p. 5.

[17] Fleming, Patricia Lockhart, "First Printers and the Spread of the Press," *in* Fleming, Patricia Lockhart, Gilles Gallichan, and Yvan Lamonde, *History of the Book in Canada, Volume I, Beginnings to 1840* (Toronto: University of Toronto Press, 2004), p. 68.

as that upon which the House of Lords in England was founded, though not possessed of hereditary titles), and **(b)** the House of Assembly (acting as the Commons House of Parliament for the province, elected every four years). The *administration* was composed of the Governor and a council styled the Executive Council (supposed to bear resemblance to the King's Privy Council in England, but composed of members who could be dismissed at the pleasure of the King, with no law in the colony regulating the exercise of their functions, receiving their instructions from the King). The judicial establishments for the provinces were few.

Notwithstanding all this show of apparent local power and control, it was simply the fact that the provinces were governed mostly by British law. Take for example, the following "Communication" published in the *Kingston Chronicle* [newspaper], August 4, 1826 (p. 3, col. 2):

> . . . The Kirk and laws of Scotland have a mere "*local* habitation and a name"—they extend not beyond the limits of that part of the United Kingdom called Scotland—they are unknown to the rest of the *British* Empire . . . . Upon what, then, do the Kirk found their claim? Upon the Canadas being a *British* Colony. The Empire of which we form a part, is, I believe, called the *British* Empire—yet we do not find that the Kirk is established throughout that Empire. The word "*British*," it seems, is insufficient for that purpose, although in Canada it is all powerful . . . . We are governed by English laws.

That is not to say there were no detractors. In 1829, James Macfarlane, Esq., of Kingston, published serially in his newspaper, the *Kingston Chronicle*, the work of David Chisholm titled "The Lower-Canada Watchman"[18] (which he also published that same year (1829) in book form (491 pages) as "The Lower Canada Watchman, Pro Patria").[19] In that work, Chisholm exercised himself mightily to disabuse his readers of the notion promulgated by "the Attorney and Solicitor General, Mr. Yorke and Mr. De Gray," who he said attempted to prove "that this proclamation [of the King] was only meant to be introductive of select parts of the law of England, and not of the whole body of laws . . . ."[20] But such detractors were met head-on. Said Chisholm in response:

> We have already alluded to the proclamation, and made such quotations from it as may convince the most obdurate, that, at the time of its publication, it was intended not only that it should form the basis of the British Sovereignty and supremacy in Canada, but the palladium of the rights and liberties of the old as well as the new inhabitants, "*Agreeably to the laws of England*." . . . [H]undreds and thousands [have] left their native country with all their resources and

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[18] *See*, for example, the *Kingston Chronicle* for February 14, 1829, p. 1, col. 1.

[19] *See Books and Pamphlets Published in Canada, Up To the Year Eighteen Hundred and Thirty-Seven, Copies of Which Are in the Public Reference Library, Toronto, Canada* (Toronto: Public Library, 1916), p. 39.

[20] *Kingston Chronicle* for February 14, 1829, p. 1, col. 1.

> emigrated to Canada, where they purchased lands, planted, settled, and carried on trade and commerce to a very great, and, in Canada at the time, a very wonderful extent, on the faith of the king's royal proclamation, guaranteeing to those who *might resort* to the new province "*The enjoyment of the benefit of the Laws of England.*"[21]

In 1831, two residents of Kingston, Upper Canada, both printers, office holders and justices of the peace—one James Macfarlane, publisher of the *Kingston Chronicle* newspaper there, and the other Hugh Christopher Thomson, publisher of the *Upper Canada Herald* newspaper there—"took upon themselves the risk and responsibility of publishing" *The Statutes of The Province of Upper Canada; Together with Such British Statutes, Ordinances of Quebec, and Proclamations, as Relate to the Said Province*.[22] On Monday, December 19, 1831, the House of Assembly of the Provincial Parliament of Upper Canada received a report from the Solicitor General of a select committee to which had been referred both a joint petition of Thomson and MacFarlane and also a petition of Robert Stanton, Esq., the King's Printer.[23] The report indicated that the committee were "of opinion that the House of Assembly should take for its use two hundred copies of the edition of the provincial statutes published by the first named petitioners."[24] The committee also stated that it had

> considered the objections of Mr. Stanton, to granting the prayer of the petition preferred by Messrs. Thomson and McFarlane but they do not think that the House of Assembly in acquiescing in the petition of the latter gentlemen, in the manner recommended, will infringe Mr. Stanton's rights as King's printer. The publication of an edition of the Statutes of the province by authority for gratuitous distribution has for some time been very generally regarded as necessary; when this measure shall be decided upon, the just right of the King's printer in this province, will of course receive proper consideration.[25]

Thus was published by two private parties what was advertised as "a faithful transcript of the

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[21] *Kingston Chronicle* for February 14, 1829, p. 1, col. 1 (italics in original).

[22] Nickalls, James Jr., *The Statutes of The Province of Upper Canada; Together with Such British Statutes, Ordinances of Quebec, and Proclamations, as Relate to the Said Province* (Kingston, Upper Canada: Hugh C. Thomson & James Macfarlane, 1831), "Advertisement" after title page and preceding p. 1.

[23] *See Kingston Chronicle* [newspaper], 21 January 1832, p. 2, col. 6. "The press announcement, 16 April 1831, that Thomson and Macfarlane would publish the revised statutes roused the ire of Robert Stanton who, as King's printer, felt that they were poaching on his preserves." Gundy, H. Pearson, "Hugh C. Thomson: Editor, Publisher, and Politician, 1791-1834," *in* Tulchinsky, Gerald, ed., *To Preserve & Defend: Essays on Kingston in the Nineteenth Century* (Montreal: McGill-Queen's University Press, 1976), p. 214.

[24] *Ibid.*

[25] *Ibid.*

Provincial Laws, as they have, from time to time, been printed by authority."[26] The publication sets forth "such British Statutes, Ordinances of Quebec, and Proclamations, as Relate to the Said Province." The contents of this publication and of a few references in the newspapers they published present an interesting background for us.

The second of the "British Statutes" reprinted in the *Statutes of the Province of Upper Canada* was "An act for making more effectual provision for the government of the province of Quebec in North America,"[27] paragraph XVIII of which provided "[t]hat nothing in this act contained shall extend, or be construed to extend, to repeal or make void, within the said province of Quebec, any act or acts of the parliament of Great Britain heretofore made, for prohibiting, restraining, or regulating the trade or commerce of his Majesty's colonies and plantations in America; but that all and every the said acts, and also all acts of parliament heretofore made concerning or respecting the said colonies and plantations, shall be, and are hereby declared to be in force within the said province of Quebec, and every part thereof."[28] And while the compilation did not contain the text of any of the British statutes dealing with copyright—namely, 8 Anne c. 19 (1710), 41 Geo. III, c. 107 (1801); 54 Geo. III, c. 156 (1814)—nor did it set forth any of the others of the thousands of British statutes that did not specifically "relate to the said province," it did contain the text of a then-recently enacted Canadian statute, passed in 1826, titled "An Act to Encourage the Progress of the Useful Arts Within This Province," dealing with *patents* for "the inventor or any new and useful art, machine, manufacture, or composition of matter." Ninth Parliament, Seventh Year of George IV c. 5 (1826).

Mr. Macfarlane's *Kingston Chronicle* (January 3, 1829), p. 2, col. 5 sets forth one of the serialized installments of David Chisholme's "The Lower Canada Watchman" and that installment dealt with the question of whether His Majesty was authorized to place the Revenue under the control of the Legislature of the province. In dealing with the question, Chisholme (a Canadian journalist and author in Quebec, Montreal and Three Rivers[29]) expressly cites to "the proceeds of the Revenue arising from the Act of the Imperial Parliament, 14, Geo. III . . . ." This all clearly reflects the applicability in Upper Canada of the Acts of the Imperial Parliament.[30]

54 Geo. 3, c. 156, enacted in 1814, provided that copyright protection extended to the British dominions in Canada. Section 4 of the "British Act to Amend the several Acts for the Encouragement of Learning" (1814) 54 Geo. 3 c. 156, clarified that copyright was infringed where "any bookseller or printer, or other person whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey or Guernsey, or in any other part of the British

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[26] Nickalls, *supra* at n. 12, "Advertisement" after title page and preceding p. 1.

[27] Otherwise known as "The Quebec Act, 1774," 14 George III, c. 83 (U. K.).

[28] *Ibid.*, p. 9.

[29] http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/DavidChisholme-QuebecHistory.htm

[30] *See also* the *Kingston Chronicle* (February 16, 1827), p. 1, col. 2; etc.

dominions, shall 'print, reprint or import' any such book or books. without the consent of the proprietor or proprietors thereof first had and obtained in writing." Reflecting this, Daniel J. Gervais, Acting Dean, Vice-Dean (Research) and Professor of Technology Law, Faculty of Law (Common Law Section), University of Ottawa and Member of the Law Society of Upper Canada and the Bar of Quebec, discussed the "Origins of the Canadian Act" in his "The Purpose of Copyright Law in Canada," *University of Ottawa Law & Technology Journal* (2005) 2:2, pp. 317-356, and in that discussion he refers (at page 326) to "the first copyright statute" ("the Statute of Anne, 1710 (UK), 8 Anne, c. 19") and states that Canada's 1921 *Copyright Act* "is clearly a common law-based statute, . . . many parts of which have survived to this day."

Prior to the British Copyright Act of 1842, copyright matters in the United Kingdom and its colonies were governed by the common law and by the Statute of Anne of 1709, enacted in 1710, also known as "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned." There were two pre-confederation (pre-July 1, 1867) provincial laws offering locally-legislated copyright protection in Canada, and those statutory provisions offered protection only within the provinces where the laws were enacted. In 1832, *after* the visit of the Prophet's emissaries to Kingston in Upper Canada, Lower Canada, now part of the province of Quebec, first enacted its "Act for the Protection of Copy Rights." When Upper Canada joined Lower Canada *in 1841*, the Lower Canada statute was confirmed for Upper Canada as well, and was renamed "An Act for the Protection of Copy Rights in this Province." Nova Scotia enacted its own legislation in 1839, which was superseded by the British Act in 1867.

Hence, in 1829 and 1830, no *local statutory enactment* governed copyrights in Upper Canada or in any of the other three provinces of Canada. But in and after the joinder of Upper Canada to Lower Canada in 1841, local legislation began to come into play in the securing of post-publication copyright protection, supplementing the Statute of Anne in affording such *post*-publication copyright protection—though not replacing common law principles that recognized *pre*-publication copyright protection (which common law principles, of course, continued in force even after enactment of the local legislation).

Only after the joinder of the Upper and Lower Canadas did recourse to the legislature ever become a part of the process of securing (protecting) a copyright. Thus it was, for example, that on Monday, July 12, 1841 representative Mr. Campbell presented in the House of Assembly of Upper Canada the petition "of Alexander Davidson, of Niagara,[31] for a copyright in favor of his *lately published* spelling book." (*See* the *Kingston Chronicle and Gazette* (17 July 1841), p. 3, col. 2, emphasis here added.) Such application, of course, did *not* pertain to the author's pre-publication copyright—it pertained to the author's "lately published" work—and it arose under the first local statutes (enacted long after 1829 and 1830).[32] Prior to enactment of the provincial laws, only the

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[31] Niagara is a neighborhood within York (Toronto); see http://en.wikipedia.org/wiki/Niagara,_Toronto

[32] For this reason, Davidson's *The Upper Canadian Spelling Book*, first completed in 1829 while a resident of Port Hope, and finally published in 1840 in York by Henry Rowsell under the title *The Canada*

common law and the Statute of Anne had prevailed.

And as to the registration requirement of the Statute of Anne, which otherwise required the registration of a title at Stationers' Hall, such registration *did not ensure protection for a colonial imprint* (and hence colonial imprints apparently were not so registered).[33] In short, in 1829-1830, the Statute of Anne 1709 provided for copyright protection in Upper Canada, Lower Canada, New Brunswick and Nova Scotia, the four provinces of Canada at the time of the revelation; no provincial legislation governed the securing of a copyright and indeed no public law and only principles of contract law apparently governed the sale of an author's intangible pre-publication rights in his copy.

What is a "Copyright"?

Some who question the revelation do so in terms that manifest a common misunderstanding

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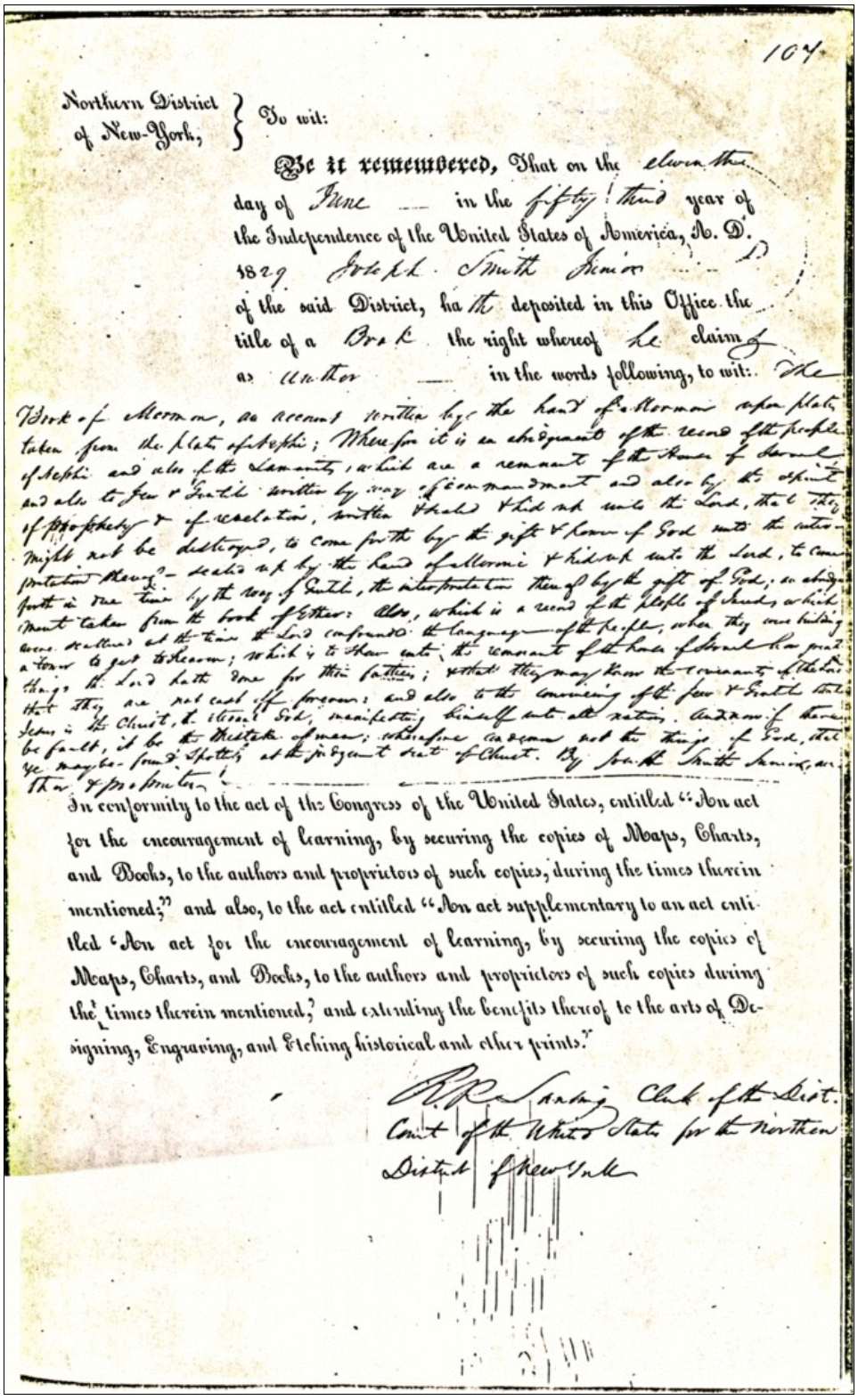
Spelling Book, is generally considered "the first copyrighted book in Upper Canada." *See* "Dictionary of Canadian Biography, Vol. VIII (1851-1860)" (Toronto: University of Toronto/Université Laval, 1985), *s.v.* "Davidson, Alexander" (citing W. R. Riddell, "The First Copyrighted Book in the Province of Canada," *Ontario Historical Society, Papers and Records*, 25 (1929): 405–14. By "first copyrighted book in Upper Canada" is meant the first book to obtain statutory copyright protection pursuant to local legislation. Davidson had attempted as early as 1831 to "obtain the sanction of the Council [the Legislative Council of the Upper Canada Legislature] to a Copyright Act for the protection of hisSpelling Book." *See* Hodgins, J. George, *Documentary History of Education in Upper Canada* (Toronto: Warwick Bros., & Rutter, 1894), pp. 1830-1831. While the petition for copyright protection under the statute was presented by Representative Campbell, it was John Tucker Williams (formerly first mayor of Port Hope, Upper Canada and first Union Parliament member for East Durham) who, shortly after becoming a Member of the Provincial Parliament in 1840 introduced a bill, which became law, "granting the first copyright in Canada for a published book," the first two books receiving such local statutory copyright protectin being both by Port Hope schoolteacher Alexander Davidson, one being a music book and the other being the spelling book. *See* http://www.nhb .com/hunter/mayors.htm

[33] Panofsky, Ruth, "Case Study: Thomas Chandler Haliburton's The Clockmaker," in Patricia Lockhart Fleming, Gilles Gallichan and Yvaan Lamonde, *History of the Book in Canada, Volume 1, Beginnings to 1840* (Toronto: University of Toronto Press, 2004), p. 352. Indeed, enforcement of a *post*-publication statutory copyright under the Statute of Anne was apparently not available to a Canadian colonial publisher when someone else in the Kingdom issued their own copy of a Canadian work. *Id.* This, of course, does not reflect any lack of property right protection *pre*-publication. For this reason, none of the known publications printed and published in York and Kingston during the years from 1814 to 1835 appear in the registers of the Stationers' Hall. *See* "Books and Pamphlets Published in Canada, Up To the Year Eighteen Hundred and Thirty-Seven, Copies of Which Are in the Public Reference Library, Toronto, Canada" (Toronto: Public Library, 1916), pp. 15-39; *see also* William Kingsford, "The Early Bibliography of the Province of Ontario, Dominion of Canada, With Other Information" (Toronto: Roswell & Hutchison, 1892, and Montreal: Eben Picken, 1892), pp. 27-29, 31-33, 35. *Compare* Myers, Robin, ed. *Records of the Worshipful Company of Stationers, 1554-1920* [microform: 115 microfilm reels] (Cambridge, UK; Teaneck, NJ, USA: Chadwyck-Healey, 1985) Harold B. Lee Library Special Collections, Manuscript Collection. I checked all relevant pages of the registers for the appearance of any of the known publications printed and published in York and Kingston during the years from 1814 to 1835 and found none of them to have been registered in the registers of Stationer's Hall.

of what a copyright is. It is common for people to think that a copyright is the *right to make copies*. Even from the beginning, however, the cases talk about protecting one's "copy," meaning protecting one's work by preventing others from copying the work, *e.g.*, preventing or stopping them from printing the same text. It is not that in having a copyright one has a right to copy one's own work; rather, it is that in having a copyright one has the enforceable right in law to exclude others from copying one's work. In this sense, it is often referred to as an *exclusive right*—meaning, literally, the right to exclude others from copying a work. Prior to first publication, it is, in the common law, a right to exclude others from first publishing the "copy"—first publishing a work—in short, a "copy right"; after publication it is, under statutes enacted for that purpose, a right to exclude others from multiplying copies of the "copy"—copies of the work—in short, a "copy right." One is recognized and protected by the common law pre-publication; the other is recognized and protected by statute post-publication.



107

Northern District of New-York, } To wit:

Be it remembered, That on the eleventh day of June in the fifty third year of the Independence of the United States of America, A. D. 1829 Joseph Smith Junior of the said District, hath deposited in this Office the title of a Book the right whereof he claims as Author in the words following, to wit: The Book of Mormon, an account written by the hand of Mormon upon plates taken from the plate of Nephi; Wherefore it is an abridgment of the record of the people of Nephi and also of the Lamanites, which are a remnant of the house of Israel and also to Jew & Gentile written by way of commandment and also by the spirit of Prophecy & of revelation, written & sealed & hid up unto the Lord, that they might not be destroyed, to come forth by the gift & power of God unto the interpretation thereof- sealed up by the hand of Mormon & hid up unto the Lord, to come forth in due time by the way of Gentile, the interpretation thereof by the gift of God; an abridgment taken from the book of Ether: Also, which is a record of the people of Jaredi, which were scattered at the time the Lord confounded the language of the people, when they were building a tower to get to Heaven; which is to show unto the remnant of the house of Israel how great things the Lord hath done for their fathers; written that they may know the covenants of the Lord that they are not cast off forever; and also to the convincing of the Jew & Gentile that Jesus is the Christ, the Eternal God, manifesting himself unto all nations. And now if there be fault, it be the mistake of men; wherefore condemn not the things of God, that ye may be found spotless at the judgment seat of Christ. By Joseph Smith Junior, Author & Proprietor.

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned;" and also, to the act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of Designing, Engraving, and Etching historical and other prints."

R. R. [illegible] Acting Clerk of the Dist. Court of the United States for the Northern District of New York

Figure 1—Clerk's Record of Deposit of a Printed copy of the Title of the Book of Mormon. Rare Book and Special Collections, Library of Congress.

A copyright is *not* a piece of paper. It is common for some, for example, to refer to the document Joseph Smith caused the Clerk of the United States District Court for Northern District of New York to record on June 11, 1829 (*see* Figs. 1 and 2) as "the Book of Mormon copyright." Not so. That document is merely a document memorializing that the Prophet on that date "deposited in this Office the title of a Book the right whereof he claims as author . . . ." The document *evidences* a copyright but the document itself in no way *is* a copyright. If anything, that document might properly be called the clerk's record of deposit of a printed copy of the title of the Book of Mormon.[34] It is commonly said that on the day the Prophet caused the record of deposit to be recorded he thus "secured" or "obtained" a copyright in the Book of Mormon. Such terminology is accurate if the word "secured" is understood in the sense of "protected" but, as we will see, not legally accurate, though colloquially acceptable if the word "secured" is understood in the sense of "obtained." More on this later. Otherwise, however, the point here is that copyright is intangible (incorporeal) personal property, not a document (and not the record of deposit created on June 11, 1829).

How Long Does An Author's Copyright Last? When and How Does It Come Into Existence?

How long does a copyright last? Although the great "Literary Property debate" dealt more with the nature of a copyright than its origins, a chief point of the debate was the duration of copyright protection, and concerned whether such protection was perpetual or only for a term of years. For a very short period of time, from 1769 to 1774, the law of England provided that copyright was perpetual, even after a statutory period of protection expired. (*Millar v. Taylor*, 4 Burr. 2303 (1769).) In *Donaldson v. Becket*, 4 Burr. 2408 (1774) the House of Lords construed The Statute of Anne 1709 (8 Anne c. 19 (enacted in 1710)) to disallow perpetuity of copyright protection once the statutory period expired.[35] The United States, too, would later reject perpetual copyright protection,

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[34] By depositing a copy of the Title Page of the Book of Mormon with the clerk of the Northern District of New York, the Prophet complied with 1 Statutes 124 (1790), as amended by 2 Statutes 171 (1802), which required "every person who . . . claim[s] to be the author or proprietor of any . . . book[]," and who wishes to assert a copyright, to perfect that copyright by "recording the title thereof in the clerk's office," by publishing within two months in a United States newspaper a copy of the clerk's record, by inserting the clerk's record "at full length in the title-page or in the page immediately following," and by delivering within six months after its publication a copy of the book to the Secretary of State. The language I use here ("record of deposit of a printed copy of the title of the Book of Mormon") is derived from the language of section 3 of the act, which provides: "And be it further enacted, That no person shall be entitled to the benefit of this act, in cases where any map, chart, book or books, hath or have been already printed and published, unless he shall first deposit, and in all other cases, unless he shall before publication deposit a printed copy of the title of such map. chart, book or books, in the clerk's office of the district court where the author or proprietor shall reside: And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose . . . "

[35] This supposedly put to rest the long-standing question whether "there is a relevant difference between a pre-publication and post-publication authorial right." *See* Nicholson, Scott H., "Explaining Copyright: The Normative Implications of Sociotechnical Construction" (Kingston, Ontario, Canada: Queen's University, 2008), pp.45-46.

via Article 1, Section 8 of the Constitution. *See Wheaton v. Peters*, 8 Pet. (U. S.) 591 (1834). Prior to publication, however, an author's right to control his copy (his common law, pre-publication author's copyright) was, and continued to be, viewed as a right existing in perpetuity, one that could be exercised without limitation of time, one that would expire only when the author first published the work.

> Common law copyright is premised on a natural law conception of intellectual property that endows the author with a perpetual and absolute right to do with his creation as he pleases. It traces its origin to England's Statute of Anne,which destroyed the common bookseller's printing monopoly by making the author rather than the bookseller the initial owner of a copyright of limited duration. In limiting copyright as an instrument of monopoly, the Statute of Anne endeavored to eradicate censorship and to promote human advancement by securing public access to a plentitude of learning materials. However, a gaping loophole remained with respect to the rights of authors: the Statute did not protect a work between the time of its creation and publication. Filling this gap, common law copyright bestowed an absolute right to exclude the world up to the point of publication.[36]

Underlying the question of duration of copyright was the philosophical question whether some form of "literary property" (or property right in a creation of literature) "had existed from time immemorial." That is, did that intangible property right exist "at common law" (prior to the enactment of the Statute of Anne)? If so, the Statute of Anne could not have—or ought not be viewed to have—destroyed the right. The Statute of Anne gave a copyright of fourteen years to "the author of any work." Did that serve to destroy a perpetual copyright that had existed prior to the 1810 enactment of the Statute of Anne? In other words, once an author published a work and relinquished the pre-publication perpetual copyright, did the author regain that right once the statutory period expired? The debate over that question went on for decades. Here, we need not be concerned; all the events relating to the emissaries' trip to Kingston apparently occurred prior to publication, as discussed elsewhere in this discussion. But the point to be understood here is that so long as the Book of Mormon had been recorded in the manuscripts, a pre-publication, common law, author's copyright already existed ("subsisted"), and would subsist indefinitely until the book were first published, a right enforceable in law without reference to any statute and without need to comply with any statutory requirements that otherwise pertain to post-publication protections—such as the requirements of registration (deposit) of the title, publication of notice in a newspaper, and the like.

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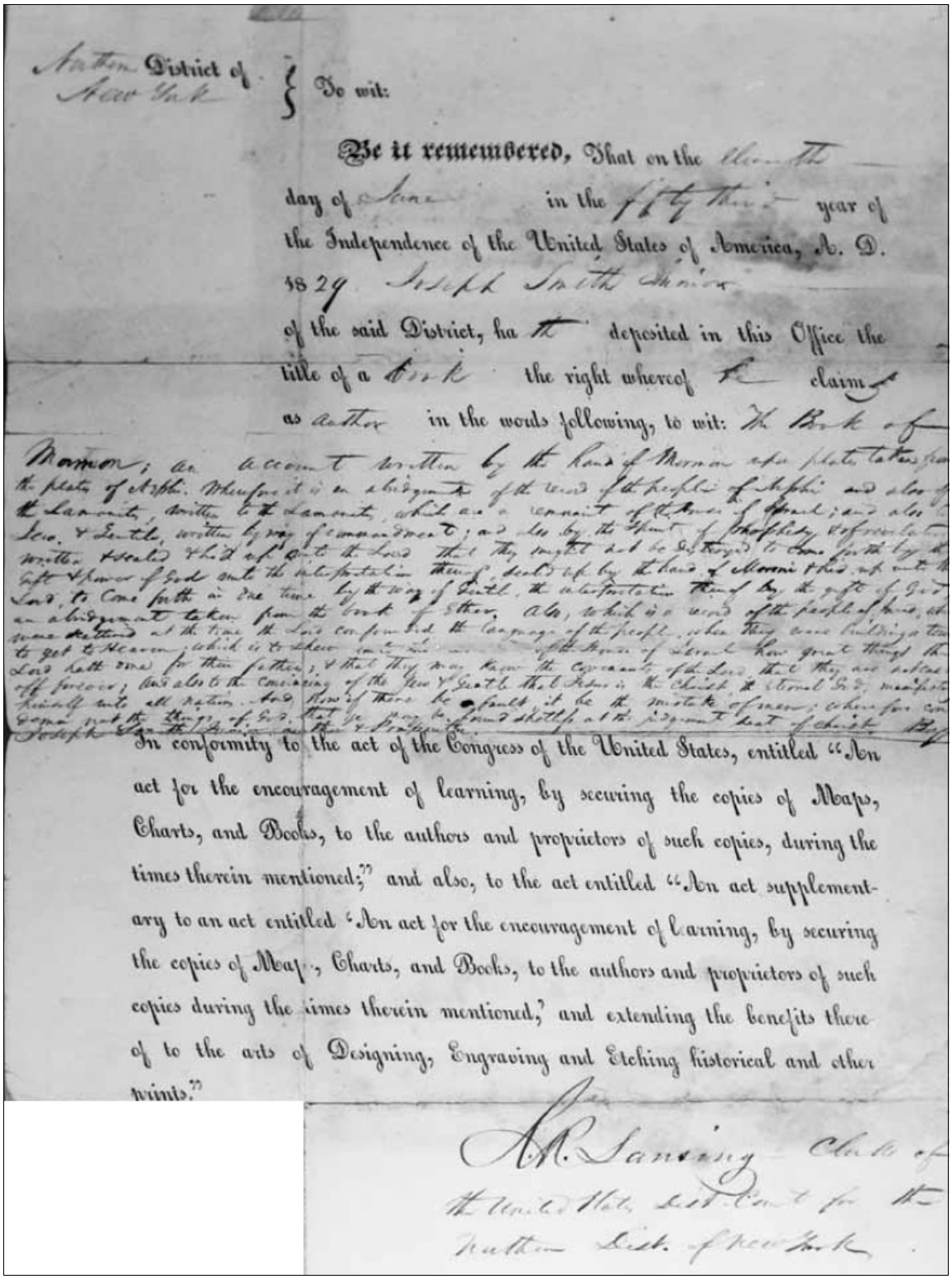
[36] Graham, Justin, "Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape," 2002 *Standford Technology Law Review* 1 (http://stlr.standford.edu/STLR/Articles/02_STLR_1) at ¶ 37. One weakness of this explanation is that it gives the impression that the common law protections came into existence only after enactment of the Statute of Anne. Actually, they preexisted the Statute.



Northern District of New York } To wit:

Be it remembered, That on the eleventh day of June in the fifty third year of the Independence of the United States of America, A. D. 1829 Joseph Smith Junior of the said District, has deposited in this Office the title of a Book the right whereof he claims as author in the words following, to wit: The Book of Mormon; an account written by the hand of Mormon upon plates taken from the plates of Nephi. Wherefore it is an abridgment of the record of the people of Nephi and also of the Lamanites, written to the Lamanites, which are a remnant of the house of Israel; and also to Jew & Gentile, written by way of commandment, and also by the spirit of prophecy & of revelation written & sealed & hid up unto the Lord that they might not be destroyed to come forth by the gift & power of God unto the interpretation thereof sealed by the hand of Moroni & hid up unto the Lord, to come forth in due time by the way of Gentile, the interpretation thereof by the gift of God. an abridgment taken from the book of Ether. Also, which is a record of the people of Jared, who were scattered at the time the Lord confounded the language of the people, when they were building a tower to get to Heaven, which is to show unto the remnant of the house of Israel how great things the Lord hath done for their fathers; & that they may know the covenants of the Lord, that they are not cast off forever; and also to the convincing of the Jew & Gentile that Jesus is the Christ & Eternal God, manifesting himself unto all nations. And now if there be fault it be the mistake of men; wherefore condemn not the things of God, that ye may be found spotless at the judgment seat of Christ. By Joseph Smith Junior Author & Proprietor.

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned;" and also, to the act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of Designing, Engraving and Etching historical and other prints."

A. R. Lansing Clerk of the United States District Court for the Northern District of New York.

Figure 2—Copy of Record of Deposit of a Printed Copy of the Title of the Book of Mormon (Courtesy The Archives of the Church History Library of the Church of Jesus Christ of Latter-day Saints, item d.1670, f. q11).

"Securing The Copy Right"

Perhaps some of the confusion in the minds of some who have begun to review this revelation (unaware they are confused) derives from a misunderstanding of the words "secure" and "securing."[37] When the revelation speaks of "securing the Copy right" some may understand that to mean "obtaining" a copyright. The word, standing alone, does allow such a meaning. However, in context, the word means something different, as discussed further below. Legally, by way of preliminary background, it should be noted that, *in the first instance*, a copyright is not granted by a government. It is not created by a government. It is not conferred by a government. And it is neither granted nor created nor conferred by a person. In short, it is not "obtained" by an author from any other entity or person. Some readers think that Joseph Smith sent his emissaries to Canada to "obtain" a copyright, even though the revelation does not expressly state that (it states they were sent to Kingston in Upper Canada to *sell* a copyright). Those same readers probably also think that when Joseph Smith deposited the title of the Book of Mormon with the Clerk of the District Court of the United States for the Northern District of New York and obtained a copy of the document memorializing the deposit of the title (*see* Figs. 1 and 2), he thereby "obtained" (or "secured" in the sense of obtained) a copyright—and that the clerk, by supplying to the Prophet a copy of the document memorializing that act, thereby granted to him a copyright (*e. g.,* that the document itself somehow constitutes a copyright or memorializes the giving of a copyright)—or that the document somehow memorializes the granting, by some other act, of a copyright. This simply is not so. In colloquial speech, it may be so; but in law it is not.

In the first instance, even before publication, copyright arises out of the act of creating a work. Copyright subsists from that moment. This is the law in the United States presently. Title 17 of the United States Code § 102(a) states that copyright "subsists" in fixed original works of authorship. This is also the law in France. CPI art. L. 111-1 states that exclusive moral and economic rights spring "from the sole fact of the work's creation." And this was the law both under the common law and under the Statute of Anne; copyright meant the "sole right and liberty of printing." Printing what? The author's creation. Thus it often is said that copyright arises as soon as an original work of authorship is fixed in a tangible medium of expression (such as ink on paper or in today's world, the fixing of electrons on a disk or drive or in flash memory).

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[37] Here, "to secure" means "to guard from danger or risk of loss," not "to get possession of; to acquire." The next ensuing use of the verb "secure" in the revelations occurs in D&C 24:3 (*see Manuscript Revelation Books*, pp. 34-35), with the same meaning. In that verse, the fields are already owned, as it were (they are referred to as "thy fields"), and yet it is already-owned fields that then are "secured," meaning guarded against danger or risk of loss, not meaning "obtained." This is akin to the difference between a borrower "securing a loan" in the sense of obtaining it and "securing a loan" in the sense of guaranteeing its repayment or safeguarding against its not being repaid (such as by the giving of "security" or collateral). To "secure" a loan is to protect against the risk of loss from non-payment; to "secure" a home (such as by locking its doors) is to protect against the risk of loss from invasion; to "secure" a field or crop is to protect against the risk of loss or destruction from trespass or damaging behavior. This is not to say that the language of the revelation constitutes legalese; it simply means that the Prophet apparently understood—even outside the context of a text dealing with the securing of a copyright (*compare* D&C 24:3 and 101:65 *with* D&C 109:11)—the difference between the two meanings of the word "secure."

Thus, the revelation correctly speaks of "securing *the* Copy right." The definite article "the" is meaningful. Prior to March 1830 (when the Book of Mormon was first published) and indeed prior to late 1829 or early 1830 (when the revelation was received), and indeed, prior to June 11, 1829 (when the Prophet deposited the title of the book with the clerk of court), the copyright in the work *already existed* (by virtue of the Prophet having fixed the text of the Book of Mormon in the manuscripts). When in late 1829 or 1830 the revelation gave these emissaries the charge to participate in the work of "*securing* the Copy right of my ~~Servent~~[38] work upon all the face of the earth," it was the work of securing a copyright that already existed (subsisted). To "secure" the copy right likely meant to protect the book from unauthorized first publication by a third party (accomplished by selling a copyright to such third party, thus granting permission). Otherwise, as pertains to post-publication protection, to "secure" the copyright would have meant to secure the protection of the statute of copyrights,[39] which in this case, to the extent there needed to be a securing of the copyright in the four provinces of Canada after first publication in the United States (post March 26, 1830), would have meant to do whatever the Statute of Anne may have required, *if the statute even applied.*

It should be remembered on this account that the great controversy that had raged on concerning the question of perpetual copyright and common law copyright applied mainly to the question of the duration of copyright protection afforded to an author *after* first publication and indeed after the expiration of the statutory period of protection. Historic legal controversies tested the questions whether or not an author at common law had rights which survived the publication of the work, whether these rights existed coterminously with statutory rights given by the Statute of Anne to an author after publication or were taken away or suspended by this and similar statutes subsequently enacted both in England and the United States. Those controversies were settled by 1830. But in England, up to the passage of the Copyright Act 1911, most all legislation dealt only with the rights of the creator of intellectual property on and after his making copies of his work public, that is, publishing it. Prior to publication his rights were deemed to rest in the common law and were perpetual in duration. And it is almost surely this right—the Prophet's pre-publication, intangible common law copyright—of which the revelation speaks, for the revelation almost without doubt was given prior to the March 26, 1830 publication of the Book of Mormon in the United States, as discussed in more detail below.

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[38] That the word "Servent" was used first in the text and then substituted with the word "work" hints at an understanding that the right of the copy is the author's right; the change in the language simply reflects an apparent desire that the language of the revelation point to the work (the Book of Mormon) as the object of the copyright rather than to the Prophet as the person who held the right as "author and proprietor."

[39] When the Statute of Anne was first brought before the Commons its title stated that it was an Act "for the Encouragement of Learning, and for the securing the property of copies of books to the rightful owners thereof"; during the Bill's passage through parliament the reference to "securing the property of copies of books" was subsequently dropped, the final Act providing that it would encourage learning "by vesting the copies of printed books in the author's or purchasers of such copies." With the 1801 Act the legislature no longer "vests" but rather once again "secures" an author's property.

We think the Shepherd's resentment burns in the wrong quarter in the following note :

"'The Maid of the Sea' is one of the many songs which Moore caused me to cancel, for nothing that I know of but because they ran counter to his. It is quite natural and reasonable that an author should claim a copyright of a sentiment; but it never struck me that it could be so exclusively his, as that another had not a right to contradict it. This, however, seems to be the case in the London law; for true it is that my songs were cancelled, and the public may judge on what grounds, by comparing them with Mr. Moore's: I have neither forgot nor forgiven it; and I have a great mind to force him to cancel Lalla Rookh for stealing it wholly from the Queen's Wake, which is so apparent in the plan, that every London judge will give it in my favour, although he ventured only on the character of one accomplished bard, and I on seventeen. He had better have let my few trivial songs alone."

We apprehend Mr. Moore had nothing to do with it; the question was one of musical copyright.

Figure 3—The Kingston Chronicle [newspaper] (April 16, 1831), p. 4, col. 1.

What Was a "Copyright" In Upper Canada in 1830?

"Retroprophet" asserts that "in 1829, there was no such thing as a Canadian copyright," that "British law provided the only copyright law that applied," and "the only way that an operative copyright for Canada could have been secured would have been by obtaining a British copyright." To an extent, this is correct (though the reference to "obtaining" a British copyright is skewed). Clearly in Upper Canada in 1830 the notion of copyright was not at all a foreign idea. Take for example the sentiments expressed publicly in 1831, *in Kingston, Upper Canada*, by one musician who claims to have been aggrieved, apparently by the act of another musician enforcing a copyright in a piece of music the purportedly aggrieved musician claimed had been infringed by the other:

> We think the Shepherd's resentment burns in the wrong quarter in the following note:
>
> "'The Maid of the Sea' is one of the many songs which Moore cause me to cancel, for nothing that I know of but because they ran counter to his. It is quite natural and reasonable that an author should claim a copyright of a sentiment; but it never struck me that it could be so exclusively his, as that another had not a right to contradict it. This, however, seems to be the case in the London law; for true it is that my songs were cancelled, and the public may judge on what grounds, by comparing them with Mr. More's [*sic*]; I have neither forgot nor forgiven it; and I have a great mind to force him to cancel Lalla Rookh for stealing it wholly from the Queen's Wake, which is so apparent in the plan, that every London judge will give it in my favour, although he ventured only on the character of one accomplished bard, and I on seventeen. He had better have let my few trivial songs alone."
>
> We apprehend Mr. Moore had nothing to do with it; the question was one of musical copyright.

The above editorial comment on the matter was published in the *Kingston Chronicle* [newspaper], April 16, 1831, p. 4, col. 1. It would hardly be understandable to readers of the *Kingston Chronicle*—this notion of copyright—unless it were part of their culture and laws. Nearly fourteen years earlier, The *Ohio Repository* [newspaper] 7 August 1817 (vol. III, No. 19), p. 3, col. 3 published the following, related to the above:

> Thomas Moore, translator of Anacreon, author of Poems, Melodies, &c. has lately published a new poem, entitled Lalla Rookh the scene of which is laid in the east. The copy right brought him 3000 guineas.

Clearly, copyrights could be sold. And Kingstonians knew it. For example, two *Kingston Chronicle* tidbits read as follows: "*Posthumous fame.*—The copy right of Lord Byron's *minor poems* was recently sold by auction in London, and *Murray* became the purchaser, for 3,700 guineas." Such was published on April 17, 1830 (p. 2, col. 6). And this: "*Sir Walter Scott's Life of Napoleon*.—An erroneous report has been very generally circulated on the subject of the price agreed to be paid by

the publishers for this work; we believe the following is the fact. Sir Walter Scott is to receive eleven thousand pounds sterling for eight thousand copies, the Baronet himself paying for the paper and printing. The copy-right to revert to the author after the sale of the first edition of eight thousand copies." Such was published on March 9, 1827 (p. 2, col. 4). Clearly, the notion of copyright, and of the sale of copyright, was known to the mind of the Upper Canadian in Kingston.

Indeed, the Upper Canadians in Kingston likely knew that a copyright was intangible personal property that could, for example, be disposed of by will. Exemplary of this is a note in the *Kingston Chronicle and Gazette* (November 11, 1835), p. 3, col. 2, regarding one famous pamphleteer and journalist (*see* Fig. 4):

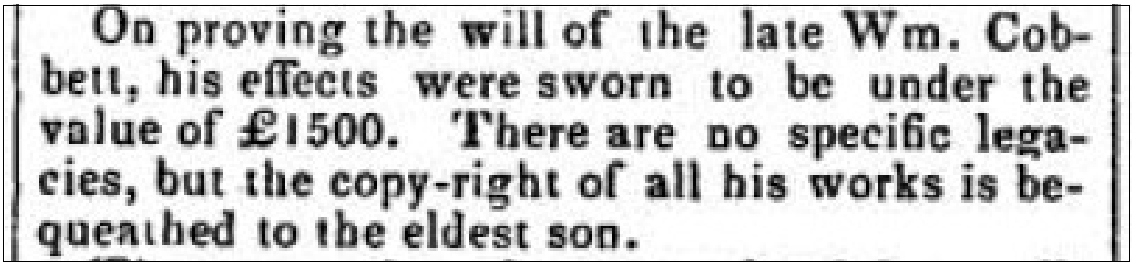
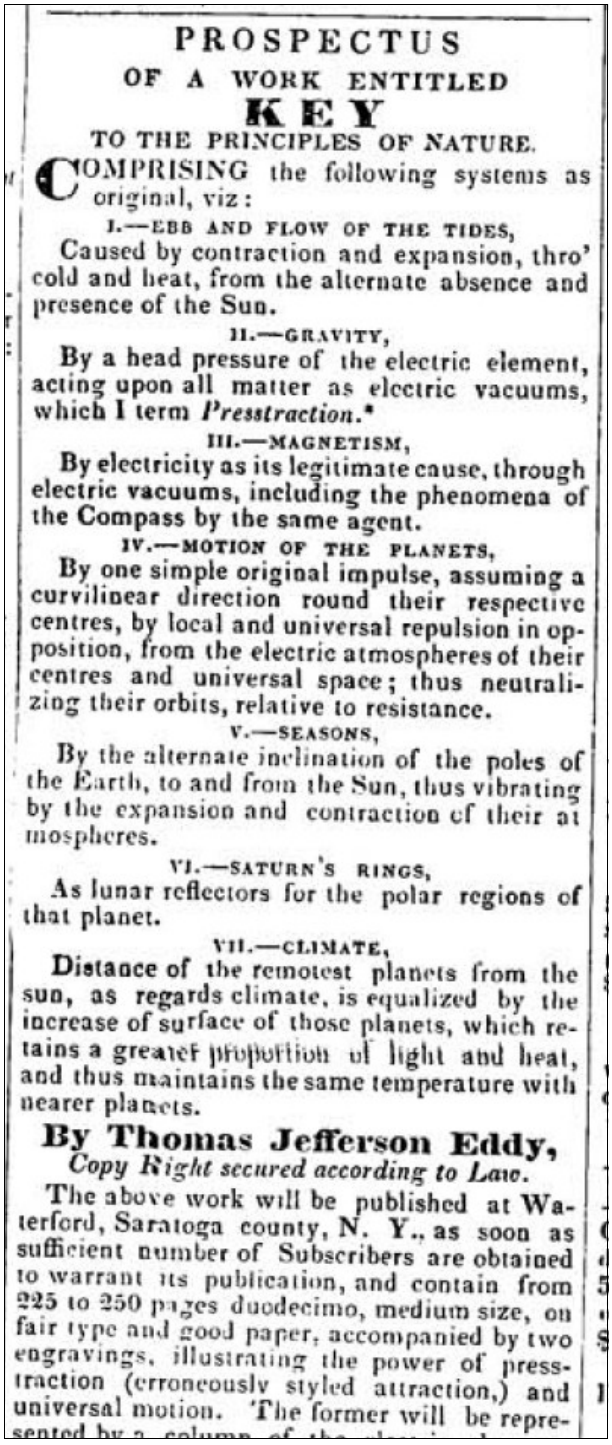

On proving the will of the late Wm. Cobbett, his effects were sworn to be under the value of £1500. There are no specific legacies, but the copy-right of all his works is bequeathed to the eldest son.

Figure 4—*Kingston Chronicle and Gazette* (November 11, 1835), p. 3, col. 2



PROSPECTUS

OF A WORK ENTITLED

KEY

TO THE PRINCIPLES OF NATURE.

COMPRISING the following systems as original, viz:

I.—EBB AND FLOW OF THE TIDES,

Caused by contraction and expansion, thro' cold and heat, from the alternate absence and presence of the Sun.

II.—GRAVITY,

By a head pressure of the electric element, acting upon all matter as electric vacuums, which I term *Presstraction*.*

III.—MAGNETISM,

By electricity as its legitimate cause, through electric vacuums, including the phenomena of the Compass by the same agent.

IV.—MOTION OF THE PLANETS,

By one simple original impulse, assuming a curvilinear direction round their respective centres, by local and universal repulsion in opposition, from the electric atmospheres of their centres and universal space; thus neutralizing their orbits, relative to resistance.

V.—SEASONS,

By the alternate inclination of the poles of the Earth, to and from the Sun, thus vibrating by the expansion and contraction of their atmospheres.

VI.—SATURN'S RINGS,

As lunar reflectors for the polar regions of that planet.

VII.—CLIMATE,

Distance of the remotest planets from the sun, as regards climate, is equalized by the increase of surface of those planets, which retains a greater proportion of light and heat, and thus maintains the same temperature with nearer planets.

By Thomas Jefferson Eddy,

Copy Right secured according to Law.

The above work will be published at Waterford, Saratoga county, N. Y., as soon as sufficient number of Subscribers are obtained to warrant its publication, and contain from 225 to 250 pages duodecimo, medium size, on fair type and good paper, accompanied by two engravings, illustrating the power of presstraction (erroneously styled attraction,) and universal motion. The former will be repre-

Figure 5—*Kingston Chronicle and Gazette* [newspaper] (30 September 1835), p. 4, col. 4. Note the reference to the "Copy Right secured according to Law" for this work advertised in Kingston and intended for publication in the United States (though apparently never published).

In the *British Whig* of March 4, 1834[40], published in Kingston, Upper Canada, the following delightful letter-to-the-editor is printed:

> To the Editor of the British Whig.
>
> Dear Doctor,
>
> I was much surprized on seeing in your paper of the 11th ult. my first letter to Mr. Ketch of London. Supposing that you must have surreptitiously procured the copy, I was indeed displeased with its publication and intended personally to resent so flagrant violation of sealed privacy. But having since learned the accident by which you obtained it, I am fully satisfied with your conduct in the transaction, and finding that the public, from this specimen of my epistolary style are desirous of being presented with my further correspondence with that worthy gentleman, I hereby inclose you a copy of my second letter making you a free gift of the copyright.
>
> By the by, I perceive that some juvenile punster, in last Saturday's Chronicle, has taken the liberty of "filching from me my good name." Perhaps I really have a namesake in Town, but I suspect that this is some witling who, by this assumption, means to blast my laurels or rather, perhaps, to transfer them to his own brows.
>
> PETER PRY.

These examples seem to show clearly that a copyright in Upper Canada likely was considered in the Kingston public mind the same as a copyright was considered in England: it was "the right which an author may be supposed to have in his own original literary compositions: so that no other person, without his leave, may publish or make profit of the copies."[41]

Could a United States Author Obtain a Copyright in Canada Without Being a British Subject?

Some may contend that "only British subjects could hold copyright in Canada."[42] Not so. In *Tonson v. Collins*, 1 Wm. Blackstone 301, 96 Eng. Rep. 169 (1761), the question of copyright was carefully considered, and even Mr. Thurlow, in arguing against it, admitted that "it is of no consequence whether the author is a natural-born subject, because this right of property, if any, is personal, and may be acquired by aliens." And on this point, it should be remembered that it was property ("a copyright") that the emissaries of the Prophet were sent to sell. And further, discussing

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[40] Page 3, col. 1.

[41] Burke, Peter. *A Treatise on the Law of Copyright in Literature, the Drama, Music, Engraving, and Sculpture and Also in Designs for Ornamenting Articles of Manufacture: Including the Recent Statutes on the Subject.* (London: John Richards & Co., 1842), p. 1, citing and quoting Blackstone (*Comm*. vol. ii, p. 405).

[42] Joe Geisner at http://www.fairblog.org/2009/09/22/copyright-revelation/

Clementi v. Walker (a case that predates the 1842 Copyright Act), the House of Lords had the following to say about *Clementi* in the case of *Jefferys v. Boosey* (4 H.L.C. 815) (a case that postdates the 1842 Copyright Act), where the *Jeffreys* case justices stated that the decision arrived at in *Clementi* "could not have occurred if the fact of the author being a foreigner had been an answer to the claim." In other words, if it were as simple as saying in the *Clementi* case that the French author should lose the case merely because he was foreign, then the court would have been hard pressed to come up with some other reason for the more elaborate ruling it came up with. Instead, the court's ruling was to the effect that the faulty attempted oral assignment and the delay in publication were the reasons the plaintiffs in that case failed, not the foreign status of the author.

Elaborating on this very point, Mr. Justice Crompton remarked more extensively in the *Jefferys* case:

> It was held in *Clementi v. Walker*, on perfectly satisfactory grounds, as is plainly to be collected from the statute, that by the first publication is meant a publication in this kingdom,—and the main question in the present case is, whether the right to acquire the monopoly by a bona fide first publication here, is confined to persons who are British subjects either by birth or Act of Parliament, or as owing temporary allegiance here by virtue of their residence in this country. In *Clementi v. Walker* no such restriction as is now contended for appears to have at all entered into the contemplation of either the Bar or the Court. Such a doctrine would have been at once decisive of the cause, and would have rendered it unnecessary for the Judges to consider the question on which they decided. In deciding that a prior publication abroad by a foreign author, not followed up by a publication here in a reasonable time, destroyed any right in the foreign author, and in doubting what would be the effect of such prior publication abroad, if followed up by a publication here within a reasonable time, the Court of King's Bench seems rather to have recognised the general right of a foreign author to become the first publisher here within the statutes, than to have supposed such right to be confined to British authors publishing here.

Mr. Justice Crompton also stated:

> I do not find any thing which is sufficiently clear to satisfy me that the Legislature has expressed any intention to restrict the protection given, further than as decided in the case of *Clementi v. Walker*, that the statute must be considered as legislating upon what is really a British publication; and I think that, provided the publication is really and bona fide British, the copyright may be acquired, although the author is foreign, although he resides abroad, and although he does not personally come to England to publish. I come to this opinion on the words of the statute, vesting the right in the authors or their assigns from the first publication; and from not finding any thing in

the Acts to exclude friendly foreigners from its advantage.

As pointed out by Mr. Justice Williams, in 1835 the law was changed (in the case of *D'Almaine v. Boosey* (4 Younge & C. Exch. 424)), such that copyright could not be gained by a foreign author who was resident abroad at the time of the publication. *See* 4 H.L.C. at 859-860. (The *Jefferys* case was decided under the Copyright Act of 1842 and under that act made clear that non-resident foreigners obtained no copyright within the realm. Earlier, however, it had not been so.) Therefore, an argument to the effect that in 1830 "only British subjects could hold copyright in Canada" must yield to the very clear dictates of English law, which hold the opposite. And that law did not change with the adoption of the Copyright Act of 1842, for in the 1854 case of *Routledge v. Low* (4 H. L. C. 815), the court held that a foreign author who was resident even for a few days in Canada, having gone there expressly for the purpose of acquiring copyright while her book was published in London, nevertheless was an author within the Act, whose literary work could qualify for copyright protection, a proposition which had not been disputed in *Jefferys v. Boosey*.

Why Distinguish "The" and "A" Copyright?

The "Concerned Christians" forum asks, "Why Did Joseph Smith Try Selling The Book Of Mormon Copyright?" In the introductory sentence immediately after that question the forum author[43] states: "Immediately after publishing the Book of Mormon in 1830, Joseph received a revelation that Hiram Page and Oliver Cowdery were to go to Toronto, Canada to sell the copyright of the Book of Mormon."[44] Unless one did not know better, one would suspect the author of that contribution to that forum believed that a "*United States* copyright" was to be sold in *Canada*. "The Mormon Curtain," which styles itself as "Ex-Mormon News, Stories And Recovery,"written by "Deconstructor," asks "Why Did Joseph Smith Try Selling The Book Of Mormon Copyright?"[45] A copyright protected by United States law, though intangible personal property, is protected within the United States as a result of the application of the laws of the United States, and that protection by the United States laws extends only so far as the laws of the United States extend, namely to the border. Absent any treaty between the United States and Upper Canada or Lower Canada or New Brunswick or Nova Scotia, no law of the United States and no law of any of the four provinces rendered effectual in Canada the copyright protection afforded by a "United States copyright." But were the emissaries commissioned to sell "the" copyright? The answer, simply, is "no."

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[43] The forum is not considered here to be even a secondary source but, rather, merely a derivative source.

[44] The forum author gives no reason for the reader to accept the statement that it was "[i]mmediately *after* publishing the Book of Mormon in 1830" that the revelation was received. The forum author also relies on the proven forgery created by Robert B. Neal, purporting to be an 1839 accusation by Oliver Cowdery [*sic*], supposedly titled, "Defense in a Rehearsal of My Grounds for Separating Myself from the Latter Day Saints" [*sic*] (Norton, Ohio [*sic*]: Pressley's Job Office [*sic*], 1839 [*sic*]), p. 229 [*sic*]. *See* Richard Lloyd Anderson, "I Have a Question: Did Oliver Cowdery, One of the Three Special Book of Mormon Witnesses, Express Doubt About his Testimony?" *Ensign*, Apr. 1987, 23–25.

[45] http://www.mormoncurtain.com/topic_joesephsmith_section2.html

"The" copyright of which the Prophet was possessed at the time of the revelation was a common law, pre-publication, author's copyright. It came into existence when the Prophet put pen to manuscript. Such copyright pre-existed June 11, 1829, when Joseph Smith caused the clerk of the District Court to record the fact the Prophet that day had "deposited the title" of the Book of Mormon. That recordation did not create a copyright; his fixing of the text of the Book of Mormon onto the manuscript is what accomplished that. When the revelation speaks of "the" copyright, it speaks of the common law, pre-publication, author's copyright of which the Prophet already was possessed.

Colloquially one might speak of "securing" (in the sense of obtaining) a copyright when in the 1830 era the title is deposited in the clerk's office of a United States district court, as if that act means the author at that time obtains the copyright in the first instance. This is what people commonly understand. However, it is not the law and is only a common understanding (founded on the notion that some of the statutory requirements that must be met in order for statutory protection to adhere make it seem that performing those acts accomplishes the role of obtaining a copyright). For example, speaking of the June 11, 1829 title registration, Lucy Mack Smith speaks of Joseph having thus "secured the copyright."[46] She reports that when the Prophet confronted Abner Cole, his remonstrance to Cole was, "Do you not know that we have secured the copyright?"[47] However, such use of the word "secured" in both instances partakes of the same ambiguity the word commonly allows for in the various other contexts in which it may be found. It can mean "secure" in the sense of to obtain or to get and it can mean "secure" in the sense of to protect against the risk of loss, damage, or destruction.

The revelation clearly and correctly distinguishes between "a" copyright and "the" copyright. The revelation does not speak of a "United States copyright"; it does not speak of "securing" a copyright in Upper Canada. Rather, it speaks only of a need of the four emissaries to be diligent in seeking to secure protection for the Book of Mormon globally: "Wherefore be dilligent in Securing the Copy right of my . . . work upon all the face of the Earth . . . ,"[48] speaking of the work the four emissaries "shall do in this thing yea even in securing the ^ Copy right . . . ."[49] No mention is made, to that point in the revelation, of Canada or Kingston (or York).

And then, later in the revelation, the text turns to imposing on the emissaries the immediate task at hand: "Wherefor I say unto you that ye shall go to Kingston . . . & I grant unto my servent a privelige that he may sell ^ a copyright through you speaking after the manner of men for the four

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[46] Smith, Lucy Mack, *Biographical Sketches of Joseph Smith the Prophet, and His Progenitors for Many Generations* (Liverpool: S.W. Richards, 1853), pp. ____.[Chapter 31.]

[47] *Ibid.* [Chapter 33.]

[48] *See Manuscript Revelation Books*, pp. 32-33.

[49] *See Manuscript Revelation Books*, pp. 32-33.

Provinces . . . ."[50] Clearly, the revelation speaks both of a more global task, of securing "the" copyright in all the world, and of a more specific task, of selling "a" copyright in Kingston. This is akin to the following hypothetical: Be diligent in establishing a United States "from sea to shining sea" and go to and effectuate the Louisana Purchase. One furthers the other but they are not the same.

Very possibly the use of the indefinite article "a" (as in "a copyright") is an indication that what was to be sold in Canada was something less than all rights pertaining to the book. Clearly *protection* afforded by United States law did not extend to Canada; but the *copyright itself* existed everywhere, being an intangible, personal right. In Canada, the Prophet's emissaries could sell a "short-run lease," with a prospective publisher "purchasing the right to print and sell a work for a short period of time or for a certain number of copies."[51]

If one were to interpret the revelation as setting forth a charge that the emissaries "secure" a copyright in Upper Canada—in the sense of "obtaining" one there—one would have to impose on the text a number of difficult readings. First, if the emissaries were charged to obtain a copyright in Upper Canada, why would the revelation tell them to do that using the phrase "secure the copyright . . . upon all the face of the earth"? Second, why use the singular? If the Prophet had already obtained a copyright in the United States and the revelation was now sending emissaries to Upper Canada to obtain a copyright there, why tell them to secure "the" copyright upon all the face of the earth? In that case, it would have to use the plural word "copyrights" (secure the copyrights on all the face of the earth). Third, why, if the phrase "secure the copyright" means to "obtain" one, why thereafter does the text tell them to sell "a" copyright; why does it not tell them to sell "the" copyright?

The simple answer—consistent with common-day English language usage as well as with copyright principles—is that (1) the revelation speaks of "the" copyright which the emissaries were to help "secure" in all the earth and which is the common law, pre-publication, author's copyright the Prophet already possessed, even prior to June 1829, and (2) the revelation speaks of "a" copyright the emissaries were to attempt to "sell" in Kingston, which is a portion of or part interest in the common law, pre-publication, author's copyright the Prophet already possessed. The revelation did not tell the emissaries to sell "the" copyright; it told them to sell "a" copyright.

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[50] *See Manuscript Revelation Books*, pp. 32-33.

[51] *See* Bennett, Richard E. and Daniel H. Olsen, "Of Printers, Prophets, and Politicians: William Lyon Mackenzie, Mormonism, and Early Printing in Upper Canada," *in* Dorius, Guy L., Craig J. Manscill, and Craig James Ostler, eds., *Regional Studies in Latter-day Saint Church History—Ohio and Upper Canada* (Provo: Religious Studies Center, 2006), 180. I express gratitude to Richard Bennett for drawing my attention to this cogent article, which I had not seen until this research paper was near completion. He and co-author Daniel Olsen, posit, quite reasonably, that "Joseph Smith's best option may well have been a short-run lease," distinguishing that option from others, such as commission, half or three-quarter profits, royalty (which was rare), and outright purchase. Regarding the last option (outright purchase), Bennett and Olsen convincingly assert that "[i]t would seem inconsistent on his [Joseph Smith's] part to now sell it [the copyright] outright and lose control of his work merely for money." *Ibid*. That assertion is supported by the text of the revelation, published after Bennett and Olsen published their article. The text of the revelation distinguishes between "the" copyright (to be secured in all the world) and "a" copyright (to be sold in Kingston).

Why Distinguish Between "Securing" and "Selling" a Copyright?

Some allege that the revelation "fails" either because the revelation "promised" a copyright could be "secured" in Kingston and yet the emissaries failed to "secure a copyright in Kingston" (they simply had been "sent to the wrong city") or because the revelation promised a sale would occur there and yet it did not (or could not) occur there. On the other hand, Bradley cogently asks, as a neutral observer, "Did the revelation send them specifically to Kingston to secure the copyright?" I answer, No, at least not expressly there and apparently not specifically there. The revelation commanded the emissaries to go to Kingston where they would "sell" a copyright "for the four Provinces." But to be sure he establishes his question, Bradley also asks, "Was it true that a Canadian copyright could not be secured in Kingston but only in Toronto?" I answer, No, it was not true and, to boot, that is perhaps not quite the right way to address the issue but a helpful way to introduce the issue. The revelation does not command the emissaries to go to Kingston (or, for that matter, to Toronto or in fact anywhere in Canada or anywhere in the world) to "secure" a copyright; rather, it sends them to Kingston to *sell* one there as part of an effort to secure the copyright everywhere ("upon all the face of the earth"). Bradley asserts that "Those sent to Kingston were given the understanding that they could not copyright the book there." That colloquialism ("copyright the book") is, as I see it, simply colloquial rendering of what Page reports; the notion of "copyrighting the book" in Kingston conjures up the notion that the emissaries were sent to Kingston to "secure" (as in obtain) a copyright there. In fact, they were sent there to sell a copyright, as part of the effort to secure it everywhere. Perhaps someone in Kingston told them they could not "copyright the book" there, but neither Page nor anyone else reports that to be what the emissaries were told. And in any event, it seems entirely beside the point. The emissaries did not go to Kingston to perform the task of "obtaining" a copyright. That, in fact, could not be done and did not need to be done. Indeed, one does not "go" anywhere to "copyright" a book or to "obtain" a copyright for a book. Copyright comes into existence upon the completion of the act of authorship.[52] What needed to be done to "secure" the copyright was something that an author or his emissary or agent or assignee could do, whether in Kingston or in York or in any other place where a publisher could practice his trade. And what needed to be done would be the selling of an interest in the copyright by the prospective sellers to the prospective purchaser or purchasers. In sum, the prospective sellers were sent to Kingston not to secure a copyright there but rather to sell a copyright there as one part of an overarching effort to secure (protect) the copyright in all the earth. And that sale would be accomplished, probably in writing, by contract or even by deed.

Bradley observes that "the editor of the revelation's text in the Book of Commandments and Revelations . . . removed elements promising that a copyright could be secured and sold in Kingston." This is an inadvertent misreading by Bradley. Nowhere in the revelation is it *promised* that a copyright could be *sold* in Kingston much less that it is *promised* in the revelation that a copyright could be *secured* (as in "obtained") in Kingston. No promise of success in securing a copyright in Canada (or anywhere else) can be gleaned from the text of the revelation and no promise of success in

[52] On "authorship" in copyright law, *see* Smith, Miriam and John W. Welch, "Joseph Smith: 'Author and Proprietor," chapter 43 in *Reexploring the Book of Mormon*, ed. John W. Welch (Salt Lake City: Deseret Book and FARMS, 1992), 154-57.

selling a copyright in Canada (or anywhere else) can be gleaned from the text of the revelation. Though Bradley states that "legal research is needed to determine whether it a copyright [*sic*] could have been secured in Kingston," such an inquiry may be irrelevant; the revelation speaks only of selling a copyright in Kingston, not of securing one there. And even if the question were relevant, the answer, clearly, would be yes, for a copyright could be "secured" anywhere in any of the four provinces. Indeed, it was to be secured for all four provinces and for that matter in all the world.

True it is that William McLellin gave an account in which he stated that when the Book of Mormon was translated and was "at the printer's with the copyright secured," the Prophet received the revelation telling the emissaries to "go to Kingston in Canada, and *get* a copy-right in that dominion to the book,"[53] the word "get" is McLellin's own word, not a word from the revelation. We know the revelation does not tell the emissaries to "get" (or "obtain") any copyright in the Canadian provinces; it tells them only to there "sell" "a" copyright as part of the effort to "secure" "the" copyright in all the earth.

Common Law Pre-Publication Copyright in Canada in 1829-1830

Introduction to the Issue. The text of the revelation, of course, is not the text either of a statute or of a constitution. It is a revelation. And therefore, it should not be "construed" or "interpreted" as if it were a statute or constitution. And while it is therefore, as a relgious text, presented as a revelation and thus not properly the subject of "private interpretation," it nonetheless does speak of what easily can be characterized as legal matters (copyright) and directs the four emissaries of Joseph Smith to perform two functions of a legal nature: (1) secure the copyright of the Book of Mormon upon all the face of the earth, and (2) sell a copyright in Kingston if the people will not harden their hearts. Hence, what it asks them to do in the realm of legal affairs can at least be analyzed in light of whether what it tells them to do was legally available for them to do.

Insofar as concerns the selling of a copyright in Kingston, of course, those who claim the revelation "fails" must support their position in the face of the conditional language used in the revelation. Nothing in the revelation guarantees success in selling a copyright in Kingston and if the requisite faithfulness of either the emissaries or the people is not manifest, the failure of a sale does not constitute a failure of the revelation. This is addressed elsewhere in this study.

But insofar as concerns the "securing" of "the" copyright "upon all the face of the earth," of course, those who claim the revelation "fails" on this account must support their position by asserting that the revelation's text requiring the four emissaries (1) to "secure" (2) "the" copyright (3) "upon all the face of the earth" somehow means that they were directed (1) to "obtain" (2) "a" copyright (3) in Kingston. Of course, as to the third element, it is perfectly reasonable to conclude, as a matter of simple geography, that if they were directed to help obtain copyright protection upon all the face of the earth then they necessarily were directed to do so also in Kingston, the latter (Kingston) being geographically part of the former (all the face of the earth). And as to the second

[53] *The William E. McLellin Papers, 1854–1880*, edited by Stan Larson and Samuel J. Passey (Salt Lake City: Signature Books), 2007, p. 503 (19 February 1877) (emphasis here added).

element (which I discuss elsewhere in this study[54]), while the use of the definite article "the" instead of the indefinite article "a" forces an interpretation of the sentence based on slightly skewed language use, the "the" can possibly be viewed as if it were an "a" if the wording "securing the copyright" is interpreted to mean the obtaining of the future copyright (as if to read, "be diligent in securing or obtaining the future copyright upon all the face of the earth, including, of course, in Kingston, where you also are sent to sell a copyright").

But as to the first element, that of "securing" the copyright, we deal not only with language issues but with legal ones. As for language issues, the word "secure," of course, is ambiguous. It can mean to obtain and it can mean to protect. And, indeed, it may at one and the same time mean both. One can secure (protect) a copyright by obtaining a copyright (though one can see why the two concepts are somewhat exclusive of one another, for one cannot obtain what one already posseses). The two meanings need not be viewed as mutually exclusive, though it is somewhat strained to view the term's two meanings that way. While the text of the revelation does not send the emissaries to Kingston specifically or to Canada generally to obtain a copyright, it can be read that way (and those who claim the revelation "fails" in this way so read it). And such a reading is possible at least in light of the fact that "Brother Hyrum [had] said it had been suggested to him that some of the brethren might go to Toronto, Canada, and sell the copy-right of the Book of Mormon for considerable money" and in response the revelation speaks not only of selling a copyright but of securing the copyright. While such an interpretation of apparent cause and apparent effect possibly admits of non-sequitur reasoning, it is not an *impossible* interpretation. After all, in characterizing the act of depositing the title of the Book of Mormon with the clerk of the district court for the Northern District of New York, both the Prophet and his mother as well as others spoke of that act as having constituted the "obtaining" of the copyright. As pointed out to me by Richard Lloyd Anderson:

> In the middle of his U.S. copyright article, [Nathaniel H.] Wadsworth gives evidence that many authors about 1830 seem to equate the filing of the title page of a new work as the obtaining of a copyright (["Copyright Laws and the 1830 Book of Mormon,"] *BYU Studies* 45/3 [2006]: 84-85). On 22 Oct.1829 JS wrote in this sense to Oliver, "that there is a copy right obtained" (Jessee, *Personal Writings of JS,* 252). When JS dictated the early history of the Church in 1838 and 1839, he continued to use this terminology of "securing" the copyright on 11 June 1829 (Jessee, *Papers of JS* 1:234, 241. [In addition,] [i]n the Squire Cole incident, Lucy's ms. has Hyrum confront him by saying, "do you not know that we have secured a copy right," no doubt referring to 11 June 1829 registration.[55]

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[54] The point there is that use of the definite article "the" likely constitutes an acknowledgement that copyright already subsists, which is consistent with the law that copyright subsists when the text is recorded on the manuscript page.

[55] Email communications from Richard Lloyd Anderson, 20 February 2010, in author's possession. I am grateful for Richard's insightful analysis of the issues and am thankful for his time in conversing with

As for these language issues, my analysis is that the common understanding—that "securing" a copyright is the equivalent of "obtaining" one—is a perfectly reasonable understanding. While Wadsworth gives evidence that many authors about 1830 seem to equate the filing of the title page in the records of the district court for the Northern District of New York with "obtaining" a copyright, this may merely reflect colloquial usage and common understanding and may reflect what the law provides, too, at least as generally understood, both then and now. It seems not at all "wrong" in the sense of being either misleading or improper. As a matter of law (and as a matter of enforceability of rights—not to mention as a matter of what it is that the text of the revelation gives us), even if Joseph specifically, or if any other author generally, were to omit filing the title page in a district court, nonetheless such an author (pre-publication) still could assert an author's pre-publication, common law right to exclude others from first publishing the author's work. The copyright itself arises upon fixation of the text in a tangible medium, not upon the deposition of the title with the clerk, notwithstanding colloquial usage and common understanding suggesting otherwise. Deposition of the title is a prelude to post-publication statutory protection and such deposition of the title *evidences* the existence of the common law, pre-publication author's copyright; but it does not either create that right or constitute the act of "obtaining" that right. The text of the revelation speaks of securing "the" copyright, a right that at least legally in the common law (if not also linguistically, as apparently recognized by the revelation's text) already subsisted. It is not at all impossible both that the text of the revelation itself may have correctly reflected what the law provides (that the copyright already existed and "securing" it meant protecting it) and that the text of statements made by others also may have correctly reflected what the law provides (that "securing" a copyright can occur in the sense of "obtaining" one). When Joseph confronted Cole, he almost surely was enforcing the common-law, pre-publication, legally enforceable author's copyright he had enjoyed since the time of putting pen to manuscript. Indeed, as Wadworth correctly points out, "Joseph's legal victory over Cole was more likely premised on common law rights that Joseph held in the *unpublished* manuscript simply by virtue of having created the work."[56]

And that on October 22, 1829 Joseph wrote to Oliver, "that there is a copy right obtained," may reflect, again, mere colloquial usage and perhaps a layman's understanding on the Prophet's part consistent with common understanding. But that his use of the word "obtained" in that sentence means that he"secured" a copyright by the act of recordation of the title with the court clerk may possibly mean only that he understood that the two acts were one and the same (recordation of the title equates to obtaining of a copyright). This is the common understanding, to be sure, but it is not necessarily what the law is and, interestingly, is not what the text of the revelation forces us to understand. The revelation, of course, does not use the word "obtained," insofar as it speaks of what is to be secured upon all the face of the earth. The text of the revelation admits of both the common understanding (to secure means to obtain) and the legal one (to secure means to protect). Indeed, the legal meaning of "secure," too, is ambiguous, meaning either to obtain or to protect.

And when Joseph Smith dictated the early history of the Church in 1838 and 1839, says

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me about them. I alone am responsible for any errors I make in analyzing the issues.

[56] Wadsworth, at 78.

Richard Lloyd Anderson, "he continued to use this terminology of 'securing' the copyright on 11 June 1829" (the Prophet's phraseology in the history being, "we went to Palmyra, Wayne county, New York, secured the copyright, and agreed . . ."). It may be, again, that such language simply reflects both the common understanding and the legal one. But again, the text of the revelation itself does not expressly employ that type of language when it speaks there of securing the copyright in all the earth; we only superimpose that reading on the text with our understanding based on word usage from sources outside of the text.

Thus, as to the first element, that of "securing" the copyright, the language issues are real and admit of two interpretations. With a little stretching, the text of the revelation directing the four emissaries to "secure" the copyright upon all the face of the earth may reasonably be interpreted to mean that they were directed to "obtain" a copyright in Kingston. That is a stretch of language, but a *possible* reading. And the legal issues, too, are real. Insofar as the revelation directs the four emissaries of Joseph Smith to perform the legal function of "securing" the copyright of the Book of Mormon upon all the face of the earth, one can ask whether that legally could be done in Kingston. This can be reviewed both generally, in light of what the law generally provides concerning the securing of a copyright, and specifically, in light of what the laws of the United States, of New York, and of Upper Canada provided concerning the securing of a copyright.

Securing a Copyright Generally. On March 26, 1830, the *Wayne Sentinel* carried the announcement, "We are requested to announce that the 'Book of Mormon' will be ready for sale in the course of next week." This announcement and the offering of the book for sale are generally considered to be the acts that constituted the "publication" of the Book of Mormon. Sometimes, however, we misapprehend the law of copyright in the United States at that time (not to mention the law applicable in the four Provinces of Canada in that 1829-1830 era); often we superimpose on our understanding of historical events of that time period an understanding (or even a misunderstanding) of copyright laws enacted in subsequent times. Since the time of the Copyright Act of 1909 until the time of enactment of the Copyright Act of 1976, a federal copyright in the United States was generally considered to be "secured" either on the date, and by the act, of publication with notice of copyright or on the date of registration if the work was registered in unpublished form. It is a common understanding, therefore, that Joseph Smith did not enjoy United States copyright protection until the time he registered the copyright in the office of the clerk of the Northern District of New York. But as the following review will attempt to show, Joseph Smith enjoyed copyright protection from the moment he set pen to manuscript. Within the United States, that copyright protection arose as a matter of New York State common law copyright principles.

Today, in the United States, *federal* copyright protection in a text is "secured" *automatically* upon the fixing of the text in a manuscript. Says the United States Copyright Office in its publication *Copyright Basics*:

> **How to Secure a Copyright**
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> ***Copyright Secured Automatically upon Creation***
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> The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the

> Copyright Office is required to secure copyright. (See following note.) There are, however, certain definite advantages to registration. See "Copyright Registration" on page 7.
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> Copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CDs, or vinyl disks. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecords"), or both. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.
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> In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, registration is not a condition of copyright protection.[57]

Securing a Federal Statutory Copyright Formerly—United States. The concept of "securing" a *federal* copyright in the United States is reflected from the earliest times, when the first copyright legislation was enacted in various of the newly independent states. Prior to the June 21, 1788 effective date of the Constitution of the United States and prior to the May 31, 1790 effective date of the first Copyright Act, Noah Webster lobbied the legislatures of New York, Pennsylvania, New Jersey and Connecticut to enact laws protecting books. On January 29, 1783, Connecticut passed the first copyright statute to be enacted in any one of the thirteen new independent states. In response to the need to provide for a uniform system of copyright protection among the various states, the Continental Congress appointed a committee "to consider the most proper means of cherishing genius and useful arts through the United States by securing to authors or publishers of new books their property in such works."[58] The committee reported that "nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius."[59] The Continental Congress thereupon passed an act that encouraged all states "to secure to the authors or publishers of any new books not hitherto printed

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[57]U. S. Copyright Office, Library of Congress (Circular 1), *Copyright Basics* (Washington, D.C., U. S. Government Printing Office, Rev. 10/2008), pp. 3, 7.

[58] 24 Journals of the Continental Congress 180.

[59] 24 Journals of the Continental Congress 326.

. . . the copy right of such books . . . .” Thereafter, each state (except Delaware) enacted its own copyright statute.

On November 28, 1787, the Chief Justice of the Pennsylvania Supreme Court, Thomas McKean (drafter of the Articles of Confederation and past President of the Continental Congress), spoke at the Pennsylvania Convention on the Ratification of the Federal Constitution in support of a national copyright law. He stated:

> the laws of the respective states could only operate within their respective boundaries, and therefore, a work which has cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular.”[60]

Thereafter, proposals were made by Charles Pinckney and James Madison to the Committee on Detail for the Constitutional Convention and in response, on September 5, 1787, the Committee proposed the following clause:

> Congress shall have Power: To Promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.

The clause was unanimously adopted and incorporated in the Constitution, and on June 21, 1788, the Constitution, along with the Copyright Clause, embodied in Article I, Section 8, Clause 8, officially became effective. Thus the Congress of the United States now had power to enact a copyright statute that would prevail among all the states.

The first federal copyright bill was proposed one year later, on June 23, 1789, and consideration of the bill was postponed first until August 17, 1789 and then until January of 1790. In response to pressure applied by President George Washington in his State of the Union address of January 8, 1790, an amended bill finally was presented “for the encouragement of learning by securing the copies of maps, charts, books, and other writings, to the authors and proprietors of such copies . . . .”[61] The 1790 Act required compliance with specific formalities in order to secure federal statutory copyright protection, which included publication of a copy of the registration within two months in one or more newspapers for four weeks and deposit of a copy of the work in the office of the Secretary of State within six months of publication.

On April 29, 1802, Congress amended the 1790 Act and among other changes, the law now

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[60] Irah Donner, “The Copyright Clause of the Constitution: Why Did the Framers Include it with Unanimous Approval?” 36 *Am. J. Legal Hist*. 361, 376.

[61] H R. 43, 1st Cong. (1790).

required that authors include a copyright notice on each copy of a work distributed to the public.[62] Generally, this was the state of the federal law in June of 1828 when Joseph Smith deposited the title of the Book of Mormon in the records of the clerk of the District Court of the United States for the Northern District of New York.

Securing a State Common Law Copyright Formerly—New York State. Common law copyright protection arises as a matter of state law. The common law insured perpetual copyright protection prior to publication and a party seeking common-law protection derives such protection from the common law of the state.[63] The first New York State Constitution in 1777 permitted the continuation of colonial common law, derived from English common law. One such principle was that the creator of a literary work was entitled to perpetual common-law copyright protection in the absence of abrogation by statute. (*See* Madison, Federalist No. 43[64].) The New York State Legislature acted to supplant post-publication common-law copyright protection when it passed a statute in 1786 "to promote literature" (L 1786, ch 54). The statute restricted the copyright protection an author of a literary work could receive after first publication for up to 28 years (*see ibid*). This statute was superseded by Congress in 1790 when the first national copyright act was enacted.[65] Consistent with the statutory abrogation rule, the Court of Appeals of New York established that New York common law would provide copyright protection to a literary work up to the point that federal law governed—*e.g.,* from and after publication.[66] An author's perpetual, pre-publication, common law copyright (to be the first to publish the work) persisted unaffected.

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[62] Act of April 29, 1802, 7th Cong., 1st Sess., 2 Stat. 171.

[63] *See Wheaton v Peters*, 8 Pet [33 U.S.] at 658. Apart from seeking relief under the federal copyright, the plaintiff in *Wheaton* argued the existence of a common law copyright upon which relief might be granted. He pointed to the words "by securing" in the federal copyright clause (U. S. Const., art. I, § 8, cl. 8) and argued that because the word "secure" signifies "to protect, insure, save and ascertain," it follows that the use of the term *in the Constitution* indicated an intention not to originate or create a right but, rather, to protect one already in existence. Although the Supreme Court rejected the argument and held that the term "by securing" referred to the securing of a future right, not an existing right, the Court nevertheless did acknowledge the existence of common law copyright in unpublished manuscripts. And as to the question of the existence of a common-law copyright law in Pennsylvania that would protect an author post-publication, the majority opinion in *Wheaton* has been criticized for its "unpersuasive analysis of Pennsylvania common law" (1 Nimmer on Copyright § 4.03, at 4-18).

[64] *See also* Whicher, "The Ghost of Donaldson v. Beckett: An Inquiry Into the Constitutional Distribution of Powers Over the Law of Literary Property in the United States," 9 *Bull Copyright Socy* 102, 131-143 (1962); Taubman, Copyright and Antitrust, at 9, 14 (1960).

[65] *See* Act of May 31, 1790, reprinted in Library of Congress, Copyright Enactments, 1783-1900, at 30-32.

[66] *See e.g. Jewelers' Mercantile Agency v Jewelers' Weekly Publ. Co*., 155 N.Y. 241 (1898) at 247; *see also Palmer v De Witt*, 47 N.Y. 532 (1872) at 536; *Estate of Hemingway v Random House*, 23 N.Y.2d 341 (1968) 346.

Said the Court of Appeals of New York in *Palmer v. De Witt*, 47 N. Y. 532 (1872):

> The common-law rights of authors, as now recognized, existed before the passage of copyright laws, and have not been taken away or impaired by those laws. By section 9 of the act of congress of 1831, no new right is secured or conferred, but simply a remedy for the violation of an existing right in another forum. (*Pierrepont v. Fowle*, 2 Wood & Min., 43; *Woolsey v. Judd*, 4 Duer, 379.) The objection to the jurisdiction of the courts of the State is not well taken.
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> The rights of authors in respect to their unpublished works, have been so frequently and elaborately considered and carefully adjudicated by the courts of this country and of England, and are now so well understood and established that there is but little to do in passing upon the merits presented by the record before us, save to apply the rules clearly deducible from adjudged cases of conceded authority. The author of a literary work or composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published it is dedicated to the public, and the author has not, at common-law, any exclusive right to multiply copies of it or to control the subsequent issues of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of statute. This is the right secured by the "copyright" laws of the different governments. It is said by Yates, J., in *Miller v. Taylor* (4 Burr. 2303, 2379), "that it is certain that every man has a right to keep his own sentiments if he pleases; he certainly has a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property, and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property; and as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that priority is guilty of a manifest wrong, and the courts have a right to stop it."
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> This principle thus early enunciated has controlled in every case in which the property right of authors, or their manuscripts before publication, has been determined. This common-law right "of first publication" is sometimes spoken of as "copyright before publication," while the right to multiply copies secured by statute, is called in contradistinction "copyright after publication."
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> Mr. Phillips, in his treatise on the law of copyright, at page 2,

> speaking of the two rights, says: "Copyright before publication is the more ancient of the two. It is the exclusive privilege of first publishing any original material product of intellectual labor. Its basis is property; a violation of it is an invasion of property, and it depends entirely on the common-law."[67]
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> An author or proprietor of an unpublished literary work has then a property in such work, recognized and protected both here and in England, and the use and enjoyment of it is secured to him as of right. This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable. It is personal, as other movable property, personal in legal contemplation, following the person of the owner, and is governed by the law of his domicile. That which is regarded and protected as property by the law of the owner's domicile, as well as by the laws of this State, must be equally within the protection of the law, whether the owner be a citizen or an alien. (Story Conf. Law.) §§ 376, 379, 380. If the character of property was impressed upon the fruits of mental labor solely by statute, it might be otherwise, as the statutes could have no extra territorial force. But where, as in this case, it is property by the law, common both to this country and the domicile of the author, the right is equally within the protection of the law in both places.[68]

Noteworthy is the fact that, unlike the situation with the securing of a federal copyright pursuant to federal statute, "the author of a literary work or composition has, *by law*, a right to the first publication of it." In other words, for a common law pre-publication copyright to subsist, the author need do nothing more than to fix the text of his work in a tangible medium (that is, put pen to manuscript). The author and his assigns secure or protect that right by acting in conformity with the conditions of its existence, namely, by diligently forbidding publication by others of the manuscript prior to the time the author directs.

Securing a Copyright Formerly—Canadian Provinces. The existence of federal statutory provisions relating to the "securing" of a copyright pursuant to United States law tends to taint our understanding of the concept of securing the copyright pursuant to Canadian law (not to mention our understanding of the concept of securing the copyright as referred to in the text of the so-called Canadian copyright revelation). The law of copyright applicable in the Provinces of Canada in the

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[67] *Palmer v. De Witt*, 47 N. Y. 532 (1872), pp. 536-537.

[68] *Palmer v. De Witt*, 47 N. Y. 532 (1872), p. 538.

1829-1830 era depended not at all, of course, on the provisions of copyright law as they may have existed in the United States (be it pursuant to statutes in effect in 1978 or in 1909 or in 1802 or in 1790). While in the United States, the "securing" of a copyright under the statutes has entailed, to some degree or another, a requirement of registration, whether such a requirement existed in the Canadian Provinces in the 1829-1830 era must be determined by reference to the law in effect then and there.

To understand what we are talking about in the first place, it is important to know what the words "copyright" and "copy" actually mean. The word "copyright" begins with the word "copy," from the Latin *copia*, meaning plenty. In its general meaning, which we commonly use, it conveys the meaning of a right to copy, to make plenty, or, more correctly, the right to exclude others from making copies. Specifically applied, it means the right to multiply copies (that is, to exclude others from making copies) of those products of the human brain known as literature and art.

But another legal sense of the word "copyright" was emphasized by English justices. Both the low Latin word *copia*, just like our word "copy," has a secondary, reversed meaning. The word also refers to a pattern to be copied (a pattern to be made plenty). In this sense, a schoolboy copies from a "copy." His "copy" is set in his "copy-book." Similarly, modern printers call for an author's "copy." "Copyright" (or "copy right" or "right in copy"), therefore, may also mean the right in a copy made, as well as the right to make (or exclude others from making) copies. In the 1854 case of *Jefferys v. Boosey* Lord St. Leonards said:

> When we are talking of the right of an author we must distinguish between [1] the mere right to his manuscript, and to any copy which he may choose to make of it, as his property, just like any other personal chattel, and [2] the right to multiply copies to the exclusion of every other person. Nothing can be more distinct than these two things. The common law does give a man who has composed a work [1] a right to that composition, just as he has a right to any other part of his personal property; but the question of [2] the right of excluding all the world from copying, and of himself claiming the exclusive right of forever copying his own composition after he has published it to the world, is a totally different thing.[69]

Prior to March 26, 1830, the right the Prophet sought to "secure" (both in the United States and in Canada) was the pre-publication, common law right to control of his manuscript. As "author" he was recognized in law as having "supreme control" over the unpublished work, and, for example, his manuscript could not be utilized by creditors as assets without his consent. "If [an author] lends a copy to another," said Baron Parke in the 1854 *Jefferys v. Boosey* case, "his right is not gone; if he

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[69] 4 H.L.C. 815 (bracketed numbers here supplied for clarity). In the same case, Baron Parke expressly pointed out these two different legal senses of the word "copyright," referring to the right *in* copy (a right of possession, always fully protected by the common law) and the right *to* copy or exclude others from making copies (a right of multiplication, which alone has been the subject of special statutory protection).

sends it to another under an implied undertaking that he is not to part with it or publish it, he has a right to enforce that undertaking." It is at the moment of publication that the undisputed, perpetual possessory right passes over into the much disputed right to control the multiplication of copies.

That an author enjoyed rights in a manuscript prior to publication is clearly both an underlying premise of and the subject of express statement of rationale in *White v. Geroch* (1819) 2 B & Ald 298; 1 Chit 24; 106 ER 376. There Chief Justice Abbot held that the English Copyright Act 1814 did not impose upon authors as a condition precedent to their deriving any benefit under that Act that the composition should be first printed, and therefore an author did not lose his copyright by selling his work in manuscript before it was printed. One cannot talk of "losing" a copyright "in a manuscript before it is printed" unless a copyright indeed subsists in a manuscript before it is printed. Expressly stated, Chief Justice Abbot said that "[t]he object of the Legislature [in enacting the Statute of Anne] was, to confer upon authors, by the Act in question, a more durable interest in their compositions, than they had before . . . . The 8 Anne. c. 18, gave to authors a copyright in works not only composed and printed, but composed and not printed; and I think that it was not the intention of the Legislature . . . to abridge authors of any of their former rights."[70]

Related to this is the earlier ruling of the court in *Donaldson v. Beckett* (1744) 2 Bro. Parl. Cas. 129; 4 Burr. 2408; 1 E. R. 837, where the judges addressed the question whether the Statute of Anne abolished the common law perpetual copyright. With only one vote's majority among the eleven judges, the decision held that authors, according to common law, had the exclusive right to the first publication for perpetuity, but the right was annulled once the work was published (and replaced by the protections afforded under statute). Specifically, the court held that at common law an author of any book or literary composition has the sole right of first printing or publishing the same for sale, and may bring an action against any person who prints, publishes or sells the same without his consent. The law does not take away his right upon the printing and publishing of such book or literary composition, and no person may afterwards reprint and sell for his own benefit such book or literary composition against the will of the author. At common law the author of any literary composition and his assigns has the sole right of printing and publishing the same in perpetuity.

In the Kingdom of Great Britain, the courts wrestled for decades with the question of the interaction of this perpetual, common law pre-publication copyright enjoyed by authors prior to publication with the statutory copyright applicable to works post-publication. With the enactment of the Statute of Anne, recognizing a right, post-publication, that expired after a number of years, what was the impact on the author's pre-publication common law copyright after the expiration of the period of statutory protection? Did that common law protection continue (or resume)? The Statute of Anne had provided a fourteen-year period of statutory protection for newly-published works, "to commence from the day of first publishing the same." But what happened to the perpetual right after the expiration of that fourteen-year period? In *Millar v. Taylor* (1769) 4 Burr. 2303; All ER Rep. 119; 98 ER 201, a preliminary answer to this question was given. Andrew Millar was a bookseller who in 1729 had purchased the publishing rights to James Thomson's poem "The Seasons." After the term of the exclusive rights granted under the Statute of Anne expired, Robert

[70] *White v. Geroch* (1819) 2 B & Ald 298, pp. 300-301.

Taylor began publishing his own competing publication, which contained Thomson's poem. The Court, led by Lord Mansfield (with Justices Aston and Willes concurring in the judgment and Justice Yates dissenting), sided with the bookseller (and hence with all other similarly situated publishers, who routinely obtained rights to first publication from authors), finding that common law rights were not extinguished by the Statute of Anne (a victory for the booksellers and publishers, who thus enjoyed the purchased right beyond the statutory period). Under Mansfield's ruling, publishers had a perpetual common law right to publish a work for which they had acquired the rights. Thus, no amount of time would cause the work to pass to the public. The ruling essentially eliminated the concept of the public domain by holding that when the statutory rights granted by the statute expired, the publisher was still left with common law rights to the work. This did not remain the law in the Kingdom of Great Britain, but the underlying premise—that there existed, pre-publication perpetual copyright in the author (and in any printer or publisher to whom the author would sell or assign the copyright)—never was denied.

While the Statute of Anne provided a fourteen-year period of statutory protection for published works, it left unaddressed the issue of rights in an unpublished (that is, pre-publication) manuscript. Yet, the cases did not leave that question untouched, either. In *Forrester v. Waller* (1741) cited in 4 Burr at p. 2331; 98 ER 216, the plaintiff, a legal reporter, applied for an injunction to restrain a defendant from printing some notes which had been surreptitiously taken from the reporter's chambers. Forrester had transcribed various cases and reports of the Court of Chancery "into a folio book now in his own custody" and had not sold or otherwise departed with "his property in the said manuscript." Forrester argued that he, and he alone, had the sole right to first publish his work, and this argument he made despite the fact that the Statute of Anne, upon which he in part relied, was silent as to what rights, if any, subsisted in an unpublished manuscript. Lord Hardwicke granted the plaintiff the requested interlocutory injunction. The case, however, has little real precedential value because the defendant acquiesced to the issuance of the preliminary injunction and therefore submitted no answer. Hence, whether it was appropriate for Forrester to assert his pre-publication common law right by reliance on the Statute of Anne (which otherwise was silent on the question) remained unexplored by the court.

Similarly, in *Macklin v. Richardson* (1770) Amb 694; 27 ER 451, an injunction was granted to restrain the publication in a magazine of a farce, occasionally suffered by the author to be acted, but never printed or published. The ruling in that case was founded on a recognition of the pre-publication common law copyright of the author. The rule, stated succinctly, was this: The author or composer of a work, whether of literature, art, or science, while the work is unpublished has a right of property in that work, and may restrain by injunction an unauthorized publication, independent of the Statute of Anne. *See also Strange's (Sir John) Case* (1754) cited in 1 Mac & G at p. 43; 41 ER 1178, where an injunction issued against a clerk who made an abridgement of his employer's manuscript cases, the cases being then unpublished.

Under the common law of England, "an author's right to prevent the unauthorized publication of his or her manuscript appears to have been recognized on the principle of natural justice, the manuscript being the product of intellectual labor and considered as much the author's

own property as the physical substance on which it was written."[71] Asked Lord Chief Justice Mansfield: "From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument—because it is just, that an author should reap the pecuniary profits of his own ingenuity and labor."

Indeed, in *Webb v. Rose*, 96 Eng. Rep. 184 (1732), the fact that the pre-publication copyright depended upon the common law of property is manifest in the fact that in that case an injunction issued without any reference to copyright at all.[72] There, Richard Webb, a lawyer, had prepared numerous manuscript copies of conveyances he had executed throughout his lifetime. Webb employed Robert Southern, a clerk and agent. Upon Webb's death, Southern left the lawyer's chambers with numerous manuscripts, belonging both to Southern and to the now-deceased Webb. Southern died in 1724 and all the manuscripts came into the possession of Edward Rose and John Talbot. William Webb, surviving son of Richard Webb, was devisee of his father's estate, and filed a bill against Rose and Talbot both to prevent them from printing his father's manuscripts and for return of the same. Sir Joseph Jekyll granted an interlocutory injunction against the printing and the action proceeded to full hearing. Noteworthy is the fact that in his bill (complaint) the plaintiff, William Webb, made no reference to the Statute of Anne nor to the fact that he himself ever intended to publish the manuscripts; nonetheless, the injunction issued. The devisee possessed an intangible *property* right to be the first to publish the manuscripts (or to perpetually refrain from doing so, and perpetually prohibit others from doing so). *See also Prince Albert v. Strange*, 1 Mac. & G. 25, 43 (H.L. 1849) ("the exclusive rights in the author of unpublished compositions . . . depend entirely upon the common law of property").

The above injunction cases, of course, "do not rest on the fully reasoned form of judgment we know today. The reports are brief and, in theoretical terms, can be explained either as the exercise of the Chancellors' conscience or the protection of a property interest, the only kind of interest protected by injunction."[73] Nevertheless, when fully considered, the cases, both in England and in America, long have recognized that

> an author has, at common law, a property in his intellectual production before it has been published, and may obtain redress against anyone who deprives him of it, or, by improperly obtaining a

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[71] William F. Patry, *Copyright Law and Practice* (Bureau of National Affairs, Inc., 2000) (*citing Atkins v. Stationers Co.*, Carter's Rep. 89 (1666) ("copyright was a thing acknowledged at common law").

[72] The English Reports account of the case is quite brief; it reads, in full, as follows: "*Webb and Rose*, 24th May, 1732, coram Jekyll, Master of the Rolls (*s*), for printing the draught, of Webb the father's conveyance, Decree, that the draught, should be delivered up, and the injunction continued. This could not be within the Act; it was never published; and the term given by the Act commences from publication. It therefore turned on the original and natural right which every man has in bis own composition."

[73] Grant Hammond, "The Legal Protection of Ideas," 29 *Osgood Hall Law Journal* 93, 102. Perhaps Hammond should have said the reports "often" are brief (and they often are); however, some are very lengthy.

> copy, endeavors to publish or to use it without his consent. The right still exists, *independent of all statutes concerning copyrights*, although in the United States, this common-law right for a long time [was] recognized and continued in force by express provision in the copyright acts. In England, by the Copyright Act of 1911, the common-law copyright in unpublished works [was] abrogated, and all rights [were required to be] claimed under the statute and [were] only such as the statute [gave]. The act, however, [gave] copyright in unpublished works.[74]

Noteworthy, again, is the fact that, unlike the situation with the securing of a federal copyright in the United States pursuant to United States federal statute, "authors, according to common law, had the exclusive right to the first publication for perpetuity, but the right was annulled once the work was published." In other words, for a common law pre-publication copyright to subsist in the Canadian Provinces, the author need do nothing more than to fix the text of his work in a tangible medium (that is, put pen to manuscript). The author and his assigns secure or protect that right by acting in conformity with the conditions of its existence, namely, by diligently forbidding publication of the manuscript[75] by others prior to the time the author directs.

When Was the Revelation Received and When Did the Four Emissaries Travel to Kingston?

Date of the Revelation. None of the major secondary sources[76] assigns either an exact date or an exact period of time either to the revelation or to the trip. The earliest copy of the revelation has now been made available (in *Manuscript Revelation Books*) and John Whitmer, the scribe who penned the text of the revelation in Revelation Book 1 (or "Book of Commandments and Revelations"), assigns to the "Commandment" the date "AD 1830."[77] Whether that is accurate or not

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[74] William Mack and William Benjamin Hale, "Common-Law Rights," in "Copyright and Literary Property" 13 *Corpus Juris* 947 (New York: The American Law Book Co., 1917) § 4. The tense of the verbs is changed in the quotation to accommodate the fact the work cited was published in 1917.

[75] The material to which the pre-publication common law copyright applied could expand as the amount of material added to the manuscript expanded. *See Cary v. Longman* (1801) 1 East. 358; 3 Esp. 273; 102 ER 138 (holding that if an author makes very considerable additions to a work before printed he obtains a copyright in the additions, and can maintain an action for an infringement of it). Thus, the text to which the Prophet's pre-publication common law copyright applied expanded over time as he continued to dictate the text for inclusion in the manuscript.

[76] For purposes of this article, a "secondary source" is one authored by someone who either wrote or lived at a time contemporaneous with the event (such as Page and Whitmer), as opposed what is characterized here as a "derivative source," namely, a source authored by one who relies only on primary, secondary or other derivative sources but not personal experience.

[77] *See Manuscript Revelation Books*, p. 30.

is not known.[78]

One would think that apart from when it was that the Prophet and his associates first perceived a pressing need to obtain funding for the printing of the Book of Mormon, the date of depositing the title of the Book of Mormon with the clerk of the Northern District of New York (June 11, 1829) might well be near the the earliest date when the Prophet could have received the so-called Canadian copyright revelation. Thereafter, in June of 1829 the Prophet was in Palmyra near Manchester (being there on about June 24 when the Eight Witnesses were shown the plates of gold and apparently being there on June 26 when the Egbert B. Grandin published the title page of the Book of Mormon as a "curiosity" in the *Wayne Sentinel*). On or about July 1, 1829 the Prophet completed the translation while in Fayette, some 35 miles from Manchester. Some time in early July of 1829, the Prophet went to Harmony. These dates precede August 25, 1829, when Martin Harris mortgaged his farm to assure payment of $3,000 to Grandin for the printing of the first 5,000 copies of the Book of Mormon. In an October 22, 1829 letter to Oliver Cowdery, the Prophet wrote the following from Harmony, Pennsylvania:

> there begins to be a great call for our books in this country the minds of the people are very much exicted when they find that there is a copy right obtained and that there is really book, about to be printed I have bought a horse of Mr. Stowell and want some one to come after it as soon as convenient Mr. Stowell has a prospect of getting five or six hundred dollars he does not know certain that he can get it but he is a going to try and if he can get the money he wants to pay it in immediately for books[79]

Wherever the Prophet was when he purchased the horse from Josiah Stowell—Stowell, for all we know, lived in South Bainbridge, Chenango County, New York at the time of the purchase and the letter indicates the Prophet wrote from Harmony, Pennsylvania, approximately 23 miles away—the fact that the Prophet spoke of Stowell as having "a prospect of getting five or six hundred dollars" that he wants to pay in immediately "for books," clearly seems to invite the inference that the time when Stowell entertained such a prospect of income is a time separate from when he experienced a similar prospect of income (though of a much higher amount of money) from an attempted sale of a copyright in Canada. But which came first in time is not apparent. On November 6, 1829, Oliver wrote from Manchester to the Prophet in Harmony, reporting on the printing of the book. Similarly, Cowdery wrote from Manchester to the Prophet in Harmony on December 28, 1829. On January 16, 1830, Joseph signed what amounts to a promissory note agreeing that Martin Harris shall have "an

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[78] *See Manuscript Revelation Books*, p. 5, concerning the chronological order and non-chronological order of some of copies of the revelations as they are set forth in Revelation Book 1. The editors' notes on pages 31 and 33 of *Manuscript Revelation Books* assign "Circa Early 1830" as the date for receipt of the revelation.

[79] Joseph Smith, Harmony, Pennsylvania to Oliver Cowdery, Manchester, Seneca County, New York, 22 Oct 1829, Joseph Smith, Letterbook 1, p. 9, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

equal privilege" with the Prophet and his friends "of selling the Book of Mormon." That document was written from Manchester.[80] That the Prophet received the so-called Canadian copyright revelation while in Manchester (RB_I:30-31) would at least justify eliminating not only October 22, 1829 (the date of the letter to Oliver Cowdery), together with dates immediately preceding it and following it, but also, *with one significant exception*, the entire period from about early July 1829 to about March 26, 1830, during all of which time, apparently, the Prophet he was located in Harmony. Thus, the Prophet may have received the so-called Canadian copyright revelation either in June or early July of 1829 or, more probably, as shown immediately below, within a couple of days prior to or after January 16, 1830.

The one exception, however, is noteworthy. It may very well be that the Prophet received the revelation in mid-January of 1830, shortly after Hyrum Smith and Oliver Cowdery discovered that Abner Cole was infringing the Prophet's copyright in the book, when the Prophet apparently made two trips from Harmony to Manchester to confront Cole about it. Cole published a newspaper, *The Reflector*, which Grandin printed. Cole apparently saw printed pages of the Book of Mormon in Grandin's shop as early as September 2, 1829[81] and by January 2, 1830 had printed the first of a number of portions of Book of Mormon text in his newspaper. Oliver apparently was aware of the impending infringement before it actually occurrred, apparently having discovered it on Sunday, December 27, 1829.[82] When Oliver and Hyrum were unable to stop the infringement, Joseph returned from Harmony to Manchester, arriving there apparently on Sunday, January 3, 1830, "nearly stiffened with the cold," one day after the first infringement appeared in print. The Prophet convinced Cole to *agree to submit* the matter to an arbitration, requiring Cole to desist,[83] which he did but not until publishing two more extracts (on January 13 and 22, 1830). More importantly, after this initial confrontation between the Prophet and Cole and after the Prophet's return to Harmony, the fact that the family apparently was "again compelled to send for" the Prophet *to deal with matters concerning the costs of printing the Book of Mormon*—which may well have been taken care of at or near the time the Prophet executed the January 16, 1830 note to Martin Harris[84]— it is quite possible that the so-called Canadian copyright revelation was received within a day or two prior to

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[80] Agreement, Joseph Smith and Martin Harris, Manchester, New York, January 16, 1830, DS, in handwriting of Oliver Cowdery, Historical Society of Pennsylvania.

[81] The Reflector, no. 1, vol. 1, September 2, 1829 ("the Golden Bible, by Joseph Smith Junior, author and proprietor, is now in press and will shortly appear").

[82] Hedges, Andrew H. "The Refractory Abner Cole," in Parry, Donald W. , Daniel C. Peterson and Stephen D. Ricks, eds., *Revelation, Reason, and Faith: Essays in Honor of Truman G. Madsen* (Provo, Utah: Foundation for Ancient Research and Mormon Studies, 2002), p. ***.

[83] Smith, Lucy Mack, *Biographical Sketches of Joseph Smith the Prophet, and His Progenitors for Many Generations* (Liverpool: S.W. Richards, 1853), pp. 149-150.

[84] Hedges, Andrew H. "The Refractory Abner Cole," in Parry, Donald W. , Daniel C. Peterson and Stephen D. Ricks, eds., *Revelation, Reason, and Faith: Essays in Honor of Truman G. Madsen* (Provo, Utah: Foundation for Ancient Research and Mormon Studies, 2002), p. ***.

or a day or two after January 16, 1830, when the Prophet was in Manchester on what apparently was his second trip there that month.[85]

Date of the Kingston Trip. Given the fact that the four emissaries reportedly arrived in Manchester from their disparate residences before the revelation was received, it would be reasonable to conclude they did not tarry in Manchester long after the revelation was received before departing on their journey to Kingston. Larry E. Morris of the Neal A. Maxwell Institute for Religious Scholarship offers a "Book of Mormon Chronology" in which he dates the trip to Kingston as "circa January 1830."[86] Susan Easton Black and Larry C. Porter date the trip to Kingston as "[i]n the winter of 1829-1830" though they do not supply a source or analysis substantiating that dating.[87] Dale R. Broadhurst[88] dates the trip ("to Toronto, Ontario, Canada to try and sell the rights for the printing of the Book of Mormon in Canada") as "1829 mid-July?"[89] One could read Hiram Page's account, with its mention of "a chance to sell a copy right in Canada *for any useful book*," to mean that the *printed* book was already in existence at the time of the revelation and trip. But his statement could equally justify the interpretation that existence of such a "useful book" was, at the time of the revelation, still a future existence and that the book was then only still in manuscript form.The statement is ambiguous on this score. Similarly, one could read the account of the interview with David Whitmer, with its mention of two emissaries supposedly taking "the *manuscript* to Canada" as an indication that the trip occurred pre-printing and pre-publication. But nothing forces that conclusion; printing took some months and the manuscript existed after publication (though taking

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[85] Hedges expresses concern about whether Joseph Smith, Sr. could possibly have made "the 240-odd-mile round-trip between Manchester and the Prophet's home near Harmony in six days at most—no small feat, considering the time of year." Stating the journey was "difficult," Hedges cites "the reference by Lucy to the expense incurred from making trips to Harmony this winter" as suggesting "that Joseph Sr. made the journey by stage, most of which averaged about sixty miles per day at the time through regular and frequent substitutions of horses." Hedges does not provide a citation to the "sixty-miles-per-day" calculation. According to William Renwick Riddell in his "London to Toronto in 1836," reprinted in *Canadian National Railways Magazine* (April 1922), part of the travels of Anna Brownell Murphy Jameson included passage both on a stage coach from Utica to Rochester, a trip of "about 135 miles," which Riddell reports "took 56 hours and passage on a carriage from Rochester to Lewiston, a trip of "70 miles" which took "28 hours." The trips on stage coach and carriage were made in lieu of passage on a steamboat on the Erie Canal because the canal was frozen. Both the stage coach trip and the carriage trip averaged 2.5 miles per hour, equivalent to Hedges' "sixty-miles-per-day" calculation.

[86] http://mi.byu.edu/publications/papers/?paperID=9&chapterID=71 (Occasional Paper # 5). No citation or explanation is given to support the date "circa January 1830."

[87] Black, Susan Easton, and Larry C. Porter, "For the Sum of Three Thousand Dollars," *Journal of Book of Mormon Studies* (Provo, Utah: Maxwell Institute, 2005) vol. 14, iss. 2, pp. 4-11 (*see* note 36).

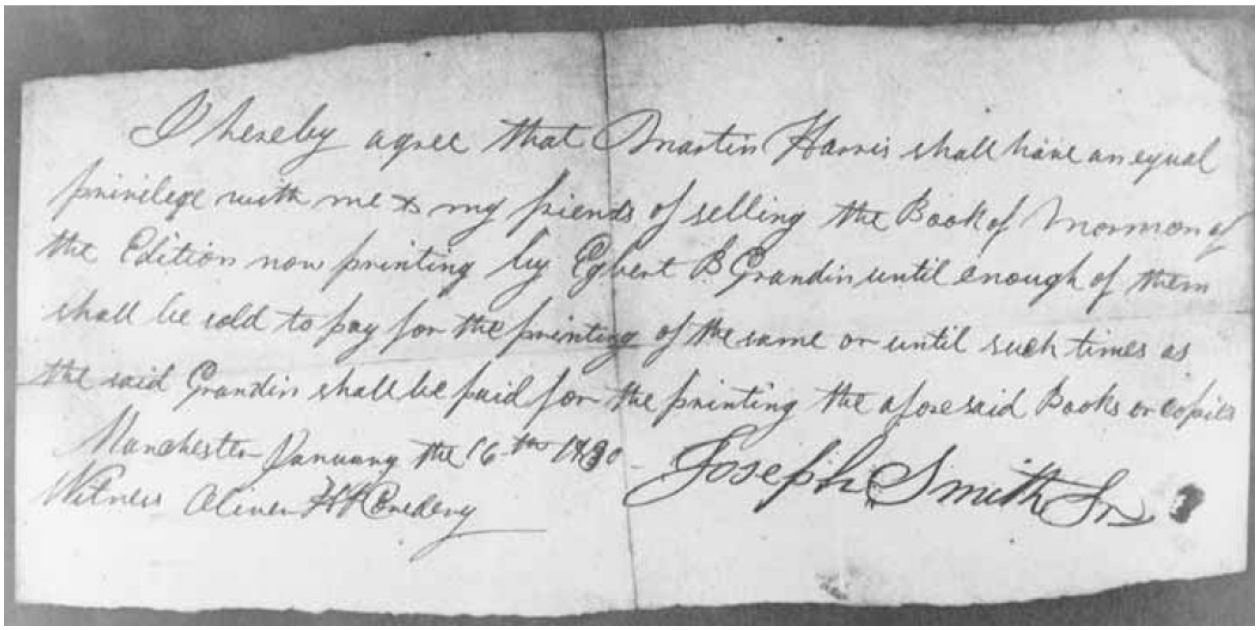
[88] *See* biography at http://www.oberlin.edu/archive/holdings/finding/RG30/SG294/ biography.html.

[89] http://olivercowdery.com/history/Cdychrn1.htm. Mr. Broadhurst supplies no source for his assignment of this date. He also speculates that "Their [Oliver Cowdery's and Hiram Page's] route of travel may have taken them near Cattaraugus Co., NY (where Oliver's brothers Warren and Dyar then lived)."

a manuscript when a printed volume would do seems inconceivable).

Hiram Page states that the group expected the revelation and "when it came," the group departed for Upper Canada. David Whitmer indicated that Cowdery and Page "crossed the lake on the ice,"[90] from which it can be gleaned the trip likely occurred in late January, when the lake that year was frozen over from shore to shore. (See more on this below.)

[90] The John L. Traughber Papers, Box 2, Folder 26, "False Prophecies," Manuscripts Division, University of Utah Marriott Library Special Collections, Salt Lake City, Utah (cited in Marquardt, H. Michael, *The Rise of Mormonism: 1816-1844* ()) p. 155.


I hereby agree that Martin Harris shall have an equal privilege with me & my friends of selling the Book of Mormon of the Edition now printing by Egbert B Grandin until enough of them shall be sold to pay for the printing of the same or until such times as the said Grandin shall be paid for the printing the aforesaid Books or Copies

Manchester January the 16th 1830 Joseph Smith Jr

Witness Oliver H Cowdery

Figure 6—Agreement, Joseph Smith and Martin Harris, Manchester, New York, 16 Jan 1830, DS, in handwriting of Oliver Cowdery, Historical Society of Pennsylvania.

If the revelation had been received in mid-1829 (which is nowhere attested) and if the emissaries also had traveled in June or July of 1829 (which also is nowhere attested), the weather would not at all have been an impediment. But if they traveled in the winter of 1830 (near or after January 16, 1830), which is commonly understood to be when the trip occurred, even then the journey was perfectly possible. Whatever the temperatures and the amount of snowfall were in January of 1830, the conditions apparently were not sufficiently inhospitable for travel to Kingston even at that time, whether by foot or even *by horse*[91] across the frozen lake[92](*see* Fig. 7, setting forth

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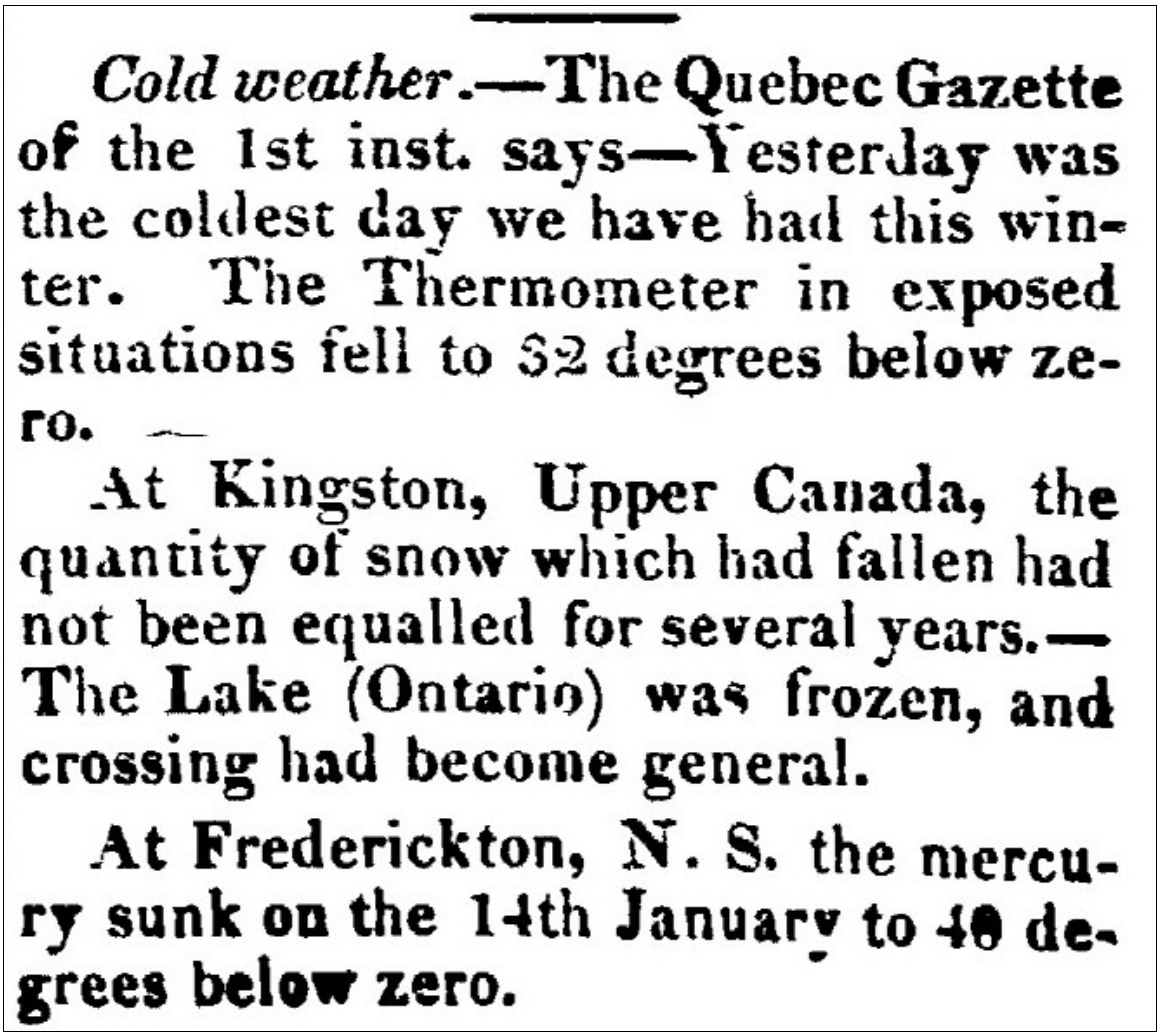
[91] Note that the weather report does not state how much of the lake was frozen over; however, the entire lake is known to freeze over on rare occasion, from the New York shores to the Canadian shores, over the full fifty miles of water. Such a full freeze apparently occurred in February of 1934 and may have occurred, or at least nearly occurred, in 1874, 1893, and 1912. *See* May, Gary, "The Day the Lake Froze Over," *in Watershed Magazine* (Winter 2008/2009), at http://www.garymay.ca/article18.htm. Apparently in 1920 the ice extended all the way from Rochester to Cobourg. *See* http://images.ourontario.ca/Cobourg/details.asp?ID=18562. Note also the following account of how rare it is for the entire lake to freeze over during the winter and how steamboats nevertheless do make wintertime lake trips through the ice:

> [It] is worthy of consideration that the waters of only a small part of the surface of Lake Ontario are frozen over in the winter. At the mouth of the Genesee, and on each side of it for a long distance, the lake is frozen only for a little way, and the ice is broken in pieces and dashed upon the shore by the winds and waves every few days. At the western part its waters are frozen for many miles. In 1835-6, the steamboat Traveller ran through the winter from Niagara to Toronto, across the lake in a direct line thirty-six miles. In March of that winter, the ice once covered the whole distance, and was broken through by the boat. On the return of the boat the water was found frozen again in the passage, but only half an inch thick. But this is a rare occurrence: it now took place in a very cold winter, and when the waters had been unruffled by winds for some days, or, as the engineer of the boat remarked, 'during a calm.'

O'Reilly, Henry, *Settlement in the West—Sketches of Rochester* (Rochester: William Alling, 1838), p. 83. But the winter of 1829-1830 may indeed have been one of those occasions when the entire lake froze over. According the Perry, Kenneth A., *The Fitch Gazetteer: An Annotated Index to the Manuscript History of Washington County, New York* (Bowie, Md: Heritage Books, 1999), vol. 4, p. 565, quoting manuscripts stating that the winter of 1829-1830 was "remarkably late in beginning," being "extremely mild through Dec," with "canals being open & ice free until Dec. 18th," but "then becoming cold," and later the winter becoming "severe," "w. intense cold through Feb., & deep snow," with "Kingston, Upper Canada, [experiencing] the deepset [*sic*] snow in several yrs., & Lake Ontario frozen over." The *Kingston Chronicle* of April 3, 1830 (p. 2, col. 6) refers to the "Opening of the Navigation," stating, "The steamboat Niagara touched at this place on Thursday last [April 1], on her route from Prescott to York and Niagara—and the Queenston, we learn[,] passed up by the American channel on Wednesday. [¶] The ice still lingers in our harbor—but looks so much exhausted that a final dissolution must soon take place." According to Dileno Dexter Calvin, Lake Ontario is known to freeze "across its full width of fifty miles," though it does so "seldom." *See* Glover, Terret R. and Dileno Dexter Calvin, *A Corner of Empire: The Old Ontario Strand* (Cambridge: University Press, 1937), p. 112. "About four inches of ice will carry a horse." *Ibid*. at p. 113.

[92] Bennett and Olsen state the party "likely walked across frozen Lake Ontario from Sacketts Harbour near Oswego, New York, to their Canadian destination of Kingston." *See* Bennett and Olsen, "Of Printers, Prophets, and Politicians," at 181.

a January 31, 1830 weather report for Quebec; Kingston, Upper Canada; and Frederickton, Nova Scotia):



Cold weather.—The Quebec Gazette of the 1st inst. says—Yesterday was the coldest day we have had this winter. The Thermometer in exposed situations fell to 32 degrees below zero.

At Kingston, Upper Canada, the quantity of snow which had fallen had not been equalled for several years.—The Lake (Ontario) was frozen, and crossing had become general.

At Frederickton, N. S. the mercury sunk on the 14th January to 40 degrees below zero.

Figure 7—Republican Compiler [newspaper] (Gettysburg, Pennsylvania) 23 February 1830 (Vol XII, no. 24), page 2, col. 5.

Whether the detail of *taking the manuscript* to Canada be true, which seems unlikely, the trip nevertheless likely occurred (or at least Whitmer seemingly would have placed it) prior to March 26, 1830 (*i. e.*, prior to publication of the Book of Mormon in the United States). It seems improbable that the Prophet's emissaries departed *after* the March 26, 1830 publication of the Book of Mormon in the United States; once a book is published in the United States, the author's common law pre-publication rights therein are considered to have terminated and copyright protection derives from statutory provision. At that point, the rights to the book likely would have no value *in Canada* except as may have been purchased by a publisher there, and a Canadian publisher likely would simply publish it either pursuant to a short-run lease[93] or pursuant to a purchase of a partial interest in the copyright. For an apparent example of this, note the publication history of an 1830 American cookbook republished in 1831 in Kingston. In 1830, in Watertown, New York, an unknown author published *The Cook Not Mad, or Rational Cookery; Being a Collection of Original and Selected Receipts*[94], . . . (Watertown: Knowlton & Rice, 1830). *See* Figs. 8 and 9. Within one year after its publication, possibly in response to the requests of advance purchasers,[95] the book was published also by a Kingston publisher (though it either may have been printed in Watertown and delivered to the Kingston publisher with a title page reflecting Kingstonian publication[96] or may have been printed in Kingston using stereotype plates from Watertown, but employing a Kingston title page[97]). *See The Cook Not Mad, or Rational Cookery; Being a Collection of Original and Selected Receipts*, . . . (Kingston, U.C.: James Macfarlane, 1831). The recto side of the title page of the 1831 Kingston publication reflects publication by James Macfarlane, a Kingston publisher. Reference to "American Publick" on the title page of the 1830 Watertown publication is replaced on the 1831 Kingston publication with reference to the "Canadian Public"). And whereas the verso of the title page of the

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[93] As suggested by Bennett and Olsen. *See* Bennett and Olsen, "Of Printers, Prophets, and Politicians," at 180.

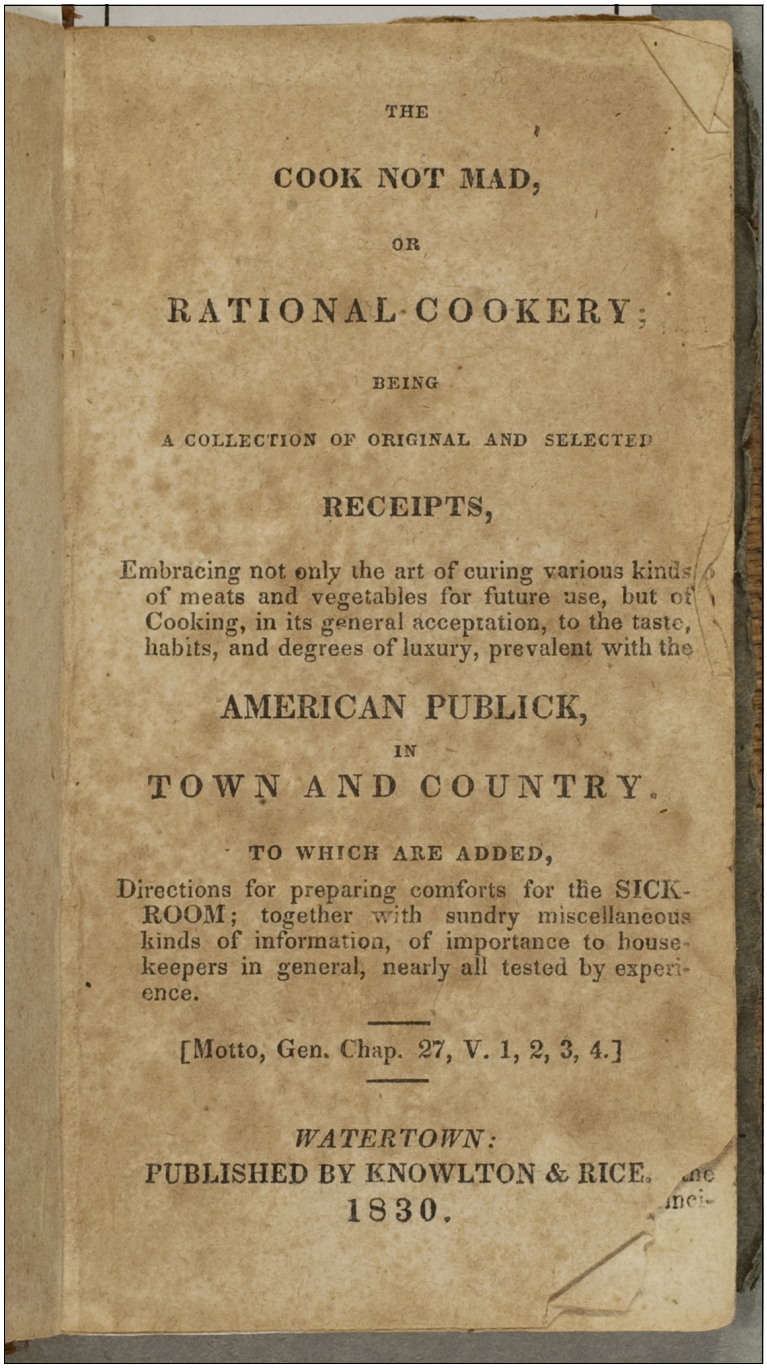
[94] The word "receipts" is an older form of the word "recipes." *See, e.g.,* "World Wide Words: Michael Quinion Writes on International English from a British Viewpoint" (last seen on February 10, 2010 at http://www.worldwidewords.org/qa/qa-rec1.htm). *See also* OED, s.v., "receipt" (at http://www.bl.uk/learning/resources/oed/50199019(2).htm) and s.v., "recipe" (at http://www.bl.uk/learning/resources/oed/50199169(2).htm), both last seen on February 10, 2010.

[95] *See* Williamson, Mary F., "A Beginning: A Publication History," *in The Culinary Historians Of Ontario* (Summer 2001, No. 29), p. 2 ("it may be that they were already spoken for when they arrived in Kingston"). My searches in the *Kingston Chronicle* for 1830-1831 find no reference to the book whatsoever; Williamson apparently found no references to the book, either, for she states, "The book seems not to have been listed in newspaper advertisements for publications available from Macfarlane & Co.'s Kingston bookshop." *Ibid.*

[96] *See* Williamson, Mary F., "Recipe and Household Literature," *in* Fleming, Patricia Lockhart, Gilles Gallichan, and Yvan Lamonde, *History of the Book in Canada, Volume I, Beginnings to 1840* (Toronto: University of Toronto Press, 2004), p. 276.

[97] *See* Gundy, H. P., "Publishing and Bookselling in Kingston Since 1810," *Historic Kingston* 10 (Kingston: Kingston Historical Society, January 1962), 27.

1830 Watertown publication sets forth a quotation of the document on file in the office of the Clerk of the Northern District of New York, by which it is memorialized that Knowlton & Rice "on the eleventh day of October, . . . A. D. 1830 . . . deposited in this Office the title of a book the right whereof they claim as proprietors," the 1831 Kingston publication omits the quotation altogether (likely owing to the fact that the registration of the Statute of Anne did not extend to the Canadian provinces). *See* Figs. 10 and 11.



THE

COOK NOT MAD,

OR

RATIONAL COOKERY;

BEING

A COLLECTION OF ORIGINAL AND SELECTED

RECEIPTS,

Embracing not only the art of curing various kinds of meats and vegetables for future use, but of Cooking, in its general acceptation, to the taste, habits, and degrees of luxury, prevalent with the

AMERICAN PUBLICK,

IN

TOWN AND COUNTRY.

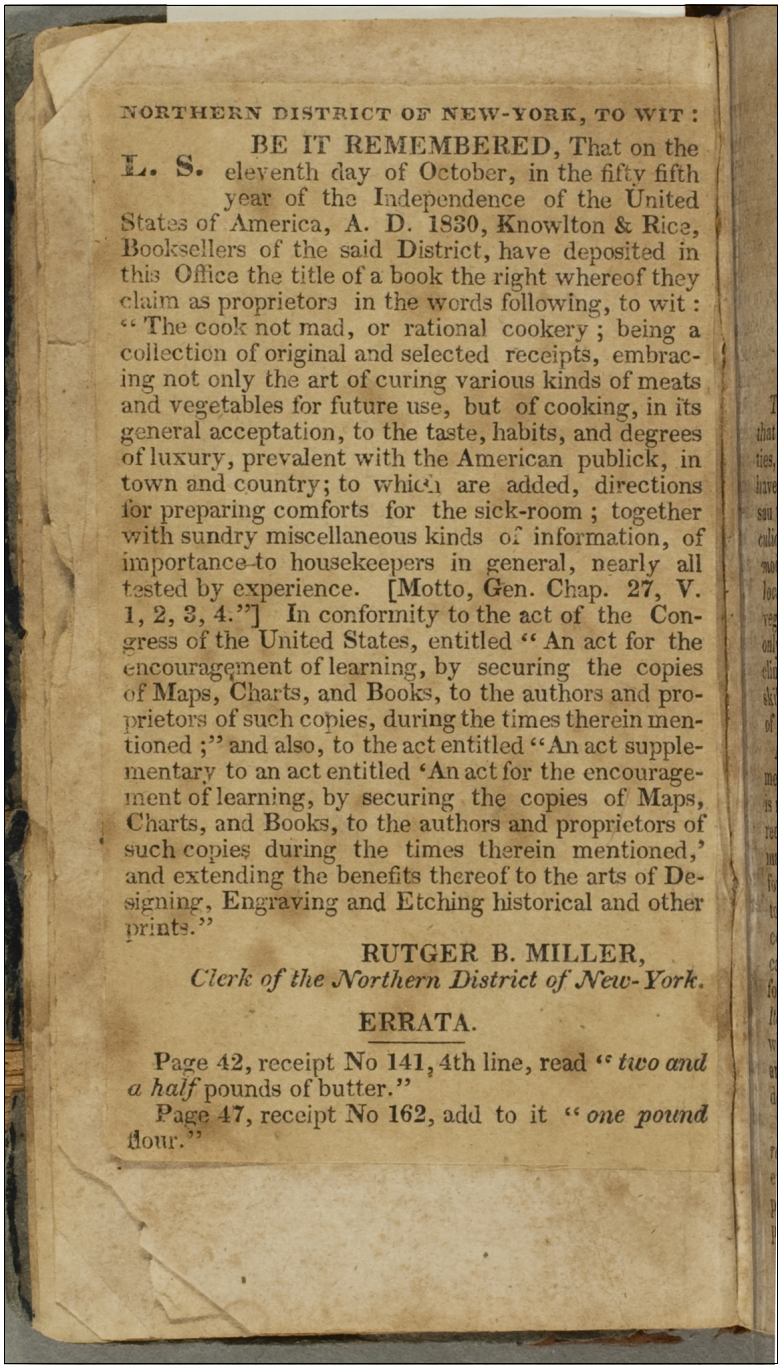
TO WHICH ARE ADDED,

Directions for preparing comforts for the SICK-ROOM; together with sundry miscellaneous kinds of information, of importance to house-keepers in general, nearly all tested by experience.

[Motto, Gen. Chap. 27, V. 1, 2, 3, 4.]

WATERTOWN:
PUBLISHED BY KNOWLTON & RICE.
1830.

Figure 8—Recto of the title page of *The Cook Not Mad* (Watertown: Knowlton & Rice, 1830).



NORTHERN DISTRICT OF NEW-YORK, TO WIT:

L. S. BE IT REMEMBERED, That on the eleventh day of October, in the fifty fifth year of the Independence of the United States of America, A. D. 1830, Knowlton & Rice, Booksellers of the said District, have deposited in this Office the title of a book the right whereof they claim as proprietors in the words following, to wit: "The cook not mad, or rational cookery; being a collection of original and selected receipts, embracing not only the art of curing various kinds of meats and vegetables for future use, but of cooking, in its general acceptation, to the taste, habits, and degrees of luxury, prevalent with the American publick, in town and country; to which are added, directions for preparing comforts for the sick-room; together with sundry miscellaneous kinds of information, of importance to housekeepers in general, nearly all tested by experience. [Motto, Gen. Chap. 27, V. 1, 2, 3, 4."] In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned;" and also, to the act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of Designing, Engraving and Etching historical and other prints."

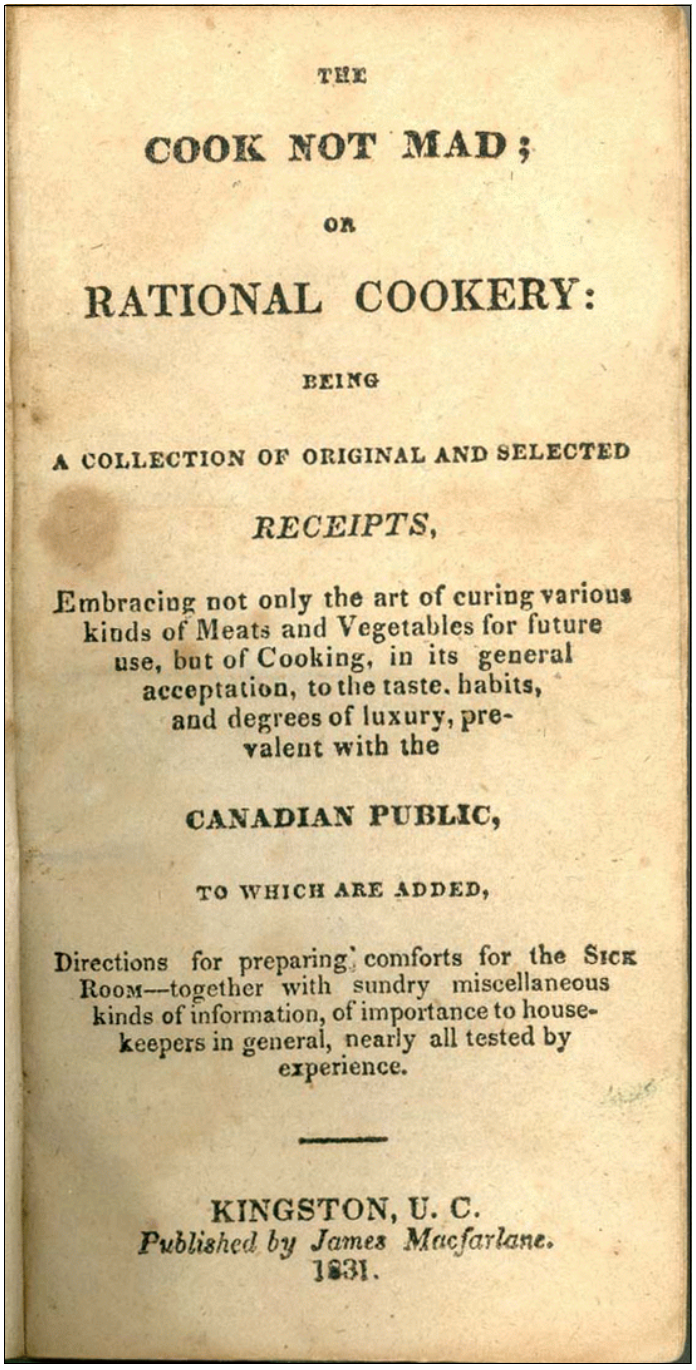
RUTGER B. MILLER,
Clerk of the Northern District of New-York.

ERRATA.

Page 42, receipt No 141, 4th line, read "*two and a half* pounds of butter."

Page 47, receipt No 162, add to it "*one pound* flour."

Figure 9—Verso of the title page of *The Cook Not Mad* (Watertown: Knowlton & Rice, 1830).



THE

COOK NOT MAD;

OR

RATIONAL COOKERY:

BEING

A COLLECTION OF ORIGINAL AND SELECTED

RECEIPTS,

Embracing not only the art of curing various kinds of Meats and Vegetables for future use, but of Cooking, in its general acceptation, to the taste, habits, and degrees of luxury, prevalent with the

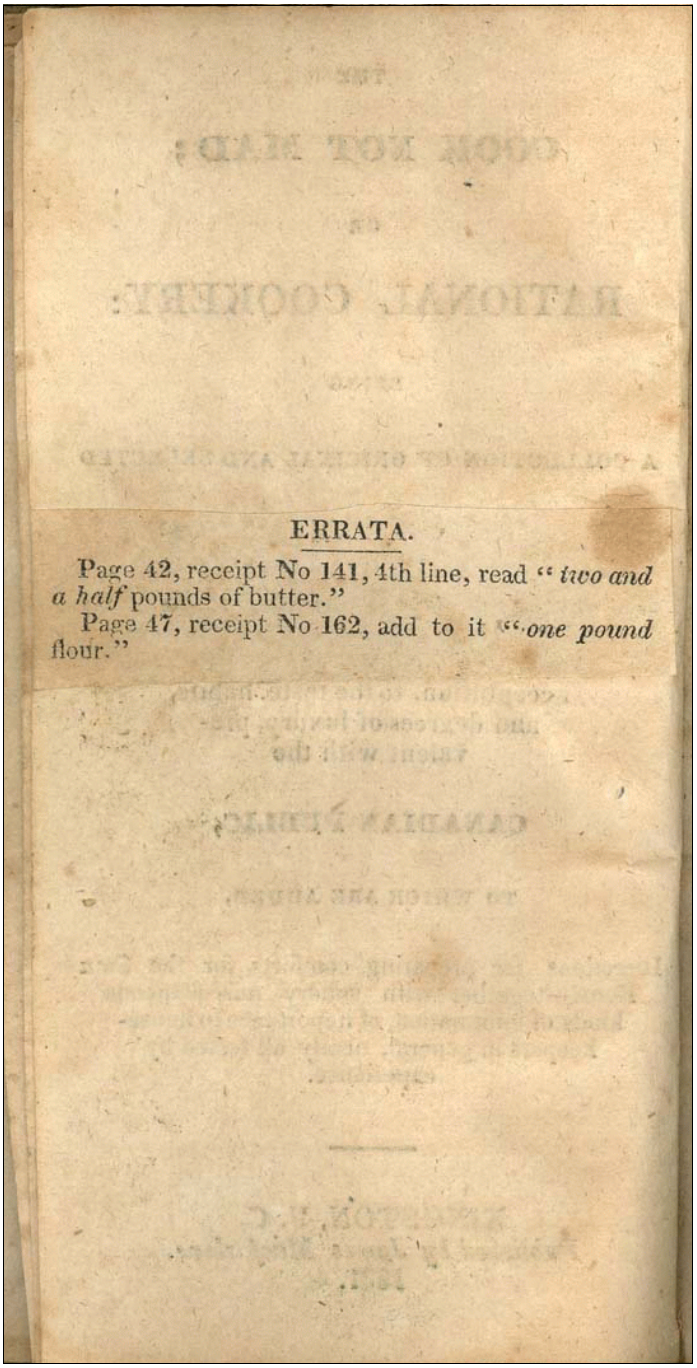
CANADIAN PUBLIC,

TO WHICH ARE ADDED,

Directions for preparing comforts for the SICK ROOM—together with sundry miscellaneous kinds of information, of importance to housekeepers in general, nearly all tested by experience.

KINGSTON, U. C.
Published by James Macfarlane.
1831.

Figure 10—Recto of the title page of *The Cook Not Mad* (Kingston: James Macfarlane, 1831). Toronto Reference Library. Photograph © 2010 Mary F. Williamson. Used by permission.



ERRATA.

Page 42, receipt No 141, 4th line, read "*two and a half* pounds of butter."

Page 47, receipt No 162, add to it "*one pound* flour."

Figure 11—Verso of the title page of *The Cook Not Mad* (Kingston: James Macfarlane, 1831). Toronto Reference Library. Photograph © 2010 Mary F. Williamson. Used by permission.

If the four emissaries went to Kingston *after* the time of the publication in the United States of the Book of Mormon (which also does not seem likely[98]), they probably would have taken with them a copy of the published book. That there is no mention of them taking a printed copy of the book with them is not evidence that they did not do so (such a conclusion would rely merely on an argument from silence); but when it is that the emissaries traveled to Kingston is simply not yet known and seemingly cannot be gleaned from the facts presently before us.[99] And because possibly "[i]t was common practice at the time for Canadian publishers to print their own editions [of books published in the United States] from stereotype plates from the U.S., or simply to paste their own title page into intact imported books . . . ,"[100] any expectation of pecuniary return for seeking to publish the Book of Mormon in Canada after its publication in the United States likely would be unfounded.

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[98] Whitmer places the trip in January of 1830. The John L. Traughber Papers, Box 2, Folder 26, "False Prophecies," Manuscripts Division, University of Utah Marriott Library Special Collections, Salt Lake City, Utah.

[99] The three publishers in Kingston, Upper Canada, in 1829-1830 were Stephen Miles, James Macfarlane, and Hugh Christopher Thomson. Macfarlane's office account and letterbooks do not pre-date 1832; no records of Stephen Miles from that time period seem to have survived. And records for Thomson for that time period are currently still being sought; they may contain information helpful to this research, they may not.

[100] Mary F. Williamson, "A Beginning: A Publication History," in *The Culinary Historians Of Ontario* (Summer 2001, No. 29), p. 2 (providing the results of a comparison between the Watertown, New York publication in 1830 of a book of recipies ["receipts"], titled *The Cook Not Mad*, a copy of which was deposited on October 11, 1830 in the Northern District of New York Clerk's Office, and the Kingston edition of the same book, published and printed in Kingston in 1831, noting that "the only apparent differences are the wording of the title as it appears on the title-page and cover, and the copyright statement on the verso of the title-page"). In an email communication, Ms. Williamson, retired Fine Arts Librarian, York University, states that she and Sandra Alston of the Thomas Fisher Rare Book Library, University of Toronto (retired), whom she describes as "an expert in early Canadian publications," together examined the American and Canadian versions of *The Cook Not Mad* and noted those two differences, attributing the differences to apparent adherence to the practice of pasting a canadian title page into an intact imported book. Examination of the recto and verso sides of the title page of the 1831 Kingston edition of *The Cook Not Mad* reveals there is no copyright statement on the verso of that edition of the book (of course); and Ms. Williamson confirms in an email that she meant to write "the only apparent differences are the wording of the title as it appears on the title-page and cover, and the copyright statement on the verso of the title-page *of the American edition*."

Figure 12—"A View from the Hill Cumorah," (August 1907), by George Edward Anderson. Brigham Young University. Dept. of Religious Education; Brigham Young University. Harold B. Lee Library. Permission to be sought. Do not duplicate.

Who Went? And Whence, Whither and How Did They Go?

Who Went? The revelation seems to command *all four* emissaries, Cowdery, Knight, Page, and Stowell, to "go to Kingston"; the text uses the plural "ye" and does not enumerate fewer than all four men in either of the two passages in which any of them are named. Although non-participant David Whitmer says *two went* and that he saw the same *two return* (Hiram Page and Oliver Cowdery), Page clearly implies that all four went, not only stating in his short account the names of all four emissaries but thereafter using the pronoun "we" ten times—concerning the preparations for the trip and the trip itself—without indicating in any way that fewer than all participated. And while in one account Whitmer states that two went and two returned, in another account (), it is quite possible of course that four went and when Whitmer saw two return, he saw only those two who returned all the way back to the Manchester area, to the home of Whitmer's father, where Whitmer says he and the Prophet were located when the two (Cowdery and Page) returned.

Whence? Page says that at the time the four emissaries were preparing to leave, they "had assembled at Father Smiths" (whose home was in Manchester, Ontario County), and that at that time the emissaries themselves "were *living* from 30 to 100 miles apart." In early 1830, **Oliver Cowdery** apparently was still boarding with the Whitmer family in Fayette, Seneca County, New York. He had apparently arrived there in the summer of 1829 with Joseph and Emma and he was present when the Church was organized there in the spring of 1830.[101] On April 11, 1830, Oliver Cowdery baptized **Hiram Page** in Seneca Lake.[102] The 1830 United States Federal Census enumeration places Page in Fayette Township, Seneca County, New York[103]; the enumeration date is not recorded. Both the Prophet's history[104] and Joseph Smith—History 1:56 place **Josiah Stowell**'s (Stoal's) residence in October of 1825 in Chenango County, New York. On 28 June 1830, the Prophet was charged with disorderly conduct and taken to South Bainbridge, Chenango County for trial, where Stowell testified on the Prophet's behalf.[105] The 1830 United States Federal Census enumeration places Stowell's

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[101] Carmack, John K. "Fayette: The Place the Church was Organized" in *Sperry Symposium Classics: The Doctrine and Covenants*, ed. Craig K. Manscill (Provo and Salt Lake City: Religious Studies Center, Brigham Young University, and Deseret Book 2004), 48-55. Even if the argued theory is credited that the Church was organized in Manchester, New York, for purposes of this present paper, crediting or discrediting such a theory is irrelevant here; the distances that Page asserts existed between the locations where the emissaries were situated ("from 30 to 100 miles apart") and the distances either from Manchester to York or Kingston or from Fayette to York or Kingston are not materially different. The copy of the revelation under discussion states it was "given at Manchester Ontario New York."

[102] History [1839 draft], Joseph Smith, James Mulholland scribe. LDS Church Archives. Transcript in *Papers of Joseph Smith, Volume 1: Autobiographical and Historical Writings*, edited by Dean C. Jessee (Salt Lake City: Deseret Book Company, 1989) 1:231–264.

[103] 1830 United States Federal Census, Fayette, Seneca, New York (Roll 109; Page: 68).

[104] Manuscript History of the Church (December 1805–August 30, 1834), vol. 1.

[105] Newel Knight holographic reminiscences ca. 1846 (Newell Knight Journal), Church Archives. Transcript, Early Mormon Documents 4:30-31. *Times and Seasons* 4, no. 3 (Dec. 15, 1842): 39-41; *Papers*

residence in Bainbridge, Chenango County, New York[106]; the date of the enumeration is not recorded. And in early 1830, **Joseph Knight** apparently was still living on his farm, as he had since 1811, located at Pickerel Pond, immediately to the east of Nineveh, Colesville township, Broome County, New York, for in June of 1830, a mob seeking to harass the Prophet surrounded Knight's residence, located in that place. The 1830 United States Federal Census enumeration places Knight's residence in Colesville Township, Broome County, New York.[107]

Based on this brief analysis, it would appear that the four men actually were living about 113 miles apart (the distance from Fayette to Bainbridge and Colesville being about 113 miles); the distance from Bainbridge and Colesville to Manchester, the location where the revelation was received, is about 130 miles. Whitmer's account expressly states that only two (Hiram Page and Oliver Cowdery) took the trip—and that they went to Toronto (known at the time of the trip as York). If Whitmer were correct that only Page and Cowdery went and returned—both of whom apparently resided in Fayette (as David Whitmer himself apparently did[108])—then Whitmer's non-participant account appears to constitute yet another attempted refutation of Page's account, not only because Whitmer names fewer participants and identifies a different destination but because he places the two participants' residences in the same town instead of, as Page has it, "from 30 to 100 miles apart."

Given the fact that Page is the only person who even alludes to the identity of the place whence the emissaries departed—namely, Father Smith's home in Manchester—the likelihood is

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of Joseph Smith, Volume 1: Autobiographical and Historical Writings, edited by Dean C. Jessee (Salt Lake City: Deseret Book Company, 1989): 1:312; *Millennial Star* 4, no. 9 (Jan 1844): 133-139..

[106] 1830 United States Federal Census, Bainbridge, Chenango, New York (Roll 86; Page 2).

[107] 1830 United States Federal Census, Colesville, Broome, New York (Roll 85; Page 54).

[108] Although the 1830 United States Federal Census does not seem to enumerate David Whitmer and in his accounts he does not expressly state the name of the place where he, himself, was located when he was an "eye witness" to the return of two emissaries, in his first account of the return of two of the emissaries he does nonetheless indicate that "Joseph was *at my father's house* when they returned [and] *I was there also*, and am an eye witness to these facts. *Jacob Whitmer and John Whitmer were also present when Hiram Page and Oliver Cowdery returned from Canada*." David Whitmer's father and brothers—Peter (1773-1854), Jacob (1800-1856), and John (1802-1878)—*are* enumerated in that census (as is the family of David's future wife, Julia A. Jolly), with the father, Peter, enumerated in Fayette (on page 68). It is possible that David Whitmer reported the return to Fayette of only two of the four emissaries because those two (Oliver Cowdery and Hiram Page), were themselves residents of Fayette; the other two emissaries, Josiah Stowell and Joseph Knight were, respectively, residents of Chenango County and Colesville Township, both located to the south of Syracuse. It is reasonable to conclude that Stowell and Knight did not proceed to Fayette with Cowdery and Page. The return trip of the four emissaries conceivably proceeded from Kingston to Oswego by steam-boat, south down the Oswego canal to Syracuse; and then further southward for Stowell and Knight to their homes and westward to Fayette for Cowdery and Page to their homes (after reporting to the Prophet at the home of Peter Whitmer, David Whitmer's father). If the trip were while the canals were still frozen, the trip by land still might have entailed the same different respective destinations for the returning travelers.

that the party left from there. Nothing is known to state or suggest otherwise.

Whither? And as for the destination, the one account we have *by a participant* clearly indicates the four emissaries named in the revelation all went to Kingston. All other accounts are hearsay accounts, at best.

How? Non-participant Whitmer says the trip occurred by the emissaries crossing Lake Ontario on the ice. That likely is true. If the emissaries traveled *before* the waters of the Erie Canal and of the lake froze, it is probable that from Manchester, the four men traveled northward a scant six and one-half miles to Palmyra, on the northern edge of which ran the Erie Canal, traversing from east to west. The emissaries then likely traveled to Kingston, Upper Canada entirely by water, first from Palmyra eastward on the Erie Canal by packet boat to Syracuse, thence by packet boat northward on the Oswego Canal to Oswego, and then 60 miles[109] by steam-boat northward across Lake Ontario from Oswego to Kingston, perhaps by way of Sacket's Harbor; numerous vessels crossed Lake Ontario from Oswego to Kingston during the season each year[110] (which season

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[109] *See* Thompson, Thomas S. *Thompson's Coast Pilot and Sailing Directions for the North-Western Lakes* (Detroit: W. A. Scripps, 1878), p. 17.

[110] In 1820 there were only four steamers on the Great Lakes, against seventy-one on Western rivers and fifty-two on the Atlantic coast.

> During the next decade eight steamers were built on the Great Lakes. The *Superior*, measuring 346 tons, came out in 1822 at Buffalo; the *Martha Ogden*, of 49 tons, at Sacket's Harbor, in 1823; the *Pioneer*, measuring 125 tons, at Buffalo, in 1825; the *Niagara*, measuring 157 tons, and the *Henry Clay*, same place, in 1826; the *Enterprise*, measuring 219 tons, at Cleveland, in 1826; the *William Penn*, measuring 215 tons, at Erie, in 1826; and one small craft of 94 tons.
>
> The steamer *Sheldon Thompson* came out in 1830, and carried three masts, the first of that rig on the lakes.

John Brandt Mansfield, ed., *History of the Great Lakes*, Vol. I (Chicago: J. H. Beers & Co. 1899) pp. 396-397. *See also Upper Canada Herald* (Kingston, ON), Sept. 16, 1829 (p. 3) ("The Steam Boat *Martha Ogden* has begun to ply between Oswego and this port [Kingston]. She arrived for the first time this morning"); *and see Geneva Gazette* (Geneva, NY), Aug. 12, 1829, citing the *Oswego Gazette* ("The *Oswego Gazette* of the 5th inst. speaks of the increasing business of that place. From eight to twenty vessels are frequently seen in the harbor, where two or three only were found a year ago. The steam-boat *Ontario* touches there on Fridays, on her way from Ogdensburgh to Niagara, and on Tuesdays on her return. The *Martha Ogden* will be ready to ply between that place, Sacket's harbor and Kingston in a few days; a steam-boat is nearly finished at Brownville, and an enterprising company at Oswego intend building two more before the close of the ensuing season"). Reference is even made of a *canal boat* having traversed Lake Ontario from Owego to Kingston in late 1830, though it was laden with live animals (an ox, a cow, a bull, two bears, a few squirrels, and some white mice), referred to as "Natural Curiosities," for viewing at a price. *See Kingston Chronicle* (Dec. 4, 1830), p. 3, col. 2.

generally ran from May 1 to November 15).[111] Though Rochester, of course, is closer to Manchester than is Oswego, it is to the *northwest* of Manchester and thus seemingly somewhat out of the way.[112] And it appears that Rochester may not have served as a port for passenger boat travel on Lake Ontario in 1829 and 1830[113] ; hence, water travel on Lake Ontario directly from Rochester to

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[111] *See Kingston Chronicle*, April 25, 1829, p. 3, col. 4 (stating that the "Lake Ontario Canadian Line of Steam-Boats"—*The Alicope*, *The Niagara*, and *The Queenston*—had made arrangements to commence their "regular trips" for the "present season" on "the first of May, and ending on the 15th November"); *see also Kingston Chronicle*, November 14, 1829 (same).

[112] It is of course possible, though far less likely, that the four men traveled from Manchester to Rochester (which is to the *northwest*) only to there travel by post coach from Rochester to Oswego and then by steam boat to Kingston. *See* the March 14, 1829 advertisement of the new line of post coaches from Rochester to Oswego, traveling on the Ridge Road three times per week, an advertisement published regularly and verbatim in the *Anti-Masonic Enquirer* (vol. 2, no. 14, Rochester, New York, Tuesday, May 12, 1829), p. 3, col. 6; *Anti-Masonic Enquirer* (vol. 2, no. 16, Rochester, New York, Tuesday, May 26, 1829), p. 4, col. 6; *Anti-Masonic Enquirer* (vol. 2, no. 27, Rochester, New York, Tuesday, August 11, 1829), p. 1, col. 5; *Anti-Masonic Enquirer* (vol. 2, no. 37, Rochester, New York, Tuesday, October 20, 1829), p. 1, col. 1; *Anti-Masonic Enquirer* (vol. 2, no. 41, Rochester, New York, Tuesday, November 17, 1829), p. 1, col. 4; and *Anti-Masonic Enquirer* (vol. 2, no. 49, Rochester, New York, Tuesday, January 12, 1830), p. 4, col. 6.

[113] In the many **Upper Canada newspaper references** to, and advertisements of, itineraries of steamboat traffic on Lake Ontario in 1829 and 1830, not once is Rochester mentioned as a stopping point or port used for passengers on steamboats. *See, e.g., Kingston Chronicle* (Jan. 3, 1829, p. 3, col. 3); *Kingston Chronicle* (Jan, 10, 1829, p. 3, col. 3; notice of a planning meeting for the passenger steamboat season; no mention of Rochester); *Kingston Chronicle* (Apr. 25, 1829, p. 3, col. 4, referring to the May 1-Nov 15, 1829 passenger steamboat season; no mention of Rochester); *Kingston Chronicle* (May 2, 1829, p. 4, col. 3); *Kingston Chronicle* (Jun. 13, 1829, p. 3, col. 3); *Upper Canada Herald* (Kingston, Sep. 16, 1829, p. 3, referring to the *Martha Ogden* which begins then to sail between Oswego and Kingston); *Kingston Chronicle* (Sep. 26, 1829, p. 4, cols. 4-5); *Kingston Chronicle* (Oct. 3, 1829, p. 4, cols. 4-5); *Kingston Chronicle* (Nov. 14, 1829, p. 4, cols. 4-5, concerning the passenger steamboat season from May 1-Nov 15, 1829); *Kingston Chronicle* (Nov. 21, 1829, p. 4, cols. 4-5); *Kingston Chronicle* (Dec. 19, 1829, p. 2, col. 1); *Kingston Chronicle* (Dec. 26, 1829, p. 3, col. 1, referring to a winter mail stage); *Kingston Chronicle* (Oct. 9, 1830, p. 2, col. 6, bottom, referring to the destruction of the *Martha Ogden* on passage from Oswego to Kingston, with passengers); *Kingston Chronicle* (Dec. 4, 1830, p. 3, col. 2); *See also* Cumberland, Barlow, *A Century of Sail and Steam on the Niagara River*, chapter 3; *Geneva Gazette* (Geneva, NY) Aug. 12, 1829 (referring to the *Martha Ogden*). Apparently Rochester first served as a port starting in about 1833. In the few **Rochester, New York newspaper references** to, and advertisements of, itineraries of steamboat traffic on Lake Ontario, no mention of passenger traffic directly from Rochester to Kingston appears. *See The Genesee Farmer* (Nov. 28, 1835), p. 380 (referring to what appears to be the advent of the "Port of Rochester" as a steamboat port "within the last two years"); *see also* Mansfield, J. B., ed., *History of the Great Lakes, Illustrated, In Two Volumes* (Chicago: J. H. Beers & Co., 1899), vol. 1, p. 448 (citing use of an agent in Rochester by "early transportation companies" that transported *ore, grain, and "all property"* as early as 1826, but with no mention of passenger travel from Rochester). In October of 1842, twelve or thirteen years after the four emissaries made their trip, the *Rochester Evening Post* (vol. 3, no. 119, Oct 17, 1842, p. 4, col. 2) advertised passage on the steamer *Gore* directly from Rochester to Kingston three times a week. The *Gore*

Kingston likely was not used.

And if the Erie Canal was frozen at the time of the trip and no boats were breaking through the ice[114]—which is the more likely scenario— it is possible the emissaries either traveled southward to Canadaigua and thence eastward by stage coach through Geneva and Auburn to Syracuse and thence northward to Oswego and by water to Kingston,[115] or they may have traveled from Manchester northward beyond Palmyra and beyond the Erie Canal, all the way to the State Road that ran eastward from Rochester and on that road eastward to Three Rivers and thence northward to Oswego, there to traverse Lake Ontario. Richard E. Bennett suggests the party may well have simply gone directly north from Manchester to the lakeshore and walked the entire distance from about Sodus Bay to Kingston over the frozen lake.[116]

Even if we were to posit that the emissaries went *entirely by land* from Manchester to Kingston (which is highly improbable[117]), we could nonetheless begin to address the question of *whither* by looking at factors outside the text of the revelation. The distance by land route from Manchester to York (westward and northward via Tonawanda and Hamilton) is 186 miles and the land-route distance from Manchester to Kingston (eastward and northward, via Watertown and Cape Vincent) is 158 miles. Even by land, from Manchester, Kingston was the closer of the two possible destinations. But no doubt, convenience by land route was not the factor—or likely not even *a* factor—that prompted the emissaries to go to Kingston instead of to York. Instead, it was *the*

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apparently was one of two boats in what a shipping notice of April 11, 1842 refered to as a "new line of steamers." *See* Robertson, J. Ross, *Robertson's Landmarks of Toronto* (Toronto: J. Ross Robertson, 1908) chapter 243.

[114] It was possible, even when the canal waters were frozen, for canal boats to navigate the canal. *See* Riddell, William Renwick, "London to Toronto in 1836," reprinted in *Canadian National Railways Magazine* (April 1922) (Anna Brownell Murphy Jameson "left New York [City], December 6 [1836], by the night steamer for Albany, there being no day boat. . . . In the morning, *the river was a sheet of ice through which the steamboat with its iron prow smashed its way for a time*; but a stop had to be called at 9 o'clock at Hudson, 114 miles from New York—it being feared that the boat would be frozen in at Albany. . . . From Utica, the usual way to travel to Upper Canada was by the Erie Canal either all the way to the Niagara River, or changing boats at Syracuse (55 miles west) to the Oswego Canal, thence to Oswego and then by steamboat to Kingston. But the Erie Canal was frozen and it was necessary to take a stage coach. . .").

[115] In 1829, the road to the south of Manchester provided, too, for travel eastward by stage coach (from Rochester to Pittsford to Canadaigua to Geneva to Auburn to Skaneateles and on past Syracuse through Manilius, Chittenango and Vernon on to Itica). *See* Stone, William Leete, "From New York to Niagara: Journal of a Tour, in Part by the Erie Canal, in the Year 1829," in *The Holland Land Co. and Canal Construction in Western New York* (Buffalo: Buffalo Historical Society, 1910), pp. 255-260.

[116] Personal conversation, February 16, 2010.

[117] *See* J. B. Mansfield, *History of the Great Lakes* (Chicago: J. H. Beers & Co., 1899), p. 186 ("the cost of travel and transportation in those days of early navigation was almost immeasurably greater by land than by water, and it was that fact that so greatly stimulated the early traffic on the Great Lakes").

revelation that told them to go to Kingston. And if we were to conjure reasons to conclude that Kingston was a more inviting, as opposed to convenient, destination than was York, we could, for example, compare the populations of the two locations and surmise that the more populous place possibly would be more financially attractive. The population of Kingston, "the largest and most populous of the towns in Upper Canada, and called the key to the province" was about 3,500 in 1830[118] compared to a population figure for York in 1830 of 2,860.[119] (It took six years for Kingston to reach a population of "about 5,500 souls" (in 1836).[120] It took only four years (until 1834, when it was incorporated as a city), for York to more than triple its population to 9,254 inhabitants.[121] In 1830, Kingston was the larger of the two possible destinations. But all these reasons fall outside the text of the revelation and apparently are foreign to the impetus that inspired the emissaries. Rather, so far as we know, it was solely what the emissaries asked for and felt they had received, namely, the voice of the Lord in a revelation, that prompted—indeed, commanded—them to go to Kingston instead of to York. It would seem incongruous for the emissaries to go on any trip at all and not to go where they were told to go. And the revelation, of course, as shown from the one presently surviving source created closest in time to the original text of the revelation (namely, the newly-published *Manuscript Revelation Books*) *commands* the four emissaries to "go to Kingston."

Why Not York, too? One might ask why the Prophet's four emissaries did not simply go *also* to York, as might be suggested by what they were told by the Kingstonians. Perhaps the time of year was an impediment. But we know so little of the circumstances surrounding the trip that it is foolhardy to surmise the answer even to that simple question.[122] As mentioned previously, only

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[118] Sneyd, Robert Brown, "The Role of the Rideau Waterway, 1826-1856" (MA thesis, University of Toronto, 1965), pp. 205-206.

[119] Statistics Canada. UC Table I - Population, Sexes, Ages, 1830 - Upper Canada (table), 1830 - Census of Upper Canada (Population/Sexes/Ages) (database), Using E-STAT (distributor). http://estat .statcan.gc.ca/cgi-win/ cnsmcgi.exe?Lang=E&EST-Fi=EStat\English\SC_RR-eng.htm (accessed: November 2, 2009); see also http://www. lsuc.on.ca/about/a/history/chronology/ (Law Society of Upper Canada, Chronology), placing the population of York at that time at 2,900. "Although York enjoys the rank of the capital [of Upper Canada], and the presence of the legislature, Kingston will ever by the head quarters of all relating to miltary, naval, *and commercial affairs*." Duncan, John Morison, Travels Through Part of the United States and Canada in 1818 and 1819 (Glasgow: University Press, 1823), vol. II, p. 113 (emphasis here added).

[120] Picken, Andrew. *The Canadas: Comprehending Topograhical Information Concerning the Quality of the Land, in Different Districts; and the Fullest General Information: for the use of Emigrants and Capitalists, Compiled from Original Documents Furnished by John Galt, Esq.* (2nd Ed.) (London: Effingham Wilson, 1836), p. 113.

[121] http://www.toronto.ca/archives/toronto_history_faqs.htm#population, The City of Toronto Archives, FAQ.

[122] *See* Hall, Roger and Gordon Dodds, *A Picture History of Ontario* (Edmonton: Hurtig Publishers, 1978), p. 36 ("some idea of the impenetrable forests and woods that pressed in upon the would-be traveller can be grasped from James Cockburn's watercolour of a stretch along the track between the towns of

after the joinder of the Upper and Lower Canadas was recourse to the legislature ever a part of the process of *securing* a copyright. But could not the four emissaries have gone to York for purposes of there seeking to *sell* a copyright? The simple answer would seem to be yes, at least if other factors did not stand in the way. Convenience, travel conditions, timing, these may be some of the factors. We do not know. More importantly, the text of the revelation itself (which sent them not to York but to Kingston) may have been the primary reason they did not go to York. They were not told to go there.

In this regard, York might have been seen as a place where the emissaries could seek and receive governmental assistance, at least for the costs of the printing of the Book of Mormon. Prior to the formation of legislative assemblies, official publications ordered by Canadian colonial governments were printed in private printing offices as well by "king's printers," official printers who were appointed (or sometimes self-appointed) as such. With the establishment of Upper Canada's bicameral parliament in 1791, "the legislative branch now had the authority to have documents printed without asking for authorization from the executive."[123] However, in addition to the printing of official publications, "the state played a modest role in supporting publications that were not offical *by purchasing copies or providing funds for the printing of non-governmental works*."[124] As mentioned previously, in Halifax, in 1829, John Howe purchased the rights to Thomas Chandler Haliburton's work and then published it as *An Historical and Statistical Account of Nova-Scotia* (Halifax: Howe, 1829). It so happens that the 1829 Haliburton text superseded Haliburton's own *A General Description of Nova Scotia*, which had previously been published six years earlier (in 1823) *with financial support by the parliament of Nova Scotia*.[125] Indeed, in 1814 the Assembly of Lower Canada provided financial assistance in the amount of £1,500 to Joseph Bouchett to publish in England a large-scale map of Lower Canada and fifteen years later, in 1829, the Assembly promised to purchase one hundred copies of the updated work and Nova Scotia purchased twenty-five.[126]

> Missionary work associated with the eduation of Native peoples also seems to have inspired the generosity of a governor such as Sir John Colborne of Upper Canada, who financed the printing of two

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Kingston and York before the days of regular traffic (c. 1830). The best time to travel was winter, when the roads were frozen hard; the worst in the spring or fall when mud and ruts became axle-deep").

[123] Gallichan, Gilles, "Official Publications," *in* Fleming, Patricia Lockhart, Gilles Gallichan, and Yvan Lamonde, *History of the Book in Canada, Volume I, Beginnings to 1840* (Toronto: University of Toronto Press, 2004), p. 312.

[124] *Ibid.* at p. 315 (emphasis here supplied).

[125] *Ibid.* at p. 318.

[126] *Ibid.* at pp. 317-318.

thousand copies of the Gospel of Matthew in Ojibwa [Chippewa].[127]

While York, indeed, might have been an inviting destination on this account, it should be remembered both that the revelation sent the emissaries to Kingston, not York, and that it did so for the purpose of there selling a copyright, not for the purpose of there seeking governmental assistance to help cover the costs of printing or publishing.

But the fact that such governmental assistance did exist at the time, even for religious books, *may* have been a reason why the emissaries were told what they were told by those in Kingston. That the emissaries did not follow through on what they were told by the Kingstonians perhaps reflects only That they considered it more important that the dictates of the revelation, not the advice of the Kingstonians, be a guide for their actions.

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[127] *Ibid.* at p. 318, *citing* Fleming, Patricia Lockhart, *Upper Canadian Imprints, 1801-1841: A Bibliography* (Toronto: University of Toronto Press in cooperation with the National Library of Canada, 1988), item no. 435 [pp. 121-122].

Figure 13—Road Between Kingston and York, Upper Canada (Library and Archives Canada, reproduction reference number C-012632, MIKAN ID number 2894469).

Figure 14—Front Street, York, Upper Canada (1804) 1 watercolour / aquarelle: watercolour, pen and ink over pencil with ink, by Elizabeth Frances Hale.

What Did Kingston Have to Offer to the Emissaries?

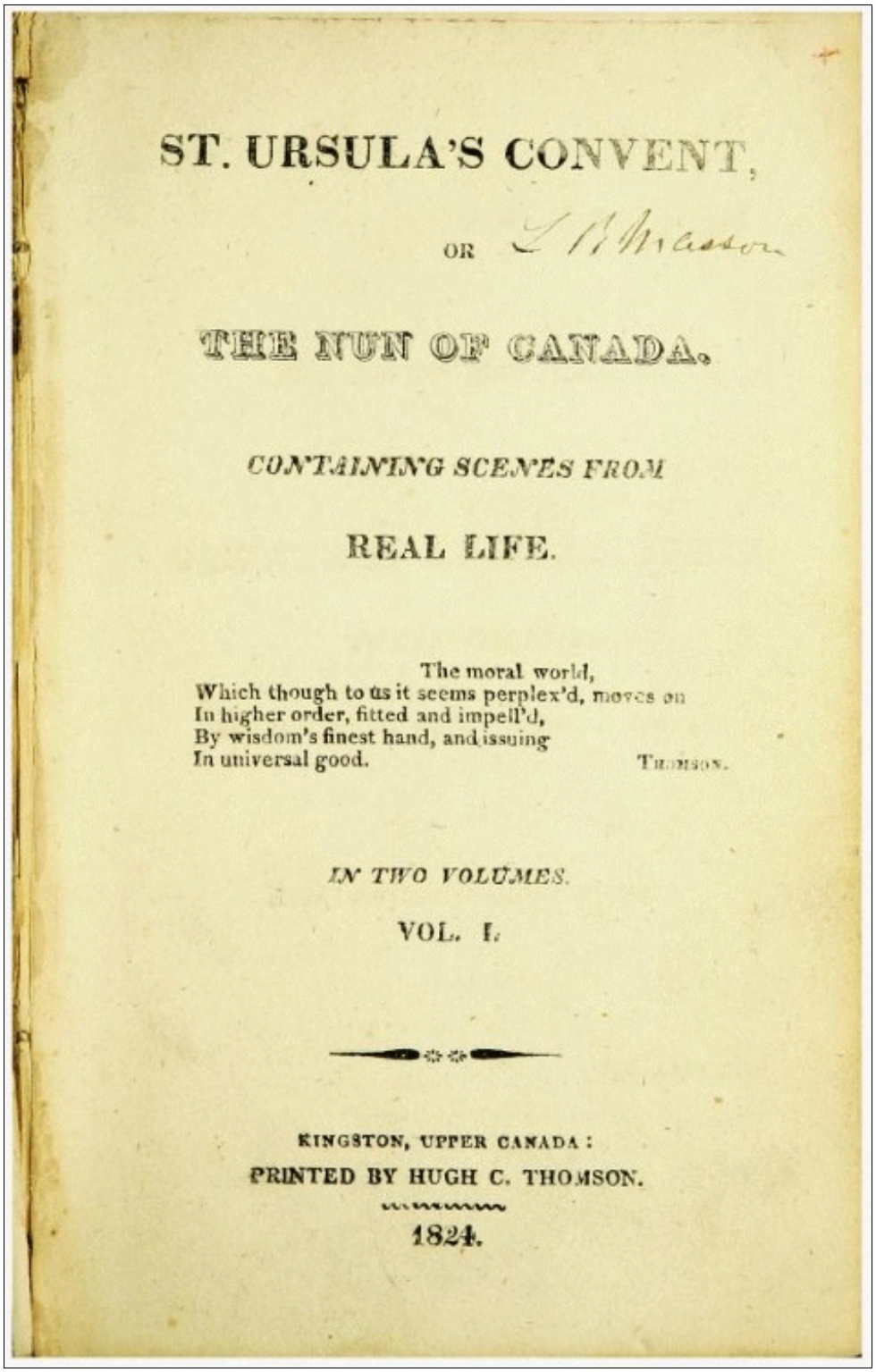
Between 1814 and 1830, it appears that at least three publishers—Stephen Miles[128], Hugh C. Thomson [also sometimes "Thompson"], James Macfarlane [also sometimes "McFarlane"]—had both printed and published at least thirty books and pamphlets in Kingston, Upper Canada. *See* "Books and Pamphlets Published in Canada, Up To the Year Eighteen Hundred and Thirty-Seven, Copies of Which Are in the Public Reference Library, Toronto, Canada" (Toronto: Public Library, 1916), pp. 15-39; *see also* William Kingsford, "The Early Bibliography of the Province of Ontario, Dominion of Canada, With Other Information" (Toronto: Roswell & Hutchison, 1892, and Montreal: Eben Picken, 1892), pp. 27-29, 31-33, 35.

Given here in abbreviated form are the titles of the thirty pre-1830 Kingston, Upper Canada publications identified in the above two bibliographical references: **(1)** [1814]. "A Form of Prayer and Thanksgiving to Almighty God to be used on Friday, the Third Day of June, 1814" (pamphlet, 14 pages); **(2)** [1815] "A short Account of the Life and Dying Speech of Joseph Bevir, Who was Executed at Kingston (Upper Canada) on Monday the 4th Day of September, 1815" (pamphlet, 32 pages); **(3)** [1818] "Address to the Jury at Kingston Assizes, in the Case of the King v. Robert Gourlay, for libel, with a Report of the Trial"; **(4)** [1818] "Essay on Modern Reformers addressed to the people of Upper Canada, to which is added a letter to Mr. Robert Gourlay" (pamphlet, 19 pages); **(5)** [1821] "The Prompter: A Series of Essays on Civil and Social Duties" (pamphlet, 56 pages); **(6)** [1822] "An Address to the Liege Men of Every British Colony and Province in the World by a Friend to His Species" (pamphlet, 13 pages); **(7)** [1823] "Constitution of the Antient Fraternity of Free and Accepted Masons" (book, about 140 pages); **(8)** [1823] "Examination of a Pamphlet entitled 'A Statement of Facts Relating to the Failure of the Bank of Upper Canada at Kingston" (pamphlet, 23 pages); **(9)** [1824] "A warning to the Canadian Land Company in a Letter Addressed to that Body by an English Resident in Canada" (pamphlet, 32 pages); **(10)** [1824] "Letter to C. A. Hagerman, by Thomas Dalton"; **(11)** [1824] "St. Ursula's Convent; or, the Nun of Canada Containing Scenes From Real Life" (fiction, two volumes, 237 pages); **(12)** [1825] "First Annual Report of the Canada Conference Missionary Society, Auxiliary to the Missionary Society of the Methodist Episcopal Church"; **(13)** [1826] "A letter to the Right Honourable the Earl of Liverpool, K.G., Relative to the Rights of the Church of Scotland in North America"; **(14)** [1826] "An Apology for the Church of England in the Canadas, in Answer to a Letter to the Earl of Liverpool, Relative

[128] Interestingly, Stephen Miles was born at Royalton, Sharon Township, Windsor County, Vermont, birthplace also of the Prophet Joseph Smith. *See* "Dictionary of Canadian Biography, Vol. IX (1861-1870)" (Toronto: University of Toronto/Université Laval, 1976), *s.v.* "Miles, Stephen." Born 19 October 1789, Miles was sixteen years older than the Prophet, and as an 18-year-old apprentice to Windsor printer Nahum Mower, Miles emigrated with him in 1807 to Montreal. By 1810 Miles was in Kingston, involved in the printing of the *Kingston Gazette*. In March of 1811, Miles withdrew from Kingston to seek employment as a journeyman printer first in Plattsburgh, New York and then in Montreal but by September of that same year he was back in Kingston, this time for good. Miles was "a member of the Methodist group in Kingston" and "a class leader and occasional local preacher." *Ibid*. He established "the first religious weekly in Upper Canada, the *Kingston Gazette and Religious Advocate*, which ran from 20 June 1828 to 26 March 1830." *Ibid*. I find no indication that any members of the Miles family met any members of the Smith family.

to the Rights of the Church of Scotland"; **(15)** [1826] "Reports of the Commissioners of Internal Navigation Appointed by His Excellency, Sir Peregrine Maitland, K.C.B."; **(16)** [1826] "The Exclusive Right of the Church to the Clergy Reserves, Defended in a Letter to the Right Honorable the Earl of Liverpool"; **(17)** [1827] "A Sermon Preached at Kingston, Upper Canada, on Sunday, the 25th Day of November, 1827"; **(18)** [1827] "A Series of Reflections on the Management of Civic Rule in the Town of Kingston"; **(19)** [1827] "Statement of the Affairs of the Late Pretended Bank of Upper Canada at Kingston" (Pamphlet, 48 Pages); **(20)** [1828] "Letter from the Reverend Egerton Byerson to the Hon. And Reverend Doctor Strachan"; **(21)** [1828] "Manual of Parliamentary Practice with an Appendix Containing the Rules of the Legislative Council, and House of Assembly of Upper Canada" (Pamphlet, 92 Pages); **(22)** [1828] "Religious Discourses, by the Author of Waverley"; **(23)** [1828] "Claims of the Churchmen and Dissenters of Upper Canada Brought to the Test"; **(24)** [1828] "The Charter of the University of King's College at York, in Upper Canada" (Pamphlet, about 23 Pages); **(25)** [1828] "The Address to Protestant Dissenters, Suited to the Present Times" (Pamphlet, 52 Pages); **(26)** [1828] "Religious Discourses. By the Author of Waverley (Sir Walter Scott)"; **(27)** [1828] "The Charter of the University of the King's College at York in Upper Canada"; **(28)** [1828] "Second Report of the Midland District Committee of the Society for Promoting Christian Knowledge"; **(29)** [1829] "The Lower Canada Watchman, Pro Patria" (Book, 491 Pages); and **(30)** [1829] "A Letter from the Honourable and Venerable Dr. Strachan, Archdeacon of York, U.C., to Dr. Lee, D.D., Convener of a Committee of the General Assembly of the Church of Scotland."

Figure 15—Kingston Ontario (1828). Kingston from Fort Henry, James Gray, 1828, 29.6 x 54.9 cm.



ST. URSULA'S CONVENT,

OR

THE NUN OF CANADA.

CONTAINING SCENES FROM

REAL LIFE.

The moral world,
Which though to us it seems perplex'd, moves on
In higher order, fitted and impell'd,
By wisdom's finest hand, and issuing
In universal good. THOMSON.

IN TWO VOLUMES.

VOL. I.

KINGSTON, UPPER CANADA:
PRINTED BY HUGH C. THOMSON.
1824.

Figure 16—*St. Ursula's Convent, or, the Nun of Canada*, by Julia Catherine Beckwith Hart (Kingston, Upper Canada: Printed by Hugh C. Thomson, 1824).

Asserting there "was no way to secure the copyright at Kingston," in support of which notion Mr. Bradley cites Hiram Page, seems to pose the wrong issue. The issue is not *securing* the copyright in Kingston but merely *selling* a copyright there. What with at least three publishers in Kingston having published at least 30 publications in the years prior to 1830, selling a copyright there was probably easy enough *if there was a willing buyer*. Indeed, the publication by Hugh C. Thomson of Julia Catherine Beckwith Hart's 1824 piece of fiction, "St. Ursula's Convent" (fiction, two volumes, 237 pages) and by James Macfarlane of David Chisholme's "The Lower Canada Watchman" (political book 491 pages) seems adequate evidence of the availability of at least two publishers or printers in Kingston who had the *physical* wherewithal to print the Book of Mormon. Whether any had the motivation to do so (financial, spiritual, or otherwise) is a separate issue.

So to answer Mr. Bradley's first question ("Could copyrights be secured in Kingston?"), it seems clearly that the answer is "yes," at least to the extent that question is interpreted to ask whether there were the necessary means in town to facilitate accomplishment of the task of securing the copyright (which the Prophet already possessed) in all the world, namely, of taking the step of selling to a publisher the intangible right to exclude others from copying the work there and elsewhere in the Provinces. No authority to purchase would be required, as is discussed in more detail below. And to answer Mr. Bradley's related question ("Did one have to do this [secure the copyright] in Toronto [York]?"), it seems that the answer to that question is "no." Joseph Smith already was possessed of a common-law, pre-publication copyright; the revelation charged the emissaries with the task of helping to secure it in all the world, not in Kingston; as for the purpose of their trip to Kingston, they were charged with the task of *selling* a copyright there. While York (as Toronto was known at the time—from 1793 to 1834) was replete with publishers, Kingston was not at all bereft of them. Indeed, Kingston publishers James Macfarlane and Hugh Thomson had the ability in 1831 to publish, with Kingston printer Francis M. Hill, such "a prestige volume" that its "typographical execution" was touted as such as "will equal if not surpass that of any work ever published in Canada."[129]

Of course, York may well have been a more inviting center for pursuing publication interests. During the 1829 calendar year, publishers in York churned out 14 publications (five of them being strictly religious in nature); during that same year, publishers in Kingston produced only three (all three of them being purely religious in nature.[130] But nothing in logic or theology requires that a

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[129] *See* Gundy, H. P., "Publishing and Bookselling in Kingston Since 1810," *Historic Kingston* 10 (Kingston: Kingston Historical Society, January 1962), 28.

[130] *See* Fleming, Patricia Lockhart, *Upper Canadian Imprints, 1801-1841: A Bibliography* (Toronto: University of Toronto Press in cooperation with the National Library of Canada, 1988), items nos. *434* (*Sermons on the Liturgy of the Church of England*), *435* (*Part of the New Testament . . . Translated into the Chippewa Tongue*), *438* (*The Order of Confirmation with Forms of Self-Examination and Devotion*), 439, *441* (*The Doctrines and Discipline of the Methodist Episcopal Church in Canada*), *442* (*A Pastoral Address to the Members of the Methodist Episcopal Church in Canada*), 446, 449, 450, 453, 455, 456, 457 and 458 (York publications, some of the numbers being here italicized to signal those that are here identified as "strictly religious in nature") and items nos. *443* (*Proceedings of the Canada Conference in te Case of Henry Ryan, Formerly a Minister in the Methodist Episcopal Church*), *445* (*Claims of the Churchment & Dissenters*

revelation concerned with the sale of publishing rights conform its commands to the seeming convenience or ease with which those rights can be sold in one place as opposed to another.

Could a Copyright be Sold and Purchased in Kingston?

Looking at the language used by Hiram Page himself—who speaks not of securing the copyright and speaks only of selling one—the question whether a copyright could be bought and sold in Kingston is a legitimate one. Page clearly states (in contrast to Mr. Bradley's "secure"-a-copyright gloss) "when we got there, there was no purchaser, neither were they authorized at Kingston to buy rights for the Province; but little York was the place where such business had to be done." That there "was no purchaser" does not necessarily mean there was no one "authorized" to purchase and it also does not necessarily mean there was "no willing purchaser." At best, that phrase ("there was no purchaser") is ambiguous. Page's statement "there was no purchaser" does confirm, however, that the emissaries accomplished the one task the revelation directed them to accomplish in Kingston, namely, to seek to sell in Kingston a copyright. That is all that the revelation required them to perform in that location, nothing more. But the remaining two clauses are more pointed: (1) "neither were they authorized at Kingston to buy rights for the Province"; and (2) "little York was the place where such business had to be done."

1. What is Meant by Page's Statement That They Were Not "*Authorized* at Kingston to Buy Rights for the Province"?

This is not a new question; it does not now first arise as a result of the new publication of the *Manuscript Revelation Books*. Rather, it is a long-posed question deriving solely from the statement made by Page. But what seems new is the emphasis on the legal—or seeming legal—aspect of the inquiry. What did the *law* provide? In response, consider the following facts. In Montreal, in 1831, Henry H. Cunningham "purchased the copyright from the Author" and then published author John Howard Willis's *Scraps and Sketches, Or, The Album of a Literary Lounger* (Montreal: H.H. Cunningham, 1831).[131] Similarly, in Halifax, in 1829, John Howe purchased the rights to Thomas Chandler Haliburton's work and then published it as *An Historical and Statistical Account of Nova-Scotia* (Halifax: Howe, 1829). Both of these are examples, at least, of the sale and purchase of intangible pre-publication common law literary rights. In neither instance, however, is there any evidence of the need for the puchaser to be authorized to purchase the rights.

Similarly, working first in Cornwallis and Fredericton and then completing her task in Kingston, Julia Beckwith Hart authored Canada's first novel, *St. Ursula's Convent; or, The Nun of Canada* (Kingston: Thomson, 1824), published anonymously at Hugh C. Thomson's *Upper Canada*

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of Upper Canada Brought to the Test), and *448* (*A Letter from the Hon. and Venerable Dr. Strachan, Archdeacon of York, U. C. to Dr. Lee, D.D. Convener of a Committee of the General Assembly of the Church of Scotland*) (Kingston publications, all of which are here italicized to signal they all are here identified as "strictly religious in nature") [at pp. 121-128]. In calendar year 1830, York's publishers produced 26 works (9 religious in nature), and Kingston's produced 4 (1 religious in nature).

[131] "Literary Notice," *Halifax Monthly Magazine* 1 (February 1831): 366.

Herald office in Kingston.[132] And again, there is no evidence known either of the exercise by Thomson of any authority to purchase the rights or of the need by Thomson to exercise any authority to purchase the rights.[133] And if, in fact, Thomson *did* need to have authorization to purchase rights from Mrs. Hart, he apparently indeed must have had them (and in 1829-1830 presumably still did have them), *in Kingston*.

In neither case is there any indication in the historical record of any requirement that either publisher obtain "authorization" to make either purchase. Indeed, nothing in the Statute of Anne and nothing in the common law required a bookseller to have authorization of any sort, much less authorization for a geographical area such as Nova Scotia or Upper Canada, in order to purchase an author's intangible copyright outright, including the author's reversionary interest set out within section 11 of the Statute of Anne.[134] As a matter of law the statute simply provided, in relevant part:

> That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; . . . (Statute of Anne, § I.)

Nothing in the statute requires the purchaser to be authorized to purchase rights for a specific area.

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[132] Parker, George L., "Courting Local and International Markets," *in* Fleming, Patricia Lockhart, Gilles Gallichan, and Yvan Lamonde, *History of the Book in Canada, Volume I, Beginnings to 1840* (Toronto: University of Toronto Press, 2004), p. 346.

[133] Indeed, who needs "authorization" when plagiarism will do? By 1828, Thomson had already proven himself capable of it. *See* Banks, M. A., "An Undetected Case of Plagiarism," *Parliamentary Journal XX* (1979, pp. 1-11 (showing that Thomson's *Manual of Parliamentary Practice* (1828) was plagiarized from Thomas Jefferson's *Manual of Parliamentary Practice* (1801)), merely "omitting references to American law and history, and, where practice differed, substituting Canadian for American legislative procedures" (*see* "Dictionary of Canadian Biography, Vol. VI (1812-1835)" (Toronto: University of Toronto/Université Laval, 1987), *s.v*. "Thomson, Hugh Christopher").

[134] Section 11 of the Act provided that, after the expiration of the fourteen year period of protection for new books (that is, books first published after 10 April 1710), the right of printing those books would return to the authors thereof (if still alive) for an additional fourteen years.

"Selling all rights in a work in advance of publication, in exchange for a guaranteed fixed sum, was . . . an attractive option for many authors who were uncertain as to whether their work might prove successful, or who simply wanted to avoid the trouble of having to negotiate with their publisher."[135] Beyond the provisions of the Statute of Anne, nothing can be found in the common law that imposes on the purchaser of an author's right any requirement that the purchase be "authorized" to purchase the right for a geographical area. In short, it is quite difficult indeed to know what truly was meant by Page's statement that the persons with whom the emissaries spoke were not "authorized at Kingston to buy rights for the province." Perhaps Page simply misunderstood what was told to him. Perhaps what was told to him was a misunderstanding of applicable law. Perhaps what was told to Page was a purposeful misrepresentation of the law, prompted by extraneous considerations (such as a desire to reject the emissaries' sales offer). This latter supposition either would require disparate individuals all to have said the same thing, which is highly unlikely absent a concerted effort to deceive, or could have resulted from Page reporting only what he gleaned from one or more of the explanations that were given to him and the other emissaries. In any event, it does not appear that what Page reported comports either with Kingston publishing history or applicable law of the time.

And in any event, neither the text of the revelation nor Page's account nor Whitmer's 1886 account nor Whitmer's 1887 account mentions that the four emissaries were sent to Kingston (or to Canada) to secure or obtain a or the copyright; only McLellin's short statement mentions that notion. And it is not justified by the text of the revelation except by superimposing on the text of the revelation a strained construction.

2. What did Page Mean When He Stated That "Little York Was the Place Where Such Business *Had* to be Done"?

As stated previously, in reporting on the emissaries' experience, Page speaks only of *selling* a copyright in Kingston, not securing or obtaining one there. The "business" of which Page speaks is the "business" of buying and selling. That Page reports that he was told that "Little York was the place where such business had to be done" is not easy to reconcile either with the historical facts of publication experiences of others in the Kingston publishing community or with the law applicable to the purchase and sale of an author's copyright in Upper Canada. The fact that buying and selling of author's rights occurred freely in Kingston is simply a matter of historical reality. And no known legal impediment to it occurring in Kingston is known (nor for that matter is any geographical impediment generally provided for either in the Statute of Anne or in the common law to the purchase of an author's rights). Julia Beckwith Hart sold her rights to *St. Ursula's Convent; or, The Nun of Canada* in Kingston, where the novel also was published (at Hugh C. Thomson's *Upper Canada Herald* office). No one apparently told her that her "business" of selling her rights "had to be done" in York. Similarly, when the 1830 Watertown, New York publication of *The Cook Not Mad* was followed by a Kingston, Upper Canada publication of the same book (with differing title page but identical contents), the title page showed it to be a Kingston, Upper Canada publication, not a York publication. And when Thompson and Macfarlane joined forces in 1831 to publish their

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[135] Deazley, Ronan, "What's New About the Statute of Anne?, or Six Observations in Search of an Act" (Congress of the International Literary and Artistic Association, London, June 15, 2009), p. 16, n. 65.

work *The Statutes of The Province of Upper Canada; Together with Such British Statutes, Ordinances of Quebec, and Proclamations, as Relate to the Said Province*, they published it in Kingston, not York, even though Robert Stanton, Esq., the King's Printer (publisher in York) attempted to stop it, both parties asserting a right to publish such a work, Stanton by virtue of his role as King's Printer and Macrarlane and Thomson by virtue of acquiescence by the House of Assembly in their petition to publish an edition of the Statutes of the province by authority for gratuitous distribution. True it is that York was the seat of the provincial Parliament both in 1824 and in 1829-1830. But beyond this, it is difficult to discern a reason why Page reported what he did. Again, perhaps Page simply misunderstood what was told to him. Again, perhaps what was told to him was a misunderstanding of applicable law. And again, perhaps what was told to Page was a purposeful misrepresentation of the law, prompted by extraneous considerations (such as a desire to reject the emissaries' sales offer). Yet again, this latter supposition either would require disparate individuals all to have said the same thing, which is highly unlikely absent a concerted effort to deceive, or could have resulted from Page reporting only what he gleaned from one or more of the explanations that were given to him and the other emissaries. In any event, it does not appear that what Page reported comports either with Kingston publishing history or applicable law of the time.

Why?

The general thought of apologists concerning why an attempt was made to sell "the copyright," is fairly represented by Paul Gutjahr of the Maxwell Institute: "Harris did not want to sell his land—hence the directions to him in Doctrine and Covenants 19:26 (March 1830) instructing him to 'impart your property [*sic*[136]] freely to the printing of the Book of Mormon.' Harris's reluctance was most likely the reason behind the unsuccessful attempt to sell the copyright for the Book of Mormon in Canada."[137] Of course, that may have been *a* reason,[138] but it probably was not *the* reason. Even David Whitmer concedes the purpose of the trip was to "sell the copyright for sufficient money *to enable them to get out the publication*."[139] But that point aside, both Page and Whitmer reference the pecuniary purpose of the trip (*see* quotations above), as does the revelation itself, though in less than express terms: "that the faithful & the righteous may retain the temperal

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[136] The quotation is "impart it freely to the printing of the Book of Mormon." In that verse, the antecedent of "it" is "thine own property."

[137] http://mi.byu.edu/publications/papers/?paperID=9&chapterID=73 (Gutjahr, Paul, "The Golden Bible in the Bible's Golden Age: The Book of Mormon and Antebellum Print Culture," at footnote 18 (Neal A. Maxwell Institute for Religious Scholarship, Occasional Paper #5).

[138] The revelation itself states that the Lord has "covenanted with those who have assisted him [JS] in my work that I will do unto them even the same Because they have done that which is pleasing in my sight (yea even all save save ~~M◇◇tin only~~ it be one o{☨\nly}) . . . ."

[139] *The Omaha Herald*, October 10, 1886; *Des Moines Daily News*, October 16, 1886; *Chicago Inter-Ocean*, October 17, 1886; *Philadelphia Press*, October 17, 1886; *The Salt Lake Daily Tribune* (vol. XXXI, no. 3), October 17, 1886 (emphasis here supplied). Note, however, that Whitmer nonetheless speaks of selling "the" copyright.

Blessing as well as the Spirit[u]al" (the "temperal Blessing" likely being a reference to the monetary return anticipated by a sale of a copyright). Clearly, it would indeed take a faithful *buyer*, convinced that the value of the text to be published exceeded the monetary investment. And that monetary investment, in pre-1840s Upper Canada, was no small impediment to a printer, for the generally acknowledged point at which unit labor-costs of production justified a certain number of copies, a printing should number 1500 copies. "High one time costs for composition encouraged a larger run of books. But beyond 1500 copies the cost of hand presswork became the most important expense, and this did not diminsh as more copies were printed . . . . For British North America printers, therefore, the unit cost of producing a book for the few hundred possible buyers was usually too high to contemplate . . . . Only those books guaranteed a large and rapid sale—almanacs, primers, catechisms—were worth the trouble"[140]—unless, of course, one with a tremendous amount of faith were to step forward to fund a print job of fewer copies, as did Martin Harris in New York. The publication of *this* book required someone to step forward who was not as interested in "printing as a business,"[141] but, perhaps, printing as a mission. It would take a printer or publisher or other person serving to fund the publication with something more than mere business sense; it would take a commitment to a higher purpose.

Clearly the revelation speaks of the monetary return anticipated by a sale of a copyright; but it speaks, too (and more often), of the spiritual purpose for the trip: "that my work be not destroyed by the workers of iniquity to the[ir] own distruction & damnation when they are fully ripe" (probably a reference to the need to preserve the integrity of the text by control over its printing and publication); "that it may be the means of bringing souls unto ~~mc~~ Salvation through mine only Be{t\gotten}." Lacking a commitment to that purpose, a businessman or printer or publisher in Kingston, or anywhere else, likely would shy away from participation in so costly a venture.

Purely by way of speculation, one could posit that *if* the Kingstonians with whom the emissaries spoke were publishers (which seems likely) and *if* the Kingstonians with whom they spoke happened to harbor an unspoken, religiously-based reason to decline the emissaries' request that someone purchase a copyright (of which there seems to be no evidence and which may never be evidenced), there at least might possibly exist some measure of support for such a notion based on the religious attitudes of the Kingston publishers. Stephen Miles was Wesleyan and at the end of his printing career (in 1835) took up the work of a Wesleyan minister.[142] James Macfarlane was a Presbyterian.[143] And Hugh C. Thomson was Anglican,[144] a "staunch Anglican," appointed warden

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[140] Bryan Dewalt, *Technology and Canadian Printing: A History from Lead Type to Lasers* (Ottowa: National Museum of Science and Technology, 1995), p. 22, *citing* Phillip Gaskell, *A New Introduction to Bibliography* (New York: Oxford University Press, 1972), pp. 161-62.

[141] *Ibid.*, p. 21.

[142] *See* Canniff, Wm., *History of the Settlement of Upper Canada* (Toronto: Dudley & Burns, 1869), p. 354.

[143] *See* Hooker, Edward William, *Memorials of the families of Mr. James Thompson and of Dea. Augustus Thompson of Goshen, Connecticut* (Hartford: Case, Tiffany and Co., 1854), pp. 87-88; *see also*

of St. George's Church.[145] While religious belief might sway a publisher in making what otherwise might be a purely economic decision, it is nowhere evidenced that religion played into the matter. And while there clearly would not have existed in 1829 or early 1830, in the minds of people living in Kingston, any pre-existing prejudice against the emissaries on account of the religious beliefs of those four men—the Latter-day Saint movement was just commencing and neither knowledge of Joseph Smith, Jr. nor knowledge either of the religious movement or of the new scripture had yet reached Kingston (I find no reference to the Prophet or to his work in any Kingston newspaper)—any mention by the emissaries of the proposed publication of what they might have described as *a new book of scripture* might possibly have been met with a cold shoulder (whether Page reported it as such or not). One cannot push this point, of course, in the absence of evidence; but it must be remembered that the Prophet was at first not successful with E. B. Grandin, apparently *on religious grounds*.[146]

"Dictionary of Canadian Biography, Vol. VII (1836-1850)" (Toronto: University of Toronto/Université Laval, 1988), *s.v*. "Macfarlane, James." Bennett and Olsen state that "Macfarlane was pro-Anglican, which would have made him uninterested in printing a controversial work like the Book of Mormon." *See* Bennett and Olsen, "Of Printers, Prophets, and Politicians," at 182, n. 25.

[144] *See* "Dictionary of Canadian Biography, Vol. VI (1812-1835)" (Toronto: University of Toronto/Université Laval, 1987), *s.v*. "Thomson, Hugh Christopher."

[145] *See* Gundy, H. Pearson, "Hugh C. Thomson: Editor, Publisher, and Politician, 1791-1834," *in* Tulchinsky, Gerald, ed., *To Preserve & Defend: Essays on Kingston in the Nineteenth Century* (Montreal: McGill-Queen's University Press, 1976), pp. 203-204, 208.

[146] Porter, Larry C., "The Book of Mormon: Historical Setting for Its Translation and Publication," *in* Black, Susan Easton and Charles D. Tate, Jr., eds., *Joseph Smith: The Prophet, The Man* (Provo: Brigham Young University, Religious Studies Center, 1993), 52-53, *citing* Tucker, Pomeroy, *Origin, Rise, and Progress of Mormonism* (New York: D. Appleton and Co., 1867), 50-51 ("believing the whole affair to be a wicked imposture," which may possibly refer not to what Grandin may have felt was a pseudo-religious text but, instead, to what Grandin thought of the treatment he perceived was being given to Martin Harris).

Postlude

Referring to "the Canadian narrative puzzle," Professor Daniel J. Gervais of the Vanderbilt University School of Law, Director of the Technology and Entertainment Law Program at that school Editor-in-Chief of the *Journal of World Intellectual Property*, and member of the Law Society of Upper Canada (Ontario) and of the Bar of Quebec, has stated:

> The Canadian copyright systems were imported, or at least inspired by, elements of UK law and the complex and at times obscure British history of copyright, which was born out of the ashes of a censorship-tainted licensing system guaranteeing a monopoly to members of the Stationers' Company. The transition from a publisher's right to an author-centric concept happened in the years that preceded the adoption of the Statute of Anne. To a certain extent, authors were instrumentalized to secure rights for publishers as assigns of authors. Common law copyright was then essentially limited to unpublished works and the right to be recognized as the author of a published work.[147]

Within this framework, the task assigned by the Prophet to his four emissaries was simple: seek to sell a copyright in Kingston so that a publisher there, as an assign of the Prophet, could exercise the Prophet's pre-publication common law right to publish the Book of Mormon; in that way, the Prophet's rights therein would be secured.

In personal correspondence with Dr. Sunny Handa, Professor of Law at McGill University and author of a treatise on Canadian Copyright Law, I posed the following question:

> BACKGROUND. As I understand it, prior to 1842, when the Statute of Anne 1709 (8 Anne, c. 19 (1710), as amended in 1801 by 41 Geo. III, ch. 107 (1801) and in 1814 by 54 Geo. III, ch. 156 (1814) was still in effect in Upper Canada, it was still the Common Law that governed the existence of an author's copyright in his manuscript *prior* to publication and that the statute offered its protections and imposed its time limits only on *published* works. My question concerns the common-law copyright that I understand existed and was recognized for an author's yet-unpublished work in that era.
>
> FACTS: The following is the fact situation. An author at that time seeks (1) to *secure* the pre-publication common-law copyright he enjoys in his manuscript and seeks (2) to *sell* an undivided interest in that copyright for the provinces of Canada existing at that time (the colonies of New Brunswick and Nova Scotia as well as the provinces of Upper Canada and Lower Canada).

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[147] Daniel J. Gervais, "A Canadian Copyright Narrative," The Journal of World Intellectual Property (2009) Vol. 11, nos. 5/6, pp432-466 (at p. 453).

> QUESTION: Regarding the sale: Looking at it from the buyer's point of view, would a potential buyer in 1829-1830 (such as a resident of Kingston at the time, for example), need to possess some sort of "authorization" to be able to *purchase* a copyright from such an author or his agent? Stated differently (from the author's point of view): Would the author or his agent be required to go to York (Toronto) in order to *sell* a copyright for the province of Upper Canada; were potential purchasers of such a copyright located only in York for some reason? And regarding the related question of *securing* such a copyright: Were there any formal steps that needed to be taken by an author, pre-publication, to secure the copyright? (I know the Statute of Anne, of course, had requirements that applied to *post-publication* copyright (Stationers' Hall registration not being one of them in the Provinces at the time, as I understand it); but I don't know if there were any formal steps that needed to be taken to *secure* a pre-publication, common-law copyright at that time.)

In response, Dr. Handa stated:

> You are correct that during the period to which your question relates, an unpublished work was protected under the common-law regime. There was no formal copyright under statute granted until publication.
>
> The common-law rights would have been those which allowed the owner of the "common-law copyright" (for lack of a better phrase) to first publish/print his work thereby putting it into the market. Such a right, was not limited in time and the clock really only started ticking upon publication at which point the common-law right was lost. Of course, there were also rules as to the citizenry of the author who could have the first ownership in the common-law work (a very important point).
>
> In terms of your question regarding the situs of the sale, I am not aware of any formality in terms of steps or geographical location needed to consummate the sale. One thing you might want to keep in mind is that although authors could transfer their works to their heirs, I believe that there is relatively little historical record as to the rules governing the inter vivos assignment of such common law protected works to third parties. I believe it could be done but I'm not 100% sure if there were formalities if any; I strongly doubt it and believe that a contractual record of the assignment would be sufficient for a third-party to then take the work and publish it. The protection of authors in the Anglo-Saxon tradition though important, was still relatively limited as the focus was more on ensuring that works were published. In other words, restrictions on the alienation of an

> unpublished work by an author would be at odds with the principles underlying the concept of copyright generally.[148]

In short, *if* Page was correct in his recollection (a question that Bradley poses)—or *if* Page was correct in his description—of what the emissaries were told (namely, that a sale could occur only in York and not in Kingston), that would seem to reflect that what the emissaries were told may simply have been wrong or perhaps intentionally misleading, if available sources and current understanding are any indication.

CONCLUSION

Previously, those who voiced difficulty with the so-called Canadian copyright revelation did not express concern about the text of the revelation; they did not have the text available to them. Second parties purported to accurately represent what the revelation states. Page clearly comes closest to paraphrasing the revelation's text. Page states, "we were all anxious to get a revelation to go; and when it came we were to go to Kingston where we were to sell *if they would not harden their hearts*." This almost exactly quotes the text of the revelation itself, which records the grant of a privelege to sell a copyright through the emissaries "if the People harden not their hearts . . . ." Though Page does not do so, others assert that the revelation *promised* success in selling a copyright in Kingston. Such an assertion has now been put to rest by the publication of the earliest known copy of the text of the revelation; it clearly makes no such promise and makes the matter one subject to the faithfulness of the emissaries and those with whom they were to deal Any present concern about the historical and legal questions surrounding the revelation do not arise from the text; rather, they arise, still, from Page's account of the experience of those made emissaries by the revelation.

It is my preliminary conclusion that publishers in Kingston readily could have purchased a copyright from the Prophet's emissaries. And publishers there readily had the wherewithal to publish the Book of Mormon. Macfarlane, for example, published "The New Testament of Our Lord and Saviour Jesus Christ" in 1830. Thomson published Beck's novel. And yet Bradley does ask an important set of questions. But now we have the text of the revelation closest to the original that helps to supply some of the answers. Bradley's overall argument is that the Canadian copyright revelation has "an apparent error," but that "this fits comfortably within an LDS view of the revelatory process, does not seem to have overly concerned Joseph Smith or his associates (at the time), and does not constitute him a 'false prophet.'"[149] He states that his position is not a criticism of foundational LDS claims but merely an honest inquiry.[150]

Page, the only participant to leave word about the matter, twice uses the word "business," once in the phrase "the business" and once in the phrase "such business." Some contend that the "business" spoken of includes the *obtaining* or *securing* of a copyright. However, in Page's text, the first use of the word "business" is preceded only by reference to "sell[ing] a copyright" (with no

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[148] Email correspondence in the possession of the author.

[149] Email correspondence in the possession of the author.

[150] *Ibid*.

mention of obtaining or securing or acquiring a copyright) and the second use of the word "business" is preceded only by reference to "buy[ing] rights for the Province" (again with no mention of obtaining or securing or acquiring a copyright). Indeed, nothing in Page's account even alludes to, much less mentions, "acquiring" or "obtaining" (or even "securing") a copyright. The same is true both of Whitmer's 1886 interview—which mentions only an attempted sale— and of his 1887 writing—which four times mentions the effort to "sell" but not once mentions any task of "securing" or "obtaining" or "acquiring" a copyright. McLellin is the only one who mentions the concept (using the phrase "get a copy-right secured in that Dominion"). The revelation itself, of course, speaks of securing "the" copyright in all the earth and selling "a" copyright in Kingston.

The word "secure" in the phrase "secure the copyright" in the text of the revelation likely is a verb that both in the legal context and in the Prophet's linguistic context meant, in essence, *to protect*, as in to protect the common-law, pre-publication copyright he already possessed, not to "acquire" or "obtain" a copyright in the first instance; hence the use of the definite article "the" and the later use of the indefinite article "a" when speaking of the sale of "a" copyright (which, in the practice of the time, was by written contract of assignment with payment of consideration (sale), sometimes even by a deed, usually being of an undivided part interest in the whole.

It appears quite clear that the revelation's command "ye shall go to Kingston" and the revelation's announcement of a grant unto the Prophet of "a privelige that he may sell a copyright" through Oliver Cowdery, Joseph Knight, Hiram Page and Josiah Stowell "for the four Provinces" are a command and announcement wholly consistent with the historical and legal context: the publishing infrastructure clearly was available in Kingston, the legal context justified the mission, and the historical context is consistent with the revelation. To the extent that any legal research is needed to ascertain whether it was or "wasn't even possible to secure a copyright at the place they'd been sent to do it," whether "copyrights could be secured in Kingston," and whether "only British subjects could hold copyright in Canada," it would seem that the answers are clear: a copyright could be "secured" in Kingston (and, of course, anywhere else in Canada, by such acts as may be required there; and, more to the point, a copyright could be sold there, as well as anywhere else, for such a right, which the Prophet already possessed, is an intangible personal property, and to sell such a right the revelation gave the Prophet a "privelige" to do). At common law, prior to publication of the manuscript in book form, the Prophet already was possessed of a copyright and did not need to "obtain" one. But possessing a copyright, he did have an incentive to "secure" it everywhere, including in the four provinces. And that involved, first of all, selling it to someone who could publish it under the Prophet's authorization. And this could be accomplished notwithstanding the Prophet was not a British citizen and perhaps also notwithstanding he personally was not there at the time of sale (he could have made plans to be there at the time of printing or publication or both, later). In short, the revelation is consistent with history, law, and religious principles. The conditional nature of the revelation—"if ye do this"; "if the People harden not their hearts"; "if ye are faithful"—balances well with the "command" to go to Kingston and the "privelige" to sell a copyright there.

END