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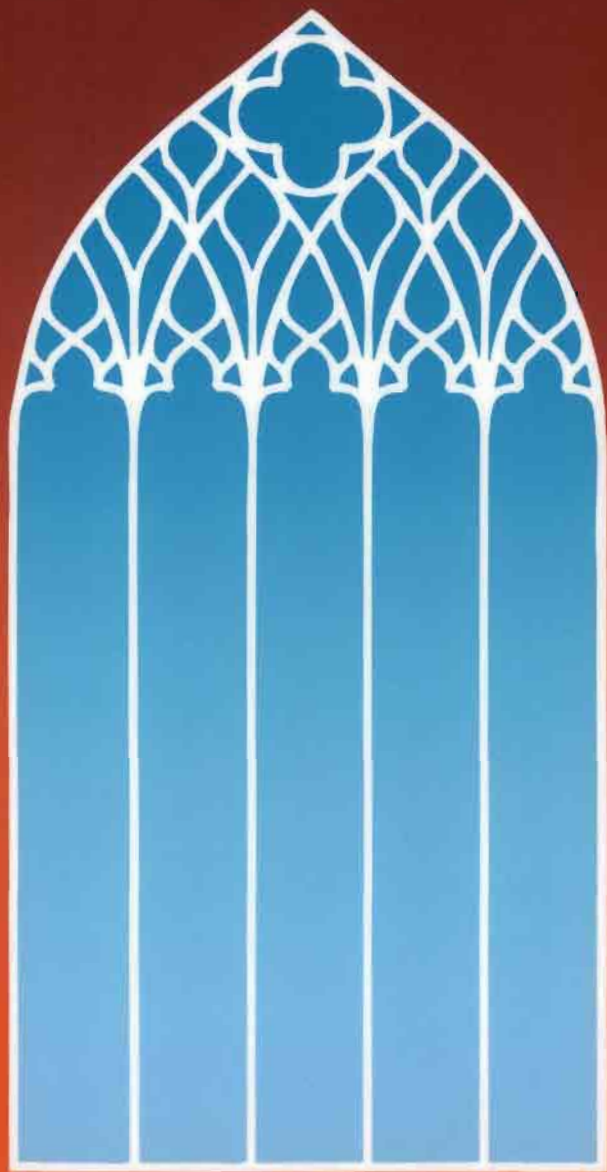
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FALL 2004

THE KIRTLAND TEMPLE SUIT AND THE UTAH CHURCH

*Eric Paul Rogers
and R. Scott Glauser*

ON JANUARY 2, 1831, IN FAYETTE, New York, Joseph Smith Jr. declared the word of the Lord to his followers: “Wherefore, for this cause I gave unto you the commandment that ye should go to the Ohio; and there I will give unto you my law; and there you shall be endowed with power from on high” (LDS D&C 38:32). The epicenter of that endowment of power would be the Kirtland Temple.

In the House of the Lord at Kirtland the elders prepared for missionary service and received a ritual cleansing and anointing called an endowment.¹ Joseph Smith and Oliver Cowdery testified that Moses, Elias, Elijah, and Jesus Christ himself appeared to them, restoring priesthood authority and power to the Earth (LDS D&C

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110). Remarkable spiritual manifestations were recorded in connection with the dedication of the temple in March 1836. Eliza Roxcy Snow wrote, "The ceremonies of that dedication may be rehearsed, but no mortal language can describe the heavenly manifestations of that memorable day. Angels appeared to some, while a sense of divine presence was realized by all present, and each heart was filled with 'joy inexpressible and full of glory.'"²

By all accounts the Mormons considered the Kirtland Temple sacred space. However, that space became polemical as well. In an effort to establish itself as legal successor to the early church and title-holder to the Kirtland Temple, the Reorganized Church of Jesus Christ of Latter Day Saints (now Community of Christ) filed a petition in the Court of Common Pleas, in Lake County, Ohio, on August 18, 1879. Among several defendants named in the suit were "The Church in Utah of which John Taylor is President and commonly known as the Mormon Church, and John Taylor, President of said Utah church."³ Although named as defendants, neither the Church of Jesus Christ of Latter-day Saints nor John Taylor was represented in the Ohio court. With the potential that the court would rule in favor of the RLDS Church, legally naming it successor and owner of the temple, why would the LDS Church absent itself from this case? Several possible answers to this question constitute the focus of this paper. Before examining the possible reasons behind the absence of the LDS Church from the litigation, however, it is necessary to comment briefly on the decision of the court and the way in which public opinion concerning the case has been shaped.

THE DECISION OF THE COURT AND PUBLIC OPINION

Kim L. Loving, an attorney and president of the Community of Christ's Eastern Great Lakes Mission Center and Kirtland Stake, has

2003 at the same session as Kim L. Loving's paper.

¹Joseph Smith Jr. et al., *History of the Church of Jesus Christ of Latter-day Saints*, edited by B. H. Roberts, 2d ed. rev. (Salt Lake City: Deseret News Press, 6 vols. published 1902-12, Vol. 7 published 1932; reprinted by Deseret Book Company, 1976, 1980 printing), 2:300, 309-10.

²Quoted in Edward W. Tullidge, *The Women of Mormondom* (New York: Edward W. Tullidge, 1877), 95.

³Court of Common Pleas, Lake County, Ohio, Record Book T, pp. 482-83, Lake County Courthouse, Painesville, Ohio.

detailed the various threads in the chain of title to the Kirtland Temple earlier in this volume. Loving's article is most significant for its unsurpassed thoroughness in examining the ownership of the temple and the motivations underlying the litigation. Loving points out that none of the defendants in the case replied or appeared in court and that the case was dismissed.

In filing the case with the court, the RLDS Church issued "findings of fact" that articulated its claims as the legal successor to Joseph Smith's original church founded in 1830. These findings constituted a proposed judgement in favor of the RLDS Church. The decision handed down by the court mirrored the proposed findings of fact with the exception of the final two sentences: "And thereupon the Court finds as matter of law that the Plaintiff is not entitled to the Judgment or relief prayed for in its petition. And thereupon it is ordered and adjudged that this action be dismissed at the costs of the Plaintiff." Hence, the findings—minus the fact that the case was thrown out of court—have been cited for over 120 years by both RLDS and LDS writers as the basis of ownership of the Kirtland Temple.

In 1899 the inscription on the east face of the temple was changed to read: "House of the Lord, Reorganized Church of Jesus Christ of Latter Day Saints in succession by order of Court February, 1880."⁴ (This entablature was removed in 1986.) In *The Reorganized Church and the Civil Courts* published in 1961, Paul Reimann dedicated an entire chapter to the Kirtland Temple suit. Quoting from court documents, he clearly demonstrates the case's dismissal.⁵ In a review of F. Henry Edwards, *History of the Reorganized Church of Jesus Christ of Latter Day Saints*, Vol. 5, Russell R. Rich took exception to Ed-

⁴RLDS General Conference Minutes, April 11, 1900, 229-30.

⁵Paul E. Reimann, *The Reorganized Church and the Civil Courts* (Salt Lake City: Utah Printing Company, 1961), 49-100. Roger D. Launius, "Joseph Smith III and the Kirtland Temple Suit," *BYU Studies* 25 (Summer 1985): 110, described Reimann's study as "an opposing opinion about the outcome of the case." In support of the traditional view—that the court ruled in favor of the RLDS Church—Launius cited Inez Smith Davis, *The Story of the Church: A History of the Church of Jesus Christ of Latter Day Saints, and of Its Legal Successor, the Reorganized Church* (Independence: Herald Publishing House, 1969), 554; Elbert A. Smith, *The Church in Court* (Lamoni, Iowa: Herald Publishing House, n.d.), 3-6; Joseph Smith III, "The Memoirs

wards's statement that the court decision "confirmed [the RLDS Church] in the possession of the Kirtland Temple." Rich writes: "This appears to be just a passing, incidental statement but is inserted for the purpose of continuing to promote the long claimed and much publicized fallacy that the Reorganized Church actually won this suit, when in reality they lost it, in spite of the fact that no one appeared against them to argue for the defense."⁶

Despite efforts to set the record straight, the fallacy has been perpetuated in more recent publications by writers such as Eric Paul Rogers, coauthor of this article, and S. Patrick Baggette II. Citing *The History of the Reorganized Church of Jesus Christ of Latter Day Saints*⁷ Rogers accepted without question that Judge L. S. Sherman "issued a judgment that the title of the Kirtland Temple was in the Reorganized Church of Jesus Christ of Latter Day Saints."⁸ Similarly, Baggette II commented parenthetically in the conclusion of his article on the Independence Temple Lot Case: "In 1880, the title to the Kirtland Temple, located in Ohio, was awarded to the RLDS Church by the Court of Common Pleas, Lake County, Ohio."⁹ Although reference to the court case of 1880 was removed from the inscription on the temple in 1986,¹⁰ popular histories and the subsequent uncritical citation of those histories have perpetu-

of President Joseph Smith (1832-1914)," *Saints' Herald* 82 (December 3, 1935): 1553-54; and Israel A. Smith, "The Kirtland Temple Litigation," *Saints' Herald* 90 (January 9, 1943): 40-43, 54.

⁶Russell Rich, Review, *BYU Studies* 10 (Summer 1970): 501.

⁷The Reorganized Church of Jesus Christ of Latter Day Saints, *The History of the Reorganized Church of Jesus Christ of Latter Day Saints* (Independence: Herald House, 1951), 304.

⁸Eric Paul Rogers, "Mark Hill Forscutt: Mormon Missionary, Morrisite Apostle, RLDS Minister." *John Whitmer Historical Association Journal* 21 (2001): 81.

⁹S. Patrick Baggette II, "The Temple Lot Case: Fraud in God's Vineyard," *John Whitmer Historical Association Journal* 23 (2003): 136.

¹⁰Ken Stobaugh, Director of Historic Sites for the RLDS Church in 1986, explains that the reference to ownership "in succession by order of court" was changed in preparation for the sesquicentennial celebration of the temple's dedication held on June 22, 1986. (The celebration was held in June rather than on March 27 because of a conflict with the RLDS World Conference.) Stobaugh also explains that the primary motivation for the

ated the fallacy.

We will now address the primary question of this paper: Why did the Church of Jesus Christ of Latter-day Saints fail to respond to the litigation in any way? We explore several possible reasons, some more convincing than others, leaving readers to draw their own conclusions.

POSSIBLE DESECRATION OF THE TEMPLE

According to Brigham Young, the Kirtland Temple had been desecrated. When laying the cornerstone of the Salt Lake Temple on April 6, 1853, he declared: "The temple at Kirtland, had fallen into the hands of wicked men, and by them been polluted like the temple at Jerusalem, and consequently was disowned by the Father and the Son."¹¹

In 1837, an economic crisis swept the nation, taking down with it the Church's Kirtland Safety Society.¹² More than one third of the membership apostatized. Joseph Smith and Sidney Rigdon left Kirtland, never to return, in January 1838, followed by the main body

change was the negative response of LDS visitors to the earlier version. He suggests that the decision was likely informed by the growing emphasis on peace and reconciliation within the RLDS Church. Carl Bezilla, maintenance supervisor for the Kirtland Temple and a member of the maintenance staff in 1986, corroborated Stobaugh's statement, indicating that the change was part of a larger project to make improvements to the temple and grounds. Between 1899 (when the inscription first mentioned the court case) and 1934 (when Historic American Building Survey photos were taken), the inscription read: "House of the Lord, built by the Church of Jesus Christ of Latter Day Saints 1834. Reorganized Church of Jesus Christ of Latter Day Saints in succession by decision of court Feb. 1880." Lachlan Mackay, Historic Sites coordinator for the Community of Christ, emails to Eric Paul Rogers, February 23 and May 27, 2004, printouts in Rogers's possession.

¹¹"Minutes of the General Conference," *Journal History of the Church of Jesus Christ of Latter-day Saints* (chronological scrapbook of typed entries and newspaper clippings, 1830–present), April 6, 1853, 2, Archives, Family and Church History Department, Church of Jesus Christ of Latter-day Saints, Salt Lake City (hereafter LDS Church Archives).

¹²Milton V. Backman Jr., *The Heavens Resound: A History of the Latter-day Saints in Ohio 1830–1838* (Salt Lake City: Deseret Book Company, 1983), 322.

of the Church later that year. Some Church members remained in Kirtland, and membership grew in the early 1840s, due to conversions and migration. A stake was organized under Almon W. Babbitt's leadership in 1841. Branches and priesthood quorums functioned in and around Kirtland. Joseph Smith, however, viewed Kirtland as a temporary gathering place and urged migration to Nauvoo, precipitating a second major exodus of the Saints in 1843. Following the murder of Joseph Smith in 1844, Brigham Young renewed the call to depart from Kirtland, "leaving neither man, woman or child behind that desires to come up here [Nauvoo] with a pure heart, leaving Kirtland to the owls and bats for a season."¹³ Reuben McBride, who had been sustained as a counselor to Bishop Thomas Burdick at Kirtland in May 1841, wrote to Brigham Young in October 1845 explaining that "apostates were doing everything they could to injure the Saints" and that they had broken into the Lord's House and taken possession of it.¹⁴

During the next 30 years the building was used for various purposes. Although some Mormons remained in the area, as Loving discusses, it is not clear to what extent they considered themselves Latter-day Saints. Certainly, after they refused urgent invitations to gather with the body of the Saints, both before and after the martyrdom, it seems likely that Church leaders regarded them as apostate.

In 1855 Thomas Colburn, a Mormon missionary, visited Kirtland and reported finding "some tolerably good Saints considering circumstances, and many apostates. They have all become 'rappers,' and deny the Christ. They have taken possession of the temple, and they are no better than thieves and robbers."¹⁵ Years later Joseph Fielding Smith wrote, without a citation to a historical source, that the Lord "had warned the saints in the beginning while the [Kirtland]

¹³Brigham Young, Letter to the "Brethren" (Kirtland Saints), January 21, 1845, photocopy, LDS Church Archives, as quoted in Backman, *The Heavens Resound*, 371.

¹⁴*History of the Church* 7:484; quoted in Backman, *The Heavens Resound*, 442 note 12. Burdick identified S. B. Stoddard, Jacob Bump, Hiram Kellogg, Leonard Rich, and Jewel Raney as leaders of the rioters.

¹⁵"Our Brethren Abroad," *St. Louis Luminary*, February 17, 1844, 50. By "rapper" he apparently meant spiritualists. Parley P. Pratt referred to "rappers" in the context of "magnetizers, clairvoyants, and writing mediums." *Journal of Discourses*, 26 vols. (London: Latter-day Saints' Book Depot,

temple was under construction that he would not accept it if they polluted it. It was not long after the Lord accepted it and the keys of several dispensations had been revealed in it, that some of the members of the Church polluted that house and it did cease to be a house of the Lord.”¹⁶ The secular purposes for which the temple was later used may have also been a factor in the LDS view that the temple was desecrated. Modern LDS practice allows for the rededication of temples. However, no precedent existed for rededication or cleansing of a desecrated temple in the nineteenth century.

Was the perceived desecration of the Kirtland Temple reason enough for ignoring the litigation? Probably not. If the Utah church could establish ownership, the property could be sold. This possibility was considered earlier. On April 27, 1846, Brigham Young met in council with Church leaders Heber C. Kimball, Willard Richards, John Taylor, Parley P. Pratt, Orson Pratt, and sixteen others. The council decided that the trustees might sell the temples at Nauvoo and Kirtland and use the proceeds to help in the westward migration of the Saints. Additionally, the council “considered that the Temple would be of no benefit to the saints, if they could not possess their private dwellings, and the time should come that they should return and redeem their inheritances they could redeem the temple also; that a sale would secure it from unjust claims, mobs, fire and so forth, more effectually than for the Church to retain it in their hands.”¹⁷

By ignoring the litigation, the LDS Church risked losing any claim to the temple. It is unlikely, however, that the LDS Church was completely uninterested in ownership of the property. Just four months after the lawsuit was filed, the LDS Church-owned and -operated *Deseret Evening News* of December 12, 1879, reprinted the following paragraph from an eastern paper:

The Mormon church which Joseph Smith built at Kirtland, Ohio,

1854–1886), 1:6–7. Jedediah M. Grant spoke of “spirit rappers” in connection with witches and wizards and notes their satanic origins and deceptive designs. *Journal of Discourses* 2:2.

¹⁶Joseph Fielding Smith, *Church History and Modern Revelation*, 4 vols. (Salt Lake City: Church of Jesus Christ of Latter-day Saints, 1946–49), 4:81.

¹⁷Elden Jay Watson, ed., *Manuscript History of Brigham Young: 1846–1847* (Salt Lake City: Elden Jay Watson, 1971), 145.

in 1834, is now owned by Smith's descendants, and is rented for lectures, dances, and exhibitions of all kinds. This first Mormon Temple is a massive stone structure, four stories in height, and surrounded by a tower overlooking all the country around. It was solidly and durably built by the Mormons themselves, of roughly hewn sandstone from plans Smith claimed to have received in a vision and is still quite well preserved.

The *Deseret Evening News* then editorialized: "The Kirtland Temple may be claimed by the persons above named, but it is not their property, and it is a shame to the holders that it is devoted to such uses. It belongs of right to the Church of Jesus Christ of Latter-day Saints, and we believe the legal title vests there as well as the just possession. Time will show." This statement suggests at least some interest in the property—desecrated or not—and the belief that LDS claims to legal title were defensible. Interestingly, the editor seems unaware that the LDS Church had been named as a defendant but failed to act in the lawsuit.

EXPENSE OF FIGHTING THE PETITION

Another possible reason for not responding to the lawsuit, is that fighting the petition would have been unjustifiably expensive. We found no documentation indicating that cost was a factor; however, we must ask, what was the dollar value of the Kirtland Temple at the time of the lawsuit? From a modern historical or spiritual perspective, the building is nearly priceless. As real property, however, it may have been worth very little at the time.

The Kirtland Temple was too large a building for the small town of Kirtland. The various groups that held and used the structure did not have congregations large enough to supply the necessary funding to properly maintain the building. Several sources reported the building to be in very poor condition at the time of the lawsuit.¹⁸

A forty-three-year-old building in need of major renovation located in a small, obscure town would be worth relatively little. Records

¹⁸"The Kirtland Temple Opened," *Salt Lake Herald*, December 7, 1882, 8; "The Old Mormon Temple," *Bear Lake Democrat*, April 28, 1883, 2; "Kirtland Temple," *Utah Journal*, *Journal History*, May 9, 1885, 15. These sources, however, also note the changes that were beginning to occur thanks to the labors of RLDS members preparing for the 1883 annual conference of the Church to be held at the Kirtland Temple. Were it not for the

show that Russell Huntley purchased the building in 1862 for \$150.37. He may have gotten a great bargain, but it seems reasonable to assume that the building could not have been sold for much more. Even today large buildings in small towns are usually considered more a liability than an asset.

Clearly, an attempt by the Utah Mormons to obtain the temple property would have been difficult and expensive—especially when considering the uncertain outcome of any court proceeding. Litigating in a distant state is time consuming and costly. At every hearing, all witnesses would have had to be present. If the LDS Church had prevailed, it would still have been necessary to actually take possession of the property. This would have been extremely difficult as there were very few LDS Church members living nearby and various other groups had been “squatting” on the premises for over thirty years.

In the unlikely event that the LDS Church, as defendant, prevailed in the lawsuit, and the even more unlikely event that it could obtain possession of the property, what would it then do with the temple? Mormon historical sites in Kirtland currently draw tens of thousands of visitors each year, but except for the occasional missionary traveling to or from his mission field, such tourism was nonexistent during the nineteenth century. By the mid-1840s, the vast majority of Saints had left Kirtland, and a formal congregation of Latter-day Saints would not be organized in Kirtland until June 5, 1977.¹⁹ Why would the market have seemed more favorable in 1879? Why spend large sums of money to obtain a building worth \$150 only to turn around and attempt to sell it?

In 1879 the LDS Church may have wanted the Kirtland Temple but may have decided against pursuing the title because the cost of obtaining it would have been much greater than the property was worth at that time.

DISTRACTED BY OTHER CONCERNS

Referring to the Kirtland Temple litigation, Elwin C. Robison, architectural historian and author of *The First Mormon Temple: Design, Construction, and Historic Context of the Kirtland Temple*, points out that

efforts of the RLDS Church, it is unlikely that the building would have been preserved to this day.

¹⁹Janet Brigham, “Kirtland Today: History with a Future,” *Ensign*, February 1979, 51.

the “timing of the suit coincided with the uproar concerning the LDS practice of polygamy and virtually ensured a judgment in favor of the RLDS Church, which repudiated the practice.”²⁰ Accepting the mistaken view that the RLDS Church had won the case, Robison cites, as the opinion of the court, a portion of the findings filed by the plaintiff: “That the Church in Utah the defendant of which John Taylor is President has materially and largely departed from the faith, doctrines, laws, ordinances and usages of the original Church of Jesus Christ of Latter Day Saints and has incorporated into its System of faith the doctrine of Celestial Marriage and a plurality of wives.”²¹ While it was clear that the judge strenuously disapproved of polygamy and accepted the RLDS position that it constituted a departure from the original church’s doctrine, the court dismissed the case. However, the notion that the LDS Church was distracted by the aggressive prosecution of polygamy can hardly be contested.

The year the temple suit was filed opened with U.S. Chief Justice Morrison R. Waite’s opinion in the landmark decision *Reynolds v. the United States*. Regarding religious freedom and the practice of polygamy, Waite asserted: “Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices.”²² On January 6, 1879, the U.S. Supreme Court unanimously confirmed the constitutionality of the anti-bigamy law of 1862 and confirmed the sentence of the lower courts upon George Reynolds. John Taylor called Waite’s opinion “so much bosh” and accused Congress of a “shameless infraction of the Constitution of the United States.”²³

The furor surrounding the Supreme Court’s decision as well as the accelerated prosecution of polygamists in Utah territory certainly created a difficult environment in which to manage Church affairs. Additional concerns that year were the trial for murder of Robert T. Burton, counselor in the Presiding Bishopric of the Utah church, in

²⁰Elwin C. Robison, *The First Mormon Temple: Design, Construction, and Historic Context of the Kirtland Temple* (Provo, Utah: Brigham Young University Press, 1997), 105.

²¹*Ibid.*, 105 note 43.

²²Quoted in Richard S. Van Wagoner, *Mormon Polygamy*, 2d ed. (Salt Lake City: Signature Books, 1989), 110.

²³Quoted in *ibid.*, 111.

connection with the Morrisite war seventeen years earlier;²⁴ a legal dispute between Brigham Young's heirs and the administrators of his estate;²⁵ and the murder of Joseph Standing, a missionary, by a mob in Whitfield County, Georgia.²⁶

Nevertheless, the Church obviously continued to function effectively and achieve many objectives. Missionary work, Church-sponsored emigration and settlement continued, as did the organization of branches, wards, districts and stakes at home and abroad. The first issues of the *Deseret Sunday School Reader* for LDS children and the *Contributor* for the Young Men's Mutual Improvement Asso-

²⁴Andrew Jenson, *Church Chronology: A Record of Important Events Pertaining to the History of the Church of Jesus Christ of Latter-day Saints* (Salt Lake City: Deseret News, 1914), 103. For a thorough treatment of the Morrisite movement and Burton's trial, see C. LeRoy Anderson, "For Christ Will Come Tomorrow": *The Saga of the Morrisites* (Logan, Utah: Utah State University Press, 1981). Burton was on trial for the murder of Isabella Bowman who was shot on the final day of the Morrisite conflict. Burton was acquitted by a jury comprised equally of Mormons and non-Mormons.

²⁵Jenson, *Church Chronology*, 104. The interwoven nature of Brigham Young's personal assets and Church assets made the settlement of his estate difficult. An obstacle to delineating personal and Church property was the Morrill Anti-Bigamy Act which disincorporated the Church and limited its real estate to \$50,000. To avoid confiscation of properties by the federal government, properties were simply held in the name of Brigham Young or some other trustee. Although some estimates placed the size of Young's estate at as much as \$8 million, after deductions for debts and fees the total available to heirs was only \$224,242. The disappointment of the heirs, the efforts of federal officials and anti-Mormons to obtain as much property as possible from the Church, and the determination of the Church to protect its property set the stage for a lengthy dispute that ended with the excommunications of six of Young's children and that was not legally settled until 1879. Leonard J. Arrington, "The Settlement of the Brigham Young Estate, 1877-79," *Pacific Historical Review* 21 (February 1952): 1-20; Leonard J. Arrington, *Brigham Young: American Moses* (New York: Alfred A. Knopf), 422-30.

²⁶Jenson, *Church Chronology*, 104. See also Ken Driggs, "'There Is No Law in Georgia for Mormons': The Joseph Standing Murder Case of 1879," *Georgia Historical Quarterly* 73 (Winter 1989): 745-72 and 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), 5:558-67.

ciation appeared. Moses Thatcher was appointed to the Quorum of the Twelve to fill the vacancy created by Orson Hyde's death, and work continued on the Salt Lake Temple.²⁷ Apostle Orson Pratt left Liverpool for Utah on Saturday, August 16, 1879, bringing with him electrotype plates for new editions of the Book of Mormon and Doctrine and Covenants.²⁸ It would not have been impossible to assign Pratt to make a court appearance in Ohio as part of this trip. In short, although other activities certainly competed for the attention of Church leaders, they would not have been insurmountable obstacles to LDS Church representation in the case.

ADVERSE POSSESSION

Another explanation is that adverse possession made the case of ownership essentially moot. Adverse possession allows a person or group to obtain legal title to real estate simply by occupying it for a period of time. Such possession must occur without the owner's consent and must be "actual, hostile, open, notorious, exclusive, uninterrupted and continuous for the prescriptive period stipulated by state law."²⁹

It might be possible to argue that the Church retained de facto control of the temple until August 1846, when Almon W. Babbitt, Joseph L. Heywood, and John S. Fullmer, acting as trustees in trust for the Church, sold Reuben McBride three tracts of land in Kirtland for a reported \$10,000.³⁰ Since McBride was a member of the Church and since the trustees were straining every nerve to raise funds to finance the migration west, it seems doubtful that this was a bona fide transaction or that \$10,000 actually changed hands.

In any case, there seems to be no evidence that can be realistically interpreted as possession by the Church after 1846; and reasonably speaking, it seems that the Church had essentially abandoned the building in 1838. Because the Utah church had not possessed the property for at least thirty-three years, the church would have been di-

²⁷Ibid., 103–5.

²⁸Ibid., 104.

²⁹"Adverse possession," *Real Estate Dictionary*, retrieved on May 27, 2004, from <http://www2.cabr.org/files/RealEstateDictionary.pdf>.

³⁰This information comes from Kim Loving's article, citing the Lake County Recorder of Deeds, warranty deed received December 21, 1846, and recorded in Book E, p. 227, January 2, 1847.

vested of all title and ownership through the operation of adverse possession. This possibility, explored in detail by Kim Loving, raises an interesting question that is beyond the scope of this paper. If the Church did not hold title, then who did? While payment of property taxes alone cannot guarantee a successful claim of adverse possession, the courts would likely have been most hospitable to an argument based upon who had paid the real property taxes over the years.

It is certain, however, that by the time the lawsuit was filed, the LDS Church had not been in actual physical possession of the building for at least thirty-three years. Any competent attorney would have advised the LDS Church of its indefensible legal position. Perhaps the Church failed to respond to the lawsuit because it had no reason to believe that it could prevail.

THE TEMPLE'S IRRELEVANCE TO ZION-BUILDING IN UTAH

The LDS Church must have considered a decaying building in Ohio much less important than the establishment of Zion in the "top of the mountains" (Isa. 2:2). In the perspective of those who followed Brigham Young, Palmyra, Harmony, Kirtland, Independence, Far West, and Nauvoo were, in many respects, simply way-stations on the road to the Rocky Mountains. They vested great reliance in a prophecy Joseph Smith had made in Nauvoo on August 6, 1842: "I prophesied that the Saints would continue to suffer much affliction and would be driven to the Rocky Mountains, many would apostatize, others would be put to death by our persecutors or lose their lives in consequence of exposure or disease, and some of you will live to go and assist in making settlements and build cities and see the Saints become a mighty people in the midst of the Rocky Mountains."³¹

Such a perspective, which of course was not shared by those who went their own way from Nauvoo, allowed them to psychologically dismiss ownership of the Kirtland Temple as a structure that had served an important but temporary purpose and was now irrelevant to the growth of the "Kingdom of God."

LACK OF PROPER NOTIFICATION OF THE LAWSUIT

When the RLDS Church filed the Kirtland Temple suit, it named "the Church in Utah of which John Taylor is President and

³¹*History of the Church*, 5:85.

commonly known as the Mormon Church” as one of the defendants. While it is clear that E. L. Kelley, the RLDS attorney, meant the Church of Jesus Christ of Latter-day Saints, the law does not allow a plaintiff to use a coined or fictitious name as a substitute for the true name of a person or organization. All plaintiffs must be correctly identified so long as the plaintiff is aware of the correct name.³² Joseph Smith III and E. L. Kelley certainly knew the correct name of the LDS Church and that it had never been known as “The Church in Utah of which John Taylor is President,” officially or unofficially. The LDS Church was, therefore, never correctly named as a defendant.³³

In addition to the LDS Church not being properly named in the pleading, it is also our belief that the LDS Church was not given proper notice as required by Ohio and U.S. law. Where the purpose of adjudication is “*in rem*” (meaning against the property), publication of notice may be sufficient. However, where the purpose of adjudication is “*in personam*” (meaning against the person), personal notice is required. The primary purpose of the Kirtland Temple suit was to establish the plaintiff as the “true and in fact only Lawful and Legitimate successor of the Church of Jesus Christ of Latter Day Saints.” Establishing ownership of the property was a secondary purpose that would follow by virtue of its successorship.

It may be argued that publication of notice was sufficient. However, a similar case was handed down by the U.S. Supreme Court just two years before the Kirtland Temple case was filed. The Court ruled that papers must be personally served, notifying a party of litigation and its claims in 1877. It specifically and clearly stated that a mere publication of process would not satisfy the law:

If, without personal service, judgments *in personam*, (meaning against the person) obtained *ex parte* (meaning without notice) against non-residents and absent parties upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had

³²Reimann, *The Reorganized Church and the Civil Courts*, 67–68.

³³*Ibid.*, 67–68.

any existence, had perished.³⁴

Failure to serve personal notice was particularly bothersome to Mark Forscutt, as Kim Loving documents. Forscutt was a prominent RLDS minister and leader, joint deed-holder to the temple with Joseph Smith III and a defendant in the case. Concerned with the legal and ethical implications of failure to notify the defendants, Forscutt raised the issue at the General Conference of the RLDS Church in April 1880:

Brother Forscutt inquired whether it was a legal measure, and if legal, whether it was morally right to institute a suit against parties whose residence was known, and yet never notify those parties of such suit?

The attorney, Bro. E. L. Kelley, replied that he had taken the steps required by the laws of the state of Ohio, in which the property was situated, and advertised in the papers there of the intention to institute such suit. He had notified the other parties interested in the suit; but did not know whether he had notified Bro. Forscutt, or not.

Bro. Forscutt stated that he had received no such notification; that if he had known of the suit, he should have felt it to be his duty to interpose objections, as his honor was partly at stake in the disposal of the Temple.³⁵

Despite Kelley's claim that he had notified all of the defendants, his "notification" consisted of an announcement in the *Painesville Telegraph*, an obscure newspaper 1,700 miles away from LDS Church headquarters. Whether such publication met the requirements of the law (and the Supreme Court would say it did not), there is no evidence that either the LDS Church or John Taylor was ever served personal notice.

CONCLUSION

This paper has investigated the strengths and weaknesses of several possible explanations for the LDS Church's absence from the

³⁴*Pennoyer v. Neff*, 95 U.S. 714 (1877).

³⁵Henry A. Stebbins, "Conference Minutes Supplement," *Saints' Herald* 27 (June 1, 1880): 180. By "honor," Forscutt likely meant that he owed a debt to a former business associate and, lacking other funds, was counting on the proceeds from the sale of the temple to pay it. Joseph Smith III, Letter to Alexander Fyfe, May 26, 1880, Joseph Smith III Letterbook 3, Community of Christ Library-Archives, Independence.

Kirtland Temple litigation:

1. The temple had been desecrated and had ceased to be the House of the Lord; therefore, the LDS Church was not interested in ownership.

2. Fighting the RLDS Church's petition would have been unjustifiably expensive at a time when the LDS Church was suffering financial difficulties.

3. The LDS Church was distracted by other concerns, primarily the fight with the federal government over polygamy.

4. Arguing the case was futile because the LDS Church had not possessed the property in over thirty years and would likely have lost on the basis of adverse possession.

5. Kirtland was irrelevant to a Great Basin kingdom.

6. The LDS Church was not properly named and notified as a defendant.

Each of these explanations could have factored into LDS Church leaders' considerations, both about fighting the suit and about appealing the court's published decision. However, we consider that the most probable explanation is that the LDS Church simply did not know of the suit until after the case was dismissed. The first mention of the suit does not appear in Utah newspapers until March 5, 1880—ten days after the court had ruled. At that point, the *Salt Lake Daily Tribune* reported: "The Court of Common Pleas of Lake County, Ohio in a decision just rendered, confirms the title of the Re-organized Church of Latter-day Saints, the non-polygamist or Josephite branch of Mormons, whose headquarters are at Plano, Illinois, and of which Joseph Smith is president, to the old Mormon Temple at Kirtland, Ohio. The decision recognizes the Josephites as the true Mormons and the Utah Mormons are declared impostors." On April 9, 1880, Joseph Smith III editorialized: "The Salt Lake City Tribune, Gentile paper and the Herald, of the Utah Church, reached us on the 9th, both having the decision of the Court in Ohio, respecting the Kirtland Temple inserted in their columns. So let the leaven work."³⁶

A review of unpublished materials including the reconstructed minutes of the meetings of the Quorum of the Twelve Apostles for 1879 and 1880; John Taylor's personal papers and correspondence

³⁶Joseph Smith III, "Editorial Items," *Saints' Herald* 27, no 7 (April 1, 1880): 103.

during the same time period; the papers and journals of Wilford Woodruff; the papers of George Q. Cannon; the papers, letters, and journals of Franklin D. Richards; the Franklin S. Richards letters; the Journal History of the Church; and the Historian's Office Journal reveal no evidence that the leadership of the LDS Church was aware of the Ohio case prior to its conclusion.³⁷ Published sources such as Jenson's *Historical Record* and *Encyclopedic History of the Church of Jesus Christ of Latter-day Saints* likewise reveal no prior knowledge of the litigation.³⁸

Although unable to prove a negative—that the LDS Church was unaware of the law suit until after the case was closed—the evidence, or lack thereof, strongly suggests that this was the reason the Church of Jesus Christ of Latter-day Saints did not represent itself in the case.

³⁷Materials in the LDS Church Archives that are currently restricted to researchers were reviewed by Ronald G. Watt. The minutes of the Quorum of the Twelve, also restricted, were reviewed by W. Paul Werrett, a staff member of the Quorum of the Twelve. He explained that the Quorum's minutes from 1849 to 1883 were destroyed when the Council House was destroyed by fire in 1883. Apostle Franklin D. Richards attempted to reconstruct those minutes from his personal journals.

³⁸Andrew Jenson, *The Historical Record: A Monthly Periodical Devoted Exclusively to Historical, Biographical, Chronological, and Statistical Matters*, 9 vols. (Salt Lake City: By the author, 1882–90); *Encyclopedic History of the Church of Jesus Christ of Latter-day Saints* (Salt Lake City: Deseret News Publishing Company, 1941).