

1986

Lucky Seven Rodeo Corporation, a Utah Corporation v. Pat Clark : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Timothy B. Anderson; Dale R. Chamberlain; Jones, Waldo, Holbrook, McDonough; Attorney for Appellant.

Phillip L. Foremaster; Attorney for Respondent.

Recommended Citation

Brief of Respondent, *Lucky Seven Rodeo Corporation v. Clark*, No. 860067.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/799

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

STATE COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 880079 - CA

IN THE SUPREME COURT OF THE
STATE OF UTAH

LUCKY SEVEN RODEO CORPORATION,)
A Utah Corporation,)

Plaintiff & Appellant,)

PAT CLARK,)
An Individual,)

Defendant & Respondent.)

SUPREME COURT NO.
860067

88-0079-CA

BRIEF OF RESPONDENT

Timothy B. Anderson &
Dale R. Chamberlain of
JONES, WALDO, HOLBROOK &
McDONOUGH
One South Main, Suite 300
St. George, Utah 84770
Telephone: (801) 628-1627

Attorney for Appellant

Phillip L. Foremaster
165 North 100 East,
Suite 1
P.O. Box 572
St. George, Utah 84770
Telephone: (801) 673-2209

Attorney for Respondent

FILED
NOV 24 1986

LIST OF PARTIES

LUCKY SEVEN RODEO CORPORATION, A UTAH CORPORATION.
PLAINTIFF AND APPELLANT.

PAT CLARK, AN INDIVIDUAL, DEFENDANT AND RESPONDENT.

TABLE OF CONTENTS

	<u>PAGE</u>
LIST OF PARTIES	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	6
POINT I: THE DISTRICT COURT DID NOT ERR IN ORDERING AND DECLAR- ING THE EASEMENT GRANTED TO THE APPELLANT BY STIPU- LATION OF THE PARTIES TERM- INATED AND OF NO FURTHER FORCE AND EFFECT AND THAT APPELLANT HAD NO FURTHER INTEREST IN THE REAL PROP- PERTY BELONGING TO RESPON- DENT AND UPON WHICH SAID EASEMENT WAS GRANTED	6
CONCLUSION	10

TABLE OF AUTHORITIES

	PAGE
1. BROWN V. OREGON SHORT LINE R. Co., (1909) 36 UTAH 257, 102 P. 740	8
2. DAHNKEN V. GEORGE ROMNEY & SONS Co., ET AL., (1947) 111 UTAH 471, 184 P. 2D 211	8
3. HARMON V. RASMUSSEN (1962) 13 UTAH 2D 422, 375 P. 2D 762	7,8&9
4. LOVETT V. CONTINENTAL BANK AND TRUST Co., (1955) 4 UTAH 2D 76, 286 P. 2D 1065	7
5. STATE V. BERCHTOLD (1960) 11 UTAH 2D 208, 357 P. 2D 183	8
6. TAYLOR V. HAMPTON, 4 McCORD (S.C.) 96, 17 AM. DEC. 710	8
7. TUTTLE V. SOWADZKI, 41 UTAH 501, 126 P. 959	8
8. WESTERN GATEWAY STORAGE Co. V. TRESEDER (UTAH 1977) 567 P. 2D 181	8
9. WHITESIDES V. GREEN, 13 UTAH 341, 44 P. 1032	8

IN THE SUPREME COURT OF THE
STATE OF UTAH

LUCKY SEVEN RODEO CORPORATION,)
A UTAH CORPORATION,)

PLAINTIFF & APPELLANT,)

-VS-)

PAT CLARK,
AN INDIVIDUAL,)

DEFENDANT & RESPONDENT.)

SUPREME COURT NO.
860067

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

THE DISTRICT COURT DID NOT ERR IN ORDERING AND DECLARING THE EASEMENT GRANTED TO APPELLANT BY STIPULATION OF THE PARTIES TERMINATED AND OF NO FURTHER FORCE AND EFFECT AND THAT APPELLANT HAD NO FURTHER INTEREST IN THE REAL PROPERTY BELONGING TO RESPONDENT UPON WHICH SAID EASEMENT WAS GRANTED.

STATEMENT OF THE CASE

ON MARCH 13, 1981 THE APPELLANT BROUGHT ACTION AGAINST THE RESPONDENT IN THE FIFTH DISTRICT COURT FOR WASHINGTON COUNTY CLAIMING TITLE TO 5.815 ACRES OF REAL PROPERTY LOCATED IN WASHINGTON COUNTY, UTAH (R. 1-4). LEGAL TITLE TO THE SUBJECT PROPERTY STOOD IN THE NAME OF THE RESPONDENT PAT CLARK (R. 152).

THE COMPLAINT OF THE APPELLANT SET FORTH TWO THEORIES UPON WHICH APPELLANT CLAIMED TITLE TO THE SUBJECT

ESENCE (R. 1-2) AND (2) ADVERSE POSSESSION (R. 2-3).

IT IS TO BE NOTED THAT AT NO PLACE IN THE COMPLAINT DID THE APPELLANT CLAIM ANY EASEMENT ON OR ACROSS THE SUBJECT PROPERTY (R. 1-4).

THE RESPONDENT ANSWERED THE COMPLAINT OF THE APPELLANT BY GENERALLY DENYING THE ALLEGATIONS OF THE APPELLANT (R. 7-8) AND COUNTERCLAIMED REQUESTING A DECREE OF THE COURT QUIETING TITLE IN RESPONDENT TO THE SUBJECT REAL ESTATE AND FOR DAMAGES (R. 8-11). AFTER WHAT CAN BE TERMED THE USUAL PRE-TRIAL DISCOVERY AND MANUVERING THE MATTER WENT TO JURY TRIAL BEFORE THE TRIAL COURT ON THE 14TH DAY OF DECEMBER, 1983 (R. 143).

AFTER APPROXIMATELY TWO AND ONE-HALF DAYS OF TRIAL THE PARTIES SETTLED THE ISSUES EXISTING BETWEEN THEM. THE AGREEMENT SETTING FORTH THE SETTLEMENT, INCLUDING THE SETTLEMENT OF ISSUES OUTSIDE THE PLEADINGS, WAS REDUCED TO WRITING IN AN INSTRUMENT ENTITLED "STIPULATION AND SETTLEMENT AGREEMENT" WAS EXECUTED BY THE PARTIES AND THEIR COUNSEL ON JANUARY 30, 1984 AND WAS FILED WITH THE COURT ON FEBRUARY 13, 1984 (R. 152-155). OBVIOUSLY UPON SETTLEMENT OF THE ISSUES AND THE REPRESENTATION OF SUCH TO THE TRIAL COURT THE COURT EXCUSED THE JURY AND THE LAWSUIT WAS TERMINATED PRIOR TO ITS COMPLETION AND THE RENDITION OF A JURY VERDICT (Tr. 330-331). THE VERBAL AGREEMENT OF THE PARTIES WHICH WAS SUBSEQUENTLY REDUCED TO WRITING IS SET FORTH AT PAGES 325 - 329 OF VOLUME II OF THE TRIAL TRANSCRIPT.

THE PROVISIONS OF THE PARTIES' SETTLEMENT AGREEMENT

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

AND THE ISSUES

WHICH ARE THE SUBJECT OF APPELLANT'S APPEAL ARE SET FORTH IN WRITING IN PARAGRAPHS 1 AND 2 OF THE PARTIES' STIPULATION AND SETTLEMENT AGREEMENT SHOWN AT PAGES 152 AND 153 OF THE DISTRICT COURT RECORD. IN THE OPINION OF RESPONDENT, FOR PURPOSES OF THIS APPEAL THE IMPROTANT PROVISIONS ARE CONTAINED IN PARAGRAPH 2 AND IT READS AS FOLLOWS:

"2. PLAINTIFF LUCKY SEVEN RODEO CORPORATION AND ITS SUCCESSORS AND ASSIGNS (HEREINAFTER "PLAINTIFF") SHALL HAVE AN EXCLUSIVE AND PERPETUAL EASEMENT TO USE, MAINTAIN AND OPERATE THE RESERVOIR AND DIKE AREA WHICH ARE DESCRIBED IN PARAGRAPH 1 ABOVE FOR IRRIGATION, STOCK WATERING, CORRALLING OF ANIMALS AND AGRICULTURAL PURPOSES, TOGETHER WITH THE OBLIGATION THAT PLAINTIFF (APPELLANT) SHALL MAINTAIN THE FENCES ENCLOSING THE AREA HEREINABOVE DESCRIBED."

THE AFOREMENTIONED EASEMENT WAS CREATED BY AGREEMENT OF THE PARTIES ON THE REAL ESTATE WHICH APPELLANT ORIGINALLY CLAIMED TITLE TO HOWEVER UNDER THE TERMS OF THE PARTIES' AGREEMENT TITLE REMAINED IN THE NAME OF THE RESPONDENT.

IN CONFORMITY WITH THE PARTIES' STIPULATION AND AGREEMENT. MADE BOTH VERBALLY AND IN WRITING, THE COURT ENTERED ITS ORDER AND JUDGMENT PUTTING THE SANCTION AND AUTHORITY OF THE COURT BEHIND THE AGREEMENT ON FEBRUARY 13, 1984 (R. 156-159). IT IS TO BE NOTED THAT THE WORDING OF THE ORDER AND JUDGMENT IS ALMOST EXACTLY THE SAME AS THAT IN THE WRITTEN STIPULATION AND AGREEMENT. ALSO, BOTH THE WRITTEN STIPULATION AND SETTLEMENT AGREEMENT (R. 152) AND THE ORDER AND JUDGMENT (R. 156) WERE PREPARED BY COUNSEL FOR APPELLANT USING WORDING CHOSEN BY HIM.

APPELLANT HAD REMOVED AND DESTROYED THE RESERVOIR AND DIKE ON THE SUBJECT PROPERTY AND THEREFORE HAD DESTROYED THE NEED FOR ANY FURTHER EASEMENT AND INDICATED ITS INTENT TO ABANDON THE SAME AND FURTHER THAT THE APPELLANT HAD FAILED TO MAINTAIN THE FENCES ON THE PROPERTY AND HAD IN FACT DESTROYED THE SAME, CONTRARY TO THE AGREEMENT OF THE PARTIES AND THE ORDER OF THE COURT. (R. 164-165). THE APPELLANT MOVED TO DISMISS THE MOTION (R. 167-169) AND THE COURT OVERRULED AND DENIED THE MOTION TO DISMISS GIVING THE APPELLANT 20 DAYS TO ANSWER THE ORIGINAL MOTION (R. 170). ON SEPTEMBER 13, 1985 THE RESPONDENT FILED HIS "MOTION FOR INTERPRETATION OF JUDGMENT AND FOR ORDER TERMINATING EASEMENT" (R. 171-173) BASED UPON THE SAME REASONS AS THOSE SET FORTH IN ITS PREVIOUS MOTION THE SAME BEING THAT (1) THE APPELLANT HAD REMOVED AND DESTROYED THE RESERVOIR AND DIKE ON THE SUBJECT PROPERTY AND THEREFORE HAD DESTROYED THE REASON FOR ANY EASEMENT AND INDICATED ITS INTENT TO ABANDON THE SAME AND (2) THAT THE FENCES ON THE PROPERTY HAD BEEN REMOVED AND DESTROYED CONTRARY TO THE AGREEMENT OF THE PARTIES AND ORDER OF THE COURT. THE APPELLANT ANSWERED THE MOTION BY ADMITTING THAT THE RESERVOIR AND DIKE HAD BEEN REMOVED (R. 177). THERE IS NOT ISSUE OF FACT IN THAT REGARD. IN ADDITION, THE RECORD INDICATES BY UNCONTROVERTED AFFIDAVIT (R. 183) THAT THE FENCES HAD BEEN REMOVED AND DESTROYED BY THE APPELLANT.

ON JANUARY 23, 1986 THE COURT ENTERED ITS SUMMARY

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Document generated by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU. ~~MENT ON SUMMARY~~ ~~PROCEEDINGS~~ BASED UPON RESPON-

DENT'S MOTIONS AND AFFIDAVIT IN SUPPORT THEREOF AND UPON APPELLANT'S ANSWER THERETO ORDERING THAT THE APPELLANT'S EASEMENT BE EXTINGUISHED AND TERMINATED. THE COURT'S RATIONAL IN ENTERING SUCH AN ORDER WAS THAT THE APPELLANT HAD PERMANENTLY DESTROYED THE REASON FOR THE EXISTANCE OF THE EASEMENT BY THE DESTRUCTION AND REMOVAL OF THE RESERVOIR AND DIKE THEREBY SHOWING ITS INTENT TO ABANDON THE EASEMENT (R. 220-224). THE COURT ALSO FOUND ADDITIONAL REASON TO TERMINATE THE EASEMENT BASED UPON THE FACT THAT THE APPELLANT HAD FAILED TO MAINTAIN THE FENCES ON THE PROPERTY AS AGREED BY THE PARTIES AND ORDERED BY THE COURT AND IN FACT HAD REMOVED PART OF THE FENCES (R. 223). IN MAKING ITS ORDER NULLIFYING THE APPELLANT'S EASEMENT THE DISTRICT COURT POINTED OUT THE FOLLOWING:

1. THAT THE APPELLANT HAD IN FACT VOLUNTARILY REMOVED THE DIKE AND RESERVOIR FROM THE SUBJECT PROPERTY THEREBY DESTROYING THE REASON FOR THE EASEMENT AND SHOWING ITS INTENT TO ABANDON THE SAME (R. 222).

2. THAT THE APPELLANT HAD REMOVED PART OF THE FENCE SURROUNDING THE SUBJECT REAL PROPERTY IN VIOLATION OF THE PARTIES' AGREEMENT AND THE ORDER OF THE COURT. (R. 222).

3. THAT BOTH THE "STIPULATION AND SETTLEMENT AGREEMENT" OF THE PARTIES AND THE "ORDER AND JUDGMENT" OF THE COURT HAD BEEN PREPARED BY COUNSEL FOR THE APPELLANT AND THEREFORE IF ANY CONTROVERSY EXISTED AS TO ITS MEANING THAT IT WAS TO BE CONSTRUED IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANT (R. 222).

4. THAT THE COURT HAD HEARD THE TESTIMONY AND EVIDENCE PRESENTED AT THE TRIAL OF THE MATTER AND PRIOR TO THE TIME THE SETTLEMENT WAS REACHED AND WAS OF THE OPINION THAT THE REASON THE EASEMENT WAS GRANTED WAS TO ENABLE APPELLANT TO MAINTAIN SAID RESERVOIR AND DIKE FOR THE BENEFIT OF THE ABUTTING AGRICULTURAL PROPERTY OWNED AND USED BY THE APPELLANT TO ENABLE THE SAME TO BE IRRIGATED AND FOR THAT PURPOSE ONLY (R. 222-223).

5. THAT THERE ORIGINALLY EXISTED A RESERVOIR AND DIKE ON THE SUBJECT PROPERTY BUT THE APPELLANT HAD DESTROYED AND REMOVED THE SAME (R. 223).

6. THAT BY THE DISTRUCTION OF SAID RESERVOIR AND DIKE THE APPELLANT HAD MANIFESTED ITS INTENT TO ABANDON ITS EASEMENT ALLOWING IT TO MAINTAIN THE SAME (R. 223).

7. THAT THE SOLE REASON FOR THE GRANTING OF SAID EASEMENT WAS TO ENABLE APPELLANT TO USE AND MAINTAIN THE SAID RESERVOIR AND DIKE (R. 223).

SUMMARY OF ARGUMENT

THE SOLE PURPOSE FOR THE GRANTING OF THE SUBJECT EASEMENT TO APPELLANT WAS TO ALLOW IT TO USE, MAINTAIN AND OPERATE THE RESERVOIR AND DIKE AREA UPON RESPONDENT'S REAL PROPERTY TO ENABLE IT TO IRRIGATE REAL PROPERTY OWNED BY IT ABUTTING THE SERVIENT PROPERTY. BY VOLUNTARILY DESTROYING AND REMOVING THE RESERVOIR AND DIKE THE APPELLANT DESTROYED ANY REASON FOR THE CONTINUANCE OF THE EASEMENT AND INDICATED ITS INTENT TO ABANDON THE SAME AND THE USE FOR WHICH IT WAS GRANTED. THE ORDER OF THE DISTRICT COURT IN DECLARING AN ABANDONMENT AND FORFEITURE AND TERMINATION OF THE EASEMENT SHOULD BE AFFIRMED.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN ORDERING AND DECLARING THE EASEMENT GRANTED TO APPELLANT BY STIPULATION OF THE PARTIES TERMINATED AND OF NO FURTHER FORCE AND EFFECT AND THAT APPELLANT HAD NO FURTHER INTEREST IN THE REAL PROPERTY BELONGING TO RESPONDENT AND UPON WHICH SAID EASEMENT WAS GRANTED.

IN PRESENTING ITS ARGUMENT THE RESPONDENT WOULD REMIND THE READER THAT THE PARTIES SPENT APPROXIMATELY TWO AND ONE-HALF DAYS IN TRIAL PRESENTING TESTIMONY

ABLE TO REACH AN AGREEMENT SETTling THE CONTROVERSY BETWEEN THEM. THE TRIAL JUDGE HEARD THIS TESTIMONY AND EVIDENCE AS WELL AS THE STIPULATED SETTLEMENT BETWEEN THE PARTIES. IN MAKING ITS DETERMINATION THAT THE EASEMENT GRANTED TO APPELLANT SHOULD BE TERMINATED THE TRIAL COURT MADE CERTAIN DETERMINATIONS AND FINDINGS BASED UPON ITS KNOWLEDGE OF THE FACTS AND THE EVIDENCE AND TESTIMONY PRESENTED AT TRIAL. THESE FINDINGS ARE SET FORTH IN ORDER AND JUDGMENT ENTERED ON THE STIPULATION AND ARE SET FORTH ABOVE INCLUDING THE FINDING THAT THE REASON THE EASEMENT WAS GRANTED TO APPELLANT WAS TO ENABLE IT TO USE, MAINTAIN AND OPERATE THE RESERVOIR AND DIKE AREA UPON RESPONDENT'S REAL PROPERTY FOR THE BENEFIT OF THE ABUTTING AGRICULTURAL PROPERTY OWNED AND USED BY APPELLANT AND TO ENABLE THE SAME TO BE IRRIGATED AND FOR THAT PURPOSE ONLY. IN ADDITION, THE TRIAL COURT DETERMINED THAT THE STIPULATION AND SETTLEMENT AGREEMENT ENTERED INTO BY THE PARTIES AND THE ORDER AND JUDGMENT ENTERED BY THE COURT WERE PREPARED BY COUNSEL FOR APPELLANT AND THEREFORE IF ANY CONTROVERSY EXISTED AS TO THEIR MEANING THAT THEY MUST BE CONSTRUED IN THE LIGHT MOST FAVORABLE TO RESPONDENT AND AGAINST APPELLANT.

THE UTAH SUPREME COURT HAS STATED MANY TIMES THAT WHEN A MATTER IS PRESENTED TO IT FOR REVIEW THAT IT WILL VIEW THE EVIDENCE AND INFERENCES DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO THE FINDINGS DRAWN BY THE TRIAL COURT.

TRUST Co., (1955) 4 UTAH 2d 76, 286 P. 2d 1065: STATE
v. BERCHTOLD (1960) 11 UTAH 2d 208, 357 P. 2d 183.
IT IS SUBMITTED THAT A STUDY OF THE RECORD, BOTH IN
THE PLEADINGS AND TRANSCRIPTS, WILL INDICATE ADEQUATE
BASIS TO SUPPORT THE TRIAL COURT'S FINDINGS AND DETER-
MINATIONS AS SET FORTH IN ITS ORDER TERMINATING THE
APPELLANT'S EASEMENT.

IT IS A WELL RECOGNIZED PRINCIPLE THAT AN EASEMENT
MAY BE ABANDONED BY THE OWNER THEREOF. DAHNKEN v.
GEORGE ROMNEY & SONS Co., ET AL., (1947) 111 UTAH 471,
184 P. 2d 211; WESTERN GATEWAY STORAGE Co. v. TRESEDER
(UTAH 1977) 567 P. 2d 181; WHITESIDES v. GREEN, 13
UTAH 341, 44 P. 1032; TUTTLE v. SOWADZKI, 41 UTAH 501,
126 P. 959; HARMON v. RASUMSEN (1962) 13 UTAH 2d 422,
375 P. 2d 762. AN EASEMENT MAY BE EXTINGUISHED BY
AN ACT OF THE OWNER OF THE EASEMENT WHICH IS INCOMPAT-
IBLE WITH THE EXISTANCE OF THE RIGHT CLAIMED. IF THE
OWNER OF THE EASEMENT HIMSELF OBSTRUCTS IT IN A MANNER
INCONSISTANT WITH ITS FUTURE ENJOYMENT, OR PERMITS
THE OWNER OF THE SERVIENT ESTATE TO DO SO, THE EASEMENT
WILL BE CONSIDERED ABANDONED. BROWN v. OREGON SHORT
LINE R. Co. (1909) 36 UTAH 257, 102 P. 740. IN THE
BROWN CASE, SUPRA, THE UTAH SUPREME COURT IN QUOTING
PREVIOUS AUTHORITY SAID AS FOLLOWS:

"(1) THAT A SERVITUDE (EASEMENT) IS EXTINGUISHED
BY ANY OBSTRUCTION OF A PERMANENT NATURE BY THE PARTY
HIMSELF TO WHOM THE SERVITUDE IS DUE (OR BY HIS CONSENT)
OR BY THE VOLUNTARY ACQUISITION OR ACCEPTANCE OF ANY
OTHER RIGHT OR PRIVILEGE INCOMPATIBLE WITH THE EXERCISE
OR ENJOYMENT OF IT; AND (2) THAT BEING ONCE LOST IS
GONE FOREVER, AND CAN NEVER BE REVIVED BUT BY A NEW
GRANT." TAYLOR v. HAMPTON, 4 MCGORD (S.C.) 96. 17

THE APPELLANT WAS GRANTED AN EASEMENT TO USE, MAINTAIN AND OPERATE THE "RESERVOIR AND DIKE" AREA UPON RESPONDENT'S REAL PROPERTY. THE TRIAL COURT DETERMINED THAT THE PURPOSE OF THE GRANT OF THE EASEMENT WAS TO ENABLE APPELLANT TO USE THE RESERVOIR AND DIKE TO IRRIGATE APPELLANT'S ABUTTING AGRICULTURAL LAND. WITH THE DISTRUCTION AND REMOVAL OF THE RESERVOIR AND DIKE THE EASEMENT COULD NO LONGER BE USED FOR THE PURPOSE FOR WHICH ITS GRANT WAS INTENDED.

IN HARMON V. RASMUSSEN, SUPRA, A FACT SITUATION EXISTED WHEREIN RASMUSSEN OWNED AN IRRIGATION DITCH EASEMENT ACROSS HARMON'S LAND. HARMON BROUGHT AN ACTION TO QUIET THE TITLE TO HIS PROPERTY AS AGAINST THE EASEMENT CLAIMING THAT RASMUSSEN HAD ABANDONED IT. THE FACTS INDICATED THAT RASMUSSEN HAD IN FACT PUT A LOAD OF EARTH AROUND A HEADGATE IN THE DITCH BUT HAD DONE NOTHING FURTHER TO INDICATE ABANDONMENT. THE ALLEGED PURPOSE OF THE EARTH AS PLACED WAS TO "PREVENT WATER BEING TURNED INTO THE DITCH BY CHILDREN". THE UTAH SUPREME COURT DETERMINED THAT THERE WAS NOT SUFFICIENT EVIDENCE TO FIND AN ABANDONMENT.

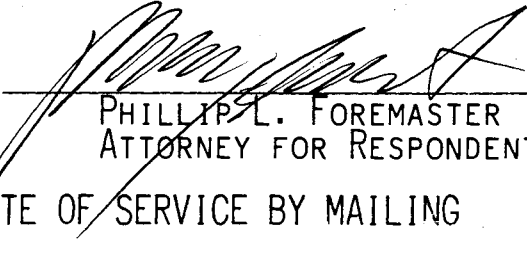
THE CASE AT BAR IS MUCH DIFFERENT. AN EASEMENT WAS GRANTED TO USE, MAINTAIN AND OPERATE A RESERVOIR AND DIKE AREA UPON RESPONDENT'S LAND. THE RESERVOIR AND DIKE ALREADY EXISTED. ONE OF THE TERMS OF THE EASEMENT WAS THAT THE FENCES SURROUNDING THE SUBJECT REAL PROPERTY WOULD BE MAINTAINED BY THE GRANTEE OF THE EASEMENT (APPELLANT). APPELLANT NOT ONLY FAILED TO MAINTAIN THE FENCES BUT REMOVED THEM.

ADDITION, WHILE THE APPELLANT WAS GIVEN AN EASEMENT AS AFORESAID TO "USE, MAINTAIN AND OPERATE" THE RESERVOIR AND DIKE ARE IT FOUND IT APPROPRIATE VOLUNTARILY DESTROY AND REMOVE THE RESERVOIR AND DIKE. IT WOULD BE ASSUMED SUCH DISTRUCTION AND REMOVAL WOULD BE OF A PERMENANT NATURE THEREBY INDICATING AN INTENT TO ABANDON THAT USE FOR WHICH THE EASEMENT WAS GRANTED.

THE EASEMENT GRANTED TO APPELLANT CANNOT BE ENLARGED OR ITS USE CHANGED BY THE ACTS OF THE APPELLANT. IN ADDITION, ONCE THE GRANT OF EASEMENT IS LOST IT CAN NEVER BE REVIVED EXCEPT BY A NEW GRANT.

CONCLUSION

THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED.
RESPECTFULLY SUBMITTED.



PHILLIP L. FOREMASTER
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE BY MAILING

I DO HEREBY CERTIFY I MAILED FOUR COPYs OF THE ABOVE AND FOREGOING BRIEF OF RESPONDENT TO JONES, WALDO, HOLBROOK & McDONOUGH, ATTORNEYS AT LAW, ONE SOUTH MAIN, SUITE 300, ST. GEORGE, UTAH 84770 ON THIS 12 DAY OF NOVEMBER, 1986.



PHILLIP L. FOREMASTER