S230104

In The
Supreme Court of California

JAIME A. SCHER, *et al.*,
Plaintiffs and Respondents,

vs.

JOHN F. BURKE, *et al.*,
Defendants and Appellants.

SUPREME COURT
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After a Decision by the Court of Appeal
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Hon. Malcolm Mackey, Judge—Case No. BC415646

NOTICE OF ERRATA TO APPENDIX OF BAR JOURNAL ARTICLES IN SUPPORT OF ANSWER BRIEF ON THE MERITS OF RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER, and ANDREA D. SCHRODER

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TO THE HONORABLE COURT, AND ALL PARTIES OF RECORD:

Due to inadvertence, the last two pages of a bar journal article by Jay L. Shavelson, Asst. Atty Gen., entitled *Gion v. City of Santa Cruz, Where do We Go From Here?,* Calif. State Bar J. 416, Sept.–Oct. 1972, attached as Exhibit A to the Appendix of Bar Journal Articles in support of Mr. Erickson's, Ms. Malick's, Mr. Schroder's and Ms. Schroder's Answer Brief on the Merits, were omitted. Attached hereto as Exhibit A is a complete copy of Mr. Shavelson's article.

DATED: May 23, 2016

Respectfully submitted,

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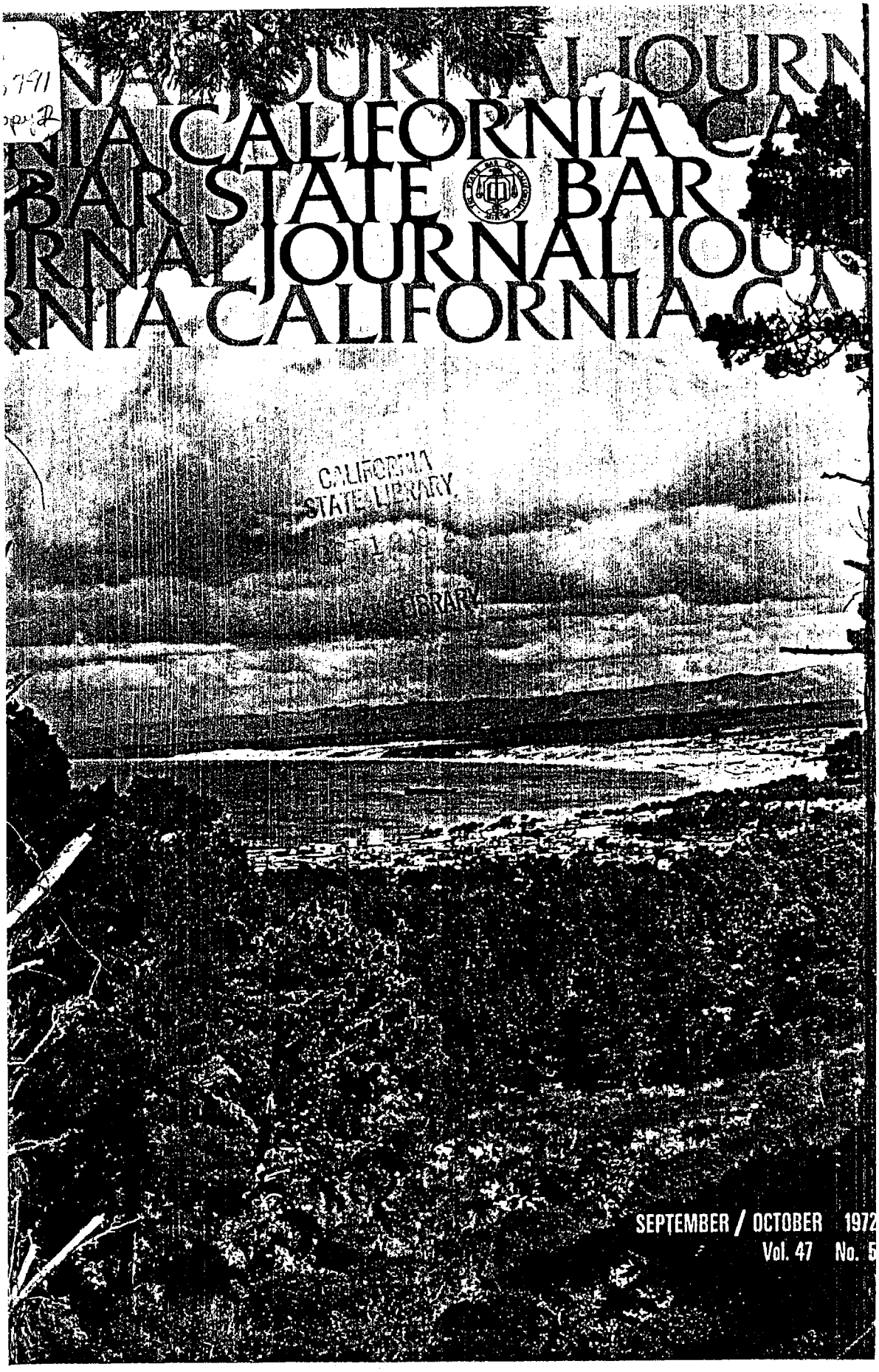
EXHIBIT "A"



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GION v. CITY of SANTA CRUZ

WHERE DO WE GO FROM HERE?

By Jay L. Shavelson*
Assistant Attorney General
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JAY L. SHAVELSON attended Boalt Hall, where he received his LL.B. in 1952, and his Masters in 1954, at which time he joined the California Attorney General's office. He became Assistant Attorney General and statewide head of the Land Law Section in 1964. He wrote the amicus curiae *brief and argued before the California Supreme Court in the* Gion *case.*

IN FEBRUARY OF 1970, an earthquake of major proportions occurred in California real property law. Its tremors have been felt by the Legislature, the bar, private landowners, the land title industry, and the public at large.

This was the celebrated consolidated action of *Gion* v. *City of Santa Cruz and Dietz* v. *King*.[1]

The California Supreme Court considered in the consolidated action (hereinafter called *"Gion"*)[2] whether there had been an implied dedication of the two beach areas. The Court summarized its holding in the following simple sentences:

> ". . . In each case the trial court found the elements necessary to implied dedication were present —use by the public for the prescriptive period [five years] without asking or receiving permission from the fee owner. There is no evidence that the re-

*The views stated herein are purely those of the author and do not necessarily represent the position of the office of the Attorney General.

[1] 2 Cal.3d 29 (1970).

[2] Rhymes with "Ryan."

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spective fee owners attempted to prevent or halt this use. It follows as a matter of law that a dedication to the public took place."

The importance of the case lies in the fact that the Court expressly repudiated the presumption of earlier decisions that public use of unenclosed and uncultivated land was attributable to a license on the part of the owner, rather than his intent to dedicate. This was said to be particularly true where the user extended over an entire tract, rather than a definite and specified line, so that dedication would practically destroy the value of the property to the owner himself.[3]

The decision has evoked a flurry of articles in California periodicals, whose titles and content reflect everything from sober analysis to righteous indignation.[4]

To avoid fields already plowed, this article is limited to the following:

1. What the Legislature has already done as a result of the *Gion* decision;
2. What further legislative steps are under consideration;
3. Absent legislative abrogation, how will the *Gion* doctrine be applied in future cases.

Legislation Enacted in 1971

Despite a number of proposals, the Legislature enacted only one bill during the 1971 Legislative Session directly traceable to *Gion*.[5] This bill amended section 813 of the Civil Code and added section 1009. Briefly stated, the legislation does two things:

a. Abrogates, with certain exceptions, the doctrine of implied dedication as to all inland areas; i.e., lands more than 1,000 yards from the mean high tide line of the Pacific Ocean and its bays and inlets.[6]

b. Establishes a liberalized procedure by which owners of coastal properties can avoid implied dedication arising from future public use.

The legislation applies only to public use *after* its effective date (March 4, 1972). It does not purport to affect implied dedications existing as of that date.[7] Its basic purpose is to give owners a method

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[3] *Manhattan Beach* v. *Cortelyou*, 10 Cal. 2d 653 (1938); *Whiteman* v. *City of San Diego*, 184 Cal. 163 (1920); *City of San Diego* v. *Hall*, 180 Cal. 165 (1919); *F. A. Hihn Co.* v. *City of Santa Cruz*, 170 Cal. 436, 448 (1915).

[4] Armstrong, *Gion* v. *City of Santa Cruz; Now You Own It — Now You Don't; or The Case of the Reluctant Philanthropist*, 45 L.A. Bar Bull. 529 (1970); Comment, *This Land Is My Land: The Doctrine of Implied Dedication and its Application to California Beaches*, 44 So. Cal. L.Rev. 1092 (1971); Comment, *A Threat to the Owners of California's Shoreline*, 11 Santa Clara Law 327 (1971); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L.Rev. 795 (1971); Note, *Californians Need Beaches—Maybe Yours!*, 7 San Diego L. Rev. 605 (1970); Note, *Implied Dedication in California: A Need for Legislative Reform*, 7 Cal. Western L. Rev. 259 (1970); Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner*, 4 Loyola U. L.Rev. 438 (1971); Note, *Public Access to Beaches*, 22 Stan. L.Rev. 564 (1970); Note, 59 Calif. L.Rev. 231 (1971).

[5] Senate Bill 504 (Lagomarsino) enacted as Statutes of 1971, Chapter 941.

[6] Some question has been raised as to the constitutionality of the distinction between coastal and inland properties. However, the validity of the classification would appear to be assured by the fact that it was adopted in the *Gion* decision itself. 2 Cal.3d at 41-43. If the statute were found unconstitutional, the "severability clause" would purportedly preserve the distinction set forth therein up to the time of judicial determination. Statutes of 1971, Chapter 941, § 4.

[7] See Statutes of 1971, Chapter 941, § 3.

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of avoiding future implied dedications, short of excluding the public from the land.

As to inland properties, the doctrine of implied dedication still applies to lands improved, cleaned or maintained at public expense, in such a manner as to put the owner on reasonable notice. Civ. Code § 1009(d). Coastal owners are given a wide, almost bewildering, variety of ways to protect themselves against implied dedications arising from future use. At least superficially the most attractive alternative is Civil Code § 813, amended to eliminate some glaring weaknesses in its former language.[8] Under this section, the owner records a notice (revocable at any time) saying that any use whatsoever by the public is by permission, and subject to the control of the owner.

Posting

The new legislation also makes it clear that compliance with Civil Code § 1008 (relating to posting of signs) prevents future implied dedication.[9] It gives the owner the option of publishing, rather than posting, the language set forth in that section.[10] Civil Code § 1009(f)(1).

If the owner uses signs, he must post them at each entrance or at intervals of not more than 200 feet along the boundary. If anyone removes them, they must be renewed at least once a year. Publication must be made annually and in accordance with Government Code § 6066 (i.e., two publications within a two week period). The obvious advantages of cheapness and convenience offered by section 813 are perhaps offset by the fear of damaging exceptions in title policies arising from any notice which appears in the record chain of title. Furthermore, regardless of the method used, the owner must not "prevent any public use appropriate under the permission granted." Civil Code § § 1009(f) and 813. It may well be argued that the "appropriate" uses are wider under § 813 (which refers to "any use whatsoever") than under § 1008 (which refers only to the "right to pass"). All things considered, many attorneys may well advise posting or publication, rather than recordation.

Future Developments

Gion has raised questions which will have to be answered by the Legislature and the courts. A detailed discussion of pending Bills would not be fruitful because they may be substantially altered or even defeated by the time this article appears in print. However, since the issues raised by pending legislation will be with us in any case, some brief comment is appropriate.

The most urgent issue is whether the *Gion* doctrine should be re-

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[8]This section formerly provided for the recordation by the owner of a notice of consent to the use of his land "for the purpose described in the notice." The recorded notice was evidence that subsequent use of the land "for such purpose" was permissive and with consent. The problem, of course, was that while the owner protected himself against dedication for the relatively harmless uses he was likely to specify (e.g., hiking), he was not protected against dedication for more damaging uses (e.g., a garbage dump).

[9]Section 1008 provides that upon compliance with its provisions, no use by any person or persons "shall ever ripen into an easement by prescription." Since *Gion* (2 Cal.3d at 39) draws a sharp distinction between easements by prescription and those arising from implied dedication, the former applicability of section 1008 to implied dedication was at least in doubt.

[10]"Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code."

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tained at all. Senate Bill 742[11] would create a presumption that all public use of unenclosed land prior to 5 years before the effective date of the act, without objection or interference by the owner, shall be presumed permissive and with the consent of the owner. Exceptions are made as to lands which have been improved, cleaned or maintained at public expense, and as to litigation pending as of the effective date of the act and involving public entities.

Arguments Pro

Since the abrogation of this very presumption is the heart of the *Gion* decision, this Bill, where applicable, would reinstate the law as many thought it to be prior to *Gion*. We may expect arguments such as the following from the proponents of the Bill:

1. That decisions prior to *Gion* lulled property owners into a false sense of security about the consequences of failing to exclude the public;
2. That *Gion* penalizes the benevolent property owner and protects the "Scrooge" who maintained fences and guards;
3. That the public should not be rewarded for trespassing on private lands; and,
4. That a dedication arising solely from use by members of the public (as distinguished from a public agency) has one of two undesirable consequences; it either (a) imposes an obligation on the local public entity (city or county) against its will, or (b) creates a "floating" dedication as to which no public entity has responsibility; e.g., for maintaining safe and sanitary conditions, etc.

Arguments Con

Those opposing S.B. 742 would contend:

1. That the presumption created by the Bill would be virtually irrebuttable in a practical sense. The Legislature would, in effect, be relinquishing public beach and recreational areas which are already much too limited;
2. That such relinquishment would be of questionable constitutionality under section 25 of Article XIII of the California Constitution (the "gift clause");[12]
3. That, as applied to beaches and other dedicated areas affording access to navigable waters, the Bill is of doubtful

[11] As amended on June 15, 1972, this Bill reads as follows:

"The people of the State of California do enact as follows:

Section 1. Section 647 is added to the Evidence Code, to read:

647. (a) Public use prior to 5 years before the effective date of this section of unenclosed private land without objection or interference by the owner of such land or by the person in lawful possession thereof shall be presumed to be permissive and with the consent of the owner or person in lawful possession thereof, except where a governmental entity has expended public funds on substantial visible improvements on or across such land, or the cleaning or maintenance related to the public use of such land, in such a manner that the owner knows or should know that the public is making a use of his land which is reasonably related to such improvements, cleaning or maintenance.

(b) The presumption created by this section shall affect the burden of producing evidence and not the burden of proof.

Section 2. This act shall not apply to any action pending on its effective date in which the state, a city, a county, or a city and county, is a party on such effective date."

[12] "Section 25. The Legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever. . . ."

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constitutionality under section 2 of Article XV of the California Constitution.[13] This section was one of the bases of the Gion decision;[14]

4. That *Gion* and *Dietz* on their facts involved a large degree of equity in the public, and it should not be assumed that future courts will apply the precedent unfairly or oppressively;
5. That less drastic legislation can mitigate the hardship on private owners without damaging the public interest;[15]
6. That the five year provision in Senate Bill No. 742 specifically rewards those owners whose response to *Gion* was to erect illegal fences and to plough over paths and other evidence of public use; and,
7. That public entities should at least have the opportunity of assuming the responsibilities properly attributable to dedications arising solely from use by members of the public.

Difficult Decision

The arguments on both sides have powerful appeal, requiring Solomon-like wisdom for their resolution. Fortunately for the author, his obvious prejudice as a public lawyer disqualifies him from making such an attempt.

Far more complex, but less drastic, legislation has been proposed at the 1972 Legislative Session in Senate Bill No. 82 and Assembly Bill No. 1410. These Bills are intended to accomplish a number of laudable objectives, although their precise content is a matter of substantial controversy. Among these objectives are the following:

1. The designation of the state and local public entities having the right and responsibility for representing the public interest in dedicated areas;[16]
2. The creation of a procedure by which an owner can sue to clear his title or define the scope of any alleged implied dedication;

continued on page 482

[13]"Sec. 2. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; *and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.*" (Emphasis added.)

[14]Senate Bill No. 742 is much more vulnerable to attack under section 2, Article XV than Senate Bill No. 504 of the 1971 Session (discussed above). This because S.B. 504 may *increase* public access by encouraging owners to keep their lands open to the public by eliminating the fear of dedication by implication, while S.B. 742 appears to have the sole effect of diminishing public access.

[15]See discussion of Senate Bill No. 82 and Assembly Bill No. 1410, *infra*.

[16]The confusion in this regard is illustrated by the following multiplicity of theories expressed or implied in litigation and agreements following *Gion:*

a. The rights reside in the "public" and no governmental entity, or combination of entities, has the power to relinquish or clarify such rights.

b. All rights reside in the local entity wherein the lands are located, i.e., the municipality, where the lands are in an incorporated area, or the county, if they are located in an unincorporated area.

c. The rights reside in the local entity, as stated above, but only where it has participated in the acquisition of the rights, e.g., by maintaining or improving the lands with public funds or personnel.

d. The rights reside in the State under Civil Code section 670 or Government Code section 182, as property of which there is no owner.

e. Rights adjacent to navigable waters reside in the State acting through the State Lands Commission under sections 6216 and 6301 of the Public Resources Code, as easements appurtenant to the lands underlying such waters.

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continued from page 419

3. The elimination of the "floating" (unaccepted) dedication if public entities fail to accept the responsibilities of dedication within a reasonable time;
4. The creation of a procedure whereby dedications may be abandoned or relocated after public hearings;
5. The elimination of the threat to owners and purchasers arising from dedications which have vested in the past, but of which there is no present evidence on the ground.[17]

A detailed discussion of the pending legislation would unduly prolong this article and would, in any event, be rendered obsolete by future amendments. However, all lawyers concerned with land law, and especially shoreline properties, should be aware of the Legislative efforts to meet the problems posed by the *Gion* decision, both as enacted and as proposed.

Gion's Future in the Courts

Although the effect of *Gion* in future litigation may be affected more by statutory than by case law, the decision raises as many questions as it answers. Thus, a brief discussion of some of these open questions which appear to be of greatest interest to members of the Bar may be worthwhile.

Preliminarily, we may predict that the legislative backlash as reflected in statutes, both enacted[18] and proposed, and in legal periodicals,[19] will cause the courts to proceed cautiously in expanding *Gion* or applying the doctrine to facts radically different from those involved in *Gion* and *Dietz*. The Legislature's reaction (beyond the substantive effects of enacted laws) may be especially significant since *Gion* relied heavily upon legislative policy to support its conclusion.[20] California courts are not likely, therefore, to follow Oregon's lead in *State ex rel. Thornton* v. *Hay*,[21] by applying the English doctrine of custom to find all or any significant segment of the California shore open to public use.

The language in *Gion* raises a number of intriguing questions which can only be resolved in future decisions. Among them:

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[17]This threat is illustrated by the statement in *Gion* (2 Cal.3d at 44) that: "Nothing can be done by the present owners to take back that which was previously given away." "Counter-prescription" by the owner appears to be presently precluded by the accepted rule that lands dedicated to public use are immune from private prescriptive rights. Civil Code § 1007; *People* v. *Chambers*, 37 Cal.2d 552, 556-57 (1951).

[18]See, e.g., the following recitals in Civil Code § 1009:

"(a) The Legislature finds that:

"(1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities.

"(2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes.

"(3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property."

[19]See footnote 4, *supra*.

[20]2 Cal.3d at 42-43.

[21]254 Ore. 584, 462 P.2d 671 (19... The court in *Hay* held that as a re... of custom the public has the right... use privately owned dry-sand areas... beaches—i.e., the areas above the c... nary or mean high-tide line but seaw... of the line of vegetation—for public re... reational purposes. The *Hay* case was r... affirmed by the Oregon Supreme Cou... in *State Highway Commission* v. *Fult*... 491 P.2d 1171 (Ore. 1971) and the do... trine enunciated therein survived an a... tack on its constitutionality in the U.S... District Court case of *Hay* v. *Bruno*, Ca... No. 68-300 (D.C. Ore., June 6, 1972).

Differences Cited

The Court clearly implied that the rules governing shoreline properties differ from those governing recreational areas in other parts of the State.[22] This distinction was placed upon two separate grounds, (a) the strong public policy in favor of shoreline access and (b) the fact that under modern conditions, beach areas are as well-defined as roadways. Left open is the question as to whether the liberal rule enunciated in *Gion* is applicable to any but shoreline properties. Persuasive arguments can be made that lands littoral to non-tidal navigable waters (such as lakes and rivers) are subject to the same policy considerations as ocean front properties since section 2, Article XV[23] of the California Constitution applies to *all* navigable waters, not just tidelands. Also, non-navigable fishing streams are at least as well defined as beaches; the public right to fish enjoys constitutional and statutory protection similar to that affecting the shoreline.[24]

Another question is the legal standard applicable to lands not subject to the same policy considerations as shoreline properties; e.g., unenclosed range and forest lands. *Gion* appears to have eliminated any *presumption* of permissive use, even as to lands of this character.[25] However, in situations where exclusion of the public from such lands is difficult or unfeasible, it may well be argued that there remains a reasonable *inference* that the public regarded the use as permissive, and that in practical effect, the former law remains unchanged.[26]

Implications

Gion (at page 41) states that "... 'No Trespassing' signs may be sufficient when only an occasional hiker traverses an isolated property . . ." From this statement, it may be inferred that in the absence of such a sign, occasional hikers on an isolated property would have been sufficient to establish an implied dedication. However, in light of the actual facts in *Gion* and *Dietz*, this statement should be regarded as obiter dictum. It is doubtful that mere "occasional" use is sufficient to establish an implied dedication, whether or not the area was posted. The fundamental principle to be derived from *Gion* is that an implied dedication will arise where the public has used the land as if it were public land. This was clearly the case in both *Gion* and *Dietz*. There is no reason to assume that the courts will find an implied dedication unless the owner has allowed members of the general public to use the land in such a manner that their sudden exclusion would defeat their reasonable expectations of continued availability.

Conclusion

The difficulties and confusion created by the *Gion* decision should not be ignored by the Legislature. On the other hand, it is submitted that they are not such as to require outright abrogation. By giving responsible public officials the procedural power to act with flexibility and by allowing the courts to refine the law on a case by case basis, there can be little doubt that a fair balance between public and private equities can be achieved. What is needed is a scalpel, not an axe.

[22] 2 Cal.3d at 41-43.

[23] See fn. 13, *supra*.

[24] E.g., Calif. Const. Art. 1, § 25, Fish and Game Code §§ 5930-5948.

[25] 2 Cal.3d at 40-41.

[26] The Oregon Supreme Court presents an example of differentiation between inland and coastal properties. While the *Hay* decision is perhaps the most far-reaching American decision on coastal implied dedication, the recent decision in *Muzzy* v. *Wilson*, 487 P.2d 875, 879 (Ore. 1971) lays down a rather stringent standard for implied dedication of non-littoral inland properties.

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CERTIFICATE OF MAILING

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Los Angeles in the office of a member of the bar of this court at whose direction the service was made. My business address is 225 S. Lake Ave., Suite 1400, Pasadena, California 91101.

On May 24, 2016, I served an executed copy of the Notice of Errata to Appendix of Bar Journal Articles in Support of Answer Brief on the Merits of Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder

The original and eight copies were deposited in the facility regularly maintained by Federal Express, in a sealed envelope with delivery fees fully provided for and addressed as follows

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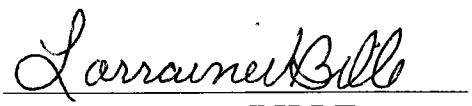
I declare under penalty of perjury under the laws of the State of California that the above is true and correct and, that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 24, 2016 at Pasadena, California.



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