S230104

In The
Supreme Court of California

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

vs.

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

After a Decision by the Court of Appeal
Second Appellate District, Division Three—Case No. B235892

On Appeal from the Los Angeles Superior Court
Hon. Malcolm Mackey, Judge—Case No. BC415646

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

GARRETT & TULLY, P.C.
*Ryan C. Squire, SBN 199473
Zi C. Lin, SBN 236989
Motunrayo D. Akinmurele, SBN 299868
225 South Lake Avenue, Suite 1400
Pasadena, California 91101
(626) 577-9500 • Fax (626) 577-0813
rsquire@garrett-tully.com

LEVINSON ARSHONSKY
& KURTZ, LLP
Richard I. Arshonsky, SBN 155624
Jason J. Jarvis, SBN 230158
15303 Ventura Blvd., Suite 1650
Sherman Oaks, CA 91403
(818) 382-3434 • Fax (818) 382-3433
rarshonsky@laklawyers.com

Attorneys for Defendants and Appellants
RICHARD ERICKSON, WENDIE MALICK,
RICHARD B. SCHRODER, and ANDREA D. SCHRODER

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Sherman Oaks, CA 91403
(818) 382-3434 • Fax (818) 382-3433
rarshonsky@laklawyers.com

Attorneys for Defendants and Appellants
RICHARD ERICKSON, WENDIE MALICK, RICHARD B. SCHRODER, and ANDREA D. SCHRODER

For the Court's convenience, defendants and appellants Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder, hereby submit copies of the following bar journal articles, which may be difficult to locate, in support of their answer brief on the merits:

A. Jay L. Shavelson, Asst. Atty Gen., *Gion v. City of Santa Cruz, Where do We Go From Here?,* Calif. State Bar J. 416, Sept.–Oct. 1972, attached hereto as Exhibit A.

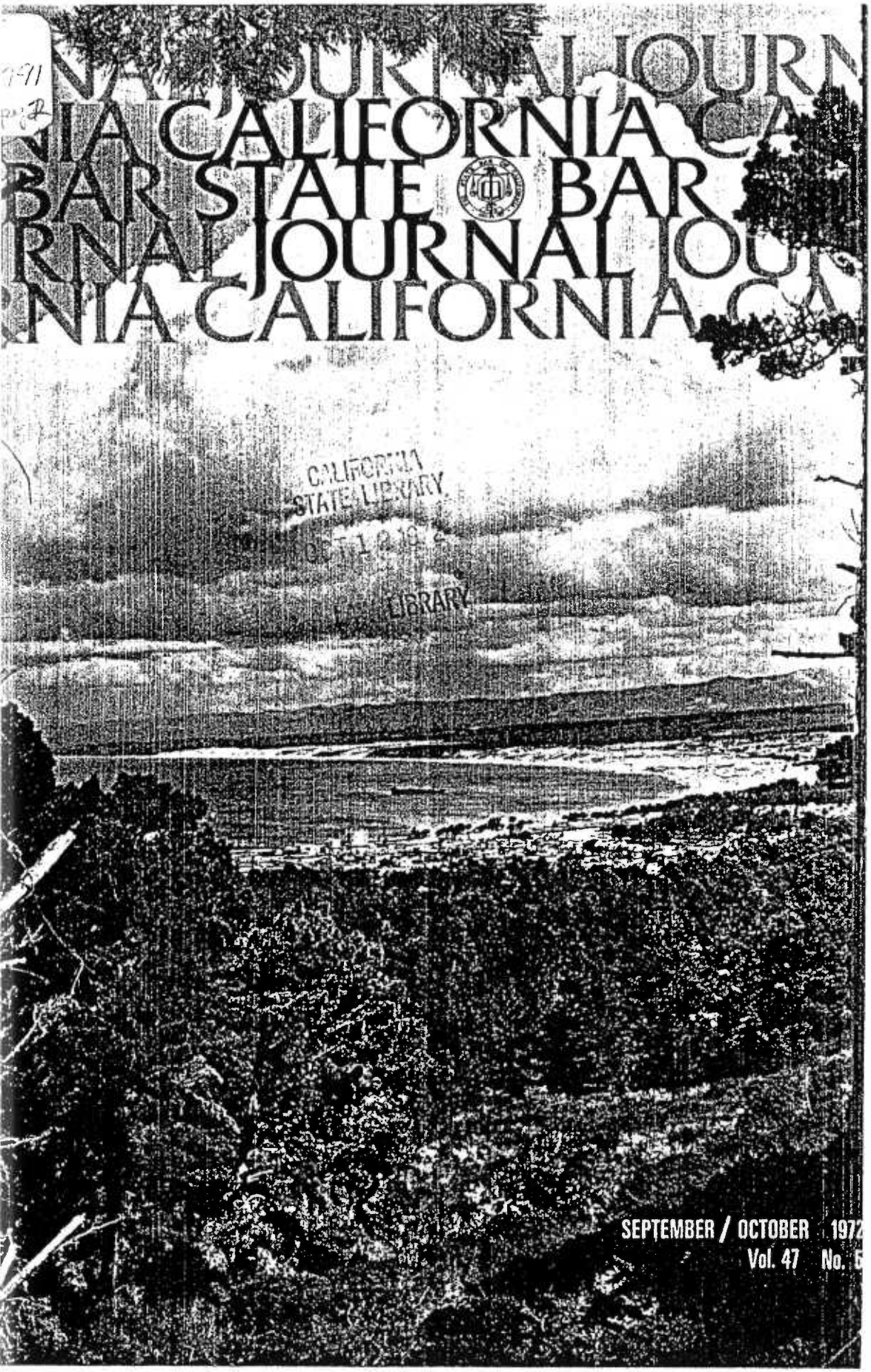
B. John Briscoe & Jan S. Stevens, *Gion After Seven Years: Revolution or Evolution?* (1977) 53 L.A. Bar No. J. 207, attached hereto as Exhibit B.

DATED: May 16, 2016

Respectfully submitted,

GARRETT & TULLY, P.C.
Ryan C. Squire
Zi C. Lin
Motunrayo D. Akinmurele

By: _____
Ryan C. Squire
Attorneys for Defendants and Appellants Richard Erickson, Wendie Malick, Andrea D. Schroder, and Richard B. Schroder



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COVER PHOTOGRAPH: View of Monterey Bay, looking north. Photograph by courtesy of Monterey Peninsula Chamber of Commerce.

GION v. CITY of SANTA CRUZ

WHERE DO WE GO FROM HERE?

By Jay L. Shavelson*
Assistant Attorney General
State of California

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."

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.

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."

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. . . ."

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.

GION AFTER SEVEN YEARS: REVOLUTION OR EVOLUTION?

By JOHN BRISCOE AND JAN S. STEVENS

A Deputy California Attorney General since 1972, Land Law Section, San Francisco, Mr. Briscoe specializes in coastal and offshore boundary litigation. He received his J.D. from the University of San Francisco.

Mr. Stevens has been an Assistant California Attorney General since 1959. He specializes in inland water-boundary litigation. He received his L.L.B. from the University of California (Boalt Hall).

The views expressed in this article are those of the writers and do not necessarily reflect the views or policies of the Department of Justice.

In 1970, when the California Supreme Court in *Gion* v. *City of Santa Cruz*[1] held that coastal property in Santa Cruz and Mendocino Counties had been impliedly dedicated to the public, its decision was promptly met with predictions of disaster and legislative efforts for repeal. Largely overlooked in the furor over the alleged loss of coastline owners' property rights were four considerations:

1. The tidelands have historically belonged to the State, and are held in trust for public purposes.[2]

2. Case law has long recognized acquisition of public rights by implied dedication, particularly in coastal areas.

3. The public policy of this State, as expressed in the Constitution and various statutes, is aimed at insuring the rights of individuals' access to the coastline and navigable waters. Thus section 4 of article X of the California Constitution (first adopted in 1879) provides that:

> "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 . . . ."

Section 4 further directs the Legislature to provide for such continued access.

4. Judicial protection of public rights in shoreline areas has been far more zealous in other states.

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

[2]People v. California Fish Co., 166 Cal. 576 (1913).

Seven years have passed since the *Gion* decision, and much of the hysteria it originally engendered has abated. Now a more considered analysis shows that the *Gion* decision did not represent the surrender to radicalism and revolution that it was sometimes represented to be.

The Evolution of the Principles of Dedication at Common Law

The ability to dedicate lands to public use has been long recognized as necessary to a society. In 1836 the United States Supreme Court observed:

> "That property may be dedicated to public use, is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation. The importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or of public business, which are found in all our towns, and especially in our populous cities."[3]

Perhaps the most concise and accurate modern definition of dedication is "the setting aside of land for a public use."[4]

Dedications have been classed as either statutory or common law,[5] and as either express or implied. " ... [E]xpress dedications are manifested by some outward act of the owner, while implied dedications usually arise by acts or conduct not directly manifesting the intention to dedication, but from which the law will imply the intent."[6]

Today express dedication is most frequently effected by a formal deed or other instrument,[7] or by the recording of a map showing public areas together with the acceptance by the municipal authorities of the "offer" to dedicate.[8] Implied dedication is to a greater extent a creature of the common law. A review of the legal antecedents of implied dedication, particularly as it has evolved in California, will show that the *Gion* holding was not a radical departure from the common law but merely a timely articulation of it.

The cases differ in their suggestions as to the doctrinal genesis of dedication. Express dedication has been said to have developed by analogy to the contract theory of offer and accept-

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[3]New Orleans v. United States, 35 U.S. (10 Pet.) 662, 712-713 (1836).

[4]23 Am. Jur. 2d *Dedication* § 1 at 4 (1965).

[5]*Id.* § 5 at 5.

[6]26 Cal. Jur. 3d *Dedication* § 4 at 157 (1976).

[7]*See* 6 Powell, *Real Property* 367 n. 10 (1976 ed.) (hereinafter "Powell").

[8]The procedures for effecting a dedication by means of a subdivision map or other record of survey are generally provided for by statute. For a collection of representative statutes, *see* Powell at 366, n. 5.

ance.[9] Dedication arising from public user has been said to act in the nature of an estoppel *in pais,*[10] or of a bastard progeny of prescription,[11] and there are the suggestions that it is akin to the common-law doctrine of customary rights.[12]

Interestingly, Blackstone felt it appropriate to distinguish title by prescription from customs "or immemorial usages."[13]

Dedication was well known to the English common law. Although it had perhaps been recognized earlier,[14] the first reported cases employing the doctrine appeared in 1732.[15] The next reported case of dedication does not appear until 1790,[16] but in subsequent years the contours of the doctrine were developed.[17]

We will here scan some of this country's early dedication cases, particularly those decided in the United States Supreme Court. From this cursory review of the decisions, three inferences can be drawn:

1. Dedication appears to have developed as a doctrine independently of prescription, estoppel and customs, but attaining attributes of those three principles.

2. Although lip service is paid throughout to a supposed requirement of an intent to dedicate or of a "lost grant," from the earliest cases public use has been evidence equally probative of a dedication as an actual grant.

3. Waterfront-access cases in particular have nourished the development of "implied" dedication.

Early American Development

In the 1827 case of *McConnell v. Lexington,*[18] the appellant had brought a bill to compel the town trust-

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[9]*See* Note, 28 S.Cal.L.Rev. 100 (1954); *compare* Carter Oil Co. v. Myers, 105 F.2d 259 (7thCir. 1939).

[10]Morgan v. Railroad Co., 96 U.S. (6 Otto) 716 (1877); Prescott v. Edwards, 117 Cal. 298, 303 (1897); People v. Laugenour, 25 Cal.App. 44 (1914); Schmitt v. San Francisco, 100 Cal. 302 (1893) ("Dedication is but a phase of estoppel."); Smith v. City of San Luis Obispo, 95 Cal. 463 (1892); 18 C.J. § 129 at 111; 8 R.C.L. 906, § 31. *Contra:* Angell, *Angell on Highways* 172, 173 (1857 ed.); 13 Cyc. 438, 439; 2 Tiffany, *Real Property* § 484 (1881 ed.).

[11]*See* State ex rel. Thornton v. Hay, 462 P.2d 671, 679 (Ore. 1969). "Confusion" of dedication and prescription criticized, Comment, 33 Yale L.J. 329 (1923). Distinction also drawn in Post v. Pearsall, 22 Wend. 425, 444 (N.Y. 1839).

[12]*Cf.* Valentine v. City of Boston, 39 Mass. (22 Pick.) 75 (1839); Seaway Co. v. Attorney General, 375 S.W. 2d 923, 929-930 (Tex. Civ. App. 1964); State ex rel. Thornton v. Hay, 462 P.2d 671, 676 (Ore. 1969).

[13]1 *Cooley's Blackstone* 645 (1899 ed.).

[14]2 Tiffany, *Real Property* 1854, n. 1a (1920 ed.).

[15]Rex v. Hudson, 93 Eng.Rep. 935 (K.B. 1732); Lade v. Shepherd, 93 Eng.Rep. 997 (K.B. 1735) (hereinafter "Lade").

[16]Rugby Charity v. Merryweather, 103 Eng. Rep. 1049 (K.B. 1790).

[17]Rex v. Lloyd, 1 Camp. 260 (K.B. 1808); Rex v. Barr, 4 Camp. 16 (K.B. 1814); Poole v. Huskinson, 11 M.& W. 827 (Ex. 1843); Regina v. East Mark, 116 Eng.Rep. 701 (1848); Bateman v. Bluck, 118 Eng.Rep. 329 (1852); Regina v. Broke, 1 F.& F. 514 (Nisi Prius 1859); Vernon v. Vestry of St. James, Westminster, 16 Ch.D. 457 (1880).

[18]25 U.S. (12 Wheat.) 582 (1827) (hereinafter "McConnell").

ees of Lexington to convey to him a certain lot, on which was a large spring. Plaintiff was the heir of his deceased brother, whom he alleged had been granted the lot. The evidence was contradictory as to whether a grant had ever been made; an entry in the town's ill-kept records indicated there had been a grant, but oral testimony disputed its accuracy. The public had always used the spring as if it were the property of the public. Chief Justice Marshall resolved the dispute in these words:

> ". . . The reasonableness of reserving a public spring for public use; the concurrent opinion of all the settlers, that it was so reserved; the universal admission of all, that it was never understood, that the spring lot was drawn by any person; the early appropriation of it to public purposes; the fact that James McConnell actually claimed a different lot, added to the length of time which has been permitted to elapse, without any assertion of title to this lot, are, we think, decisive against the appellant."[19]

Barclay v. Howell,[20] the Pittsburgh waterfront case, was decided by the Supreme Court after the *McConnell* decision. In this case, the Penn family's attorney, Tench Francis, had authorized George Woods to survey the town of Pittsburgh for immediate sale. The survey, completed in 1784, left a strip of land between the north bank of the Monongahela River (near its confluence with the Allegheny River) and the southerly line of a row of lots. In this space the surveyor had designated "Water Street" but had neglected to give the street a specific southerly boundary. The plaintiff claimed a lot lying between Water Street and the River under a grant from the town proprietors made in 1814 to one Wilson. The defendants alleged that the entire strip from the northerly boundary of Water Street to the River had been dedicated to public use.[21] The Court concluded that the lapse of thirty years, the public use during the period, and the need of the public for the land (for access to the river), all militated in favor of the public. Significantly, the Court added:

> "In some cases, a dedication of property to public use, as, for instance, a street or public road, where the public has enjoyed unmolested use of it for six or seven years, has been sufficient evidence of dedication . . . .
>
> "If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment, by the statute of limitations."[22]

Cincinnati v. White,[23] decided with *Barclay* in 1832, is known best for hav-

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[19] *Id.* at 586.

[20] 31 U.S. (6 Pet.) 498 (1832) (hereinafter "Barclay").

[21] *Id.* at 501-502, 512.

[22] *Id.* at 512-513.

[23] 31 U.S. (6 Pet.) 431 (1832) (hereinafter "Cincinnati").

ing rejected the argument that because the public is not a proper grantee, attempted dedications to public use are ineffective. But of interest here are the several unequivocal statements that support the doctrine of "implied" dedication as it was enunciated by the *Gion* court in 1970. A plan for the town of Cincinnati had been made and approved by the town proprietors in 1789. It designated the land lying between Front Street and the River, which land included the property here in dispute, as a common dedicated to public use. Plaintiff's lessor traced his title to a 1791 grant from one of the original town proprietors.[24] Although the Court concerns itself primarily with questions such as the authority of the town proprietors to dedicate land while they possessed but an equitable title (the Congressional patent was not issued until 1794), its discussion of dedication generally is noteworthy. The Court relies on the 1735 English case of *Lade v. Shepherd*,[25] (elsewhere referred to, apparently erroneously, as the "earliest reference to dedication")[26] for the proposition "that no deed or writing was necessary to constitute a valid dedication of the easement."[27]

The criticism that *Gion* worked a radical change in the law of dedication is belied by the discussion that follows the *Cincinnati* Court's analysis of *Lade*. The Court first cites with approval *Jarvis v. Dean*,[28] in which it was ruled that although the roadway in that case had been used by the public only four or five years, nonetheless the jury was entitled to presume that the use was pursuant to an intent of the landowner to dedicate. When the public user had been shown, the Court observed, "the mere naked fee of the land remained in the owner of the soil . . . ."

The Court concludes the discussion with this statement:

> "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of Jarvis v. Dean, already referred to, with respect to a street; and the same rule must apply to all public dedications; and *from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed.* In the present case there having been an actual dedication, fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of Rex v. Lloyd, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive

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[24] *Id.* at 433-435.

[25] 2 Str. 1004.

[26] Note, 42 Harv.L.Rev. 832 (1929); *compare* Comment, 10 Cal.L.Rev. 419, 420 (1922).

[27] 31 U.S. (6 Pet.) 431, 437.

[28] 3 Bing. 447.

prohibition, *he shall be presumed to have dedicated it to the public.*"[29]

Allowing dedication to be presumed from public user, then, is by no means a radical innovation of the law.

The 1836 decision in *New Orleans v. United States*[30] was upon a petition by the United States to prohibit New Orleans from selling certain waterfront lots, alleging the lots to belong to the United States. New Orleans answered that at the time of cession of Louisiana to the United States, the land was not that of the king of either Spain or France but of the inhabitants of New Orleans.

In 1724 and again in 1728, maps were made of the town of New Orleans which designated the disputed property as a "quay," a vacant space between the water's edge and the first row of buildings. (The Court further noted that the term "quay" was understood in all commercial countries to mean a space for the public use as commerce requires.) While Louisiana was chartered to the Western Company, a plan for New Orleans incorporating these maps was adopted and the city was established.[31]

The United States objected that any purported dedication of these lands as a quay was not done in compliance with the laws of France. To this objection the Court responded that it ought to presume in favor of more than one hundred years of public use.[32]

> "Does not this long acquiescence of the monarch, and enjoyment of the property by the city, afford some evidence of right? . . .
>
> "If a grant from the king were necessary [under French law] to confirm the claim of the city, might it not be presumed, under such circumstances?"[33]

The Court held the lands to have been dedicated to public use, and rejected other arguments advanced by the Government. It concluded, "neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government . . . ."[34]

Parenthetically, the *New Orleans* decision is compelling authority for the proposition, yet undeclared judicially in California, that beach and beach-access lands dedicated under a prior sovereign retained their trust character upon cession to the United States.[35]

Thus dedication by public user alone, though not at all times accepted by all courts,[36] had been a prevalent concept in American property law long before the admission of California to

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[29]31 U.S. (6 Pet.) 431, 439 (emphasis added).

[30]35 U.S. (10 Pet.) 662 (1836) (hereinafter "New Orleans").

[31]*Id.* at 714-715.

[32]*Id.* at 720.

[33]*Id.* at 721.

[34]*Id.* at 737.

[35]*See* Comment, *California Beach Access: The Mexican Law and The Public Trust*, 2 Ecol.L.Q. 571 (1972).

[36]*See* cases collected at 4 Tiffany, *The Law of Real Property*, § 1102 at 339 n. 41.

the Union.[37] Thus too, while in several cases the fact of public user was utilized simply to infer an intent to dedicate[38] or a public acceptance of an offer of dedication,[39] in many others it became as compelling an index of dedication as a formal offer to dedicate and a formal acceptance combined.[40]

The California Doctrine Develops

The California cases treating implied dedication are too many to examine individually. For this reason, only certain salient decisions will be discussed.

As early as 1854, the State Supreme Court recognized public use as evidence from which an intent to dedicate could be presumed in *City of San Francisco v. Scott*.[41] Scott, the agent of Price, had razed a structure on Price's property after a city ordinance extended Commercial Street through the lands. The lot appeared to be an extension of the street. Despite Scott's declaration that the lot was not to be public until he received compensation, the public used the land four to five months before he obstructed passage. The City then sued him.

From this brief period of public use the trial court found that the lot had been dedicated; but the Supreme Court reversed, holding the length of public use too short to warrant inferring an intent to dedicate.[42] In its opinion the Court expounded three circumstances from which a dedication could arise: (1) by deed or overt act of the landowner; (2) by presumption from long-continued public use; and (3) by presumption from the acquiescence of the landowner in the public use. As to the second means, the court wrote that no specified length of use established the presumption of dedication, that in certain cases twenty years had been necessary while in others a briefer time had sufficed.[43] To raise a presumption of dedication, it was later held that the public use must endure for the period of limitations to recover real property.[44]

Smith v. San Luis Obispo,[45] decided in 1892, is significant for the proposition that payment of taxes does not ne-

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[37]In addition to the cases discussed above, *see, e.g.*, Valentine v. City of Boston, 39 Mass. (22 Pick.) 75, 81 (1839): "And the general directions, 'that a way might be acquired by dedication or user, that twenty years' use of land as a way would raise a presumption that it had been dedicated by the owner to the public for a way, and that forty years 'use of the land as a way would give the public a right of way over it,' are in themselves correct and *all that the case required* . . . ." (emphasis added).

[38]B. F. Trappey's Sons, Inc. v. City of New Iberia, 73 So.2d 423, 424 (1954); Seaway Co. v. Attorney General, 375 S.W. 2d 923, 936 (Tex. Cir.App. 1964); Folkstone Corporation v. Brockman, [1914] A.C. 388; Poole v. Huskinson, 11 M.& W. 827 (Ex. 1843).

[39]Eltinge v. Santos, 171 Cal. 278, 282 (1915); Phillips v. Stamford, 71 A. 361, 363-364 (Conn. 1908).

[40]*See, e.g.*, Valentine v. City of Boston, 39 Mass. (22 Pick.) 75 (1839); New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836).

[41]4 Cal. 114 (1854).

[42]*Id.* at 117.

[43]*Id.* at 116.

[44]*See* Hartley v. Vermillion, 141 Cal. 339, 348-349 (1903); Bolger v. Foss, 65 Cal. 250, 251 (1884).

[45]95 Cal. 463, 468 (1892); *accord,* Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 670 (1938); Schwerdtle v. County of Placer, 108 Cal. 589, 596 (1895).

gate the presumption of dedication from public use, at least when it is not the entire assessed parcel that has been assertedly dedicated.

Schwerdtle v. Placer County: Public Use For The Statutory Period

California's law of implied dedication coalesced in *Schwerdtle v. Placer County*.[46] Schwerdtle sought to enjoin the county from trespassing on his property, which had been used by the public some thirty-seven years. The trial court ruled that public use for this period as a matter of law effected a dedication and the Supreme Court affirmed. The high court held that adverse use for the period of limitations (five years) established a conclusive presumption of assent in the dedication, and negated any claim that the use was under a license.[47] In so holding, the Court analogized to the person who obtains a prescriptive easement; by using land for the prescriptive period he establishes the presumption of a grant.[48]

The *Schwerdtle* court also traced the elements of what the *Gion* opinion called "implied in fact" dedication. When a dedication is sought to be established by use over a short time the actual consent or acquiescence of the landowner is necessary.[49]

A significant aspect of the opinion is the Court's approving citation of numerous cases and texts holding that public use for the period of limitations establishes the presumption of dedication; no presumption of a license is employed whatever.[50]

The 1897 case of *People v. Sperry*[51] was decided in favor of the landowner from a failure of proof of implied-in-fact dedication (*i.e.*, acquiescence). The court held that the defendant's unrecorded map depicting a street was insufficient evidence of an intent to dedicate.[52] No question was raised of a dedication arising from public use for the prescriptive period. In fact the Court observed, "During all of the time the street was never opened throughout its length to public use as a street, and the defendants constantly maintained visible obstructions across it."[53] There was apparently the minimum use necessary to "accept" the defendants' acquiescence, had it existed, for the Court observes that "while the use by the public is sufficiently established, that use was not referrable to any offer of dedication upon the part of the owner."[54]

Again in 1903, the Court reaffirmed that a dedication may occur from prescriptive public use, holding that public use without objection of the landowner negates any asserted presumption of permission or license. In *Hartley v. Ver-*

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[46]108 Cal. 589 (1895) (hereinafter "Schwerdtle").

[47]*Id.* at 593, 596. This statement appears to be the first use in California of the concepts of "adverse" user and license in a discussion of dedication.

[48]*Id.* at 595-596.

[49]*Id.* at 593.

[50]*Id.* at 594-596.

[51]116 Cal. 593 (1897).

[52]*Id.* at 595.

[53]*Id.* at 595-596.

[54]*Id.* at 595.

million,[55] the Court wrote:

> "Here the finding is . . . that for more than ten years last past before the commencement of this suit the plaintiff has, with the general public, used the said road and highway as a public road and highway, without let or hindrance of any kind, until the erection by the defendant of the gate upon the third of August, 1899. These findings expressly negate the presumption that the use of the road was by licence or permission, but, on the contrary, as a matter of right and without permission of any one . . . ."[56]

F. A. Hihn Co. v. City of Santa Cruz; Presumption of License as a Divergence From Emerging Law

In a paragraph of dictum in 1915, the Supreme Court expressed views of implied dedication at antipodes with its holding in *Hartley* and in *Schwerdtle*. In *F. A. Hihn Co. v. City of Santa Cruz*,[57] the Court stated, "where land is unenclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate . . . ."[58] In the support of this proposition the Court ignored its recent previous holdings and cited only a case digest of the time.

That this statement is a dictum is plain from a reading of the very paragraph in which it is found. The City had tried to establish an adverse possession, had not met its burden of proof, and had apparently tried to argue a dedication at the close of evidence. The Supreme Court opened the paragraph in which the above-quoted statement is found with this sentence: "Whether the facts shown establish a dedication of the land to the public use for pleasure grounds is a question that might be dismissed with the simple statement that *the answer did not set up a dedication and that the finding in this regard was outside of the issues* . . . ."[59]

People v. Southern Pacific R.R. Co.,[60] decided nine years after *Hihn*, is noteworthy because, while the evidence showed simply that people used the road for various purposes for the statutory period, the Court (citing both *Hihn* and *Schwerdtle*) nonetheless held that this evidence was sufficient to support a finding of adverse use, and therefore dedication.[61]

Like *People v. Sperry*,[62] *Manhattan Beach v. Cortelyou*[63] was decided adversely to the public because of a failure to show an implied-in-fact (acquiescence) dedication. As in *Sperry*, the question of whether an implied dedication had occurred by virtue of public use for the prescriptive period did not arise. In fact the city admitted "that there were comparatively few people along the beach in those early years . . . ." Additionally, signs placed

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[55] 141 Cal. 339 (1903) (hereinafter "Hartley").

[56] *Id.* at 349.

[57] 170 Cal. 436 (1915) (hereinafter "Hihn").

[58] *Id.* at 448.

[59] *Id.* at 447.

[60] 68 Cal.App. 153 (1924).

[61] *Id.* at 165.

[62] 116 Cal. 593 (1897) (hereinafter "Sperry").

[63] 10 Cal.2d 653 (1938).

near the bathhouse and picnic booths read "Private property; permission to pass over revocable at any time."[64] The Court relied upon the dubious language in *Hihn* that public use of property will ordinarily be attributed to a license;[65] this language, even if it were correct in implied-in-fact dedication cases, is plainly inapt in cases of dedication by prescriptive public user.[66]

Union Transportation: Implied-in-Law Dedication

Union Transportation Co. v. Sacramento[67] was the last principal implied dedication case decided by the Supreme Court before *Gion*. It is significant for its reiteration of the California law of implied dedication, particularly the distinctions between implied-in-fact and implied-in-law dedications. Implied-in-fact dedication occurs, the Court notes, when the owner has long acquiesced in public use of the property "under circumstances which negative the idea that the use was under a license."[68] Implied-in-law dedication, analogized to the doctrine of prescription, is said to occur when the public has used the property for a period of more than five years with full knowledge of the owner, without asking or receiving permission and without objection being made by anyone. When these elements exist, the court held, "*a conclusive presumption of dedication to the public arises.*"[69] Citing *O'Banion v. Borba*,[70] a prescriptive easement case, the Court held that "whether the user was adverse is a question of fact to be determined from all of the circumstances of a case.[71] The Court made no no reference to the *Hihn* dictum that in implied-in-fact cases, public user is "ordinarily" attributed to a license on the part of the owner. Moreover, one could infer from its reference to *O'Banion* that the dictum was banished forever, for in that decision the Court dissolved any notion that user is presumed to be pursuant to a license from the owner, even on unenclosed, uncultivated lands.[72]

In conclusion, in *Union Transportation* the Court held:

> "From these facts, as well as the general appearance, location and evident purpose of the road and bridge it could be inferred either that the landowners intended by acquiescing in their user to dedicate them to the public or that the user was adverse and that it continued so for a period

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[64] *Id.* at 665.

[65] *Id.* at 668.

[66] *See, e.g.*, People v. Southern Pacific R.R. Co., 68 Cal.App. 163, 165 (1924); Hartley v. Vermillion, 741 Cal. 339, 349 (1903); Schwerdtle v. Placer County, 108 Cal. 589, 595-596 (1895).

[67] 42 Cal.2d 235 (1954) (hereinafter "Union Transport").

[68] *Id.* at 240.

[69] *Id.* at 240 (emphasis added).

[70] 32 Cal.2d 145 (1948) (hereinafter "O'Banion").

[71] 42 Cal.2d at 240-241.

[72] O'Banion at 149-150; *see also* MacDonald Properties, Inc. v. Bel-Air Country Club, 72 Cal.App.3d 693, 701-704 (1977), a prescriptive-easement case, in which the court held that use of another's property is presumed adverse unless the owner posts permissive-use signs or takes other steps to communicate permission, such as suggested by Civil Code § 1008.

greater than five years."[73]

The Gion Decision and Its Aftermath

The Supreme Court consolidated for decision *Gion v. City of Santa Cruz* and *Dietz v. King*[74] and decided them February 19, 1970. *Gion* concerned coastline property in Santa Cruz, and the *Dietz* dispute involved public rights in Navarro Beach in Mendocino County and a dirt road leading to the beach. The significance of the decision is its restatement of the California law of implied dedication and its emphasis on the particular applicability of the doctrine to shoreline areas.

The Court first summarized the two types of implied dedication as they had been expounded in *Union Transportation.* It then observed that in the instant case only adverse user was being urged as a basis for finding implied dedications. Significantly, it added that evidence of acquiescence (implied-in-fact dedication) was present in each case, plainly implying that with the given facts an implied dedication could be found under both theories. This observation illuminates the meaning of "adversity" as used in implied-in-law dedication cases, for "adversity" here does not denote a character of public use that occurs against the landowner's wishes. It simply refers to the character of public use when the landowner has inadequately notified the public that he intends to retain his right of exclusive possession.

This observation also serves to distinguish that acquiescence which effects an implied-in-fact dedication from the permission or license that vitiates an implied-in-law dedication. "Acquiescence" connotes a passive disinterest, whereas the latter concept implies an express assertion both of ownership and tolerance of the public use. ("Acquiescence" may also mean any conduct evincing an intent to dedicate that falls short of express dedication.) Granting a permission or a license is an affirmative act and is best accomplished by the legislatively prescribed methods of posting the property or recording a notice of consent to public use.[75]

The *Gion* decision treated three questions:

> "(1) When is a public use deemed to be adverse? (2) Must a litigant representing the public prove that the owner did not grant a license to the public? (3) Is there any difference between shoreline property and other property?"[76]

As to the first question, the Court held that it is merely necessary that the public has used the land as it would use public land of the same character (e.g., park lands, beaches, roads), and that its use was without objection or interference for more than five years. When these facts have been shown, no additional finding of "adversity" is necessary.[77]

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[73]Union Transport at 241.

[74]Hereinafter "Dietz."

[75]Civ. Code §§ 1008, 843.

[76]Gion v. City of Santa Cruz, 2 Cal.3d 29, 39 (1970).

[77]*Id.*

The second issue arose, the Court noted, because of the language from *Hihn*:

> "[W]here land is unenclosed and uncultivated the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate."[78]

The Court observed that such a view had already been rejected in *O'Banion,* and held that no reason existed to prefer landowners in implied dedication cases over those in prescriptive-easement cases. The question is one of fact:

> "We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use."[79]

With respect to the *Hihn* language, the Court could have added, of course, that the statement was dictum, and that *Hihn* was, unlike *Gion*, a case of implied-in-fact (acquiescence) dedication.

In discussing the third question, the Court cited California's long continued policy of encouraging public use of and access to the shore. Thus, it concluded,

> "[The] intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways."[80]

In the course of its decision the Court made several other observations that are useful in analyzing future cases:

1. "Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public."[81]

2. Diverse groups of people must have used the land, and not simply "a limited and definable number of persons . . . ."[82]

3. The mere fact that public use fluctuated seasonally does not negate an implied dedication.[83]

4. As discussed above, once five years of public use has been shown, the landowner must then affirmatively prove he has granted the public a license or that he has made "significant" efforts to prevent the use. If he has made no "significant" efforts, "it will be held as a matter of law that he intended to dedicate the pro-

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[78]F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 448 (1915).

[79]Gion v. City of Santa Cruz, 2 Cal.3d 29, 40-41 (1970).

[80]*Id.* at 43.

[81]*Id.* at 39.

[82]*Id.* at 39.

[83]*Id.* at 40.

perty . . . ."[84]

5. Whether people affirmatively believed the land to be public is not as significant as whether they used it as if it were, or ignored claims of the true owner.[85]

6. "If a constantly changing group of persons use [*sic*] land in a public way without knowing or caring whether the owner permits their presence, it makes no difference that the owner has informed a few persons that their use of the land is permissive only."[86]

7. Once five years of public use have occurred, no subsequent acts of the owner or his successor can rescind the dedication.[87]

Interestingly, overlooked by the *Gion* court and by the critics who have charged it with tampering with the rules of real property law was a line of cases holding that public use is presumed adverse and not permissive. In 1951, Justice Peters had written in an implied dedication case:

> "There is a general presumption that a use by other than the owner is adverse and not permissive. While this presumption is not as strong when the land is open and uncultivated and remote, as when it is enclosed, cultivated and developed [citing *Hihn, inter alia*] the presumption exists in either case."[88]

Gion Criticized

The Court's holding in *Gion* was criticized principally on two policy grounds: inequity to the hospitable landowner and the threat of widespread closings of hitherto open land. It was argued that a landowner who had permitted the public to use coastal and other unimproved property under the assumption that he was not losing his property rights should not be penalized for opening his land. The critics predicted that prudent landowners would, as a result of the decision, close their land to the public, and that by the summer of 1971 some nine million acres of land would be closed.[89]

The decision was also criticized on legal grounds for having assertedly changed the law of implied dedication in California. The two principal asserted criticisms were: (1) *Gion* abolished a presumption that public use is by permission of the landowner and substituted for it a contrary presumption and (2) it eliminated adversity as a necessary element of the principle of

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[84] *Id.* at 41.

[85] *Id.* at 44; *compare id.* at 39.

[86] *Id.* at 44.

[87] *Id.*

[88] People v. Sayig, 101 Cal.App.2d 890, 897 (1951); *cf.* Laguna Beach v. Consolidated Mtg. Co., 68 Cal.App.2d 38, 44-46 (1945).

[89] Weekly Newsletter No. 15 from the office of Senator Robert J. Lagomarsino (May 7, 1971). *Cf.* Staff analysis of Senate Bill 504, Assembly Committee on Planning and Land Use (June 8, 1971), concluding that the bill would have only an "indirect" effect on incentive to allow the public use of land: "Good will and public relations will remain the major factor in allowing the public use of private lands for recreational purposes."

implied dedication.[90] The charges have been met and adequately disproved elsewhere,[91] and will thus be but briefly discussed here.

Gion did not overrule a presumption of permissive use. First, the statement in *Hihn* that public use of unenclosed lands is ordinarily to be attributed to a license was, as we have shown above, pure dictum. Moreover, *Hihn* was a case of implied-in-fact dedication; *Gion* was an implied-in-law dedication decision. Thirdly, the critics ignore the line of cases holding that public use is presumed adverse.[92]

The assertion that the court substituted a presumption of adverse use is without sense. First, the Court expressly stated that the question of the character of public use is one of fact and to be resolved without the use of presumptions.[93] Secondly, in the nature of things public use is either pursuant to a license or not; if not it is said to be "adverse." Adversity is not something that is proved by certain facts; it is a state that exists when certain facts—permission or a license—do not exist. Adversity is then akin to the concept of malice in the criminal law of homicide; malice is simply a state that is said to exist when mitigating circumstances such as heat of passion are not present. It is of no little significance too that evidence of a license, or of "significant efforts" to halt public use, is singularly within the possession of the putative landowner.

The criticism that the *Gion* court abolished the requirement that the public use be adverse is similarly without reason. What the court held was that when the public has used private property as it would have used public property for a five year period, without asking or receiving permission to do so, a separate finding of adversity is unnecessary.[94] Again, adversity is that character of public use when the public (1) has used the property as it would use public property, and (2) has neither asked nor received permission to do so. A separate finding of adversity would of course be superfluous; requiring it would only risk confusing the litigants and the trial courts into thinking another elusive element must be proved.

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[90]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, 545 (1970); Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz,* 8 Cal. Western L.Rev. 75 (1971); Comment, *This Land Is My Land: The Doctrine of Implied Dedication and its Application to California Beaches,* 44 Cal.L.Rev. 1092, 1103 (1971); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication,* 18 U.C.L.A. L. Rev. 795, 809 (1971); Note, *Californians Need Beaches—Maybe Yours,* 7 San Diego L.Rev. 605, 614 (1970).

[91]Gallagher, Jure and Agnew, *Implied Dedication: The Imaginary Waves of Gion-Dietz,* 5 Sw. U. L.Rev. 48, 63-82 (1973).

[92]*See, e.g.,* People v. Sayig, 101 Cal.App.2d 890, 897 (1951); *cf.* Laguna Beach v. Consolidated Mtg. Co., 68 Cal.App.2d 38, 44-46 (1945).

[93]Gion at 41.

[94]*Id.* at 39.

The Post-Gion Cases

Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.,[95] decided in 1975, was the next reported implied-dedication decision after *Gion*. The case was brought by a motorcycle club whose members (and occasionally the general public) used the inland property for motorcycle riding and organized events. The Ramblers' clubhouse stood on adjoining property. The club alleged both an implied dedication to the public as well as a prescriptive easement in itself. The court found substantial evidence that the club's and the public's use of the subject property was by permission of the landowners, and held, therefore, that no implied dedication had resulted. This evidence included club members' awareness that the property was privately owned, that their right to use it could be revoked, and that they had the "consent" of the owners to use the land.[96]

Although the appeal was plainly decided at this point, the court went on to hold "that the rules and rationale of *Gion* extend no further than to roads, beaches and shoreline areas and that they are inapposite to the open field and hillsides of the inland areas of the defendants in the case at bench."[97] In so holding, the court apparently overlooked the following language from *Gion*:

> "Most of the case law involving dedication in this state has concerned roads and land bordering roads. [Citations.] . . . The rules governing implied dedication apply with equal force, however, to land used by the public for purposes other than as a roadway. In this state, for instance, the public has gained rights, through dedication, in park land [citations], athletic fields [citations], and in beaches [citations].
>
> "*Even if we were reluctant* to apply the rules of common law dedication to open recreational areas, we must observe the strong policy expressed in the Constitution and statues of this state of encouraging public use of shoreline recreational areas."[98]

The *Richmond* court also overlooked the plain language of an earlier appellate decision:

> "Naturally, more evidence of an intent to dedicate to public use is required in an open country where the public has been in the habit of going at will, without any clearly defined roadways, than in the case of a

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[95]47 Cal.App.3d 747 (1975) (hereinafter "Richmond").

[96]*Id.* at 753-754.

[97]*Id.* at 759.

[98]Gion at 41-42 (emphasis added). Richmond too seemed to have misapprehended the difference between implied-in-fact and implied-in-law dedication. It noted that Gion stated that the question of acquiescence of the landowner was not before the court, and assumed that this statement meant the parties had agreed that the use had been adverse. Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co., 47 Cal.App.3d 747, 758 (1975). This of course was not what was meant. On the contrary, the question of the character of the use was central to the Gion decision, and one principal holding of the case concerned whether a finding of adversity was necessary to support a judgment of implied-in-law dedication. Gion v. City of Santa Cruz, 2 Cal.3d 29, 39 (1970).

boardwalk."[99]

In the most recent California decision treating implied dedication, *County of Orange v. Chandler-Sherman Corp.*,[100] the issue was the quantum of use needed to support a finding of implied dedication. Observing that rarely did more than 12 to 15 people at one time use the 2,000-foot beach, the court upheld the trial court's finding that insufficient public use had occurred.

> "[T]he use must be substantial rather than casual and even though the use need not be otherwise adverse to the interests of the owner, the scope and continuity of the use must be great enough to clearly indicate to the owner that his property is in danger of being dedicated."[101]

The Legislative Response

When the California Supreme Court made an affirmative response to the "felt necessity" for public access, its decision was promptly met with predictions of disaster and legislative efforts—successful in part—for repeal. The story is a microcosm of environmental issues. It is an illustration of the problems that arise in legislatures when the irresistible force of public necessity meets the immovable object of an alleged vested right.

Initial reaction to the cases was, in many quarters, one of horrified negativism. The holding caused an immediate uproar on the part of agricultural, forest, and other holders of unimproved land held in large tracts which, for reasons of hospitality, economy, public relations or simply impossibility, had historically been opened to the public. It led to the introduction of a number of bills designed to remedy what were alleged to be the drastic consequences of the decision. The court's holding was criticized principally on two grounds: inequity to the hospitable landowner and the threat of widespread closings of hitherto open land. It was argued that a landowner who had permitted the public to use coastal and other unimproved property under the assumption that he is not losing his property rights should not be penalized for opening his land to the public. Prospectively, it was alleged that prudent landowners would, as a result of the decision, close their land to the public, and that by the summer of 1971 some nine million acres of land would be closed.[102]

Legislative responses took roughly four forms:

1. Proposals for outright repeal of the decision, both prospectively and retroactively, by establishing a presumption against implied dedication in all areas where there had been no im-

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[99]Laguna Beach v. Consolidated Mtg. Co., 68 Cal.App.2d 38, 44 (1945).

[100]54 Cal.App.3d 561 (1976).

[101]*Id.* at 565.

[102]Weekly Newsletter No. 15 from the office of Senator Robert J. Lagomarsino (May 7, 1971). *Cf.* Staff analysis of Senate Bill 504, Assembly Committee on Planning and Land Use (June 8, 1971), concluding that the bill would have only an "indirect" effect on incentive to allow the public use of land: "Good will and public relations will remain the major factor in allowing the public use of private lands for recreational purposes."

provement at public expense.[103]

2. Legislation to repeal the doctrine *prospectively*, thus permitting the establishment of public easements already in existence (so long as witnesses and proof remained available) but terminating the operation of the doctrine for future purposes.[104]

3. Legislation to provide protection for landowners who made their property available to the public by more specific recordation and notice provisions.[105]

4. Legislation sponsored by the land title companies to cope with the mechanical problems arising from the decision, *i.e.*, identification of the public agency which would administer and maintain the public easement, a reverse prescription provision, and authority for a landowner to quiet title.[106]

All but the third alternative met with early attack from representatives of conservation organizations.

A consensus approach to the *Gion/Dietz* decisions rapidly developed. On March 9, 1971, fourteen legislators led by Senator Robert Lagomarsino introduced Senate Bill 504, a vehicle which the lead author described as "a composite approach to resolving the issues of public rights and private property rights . . . ." Lagomarsino said,

> "One of the things that the Gion case did was to punish these small 'good guys,' the ones who had been making their land available to public use over the years, and reward the 'bad guys' who had fenced off their lands. With this bill, we hope to give assurance to the 'good guys' that they can continue to allow the public to use their lands without thereby losing title."[107]

The bill, introduced at the request of the California Chamber of Commerce,[108] quickly won the support of the California Farm Bureau Federation and numerous other organizations representing agricultural, forest and land title interests.[109]

But even the relatively modest proposal of Senate Bill 504 for prospective abrogation of the doctrine was criticized in that,

> ". . . as a practical matter the bill results in the loss of rights that have already vested in the public. Since no public use after the effective date of the act would count for dedication purposes, as the years pass there will be less and less evidence available to prove pre-existing public use."

It was suggested, for instance, that a landowner intent on denying public rights could accomplish it by allowing public use until no witnesses were left to testify.[110] Under continued pressure, the bill was amended in the Assembly to be inapplicable to any coastal prop-

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[103]Senate Bill 1204 (1971 Reg. Sess.).

[104]Senate Bill 504 (1971 Reg. Sess.).

[105]Assembly Bill 2885 (1971 Reg. Sess.).

[106]Senate Bill 1132 (1971 Reg. Sess.).

[107]Press Release No. 18, Office of State Senator Robert J. Lagomarsino, March 9, 1971.

[108]Enrolled Bill Memorandum to Governor, October 7, 1971.

[109]Letter, Robert J. Lagomarsino to Hon. Ronald Reagan, September 27, 1971.

[110]Letter, Reverdy Johnson, Attorney at Law, to George Miller III, Administrative Assistant to Senator Moscone (March 30, 1971).

erty for 1,000 yards inland. The recordation approach was further adopted in part by permitting use of property after the effective date of the bill without the acquisition of rights in the public, provided the owner did any of the following:

1. Posted specified signs or published a specified statement.

2. Recorded a specified notice.

3. Entered into a written agreement with any federal, state, or local agency providing for the public use of the land.[111]

Implied dedication remained available where a governmental entity expended public funds on visible improvements on or across the lands or in the cleaning or maintenance related to public use of the lands in such a manner that the owner knew, or should have known, that the public was making such use of his land.[112] In this form, Senate Bill 504 was signed into law as Civil Code section 1009.

Although the coastline exception in the bill caused withdrawal of support of the California Land Title Association,[113] apparently on the ground that the classification established would be held unconstitutional, a subsequent opinion of the Legislative Counsel affirmed the validity of the distinction.[114]

The "public improvement exception" under which implied dedication remains was designed to maintain a useful and historical purpose for the doctrine. Since early times in California, this theory has served to protect the public from unscrupulous real estate developers who would subdivide land and tell prospectice buyers that non-existent public parks or streets were to be located in the development. When the subdividers later tried to put the alleged "park land" to other uses, the court would hold that notwithstanding record title, the land had been impliedly dedicated as a public park.[115] Representations to the effect that roads would be public streets were dealt with similarly,[116] and the doctrine has been invoked to preserve remedies against local government in tort liability.[117]

Other responses came pursuant to the procedural problems that this matter raised. For instance, the Office of the Attorney General supported Assembly Bill 1446 by then Assemblyman John Dunlap. This bill would

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[111]Civ. Code § 1009 (f).

[112]Civ. Code § 1009 (d).

[113]*See* memorandum from William G. Barker and Peter J. Laden, Law Clerks, to Robert G. Rove, Vice President, Assistant Senior Title Counsel, and John F. Forward II, Associate Counsel, (August 19, 1971).

[114]Legislative Counsel Opinion No. 17692 (August 3, 1971).

[115]*See* Archer v. Salinas City, 93 Cal. 43 (1892); Phillips v. Laguna Beach Company, 190 Cal. 180 (1922); Morse v. E. A. Robey and Company, 214 Cal.App.2d 464 (1963); Morse v. Miller, 128 Cal.App.2d 237 (1954); Washington Boulevard Beach Company v. Los Angeles, 38 Cal.App.2d 135 (1940).

[116]*See, e.g.*, Larkey v. City of Los Angeles, 70 Cal. App. 635 (1925).

[117]Thus in Union Transportation Company v. Sacramento County, 42 Cal.2d 235 (1954), it was held that a cause of action existed against the county when a bridge collapsed under a truck because the bridge had been impliedly dedicated to public use.

have provided an orderly procedure for dealing with dedication by requiring multiple agencies to hold a public hearing and to post notices and advertise the hearing before granting approvals and permits for development adjacent to the Pacific Ocean. Thus, the public interest would have been protected by adequate notice and opportunity to be heard.

Recordation as the sole means of protection was discarded relatively early in response to advice from the State Chamber of Commerce that it did not adequately protect the landowner who failed to record all possible public uses, and in fact that land adjacent to lands for which recordation had been made would still be subject to the threat of implied dedication.[118]

Notwithstanding the pressure on the Legislature to repeal *Gion*, the effect of Civil Code section 1009 is an affirmation of the doctrine and of the strong public policy of this State aimed at insuring individuals access to coastal areas.[119]

Since the *Gion* decision, the Legislature has consistently reaffirmed the doctrine and the policy enunciated by the Court;[120] the most notable example being the recently enacted California Coastal Act of 1976,[121] which was a response to the people's mandate when they enacted the California Coastal Zone Conservation Act of 1972[122] through the initiative process. The new coastal act specifically reaffirms public rights by virtue of implied dedication and provides:

> "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including but not limited to the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."[123]

The Approach of Other States to Public Rights in Shoreline Areas

The problems of growing urbanization pointed out in *Gion* have been dealt with far more drastically in other states.

A Texas appellate court applied the implied dedication doctrine to uphold a public easement to a Gulf Coast beach six years before the California court's decision in *Gion*, holding that,

> "...the act of throwing open property to the public use without any other formality is sufficient to establish the fact of dedication to the public...."[124]

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[118]Letter, Larry Kiml, State Chamber of Commerce, to R. Frederic Fisher, Legal Committee, Sierra Club, February 17, 1971.

[119]Gion at 42-43.

[120]*See, e.g.*, 1975 Cal. Stats., ch. 54, § 2 and 1974 Cal. Stats. ch. 1484, § 4, which mandate that public right by reason of implied dedication be assessed prior to the expenditure of any funds for park acquisition. Govt. Code § 66478.11 requires that all subdivision maps provide access to land below the ordinary high water mark. Pub. Res. Code § 6210.9 provides methods for acquiring access to tide and submerged lands.

[121]1976 Cal. Stats. chs. 1330, 1331 and 1441.

[122]Pub. Res. Code §§ 27000 *et seq.*

[123]Pub. Res. Code § 30211.

[124]Seaway Co. v. Attorney General, 375 S.W.2d 923, 929-930 (Tex. Cir. App. 1964).

The Hawaii Supreme Court has upheld beach access based on ancient native use,[125] and has held that the royal patents granted to private landowners "ma ke kai" (along the sea) carried with them title only to the debris or vegetation line of the shore, rather than to the more waterward line of mean high water.[126]

Perhaps more far-reaching was the decision of the Oregon Supreme Court, which rejected as inadequate the rules of implied dedication and prescription in favor of a uniform rule applicable to all the ocean front lands of the state based on the old English doctrine of custom. This decision gave the public rights to all of the dry-sand area of Oregon's beaches.[127] It is interesting to conjecture on the possible results in California if this doctrine had been applied. Application of Indian custom would conceivably have opened up beaches and foreshore for all 1,051 miles of coastline. Adoption of Mexican law and custom would apparently have increased public ownership up to the line of "extraordinary," rather than "mean," high tide.[128] Similarly, Spanish law had previously given everyone the right to "fish and erect a cottage for shelter."[129]

Conclusion

Examining restrictions placed upon property rights as early as the twelfth century, Professor Richard Powell has concluded that the limits on property use become more circumscribed "as neighbors gain nearness." Powell points out that with the growth of urbanization, the police power has necessarily grown, at the expense of the private landowner, to encompass the doctrines of zoning, nuisance, redevelopment, and other principles affecting the use of private property.[130] Had *Gion* truly expanded the doctrine of implied dedication, then it very likely would have been found constitutional nonetheless.

But contrary to the then-prevalent belief nurtured by its critics, *Gion* was not a radical departure from existing law. One of the law's oldest principles is set forth in the Institutes of Justinian:

> "By natural law itself these things are the common property of all: air, running water, the sea, and with it the shores of the sea."[131]

The law has suffered ownership of many classes of things, even human life, but it has rarely permitted such exclusive dominion over the shores of the

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[125]Palama v. Sheehan, 440 P.2d 95, 97-98 (Hawaii 1968).

[126]Application of Ashford, 440 P.2d 76 (Hawaii 1968).

[127]State ex rel Thornton v. Hay, 462 P.2d 671, 679 (Ore. 1969). The "dry sand area" was defined by the court as that shore between mean high tide and the visible line of vegetation. *Id.* at 672-673.

[128]Valentine v. Sloss, 103 Cal. 215, 219 (1894); Hihn at 443.

[129]3 Kent, *Commentaries on American Law* 342 (Da Capo ed. 1971).

[130]R. Powell, *Property Rights and Civil Rights*, 15 Hastings L.J. 135 (1963); *see* Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Ayres v. City Council of Los Angeles, 34 Cal.2d 31 (1949).

[131]Inst. Justinian, Bk. 2, Tit. I, § 1.

oceans and inland waters. For what person lacking education in the niceties of law really expects that he may reduce a portion of shoreline to his exclusive possession? A beach or marsh or mud flat can be held exclusively only with great difficulty, because the waters that formed it erode and re-shape it more quickly and violently than any other landform is re-shaped, except by seismic disturbances. By the same token, who has not felt the innate sense that everyone may use the shores and beaches? The *Gion* decision was simply a modest attempt to protect that expectation.

1977 HI-JINKS

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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 16, 2016, I served an executed copy of the Appendix of Bar Journal Articles on Support of Answer Brief on the Merits of Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder

Pursuant to the court's e-Submissions procedures, a true and correct copy was uploaded through their on-line system. 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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Court of Appeal
Second District, Div. 3
Ronal Reagan State Building
300 So. Spring Street
2nd Floor, North Tower, Los Angeles, CA 90013

Superior Court of Los Angeles
Hon. Malcolm Mackey, Dept. 55
111 No. Hill Street
Los Angeles, CA 90012

June S. Ailin, Esq.
ALESHIRE & WYNDER, LLP
2361 Rosecrans Ave., Ste 475
El Segundo, CA 90245
Tel (310) 527-6660 • Fax (310) 532-7395
E-mail: jailin@awattorneys.com

Attorney for Plaintiffs Jaime A. Scher and Jane McAllister

Bennett Kerns, Esq.
LAW OFFICES OF BENNETT KERNS
2001 Wilshire Boulevard, Suite 200
Santa Monica, CA 90403-5789
Tel (310) 452-5977 • Fax (310) 828-2146
E-mail: kernslegal@yahoo.com

Attorney for Defendants John Burke, Germaine Burke and Bennett Kerns, trustee of the A.S.A. Trust, Dated June 28, 2005

Robert S. Gerstein, Esq.
LAW OFFICES OF ROBERT S. GERSTEIN
12400 Wilshire Blvd., Ste. 1300
Los Angeles, CA 90025
Telephone: (310) 820-1939
Facsimile: (310) 820-1917
E-mail: robert.gerstein1@verizon.net

Attorney for Defendants John Burke, Germaine Burke and Bennett Kerns, trustee of the A.S.A. Trust, Dated June 28, 2005

Wendy Cole Lascher, Esq.
FERGUSON CASE ORR PATERSON
1050 South Kimball Road
Ventura, CA 93004
Telephone: (805) 659-6800
Facsimile: (805) 659-6818
E-mail: wlascher@fcoplaw.com

Attorney for Defendant Gemma Marshall

Richard I. Arshonsky, Esq.
Jason J. Jarvis, Esq.
LEVINSON ARSHONSKY
& KURTZ, LLP
15303 Ventura Blvd., Suite 1650
Sherman Oaks, CA 91403
(818) 382-3434 • Fax (818) 382-3433
rarshonsky@laklawyers.com

Attorneys for Defendants, Appellants, and Cross-respondents Richard Erickson, Wendie Malick, Richard B. Schroder, and Andrea D. Schroder

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 16, 2016 at Pasadena, California.

Lorraine Bille

LORRAINE V. BILLE