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IMPLIED DEDICATION: A THREAT TO THE OWNERS OF CALIFORNIA'S SHORELINE

With the increase of urbanization and the general rise in population, the people of California are confronted with a shortage of open recreational land, particularly public beach land.¹ In a recent opinion consolidating two cases, *Gion v. City of Santa Cruz* and *Dietz v. King*,² the Supreme Court of California handed down a decision which may help remedy this shortage.

*Gion v. City of Santa Cruz*³ concerns three lots of shoreline land of approximately 480 feet in length with a depth varying from 70 to 160 feet. Each lot contained some land which overlooked the sea about 30 to 40 feet above sea level. For 60 years the public used the lots as a parking area. The land was also used for fishing, swimming and other recreational activities. Since 1900 the city facilitated the public's use by posting signs, filling holes, installing an alarm system and paving the parking lot.⁴ The sanitation department provided trash receptacles and cleaned the area after heavy use.

The owner, Mr. Gion, did not object to the public's use, nor did he grant permission to the public to use his land. The superior court found Gion to be the fee owner, but declared the fee to be subject to an easement in the City of Santa Cruz for itself, and on behalf of the public, in, on, over, and across the property for public recreational purposes.⁵ This easement right included, but was not limited to, parking, fishing, picnicking, general viewing, public protection and policing, as well as erosion control. However, the easement did not give the City or the public the right to construct any permanent structures on the land.⁶

In *Dietz v. King*,⁷ the plaintiffs, as representatives of the public, filed a class action seeking to enjoin the defendant, King, from interfering with the public's use of Navarro Beach and an unimproved dirt road, Navarro Beach Road, which led to that beach. The beach in question is a sandy peninsula surrounded by cliffs and bounded

¹ Comment, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565 (1970).

² *Gion v. City of Santa Cruz* and *Dietz v. King*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (hereinafter referred to as *Gion*).

³ *Id.*

⁴ *Id.* at 35, 465 P.2d at 53, 84 Cal. Rptr. at 165.

⁵ *Id.* at 35, 465 P.2d at 53, 84 Cal. Rptr. at 165-66.

⁶ *Id.* at 35, 465 P.2d at 54, 84 Cal. Rptr. at 166.

⁷ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

by Navarro River. Navarro Beach Road was the only convenient access to the beach. There was evidence that the public had used the road and the beach for over 100 years. None of the previous owners of the King property had ever objected to public use of Navarro Beach Road.

In 1960, King attempted to block the road. The public repeatedly destroyed his barriers and continued to use the land until 1966 when King hired a construction crew to permanently block the road. That act prompted members of the public to bring the class action. The superior court ruled in favor of the defendant, stating that there had been no dedication of the beach or of the road. The California Supreme Court affirmed *Gion* and reversed *Dietz*, finding a dedication in both cases of a public recreational easement.

These cases constitute a great threat to the owners of beachland⁸ in California who have not objected to the public use of their land, and who have not been cautious enough to have affirmatively granted a license to the public. A landowner's past generosity may have created permanent rights in the public without evidence that the landowner intended such a result.

IMPLIED DEDICATION PRIOR TO GION

Dedication is a common law principle that enables a private landowner to donate his land for some public use.⁹ To accomplish common law dedication, there must be unequivocal proof that the owner intended to dedicate his land.¹⁰ Such proof may be provided by the express words of the owner or it may be implied by various acts of the owner which manifest his intent to dedicate.¹¹

Where dedication is implied from the owner's acts, the public

⁸ Although the facts in *Gion* were concerned with beach land, and the court alluded to a number of statutes that indicated public policy favored access to the shoreline, *see* note 48, *infra*, we are dealing essentially with common law principles of implied dedication. Therefore, it is not likely that the courts will limit the *Gion* opinion to beach land areas.

⁹ 11 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 33.02 (3d rev. ed. 1964); 2 G. THOMPSON, *REAL PROPERTY* § 369 at 462 (1961).

¹⁰ *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 240, 267 P.2d 10, 14 (1954); *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 448, 150 P. 62, 70 (1915); Comment, *Dedication of Land in California*, 53 CALIF. L. REV. 559, 560 (1965); 11 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 33.03 (3d rev. ed. 1964); 2 G. THOMPSON, *REAL PROPERTY* § 370 at 471-72 (1961); 4 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 1101 (3d ed. 1939).

¹¹ *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 240, 267 P.2d 10, 14 (1954); Comment, *Dedication of Land in California*, 53 CALIF. L. REV. 559, 560 (1965); 11 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 33.03 (3d rev. ed. 1964); 2 G. THOMPSON, *REAL PROPERTY* § 370 at 471-72 (1961); 4 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 1101 (3d ed. 1939).

normally bases its claim on the fact that the public has used the land for a long period of time.¹² Such use by the public is termed "public user," and means actual use and enjoyment by the public of some right or property.¹³

Two theories have developed in the cases which enable "public user" to have one of two effects on a finding of dedication. An offer to dedicate land may be inferred from the owner's long acquiescence in public user under circumstances which negate the idea that the use was under a license.¹⁴ Or, a conclusive presumption of dedication will arise on a finding of "adverse public user" for a period of five or more consecutive years.¹⁵

Public user *alone* has been held not to negate the idea of a license since public user is as consistent with a finding of a license as it is with a finding of dedication. The party claiming dedication must offer more evidence than mere public user; he must present evidence which demonstrates that the owner's acts were inconsistent with a mere license.¹⁶

For example, if the original owners of adjoining property agree to create an alley by each offering a ten foot strip, the circumstances indicate an intent to dedicate rather than the granting of a license.

In such a case a court will base its decision on the fact that all subsequent deeds from the original owners do not mention or include the ten foot strip.¹⁷ Likewise, a landowner's asking public authorities for permission to make changes on his land is inconsistent with an intent to maintain full control, negating the idea of license.¹⁸

In addition to public user giving rise to an inference of offer to dedicate under specific circumstances, public user for the period of time required to gain prescriptive rights causes a conclusive presumption of dedication to arise.¹⁹ Such is the case only where the

¹² Public user is involved in the cases either for purposes of showing the owner's intent to dedicate, or merely for representing the public's acceptance of the owner's offer.

¹³ BLACK'S LAW DICTIONARY 1711 (4th rev. ed. 1968).

¹⁴ See *City of San Diego v. Hall*, 180 Cal. 165, 179 P. 889 (1919); *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62 (1915); *Niles v. City of Los Angeles*, 125 Cal. 572, 58 P. 190 (1899); *Hargo v. Hodgdon*, 89 Cal. 623, 26 P. 1106 (1891).

¹⁵ See note 19 and accompanying text *infra*.

¹⁶ See *Niles v. City of Los Angeles*, 125 Cal. 572, 58 P. 190 (1899); *Cooper v. Monterey County*, 104 Cal. 437, 38 P. 106 (1894); *Latham v. City of Los Angeles*, 87 Cal. 514, 25 P. 673 (1891).

¹⁷ *Hargo v. Hodgdon*, 89 Cal. 623, 26 P. 1106 (1891).

¹⁸ *People v. Sayig*, 101 Cal. App. 2d 890, 226 P.2d 702 (1951).

¹⁹ See *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 267 P.2d 10

public has used the land without asking for or receiving permission from the owner and without objection from anyone.²⁰ This is sometimes referred to as "adverse public user."²¹ Furthermore, while causing a conclusive presumption of knowledge and acquiescence to arise, adverse public user simultaneously negates the idea of mere license.²²

In any case, the ultimate issue is whether public user for the prescriptive period is under a license from the owner. If public user is pursuant to a license, it is permissive rather than adverse, and the conclusive presumption will not arise. The question of whether use is permissive or adverse is ordinarily one of fact to be determined from all the circumstances of the case.²³ Long continued use without objection by the owner is one of the bases for a finding of adversity.²⁴

In *Hartley v. Vermillion*,²⁵ a road had been used by the public for over fifteen years. Witnesses at the trial testified that they used the road without asking permission from anyone and without objection by anyone. One of the former owners of the land testified that he never gave anyone permission to use the land and that he never objected to the public's use. The court, in finding a dedication, stated that where the owner has not hindered the public's use of his road for more than ten years, the presumption that use of the road was by license is negated.²⁶

The difference between the cases giving rise to an inference of offer to dedicate on a finding of public user and those cases giving rise to a conclusive presumption of dedication on a finding of adverse public user for five or more years was expressed by the California Supreme Court in *Schwerdtle v. County of Placer*:²⁷

(1954); *Hare v. Craig*, 206 Cal. 753, 276 P. 336 (1929); *Arnold v. City of San Diego*, 120 Cal. App. 2d 353, 261 P.2d 33 (1953).

²⁰ *Id.*

²¹ See *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933); *People v. Myring*, 144 Cal. 351, 77 P. 975 (1904).

²² *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933); *Schwerdtle v. Placer County*, 108 Cal. 589, 41 P. 448 (1895); *Arnold v. City of San Diego*, 120 Cal. App. 2d 353, 261 P.2d 33 (1953).

²³ *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 240-41, 267 P.2d 10, 13 (1954); *O'Banion v. Borba*, 32 Cal. 2d 145, 149-50, 195 P.2d 10, 12 (1948).

²⁴ See *Fleming v. Howard*, 150 Cal. 28, 87 P. 908 (1906); *Hartley v. Vermillion*, 141 Cal. 339, 74 P. 987 (1903); *Barnes v. Daveck*, 7 Cal. App. 487, 94 P. 779 (1908). But see *Lyons v. Schwartz*, 40 Cal. App. 2d 60, 65, 104 P.2d 383, 386 (1940), for the proposition that long user might raise a presumption of intent to dedicate, but not a conclusive presumption of such intent.

²⁵ *Hartley v. Vermillion*, 141 Cal. 339, 74 P. 987 (1903).

²⁶ *Id.* at 349, 74 P. at 991.

²⁷ *Schwerdtle v. Placer County*, 108 Cal. 589, 41 P. 448 (1895).

If a dedication is sought to be established by use which has continued a short time—not long enough to perfect the rights of the public under the rules of prescription—then truly the actual consent or acquiescence of the owner is an essential matter. . . . But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication.²⁸

Public user for any length of time can give rise to an inference of an offer to dedicate if the owner's consent can actually be proven.²⁹ In such a case, the period of public user is merely evidentiary. On the other hand, adverse user must have occurred for at least five years if adverse user is to give rise to a conclusive presumption of dedication.³⁰

In either situation a finding of dedication will not result if the courts determine that the public user was under a license. The cases are not clear as to which party has the burden of showing the existence or nonexistence of a license except when the property in question is open and unenclosed land. When the character of the land is open and unenclosed, use by the public is generally attributed to be under a license.³¹

GION V. CITY OF SANTA CRUZ

The *Gion* opinion³² approaches the question of adverse public user from a new perspective, making it clear that the landowner has the burden of showing the existence of a license. *Gion* clearly separates the principle of adverse user from that of permissive user, or use under a license. Adverse user is determined by the intent of the public rather than the acts of the owner. Thus, in determining adverse user, the fact that an owner acts in a manner consistent with a claim of complete dominion over the property is no longer controlling.

Adverse public user for purposes of proving dedication is similar to adverse private user for purposes of establishing prescription.³³ The court warned, however, that any analogies from the law

²⁸ *Id.* at 593, 41 P. at 451.

²⁹ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 38, 465 P.2d 50, 56, 84 Cal. Rptr. 162, 167-68 (1970); *Morse v. Miller*, 128 Cal. App. 2d 237, 245, 275 P.2d 545, 551 (1954).

³⁰ *Id.*

³¹ *City of Manhattan Beach v. Cortelyou*, 10 Cal. 2d 653, 668, 76 P.2d 483, 490 (1938); *City of San Diego v. Hall*, 180 Cal. 165, 168, 179 P. 889, 890 (1919); *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 448, 150 P. 62, 68 (1915).

³² *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

³³ *Id.* at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

of prescription can be misleading.³⁴ The adverse possessor or the person attempting to gain a personal easement is attempting to gain a personal property right.³⁵ The test in such a situation is whether the individual actually claimed a personal legal right in the property. In establishing dedication, the public is trying to gain a public right rather than a private right. The public need only show that persons have used the land as they would have used public land.³⁶ Thus, if the land is a beach or shoreline, it must be shown that the land was used as if it were a public recreational area. A separate finding of "adverse" use is not necessary when there is evidence that the public used the land, as it would public recreational land, for five or more years without objection or interference.³⁷

Although *Gion* did not specifically regard adverse public user as being synonymous to public user without a license, or public user without permission, the legal significance of license or permission was discussed. The court clarified prior cases regarding presumption of license and burden of proof by requiring that the landowner affirmatively prove that a license has been granted to the public.³⁸

The *Gion* opinion, as well as some previous cases,³⁹ confused the doctrine of implied dedication with the doctrine of prescription. The *Gion* court allowed a dedication to be based solely on a finding of adverse public user for a period of five or more years. *As a result, the intent of the public determines the character of use rather than the intent of the landowner.* The landowner's intent is indirectly examined if he attempts to defeat the finding of dedication by affirmatively proving he granted a license. If the landowner cannot prove the existence of a license, a dedication can be based solely⁴⁰

³⁴ *Id.*

³⁵ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 39, 465 P.2d 50, 56, 84 Cal. Rptr. 162, 168 (1970); e.g., 2 G. THOMPSON, REAL PROPERTY § 340 (1961).

³⁶ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 39, 465 P.2d 50, 56, 84 Cal. Rptr. 162, 168 (1970).

³⁷ *Id.*

³⁸ *Id.* at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169.

³⁹ See Comment, 7 CALIF. L. REV. 65, 65 n.1 (1918). See also *Hartley v. Vermillion*, 141 Cal. 339, 74 P. 987 (1903); *Bolger v. Foss*, 65 Cal. 250, 251, 3 P. 871, 871 (1884); *Smith v. Kraitz*, 201 Cal. App. 2d 696, 701, 20 Cal. Rptr. 471, 474 (1962); *People v. Sayig*, 101 Cal. App. 2d 890, 896, 226 P.2d 702, 706 (1951).

⁴⁰ In *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), the court, with respect to the *Gion* case (as opposed to the *Dietz* case) could have based its finding of dedication on the fact that the owner indicated his willingness to dedicate by not objecting to the substantial amount of maintenance and improvement provided by the public, see text accompanying note 3 *supra*. But, in the *Dietz* case, there were no facts to show willingness to dedicate other than the owner's failure to object to the public use. Therefore, the court's decision could not have been based on the facts of public expenditure because such expenditures were peculiar to the *Gion* case.

on a finding that the public used his land for five years, believing it to be public land.

Prior to *Gion* the California courts were not receptive to the argument of implied dedication when open beach land was in question.⁴¹ Traditionally, the courts have attributed the use of open and unenclosed land to be under a license.⁴² Public use of beach land for a long period of time precluded a finding of dedication without additional proof that the owner intended to relinquish some of his control to the public. In *Hihn v. City of Santa Cruz*,⁴³ the court said:

[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 an intent to dedicate (Cyc. 484.) This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. (Cyc. 484.) It will not be presumed, from mere failure to object, that the owner of such land so used intended to create in the public a right which would practically destroy his own right to use any part of the property.⁴⁴

The cases of dedication based on adverse public user for five or more years that were decided prior to *Gion* were concerned with passageways or roadways. The courts had little difficulty in finding an implied dedication in these road cases. In most instances, the land was undeveloped and roads were greatly needed to foster communication. To facilitate this need, various statutes were enacted which provided that public use of roadways for a given period of time constituted a dedication.⁴⁵ Relying on these statutes, the courts in earlier cases⁴⁶ established the rationale by which later courts applied public user to the common law theory of dedication in order to arrive at the same conclusion.

⁴¹ See text accompanying note 44, *infra*. See also *City of Manhattan Beach v. Cortelyou*, 10 Cal. 2d 653, 668, 76 P.2d 483, 490 (1938); *City of San Diego v. Hall*, 180 Cal. 165, 168, 179 P. 889, 890 (1919); *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 448, 150 P. 62, 68 (1915). *But see* *People v. Sayig*, 101 Cal. App. 2d 890, 897, 226 P.2d 702, 707 (1951), where the court states: "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, . . . the presumption exists in either case."

⁴² See text accompanying note 44 *infra*.

⁴³ *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62 (1915).

⁴⁴ *Id.* at 448, 150 P. at 68.

⁴⁵ Cal. Stats., 1878, ch. CCCCLXIII, § 1, at 716 (1878); Cal. Stats., 1877, ch. X, § 1, at 6 (1877); Cal. Stats., 1874, ch. CCCXLII, § 1, at 503 (1874); CAL. POL. CODE § 2619 (1881).

⁴⁶ *Freshour v. Hihn*, 99 Cal. 443, 34 P. 87 (1893); *McRose v. Bottyer*, 81 Cal. 122, 22 P. 393 (1889); *Bolger v. Foss*, 65 Cal. 250, 3 P. 871 (1884).

In a similar manner, the *Gion* court felt that there was a substantial need for public beach land, thereby determining that public policy favored an expansion of the doctrine of implied dedication by public user to include shoreline areas.⁴⁷ To support this argument the court alluded to a number of statutes which,⁴⁸ when read together, establish the legislative policy as favoring public *access* to California's shorelines. However, these statutes cannot be construed to authorize a finding of dedication on the basis of adverse public user of a public easement over an entire plot for recreational purposes.⁴⁹

The *Gion* court failed to anticipate the greater burden a public easement would place on the owner of beach land as opposed to the lesser burden on the owner of a narrow strip of land. Each landowner occupies a substantially different position. In order to find a public recreational easement, more proof than adverse public user for five years should be required when the land in question is open and unenclosed. More specifically, the owner's inaction should not be sufficient to work a dedication. The courts should require a showing of affirmative action by the landowner which manifests his intent to dedicate, or a showing that the landowner knowingly accepted substantial public improvements.⁵⁰

⁴⁷ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 172 (1970).

⁴⁸ CALIF. CONST. art. XV, § 2, provides that no individual owning the frontage of tidal lands of a harbor, bay, inlet, estuary, or other navigable water in the State, shall be permitted to exclude the right of way to such waters whenever it is required for any public purpose. The *Gion* court provides a long list of authority to establish that recreational purposes are recognized as "public purposes." The *Gion* court also recognizes that although this provision of the California Constitution may be limited somewhat by the United States Constitution, that nevertheless, they should encourage public *access* to shoreline whenever possible: CAL. CIV. CODE § 830 (West 1954), provides that absent special language in a deed, private ownership of shoreline ends at the highwater mark. This statute has little relevance to the facts in the *Gion* opinion since most of the land in question is above the highwater mark. In addition to the two provisions mentioned above, the court listed the following legislative enactments to indicate that there is strong public policy favoring public access to the shoreline; CALIF. CONST. art. I § 25, guaranteeing the right to fish; CAL. GOV'T CODE §§ 54090-93 (West 1968), relates to discrimination in beach access; CAL. GOV'T CODE §§ 39933-37 (West 1968), requires municipalities to maintain access to navigable waters; CAL. FISH AND GAME CODE § 6511 (West 1958) and CAL. PUB. RES. CODE § 6008 (West 1956), place restrictions on the sales and leases of lands in Humboldt Bay in order to preserve the public access; CAL. PUB. RES. CODE § 6210.4 (West 1956), requires the state to reserve a convenient access to navigable water in connection with the sale or other disposition of shoreline lands; CAL. PUB. RES. CODE § 6323 (West 1956), forbids structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach.

⁴⁹ All of the statutes in question make reference only to *access* to navigable waterways. See note 48 *supra*.

⁵⁰ The landowner should be precluded from asserting that he never intended a public easement to arise when he or his predecessor in title has not objected to the government of the public expending a substantial amount of time or money for im-

A Recreational Easement Creates a Greater Hardship than a Road Easement

A road, unlike a beach, does not ordinarily encompass the landowner's entire acreage, but usually constitutes only a narrow strip. The landowner is left in full control of the abutting land even if the public gains a roadway easement. On the other hand, dedication of beach land deprives the owner of most of the rights and privileges generally associated with fee ownership. He cannot build a home and enjoy the privacy normally experienced by a private home owner due to the rights created in the public. These rights may preclude him from building a home on the dedicated land since once the public easement is established the landowner may not use the land in a manner inconsistent with that easement.⁵¹ For example, if the public has used the proposed homesite for five consecutive years for purposes of parking or recreation, it is likely that any structure placed on that site will be prohibited⁵² since it would be inconsistent with the easement. Furthermore, the landowner will lose his right to sell his property free of the encumbrance created by the public easement.

The conclusion reached in the *Gion* opinion is not a fair expansion of the doctrine of adverse public user. The court reaches an inequitable result if it finds a dedication based solely on the public's use of another's land when the public is using that land in the mistaken belief that it is public property. In most instances, the landowner probably has no intention of creating any rights in the public. It is more probable that the owner of beach land intends to allow the public to use his land as long as they do not interfere with his enjoyment or with his desire to develop the land at a later date. The landowner is faced with the possibility of losing valuable property rights

provement of his land. *Cf.* *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933); *Walter G. Brix Inc. v. Brown*, 145 Cal. App. 2d 177, 302 P.2d 74 (1956).

⁵¹ See *Robinson v. Cuneo*, 137 Cal. App. 2d 573, 577, 290 P.2d 656, 658 (1955); 11 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 33.66 (3d rev. ed. 1964); 2 G. THOMPSON, *REAL PROPERTY* § 431 (1961).

⁵² Prior to *Gion* the courts found dedication of a fee rather than an easement when open recreation land was in question, *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 45, n.3, 465 P.2d 50, n.3, 84 Cal. Rptr. 162, 172, n.3 (1970). Consequently, there is no precedent in California which establishes the extent to which a landowner may use his land when there is a public recreational easement over the entire plot. For example, if the owner wanted to build a house on the land, whether or not such a structure would interfere with the public easement would depend entirely on the character of the land in relation to the extent of the public use. If the nature of the land is such that a house built by the owner will not interfere with the public's enjoyment of the easement, then the owner will probably be allowed to build. On the other hand, if the land consists of one small lot that the public was using for a parking area, a house built on that lot would clearly be inconsistent with the public easement, and thus, the landowner would be prohibited from building on that lot. *Cf.* *Herzog v. Gosso*, 41 Cal. 2d 219, 224, 259 P.2d 429, 433 (1953).

which are guaranteed by the United States Constitution⁵³ as well as the California Constitution.⁵⁴ These rights are fundamental to the people of California and should not be interfered with unless absolutely necessary for the public welfare. When the government finds that acquisition of public beach land is necessary to promote the health, safety, and welfare of the public, then the government and the public should bear the burden of condemning the land and compensating the owner.⁵⁵ Some protection should be afforded the landowner in order to prevent the loss of his land to the public when the landowner has done no more than abstain from objecting to the public user. The California legislature could provide that public use of recreational land for any length of time shall be presumed to be under a license. Such a presumption would protect a landowner unless he were to do some act, in addition to acquiescing in the public user, that would be inconsistent with a desire to retain full control of the property.⁵⁶

PROTECTIVE ACTION BY THE LANDOWNER

Without statutory protection, the landowner should be wary when allowing the public use of his land. If the public has adversely used the land for over five years, there is very little the landowner can do to prevent a finding of dedication. If, however, an easement has not yet vested in the public, the landowner can take steps to protect himself.

Where the Land Has Been Used for Less Than Five Years

What effect will the *Gion* opinion have on the landowner whose land has been used by the public for less than five years? The conclusive presumption of dedication only arises after five years of adverse public use. Yet a court is not precluded from finding a dedication based on public use for less than five years. The party

⁵³ U.S. CONST. amend. V, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."; U.S. CONST. amend. XIV, § 1, provides, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

⁵⁴ CALIF. CONST. art. I, § 1 (West 1954), provides: "All men are by nature free and independent, and have certain inalienable rights among which are those of enjoying and defending life, and liberty; acquiring and possessing, and protecting property; and pursuing and obtaining safety and happiness."

⁵⁵ CAL. CODE CIV. PROC. §§ 1237 *et seq.* (West 1955).

⁵⁶ See *Diamond Match v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933); *Hargo v. Hodgdon*, 89 Cal. 623, 26 P. 1106 (1891); *Walter G. Brix Inc. v. Brown*, 145 Cal. App. 2d 177, 302 P.2d 74 (1956); *People v. Sayig*, 101 Cal. App. 890, 226 P.2d 702 (1951); *McKenzie v. Gilmore*, 33 P. 262, 3 Cal. Unrep. 886 (1893). See text accompanying note 50 *supra*.

asserting dedication would have to demonstrate that the landowner has actually consented to a dedication. The public user in such a case would represent acceptance of the owner's implied offer to dedicate.⁵⁷ There is nothing that an owner can do about his past acts to prevent a finding of dedication based on those acts. However, he can prevent a finding of dedication based on adverse public user for five or more years.

The *Gion* court specifically discussed the necessary action that a landowner must take to prevent a conclusive presumption of dedication from arising.

For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years . . . 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.⁵⁸

The landowner's first reaction to *Gion* will probably be to prevent public use in the future and thereby avoid the problem altogether. In order to arrive at the most effective course of action, one must consider the following questions: Has the public begun to use the land, and if so, how many people are involved? Does the landowner live near the land or is he an absentee owner? What is the overall size and shape of the plot? Can it be effectively and efficiently policed?

If the landowner resides on or near his land, and is in a position to supervise the area, he could post "No Trespass" signs. Should such signs prove ineffective he could order those persons using his land to leave the property and could then institute trespass actions against the offenders. These actions are practical, however; only if there are small numbers of people defying the wishes of the landowner.

The landowner who is attempting to prevent public use of his land must either be successful or his attempts must be "bona fide." Otherwise, the owner's attempts will not be sufficient to thwart a finding of dedication.⁵⁹ One must look to the means used in relation to the character of the property and the extent of the public use in order to determine if the owner's attempts are "bona fide."⁶⁰ The *Gion* court stated: "[a]lthough 'No Trespass' may be sufficient when

⁵⁷ See *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 241, 267 P.2d 10, 13 (1954); *Schwerdtle v. Placer County*, 103 Cal. 589, 593, 41 P. 448, 451 (1895).

⁵⁸ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 41, 465 P.2d 50, 57, 84 Cal. Rptr. 162, 169 (1970).

⁵⁹ *Id.*

⁶⁰ *Id.* at 41, 465 P.2d at 56, 84 Cal. Rptr. at 169-70.

only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property."⁶¹

The landowner does not have to prevent, or attempt to prevent, the public use of his land in order to avoid losing his property. There is strong dictum in *Gion* which provides that a landowner can avoid being victim to an implied dedication based on public user if he can affirmatively grant a license to the public.⁶² The more generous landowner can allow the public to use his land while still evincing an intent to remain in full control. Section 813 of the California Civil Code⁶³ provides for public recordation of real property licenses. That section was specifically enacted to protect the landowner from losing his property rights by prescription and to provide notice to users rather than future purchasers.⁶⁴ Furthermore, the statute implies that recordation provides constructive notice to public users as well as private users. Strict compliance with section 813 does not provide the landowner with conclusive evidence of a license. It does, however, provide some evidence that the landowner granted permission for a prescribed use on a given date.⁶⁵

Section 1008 of the California Civil Code⁶⁶ provides the owner with an additional course of action which further evinces his intent to grant a license. It provides that no use by any person or persons for any length of time will ever ripen into prescription if the owner of the land posts signs at each entrance, or at intervals of at least 200 feet along the perimeter, which declare that the right to use the land is by permission of the owner. Compliance with both sections would establish actual notice to the public that use is pursuant to a license and constructive notice of the license granted as of a given date.⁶⁷

⁶¹ *Id.* at 41, 465 P.2d at 58, 84 Cal. Rptr. at 170.

⁶² *Id.* at 41, 465 P.2d at 58, 84 Cal. Rptr. at 169.

⁶³ CAL. CIV. CODE § 813 (West Supp. 1969) provides: "The holder of record title to land may record in the office of the recorder of any county in which any part of his land is situated, a notice of consent to the use of his land, or any part thereof for the purpose described in the notice. The recorded notice of consent is evidence that the subsequent use of his land for such purposes is permissive and with consent. . . . In the event of use by other than the general public, any such notices to be effective, shall also be served by registered mail on the user. The recording of notice of consent shall not be deemed to affect rights vested at time of recording."

⁶⁴ 1963 Code Legislation, 38 CAL. S.B.J. 601, 646 (1963).

⁶⁵ *Id.*

⁶⁶ CAL. CIV. CODE § 1008 (West Supp. 1969) provides: "No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner.'"

⁶⁷ See CALIFORNIA CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION, 48 (1965).

In addition to the above, if the landowner could lease his land to the city or state for a nominal sum, any use by the public under such a lease could not give rise to a dedication.⁶⁸ Neither a person nor the public as an entity could acquire permanent rights since the possessory estate is public property. California Civil Code Section 1007 provides in part that “. . . no possession by any person, firm or corporation no matter how long continued of any land, . . . easement, or other property whatsoever . . . owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.”⁶⁹

By encouraging landowners to grant a license to the public or to lease their shoreline property to the government, the beach land shortage may temporarily be resolved. The public authorities should take advantage of this temporary remedy to acquire funds that will enable the public to gain the necessary recreational land by eminent domain and thereby provide the landowner with some compensation for his loss.

The above suggestions will be beneficial to a landowner if the public has used his land for less than five years. There are many instances, however, when public use has occurred for more than five years without any objection from the landowner. In such a case, what action, if any, can the landowner take to avoid a finding of dedication?

Where the Public Has Used the Land for Five or More Consecutive Years

Gion provides that adverse public user for five or more years gives rise to a conclusive presumption of dedication. As stated earlier,⁷⁰ the *Gion* opinion essentially creates in the public a right of prescription, permanently establishing the right to use the beach land after the fifth year of public use. If the public is able to prove five years of adverse public use, the landowner's granting of a license would not prevent the easement from arising. The license in such a case would be an attempt to give the public permission to do that which it already has a right to do. In any event, the landowner should grant a license since the public has the burden of proving five consecutive years of adverse use. A license will at least protect

⁶⁸ In light of the *Gion* opinion, it is highly unlikely that a public body will be willing to become a lessee of beach land for the benefit of the public if it appears that the public has used the land for five years. On the other hand, if the land is good recreational land, and the public has not used it sufficiently to give rise to an implied dedication, the governing body might be willing to come to terms.

⁶⁹ CAL. CIV. CODE § 1007 (West 1954).

⁷⁰ See note 39 *supra*.

the landowner where the public cannot meet this burden without claiming use during those years after the granting of the license.

If the landowner is successful in terminating the public use, or the public of its own volition decides to stop using the land, will such termination of public use be sufficient to extinguish the public rights? As a general rule, public easement rights, once created by public use, cannot be defeated or impaired by a private claim based on use adverse to the public right.⁷¹ However, if the landowner is successful in terminating the public use for a period of five years, there is a possibility that the easement will be extinguished. Section 811, subdivision four, of the California Civil Code provides: "A servitude is extinguished: . . . (4) When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."⁷²

The substance of section 811(4) was discussed in an early California case, *McRose v. Bottyer*.⁷³ That case involved a road that had been dedicated in compliance with a statute⁷⁴ which provided that all roads used as such in Butte county for a period of five years shall be public highways. The dedication of this road was based solely on evidence of public user, similar to the requirements for dedication as announced in *Gion*. The *McRose* court said that section 811(4) did not extinguish the easement because nonuse had occurred for less than five years.⁷⁵ The decision implies that 811(4) will be applied to public rights as well as private easements when such rights are created by enjoyment.⁷⁶

However, it has been held⁷⁷ that once dedication is complete, nonuse or delay in use will not extinguish public rights. In these

⁷¹ See *Hargo v. Hodgdon*, 89 Cal. 623, 26 P. 1106 (1891); *People v. Sayig*, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); CAL. CIV. CODE § 1007 (West Supp. 1969), provides in part, ". . . no possession by any person, firm, or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof."

⁷² CAL. CIV. CODE § 811(4) (West 1950).

⁷³ *McRose v. Bottyer*, 81 Cal. 122, 22 P. 393 (1889).

⁷⁴ Cal. Stats., 1874, ch. CCCXLII, § 1, at 503 (1874), provides: "All roads in the County of Butte shall be public highways which are now used and have been so declared by the Court of Sessions or Board of Supervisors, or which may be declared hereafter by the Board of Supervisors. Also all roads used as such for a period of five years."

⁷⁵ *McRose v. Bottyer*, 81 Cal. 122, 125-26, 22 P. 393, 394 (1889).

⁷⁶ *Id.*

⁷⁷ *Archer v. Salinas City*, 93 Cal. 43, 28 P. 839 (1892); *County of Sacramento v. Lauszus*, 70 Cal. App. 2d 639, 161 P.2d 460 (1945); *Humbolt County v. Van Duzer*, 48 Cal. App. 640, 192 P. 192 (1920).

cases, the courts did not rely solely⁷⁸ on evidence of five or more years of public user without objection or interference by the landowner. The scope of subdivision four of section 811 was not considered. In a situation where the public gained rights by merely showing adverse public user for five or more years it would seem desirable that 811(4) be applicable in order to protect the landowner. Furthermore, finding an extinguishment based on five or more years of nonuse would not conflict with Section 1007 of the California Civil Code⁷⁹ since the extinguishment of the easement would be based on nonuse by the public, not adverse use by the landowner.

Even if a landowner is successful in stopping the public use for a period of five years, it is still possible that a court would refuse to apply section 811(4) to a public easement created by dedication. The court could maintain that the easement was not created by "enjoyment." The court could hold that public user is merely evidentiary of the landowner's intent to dedicate. The *Gion* court was careful to label the result of their decision an implied dedication rather than public prescription. It is likely, therefore, that the courts in the future will refuse to apply Section 811(4) of the California Civil Code to public rights that are created by public user.

From the foregoing it is evident that the landowner who has experienced public user for five years has little or no recourse to prevent the public from claiming permanent easement rights. This result is especially unfair to a landowner who, relying on the law prior to *Gion*, did not affirmatively grant a license. Prior law did not provide for a dedication of open recreational land without evidence of acts by the owner that manifested his intent to dedicate the land.⁸⁰ Also, prior law presumed public use of recreation land to be under a license from the owner.⁸¹

If the landowner wishes to preserve his rights, he should do everything possible to terminate the public use, or at least limit it to an area of his land that will least interfere with his enjoyment of the land. The extent of the public easement will depend on the extent and character of use for any consecutive five year period.⁸² If the public is using the entire plot for any five year period, tech-

⁷⁸ See text accompanying notes 35-37 *supra*.

⁷⁹ See text accompanying note 69 *supra*.

⁸⁰ See note 41 *supra*.

⁸¹ See note 42 *supra*.

⁸² CAL. CIV. CODE § 806 (West 1954), provides: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it is acquired."

nically the public has a permanent right over the land. If, however, the owner is successful in limiting the use, the public may have problems in proving that they had, at one time, used the whole plot for five consecutive years. This action will not entirely free the landowner from the public easement, but it might work to limit that easement to an area that does not totally interfere with the landowner's enjoyment of his land.

CONCLUSION

The *Gion* opinion constitutes a direct threat to the landowners of California's shoreline.⁸³ The landowner who was generous enough to allow the public to use his land while it remained undeveloped is now prevented from terminating that use. If the owner should decide to build a home on his land, he cannot expect to enjoy the privacy that one normally expects as a private homeowner. Also, if the landowner should decide to sell, he might have difficulty receiving a fair price. The possibility that the land is subject to a public easement for recreational purposes will severely cloud the title. The extent of such an easement is so indefinite that a buyer would be extremely cautious before parting with his money. As a result, the owner of California's shoreline are being forced to single handedly bear the burden of providing public beach land to California's populace.

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⁸³ The threat of the *Gion* opinion is intensified if the local governing body develops a definite policy with respect to gaining public easements over beach land by implied dedication. Santa Cruz County has begun to develop such a policy. Following is a list of some of the recommendations given to the County Board of Supervisors from the County Counsel. The letter is dated November 10, 1970. "To protect the public rights, the following actions should be taken: (Some of them are already taken pursuant to the recommendation of the Parks and Recreation Commission report.)"

1. Take an inventory of publicly used beach areas, access thereto, parking lots, etc., used in conjunction with the beach. (This suggestion has already been acted upon affirmatively).
2. Assign priorities to the public uses and areas.
3. Enlist public participation in taking the inventory and assigning priorities.
4. Instruct the Planning, Building Inspection, and Public Works Departments to refuse permits for use of shoreline property until such time as the status of the public use has been determined. At this time, intensive investigation of the factual basis for a claim of public rights should be instituted. If there is substantial evidence of the existence of a public easement inconsistent with the proposed private use, the permit should be denied or conditioned so as to protect the public rights.
5. Institute regular, systematic and continuing surveillance of beach areas with a view to collecting evidence of use, such as photographs, dates, times, places, extent of use, and identification of potential witnesses.
6. At such time as a property owner makes an effort to halt public use in any significant way, begin intensive investigation to determine if facts warrant suit on behalf of the public to establish such public rights.