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PROCEDURAL RIGHTS OF JUVENILES—CALIFORNIA REQUIREMENT OF CORROBORATION OF ACCOMPLICE TESTIMONY NOT APPLICABLE TO WARDSHIP PROCEEDINGS IN JUVENILE COURT—*In re R. C.*, 39 Cal. App. 3d 887, 114 Cal. Rptr. 735 (1974), *hearing denied* (August 28, 1974).

In the early morning hours of February 26, 1973, two San Francisco police officers observed R.C. and J.J. engaging in activity which, upon further investigation, was found to be indicative of an attempted entry into a building. Earlier that evening, R.C. had been identified to one of the officers as a possible suspect in a series of fires that had been set in the area.[1] The two boys were taken into custody and questioned separately about a fire in which two deaths had occurred. J.J. denied any knowledge of the fire but admitted that he, D.B., and R.C. belonged to a group called "The Flames," and that they had been responsible for 14 or 15 other fires in the area. R.C. did not speak.

At the hearing on the petition against him, R.C. again chose not to testify. It was stipulated, however, that minors D.B. and J.J. would testify that they, along with R.C., had set fire to two specific vacant buildings with the intent to burn them. It was also stipulated that the fires set at the locations of the buildings were incendiary in origin.[2]

It was determined that R.C. had violated the state law relating to arson,[3] and he was committed to the California Youth Authority.[4]

The appeal of the decision was based on a denial of a motion brought by R.C.'s counsel to strike the petition against R.C. on the ground that Penal Code section 1111[5] required corroboration

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1. *In re* R. C., 39 Cal. App. 3d 887, 891, 114 Cal. Rptr. 735, 737 (1974), *hearing denied* (August 28, 1974).

2. *Id.*, 114 Cal. Rptr. 738.

3. CAL. PEN. CODE § 447a (West 1970) makes it illegal to set fire to a dwelling house or other enumerated appurtenances thereto.

4. R. C.'s commitment was pursuant to CAL. WELF. & INST'NS CODE § 602 (West Supp. 1974), which provides in relevant part:

> Any person who is under the age of 18 years when he violates any law of this state . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

5. CAL. PEN. CODE § 1111 (West 1970) states:

> A conviction cannot be had upon the testimony of an accomplice unless

of the stipulated testimony of D.B. and J.J., who were accomplices in the offense charged against R.C.

In affirming the order of commitment, the court of appeal held that Penal Code section 1111 does not by its own terms apply to juvenile proceedings, and the principle expressed therein is not required in such proceedings either as a matter of due process or equal protection.[6]

Thus the judicial struggle over the appropriate method of processing juvenile offenders through the juvenile justice system continues. In recent years, courts at both the federal and state levels have wrestled with conflicting theories of juvenile law.[7] Simply stated, there are at opposite ends of the theoretical spectrum the "Purists"[8] and the "Constitutionalists."[9] The "Purists" wholeheartedly endorse the social-welfare philosophy that the state should act through the courts to deal with juvenile problems in a practical, protective, and, consequently, informal capacity. The "Constitutionalists" advocate full constitutional rights and procedural safeguards for minors.[10] Many decisions have stemmed from a growing recognition that the attempt to treat juveniles who act in violation of the law as delinquent children in a benevolent, noncriminal atmosphere rather than as junior criminals has met with only limited success.[11] While the problem is still unresolved, the trend has been toward a continuing integration of many of the procedural rights accorded adult criminal defendants into the ad-

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it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the case in which the testimony of the accomplice is given.

6. 39 Cal. App. 3d at 892-97, 114 Cal. Rptr. at 738-42.

7. *See generally*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); T.N.G. v. Superior Court, 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971); *In re* S.A., 6 Cal. App. 3d 241, 85 Cal. Rptr. 775 (1970).

8. Gardner, *Gault and California*, 19 HAST. L.J. 527 (1968).

9. *Id.*

10. *Id.*

11. In McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 (1971), the Court stated:

> We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized. . . . Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged. The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.

judicative phase of juvenile proceedings where commitment is a possible consequence.[12]

Given this historical setting, the significance of *In re R.C.* as a new watermark in the ebb and flow of statutory and judicial changes in California law can now be considered.

The initial issue decided by the court of appeal was that Penal Code section 1111 did not expressly apply to juvenile wardship proceedings. As viewed by the court, the point of controversy was not the admissibility of the uncorroborated accomplice testimony,[13] but the effect of that testimony once admitted. The opinion of the majority was that

> Penal Code section 1111 by its own terms applies only to criminal *convictions*, while Welfare and Institutions Code section 503 provides that an "order adjudging a minor to be a ward of the juvenile court shall *not be deemed a conviction of a crime for any purpose*, nor shall a proceeding in the juvenile court be deemed a criminal proceeding. . . . To apply Penal Code section 1111 to a juvenile proceeding would thus be contrary to the intention expressed in the statute.[14]

This statement illustrates the theoretical stance taken by the majority of the court concerning procedural formalities in the juvenile courts. The notion, however, that juvenile proceedings are totally noncriminal is certainly controversial. Although the view posited by the majority here has prevailed in California,[15] as juvenile courts adopt more procedural rules and formalities they tend to resemble more and more their adult court counterparts. As a result, the opposing view takes on ever-increasing significance. The "Constitutionalists"[16] would argue that an adjudication of wardship, when based on a charge of committing an act that amounts to a felony, for example arson,[17] is similar to an adult criminal proceeding in terms of its "effect" on the convicted defendant, and therefore should be characterized by similar procedural rules.

The idea that terming a wardship adjudication "civil" is a "legal fiction" which does violence to reason and reality was first enunciated in California in *In re Contreras*,[18] and received strong

12. Comment, *Jury Trial for Juveniles*, 23 HAST. L.J. 467, 480 (1972).

13. 39 Cal. App. 3d at 892, 114 Cal. Rptr. at 738.

14. *Id.* (emphasis by the court).

15. *See In re* S.A., 6 Cal. App. 3d 241, 85 Cal. Rptr. 775 (1970), where the same reasoning was used to hold section 1203.4 of the Penal Code, providing for the setting aside of a guilty verdict in the case of a defendant who has fulfilled the conditions of probation, inapplicable to a minor as to whom juvenile court jurisdiction had terminated.

16. *See* text accompanying note 10 *supra*.

17. CAL. PEN. CODE § 447a (West 1970).

18. 109 Cal. App. 2d 787, 241 P.2d 631 (1952). The court said: "It is

support in *In re Mikkelson.*[19] In 1970, the California Supreme Court in *Joe Z. v. Superior Court*[20] concluded that juvenile proceedings are quasi-criminal in nature, involving "as they often do the possibility of a substantial loss of personal freedom."[21] Nevertheless, the *In re R.C.* majority chose to uphold the civil versus criminal distinction between juvenile wardship adjudications and adult criminal proceedings set forth in Welfare and Institutions Code section 503.[22] The adherence of the court to the theory that the juvenile and adult systems of criminal justice are not the same allowed it to find no need for an express application of the accomplice testimony rule to a wardship proceeding. Having decided that issue, the majority then faced the due process and equal protection claims raised by the defendant.

In evaluating whether due process considerations require the application of Penal Code section 1111 to juvenile wardship adjudications, the court of appeal began by admitting that such proceedings "must comport with the essentials of due process and fair treatment."[23] The court took the view that corroboration of accomplice testimony was not essential to due process in adult criminal cases; therefore "it similarly is not required in juvenile cases."[24] This reasoning requires further analysis.

At the outset it should be noted that all courts in our legal system regard the testimony of an accomplice witness with some degree of suspicion.[25] This is because the accomplice may wish to testify falsely in the hope of gaining some sort of immunity or leniency, or to shield himself by ascribing his own or another's acts to an innocent suspect, or to lie for purposes of revenge.[26] Corroboration of accomplice testimony is not required in federal prosecutions,[27] and the court of appeal further cites a concurring opinion in the New York decision, *In re M.*,[28] which notes that a "vast majority"[29] of the states do not require it. This "vast ma-

common knowledge that such an adjudication . . . is a blight upon the character of and is a serious impediment to the future of such minor." *Id.* at 789, 241 P.2d at 633; *cf. In re* Alexander, 152 Cal. App. 2d 458, 313 P.2d 182 (1957).

19. 226 Cal. App. 2d 467, 471, 38 Cal. Rptr. 106, 108 (1964).

20. 3 Cal. 3d 797, 801, 478 P.2d 26, 28, 91 Cal. Rptr. 594, 596 (1970).

21. *Id.* The court refused, however, to go so far as to apply the same rules of discovery to a juvenile case as would be applied in an adult criminal case.

22. CAL. WELF. & INST'NS CODE § 503 (West 1972).

23. 39 Cal. App. 3d at 892, 114 Cal. Rptr. at 738, *citing, In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

24. 39 Cal. App. 3d at 893, 114 Cal. Rptr. at 739.

25. Comment, *Accomplice Corroboration—Its Status In California,* 9 U.C.L.A.L. REV. 190 (1962).

26. *Id.* at 192.

27. 39 Cal. App. 3d at 893, 114 Cal. Rptr. at 739, *citing,* United States v. Honore, 450 F.2d 31, 34 (9th Cir. 1971), *cert. denied,* 404 U.S. 1048 (1971).

28. 34 App. Div. 2d 761, 310 N.Y.S.2d 399 (1970).

29. *Id.* at 763, 310 N.Y.S.2d at 401-02.

jority" language is somewhat misleading.[30] In twenty-one states the rule that a felony conviction cannot be based solely on uncorroborated accomplice testimony is given either total or partial application.[31] Thus, the court of appeal's argument that California's requirement that accomplice testimony be corroborated is not an essential of due process even in adult criminal cases, but merely a "legislative refinement,"[32] is at least questionable in light of the procedural rules adopted in several states. That the federal courts do not apply the rule is, of course, a major countervailing consideration.

In assessing the requisite due process applicable in specific juvenile court procedures, the United States Supreme Court decision in *In re Winship*[33] provides an analytical base. *Winship* held that where a juvenile is charged with an act which would constitute a crime if committed by an adult, due process requires the adjudication standard to be proof beyond a reasonable doubt. The Supreme Court stated that judicial intervention into the life of a minor in order to attempt to rehabilitate him should not take "the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult."[34]

The New York appellate court in *In re M.*[35] interpreted *Winship* to mean that full compliance with the due process requirement of establishing proof beyond a reasonable doubt necessitated the application of New York's Code of Criminal Procedure, section 399,[36] to juvenile proceedings. The law in New York is very

30. The citation of authority given by the concurring judge is 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940). Yet section 2056, speaking of the corroboration doctrine, reads in pertinent part:

> As a matter of common law, then, the doctrine was universally understood (except by one or two courts) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury. It followed that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony . . . .
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> But in *nearly half* of the jurisdictions of the United States a statute has expressly turned this cautionary practice into a rule of law. The judge must therefore under these statutes instruct the jury in the rule of law and the jury must follow it . . . .

Id. (emphasis added).

31. *Id.* at n.10.

32. 39 Cal. App. 3d at 893, 114 Cal. Rptr. at 739.

33. 397 U.S. 358 (1970).

34. *Id.* at 367.

35. 34 App. Div. 2d 761, 310 N.Y.S.2d 399 (1970). *In re* M. and *In re* R.C. both involved minors charged with arson offenses where the only available evidence was uncorroborated accomplice testimony.

36. The New York Code of Criminal Procedure was replaced in its entirety by the Criminal Procedure Law, which became effective September 1, 1971. However, the requirement that accomplice testimony be corroborated was not changed. The new statute provides that "a defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tend-

similar to California Penal Code section 1111 in relation to convictions based solely on uncorroborated accomplice testimony. The principle that corroborated accomplice testimony is an integral part of due process in adjudications of juvenile delinquency continues to be followed in New York.[37] The *In re R.C.* court, relying in part on the above-criticized concurring opinion in *In re M.*, thought the *Winship* case ill-applied to the accomplice testimony rule, and concluded that Penal Code section 1111 is not required by due process.[38]

Another Supreme Court case relevant to this discussion is *McKeiver v. Pennsylvania*,[39] in which the Court stated that the due process standard applicable to juvenile court proceedings, as developed by *In re Gault*[40] and *Winship*, is "fundamental fairness."[41] As that standard was applied in those cases, there was "an emphasis on *fact finding procedures.* The requirements of notice, counsel, confrontation, cross-examination and standard of proof naturally flowed from this emphasis."[42] While *McKeiver* went on to hold that the right to a jury trial is not a necessary component of accurate fact finding and therefore not required in juvenile courts, this is important because the truth and credibility of the sole testimony upon which a conviction is based is an integral component of accurate fact finding. Since Penal Code section 1111 fits within the fact finding category, this is another indication that its use in juvenile proceedings is justified on due process grounds.

Thus, the court of appeal's reasons for rejecting appellant's due process argument in *In re R.C.* are not without counterpoints worthy of consideration. With regard to the equal protection argument considered and rejected by the majority, Justice Rattigan was in strong disagreement.[43]

The thrust of the majority's argument was that the purposes, needs, and characteristics of the adult and juvenile criminal systems are different;[44] consequently, reasonable differences in procedure are justified so long as due process standards are met. The lack of a jury trial in the juvenile court was used as an example of the differences between the two systems which militate

ing to connect the defendant with the commission of such offense." N.Y. CRIM. PRO. LAW § 60.22 (McKinney 1971).

37. *In re* L., 41 App. Div. 2d 674, 340 N.Y.S.2d 1001 (1973).

38. *See* note 24 and accompanying text *supra.*

39. 403 U.S. 528 (1971).

40. 387 U.S. 1 (1967).

41. 403 U.S. at 543.

42. *Id.* (emphasis added).

43. 39 Cal. App. 3d at 898-99, 114 Cal. Rptr. at 742-43 (Rattigan, J., dissenting).

44. *Id.* at 894, 114 Cal. Rptr. at 739.

against the equal protection argument. The court argued that "it is not unreasonable to suppose that a judge conducting a juvenile hearing is less likely than a jury would be to accept accomplice testimony uncritically."[45] Another disparity noted was the relative severity of the possible consequences of an adult court conviction compared with an adjudication of delinquency.[46]

While the argument concerning the jury-judge dichotomy appears reasonable, the comparison of the severity of possible consequences is of marginal validity. Granted, a juvenile perpetrator of an act equivalent to a serious felony will not be subjected to the harsh maximum sentences faced by an adult perpetrator, but as the court of appeal itself noted, "[t]he peculiarities of the juvenile commitment process may cause a juvenile offender to be confined longer than one prosecuted as an adult for the same conduct . . . ."[47]

In dissent, Justice Rattigan was of the opinion that the majority's justification of the differences in the systems, solely upon the basis that due process standards have been satisfied, ignored the affected juvenile's right to equal protection of the laws.[48] The dissenting justice characterized the majority's reasons for upholding the different treatment accorded to juveniles as being based on one or both of the following alternative premises:

> (1) . . . a contrary holding would subvert the essential difference between juvenile and adult prosecutions as adversary procedings . . . ; or (2) . . . the specific, disparate treatment in question otherwise operated to serve the best interests of the affected juvenile or of the system of juvenile justice generally.[49]

These reasons were then distinguished as they related to Penal Code section 1111. Justice Rattigan did not feel that requiring corroboration of accomplice testimony would raise juvenile proceedings to the adversary plateau of adult criminal prosecutions, nor that refusal to apply the statute in any way served the best interests of the juvenile or the system through which he is processed.[50]

The first of the dissent's arguments appears to be especially meritorious. The majority's view that an application of Penal Code section 1111 would tend toward formality and an adversary atmosphere carries little weight when considered in relation to all

45. *Id.* at 895, 114 Cal. Rptr. at 740.
46. *Id.*
47. *Id.*
48. *Id.* at 898, 114 Cal. Rptr. at 742.
49. *Id.* at 898-99, 114 Cal. Rptr. at 742-43 (citations omitted).
50. *Id.* at 899, 114 Cal. Rptr. at 743.

of the procedural rules applied thus far to juvenile proceedings.[51] The right to counsel, notice, confrontation, appeal, and the privileges against self-incrimination, double jeopardy, and the many others recognized in California's juvenile justice system make for a system that is laced with formality and the clamor of adversary proceedings. In light of this, the argument that the juvenile system can still be characterized as "civil" or even "quasi-criminal" is eroded.

The dissent's second argument goes to the very heart of the "Purist" vs. "Constitutionalist" debate over the proper treatment of juvenile offenders.[52] According to *McKeiver v. Pennsylvania*, the juvenile court system contemplates fairness, concern, sympathy and paternal attention for its subjects.[53] But whether it approximates that ideal in practice is another consideration.[54] Applying this consideration to Penal Code section 1111, it seems proper to ask whether its application will in any way serve to remedy the present defects in the juvenile system. Quite possibly the fact finding function would be insured of more accuracy by requiring corroboration of accomplice testimony. But use of the rule would at the same time result in a diminution of the juvenile court's ability to experiment in dealing with the problems of the young. Chief Justice Burger, dissenting in *In re Winship*, argues that the already much-formalized juvenile system should not be further strait-jacketed with more procedural rules.[55] He posits the notion that the procedural trend is actually a protest against inadequate juvenile court staffs and facilities. Because of the literal breakdown in many juvenile courts, he states that the judicial reaction has been to "burn down the stable to get rid of the mice. . . .

51. In a juvenile wardship proceeding under Welfare and Institutions Code section 602, a minor is protected by the following procedural rights and safeguards: right to be advised of constitutional rights, CAL. WELF. & INST'NS CODE § 627.5 (West 1972); right to counsel, *Id.* §§ 633-34, 679; right to notice of charges, *Id.* § 633; right to confront and cross-examine witnesses, *Id.* §§ 630, 702.5 (West Supp. 1974); privilege against self-incrimination, *Id.*; right to appeal, *Id.* § 800 (West 1972); protection against double jeopardy, *Id.* § 606; violation of a criminal statute must be proved beyond a reasonable doubt, *Id.* § 701. *See In re* Robert T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970) (exclusionary rules relating to illegally seized evidence); *In re* Carl T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (1969) (unconstitutional pretrial identification procedures); *In re* Michael M., 11 Cal. App. 3d 741, 96 Cal. Rptr. 887 (1970) (rights must be explicitly waived prior to a judicial admission); *In re* Roderick P., 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972) (statements obtained in violation of *Miranda* are inadmissible). *See also In re* Winship, 397 U.S. 358 (1970) and text accompanying notes 25-26 *supra*. These and other rights were cited by the *In re R.C.* court. 39 Cal. App. 3d at 896-97, 114 Cal. Rptr. at 741-42.

52. *See* text accompanying note 10 *supra*.

53. 403 U.S. at 550.

54. *See* note 11 and accompanying text *supra*.

55. 397 U.S. at 376 (dissenting opinion).

Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases."[56]

Will more money, more courts and more specialized juvenile judges make up for the deficiencies in the present system which conceivably brought on the outcry for procedural safeguards? This question, as well as whether the stable of juvenile justice is being burned down or is actually being renovated into a more viable structure by the continuing application of these protections cannot be definitively answered. One clear fact, however, is that California has long been a front-runner in providing procedural protections for minors.[57] The gap between equal procedural rights for juveniles and adults is closing. But the court of appeal in *In re R.C.* has chosen, for the present, not to move any further in that direction.

Timothy R. Patterson

56. *Id.*

57. Comment, *The Conflict of Parens Patriae and Constitutional Concepts of Juvenile Justice*, 6 LINCOLN L. REV. 65 (1970).

SECURITY TRANSACTIONS—"ONE FORM OF ACTION" RULE IS APPLICABLE TO MORTGAGES AND DEEDS OF TRUST SECURED BY A COMBINATION OF REAL AND PERSONAL PROPERTY—*Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974).

In July, 1965, Diversified Enterprises Incorporated borrowed $153,946 from the Community Bank, returning one promissory note for that amount secured by a chattel mortgage on equipment and trucks owned by Diversified, and as additional security a promissory note for $40,000 secured by a deed of trust on certain real property. Upon Diversified's default, the bank commenced an action to judicially foreclose[1] upon the chattel mortgage, pursuant to section 9501 of the California Commercial Code.[2] At this time Diversified sold to one Glen Walker the real property securing the $40,000 note. The bank commenced foreclosure upon the real property by recording notice of default and election to sell under the power of sale provided in the deed of trust. Later, a deficiency judgment of $93,570.83 requesting the unpaid balance on the $153,946 note was awarded to the bank following judicial foreclosure and sale of the chattels.

The plaintiff brought suit to quiet title in the real property and enjoin the trustee's sale. Although the superior court granted a temporary injunction staying the sale, it later dissolved the injunction and awarded title in the real property to the defendant bank. The Second District Court of Appeal affirmed. On appeal to the California Supreme Court plaintiff Walker contended that the bank was barred from resorting to its real property security by the "one form of action" rule,[3] set forth in section 726 of the California Code of Civil Procedure, requiring judicial foreclosure of all security for a single debt within a single action.[4] The court, in *Walker v. Community Bank*,[5] reversed the lower court on the ground that the respondent had made an election to judicially foreclose separately on the personal property collateral and conse-

1. CAL. CIV. PRO. CODE § 725(a) (West 1955) authorizes use of judicial foreclosure by the mortgagee or the beneficiary or trustee of a deed of trust.

2. CAL. COMM. CODE § 9501 (West 1964).

3. Walker v. Community Bank, 10 Cal. 3d 729, 733-34, 518 P.2d 329, 331, 111 Cal. Rptr. 897, 899 (1974).

4. CAL. CIV. PRO. CODE § 726 (West Supp. 1974) reads in relevant part:

> There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter.

5. 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974).

quently had waived its right to proceed against the real property security interest.[6]

Prior to 1963, section 726 of the California Code of Civil Procedure applied to both real and personal property security, requiring a creditor to combine all actions involving security for a single debt into a single judicial foreclosure before he could pursue any additional remedies such as a deficiency judgment.[7] This was known as the "one form of action" rule, developed by the Legislature to protect mortgagors from costly multiple suits upon separate portions of security for a single debt, as well as to make the security the primary source of satisfaction for a debt.[8] The rule applies to deeds of trust as well as mortgages.[9] In 1963 the Legislature amended section 726,[10] deleting the reference to personal property and making the provisions of that section applicable solely to security transactions involving *any* real property.[11]

At the same time the Legislature enacted the California Commercial Code.[12] Section 9501 of the Code prescribes creditors' enforcement procedures for a debt in default which must be followed in situations where personal property constitutes the only form of security.[13] Noticeably absent is any limitation to a single form of action.

The issue before the *Walker* court was whether the amendment of section 726 of the Code of Civil Procedure and the concurrent enactment of section 9501 of the California Commercial Code made section 726, as revised, applicable to security agreements involving personal *and* real property. Specifically, if a creditor judicially forecloses upon personal property within section 9501 of the Commercial Code and obtains a deficiency judgment, can he then proceed to a separate foreclosure upon the untouched

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6. *Id.* at 741, 518 P.2d at 337, 111 Cal. Rptr. at 905.

7. CAL. CIV. PRO. CODE § 726 (West Supp. 1974) applies to judicial foreclosures. Before a creditor can obtain a deficiency judgment he must also escape the sanction of the antideficiency statutes. Section 580(b) of the California Code of Civil Procedure prohibits deficiency judgments on purchase mortgages and land sale contracts. Section 580(d) prohibits deficiency judgments following non-judicial sales of property.

8. Comment, *Mortgages and Trust Deeds: When Foreclosure is Required under Cal. Code Civ. Pro. § 726: Counterclaim and Set Off When One Claim is Secured*, 25 CALIF. L. REV. 347, 348 (1937).

9. Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 650, 20 P.2d 940, 945 (1933).

10. Cal. Stats. (1963), ch. 819, § 26, at 2007 (effective Jan. 1, 1965).

11. 10 Cal. 3d 729, 735, 518 P.2d 329, 332-33, 111 Cal. Rptr. 897, 900-01 (1974).

12. Cal. Stats. (1963), ch. 819, § 1, at 1849 (effective Jan. 1, 1965).

13. CAL. COMM. CODE § 9501 (West 1964) provides in part: "The creditor may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any judicial procedure."

real property security through private sale, without running afoul of the "one form of action" rule?

The court found that deletion of the words "personal property" from section 726 makes its provisions applicable only to security arrangements involving *some* real property, whereas the enactment of section 9501 brings enforcement of purely personal property within the exclusive province of the Commercial Code.[14] As to the hybrid case where the collateral for a debt is both real and personal property the court focused upon subdivision (4) of section 9501.[15] In its reading of that subdivision[16] the *Walker* court found that a creditor can "elect to proceed solely as to the personal property under the Commercial Code,"[17] but that if he wishes to protect *both* real and personal property security "he must do so according to the rights and remedies accorded real property security and *not* pursuant to the Commercial Code."[18] In effect the court held that the "one form of action" rule is applicable in California where the security for a single debt is *both* real and personal property.[19]

Why was the *Walker* court so concerned with preserving the applicability of section 726 to proceedings involving combined real and personal property security? One justification for the court's desire to retain a broadly effective statute was the concern expressed by Professor Hetland—the prevention of a multiplicity of suits.[20] More importantly, however, the court seems to have

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14. 10 Cal. 3d at 734-35, 518 P.2d at 332-33, 111 Cal. Rptr. at 900-01.

15. CAL. COMM. CODE § 9501(4) (West 1964) reads:

> If the security agreement covers both real and personal property, the secured party may proceed under this chapter as to the personal property or he may proceed as to both the real and personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this chapter do not apply.

16. The court's interpretation is based largely upon the comments to the California Commercial Code. CAL. COMM. CODE § 9501, Comment 5 (West 1964) states in part:

> The collateral for many corporate security issues consists of real and personal property. In the interest of simplicity and speed subsection (4) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this Act leaves to other state law all questions of procedure with respect to real property. For example, this Act does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real property.

17. 10 Cal. 3d at 735, 518 P.2d at 332, 111 Cal. Rptr. at 900.

18. *Id.* (Emphasis in original).

19. The court relied heavily upon Professor Hetland's assessment of the applicability of the rule in the combined real-personal property security situation. *Id.* at 733 n.2, 518 P.2d at 332 n.2, 111 Cal. Rptr. at 899-900 n.2. *See* HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 6.18, at 257-58 (Cont. Ed. Bar 1970) [hereinafter cited as HETLAND].

20. *See* HETLAND, *supra* note 19, § 6.18, at 257.

reasoned that, given the nature of security agreements within the typical commercial context, a borrower should be afforded a greater measure of protection than a lender. The *Walker* court apparently felt this policy to be the basic import of section 726 and doubtless was loathe to chisel away the debtor's protection in favor of enhancing the creditor's convenience in enforcing his security interests.[21]

After finding section 726 to be applicable to the case, the court applied the guidelines set forth in *James v. P.C.S. Ginning Co.*[22] In that case the mortgagee had elected the remedy of a personal judgment in satisfaction of the mortgagor's debt. The *James* court held that the equitable lien priority over real property security had been waived under the "one form of action" rule and that the mortgagee was consequently barred from foreclosure of its lien.[23]

Utilizing this reasoning the *Walker* court held that the "one form of action" rule embodied in section 726 prohibits a creditor from obtaining a personal judgment against his debtor and then proceeding in a separate action against the real property.[24] The proper form, said the court, would be to proceed against the real property *before* seeking any additional remedy through personal judgment.[25]

The protection extended to the debtor operates in two ways. First, the mortgagor may set up section 726 as an affirmative defense[26] compelling the mortgagee to exhaust all security before seeking a deficiency judgment and, at the same time, barring any other form of judicial action.[27] In the case at hand the mortgagor, Diversified Enterprises, waived such a defense.[28] Under the rule of *James v. P.C.S. Ginning Co.*,[29] such a waiver results in the provisions of the statute operating as a sanction,[30] automatically bar-

21. If a creditor were allowed to foreclose partially upon his security he would then be in a position to take advantage of market values in land by foreclosing at the most opportunistic times.

22. 276 Cal. App. 2d 19, 80 Cal. Rptr. 457 (1969).

23. *Id.* at 23, 80 Cal. Rptr. at 460. The mortgagee ginning company had retained both a chattel mortgage and an equitable lien on real property as security. Upon default it obtained a personal judgment for the balance against the mortgagor after which the mortgagor filed a homestead upon the land.

24. 10 Cal. 3d at 741, 518 P.2d at 337, 111 Cal. Rptr. at 905.

25. *Id.*

26. HETLAND, *supra* note 19, § 6.18, at 243.

27. Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 38, 378 P.2d 97, 98, 27 Cal. Rptr. 873, 874 (1963).

28. The benefits of section 726 as an affirmative defense for the mortgagor may be waived after the loan contract is made. *See* Salter v. Ulrich, 22 Cal. 2d 263, 267, 138 P.2d 7, 9 (1943).

29. 276 Cal. App. 2d 19, 23, 80 Cal. Rptr. 457, 460 (1969).

30. *See* HETLAND, *supra* note 19, § 6.18, at 243.

ring foreclosure by the mortgagee of any remaining real property security once he obtains a personal judgment against the mortgagor. Here, plaintiff Walker was the windfall recipient of the protection of the statute's sanction aspect.[31] Although he purchased title to the realty with full knowledge of the outstanding trust deed,[32] he was permitted to invoke this sanction, preventing the bank from foreclosing upon the real property, because through election, it had "waived all right to such security."[33]

Section 726, then, remains a powerful weapon in a debtor's arsenal. Although he may compel a creditor to satisfy a defaulted obligation by foreclosing upon all of the security first,[34] he need not do so. Often it may be to his advantage to waive the affirmative defense, since the sanction aspect of the statute will then protect any outstanding real property security which an unwary creditor may have neglected to foreclose upon in the initial action. If the creditor neglects to foreclose upon the real property he then loses the balance of the debt as well as the security.[35] The *Walker* result is unfavorable to such a creditor,[36] but it gives him fair notice that the "one form of action" rule is not dead letter in situations where the security for an obligation is both real and personal property.

The practical impact of *Walker*, beyond the preservation of section 726's debtor protection in combined real and personal property situations, may be that institutional lenders will extend fewer mortgages involving some real property security.[37] Loan amounts for these mortgages may decrease. At the same time, interest rates on such transactions may increase as those creditors involved in judicial foreclosures are forced to rely for their security primarily upon land, which may be of relatively little value[38] in satisfying a debtor's obligation.[39] Wary lenders, spurred to protect themselves through more extensive security and personal credit

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31. 10 Cal. 3d at 739 n.4, 518 P.2d at 335-36 n.4, 111 Cal. Rptr. at 903-04 n.4.

32. Walker v. Community Bank, 31 Cal. App. 3d 380, 107 Cal. Rptr. 345, 350 (1973), *vacated by*, Walker v. Community Bank, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974).

33. 10 Cal. 3d at 741, 518 P.2d at 337, 111 Cal. Rptr. at 905.

34. HETLAND, *supra* note 19, § 6.18, at 243.

35. *Id.*

36. *See* Kendall, *Effect of the One Action Rule on Real Property Security Interests*, 44 L.A. BAR BULL. 116, 136-44 (1969) [hereinafter cited as Kendall].

37. *Id.* at 144.

38. *Id.* at 136.

39. Where the creditor is a junior lienor, however, he will not be barred from a deficiency judgment by section 726 where the land has been rendered valueless by a senior sale. Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 40-41, 378 P.2d 97, 100, 27 Cal. Rptr. 873, 876 (1963).

evaluation,[40] will no doubt include more restrictive stipulations in loan contracts, such as due-on-sale provisions.[41] Innovative financing devices for real-personal property mortgages, such as combinations of mortgages and unsecured loans,[42] which previously enabled lending institutions to make at least some relatively safe loans, may now be discouraged. The net result of *Walker* may well be that there will be less borrowed money circulating in the California economy, at least where these loans are secured in part by real property.

In its reading of the Commercial Code the California Supreme Court extended the protection given a mortgagor by section 726 of the Code of Civil Procedure. The commercial ramifications of *Walker*, however, may be more important to the prospective borrower in an already tight money market than the procedural safeguard of the "one form of action" rule.

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40. *See* Kendall, *supra* note 36, at 138, 144.

41. Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 579-80, 81 Cal. Rptr. 135, 138-39 (1969). However, a due-on-sale clause will be enforced by the courts only where the beneficiary-obligee can demonstrate a threat to his security sufficient to justify such a restraint on alienation. Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 638-40, 526 P.2d 1169, 1174-76, 116 Cal. Rptr. 633, 638-40 (1974).

42. Some writers have suggested that the lender make two loans when the security is inadequate to cover the lender's risk. One loan is made for the amount of the security and is secured, while the other loan is equivalent to the balance and is unsecured. This method avoids subordination to other general creditors as to any amount outstanding after resort to the security. *See* Brown, *Preventive Law: The Divided Loan*, 36 CAL. ST. B.J. 81 (1961).