

In summary, I would grant the motion for rehearing and deny the writ. In the alternative, I would adopt the above guidelines.

PHILLIPS, Chief Justice, dissenting.

#### ON MOTION FOR REHEARING

I join in that portion of Justice Gonzalez's dissent which discusses the nature of the writ of mandamus. I do not believe the trial judge clearly abused his discretion in this case. The resolution of this issue, although important to the jurisprudence of the state, should properly await another day.

In light of that conclusion, I do not join in the remainder of Justice Gonzalez's opinion. In particular, I disagree with the apparent suggestion that this court should mandate a bifurcated trial whenever punitive damages are to be awarded. I believe this is an unnecessarily cumbersome means of protecting the defendant's legitimate interests against prejudice and the invasion of privacy. The trial court can more efficiently accomplish these objectives by placing limits on the scope and nature of discovery, issuing protective orders, and giving such jury instructions as may be appropriate.

I agree with Justice Gonzalez's observation that most of the questions raised by respondent are properly left to the discretion of the trial court. The trial court is in the best position to determine how to balance the right to legitimate discovery with the right to avoid harassment or prejudice. The exact parameters of this new right to discovery, including those problems raised in the remainder of Justice Gonzalez's dissent, should be resolved in subsequent litigation by the orderly development of case authority.

#### CITIZENS STATE BANK OF SEALY, TEXAS, Petitioner,

v.

CANEY INVESTMENTS, et al.,  
Respondents.

No. C-6708.

Supreme Court of Texas.

March 16, 1988.

Rehearing Denied March 16, 1988.

After receiver had been appointed for general partner's property, including property which was owned by limited partnership, bank attempted to enforce its lien on property, and limited partners filed petition in intervention. The 310th District Court, Harris County, Allen J. Daggett, J., granted limited partners declaratory relief and permanently enjoined bank from foreclosing liens, and bank appealed. The Court of Appeals, 733 S.W.2d 581, affirmed, and bank appealed. The Supreme Court held that: (1) trial court could not permit partnership and partners to intervene after judgment appointing receiver had become final, and (2) bank was entitled to jury trial.

Reversed and vacated.

#### 1. Receivers $\Leftarrow$ 34

Trial court could not permit limited partnership and partners to intervene in receivership created in divorce proceeding to take possession of general partner's assets, including real estate owned by limited partnership and managed by general partner's corporation, after judgment appointing receiver had already been rendered and become final. Vernon's Ann.Texas Rules Civ.Proc., Rule 60.

#### 2. Jury $\Leftarrow$ 14(11, 12.5)

Bank was entitled to jury trial at hearing on request of partnership and partners to enjoin bank from foreclosing its lien on property owned by partnership and to declare liens invalid. Vernon's Ann.Texas Rules Civ.Proc., Rule 216; Rules App.



Proc., Rule 133(b); Vernon's Ann. Texas Const. Art. 1, § 15; Art. 5, § 10.

Donald W. Mills, De Lange, Hudspeth, Pitman & Katz, Houston, for petitioner.

Matthew H. Hartzell and Joe C. Holzer, Hirsch & Westheimer, P.C., Houston, for respondents.

#### PER CURLIAM.

The court's opinion of October 21, 1987 is withdrawn, and the following is substituted.

This is an appeal by Citizens State Bank from an order by a family court judge which declared the bank's liens against partnership property void, and ordered a permanent injunction to prevent the bank from exercising foreclosure. The trial court also allowed third parties to intervene after a judgment had become final, and denied the bank its constitutional right to a jury trial. The court of appeals affirmed. 733 S.W.2d 581. We reverse the judgment of the court of appeals and dismiss.

G.C.R.E.A., Ltd. # 24 is a limited partnership which owned a 10.839 acre tract of land managed by Gulf Coast Real Estate Auction Company, Inc. ("G.C., Inc."), the general partner. Albert Kuehnert is the president and sole shareholder of G.C., Inc. The respondents in this case are current or former limited partners of G.C.R.E.A., Ltd. # 24.

In 1980, Kuehnert conveyed the tract of land to his own company, G.C., Inc. He then executed a deed of trust to Citizens State Bank to use the land as collateral for a personal loan. In 1983, Kuehnert filed suit for divorce in the trial court, which was granted on April 29, 1985, and the decree was signed June 19, 1985. In an ancillary proceeding, the trial court appointed a receiver to take possession of certain assets and sell them. Among the assets listed was the 10.839 acre tract, which was in the name of G.C., Inc., a company wholly owned by Mr. and Mrs. Kuehnert.

In May of 1986, Citizens State Bank attempted to foreclose its lien on the 10.839

acre tract. On May 13, the partnership and the partners individually filed a petition in intervention in the receivership. They requested an order to enjoin the bank from foreclosing its lien on the property and to declare the liens invalid. The hearing on the permanent injunction was set for June 30, 1986. The trial court denied the bank a jury trial on the injunction. In a bench trial, the court declared the liens void, and permanently enjoined the bank from attempting to foreclose the void liens. The court of appeals affirmed.

[1] Since the trial court allowed the Respondents to intervene after the judgment had already been rendered and become final, the appeal should have been dismissed. See *Comal County Rural High School District No. 705 v. Nelson*, 158 Tex. 564, 314 S.W.2d 956, 957 (1958); Tex.R.Civ.P. 60. We hold that the trial court and court of appeals erred by assuming jurisdiction.

[2] The more egregious error, however, was that the bank was denied its right to a trial by jury at the hearing on the permanent injunction. It has long been the law in this state that parties to a hearing on a permanent injunction are entitled to a jury. See *Ex parte Allison*, 99 Tex. 455, 456, 90 S.W. 870, 871 (1906); see also *Walling v. Kimbrough*, 365 S.W.2d 941 (Tex.Civ.App.—Eastland), *aff'd*, 371 S.W.2d 691 (Tex. 1963). The Texas Constitution provides that "[t]he right to trial by jury shall remain inviolate..." Tex. Const. art. I, § 15. It further provides that in all "District Courts, the plaintiff ... shall, upon application made in public court, have the right to trial by jury..." Tex. Const. art. V, § 10. To exercise his right to a trial by jury, a civil litigant must follow Tex.R.Civ. P. 216 to make application and pay a jury fee no less than ten (10) days before trial.

The bank perfected its right to a jury trial under rule 216. On June 18, 1986, the bank filed a demand for a jury trial and tendered the jury fee in accordance with rule 216. On June 30, 1986, when the parties appeared for the hearing on the permanent injunction, the trial court denied the bank its perfected right to a trial by

jury. We hold that the judgment of the court of appeals which upheld this denial conflicts with Tex.R.Civ.P. 216. Therefore, pursuant to Tex.R.App.P. 133(b), a majority of the court grants the application for writ of error. Without hearing oral argument, we reverse the judgment of the court of appeals and vacate the trial court's order which granted a permanent injunction. Accordingly, the cause is dismissed. The motion for rehearing is overruled.



Johnny Ray McGINNIS, Appellant,

v.

The STATE of Texas, Appellee.

No. 429-86.

Court of Criminal Appeals of Texas,  
En Banc.

March 9, 1988.

Defendant was convicted by jury pursuant to statute making misdemeanor theft third-degree felony if accused has been previously convicted two or more times of any grade of theft. Following penalty stage of trial, before the 291st Judicial District Court, Dallas County, Ed Gossett, Special Judge, defendant appealed. The Dallas Court of Appeals, Fifth Supreme Judicial District, dismissed the indictment for third-degree felony theft, holding that the State had failed to prove validity of one of prior theft convictions supporting third-degree felony charge, and State petitioned for discretionary review. The Court of Criminal Appeals, Onion, P.J., held that: (1) State defeated its otherwise prima facie showing of validity of prior misdemeanor theft conviction when it introduced certified copy of information which did not appear to contain any allegations or name of defendant, and (2) although reversal of jury conviction of defendant for third-degree felony theft was

proper, it was error to dismiss underlying misdemeanor indictment.

Affirmed as reformed; remanded to trial court with instructions.

Clinton, J., filed concurring opinion, in which Campbell, J., joined.

1. Larceny  $\S$ 65

Under statute providing that theft is felony of third degree if value of the property is less than \$750 and accused has been previously convicted two or more times of any grade of theft, State defeated its otherwise prima facie showing of validity of prior theft conviction by introducing certified copy of information which was blank in its essential parts, and as such did not allege offense upon which valid conviction could be based. V.T.C.A., Penal Code  $\S$  31.03(d)(4)(C) (now (e)(4)(C)).

2. Criminal Law  $\S$ 1030(3)

Defendant could challenge, for first time on appeal, validity of indictment underlying one of prior theft convictions used to enhance misdemeanor theft charge to third-degree felony theft. V.T.C.A., Penal Code  $\S$  31.03(d)(4)(C) (now (e)(4)(C)).

3. Criminal Law  $\S$ 1165(1), 1202.1

Indictment and Information  $\S$ 144.1(1)

Where State failed to prove validity of prior theft convictions necessary to enhance charge of misdemeanor theft to third-degree felony under statute, reversal of accused's conviction of third-degree felony theft was proper, but dismissal was not required of primary misdemeanor offense charged in indictment; overruling *Ex Parte Lucky*, 571 S.W.2d 918 (Tex.Cr.App.). V.T.C.A., Penal Code  $\S$  31.03(d)(4)(C) (now (e)(4)(C)).

4. Criminal Law  $\S$ 190

Where State, in prosecution for theft, failed to prove validity of prior misdemeanor theft conviction, so as to enhance misdemeanor theft charge to third-degree felony, alleged prior misdemeanor conviction could not be used for purpose of enhancing accused's punishment at any new trial on primary offense. V.T.C.A., Penal Code  $\S$  31.03(d)(4)(C) (now (e)(4)(C)).