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Distress Warrant and Trial of Right of Property under the 1981 Texas Rules 1981 Rules of Civil Procedure: Content and Comments.

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**DISTRESS WARRANT AND TRIAL OF RIGHT OF PROPERTY
UNDER THE 1981 TEXAS RULES**

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I. INTRODUCTION

The distress warrant and trial of right of property are two venerable writ remedies still having practical application for the modern Texas creditor.¹ The 1972 United States Supreme Court opinion

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1. The distress warrant remedy is available by virtue of TEX. REV. CIV. STAT. ANN. arts. 5227, 5239 (Vernon 1962); TEX. R. CIV. P. 610-620. Trial of right of property is available under TEX. REV. CIV. STAT. ANN. arts. 7409, 7417, 7418 (Vernon 1960); TEX. R. CIV. P. 717-736.

in *Fuentes v. Shevin*,² however, cast serious doubt on the constitutionality of the extraordinary writ remedies available under Texas law.³ In 1979, amendments to the Texas Rules of Civil Procedure governing attachment, sequestration, and garnishment freed these writ remedies from constitutional attack under *Fuentes* and its progeny.⁴ Two other sections of the Texas rules dealing with distress warrants and trial of right of property, however, were in need of revision to correct constitutional deficiencies under the due process clause.⁵ The 1981 rules, recently adopted by the Supreme Court of Texas, were promulgated to fulfill the procedural due process requirements applicable to distress warrants and trial of right of property.⁶ This article reviews the function and application of those remedies and analyzes the recent revisions of the Texas Rules of Civil Procedure.

II. DISTRESS WARRANTS

A distress warrant is a statutory remedy created for the purpose of giving landlords a summary method of enforcing statutory liens

2. 407 U.S. 67 (1972). The Court found a Florida replevin statute, permitting ex parte prejudgment seizure by one person, of property owned or possessed by another, to be violative of the fourteenth amendment. *Id.* at 92-93.

3. The similarity of the Texas attachment procedure with that of the Florida practice held unconstitutional in *Fuentes* raised questions as to the legitimacy of the Texas writ remedy laws. See Soules, *Attachment, Sequestration, and Garnishment: The 1977 Rules*, 32 Sw. L.J. 753, 753 (1978); cf. *Stevenson v. Cullen Center, Inc.*, 525 S.W.2d 731, 735 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (Texas distress warrant procedure unconstitutional in lacking proper due process protections including prompt post-seizure hearing).

4. See TEX. R. CIV. P. 592-609 (attachment); TEX. R. CIV. P. 696-716 (sequestration); TEX. R. CIV. P. 658-679 (garnishment). The decision in *Fuentes v. Shevin* was explained and modified in two Supreme Court decisions that followed. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the Court, withdrawing significantly from the language in *Fuentes*, weighed the property interests of the creditor against the interests of the debtor in upholding a Louisiana statute affording the debtor certain protective rights. *Id.* at 607. Later in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court proposed specific standards for fourteenth amendment due process compliance in prejudgment seizures. *Id.* at 611-12 (Powell, J., concurring).

5. The rules dealing with distress warrants and trial of right of property similar to the former rules of attachment, sequestration, and garnishment did not afford sufficient considerations of due process. See *Stevenson v. Cullen Center, Inc.*, 525 S.W.2d 731, 735 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Soules, *Attachment, Sequestration, Garnishment: The 1977 Rules*, 32 Sw. L.J. 753, 770-76 (1978).

6. See TEX. R. CIV. P. 610-620 (distress warrant); TEX. R. CIV. P. 717-736 (trial of right of property).

on certain property of their tenants.⁷ At English common law, the landlord himself executed the distress, took the tenant's property into his possession, and retained it as security until the tenant's debt was paid. A 1689 English statute⁸ gave the landlord the right to sell the property unless it was replevied within five days, at which time the tenant's right to replevy ceased.⁹ In Texas, the statutory distress warrant was first created by the Seventh Congress of the Texas Republic in 1843, as article 1271, "An Act Concerning Rents."¹⁰ Texas courts have repeatedly stated that the purpose of the distraint statutes is to provide a landlord with a "speedy and effective" or "simple and inexpensive" means of preserving his lien until suit to foreclose that lien can be filed and prosecuted to judgment.¹¹

A. *The Landlord's Liens*

Landlord's liens are created by articles 5222, 5238, and 5236d of the Texas Revised Civil Statutes.¹² They exist independent of the distress warrant remedy;¹³ and arise from the landlord-tenant relationship.¹⁴ A landlord's lien continues in the affected property for the period of time provided by the statute and is not affected by

7. See *Bourcier v. Edmondson*, 58 Tex. 675, 678 (1883).

8. The Distress for Rent Act, 1689, 2 Will. & Mar., c. 5, § 1.

9. *Gollehon v. Porter*, 161 S.W.2d 134, 137 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

10. See 1843 Tex. Gen. Laws, An Act Concerning Rents, at 41, 2 H. GAMMEL, LAWS OF TEXAS 861 (1898).

11. See, e.g., *McKee v. Sims*, 92 Tex. 51, 53, 45 S.W. 564, 565 (1898); *Keep 'Em Eating Co. v. Hulings*, 165 S.W.2d 211, 213 (Tex. Civ. App.—Austin 1942, no writ); *Webb v. Bergin*, 38 S.W.2d 841, 842 (Tex. Civ. App.—Waco 1931, writ dis'm'd).

12. See TEX. REV. CIV. STAT. ANN. art 5222 (Vernon 1962) (creating "landlord's lien" in property of lessee of agricultural land); *id.* art. 5238 (creating "owners of buildings lien" in non-exempt property of lessee of "any residence, storehouse, or other building"); *id.* art. 5236d (Vernon Supp. 1980) (creating "landlord's lien for rent" in non-exempt property of lessee of a dwelling). See generally *id.* arts. 5222-5239 (Vernon 1962); *id.* art. 5236d (Vernon Supp. 1980-1981); TEX. R. CIV. P. 610-620. Section 1 of article 5236d, the "landlord's lien for rent," does not actually create a new lien, since landlords of residential property were already protected by the "owners of buildings lien" under article 5238. See notes 33-36 *infra* and accompanying text.

13. See *Marsalis v. Pitman*, 68 Tex. 624, 626, 5 S.W. 404, 405 (1887); *Templeman v. Gresham*, 61 Tex. 50, 52 (1884); *Webb v. Bergin*, 38 S.W.2d 841, 842 (Tex. Civ. App.—Waco 1931, writ dis'm'd).

14. See *Gillet v. Talley*, 60 S.W.2d 868, 870 (Tex. Civ. App.—Austin 1933, no writ); *Stoma v. Filgo*, 26 S.W.2d 1100, 1102 (Tex. Civ. App.—Dallas 1930, no writ).

failure to obtain a distress warrant or by the wrongful suing out of a writ to obtain a distress warrant.¹⁵ The right to a distress warrant, on the other hand, is dependent upon the existence of a statutory landlord's lien and continues only so long as the lien exists.¹⁶ Additionally, when a contractual landlord's lien is provided for in a lease, a landlord may protect his security interest in his tenant's possessions situated on the leased premises by obtaining a distress warrant, but only under conditions allowed by the statutes.¹⁷

B. *Conditions for Obtaining Warrant*

Aside from the existence of a statutory landlord's lien, the other conditions required before a landlord may obtain a distress warrant are set out in the distress warrant statutes.¹⁸ Article 5227 of the Texas Revised Civil Statutes, creating the remedy for lessors of agricultural land, establishes three situations under which the warrant may be obtained. The remedy is available when any rent or advances of money or of "the value of all animals, tools, provisions and supplies furnished or caused to be furnished by the landlord to

15. *Webb v. Bergin*, 38 S.W.2d 841, 842 (Tex. Civ. App.—Waco 1931, writ *dism'd*).

16. *See Marsalis v. Pitman*, 68 Tex. 624, 626-29, 5 S.W. 404, 405-06 (1887) (landlord's lien created by statute to secure rents due and rents that will become due under a lease contract); *Gollehon v. Porter*, 161 S.W.2d 134, 136 (Tex. Civ. App.—Amarillo 1942, writ *ref'd w.o.m.*) (distress warrant may issue so long as lien continues, even if property has been removed from rented building); *Webb v. Bergin*, 38 S.W. 841, 842 (Tex. Civ. App.—Waco 1931, writ *dism'd*) (right to distress warrant may be exercised at any time before lien is lost). "The purpose of a distress warrant is not to fix a lien, but to seize and secure property on which the law has given a lien, that it may be sold in satisfaction of the debt or demand secured by the existing lien." *Marsalis v. Pitman*, 68 Tex. 624, 625, 5 S.W. 404, 406 (1887).

17. *Compare Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141, 143-45 (Tex. Civ. App.—Dallas 1965, writ *ref'd n.r.e.*) (contractual provision gave landlord lien on all of tenant's personal property situated on leased premises and prohibited removal of property without prior consent of landlord until all back rent and any other sums of money to become due under the lease had been paid; legal remedy of distress warrant unavailable when no rent or advances due; hence, landlord had right to injunction when tenant attempted to remove property before end of lease term) *with* *Gunst v. Dallas Trust & Sav. Bank*, 8 S.W.2d 806, 807 (Tex. Civ. App.—Dallas 1928, no writ) (contractual provision gave landlord lien on "all goods, wares, chattels, implements, fixtures, furniture, tools, and other personal property, which were then or should afterwards be placed upon the premises"; upon non-payment of rent, landlord sued out a proper distress warrant on two pianos). Article 5236d, section 4 provides that a contractual landlord's lien is enforceable only if it is "underlined or printed in conspicuous bold print in the rental agreement." TEX. REV. CIV. STAT. ANN. art. 5236d, § 4 (Vernon Supp. 1980-1981).

18. *See* TEX. REV. CIV. STAT. ANN. arts. 5227, 5239 (Vernon 1962).

the tenant to make a crop"¹⁹ on the leased land becomes due; secondly, when the tenant is about to leave the leased premises; or finally when the tenant is about to remove the security for the landlord's lien from the premises.²⁰ When none of these conditions obtains, however, no distress warrant will issue.²¹ The article 5239 distress warrant, enabling enforcement of an "owners of buildings lien" by the owner of residential or commercial property, establishes the same three circumstances as article 5227, but adds the additional requirement that the landlord make an affidavit and bond.²² New rules 610 and 611 of the Texas Rules of Civil Procedure extend the bonding requirement to issuance of both kinds of distress warrant.²³

19. See *id.* art. 5222.

20. See *id.* art. 5227.

21. See *Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141, 144 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Watson v. Corley*, 226 S.W. 481, 482 (Tex. Civ. App.—Texarkana 1920, no writ).

22. See TEX. REV. CIV. STAT. ANN. art. 5239 (Vernon 1962).

23. A landlord no longer has a common law or statutory self-help remedy by which to obtain property of the tenant in satisfaction of unpaid rents. Such a remedy existed under former article 5238a and was called a "baggage lien for rent." See 1969 Tex. Gen. Laws, ch. 686, §§ 1-7, at 2008. The statute was declared unconstitutional by the United States Court of Appeals for the Fifth Circuit in 1972 on the authority of *Fuentes* as a deprivation of property without due process of law because it denied "the right to a prior opportunity to be heard before chattels are taken from their possessors." See *Hall v. Garson*, 468 F.2d 845, 847 (5th Cir. 1972). Although *Fuentes* is now thought not to apply to "self-help" repossession, nonetheless the statute subsequently was repealed and replaced by article 5236c, which limits the residential landlord to changing the tenant's door locks "when the tenant's rentals are in fact delinquent in whole or in part." When a landlord avails himself of this remedy, however, he must also leave a written notice on the tenant's front door "describing the name of the individual who will provide the tenant with such key; and such key shall be provided regardless of whether the tenant pays any delinquent rentals." TEX. REV. CIV. STAT. ANN. art. 5236c (Vernon Supp. 1980-1981). See *Michaux v. Koebig*, 555 S.W.2d 171, 176 (Tex. Civ. App.—Austin 1977, no writ); Wallenstein, *Property, Annual Survey of Texas Law*, 28 Sw. L.J. 27, 59 (1974). Under present law, therefore, a landlord's lien, whether statutory or contractual, does not, without consent or a specific contractual provision, authorize a residential landlord to take self-help possession of a tenant's personal property which is subject to the lien. Judicial foreclosure is the only way remaining for a landlord to enforce his lien. Furthermore, the landlord who avails himself of self-help possession of the tenant's property is liable to the tenant in conversion. See *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Schwulst v. Neely*, 50 S.W. 608, 610 (Tex. Civ. App. 1899, no writ) (case decided before adoption of subsequently repealed article 5238a; therefore, holding should not be affected by adoption and repeal). The landlord and tenant may still contract for self-help seizure of property to satisfy a landlord's lien, but article 5236d, which replaced the "baggage lien for rent," sets strict limits on this remedy. Under section 5 it is stated that neither the landlord nor his agent may seize property defined in the statute

C. *Property Affected by the Lien*

The landlord's lien statute, article 5222, gives the landlord a "preference lien" on "animals, tools, and other property furnished or caused to be furnished by the landlord to the tenant" and on crops raised by the tenant on the rented land.²⁴ The landlord's lien extends to crops raised on the premises by a subtenant or assignee of the tenant.²⁵ The statute specifically withholds the landlord's lien in cases where a tenant of agricultural land "furnishes everything except the land" and the landlord "charges a rental of more than one-third of the value of the grain and more than one-fourth of the value of the cotton raised on said land." In addition, the lien is not available in cases where "the landlord furnishes everything except the labor and the tenant furnishes the labor and the landlord directly or indirectly charges a rental of more than one-half the value of the grain and more than one-half of the value of the cotton raised on said land. . . ."²⁶ The value of the lien granted by article 5222 is equal to the value of "any rent that may become due"; any money advanced to the tenant; "the value of all animals, tools, provisions and supplies furnished or caused to be furnished by the landlord to the tenant to make a crop on such premises;" and the value of anything provided by the landlord enabling the tenant to "gather, secure, house and put [his crops] in condition for marketing."²⁷

Under the terms of article 5223, the agricultural landlord's lien on animals and tools furnished the tenant by the landlord and on the tenant's crop is purportedly "superior to all laws exempting such property from forced sale."²⁸ In contrast, under article 5238,

as exempt "under any circumstances." The landlord may, however, seize non-exempt property if such seizure is provided for in the written lease agreement. See TEX. REV. CIV. STAT. ANN. art. 5236d, § 5 (Vernon Supp. 1980-1981). It appears that under section 3 a residential tenant cannot create an effective contractual landlord's lien in exempt property. See *id.* art. 5236d, § 3. For a discussion of the contractual landlord's lien and residential premises, see note 39 *infra* and accompanying text.

24. See TEX. REV. CIV. STAT. ANN. art. 5222 (Vernon 1962).

25. See *Forrest v. Durnell*, 86 Tex. 647, 652, 26 S.W. 481, 483 (1894).

26. TEX. REV. CIV. STAT. ANN. art. 5222 (Vernon 1962).

27. See *id.*

28. *Id.* art. 5223; see *Stevens v. Cox*, 255 S.W. 241, 242 (Tex. Civ. App.—Austin 1923, no writ) (when landlord sued out writ of attachment instead of distress warrant upon corn, cotton, farm implements and hogs, and obtained a judgment foreclosing his landlord's lien, the judgment was affirmed on the ground that no injury was worked on a tenant since his

an "owners of buildings lien" has no effect on property exempt from forced sale.²⁹ Moreover, under article 5236d, a landlord's lien securing rentals of residential property has no effect on property specifically exempted by section two of the same statute.³⁰ Another exception to the superiority of the landlord's lien is created by article 5224 which provides "[s]uch lien shall not attach to the goods, wares and merchandise of a merchant, trader or mechanic, sold and delivered in good faith in the regular course of business to the tenant."³¹ The Texas Supreme Court has determined that the words "to the tenant" in this statute were intended by the legislature to mean "by the tenant."³²

Article 5238, creating the "owners of buildings lien" referred to above, was first enacted in 1879 as an amendment to the landlord's lien statutes.³³ The purpose of the statute was to confer on the owners of "residences and storehouses and other buildings occupied or used by tenants . . . the same rights and privileges as are now conferred by law on other landlords."³⁴ The statute grants a "preference lien upon all property of the tenant or of any subtenant" in the leased building and secures "rents due and to become due" under the lease agreement.³⁵ The statute imposes a filing re-

property exempt from execution was not exempt from the landlord's lien); TEX. REV. CIV. STAT. ANN. art 3840 (Vernon 1966) (statutory exemption of personal property shall not apply to landlord's lien or other debts secured by liens on such property).

29. See, e.g., *Hamberlin v. Aston*, 114 Tex. 263, 270, 267 S.W. 684, 687 (1924) (tenant's property exempt under exemption statutes is also exempt from claims for rent unless the tenant mortgages or fixes a lien upon his exempt property himself); *Commercial Credit Corp. v. Patterson*, 248 S.W.2d 965, 969 (Tex. Civ. App.—Austin 1952, writ ref'd n.r.e.) (article 5238 lien does not extend to exempt property even when lease contained provision giving landlord a statutory lien on the tenant's stock and fixtures located in the leased building); *McNabb v. Terminal Bldg. Corp.*, 93 S.W.2d 189, 190 (Tex. Civ. App.—Dallas 1936, writ ref'd) (landlord's lien does not extend to exempt property unless tenant expressly mortgages specific property to landlord).

30. TEX. REV. CIV. STAT. ANN. art. 5236d, § 2 (Vernon Supp. 1980-1981).

31. *Id.* art. 5224 (Vernon 1962).

32. See *Freeman v. Collier Racket Co.*, 100 Tex. 475, 478, 101 S.W. 202, 203 (1907); *Marsalis v. Pitman*, 68 Tex. 624, 627, 5 S.W. 404, 405 (1887).

33. See 1879 Tex. Gen. Laws, ch. 119, §§ 1-2, at 128, 8 H. GAMMEL, LAWS OF TEXAS 1428 (1898).

34. *Id.*; see *Marsalis v. Pitman*, 68 Tex. 624, 627, 5 S.W. 404, 405 (1887); *H.R.E., B. & B. Ass'n v. Cochran*, 60 Tex. 620, 623 (1884).

35. The Texas Supreme Court has construed this provision as limiting the security value of the lien to the value of rents due or to accrue in the future but only under the present term of the lease and not for any future term or period of holding over. See *Couts v. Spivey*, 66 Tex. 267, 268, 17 S.W. 540, 540 (1886) (in tenancy from month-to-month with

quirement when a landlord of commercial property wishes to secure his lien for rents more than six months overdue.³⁶

Article 5236d, enacted in 1973³⁷ as a replacement for the invalidated "baggage lien" law,³⁸ overlaps article 5238 in that it applies only to residential premises and provides its own list of exempt property.³⁹ Although the new statute renders void any attempt to waive exemptions granted therein,⁴⁰ it also provides for an enforceable contractual landlord's lien,⁴¹ presumably in non-exempt property.⁴²

D. Duration of the Lien

The landlord's lien under article 5222 continues in the affected

notes given for future months' rent, no statutory lien exists to secure payment of rent for months after the termination of the tenancy); *H.R.E., B. & B. Ass'n v. Cochran*, 60 Tex. 620, 624 (1884) (statute does not "impose a charge in advance . . . for any rents that might by possibility become due for another term . . . whether such term be created by contract or by the tenant's holding over").

36. See TEX. REV. CIV. STAT. ANN. art. 5238 (Vernon 1962). Article 5238 states, in part: No lien for rent more than six (6) months past due upon any storehouse or other building rented for commercial purposes shall be valid as against bona fide purchasers or unsecured or lien creditors of said tenant and/or subtenant, unless said statement shall be verified, filed and recorded as . . . provided [by this statute].

. . . The lien for rents to become due shall not continue or be enforced for a longer period than the current contract years, it being intended by the term "current contract years" to embrace a period of twelve (12) months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract. Such lien shall continue and be in force so long as the tenant shall occupy the rental premises, and for one (1) month thereafter . . .

Id.

37. See *id.* art. 5236d (Vernon Supp. 1980-1981).

38. See 1969 TEX. GEN. LAWS, ch. 686, §§ 1-7, at 2008. See discussion of the former article 5238a "baggage lien" at note 23 *supra*.

39. See TEX. REV. CIV. STAT. ANN. art. 5236d, §§ 1-2 (Vernon Supp. 1980-1981). Section two of the statute exempts, notwithstanding any other statute to the contrary, specified fixtures and items of personal property including: tools used in a trade or business, one automobile, certain items of household and kitchen furniture and utensils, all goods known by the landlord to be subject to a chattel mortgage lien, and other articles. See *id.*; *cf. id.* art. 3836 (exempts from forced sale certain items of personal property the value of which does not exceed an aggregate fair market value ceiling established by the statute).

40. See *id.* art. 5236d.

41. See *id.* art. 5236d, § 4.

42. See generally *Hamberlin v. Aston*, 114 Tex. 263, 268, 267 S.W. 684, 686 (1924) (under predecessor of article 3840 statutory exemptions yield to a debt secured by a lien created by the owner of personal property); TEX. REV. CIV. STAT. ANN. art. 3840 (Vernon 1966) (statutory exemptions do not apply "when the debt is due for rents or advances made by a landlord to his tenant, or to other debts which are secured by a lien on such property").

property until one month after the property is removed from the rented premises, or, if agricultural products are placed in a state-regulated warehouse within thirty days of their removal from the leased premises, the lien continues as long as the products remain in the warehouse.⁴³ The "owners of buildings lien" is limited to the remaining term of the lease contract "so long as the tenant shall occupy the rental premises, and for one . . . month thereafter"⁴⁴ The landlord's lien, moreover, must be prosecuted to judgment of foreclosure in order to prevent waiver or abandonment.⁴⁵ A landlord's grant of permission for a tenant to sell crops subject to the lien has been held to constitute a waiver of the lien.⁴⁶ A quashing of a distress warrant and consequent return of the property seized, however, does not impair the landlord's lien.⁴⁷ Furthermore, the landlord's acceptance of a third party's promise to pay rents due does not constitute a release of his lien.⁴⁸ A landlord, however, is not entitled to enforce his lien when the unpaid rents secured by the lien are exceeded in value by a tenant's recovery of damages against his landlord for breach of the lease.⁴⁹

E. *Priority of the Landlord's Lien*

As a general rule, the mere existence of a statute creating a landlord's lien constitutes constructive notice of the lien to all other claimants of the tenant's personal property.⁵⁰ The lien is subordinate, however, to pre-existing mortgages or security interests of which the landlord has actual or constructive notice;⁵¹ to

43. See TEX. REV. CIV. STAT. ANN. art. 5223 (Vernon 1962).

44. *Id.* art. 5238.

45. See *Wise v. Old*, 57 Tex. 514, 515 (1882) (although property subject to landlord's lien is seized under a distress warrant, decision to take a personal judgment without foreclosing landlord's lien waives the lien).

46. See *Dill v. Graham*, 530 S.W.2d 157, 160 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Woodson v. Westbrook*, 272 S.W. 821, 822 (Tex. Civ. App.—Austin 1925, writ dism'd).

47. See *Spann v. Trumpf*, 83 S.W.2d 1043, 1045 (Tex. Civ. App.—Dallas 1935, no writ).

48. See *Block, Oppenheimer & Co. v. Latham*, 63 Tex. 414, 417 (1885).

49. See *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522, 527 (Tex. Civ. App.—El Paso 1930, writ dism'd).

50. See *Dill v. Graham*, 530 S.W.2d 157, 160 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (landlord's lien created by article 5222); *Shwiff v. City of Dallas*, 327 S.W.2d 598, 601 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (owners of buildings lien created by article 5238).

51. See *Bank of North America v. Kruger*, 551 S.W.2d 63, 65-66 (Tex. Civ. App.—

interests arising when the landlord's lien has expired;⁵² to subsequently created mortgages or security interests which are perfected when no rents are due under the current lease term;⁵³ and to any competing interest when the landlord's claim for rents more than six months overdue on commercial property has not been recorded.⁵⁴ On the other hand, the landlord's lien statutes give constructive notice to, and create liability for conversion in a purchaser of crops from a tenant who lacks his landlord's consent to sell,⁵⁵ in a tenant's creditor who sells crops under levy of execution,⁵⁶ and in a purchaser of a tenant's fixtures who buys within thirty days of the end of a lease term.⁵⁷

F. *Wrongful Distraint*

Rule 610 of the Texas Rules of Civil Procedure requires the plaintiff seeking a distress warrant to swear that such warrant is not sued out for the purpose of vexing and harassing the defen-

Houston [1st Dist.] 1977, writ ref'd n.r.e.). The court relied on section 9.104(2) of the Texas Business and Commerce Code and article 5238 of the Texas Revised Civil Statutes. *Id.* at 65-66. See *Radford v. Bacon Securities Co.*, 18 S.W.2d 848, 850 (Tex. Civ. App.—Eastland 1929, no writ) (applying pre-UCC law and article 5238).

52. See TEX. REV. CIV. STAT. ANN. art. 5223 (Vernon 1962) (landlord's lien continues one month or as long as property remains in state-regulated warehouse if placed there within thirty days of removal from rented premises); *id.* art. 5238 (owners of buildings lien continues for one month after tenant removes from rented premises).

53. See *H.R.E., B. & B. Ass'n v. Cochran*, 60 Tex. 620, 623-24 (1884); *Collins v. McFarland*, 60 S.W.2d 334, 335 (Tex. Civ. App.—Amarillo 1933, writ ref'd). An unrecorded contractual landlord's lien is "inchoate" and inferior to a subsequently perfected federal tax lien. See *United States v. Truss Tite, Inc.*, 285 F. Supp. 88, 92 (S.D. Tex. 1968).

54. See *Industrial State Bank v. Oldham*, 148 Tex. 126, 129, 221 S.W.2d 912, 913 (1949); *Gunst v. Dallas Trust & Sav. Bank*, 8 S.W.2d 806, 808 (Tex. Civ. App.—Dallas 1928, no writ); TEX. REV. CIV. STAT. ANN. art. 5238 (Vernon 1962). See generally *Bank of North America v. Kruger*, 551 S.W.2d 63, 66 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

55. See *Templeman v. Gresham*, 61 Tex. 50, 51-53 (1884); *Dill v. Graham*, 530 S.W.2d 157, 160 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

56. See *Crider v. McIntyre*, 20 S.W.2d 242, 243 (Tex. Civ. App.—Waco 1929, writ dism'd).

57. See *Webb v. Bergin*, 38 S.W.2d 841, 842 (Tex. Civ. App.—Waco 1931, writ dism'd). The *Webb* case is pre-UCC, but section 9.104(2) of the Texas Business and Commerce Code specifically excludes landlord's liens from the purview of the code. It would seem, therefore, that pre-code law still controls priorities involving landlord's liens although the code itself now controls the manner of perfecting security interests in fixtures and other chattels. For two cases illustrating the conflicts between landlord's liens and mortgaged fixtures, see *Shwiff v. City of Dallas*, 327 S.W.2d 598 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) and *Lynch v. Cock*, 195 S.W.2d 773 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.).

dant.⁵⁸ Revised rule 611 requires the execution of a bond in "an amount approved by the justice of the peace . . . conditioned that the plaintiff will prosecute his suit to effect and pay all damages and costs as may be adjudged against him for wrongfully suing out such warrant." In contrast, former rule 611 required that the bond be conditioned upon the plaintiff's payment of any damages sustained by the defendant "in case such warrant has been illegally and unjustly sued out, . . ." ⁵⁹ and a warrant "illegally and unjustly sued out" was held to be a warrant not in substantial compliance with the requirements of the statute nor based upon true grounds in fact.⁶⁰ The courts should interpret "wrongful" in new rule 611 exactly as the term "illegally and unjustly" was interpreted in former rule 611.

The tenant can bring his action for damages in the distress proceedings⁶¹ or in an independent action.⁶² Two instances of wrongful distraint giving rise to a cause of action for damages are the making of false allegations in the landlord's affidavit as to the amount of rent due,⁶³ and levying upon property not subject to the landlord's lien.⁶⁴ The measure of damages recoverable by a tenant for wrongful distraint is equal to the value of the use of the goods levied on during the period in which they were removed from the tenant's possession.⁶⁵ A landlord is not liable, however, for any illegal acts of the levying officer which result in damage to the tenant, but which are not done under the distress warrant.⁶⁶ In the case of

58. TEX. R. CIV. P. 610 (1981 amendment preserved this requirement).

59. Compare TEX. R. CIV. P. 611 with TEX. R. CIV. P. 611 (1978).

60. To the extent that an allegation of rent due exceeds the actual rent due, a distress warrant is "illegally and unjustly sued out." See, e.g., *McKee v. Sims*, 92 Tex. 51, 53, 45 S.W. 564, 564 (1898); *Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141, 144 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *McAfee v. Chandler*, 7 S.W.2d 623, 624 (Tex. Civ. App.—Amarillo 1928, no writ).

61. See *Scott v. Byers*, 275 S.W. 1088, 1088 (Tex. Civ. App.—Waco 1925, writ dismissed).

62. See *McAfee v. Chandler*, 7 S.W.2d 623, 624 (Tex. Civ. App.—Amarillo 1928, no writ).

63. See *McKee v. Sims*, 92 Tex. 51, 53, 45 S.W. 564, 564 (1898).

64. See *Scott v. Byers*, 275 S.W. 1088, 1088 (Tex. Civ. App.—Waco 1925, writ dismissed) (levy on tenant's exempt property by holder of owners of buildings lien gave rise to cause of action for damages); *Kingsley v. Schmicker*, 60 S.W. 331, 332-33 (Tex. Civ. App. 1900, no writ) (distraint of property known by landlord to belong to non-tenant gave rise to cause of action for damages).

65. *Scott v. Byers*, 275 S.W. 1088, 1088 (Tex. Civ. App.—Waco 1925, writ dismissed).

66. See *Kimbrough v. Powell*, 13 S.W.2d 467, 469 (Tex. Civ. App.—Waco 1929, no writ).

crops seized under a distress warrant, the measure of damages for wrongful distraint is the value of the crop seized and converted.⁶⁷

Exemplary damages for wrongful distraint are also recoverable if the warrant is issued without probable cause and for the purpose of vexing and harassing the tenant.⁶⁸ A landlord, therefore, may be held liable for exemplary damages when the levying officer seizes exempt property at the landlord's direction.⁶⁹ The elements of exemplary damages recoverable for wrongful distraint may include loss of business,⁷⁰ attorney's fees,⁷¹ and the value of time spent and expenses incurred by a tenant in regaining repossession of his property wrongfully distrained.⁷²

G. *The 1981 Rules—Distress Warrants*

In the early 1970's distress warrant procedures came under attack as being violative of the due process requirements for prejudgment seizure imposed by the Fourteenth Amendment⁷³ as interpreted by several decisions of the Supreme Court of the United States.⁷⁴ Furthermore, in 1975, the Texas distress warrant stat-

67. *Majors v. Goodrich*, 54 S.W. 919, 920 (Tex. Civ. App. 1900, no writ).

68. See *McAfee v. Chandler*, 7 S.W.2d 623, 624 (Tex. Civ. App.—Amarillo 1928, no writ); *Burger v. Rhiney*, 42 S.W. 590, 592 (Tex. Civ. App. 1897, no writ); *Smith v. Jones*, 31 S.W. 306, 307 (Tex. Civ. App. 1895, no writ). See generally *TEX. R. CIV. P.* 610.

69. See *White v. Stribling*, 71 Tex. 108, 109, 9 S.W. 81, 82 (1888).

70. See *Burger v. Rhiney*, 42 S.W. 590, 591 (Tex. Civ. App. 1897, no writ).

71. See *id.* at 591.

72. See *Watson v. Boswell*, 61 S.W. 407, 409 (Tex. Civ. App. 1901, no writ); *Smith v. Jones*, 31 S.W. 306, 307 (Tex. Civ. App. 1895, no writ).

73. See U.S. CONST. amend. XIV, § 1.

74. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616-18 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972). See generally *Soules, Attachment, Sequestration, and Garnishment: The 1977 Rules*, 32 Sw. L.J. 753, 753-76 (1978). In *Fuentes*, Florida and Pennsylvania replevin statutes permitting ex parte prejudgment seizure of property were held to be unconstitutional denials of due process. See *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972). In *Mitchell*, however, a Louisiana sequestration statute that required a second creditor to justify issuance of a prejudgment writ by establishing with sworn ex parte averments the probability of ultimate success and also afforded the debtor an early opportunity to put the creditor to his proof before final deprivation of property was held constitutional. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616-18 (1974). In the *Di-Chem* case the Supreme Court held unconstitutional a Georgia prejudgment garnishment statute that lacked the *Mitchell* protections. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1974). The Court abandoned the *Fuentes* holding that any deprivation of property by prejudgment seizure without prior notice violated due process. See *id.* at 609 (Stewart, J., concurring).

utes⁷⁵ and related rules of civil procedure⁷⁶ were held unconstitutional in *Stevenson v. Cullen Center, Inc.*⁷⁷ A Houston court of civil appeals noted that a distress warrant could be issued on mere conclusory allegations in the applicant's affidavit and that opportunity for a prompt post seizure hearing was not provided.⁷⁸ The Supreme Court of Texas in response to these decisions revised the entire rules system on distress warrants effective January 1, 1981.

A distress warrant is obtained by means of an application filed with the justice of the peace.⁷⁹ The application can be filed at the commencement of a suit or at any time during its progress. The application may be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of the relevant facts. The application must include a statement that the amount sued for is rent or advances described by statute, or it must contain a writing signed by the tenant to that effect. The application must also include a sworn statement that the warrant is not sued out for the purpose of vexing and harassing the defendant. Furthermore, the application must comply with all statutory requirements⁸⁰ and must state the grounds for issuing the warrant and the specific facts relied upon to warrant the required findings by the justice of the peace.⁸¹

The affidavit setting forth grounds for the issuance of a distress warrant must state that the amount sued for is rent or advances and that the landlord has filed a bond conditioned upon the promise that he will prosecute his suit to effect and pay all damages and costs that may be adjudged against him for wrongfully suing out the distress warrant.⁸² Additionally, the affidavit must state that one of three conditions exists: first, that rent or advances have become due; or second that the tenant is about to leave the leased premises; or finally that the tenant is about to remove the security for the landlord's lien from the premises.⁸³ Two or more grounds

75. See TEX. REV. CIV. STAT. ANN. arts, 5227-5239 (Vernon 1962).

76. See TEX. R. CIV. P. 610-620.

77. 525 S.W.2d 731, 735 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

78. See *id.* at 734-35.

79. See TEX. R. CIV. P. 610.

80. See TEX. REV. CIV. STAT. ANN. arts, 5222, 5238 (Vernon 1962); *id.* art. 5236a (Vernon Supp. 1980-1981).

81. See TEX. R. CIV. P. 610.

82. See *id.*

83. Cf. TEX. REV. CIV. STAT. ANN. art. 5227 (Vernon 1962) (setting out three statutory

may be stated conjunctively or disjunctively.⁸⁴

The application for a distress warrant and any affidavits must be made on personal knowledge setting forth such facts as would be admissible in evidence. Facts may be stated based upon information and belief, however, if the grounds of such belief are specifically stated. The warrant, if issued, is made returnable to a court having jurisdiction of the amount in controversy. No warrant can be issued, however, before final judgment except on written order of the justice of the peace after a hearing, which may be *ex parte*. The justice of the peace, in granting the application, shall make specific findings of fact to support the statutory grounds found to exist, shall specify the maximum value of property that may be seized, and the amount of bond required of plaintiff, and shall command that the property be kept safe and preserved subject to further orders of the court having jurisdiction.⁸⁵

The bond for a distress warrant required of the plaintiff shall be in an amount which, in the opinion of the court, will compensate the defendant adequately for all damages and costs which may be adjudged against the plaintiff for wrongfully suing out the warrant in the event the plaintiff fails to prosecute his suit to effect.⁸⁶ The justice of the peace shall find in his order the amount of bond required to replevy which, except for the defendant's option provided in rule 614, will be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and estimated court costs. In addition, the order may direct the issuance of several warrants at the same time or in succession to be sent to different counties.⁸⁷ No distress warrant, however, may be issued before final judgment until the applicant has filed a bond payable to the defendant in an amount approved by the justice of the peace with sufficient surety or sureties as provided by statute.⁸⁸

After notice to the opposite party, before or after issuance of the warrant, either party may file a motion to increase or reduce the amount of the plaintiff's distress warrant bond or to question the sufficiency of his sureties, in a court having jurisdiction of the sub-

conditions for issuance of distress warrant).

84. See *TEX. R. CIV. P.* 610.

85. See *id.*

86. See *id.*

87. See *id.*

88. See *TEX. R. CIV. P.* 611.

ject matter. Upon hearing, that court shall enter its order with respect to such bond and sufficiency of the sureties.⁸⁹

A distress warrant is directed to the sheriff or any constable in the State of Texas. It commands him to attach and hold, unless replevied, subject to further orders of the court having jurisdiction, so much of the property of the defendant, not exempt by statute, of reasonable value in approximately the amount fixed by the justice of the peace, as shall be found within his county.⁹⁰ The defendant must be served with a copy of the distress warrant, the application, any accompanying affidavits, and orders of the justice of the peace as soon as practicable following the levy of the warrant.⁹¹ The following notice must be prominently displayed on the face of the copy of the warrant served on the defendant:

To _____, Defendant: You are hereby notified that certain properties alleged to be owned by you have been seized. If you claim any rights in such property, you are advised: 'YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WARRANT.'⁹²

At any time before judgment, if the seized property has not been previously claimed or sold, the defendant may replevy it, or any part of it, or the proceeds of the sale of the property if it has been sold under order of the court by giving a bond.⁹³ The replevin bond must be made with sufficient surety or sureties as provided by statute, to be approved by a court having jurisdiction of the amount in controversy and payable to plaintiff in double the amount of the plaintiff's debt. At the defendant's option, however, the bond may be for not less than the value of the property sought to be replevied plus one year's interest at the legal rate from the date of the bond, conditioned that the defendant shall satisfy to the extent of the penal amount of the bond any judgment which may be ren-

89. *See id.*

90. *See* TEX. R. CIV. P. 612.

91. *See* TEX. R. CIV. P. 613.

92. *See id.*

93. *See* TEX. R. CIV. P. 614.

dered against him in such action.⁹⁴

As with the distress warrant applicant's bond, either party has the right to prompt judicial review of the amount of the replevin bond required, denial of the bond, sufficiency of sureties, or estimated value of the property at issue.⁹⁵ The court's determination may be made upon the basis of uncontroverted affidavits, setting forth such facts as would be admissible in evidence; otherwise the parties must submit evidence. An order either approving or modifying the requirements of the order of the justice of the peace is to be promptly entered. This order will supersede and control all previous orders made with respect to such matters.⁹⁶

On reasonable notice to the plaintiff the defendant may move the court to substitute property of equal value as that attached, for the property seized.⁹⁷ If sufficient property of the defendant has been located to satisfy the order of seizure, the court may authorize substitution of one or more items of the defendant's property for all or part of the property seized. The court shall make findings as to the value of the property to be substituted. If substitution is granted, the property released must be delivered to the defendant, if it is personal property, and all liens upon such property from the original order of seizure or modification shall be terminated. Seizure of substituted property will relate back to the date of levy on the original property seized. No property, however, on which liens have become affixed since the date of levy on the original property may be substituted.⁹⁸

A defendant whose property has been seized, or any intervening claimant, may by sworn written motion seek to vacate, dissolve, or modify the seizure and the order directing its issuance for any grounds or cause, extrinsic or intrinsic.⁹⁹ Such motion shall admit or deny each finding of the order directing the issuance of the warrant except when the movant is unable to admit or deny the finding, in which case the movant must set forth the reasons why he cannot admit or deny. Unless the parties agree to an extension of time the motion shall be heard promptly after reasonable notice to

94. *See id.*

95. *Compare* TEX. R. CIV. P. 611 *with* TEX. R. CIV. P. 614.

96. *See* TEX. R. CIV. P. 614.

97. *See id.*

98. *See id.*

99. *See* TEX. R. CIV. P. 614a.

the plaintiff, so that the issue will be determined not later than ten days after the motion is filed. The filing of the motion will stay any further proceedings under the warrant, except for an order concerning the care, preservation, or sale of any perishable property, until a hearing is had and the issue is determined. The warrant will be dissolved unless at such hearing the plaintiff proves the specific facts alleged and the grounds relied upon for issuance, but the court may modify the order of the justice of the peace granting the warrant and the warrant issued pursuant to the order. The movant shall have the burden of proving, however, that the reasonable value of the property seized exceeds the amount necessary to secure the debt, interest for one year, and probable costs. "He shall also have the burden to prove the facts justifying substitution of property."¹⁰⁰

The court's determination may be made upon the basis of affidavits setting forth facts that could be admissible as evidence, but additional evidence, if tendered by either party, will be received and considered.¹⁰¹ The court may make all such orders, including orders concerning the care, preservation, or disposition of the property (or the proceeds if the property has been sold) as justice may require. If the movant has given a replevy bond, an order to vacate or dissolve the warrant shall vacate the bond as well, discharging the sureties thereon. If the court merely modifies the order of the justice of the peace or the warrant issued pursuant to the order, it will make further orders with respect to the bond consistent with the modification.¹⁰²

When property levied on has not been claimed or replevied, the judge to whose court the writ is made returnable may order the property to be sold when it appears that the property is in danger of serious and immediate waste or decay, or that keeping it until trial will necessarily cause such expense or deterioration in value as to lessen greatly the amount likely to be realized from its sale.¹⁰³ The judge may act upon affidavits in writing or oral testimony and may, by a preliminary order entered of record, with or without no-

100. *See id.*

101. *See id.*

102. *See id.*

103. *See* TEX. R. CIV. P. 615 (sale of perishable property was not affected by the 1981 amendment to this rule).

tice to the parties as the urgency of the case requires, direct the sheriff or constable to sell the property at public auction for cash.¹⁰⁴ If a party other than the defendant applies for such order of sale, the court may not grant the order unless the applicant files with the court a bond payable to the defendant with two or more sureties, approved by the court. Furthermore, such order shall be conditioned so that the applicant will be responsible to the defendant for any damages he may sustain in case the sale has been illegally and unjustly applied for or illegally and unjustly made.¹⁰⁵ The sale is to be conducted in the same manner as sales of personal property under execution, except that the time of sale and time of advertisement of the sale may be fixed by the judge at a time earlier than ten days according to the exigency of the case.¹⁰⁶ The officer making the sale shall promptly pay the proceeds to the clerk of the court ordering the sale, or to the judge, and shall make a written return of the order of sale with an itemized account of the expenses attending the sale.¹⁰⁷ The return must be signed by the officer officially and filed with the papers of the case.¹⁰⁸

III. TRIAL OF RIGHT OF PROPERTY

Trial of right of property is a statutory remedy¹⁰⁹ made available to a third party claimant of personal property which has been levied upon, when the claimant is not a party to the writ under which an original levy is made.¹¹⁰ The remedy was first adopted in Texas

104. See TEX. R. CIV. P. 616 (1981 amendments did not alter procedure to protect interests under this rule).

105. See *id.*

106. See TEX. R. CIV. P. 617 (procedure for sale of perishable property was left unaffected by the 1981 amendments to this rule).

107. See TEX. R. CIV. P. 618 (return shall also state the time and place of sale, the name of the purchaser, and the amount of money received).

108. See *id.*

109. See TEX. REV. CIV. STAT. ANN. arts 7409, 7417, 7418 (Vernon 1960); TEX. R. CIV. P. 717-734.

110. See TEX. R. CIV. P. 717. The new rule begins with language as follows: "Whenever a distress warrant, writ of execution, sequestration, attachment, or other like writ is levied" *Id.* Although distress warrant was not mentioned in previous versions, it has historically been considered one of the "like" writs referred to in the statutes and rules. See, e.g., *Wills Point Bank v. Bates*, 76 Tex. 329, 331, 13 S.W. 309, 309 (1890); *Livingstone v. Wright*, 68 Tex. 706, 707, 5 S.W. 407, 407 (1887); *Gorman Co. v. Jones*, 245 S.W. 448, 449 (Tex. Civ. App.—Dallas 1922, no writ); TEX. R. CIV. P. 717 (1968). Garnishment, too, is a writ within the contemplation of the rules for trial of right of property. See *Voelkel-McLain Co. v. First*

by the Fourth Congress of the Texas Republic in 1840¹¹¹ and was intended to provide a means of giving a claimant a "summary method of asserting his title or right of possession, without resort to an ordinary suit for a recovery of the property or its value."¹¹² Upon compliance with rules 717 through 719 of the Texas Rules of Civil Procedure a claimant can have the disputed property seized and delivered into his possession.¹¹³ The trial of right of property will be docketed "in the original writ proceeding in the name of the plaintiff in the writ as the plaintiff, and the claimant of the property as intervening claimant."¹¹⁴ Under former rule 725, the plaintiff in the writ and the claimant were required to proceed with their trial of right of property *before* trial could be had in the main suit between the levying plaintiff and his debtor.¹¹⁵ When the writ in the original suit failed, however, the claimant was no longer bound to the plaintiff by his bond, and there could be no trial of right of property.¹¹⁶ Under new rule 723 the claimant's right to the

Nat'l Bank, 296 S.W. 970, 971 (Tex. Civ. App. 1927, no writ); *Rodgers v. Murraray*, 247 S.W. 888, 888 (Tex. Civ. App.—San Antonio 1923, no writ).

111. See 1840 Tex. Gen. Laws, An Act To Establish the Method of Trying the Right of Property Levied on by Execution, When the Property is Claimed by any Person Not a Party To such Execution, at 64, 2 H. GAMMEL, LAWS OF TEXAS 238 (1898).

112. *White v. Jacobs*, 66 Tex. 462, 464, 1 S.W. 344, 345 (1886); *cf. Osborn v. Koenigheim*, 57 Tex. 91, 95 (1882) (statute gives claimant "a simple remedy by which he may protect both his title and possession"); *Vickery v. Ward*, 2 Tex. 212, 215 (1847) (statutory procedure for trying the right of property "is the most simple, and least expensive"; defendant may except to claimant's failure to use statutory mode of suit).

113. The statutes, however, are not the exclusive remedy. An aggrieved party may also bring an action for wrongful taking of property regardless of the statute. See *Brown & Co. v. Rohr*, 228 S.W.2d 322, 324 (Tex. Civ. App.—Eastland 1950, no writ).

114. See TEX. R. CIV. P. 723; *cf. TEX. R. CIV. P. 725* (1966) (upon return of oath and bond, trial of right of property was docketed "in the name of the plaintiff in the writ as the plaintiff, and the claimant of the property as defendant.").

115. See *Webb v. Bergin*, 38 S.W.2d 841, 843 (Tex. Civ. App.—Waco 1931, writ *dism'd*) (landlord filed suit to foreclose landlord's lien; claimant delivered oath and bond and acquired possession of disputed property, thus instituting trial of right of property; therefore, trial court in landlord's suit was "without authority to enter a judgment . . . until the trial of right of property suit was disposed of."); *Pring v. Pratt*, 1 S.W.2d 441, 445-46 (Tex. Civ. App.—El Paso 1927, writ *dism'd*) (previously, trial of right of property was to be had before trial between original parties; trial of right of property was not ancillary to the original suit).

116. See *Brown v. Collins*, 77 Tex. 159, 162, 14 S.W. 173, 175 (1890) (landlord had tenant's goods seized under distress warrant; claimant gave bond and received same goods from sheriff; tenant had distress warrant quashed; landlord had judgment for debt but court released goods distrained; when this action held error on appeal, trial court then rendered judgment against claimant on his bond for trial of right of property in order to satisfy landlord's lien; *held*: because distress warrant was quashed, claimant was no longer bound by his

property is tried in the main suit. Failure of the plaintiff's writ, therefore, should result in the dismissal of the entire action and the release of the claimant from his bond as to the plaintiff.¹¹⁷

Once personal property is seized under the statutory procedure, the officer must deliver that property to the claimant.¹¹⁸ Under new rule 717, the officer may not so deliver the property "except on written order of the court after a hearing pursuant to [new] Rule 718."¹¹⁹ Any party who has replevied property may not be dispossessed except by order of a court following a hearing.¹²⁰ When the sheriff levies on an undivided interest in personal property by taking possession of the whole, this seizure is held to constitute an acknowledgment by the sheriff that the "claimant is entitled to possession of the property if he is the owner of the interest levied upon."¹²¹ The claimant then has the right to proceed to a trial of right of property without joinder of the owner of the other undivided interest.¹²²

bond.).

117. See TEX. R. CIV. P. 723.

118. *Stewart v. Howell Co.*, 264 S.W. 208, 210 (Tex. Civ. App.—Dallas 1924, writ ref'd) (writ of attachment out of district court levied on shares of stock; writ of garnishment issued against issuer of stock; claimant of stock procured bond through another district court; held: officer receiving the affidavit and bond had a duty to deliver the property to the claimant).

The original statute of 1840 made no mention of the status of property delivered to a claimant, and as a consequence, such property was subject to a continuing series of levies under various writs. See *Friberg, Klein & Co. v. Elliott & Wright*, 64 Tex. 367, 369 (1885); 1840 Tex. Gen. Laws, An Act To Establish the Method of Trying the Right of Property Levied on by Execution, When the Property is Claimed by any Person Not a Party to such Execution, at 64, 2 H. GAMMEL, LAWS OF TEXAS 238 (1898). In 1887, however, the statute was amended to read:

Upon the approval of such bond and delivery of the property to the claimant, the same shall be deemed in *custodia legis*, and shall not be taken out of his possession by any other like writ or writs, but said writs may be levied on the same by giving notice to the claimant, and in such cases the claimant's bond shall also inure to the benefit of the several plaintiffs in such writs according to their respective priorities.

1887 Tex. Gen. Laws, ch. 112, § 1, at 104-05, 9 H. GAMMEL, LAWS OF TEXAS 902 (1898). See *Graham v. Thomas D. Murphy Co.*, 497 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *Stewart v. Howell Co.*, 264 S.W. 208, 210 (Tex. Civ. App.—Dallas 1924, writ ref'd). This rule remained in effect until the 1981 revisions. See TEX. R. CIV. P. 718 (1966). New rule 718, like the pre-1887 statutes, makes no mention of in *custodia legis* status. See generally TEX. R. CIV. P. 718.

119. See TEX. R. CIV. P. 717, 718.

120. See TEX. R. CIV. P. 608 (attachment); TEX. R. CIV. P. 614a (distress warrant); TEX. R. CIV. P. 664a (garnishment); TEX. R. CIV. P. 712a (sequestration).

121. See *Hamburg v. Wood*, 66 Tex. 168, 168, 18 S.W. 623, 623 (1886).

122. See *id.* at 168, 18 S.W. at 623-24.

A. Availability of the Remedy

The nature of the claim necessary to entitle a claimant to a trial of right of property has been the subject of considerable litigation. The original statute of 1840 gave little guidance, speaking only of the claimant's "claim" or "right."¹²³ Until the recent amendments to the rules, these two terms were augmented only by the phrase "authority and right" in rule 724¹²⁴ and a caption added to rule 730 naming it "Failure to Establish Title."¹²⁵ The courts have held, however, both before and since the addition of the caption that the claimant need not prove up title to the disputed property, but need prove only his right of possession.¹²⁶ Among those who have been found to have a right of possession and, therefore, grounds for bringing a trial of right of property are a mortgagee out of possession whose mortgagor is in default¹²⁷ and a claimant by estop-

123. See 1840 Tex. Gen. Laws, An Act To Establish the Method of Trying the Right of Property Levied on by Execution, When the Property is Claimed by any Person Not a Party to such Execution, at 64, 2 H. GAMMEL, LAWS OF TEXAS 238 (1898).

124. The rule states: "The plaintiff shall make a brief statement of the authority and right by which he seeks to subject the property levied on to the process. . . ." See TEX. R. Civ. P. 724.

125. The caption itself first appeared as a marginal caption in the 1895 codification and has been retained in the new rules. Compare TEX. REV. CIV. STAT. ANN. art. 5307 (Batts' 1895) with TEX. R. CIV. P. 730.

126. See *White v. Jacobs*, 66 Tex. 462, 464, 1 S.W. 344, 345 (1886) ("[I]t is not necessary that both ownership and possession should unite in the claimant. . . . Either the question of title in the claimant, or that of his right to hold possession of the property as against defendant in the process, is what is to be tried. If either is found to exist in the claimant, he must succeed in the suit. . . ."); *Bufkor, Inc. v. Star Jewelry Co., Inc.*, 552 S.W.2d 522, 524 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (one who has neither title nor right to possession may not prevail in a trial of right of property); TEX. R. CIV. P. 730 (when claimant fails "to establish his right" to the property, judgment may be rendered against him).

127. See, e.g., *Willis v. Satterfield*, 85 Tex. 301, 307-08, 20 S.W. 155, 157 (1892) (one purpose of statutes is to allow speedy determination of right to immediate possession of property when claimant is entitled to possession against even true owner; at time of levy, trustee under deed of trust on chattels was empowered to take immediate possession but had not done so; trustee was still entitled to bring claim in trial of right of property); *Osborn v. Koenigheim*, 57 Tex. 91, 95 (1882) (pledgee who has received valid constructive delivery of pledged property may resort to trial of right of property if levy is made by officer's taking possession of property, but if levy is made giving notice to pledgee in possession, pledgee should "appeal to the equitable powers of the court."); *Sanders v. Farrier*, 271 S.W. 293, 296 (Tex. Civ. App.—Texarkana 1924, writ dism'd) (mortgage on cattle gave mortgagee right to take possession of cattle and sell them upon mortgagor's default; at time of levy of attachment on cattle, mortgage was in default and hence mortgagee was "authorized to bring the statutory action for the trial of the right of property, for he was legally entitled to the possession of the cattle."); cf. *Walter Connally & Co. v. Steger*, 4 S.W.2d 83, 84 (Tex.

pel.¹²⁸ New rule 718 states: "The claimant shall have the burden to show superior right or title to the property claimed as against the plaintiff and defendant in the writ." In all likelihood, this language will not affect prior case law.

B. *Burden of Proof*

New rule 718, providing for a hearing when a claimant seeks possession of seized property, places the burden of proof at the initial hearing upon the claimant. Rule 728 concerns placement of the burden of proof at the trial of right of property proceeding itself, now incorporated into the main suit on the plaintiff's writ. Under this rule, if the property levied on was in the possession of the claimant at the time of levy, the burden of proof is placed on the plaintiff.¹²⁹ If the property is levied on while in the possession of anyone else, however, the burden of proof is on the claimant.¹³⁰ The Supreme Court of Texas has stated that the statutory rule of burden of proof "was evidently intended to give effect . . . to the presumptions arising from the possession of chattels. . . ."¹³¹ If it is difficult to determine who had possession of the property at the time of levy, case law has established some guidelines a trial court may follow. Appellate courts have suggested that the court may direct placement of the burden of proof,¹³² that the plaintiff in the

Civ. App.—Texarkana 1928, no writ) (mortgagee out of possession had right to seize mortgaged property upon demand; failure to make demand before writ of execution levied deprived mortgagee of right to bring trial of right of property). The general rule, of course, is that a mortgagee does not have the right of possession of the mortgaged property and hence ordinarily cannot use the statutory remedy. See *Wright v. Henderson*, 12 Tex. 43, 44 (1854); *Bufkor, Inc. v. Star Jewelry Co., Inc.*, 552 S.W.2d 522, 524 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

128. See *Lang v. Daugherty*, 74 Tex. 226, 229-31, 12 S.W. 29, 31-33 (1889). In *Lang* levy of execution was followed by sequestration rather than trial of right of property. All parties except the execution plaintiff agreed that the sequestration plaintiff should take seized cattle in settlement of his claim, and the execution plaintiff acquiesced in vacation of his execution. Upon his attempt to levy on the same property again, the court held the execution plaintiff was barred by his acquiescence and by his failure to apply for equitable relief "against an improper preference of other creditors." *Id.* at 231, 12 S.W. at 33.

129. See *Gus. Lewy & Co. v. Fischl.*, 65 Tex. 311, 319 (1886); Tex. R. Civ. P. 728. If the property is in the possession of the claimant's agent at the time of levy, the burden of proof remains with the plaintiff. *King v. Sapp*, 66 Tex. 519, 521, 2 S.W. 573, 574 (1886).

130. See *Pierson v. Tom*, 10 Tex. 145, 147 (1853); Tex. R. Civ. P. 728. The rule holds true when the property is in the possession of the writ defendant's trustee or agent. See *id.*

131. *Pan Handle Nat'l Bank v. Foster*, 74 Tex. 514, 516, 12 S.W. 223, 224 (1889).

132. See *Miller v. Sturm*, 36 Tex. 291, 292 (1871-1872) (dictum); *Continental Oil & Gas*

writ should automatically assume the burden of proof,¹³³ or that the trial court may submit the question to the jury.¹³⁴

C. *Trial of Right of Property and Other Remedies*

Trial of right of property is not an exclusive remedy; a claimant of property may forego the statutory remedy and sue in conversion¹³⁵ or seek an injunction¹³⁶ if he can show the usual equitable requirements, including the fact that trial of right of property affords him no adequate legal remedy.¹³⁷ When a claimant does resort to the statutory remedy, however, he makes an election apparently waiving his privilege of suit at common law.¹³⁸ Until the recent rule change, there was some question whether a claimant

Prod. Co. v. Austin, 17 S.W.2d 1114, 1115 (Tex. Civ. App.—Eastland 1926, no writ); *Dawedoff v. Hooper*, 190 S.W. 522, 525 (Tex. Civ. App.—El Paso 1916, no writ).

133. See *Boaz v. Schneider*, 69 Tex. 128, 130, 6 S.W. 402, 403 (1887).

134. *Brown v. Lessing*, 70 Tex. 544, 545, 7 S.W. 783, 784 (1888) (dictum).

135. See *Lang v. Daugherty*, 74 Tex. 226, 229, 12 S.W. 29, 31 (1889); *Carmichael v. Page*, 32 S.W.2d 674, 675-76 (Tex. Civ. App.—Texarkana 1930, writ ref'd). *But see Vickery v. Ward*, 2 Tex. 212, 215 (1847) (when claimant attempts to bring suit to try right of property by petition and summons rather than under the statutory procedure, such suit would be subject to exception by defendant).

136. The remedy of trial of right of property, it is important to remember, is available only to claimants of personal property and not to claimants of real property or fixtures. See *Jones v. Bull*, 90 Tex. 187, 191-92, 37 S.W. 1054, 1056-57 (1896) (trial of right of property not available to claimant of fixtures, but when claimant himself causes fixtures to be severed from the soil, thus rendering them personal property, those in ownership or possession of the land may enforce the claimant's bond against the claimant and his sureties). A claimant of land levied on, therefore, has no legal remedy in the trial of right of property and consequently, must resort to an injunction. See *Hardy v. Broaddus*, 35 Tex. 668, 670, 686 (1871-1872) (execution levied upon land as well as cotton, corn, and mules; so far as the land was concerned, common law action for injunction would lie).

137. See, e.g., *Long v. Castaneda*, 475 S.W.2d 578, 582 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) (when claimant is suing for damages as well as possession and when priority of liens may have to be determined in trial, trial of right of property does not constitute an adequate legal remedy); *Herndon v. Cocke*, 138 S.W.2d 298, 300 (Tex. Civ. App.—El Paso 1940, no writ) (when property levied on was merchant's stock in trade and fixtures and merchant was threatened with loss of his business as a result of levy, grant of temporary injunction was proper); *Berwald's, Inc. v. Brown*, 69 S.W.2d 221, 222-23 (Tex. Civ. App.—Dallas 1934, no writ) (when damage resulting from the levy is not measured by value of the property alone but includes incidental damages for loss of a business, legal remedy of trial of right of property may be inadequate and injunction may lie). *But see Tex. R. Civ. P. 723* (under amended rule 723 the claimant is denominated "intervening claimant" in the suit on the writ and thus may have an adequate legal remedy in some situations).

138. See *Lang v. Daugherty*, 74 Tex. 226, 228, 12 S.W. 29, 31 (1889); *Moore v. Gammel*, 13 Tex. 120, 122 (1854); *Vaughn v. Porter*, 44 S.W.2d 1009, 1011 (Tex. Civ. App.—Amarillo 1931, no writ).

could intervene in the suit on the writ under which levy was made.¹³⁹ Under new rule 723, however, the claimant becomes the "intervening claimant," and the trial of right of property is docketed in the original writ proceeding.

D. Claimant's Failure to Establish His Claim

Following a prejudgment seizure and retention of property pending trial, a claimant's failure to prevail in his trial of right of property results in rendition of judgment against him and his sureties for the value of the property¹⁴⁰ plus interest from the date of his bond.¹⁴¹ Under rule 732, however, the unsuccessful claimant has the option of returning the property within ten days of the judgment "in as good condition as he received it."¹⁴² The return contemplated by rule 732 is an actual return; a mere tender of the property several miles from its location has been held not to be a return within the meaning of the statute.¹⁴³ Moreover, a statement by a claimant's agent to the sheriff that the claimant wants to return the property has been held not to be a proper return.¹⁴⁴ Furthermore, the claimant cannot satisfy the judgment against him by returning part of the property and paying for the rest.¹⁴⁵ Having

139. See *Bassett v. Garthwaite*, 22 Tex. 231, 233, 236 (1858) (bill of intervenor permitted in garnishment suit; point not raised on appeal); *McAdow Motor Co. v. Luckett*, 131 S.W.2d 267, 269 (Tex. Civ. App.—El Paso 1939, no writ) (trial court did not err in refusing to strike intervention in sequestration suit; requirements for intervention, however, are different from those for trial of right of property). *But see Whiteman v. Willis*, 51 Tex. 421, 426 (1879) (dictum) ("it is, as a general rule, the proper practice to require parties to be confined to . . . the trial of right of property"); *Wilke v. Wilke*, 220 S.W. 418, 418-19 (Tex. Civ. App.—Dallas 1920, no writ) (dictum) (intervenor in sequestration suit not proper; claimant should use either trial of right of property or suit for conversion and damages).

140. The value to the time of levy is the proper estimate. See *Gilmour v. Heinze*, 85 Tex. 76, 79, 19 S.W. 1075, 1077 (1892).

141. See Tex. R. Civ. P. 732.

142. See *Mardis v. Johnson*, 43 Tex. 225, 226 (1875) (claimant's bond not forfeited until the full ten day period for return of the property has expired); Tex. R. Civ. P. 732.

143. See *Edwards v. Connolly*, 61 Tex. 30, 32-33 (1884) (tender to sheriff, who was ten or more miles from the property and therefore could not inspect it, held not sufficient; dictum to effect that a symbolic or constructive delivery might be sufficient in some cases).

144. See *Garrity & Huey v. Thompson & Ohmstead*, 67 Tex. 1, 3, 2 S.W. 750, 751 (1886) (when claimant's attorney's agent told deputy sheriff that attorney wished to return property, but that it was in possession of a third party, such statement was "no more than an expression of a wish to deliver the property").

145. See *Cox v. Janes*, 141 S.W. 326, 327 (Tex. Civ. App.—Austin 1911, no writ) (since statute is intended for benefit of claimant and his sureties, they must bring themselves

properly returned the property, the unsuccessful claimant must also pay the reasonable rental value of the property for the period of time he held it under his bond,¹⁴⁶ costs,¹⁴⁷ and damages in the amount of ten percent of the value of the property,¹⁴⁸ or, if that value exceeds the amount claimed in the creditor's writ, ten percent of the latter amount.¹⁴⁹

If the unsuccessful claimant fails to return the property within ten days, the successful party or parties in the suit on the writ can have execution of their judgment against the claimant.¹⁵⁰ Although rule 730 provides for judgment against the claimant "for the value of the property," it also provides for fixing in the judgment the amount of each successful party's claim.¹⁵¹ The effect of these provisions is to limit the recovery against the non-returning claimant to the value of the property or the aggregate of all successful claims, whichever is less, plus legal interest under rule 730 and damages under articles 7417¹⁵² and 7418.¹⁵³

within its provisions; returning part and offering to pay value of missing part does not constitute compliance with the statute); cf. *Edwards v. Connolly*, 61 Tex. 30, 32 (1884) ("[u]nder the law the whole of the property is to be returned.").

146. See *Moore v. Rabb*, 159 S.W. 85, 88 (Tex. Civ. App.—Galveston 1913, no writ) (judgment should fix amount of rent so that claimant will know how much he must pay if he elects to return property); TEX. R. CIV. P. 723.

147. Rule 719 indicates that costs are recoverable only when it is found that the claimant has wrongfully sued out his claim. See TEX. R. CIV. P. 719.

148. See *Dupree v. Woodruff*, 19 S.W. 469, 470 (1892); *Moore v. Rabb*, 159 S.W. 85, 88 (Tex. Civ. App.—Galveston 1913, no writ); TEX. REV. CIV. STAT. ANN. art. 7417 (Vernon 1966); TEX. R. CIV. P. 732. The provision for damages in the amount of ten percent of the value of the property presumably was intended as a statutory penalty. See *Nunn v. Raby*, 158 S.W. 187, 189 (Tex. Civ. App.—Dallas 1913, no writ).

149. See *Dupree v. Woodruff*, 19 S.W. 469, 470 (1892); TEX. REV. CIV. STAT. ANN. art. 7418 (Vernon 1966).

150. See TEX. R. CIV. P. 731.

151. See *id.* (providing for adjustment of priorities of claims when the total of such claims exceeds the amount of the judgment).

152. Article 7417 states:

In all trials of the right of property under the provisions of this title, if the claimant shall fail to establish his right to the property, the court or justice trying the same shall give judgment against all the obligors in the claimant's bond for ten percent damages of the value of the property.

TEX. REV. CIV. STAT. ANN. art. 7417 (Vernon 1966).

153. Article 7418 states: "When such value is greater than the amount claimed under the writ, by virtue of which such property was levied upon, the damages shall be on the amount claimed under said writ." *Id.* art. 7418.

E. *The 1981 Rules—Trial of Right of Property*

Responding to the due process requirements for prejudgment seizure imposed by the Fourteenth Amendment,¹⁵⁴ as interpreted by the Supreme Court of the United States,¹⁵⁵ the Supreme Court of Texas overhauled its rules pertaining to trial of right of property, effective January 1, 1981.

A trial of right of property is obtained by means of an application filed with the court in which the suit on the writ is pending. The application that the claim is made in good faith may be supported by affidavits of the claimant, his agent, his attorney, or other persons having knowledge of relevant facts and must comply with all statutory requirements, stating the grounds for the claim and the specific facts relied upon by the claimant to warrant the required findings by the court.¹⁵⁶ The application and any affidavits must be made on personal knowledge setting forth such facts as would be admissible in evidence, but facts may be stated based upon information and belief if the grounds of such belief are specifically stated.¹⁵⁷

To obtain possession of the property levied on, a claimant must, by sworn written motion, admit or deny each finding of the order directing the issuance of the writ except when the claimant is unable to admit or deny the finding, in which case he must set forth the reasons why he cannot admit or deny.¹⁵⁸ His motion must also contain the reasons why the claimant has superior right to possession or title to the property claimed as against the plaintiff in the writ. Unless the parties agree to an extension of time, the motion shall be heard promptly after reasonable notice to the plaintiff, which may be less than three days. The issue shall be determined not later than ten days after the motion is filed. The filing of the motion will stay any further proceedings under the writ until a

154. See U.S. CONST. amend. XIV, § 1.

155. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607-08 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 601 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 82-90 (1972); Soules, *Attachment, Sequestration, and Garnishment: The 1977 Rules*, 32 Sw. L.J. 753, 753-76 (1978).

156. See TEX. R. CIV. P. 717 (two or more grounds may be stated conjunctively or disjunctively).

157. See *id.*

158. See TEX. R. CIV. P. 718.

hearing is had and the issue determined.¹⁵⁹ At the hearing the claimant has the burden to show superior right or title to the property claimed as against the plaintiff and defendant in the writ. The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence, but additional evidence if tendered by either party can be received and considered.¹⁶⁰

Before claimed property is delivered to the claimant he must file with the levying officer a bond in an amount fixed by the court's order and equal to double the value of the property claimed, payable to the plaintiff in the writ with sufficient surety or sureties as provided by statute.¹⁶¹ If the claimant fails to return the property and pay for the use of the property, then he must pay the plaintiff the value of the property with legal interest from the date of the bond and also pay all damages and costs that may be awarded against him for wrongfully suing out his claim.¹⁶² The plaintiff or claimant may file a motion in the court in which suit is pending to increase or reduce the amount of the bond or to question the sufficiency of the sureties. Upon a hearing the court will enter an order with respect to the bond and sufficiency of the sureties.¹⁶³

Trial of right of property is no longer a separate proceeding, but is docketed in the original writ proceeding in the name of the plaintiff in the writ as the plaintiff and the claimant of the property as intervening claimant.¹⁶⁴ After docketing and on the hearing date set by the court, the court or justice shall enter an order directing the making and joinder of issues by the parties.¹⁶⁵ The issues must be in writing and signed by each party or his attorney. The plaintiff is required to make a brief statement of the authority and right by which he seeks to subject the property levied on to the process. The claimant and other parties, in contrast, are only

159. Orders concerning the care, preservation, or sale of any perishable property may be issued by the court even after the motion is filed. *See id.*

160. *See id.*

161. *See* TEX. R. CIV. P. 719. The bond must be conditioned that the claimant will return the property to the officer in as good condition as he received it and that he shall pay the reasonable value of the use, hire, increase, and fruits of the property from the date of the bond. *See id.*

162. *See* TEX. R. CIV. P. 719.

163. *See id.*

164. *See* TEX. R. CIV. P. 723.

165. *See* TEX. R. CIV. P. 724.

required to make brief statements of the nature of their claims.¹⁶⁶ If the plaintiff appears and the claimant fails to appear, or neglects or refuses to join issue within the time prescribed for pleading, the plaintiff is entitled to a judgment by default.¹⁶⁷ If the plaintiff, however, fails to appear a nonsuit will be entered against him.¹⁶⁸

The burden of proof in the trial of right of property is on the plaintiff filing the writ, if the property was taken from the possession of the claimant pursuant to the original writ.¹⁶⁹ If the property was taken from the possession of any person other than the claimant, however, the burden of proof is on the claimant.¹⁷⁰ Furthermore, if the property is in the possession of the claimant's agent at the time of levy, the burden of proof remains with the plaintiff.¹⁷¹ Finally, when the property is in the possession of the writ defendant's trustee or agent the burden of proof is on the claimant.¹⁷²

The rules provide that the proceedings and practice on the trial of right of property shall be as similar as possible to other cases before the court or justice hearing the cause.¹⁷³ When the trial of right of property is held in a county other than that in which the original writ issued, the copy of the writ is received in evidence in the same manner as the original would have been.¹⁷⁴

Following a prejudgment seizure and retention of property pending trial, a claimant's failure to prevail in his trial of right of property results in rendition of judgment against him and his sureties for the property or the value of the property plus interest from the date of his bond.¹⁷⁵ The value of the property is determined as of the time of levy.¹⁷⁶ The officer receiving the claimant's application and bond is required to endorse on the original writ the fact that a claim has been made and application and bond given and by whom, and to endorse on the claimant's bond the value of the

166. *See id.*

167. *See* TEX. R. CIV. P. 725.

168. *See* TEX. R. CIV. P. 726.

169. *See* TEX. R. CIV. P. 728.

170. *See id.*

171. *See* King v. Sapp, 66 Tex. 519, 520, 2 S.W. 573, 574 (1886).

172. *See* Pierson v. Tom, 10 Tex. 145, 147 (1853).

173. *See* TEX. R. CIV. P. 727.

174. *See* TEX. R. CIV. P. 729.

175. *See* TEX. R. CIV. P. 719, 730.

176. *See* Gilmour v. Heinze, 85 Tex. 76, 79, 19 S.W. 1075, 1077 (1892).

property as assessed by the officer.¹⁷⁷ The unsuccessful claimant may either return the property within ten days of the judgment "in as good condition as he received it" or pay the successful party the value of the property plus interest.¹⁷⁸

If the unsuccessful claimant fails to return the property within ten days, the successful party or parties can have execution of their judgment against him.¹⁷⁹ The judgment shall then fix the amount of each successful party's claim, and provide for the adjustment of priorities of claims when the total of such exceeds the amount of the judgment.¹⁸⁰ The effect of these provisions is to limit the recovery against the non-returning claimant to the value of the property or the aggregate of all successful claims, whichever is less, plus legal interest and damages.¹⁸¹

IV. CONCLUSION

The Texas rules on the distress warrant and trial of right of property remedies as revised meet all requisites of due process. Care in using the remedies, however, must be exercised until the courts affirmatively recognize that regardless of statutory infirmities, these rule revisions satisfy the due process requirements. Furthermore, until the legislature amends the pertinent statutes to excise procedural infirmities that may remain textually, even though apparently cured by the revised rules, there may be some doubt remaining as to the viability of the distress warrant and trial of right of property remedies.

177. See TEX. R. CIV. P. 720.

178. See TEX. R. CIV. P. 719, 730, 731, 732. A claimant returning property must pay the reasonable rental value of the property for the period of time it was held under bond. See *Moore v. Rabb*, 159 S.W. 85, 88 (Tex. Civ. App.—Galveston 1913, no writ); TEX. R. CIV. P. 732. The claimant must also pay damages in the amount of ten percent of the value of the property, or, if that amount exceeds the amount claimed in the creditor's original writ, then ten percent of the latter amount. See *Dupree v. Woodruff*, 19 S.W. 469, 470 (1892); *Moore v. Rabb*, 159 S.W. 85, 88 (Tex. Civ. App.—Galveston 1913, no writ); TEX. REV. CIV. STAT. ANN. arts. 7417-7418 (Vernon 1966); TEX. R. CIV. P. 732. Court costs may be charged against the unsuccessful claimant. See TEX. R. CIV. P. 719, 732.

179. See TEX. R. CIV. P. 731.

180. See *id.*

181. See TEX. REV. CIV. STAT. ANN. arts. 7417-7418 (Vernon 1966); TEX. R. CIV. P. 730.