

# South Carolina Law Review

---

Volume 50  
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

Article 13

---

Summer 1999

## Property Law

James Johnson

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

James Johnson, Property Law, 50 S. C. L. Rev. 1051 (1999).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

**PROPERTY LAW**

**GET IN LINE, THE LINE FORMS AT THE DOOR: A  
LANDLORD'S LIEN FOR DISTRAINT ENJOYS  
SENIORITY OVER PRIOR PERFECTED SECURITY  
INTERESTS IN SOUTH CAROLINA**

I. INTRODUCTION

In *Greenwood Petroleum Co. v. Wingard (Ex parte Smith)*<sup>1</sup> the South Carolina Court of Appeals held that a landlord's lien for unpaid rent takes priority over a creditor's security interest in the tenant's property even though the creditor's interest arose first in time.<sup>2</sup> The issue of priority between these competing liens is not unique to South Carolina; a survey of state law indicates that at least ten state courts have ruled on this exact issue.<sup>3</sup> Although at first glance the problem appears to be simple, the issue is far more complicated than it seems. The problem arises because Article 9 of the Uniform Commercial Code (UCC) excludes landlords' liens from its coverage.<sup>4</sup> Without Article 9 authority, courts are forced to grapple with this issue under non-Code law. Hence, non-UCC landlords' liens compete with UCC-created security interests for priority, and courts have had to untangle pre-UCC schemes to determine priorities among the competing parties with varying results from one jurisdiction to the next.<sup>5</sup>

Part II of this Note discusses cases from various jurisdictions to introduce this problem in sundry factual circumstances and to illustrate different solutions reached by courts across the country. Part III focuses on South Carolina's non-UCC law on this issue and reviews the South Carolina General Assembly's recent repeal of section 27-39-260, which once provided a method for untangling this priority problem. Part IV examines *Wingard* and discusses the South Carolina Court of Appeals's analysis of this priority issue in light of two other South Carolina decisions in this area. Finally, this Note concludes with a suggestion for resolving this case on appeal in a manner that

---

1. 300 S.C. 479, 498 S.E.2d 908 (Ct. App. 1998).

2. *Id.* at 482, 498 S.E.2d at 910.

3. See generally Annotation, *Secured Transactions: Priority as Between Statutory Landlord's Lien and Security Interest Perfected in Accordance with the Uniform Commercial Code*, 99 A.L.R.3d 1006 (1980) (surveying by jurisdiction various approaches to the priority issue) [hereinafter Annotation].

4. S.C. CODE ANN. § 36-9-104(b) (Law. Co-op. 1976). Title 36 is South Carolina's enacted version of the Uniform Commercial Code.

5. See Annotation, *supra* note 3, § 2, at 1008.

comports with the legislature's intent as evidenced by the legislative history from the repeal of section 27-39-260.

## II. BACKGROUND TO THE PROBLEM

Article 9 specifically excludes landlords' liens from coverage.<sup>6</sup> Thus, courts faced with a priority dispute between a landlord's lien and a perfected security interest are forced to resolve the issue in various ways. A majority of courts confronted with the issue have looked to pre-UCC or non-UCC law to determine priority between a landlord's lien and a security interest.<sup>7</sup>

### A. *Pre-UCC or Non-UCC Law*

#### 1. *Absolute Rule of Preference*

In jurisdictions with a rule of absolute preference, courts faced with this priority problem would apply the rule of preference and give priority to either the landlord or the creditor according to the pre-UCC rule in effect.<sup>8</sup> In *Hartwell v. Hartwell Co.*<sup>9</sup> a New Jersey court determined it would resolve priority disputes between a landlord and a secured creditor according to pre-UCC New Jersey law because Article 9 did not cover landlords' liens.<sup>10</sup> The Hartwell Company leased premises belonging to Iantha for a term of ten years.<sup>11</sup> Subsequently, a husband and wife purchased all of Hartwell's stock.<sup>12</sup> The purchase agreement allowed the sellers, Jack and Jennifer Hartwell, to exercise their rights pursuant to a security agreement if the purchasers failed to meet weekly payments.<sup>13</sup> This security agreement gave the Hartwells an interest in all of the company's collateral assets.<sup>14</sup>

The purchasers defaulted on the weekly payments, and the Hartwells moved forward to collect the company's assets pursuant to the purchase agreement.<sup>15</sup> Meanwhile, Iantha (the landlord) intervened in the suit to enforce its statutorily defined landlord's lien.<sup>16</sup> When asked by the parties to determine the priority of the competing interests, the court found that New Jersey common law had a rule of preference for the secured creditor.<sup>17</sup> Therefore, the

---

6. See S.C. CODE ANN. § 36-9-104(b).

7. Annotation, *supra* note 3, § 2, at 1008.

8. *Id.*

9. *Hartwell v. Hartwell Co.*, 400 A.2d 529 (N.J. Super. Ct. Ch. Div. 1979).

10. *Id.* at 534.

11. *Id.* at 531.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 534.

court held that the landlord's lien was subordinate to the creditor's perfected security interest.<sup>18</sup>

Other jurisdictions have resolved similar priority disputes using pre-UCC law where such law reflected a rule of absolute preference for the landlord. In *In re Einhorn Bros., Inc.*<sup>19</sup> the Third Circuit Court of Appeals held that because the UCC did not apply to landlords' liens, Pennsylvania's enactment of the UCC did not alter existing Pennsylvania law on landlords' liens.<sup>20</sup> Examining Pennsylvania's pre-UCC law, the court found that a landlord's lien enjoyed priority over various security interests.<sup>21</sup> Accordingly, the landlord's lien prevailed against the bank's competing security interest even though the bank perfected its interest before the landlord's lien attached.<sup>22</sup>

## 2. "First in Time, First in Right"

In jurisdictions where pre-UCC law did not supply a rule of absolute preference for either the landlord or the creditor, some courts have followed a "first in time, first in right" rationale.<sup>23</sup> In *National Investment Trust v. First National Bank*<sup>24</sup> John Shuckertt entered a lease with National Investment Trust.<sup>25</sup> Nine months later, First National Bank in Albuquerque loaned Jeanne Lyons funds allowing her to buy out John Shuckertt's furniture business.<sup>26</sup> To secure the loan, the bank perfected a security interest in the business's inventory then owned or later acquired.<sup>27</sup> Subsequently, Shuckertt assigned Lyons the lease with National Investment Trust.<sup>28</sup> Ultimately, Lyons went bankrupt, and First National Bank sought to enforce its security interest in the inventory located on the leased premises.<sup>29</sup> National Investment Trust also stepped forward to assert its statutory landlord's lien.<sup>30</sup> In an unusual twist, the court resolved this dispute by finding that both parties' interests attached at the same time—the moment the property was brought to the leased premises.<sup>31</sup> However, the court noted that under New Mexico case law, First National Bank could not be charged with notice of National Investment's lease because First National perfected its security interest over a month before the tenant entered

---

18. *Id.*

19. 272 F.2d 434 (3d Cir. 1959).

20. *Id.* at 440-41.

21. *Id.* at 440.

22. *Id.* at 443.

23. *See* Annotation, *supra* note 3, § 2, at 1008.

24. 543 P.2d 482 (N.M. 1975).

25. *Id.* at 483.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 482.

30. *Id.*

31. *Id.* at 483.

the lease agreement with National Investment.<sup>32</sup> Moreover, the landlord “had notice of the recorded security interest at the time of the assignment.”<sup>33</sup> Therefore, the bank’s security interest had priority over Investment Trust’s landlords’ lien.<sup>34</sup>

### B. Using UCC Priority Rules

A minority of courts have resolved the priority issue between secured creditors and landlords by determining the priority of the competing interests using Article 9 principles, despite the Article’s specific exclusion of landlords’ liens.<sup>35</sup> The rationale commonly provided for this exclusion is that Article 9 governs only consensual liens.<sup>36</sup> Landlords’ liens are nonconsensual because the landlord’s right to distraint property is a statutory right, and the subsequent lien arises and attaches by operation of law.<sup>37</sup>

Courts in several jurisdictions have held that landlords’ liens are excluded from Article 9 only in terms of the liens’ creation—meaning the manner in which the liens attach and are perfected.<sup>38</sup> Using this reasoning, once the lien has arisen, the Article 9 rules would govern the interaction of the non-UCC and any other UCC created liens. A court reading the UCC broadly could therefore use Article 9 to decide the priority of competing liens even if one of the liens was created outside Article 9.

The Illinois Appellate Court applied Article 9 principles in *Peterson v. Zeigler*<sup>39</sup> and held that a creditor with a prior perfected security interest in the tenant’s property enjoyed priority over a landlord’s statutory lien.<sup>40</sup> Although the *Peterson* court recognized the exclusion of landlords’ liens from Article 9, it noted that “[i]n order for article nine to be the comprehensive statute that it was meant to be on the subject of consensual security interests, article nine must always supply a rule for determining the priorities between a consensual security interest and any other kind of lien.”<sup>41</sup>

32. *Id.* at 484.

33. *Id.*

34. *Id.*

35. See Annotation, *supra* note 3, § 2, at 1008.

36. See BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* §1.08(2) (1993).

37. See Daniel A. Harvey, *Article 9’s Exclusion of Consensual Landlord’s Liens: King Furniture City Revisited*, 16 UCC L.J. 360, 360-61 (1984).

38. See generally Annotation, *supra* note 3, § 5, at 1012-13 (discussing recent decisions from Illinois and Texas in which courts applied UCC rules to priority disputes between landlords’ liens and secured interests).

39. 350 N.E.2d 356 (Ill. App. Ct. 1976).

40. *Id.* at 362.

41. *Id.*

### III. SOUTH CAROLINA'S NON-UCC PRIORITY RULE & THE REPEAL OF SECTION 27-36-260

The cases discussed in Part II reveal that, in many jurisdictions, determining priority between perfected security interests and landlords' liens is a relatively simple process despite Article 9's exclusion of landlords' liens from its coverage. Courts faced with the issue have generally been able to determine priority according to pre-UCC, common-law rules. However, South Carolina's non-UCC law on this priority issue has been significantly overhauled by the South Carolina General Assembly.

Prior to 1988, South Carolina had a statutory provision that provided a rule for determining priority between a landlord's lien and a creditor's security interest.<sup>42</sup> However, the General Assembly repealed section 27-39-260 for reasons discussed below. The repeal of section 27-39-260 in 1988 took from the judiciary a relatively simple solution for resolving this dispute.

South Carolina has recognized a landlord's right to distrain a tenant's property since 1712.<sup>43</sup> However, this right has caused priority problems due to a timing difference between a landlord's right to distrain property on the leased premises and the subsequent attachment of the landlord's lien. Traditionally, a landlord's right to distrain a tenant's property automatically arose upon the lease's effective date,<sup>44</sup> and it would extend to all property located upon the leased premises.<sup>45</sup> However, an actual lien on the property would not attach until a tenant defaulted on the lease terms and the landlord initiated a judicial proceeding known as "levying for distress" on the tenant's property.<sup>46</sup>

This gap between a landlord's right to distrain property on the premises and the subsequent attachment of the lien severely threatened a

42. S.C. CODE ANN. § 27-39-260 (Law. Co-op. 1976) (repealed 1988).

43. Act effective Jan. 1, 1989, No. 494, 1988 S.C. Acts 4519.

44. S.C. CODE ANN. § 27-39-260 (Law. Co-op. 1976) (repealed 1988); *see generally* Harvey, *supra* note 37, at 363-64 (discussing the history of the common-law and statutory landlord's lien).

45. S.C. CODE ANN. § 27-39-260 (Law. Co-op. 1976) (repealed 1988). The statute provided:

When property distrained for arrears of rent is subject to the lien of a chattel mortgage placed upon such property and recorded before the rent contract was entered upon or before such property was brought upon the rented premises, the landlord may pay the amount due upon such mortgage debt and subject the property to the payment thereof as well as to the payment of the amount due for rent and the tenant shall inform the officer making distress of any such liens. If the landlord declines or fails to pay such mortgage debt the officer shall return such property on which such chattel mortgage may be a lien to the tenant. And if the landlord have actual notice of any unpaid purchase money lien, such lien shall have priority to his claim for rent in the same manner as above provided for certain chattel mortgages.

*Id.*

46. Frady v. Smith, 247 S.C. 353, 357-58, 147 S.E.2d 412, 414 (1966).

creditor's interest in any property located on the premises that served as collateral. Before the repeal of section 27-39-260, a creditor holding a secured interest in the collateral was accorded statutory priority only if the creditor had perfected its security interest before the lease commenced or before the property was brought onto the leased premises.<sup>47</sup> Thus, if the security interest attached after the lease's commencement, when the property was already located on the leased premises, the landlord's lien received priority over the creditor's interest even though the creditor perfected its interest first.<sup>48</sup> This was true even if the landlord had *actual knowledge* of the security interest's existence.<sup>49</sup>

Section 27-39-260 contained serious problems. For example, under the statute, a creditor might perfect a security interest in the "furniture and fixtures" of a local business operated upon leased premises. If at any time the tenant defaulted on the rent, the landlord could exercise his statutory right to distrain the property on the premises. As soon as the landlord levied on the property, his lien would arise over the tenant's chattels, including the furniture and fixtures, located on the leased premises. Under section 27-39-260, the landlord's lien would enjoy priority even though the creditor's lien was perfected first and the creditor lacked knowledge of the competing lien on the property, which arose by operation of law when the landlord levied for distress.

As a result of this potentially unfair treatment of creditors under the statute, the South Carolina General Assembly repealed section 27-39-260 with the following explanation:

The net effect [of section 27-39-260] is that a large number of fully perfected nonpurchase money security interests are potentially subordinate to distress liens. This is inconsistent with the priority rules in the UCC. Section 36-9-301(1) states that a perfected security interest takes priority over any lien creditor *unless the creditor obtains a lien before the security interest is perfected*; and a landlord cannot qualify as a lien creditor until *after* distress and levy.<sup>50</sup>

---

47. S.C. CODE ANN. § 27-39-260 (Law. Co-op. 1976) (repealed 1988).

48. *Id.*

49. *Fraday*, 247 S.C. at 358-59, 147 S.E.2d at 414.

50. Act effective Jan. 1, 1989, No. 494, 1988 S.C. Acts 4519-20 (emphasis added) (citation omitted). The UCC section referred to in the General Assembly's explanation provides in pertinent part:

- (1) Except as otherwise provided . . . an unperfected security interest is subordinate to the rights of:
- (a) persons entitled to priority under § 36-9-312;
  - (b) a person who becomes a lien creditor without

By repealing section 27-39-260, the General Assembly disposed of South Carolina's non-UCC rule for determining priority disputes between landlords' liens and prior perfected security interests. The General Assembly failed to replace section 27-39-260 with another statute reflecting a rule of preference for either the landlord or the creditor. Although the legislative history shows that the General Assembly intended section 36-9-301(1) of the UCC to supply the rule for resolving priority disputes between these competing liens, it did not square this plan with section 36-9-104's exclusion of landlords' liens from Article 9 coverage.<sup>51</sup> The General Assembly's failure to resolve, or even to address, this conflict after repealing section 27-29-260 left the South Carolina judiciary with little guidance to determine this issue.

#### IV. *Wingard*

The Wingards operated the Westside Pharmacy.<sup>52</sup> J. M. Smith held a promissory note issued in the amount of approximately \$65,000 that was secured by a security agreement in the inventory and fixtures located on the leased premises.<sup>53</sup> Smith had perfected this interest "by the filing of financing statements in the office of the Clerk of Court for Greenwood County on July 28, 1995, and in the office of the Secretary of State for South Carolina on August 7, 1995."<sup>54</sup> After Smith perfected this interest, Wingard filed for bankruptcy in December of 1995.<sup>55</sup> Subsequently, Wingard's lease agreement was extinguished pursuant to Chapter Seven of the Federal Bankruptcy Code.<sup>56</sup>

The Greenwood Petroleum Company (GPC) purchased the property

---

knowledge of the security interest and before it is perfected;

...

(3) A "*lien creditor*" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest.

S.C. CODE ANN. § 36-9-301 (Law. Co-op. 1976).

51. See S.C. CODE ANN. § 36-9-104(b) (Law. Co-op. 1976).

52. Appellant's Brief at 3, *Greenwood Petroleum Co. v. Wingard* (*Ex parte Smith*), 330 S.C. 479, 498 S.E.2d 908 (Ct. App. 1998) (No. 96-CP-24-604).

53. *Wingard*, 330 S.C. at 481, 498 S.E.2d at 909.

54. Appellant's Brief at 3.

55. *Id.*

56. 11 U.S.C. § 365(b)(4) (1994).



where Wingard had operated his business in March of 1996.<sup>57</sup> GPC informed Wingard that if he failed to remove the inventory from the premises, GPC would charge Wingard a rental fee in the amount of \$2,000 per month.<sup>58</sup> Wingard failed to remove his property and never paid rent to GPC.<sup>59</sup> After six months, GPC seized Wingard’s inventory to collect \$12,000 in back rent pursuant to sections 27-39-210 through 27-39-360 of the Code of Laws of South Carolina.<sup>60</sup> These sections provide a landlord with a statutory remedy for distraint of property.<sup>61</sup>

At the commencement of the distraint procedure, Smith contested GPC’s right to distraint the property based on his prior perfected security interest in the inventory.<sup>62</sup> Smith argued to the Greenwood County Magistrate that his prior security interest had priority over the landlord’s right to distraint the property.<sup>63</sup> The magistrate disagreed, noting that “the presence of personal property at the leased premises (not the ownership) . . . makes it subject to distraint.”<sup>64</sup> The circuit court affirmed the magistrate’s decision and noted that “section 36-9-104 of the Uniform Commercial Code provides that the chapter [Article 9] does not apply to a landlord’s lien.”<sup>65</sup>

On appeal the South Carolina Court of Appeals held that GPC, as landlord, was entitled to recover “free of Smith’s security interest.”<sup>66</sup> The *Wingard* court modeled its response to this issue after the recent case of *Tolemac, Inc. v. United Trading, Inc.*<sup>67</sup> In *Tolemac* a landlord exercised his statutory distraint over a tenant’s property as well as property belonging to a third party that was located on the leased premises.<sup>68</sup> The third-party owner challenged the distraint action, claiming the distraint violated his substantive due process rights.<sup>69</sup> The *Tolemac* court noted that the plain language of section 27-39-250 provides that “all property upon the rented premises is subject to distress”<sup>70</sup> and held that the landlord could distraint the third party’s property so long as the landlord first applied the tenant’s personal property to the debt.<sup>71</sup>

57. Appellant’s Brief at 4.

58. *Id.*

59. *Id.*

60. *Greenwood Petroleum Co. v. Wingard (Ex parte Smith)*, 330 S.C. 479, 481, 498 S.E.2d 908, 909 (Ct. App. 1998).

61. *See* S.C. CODE ANN. §§ 27–39-210 to -360 (Law. Co-op. 1991).

62. *Wingard*, 330 S.C. at 481, 498 S.E.2d at 909.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 482-83, 498 S.E.2d at 910.

67. 326 S.C. 103, 484 S.E.2d 593 (1997).

68. *Id.* at 104-05, 484 S.E.2d at 594.

69. *Id.* at 105, 484 S.E.2d at 594. *See generally* Paul E. Hammack, Note, *Third-Party Lessors and Bailors Beware: South Carolina Distraint Statute Threatens Due Process*, 49 S.C. L. REV. 1259 (1998) (discussing the *Tolemac* decision as a violation of substantive due process).

70. *Tolemac*, 326 S.C. at 106, 484 S.E.2d at 595 (quoting S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991)).

71. *Id.*

The *Wingard* court erred in using *Tolemac* to resolve the priority issue between a security interest and a landlord's statutory lien by failing to distinguish the rights of third-party property owners (to whom *Tolemac* should apply) from the rights of creditors holding perfected security interests in the property distrained.<sup>72</sup> This distinction should be critical to the analysis because the interests of these parties deserve different degrees of protection. While the court recognized that Smith's claim as a secured creditor would have prevailed under the old South Carolina statute, the court declared that priority between the two interests could be decided by applying current South Carolina distraint statutes.<sup>73</sup> The court then examined section 27-39-250 and found that the "legislature intended for a landlord to be able to distraint the property of a third party, even though a third party holds unencumbered, complete ownership of the property."<sup>74</sup> The court also concluded that "a secured creditor sits in the same posture as a third party under § 27-39-250. Therefore, the property distrained by the landlord is taken free of Smith's security interest."<sup>75</sup> The court was unpersuaded that section 27-39-250 distinguishes between a third party's ownership and a creditor's security interest in the tenant's property.

This reasoning makes some sense. In *Tolemac* the court interpreted section 27-39-250 to conclude that a third party having complete ownership of the property on the leased premises could lose that property to a landlord's lien.<sup>76</sup> Therefore, if a landlord can distraint property wholly owned by a third party under the statute, why should a creditor holding less than complete ownership of the property be accorded greater protection? So long as a creditor's lien or security interest in the property is less than full ownership of that property, then the creditor's property should be subject to the landlord's distraint under section 27-39-250.

However, arguments exist to refute the proposition that a lien is the legal equivalent of ownership.<sup>77</sup> When parties release property from their possession, not having secured it, the property becomes subject to the laws of the place where it comes to rest.<sup>78</sup> Admiralty law provides a helpful analogy. If one ships property over navigable waters, the relinquished property becomes subject to the laws of admiralty.<sup>79</sup> Should the property become derelict, it may be salvaged, with the salvagor accorded the right to recover *in rem* against the

---

72. *Greenwood Petroleum Co. v. Wingard (Ex parte Smith)*, 330 S.C. 479, 482-83, 498 S.E.2d 908, 910 (Ct. App. 1998).

73. *Id.* at 482, 498 S.E.2d at 910.

74. *Id.*

75. *Id.* at 482-83, 498 S.E.2d at 910.

76. *Tolemac*, 326 S.C. at 106, 484 S.E.2d 595.

77. *See, e.g.*, Appellant's Reply Brief at 2, *Wingard*, 330 S.C. 479, 498 S.E.2d 908 (No. 96-CP-24-604).

78. *See* Wendell Carnahan, *Tangible Property and the Conflict of Laws*, 2 U. CHI. L. REV. 345, 348 (1935).

79. *See generally* THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §§ 1-1 to 1-12 (2d ed. 1994) (discussing admiralty jurisdiction).

property.<sup>80</sup> The owner in that instance is unable to protect the property from the operation of a maritime lien that arises against the property.<sup>81</sup> In the same fashion, a third party, having forgone any attempt to secure the property, will be unable to protect it from the operation of a landlord's lien pursuant to section 27-29-250 once the property arrives upon a leased premises.

Alternatively, one who has taken the necessary steps to perfect a secured interest in property has done more than a third-party owner who has simply relinquished the property and nothing else. Consequently, the law should afford greater protection to those who attempt to protect their rights to the fullest extent available by law. The court could have further distinguished a third-party owner and the holder of a secured interest in property on the premises by examining the subject of notice. As a practical matter, because the law treats property belonging to a third party differently than the tenant's property under a landlord's lien,<sup>82</sup> when the landlord attempts to exercise his distraint, the tenant is likely to become rapidly bereft of all possessions. The tenant may deny ownership of anything of value located on the premises, and the landlord's remedy will be less effective. On the other hand, because a security interest is publicly recorded, the landlord at least can verify exactly what property on the premises is available to distraint and what property is tied up in creditors' security interests.

Viewed in this light, granting the secured creditor greater legal protection than third-party owners seems fundamentally sound. As discussed above, the interests involved are distinct; a creditor does not, as the court held in *Wingard*, axiomatically "sit[] in the same posture as a third party under § 27-39-250."<sup>83</sup> Therefore, the court should not have relied on *Tolemac* to decide the priority issue presented in *Wingard*. Instead, the court should have looked to an earlier South Carolina case, *Oxford Finance Companies v. Burgess*.<sup>84</sup> In *Oxford* the South Carolina Supreme Court examined the issue of priority between a landlord's lien and a creditor's secured interest and ruled in the creditor's favor.<sup>85</sup> The court impliedly recognized that the repeal of section 27-26-260 left a landlord with no statutory right to recover against a prior perfected security interest in a tenant's property.<sup>86</sup>

In *Oxford* the tenants leased from Burgess a lot for a mobile home.<sup>87</sup> The lease agreement commenced on November 13, 1986, and two days later

80. See generally 3A MARTIN J. NORRIS, BENEDICT ON ADMIRALTY § 155, at 11-10 (1997) (describing *in rem* proceedings against salvaged property and discussing the owners' rights).

81. *Id.*

82. See S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1976).

83. *Greenwood Petroleum Co. v. Wingard (Ex parte Smith)*, 330 S.C. 479, 482, 498 S.E.2d 908, 910 (Ct. App. 1998).

84. 303 S.C. 534, 402 S.E.2d 480 (1991).

85. *Id.* at 535-36, 402 S.E.2d at 480.

86. *Id.* at 537-38, 402 S.E.2d at 481-82.

87. *Id.* at 536, 402 S.E.2d at 480.

the tenants purchased a mobile home giving the seller a security interest in the home.<sup>88</sup> Oxford Finance Companies ultimately acquired the note and filed a certificate of title on March 27, 1987.<sup>89</sup> Two years later, the tenants abandoned the property, defaulted on the purchase money note secured by the mobile home, and became delinquent on the landlord's rent.<sup>90</sup> The landlord refused to surrender possession of the mobile home to Oxford Finance Company, claiming that "he was entitled to the mobile home by virtue of a landlord's lien for past due rent and late charges with priority over Oxford's security interest."<sup>91</sup>

This case presented the classic timing problem discussed above.<sup>92</sup> In *Oxford* the secured party perfected a security interest in the mobile home *after* the effective date of the lease. Therefore, under the old statutory scheme, the mobile home would have been subject to the landlord's statutory distraint<sup>93</sup> even though the security interest was perfected and recorded before the landlord ever actually levied against the property to become a lien creditor.<sup>94</sup> However, the court recognized the General Assembly's repeal of section 27-39-260 and awarded the mobile home to Oxford, thus recognizing Oxford Finance Company's priority as the holder of the prior perfected security interest.<sup>95</sup>

Unfortunately, the *Oxford* opinion does not set forth fully the rights of the competing lien parties. The court decided the case by focusing on the legislature's repeal of section 27-39-260, under which the landlord claimed relief.<sup>96</sup> Therefore, the court held that while that "statute *may* have given the Landlord some rights to the mobile home,"<sup>97</sup> the statute's repeal applied retroactively, and the landlord enjoyed neither privilege nor right to deny possession of the mobile home to Oxford.<sup>98</sup> Although the court failed to state explicitly the law courts must use to untangle priority disputes, the opinion *implies* that the repeal of section 27-39-260 eliminated a landlord's right to recover against any security interest that is perfected before the landlord becomes a lien creditor.

## V. CONCLUSION

The South Carolina Court of Appeals has ostensibly established a clear rule of preference in cases involving priority disputes between landlords and

---

88. *Id.*

89. *Id.*

90. *Id.* at 536, 402 S.E.2d at 481.

91. *Id.*

92. *See supra* Part III.

93. S.C. CODE ANN. § 27-39-260 (Law. Co-op. 1976) (repealed 1988).

94. *Id.*

95. *Burgess*, 303 S.C. at 538, 402 S.E.2d at 482.

96. *See supra* Part III.

97. *Burgess*, 303 S.C. at 537-38, 402 S.E.2d at 481.

98. *Id.* at 537-38, 402 S.E.2d 481-82.

secured creditors—the creditor loses. After *Wingard*, the *Tolemac* holding is so broad that it would allow a landlord to levy distress against a cab left running at the curb of his rental property, no matter who has a perfected security interest in the vehicle, because the court interpreted the statute’s language that “all property upon the rented premises is subject to distress” too literally.<sup>99</sup> This result ignores the Uniform Commercial Code and South Carolina’s legislative history.<sup>100</sup> Ironically, the type of result reached by the *Wingard* court was the impetus that prompted the legislature to repeal section 27-36-260. Under the *Wingard* rule, just as under the old statute, “a large number of fully perfected nonpurchase money security interests are potentially subordinate to distress liens.”<sup>101</sup>

The legislature intended that a landlord’s lien would be subject to the rules of priority set forth in section 36-9-304 even though the landlord’s lien arose outside of Article 9.<sup>102</sup> According to this scheme, once landlords become “lien creditors” under section 36-9-304 by levying for distress, they would enjoy priority only over *unperfected* security interests in tenants’ property.<sup>103</sup> This scheme would follow the legislative history concerning the repeal of section 27-39-260 and would also allow fair treatment of creditors. Under the *Wingard* rule, a creditor is unable to acquire knowledge of a competing lien because the landlord’s lien arises by operation of law after the creditor has already extended credit. Conversely, the scheme advocated when the legislature repealed section 27-39-260 at least affords landlords an opportunity to acquire notice of any perfected security interests impacting property located upon their premises because those interests will be filed and recorded.

The *Wingard* decision ignores the distinction between a creditor’s security interest and a third party’s property located on leased premises. As discussed in this Note, creditors merit greater protection under these circumstances than third parties who have put forth no effort to secure their property. For these reasons, the South Carolina Supreme Court should grant certiorari on this case and apply Article 9 rules to resolve this problem to prevent landlords from prevailing against any and all prior perfected interests in property that merely happen to occupy their premises.

*James Johnson*

---

99. S.C. CODE ANN. § 27-39-250 (Law. Co-op. 1991).

100. Act effective Jan. 1, 1989, No. 494, 1988 S.C. Acts 4520.

101. *Id.* at 4519.

102. *Id.* at 4520.

103. *See supra* Part III.