THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

William C. Tindal, Special Referee

Appellate Case No. 2013-002370

Ned Gregory, Jr., ... Respondent,

v.

Howell Jackson Gregory, The Gregory Company, Inc.,
and the City of Lancaster, ... Defendants,

Of whom Howell Jackson Gregory is the .... Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

Did the Court of Common Pleas for Horry County err in determining the principal amount of the judgment entered by it on April 25, 2006?

II.

Did the Court of Common Pleas for Lancaster County err in finding that the appellant's assignment to his wholly owned corporation of his right to take title to the Lancaster properties was voidable under the Statute of Elizabeth?

III.

Was the respondent authorized by statute to file a *lis pendens* against the Lancaster properties when he filed suit to set aside the conveyance of those properties as fraudulent under the Statute of Elizabeth?

COUNTERSTATEMENT OF THE CASE

Consolidated in this matter are appeals in two related actions.

The first is a partition action, filed by the respondent in Lancaster County in 2000 as Case Number 2000-CP-29-896. The action was referred by consent to the Master in Equity for Horry County because one of the properties was located in that county, whereupon venue was transferred and the action was assigned an Horry County case number, 2002-CP-26-1706. The appeal in this partition action bears Appellate Case Number 2013-002443.

The second is an action by the respondent to set aside an allegedly fraudulent conveyance under the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, filed in Lancaster County in 2008, Case Number 2008-CP-29-1084. The appeal in this action bears Appellate Case Number 2013-002370. The Court directed the use of this case number and its caption for the consolidated appeals.

<u>Proceedings in the Partition Action</u>

The partition action was filed by Ned Gregory, Jr. ("Ned"), the respondent herein, against Howell Jackson Gregory ("Jack"), an appellant herein (henceforth, "the appellant"), on October 27, 2000, seeking partition of three adjacent parcels in downtown Lancaster and a house in Myrtle Beach. The respondent additionally sought a partition accounting. By order of the Honorable Paul E. Short, Jr., Presiding Judge of the Sixth Judicial Circuit, dated October 12, 2001, the partition action was referred with finality to the Master in Equity for Horry County. Judge Short entered a consent order transferring venue to Horry County on February 27, 2002.

Following trial on December 10, 2001, and post-trial discovery, by order of the Honorable J. Stanton Cross, Jr., Master in Equity of Horry County, dated April 5, 2005, the subject properties were ordered to be sold at auction. Judge Cross appointed Robert K. Folks, Esquire, a member of the Bar of Lancaster County, as special referee to conduct

the auction sale of the Lancaster parcels. If the successful bidder at auction were anyone other than one of the two cotenants (Ned and Jack), the successful third-party bidder was ordered to deposit five (5%) percent of the amount of the successful bid and to pay the balance within thirty (30) days. Special Referee Folks conducted the auction on June 6, 2005 and reported to the court that the successful bidder was the appellant Jack Gregory, who bid in the property for $170,000.00. Judge Cross auctioned the Myrtle Beach house. The successful bidder was the appellant Jack Gregory.

At hearings conducted on February 16, 2006, and March 17, 2006, Judge Cross tried the remaining issues related to respondent's claim for a partition accounting. By order dated April 25, 2006, Judge Cross found that the respondent was entitled to judgment against the appellant in the partition accounting in the gross amount of $42,859.47 in upkeep expenses and rent.[1] Judge Cross found that the appellant was entitled to an offset for his own upkeep expenses in two amounts: (1) a conceded amount of $7,940.00 for removal of gas tanks at one of the Lancaster parcels; and (2) property tax payments on the Myrtle Beach house for tax years 2002, 2003, and 2004, if proved. In this regard the order of April 25, 2006 provides:

> The Defendant [the appellant] is entitled to a setoff to [*sic*] the amount expended by the Plaintiff [Ned] of any funds that he [the appellant] can prove that he contributed, without contribution from the Plaintiff [Ned]. It is conceded that Defendant [the appellant] spent [$7,940.00] to remove the gas tanks from the Lancaster property. The only other contribution by the Defendant [the appellant] was for real estate taxes for the Myrtle Beach house. The Defendant [the appellant] will be given credit for any real estate taxes he paid on the Myrtle Beach property for the years 2002, 2003 and 2004, if paid receipts are produced.

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[1] This figure consisted of two sums: (1) $21,959.47 for respondent's property upkeep expenses, and (2) $20,900.00 rental value of the Myrtle Beach house, occupied by appellant.

[Order of April 25, 2006, p. 2.][2]

Judge Cross further noted that the appellant had not complied with the terms of the auction sale, ten months earlier. Judge Cross therefore ordered the Lancaster properties to be re-auctioned. Re-auction was avoided when the Master accepted from the appellant on April 28, 2006 a check for $93,925.00, representing one-half of his successful bid at the June 2005 auction, plus costs. [*See* Appellants' Brief, Argument "A," last sentence of first paragraph.]

On August 10, 2006, without notice to respondent [Tr. of hearing of Dec. 12, 2013, pp. 48-52], Judge Cross issued what was styled a *nunc pro tunc* order. In this *ex parte* order Judge Cross granted credit to the appellant against the judgment of April 25, 2006 in the sum of $4,077.99, being the amount paid by the appellant in property taxes for the years 2002, 2003, and 2004. Although Judge Cross had found in the earlier order that "[t]he only other contribution by the Defendant [the appellant] was for real estate taxes for the Myrtle Beach house", Judge Cross purported to grant the appellant an additional credit in the amount of $13,500.00 paid to a roofing contractor for work on one of the Lancaster buildings. When notified of this order, the respondent moved for reconsideration under Rule 59, SCRCP, but the motion was never heard.

The alleged contribution of $13,500.00 originated when the appellant contracted with Tod Sipes Construction, Inc., for roofing work, then failed to pay for it. Sipes sued both the appellant and the respondent as cotenants. The case was settled with the payment to Sipes' attorney of the amount due by the appellant. Judge Goode's order approving the settlement and dismissing the case forbade charging respondent Ned Gregory for any portion of the payment:

Now, Therefore, it is Ordered, Adjudged and Decreed

[2] Also, Judge Cross ordered the appellant to pay the sum of $2,228.00 for publication costs and the special referee's fees in the partition sale, but this portion of the order was unrelated to the judgment entered in the partition accounting.

> that the amount paid in settlement by [Jack Gregory] to the Plaintiff [Sipes] shall not be charged against Ned Gregory as against his interest in the property, nor shall it be used as a set-off against Ned Gregory in the distribution of the proceeds of sale of the property herein, nor charged as a debt against Ned Gregory in any manner whatsoever.

[Order of May 27, 2006, in Case No. 2005-CP-29-141, p. 3.]

In October 2006, the appellant Gregory's attorney, James Irvin, Esq., delivered to Judge Cross a draft deed conveying the Lancaster properties, not to the appellant Jack Gregory but to The Gregory Company, Inc.[3] Judge Cross returned the executed deed to Mr. Irvin. The deed was held for nineteen months, then recorded on June 4, 2008. Respondent Ned Gregory filed Case No. 2008-CP-29-1084 on September 19, 2008, under the Statute of Elizabeth, seeking to void the deed to The Gregory Company, Inc., and placing title in the name of appellant Jack Gregory, subjecting the Lancaster properties to the judgments held by respondent.

On June 10, 2008, the Horry County Clerk of Court issued a Transcript of Judgment in the partition action in the amount of $45,087.47 against the appellant Jack Gregory.[4] By motion dated September 24, 2012, the appellant moved to reduce the amount of the judgment to take account of the offsets granted in the *ex parte nunc pro tunc* order of August 10, 2006.[5] The motion was heard on December 10, 2012 by the Honorable Cynthia Graham Howe, Master in Equity for Horry County. By order dated March 4, 2013, Judge Howe denied the motion. By motion dated April 1, 2013, the appellant moved for

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[3] The Gregory Company, Inc., a corporation wholly owned and controlled by the appellant, was his *alter ego*. *See*: *In re Gregory,* S.C. Supreme Court Op. No. 25135 filed May 3, 2000.

[4] This was the sum of the three amounts awarded to the respondent in the order of April 25, 2006. The Clerk failed to credit the appellant with the upkeep expense of $7,940.00 for gas tank removal awarded to him in that order.

[5] In addition to the offset for gas tank removal expense, $7,940.00, granted in the order of April 25, 2006, and the offset for property taxes allowed in the order of April 25, 2006, if proved, the appellant sought an offset for roofing expense of $13,500.00. [Motion of 9/24/12.]

reconsideration under Rule 59, SCRCP. The motion was heard on May 15, 2013. At the hearing, the respondent conceded that the judgment should be reduced by the amount of $7,597.03.

By order dated May 15, 2013, Judge Howe reduced the amount of the 2006 judgment against the appellant from $45,087.47 to $37,490.44, based upon the respondent's concession.

By motion dated April 1, 2013, the appellant again moved for reconsideration under Rule 59, SCRCP. By order dated October 17, 2013, the motion was denied.

The appellant Jack Gregory served notice of appeal of the order of October 17, 2013 on November 4, 2013.

Proceedings in the Statute of Elizabeth Case

The Statute of Elizabeth action was filed on September 19, 2008 by Ned Gregory, the respondent herein, against Jack Gregory and The Gregory Company, Inc., the appellants herein, to void the Master's deed of the Lancaster properties to The Gregory Company, Inc., placing title instead in the name of the appellant Jack Gregory and subjecting the properties to judgments held by respondent against the appellant.[6] The City of Lancaster was joined as a party defendant but was later dismissed. The appellants Jack Gregory and The Gregory Company, Inc., counterclaimed on various grounds.

By order of the Honorable Kenneth G. Goode, Presiding Judge of the Sixth Judicial Circuit, dated June 30, 2009, William C. Tindal, a member of the Bar of Lancaster County, was appointed special referee to enter judgment with finality. The case was tried before the special referee on September 26, 2012. By order dated April 13, 2013, the special referee entered judgment in favor of the respondent, voiding the conveyance to The Gregory Company, Inc., and ordering an auction sale of the Lancaster properties to satisfy

[6] In addition to the partition accounting judgment, respondent holds an Horry County judgment against the appellant in the amount of $3,060.00, entered May 27, 2006, in an unrelated matter.

the respondent's judgments against the appellant Jack Gregory.

By motion dated June 6, 2013, the appellants moved under Rule 59, SCRCP, to reconsider. By order dated October 31, 2013, Special Referee Tindal amended his earlier order so as to reflect the reduction in the amount of the partition accounting judgment as ordered by the Horry County Master in Equity on May 15, 2013.

Jack Gregory and The Gregory Company, Inc., served notice of appeal of the order of October 31, 2013 on November 6, 2013.

STATEMENT OF FACTS

The salient facts are recited in the Counterstatement of the Case.

The confusion which checkers the painfully protracted history of this litigation is perhaps unique. Much but not all of it arises from the appellant's effort to reconstruct to his advantage events of 2006 which were undocumented when they occurred, much less now. Some of it arises from the appellant's effort to claim credit for items never mentioned by him in 2006 or until these proceedings got underway in 2012. These items include the appellant's claim that, in 2006, he overpaid to the Horry County Master in Equity the interest due as a result of his year's delay in making good his successful bid on the partition sale of the Lancaster properties. These items also include his effort to transmute that interest payment, which had nothing to do with the appellant's contribution toward upkeep of the subject properties — the sole subject of the partition accounting judgment — into a credit against that judgment. But principally the confusion is generated by the appellant's sometime claim — seven years after the fact — that it was not the appellant personally but his corporation which was the successful bidder at the partition auction of the Lancaster properties.

These and other aspects of the facts of this matter will be discussed in the Argument section of this brief, below.

ARGUMENT

I.

The amount of the partition accounting judgment entered on April 25, 2006 was $45,087.47, less an offset of $7,940.00. The Order for Judgment permitted the judgment debtor to apply for a single further offset — property taxes for three years. The judgment debtor failed to move for such an offset. Instead, he presented *ex parte* to the Master in Equity a list of further offsets which he sought. The Master's order purporting to grant two of those items and rejecting the others was void. In the orders under appeal, the Master correctly determined that the principal amount of the judgment is found in the Order of Judgment of April 25, 2006.

Judgment in the partition accounting was entered against the appellant on April 25, 2006. The judgment consisted of three components: (1) Myrtle Beach rent of $20,900.00; (2) Lancaster properties upkeep of $21,959.47; and (3) partition action costs reimbursable to the respondent of $2,228. These three amounts total $45,087.47. Against this total the court found the appellant entitled to an offset for his contribution of $7,940.00 to Lancaster properties upkeep for removal of the gas tanks. Thus, the net amount of the judgment was $37,147.47.[7]

In what proved to be an imprudent indulgence to the appellant, the Master in Equity — having heard all the evidence offered in two hearings on the partition accounting — gave the appellant the opportunity to make a post-judgment showing of another contribution to the upkeep of the properties, not proved at trial. The Master allowed the appellant to apply for a single additional offset for any Horry County property tax payments made by him for three specific years.

Instead of gathering evidence of any such tax payments not offered at trial and then moving for the belated offset, the appellant approached the Master *ex parte* with a laundry

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[7] Much of the resulting confusion — and with it the opportunity for obfuscation — came from the fact that the order did not specify the amount of the judgment as a sum certain.

list of additional items claimed by him to have been contributed to the upkeep of the partitioned properties, not limited to the specified property taxes.[8] With no notice and no hearing, the Master issued a second order — the so-called "*nunc pro tunc*" order of August 10, 2006 — granting two additional offsets to the judgment entered on April 25, 2006. These were: (1) property taxes of $4,077.99; and (2) $13,500.00 for Lancaster roof repairs. Since no record of this *ex parte* conference exists, it is unknown what was said to the Master or shown to him. It is very safe to say, however, that the Master was not shown the Order of May 27, 2006 of Judge Goode, from which the $13,500.00 figure derived. That order provided:

> Now, Therefore, it is Ordered, Adjudged and Decreed that the amount paid in settlement by [Jack Gregory] to the Plaintiff [Sipes] shall not be charged against Ned Gregory as against his interest in the property, nor shall it be used as a set-off against Ned Gregory in the distribution of the proceeds of sale of the property herein, nor charged as a debt against Ned Gregory in any manner whatsoever.

[Order of May 27, 2006, in Case No. 2005-CP-29-141, p. 3.]

When respondent's attorney received word of the Order of August 10, 2006, respondent moved to alter or amend, but the order was never heard.

The *ex parte* so-called *nunc pro tunc* order was void.

The Fourth Circuit Court of Appeals described the limited function of a *nunc pro tunc* order in these terms:

> *Nunc pro tunc* literally means "Now for then." *Maksymchuk v. Frank,* 987 F.2d 1072, 1075 n. 2 (4th Cir.1993) (quoting 67 C.J.S. at 1 (1978)). We previously defined the doctrine as "'a procedure whereby a determination previously made, but for some reason improperly entered or expressed, may be corrected and entered as of the original time when it should have been, or when there has been an omission to enter it at all.'" *Id.* (quoting 67 C.J.S. at 2). The purpose of an order entered *nunc pro tunc* is to correct mistakes or omissions in

[8] The appellant sought offset for various other amounts not identified in this record. Appellant told Judge Howe: "I did hand up to Judge Cross a list of all the expenses that I had incurred . . . ." [Hearing of 12/10/12, p. 14.] "There was a lot more that I brought." [*Id.*, p. 16.] Appellant gave the Master "a whole list of things". [*Id.*, p. 51.]

> the record so that the record properly reflects the events that *actually took place.* It may not be used to retroactively record an event that never occurred or have the record reflect a fact that never existed. *See Ex parte Buskirk,* 72 F. 14, 20-21 (4th Cir.1896); *see also Rockingham Cnty. Dep't of Soc. Servs. v. Tate,* 202 N.C.App. 747, 751-52, 689 S.E.2d 913, 916-17 (2010). We explained long ago that "[t]he rule is now well established that *nunc pro tunc* orders cannot operate to modify orders theretofore made or to take the place of orders intended to be made but omitted. The courts can by such orders supply omissions in the record of what was actually done in the cause at a former time when it was under consideration, and by mistake or neglect not entered in the clerk's minutes or the court's records; but where the court has omitted to make an order which it could have made, and in fact intended to make, it cannot subsequently make the same *nunc pro tunc*, so as to make it binding upon the parties to the suit from the date when it was so intended to have been entered. . . ." *Buskirk,* 72 F. at 20-21. The passage of time has not altered the purpose and limitations of this rarely-used device. *See Maksymchuk,* 987 F.2d at 1075 n. 2.

Glynne v. Wilmed Healthcare, 699 F.3d 380, 383-84 (4th Cir. 2012). *See: Heins v. Heins,* 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001); *Ex parte Strom,* 343 S.C. 257, 264-65, 539 S.E.2d 699, 702-03 (2000):

> *Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. "A prerequisite for a *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record." *Dewees v. Sweeney,* 947 S.W.2d 861 (Tenn. Ct. App.1996), *app. den'd,* (1997); *see also Simmons v. Atlantic Coast Line R.R. Co.*, 235 F.Supp. 325, 330 (D.S.C. 1964) (*nunc pro tunc* entry cannot be made to serve the office of correcting a decision or of supplying non-action on the part of the court); *Carroll v. Carroll*, 338 S.W.2d 694, 695 (Ky. 1960) ("The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action."); 20 AM.JUR.2D *Courts* § 29 (1995) (the order cannot supply the record with action that the court failed to take).

In 2012 the appellant filed a motion to correct a "transcript of judgment" prepared by the Horry County Clerk of Court in 2008. Such a document is prepared to evidence the amount of a judgment for use in another venue or jurisdiction but has no power to change the actual judgment. In substance, the appellant's motion was to determine the principal

amount of the judgment against him, and only incidentally to correct the transcript thereof if inaccurate, and that is how the Horry County Master in Equity treated the motion.

The appellant has failed in his duty to supply a record sufficient for deciding the issues presented by failing to procure a transcript of the hearing of his Horry County motion or any of its Rule 59 reiterations. *See: Windham v. Honeycutt,* 290 S.C. 60, 348 S.E.2d 185, 187 (Ct. App. 1986) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). On appeal he relies upon a concession made by the respondent at one of his Rule 59 hearings. The order of judgment of April 25, 2006 explicitly granted to the appellant an offset of $7,940.00 for the contribution cost of gas tank removal. At the Rule 59 hearing on May 15, 2013, seven years later, the appellant claimed an additional offset for the amount of $7,597.03, charged him by the court as interest for his year-long failure to satisfy his bid for the Lancaster properties.[9] [Order of August 10, 2006; Appellant's Return dated 11/21/13 to Motion to Dismiss, p. 3: $7,597.03 was "to end the Lancaster sale."] This payment was wholly unrelated to any credit to which the appellant might have been entitled in the partition accounting as contribution to the upkeep of the jointly titled properties. Ironically, the respondent mistakenly conceded that the appellant was entitled to an offset in this amount.[10] Absent this mistaken concession, on no account would the appellant have been entitled to an offset against the partition accounting judgment for the interest he was required to pay, as purchaser at the Lancaster auction, on account of his delay in fulfilling his bid. That was a separate matter entirely. It would figure into the distribution of funds from the partition sale and the resulting accounting — *i.e.,* the ***sale*** accounting, not the ***upkeep contribution*** accounting. The appellant has presented no evidence of the sale

[9] Interest at the rate of 8.25% on half the successful bid for thirteen months was rounded to $7,597.03. *See* letter of May 22, 2006 from Clifford Welch, Ned's counsel, to Judge Cross.

[10] The number was similar to the $7,940.00 offset for gas tank removal, granted to the appellant in the Order of April 25, 2006.

accounting, as to which there has been no challenge at any time.

Thus, the appellant benefits from a mistaken concession of an amount to which he had no claim for offset — but approximately equal to his contribution of gas tank removal expense, granted in the Order of April 25, 2006.

II.

The appellant's assignment to his wholly owned corporation of his right to take title to the Lancaster properties was voidable under the Statute of Elizabeth. The deed to the corporation was properly voided. Title was properly placed in the appellant personally and subjected to the claims of his judgment creditor.

The appellant's principal claim against the orders issued in the Lancaster County Statute of Elizabeth action is that the 2006 Horry County judgment is "non-final", so that the court in the Statute of Elizabeth action erred in relying upon the Horry County court's determination of the principal amount of that judgment.

The Horry County judgment of 2006 is as final as a judgment can get. *See: Bone v. U.S. Food Services, Inc.,* 404 S.C. 67, 78, 744 S.E.2d 552, 558-59 (2013). Moreover, the respondent holds a second judgment against the appellant which is undisputed in amount. This judgment, too, is unpaid, and the appellant lacks the ability to satisfy this judgment, either. The Statute of Elizabeth court could have set aside the fraudulent conveyance to appellant's corporation solely in reliance upon this undisputed judgment without regard to the larger partition accounting judgment.

The appellant switches back and forth in his brief between whether he personally was the successful bidder[11] at the partition sale in 2006 or whether his corporation was. The only evidence is that the appellant Jack Gregory was the successful bidder. The Horry County order for auction specified that if a third party were the successful bidder, it would

[11] For example, "Appellant was the highest bidder and subsequently assigned his bid to his corporation . . . ." [Brief at 6.] The special referee "was correct in stating 'Mr. Jack Gregory bid in the Lancaster County property at the sale . . . .'" [Brief at 22.]

be required to make a deposit of 5% and pay the balance in thirty days, but if either of the parties to the auction were successful, no deposit would be required. Jack Gregory was the successful bidder. He offered no deposit, and none was required. The special referee who conducted the auction reported to the court that Jack Gregory **bid in** the property.[12] [Folks report.] The appellant states in his brief that this report was correct. [Brief at 2.] The appellant's attorney averred that the appellant was the successful bidder and had assigned his bid. [Irvin affidavit, 11/8/06.] When the appellant failed for eleven months to satisfy his successful bid, the court found that he had failed to do so and ordered re-auction. When the appellant immediately made good his bid (with a check from his wholly owned corporation), his attorney prepared and submitted to the court a deed reciting that the appellant was the successful bidder and that he had assigned his bid to his corporation. [Deed.] This version of what happened — which is the correct one — is found at various points in the appellant's brief.

It was of course the appellant's goal to avoid receiving title to the Lancaster properties which he had purchased at the partition auction so as to shield those assets from the judgments against him. Thus, the assignment was fraudulent, as was causing the court's deed to be issued to the corporation rather than to the appellant.

The Lancaster court committed no error in setting aside the assignment and the conveyance, and placing the property in the name of appellant Jack Gregory.

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12 **BID.** * * *
—**Bid in.** Property sold at auction is said to be "bid in" by the owner or an incumbrancer or some one else who is interested in it, when he attends the sale and makes the successful bid.

BLACK'S LAW DICTIONARY 205 (4th ed. 1951). *See, e.g., Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973).

III.

A plaintiff who commences an action to void a deed to real estate under the Statute of Elizabeth is statutorily permitted to file a *lis pendens.*

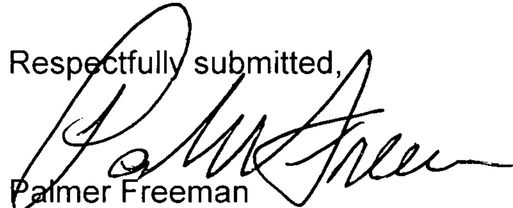
When the respondent commenced the Statute of Elizabeth action, he filed a *lis pendens* inaccurately styled a "Third Lis Pendens". This was not the third but the first and only *lis pendens* filed in the Statute of Elizabeth action. The misnomer can be attributed to the fact that two *lis pendens* had been filed in the partition action, years earlier.

A *lis pendens* is properly filed in connection with an action to set aside a conveyance under the Statute of Elizabeth. *Lebovitz v. Mudd,* 293 S.C. 49, 398 S.E.2d 698 (1987). The fact that the label attached to the document was partly inaccurate is of no consequence.

CONCLUSION

For the foregoing reasons, the respondent asks the Court to affirm the Order and Judgment entered April 30, 2013 by Special Referee Tindal, finding the transfer of the subject property to appellant Gregory's corporation to have been in violation of the Statute of Elizabeth, and further to dismiss the appeal of the orders of the Horry County Master in Equity.

Respectfully submitted,



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