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Practice and Procedure—Nunc Pro Tunc Order—Function and Nature—When Entered

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v. South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559. Obviously none of the above cases are like the principal case. The only similar case found is Higgins v. California Petroleum Co., 109 Cal. 304, 41 Pac. 1087, but in that case while there was a lease by two landowners, it does not appear that the area of each parcel was the same. The court held there was a presumption that the royalties were to be divided equally and this was supported by the fact that the parties had so interpreted the contract up to the time of the dispute. Since it does not appear that the parcels were equal in area the rule laid down is not the same as that of the principal case which divided the royalty in proportion to the areas of the several tracts. It is submitted that since the lessee in the principal case has the right to develop any part of the entire tract and cannot be compelled to protect any particular parcel from drainage the conclusion reached by the court is sound.

Practice and Procedure—Nunc Pro Tunc Order—Function and Nature—When Entered. — In a proceeding, by way of motion, for execution on a forthcoming bond, the plaintiff had judgment below and a writ of error was awarded to the defendant. The defendant appeared for the purpose of making a motion to set aside the verdict and to grant him a new trial, but the court, being engaged in other matters, did not entertain such motion, or direct any order to be filed, or pass upon or file the motion. At a subsequent term, the court entered a nunc pro tunc order filing the motion for a new trial, overruling the same, and showing the defendant's exceptions. Held, that the writ of error granted by the lower court be dismissed on the ground that a nunc pro tunc order cannot be entered to make the action of the court speak as of a date different from the day upon which such action took place. Payne v. Riggs, 92 S. E. 133 (W. Va. 1917).

The power of courts to make entry of orders or judgments nunc pro tunc has been exercised from the earliest times. Weatherman v. Commonwealth, 91 Va. 796, 22 S. E. 349. The function of a nunc pro tunc order is to make the record of the court speak the truth. Payne v. Riggs, supra; O'Sullivan v. People, 144 Ill. 604, 32 N. E. 192. At common law, the judge might, while the proceeding was in the breast of the court, amend the record so as to make it truthfully set forth what had occurred, but this could not be done after the term at which final judgment was rendered. This rule resulted in such hardship that relief was given by early English statutes, which are the sources of our practice as to nunc pro tunc orders. See 17 Ency. Pl. and Pr. 919. A nunc pro tunc entry is a present entry of something which was actually done previously, but to have effect as of the former date. The principal case shows that its office is not to supply omitted action of the court, but only to supply an omission from the record of action already had, which was omitted from the record through inadvertence or mistake. Perkins v. Haywood, 132 Ind. 95, 31
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N. E. 670. This is true whether the omitted action was discretionary or mandatory. Lindauer v. Pease, 192 Ill. 458, 61 N. E. 454; Wilson v. Vance, 55 Ind. 394; Klein v. Southern Pac. Co., 140 Fed. 213; see 29 Cyc. 1516. A formal judgment rendered, but not entered because of negligence or mistake of the clerk, may be entered by a nunc pro tunc order at a subsequent term of court, provided the evidence of the rendition thereof is sufficient. Schoonover v. Baltimore and Ohio R. R. Co., 69 W. Va. 560, 73 S. E. 266; Vance v. Railway Co., 53 W. Va. 388, 44 S. E. 461. In West Virginia the rule is the same when the unrecorded motion was on a preliminary question. Scott v. Newell, 69 W. Va. 118, 70 S. E. 1092. A nunc pro tunc order is valid to supply a failure of the court's records to show that a motion was made, entertained and continued, where the order shows appearance of the parties, and argument therein, and there is nothing to contradict the facts so certified by the court. Cole v. State of West Virginia, 73 W. Va. 410, 80 S. E. 487; Stampfle v. Bush, 71 W. Va. 659, 77 S. E. 283; Vance v. Railway Co., supra. The above cases show that there are but two classes of cases where nunc pro tunc orders are entered: (1) Where an order was in fact made, or some action taken by the court which was not at the time formally entered of record, and (2) where the party litigant was entitled to have certain relief at a particular date, and the failure to grant it at that time was due to some delay or omission upon the part of the court. The authorities are very discordant concerning what evidence will justify the court in finding that previous judicial action had been taken. The courts of Alabama, and Missouri adhere firmly to the rule that an entry nunc pro tunc can only be made upon showing some entry or memorandum in or among the records, or quasi-records of the court, and that parol evidence cannot be received. Ex Parte Jones, 61 Ala. 399; Evans v. Fisher, 26 Mo. 541. This rule prevails in other states. Hegeler v. Nenckel, 27 Cal. 491; Adams v. Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191; Cairo, etc. R. R. Co. v. Holbrook, 72 Ill. 419; Ludlow v. Johnson, 3 Ohio 553, 17 Am. Dec. 609. On the other hand, some authorities hold that an entry may be made nunc pro tunc on any satisfactory evidence. Frink v. Frink, 43 N. H. 508; Rugg v. Parker, 7 Gray 172; Weed v. Weed, 25 Conn. 337; Miller v. Royce, 60 Ind. 189; Bobo v. State, 40 Ark. 224. The West Virginia court appears to agree with the latter cases, and will enter a nunc pro tunc order upon any competent legal evidence. Cole v. State, supra. Upon consideration of the function and nature of nunc pro tunc orders, the principal case appears to be sound in principle and in accord with the weight of authority.

TRESPASS — CUTTING TIMBER — DAMAGES — INNOCENT CONVERSION. — In an action of trover for the conversion of standing timber, which the defendant had manufactured into lumber, it was found that the trespass was committed under a bona fide claim of