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Trespass--Cutting Timbers--Damages--Innocent Conversion

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. 338, 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

title. *Held,* that the damages were "the value of the trees as they stood immediately before they were severed from the land." *Wood* v. *Weaver,* 92 S. E. 1001 (Va. 1917).

Where timber trees are converted *bona fide* and their value thereby enhanced, the proper measure of damages in an action of trover is in dispute. The great weight of authority is in accord with the principal case in holding that the measure of damages is the stumpage value. *Gates* v. *Rifle Boom Co.,* 70 Mich. 309, 38 N. W. 245; *Whitney* v. *Huntington,* 37 Minn. 197, 33 N. W. 561; *Ross* v. *Scott,* 15 Lea (Tenn.) 479; *Wooden-ware Company* v. *United States,* 106 U. S. 432. The same has been held in West Virginia in an action of trespass. *Darnell* v. *Wilmoth,* 69 W. Va. 704, 709, 72 S. E. 1023. In accordance with the same rule, the weight of authority holds that where ore or coal are converted by a *bona fide* trespasser, the measure of damages is the value of the ore or coal in place before severance. *Chamberlain* v. *Collinson,* 45 Ia. 429, 436; *Stockbridge Iron Co.* v. *Cone Iron Works,* 102 Mass. 80, 86; *Keys* v. *Pgh. & W. Coal Co.,* 58 Ohio St. 246, 50 N. E. 911; *Forsyth* v. *Wells,* 41 Pa. 291, 294; *Coal Creek M. & M. Co.* v. *Moses,* 15 Lea (Tenn.) 300. The same has been held as to oil. *Dyke* v. *National Transit Co.,* 22 App. Div. 360, 49 N. Y. Supp. 180. Some states determine this value in the case of coal by the usual royalty paid. *Lyons* v. *Central Coal and Coke Co.,* 239 Mo. 626, 144 S. W. 503. These holdings as to *bona fide* conversion of timber, coal, ore and oil are in accord with the principle that damages should be only compensation for loss suffered. See 1 SUTHERLAND, DAMAGES, 4 ed. §12. The action of trover is for convenience, and not to enable the plaintiff to recover an unjust amount where the defendant is innocent. *Forsyth* v. *Wells,* 41 Pa. 291. The doctrine of quasi-contractual recoupment, which allows the innocent converter the value of his services not in excess of the resulting increase in the value of the property gives a satisfactory theoretical basis for this result in actions of trover and prevents a conflict with the rule that the measure of damages in actions of trover is the value at the time and place of conversion. *Dartmouth College* v. *International Paper Co.,* 132 Fed. 92. Some states hold to the technical view that since there can be no conversion until there has been severance from the realty, therefore the damages for innocent conversion must be fixed as of that time. In accordance with this view, a minority of states hold the measure of damages, where trees are cut by an innocent trespasser, is their value immediately after severance. *White* v. *Yawkey,* 108 Ala. 270, 19 So. 360; *Stearns Coal & Lumber Co.* v. *Boyatt,* 168 Ky. 111, 181 S. W. 962; *Moody* v. *Whitney,* 38 Me. 174, 61 Am. Dec. 239; *Wall* v. *Holloman,* 156 N. C. 275, 72 S. E. 369; *Beede* v. *Lamprey,* 64 N. H. 510, 115 Atl. 133, 10 Am. St. Rep. 426. But in these cases, the plaintiff is not permitted to recover for increased value from transportation. *Wright* v. *Skinner,* 34 Fla. 453, 463, 16 So. 335; *Beede* v. *Lamprey,* 64 N. H. 510, 15 Atl. 233, 10 Am. St. Rep. 426. In accordance with the

same view, the measure of damages for innocent conversion of coal has been held to be its value after severance from the realty. *Ivy Coal & Coke Co.* v. *Alabama Coal &Coke Co.,* 135 Ala. 579, 33 So. 547; *McLean County Coal Co.* v. *Lennon,* 91 Ill. 561, 33 Am. St. Rep. 64. There are several objections to the minority view of the measure of damages for *bona fide* conversion of lumber or coal. First, it is contrary to the fundamental principle that the damages allowed should not exceed compensation for the injury sustained. *Forsyth* v. *Wells, supra;* see 1 SUTHERLAND, DAMAGES, 4 ed. § 12. Second, the plaintiff is unjustly enriched, while the defendant is deprived of improvements made *bona fide.* Dartmouth College v. *International Paper Co.,* 132 Fed. 92; see 18 HARV. L. REV. 305. Third, "although the defendant's wrongful act was in reality a trespass upon real estate, the plaintiff recovers a greater amount than the damage to the realty, and a greater amount than he could recover in an action of trespass." See SEDGWICK, DAMAGES, 9 ed. § 500. This is recognized in the following cases: *White* v. *Yawkey,* 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; *Omaha G. S. & R. Co.* v. *Tabor,* 13 Colo. 41, 21 Pac. 925, 930, 16 Am. St. Rep. 185; *Skinner* v. *Pinney,* 19 Fla. 42, 49, 45 Am. Rep. 1; *Foote* v. *Merrill,* 54 N. H. 490, 20 Am. Rep. 151. Where conversion is by a wilful trespasser, the authorities are practically unanimous in following the *dictum* in the principal case that the plaintiff is entitled to the value of the trees in their improved state. *Smith Timber Co.* v. *Auld,* 218 Fed. 824; *Cummings & Co.* v. *Masterson,* 42 Tex. Civ. App. 549, 93 S. W. 500; *Bailey* v. *Hayden,* 65 Wash. 57, 117 Pac. 720, 721; *Wooden-ware Co.* v. *United States,* 106 U. S. 432; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 293. The same rule has been applied to coal. *Sunnyside Coal and Coke Co.* v. *Reitz,* 14 Ind. App. 478, 43 N. E. 46, and also as to ore. *Patchen* v. *Keelley,* 19 Nev. 404, 14 Pac. 347. If the conversion is wilful, the defendant's *mala fides* prevents his securing any right of recoupment on quasi-contractual grounds for increase in value from his efforts and permits the technical rule as to damages in trover to apply. *Dartmouth College* v. *International Paper Co., supra;* see 20 HARV. L. REV. 227; 18 HARV. L. REV. 305. Since a wilful converter makes improvements knowingly, he takes the risk of losing his labor.