

Fuentes Vs. United States

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Appellant : Fuentes

Respondent : United States

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Fuentes v. United States - 63 U.S. 443 (1859)

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Fuentes v. United States

63 U.S. (22 How.) 443

APPEAL FROM THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLLABUS

A petition was presented to the board of commissioners in California, claiming the confirmation of a title to land, which petition alleged:

1. That a grant had been issued by Micheltorena, and delivered in June, 1843.
2. That it was recorded.
3. That it was not to be found in the archives, because the record had been burned.
4. That the grant was approved by the departmental assembly, but that the record of such approval had been burned.
5. That therefore the claimant could not produce any evidence that the grant had been so approved.

The secondary evidence offered does not prove the existence of such records, nor their destruction. The recital in the grant is not sufficient evidence of this.

The paper produced by the claimant, purporting to be a grant, must therefore be judged by itself. There was no evidence that it had been preceded by the usual formalities, such as a petition, an examination, an inquiry into the character of the applicant, an order for a survey, a reference to a magistrate for a report, a transmission of the grant to the departmental assembly, nor was there an expediente on file.

Where these requirements do not appear, a presumption arises against the genuineness of the grant, making it a proper subject of inquiry before that fact can be admitted.

The evidence produced in this case does not establish the genuineness of the grant.

There is also an absence of all proof that the grant had been delivered to the grantee, then a minor, or to anyone for him. If the grant was genuine, and not delivered until after the cession of California to the United States, it would not give the grantee any right to claim the land.

A recital in the paper or grant, that the prerequisites had been complied with, is not sufficient ground for a presumption that they had been observed.

The cases decided heretofore by this Court do not support the position.

These cases examined.

If the conditions imposed by the grant were conditions subsequent, yet the grantee allowed years to pass without any attempt to perform them until a change of circumstances had taken place, which amounts to evidence of an abandonment.

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The nature of the title, and evidence in support of it, are stated and commented on in the opinion of the Court, and need not be repeated.

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MR. JUSTICE WAYNE delivered the opinion of the Court.

The appellant has come to this Court asking for a confirmation of his claim to eleven leagues of land, called Potrero. The paper under which he claims the land purports to be a grant from Governor Micheltorena. It recites that the land is within the ex-mission of San Jose, bounded on the north by the locality called the Warm Springs, on the south by Palos, on the west by the peak of the hill of the ranchos Tulgencio Higuera and Chrysostom Galenda, and on the east by the adjoining mountains. It also recites that the governor had taken all the necessary steps and precautionary proofs which were required by the Mexican laws and regulations for granting lands, and that he had granted the land upon the following conditions to the appellant:

1. That he should enclose it without prejudice to the crossways, roads, and uses; that he shall have the exclusive enjoyment of it, and apply it to such use and culture as may best suit his views.

2. That he should apply to the proper judge for judicial possession of the same, by whom the boundaries shall be marked out, and along which landmarks should be placed to designate its limits, and that fruit and forest trees shall be planted on the land.

3. That the land given should contain eleven leagues for large cattle, as is designated by a map said to be attached to the expediente. The land is to be surveyed according to the ordinance, and should there be an overplus, it was to inure to the benefit of the nation.

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The title is to be recorded in the proper book, and then to be delivered to the petitioner for the land, for his security. This paper bears date the 12th June, 1843, and has the name of Micheltorena to it, which is denied to be his signature.

The first inquiry, then, concerning it, should be into its genuineness. Was it executed by Governor Micheltorena? Has the party claiming proved it?

The testimony introduced in support of the genuineness of the paper is to be found in the depositions of Zamon De Zaldo, Jose Abrego, Manuel Castro, and Joseph L. Folsom. Zaldo declares himself to be chief clerk and interpreter to arrange and classify the Spanish and Mexican archives in the custody of the Surveyor General of California. He was not interrogated as to the signature to the paper, and says nothing about its having been executed by Micheltorena. He was asked what he knew of the book of land titles of the Mexican government for the year 1843. He answers that he knew that a book for the year 1843 was not in the office, though he did not know of his own personal knowledge that such a book ever existed, and that all that he did know about it had been learned from a correspondence in the office, that such a book belonging to the archives had been in the possession of J. L. Folsom, United States quartermaster at the time, and that he had learned, in the same way, that it was destroyed with Folsom's papers by the fire in San Francisco of 1851. Folsom states that a book of records, containing grants of land in Upper California, had been put into his possession in the spring of 1851, to be used as

evidence in the suit of *Leese & Vallejo v. Clark*, then pending in the Superior Court of the City of San Francisco. It was in the Spanish language, and came from the archives of the Mexican government of California, then in the possession of the commanding general at Benicia, and was delivered to him as an officer of the army, for safekeeping. He adds: after the book was used as evidence, it was returned to me, and was deposited in my office in the City of San Francisco, and whilst there, the great fire of the 3d and 4th May, 1851, occurred, by which my office and its contents, including the said book, were destroyed. And he then concludes

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his deposition, saying:

"I am not positive as to the date of the grants contained in the said book, but from my best recollection, my impression is that they were for the years 1843 and 1844."

The purpose for which Zaldo and Folsom were made witnesses for the claimant was to connect the book which Zaldo said was not among the archives with the book which Folsom said had been burned, that it might be inferred, from the date of the paper upon which Fuentes rests his claim, that it had been recorded in that book. It is stated in the petition that the grant was issued and delivered in due form of law on the 12th June, 1843; that it was recorded at the time it was issued; that it was not to be found in the archives; and that he believes that the copy of the grant was burned, and on that account could not be produced. It is further stated, that the grant had been approved by the territorial legislature, and was in all respects formally completed according to law, but that the records of the legislature for the year 1843 were in like manner destroyed by fire at the same time with the record of the grant, and that the claimant could not produce any evidence of the approval of the grant by the legislature. In this recital from the petition we find a very exact anticipation of what the evidence ought to be, to prove that such a grant had been issued, and that it had been duly recorded, but none such was introduced. Zaldo believes, from a correspondence in the office, that a book belonging to it had been

burned while it had been in the safekeeping of Folsom. Folsom says a book from the archives was burned, but that he cannot be positive as to the date of the grant in it, but that from his best recollection his impression was, the grants in it were for the years 1843 and 1844; and Zaldo declares that he had no personal knowledge that such a book ever existed, but adds, that there is wanting in the office a book for the year 1843. This falls far short of the evidence which was necessary to connect the alleged grant with the archives of the office. There is no other evidence in the record to supply such deficiency. And it is admitted now that the paper was never sent to the departmental assembly.

In truth, between that burned book and the Fuentes paper,

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the testimony in the record makes no connection whatever. The mere declaration that it was dated in 1843 cannot do so. Nor can any implication of the kind be raised from the testimony of Abrego and Castro. Neither of these witnesses was interrogated concerning the burned book, nor was any attempt made to prove that any of the records of the departmental assembly, *especially its approval of this grant*, had been burned at the same time. What has been said of the insufficiency of the evidence to prove the record of the paper applies with equal force to the certificate which is alleged to have been given by Jimeno, that the paper set out in the petition as a grant had been recorded in the proper book, which is used in the archives of the secretary's office.

The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the Act of Mexico of the 18th August, 1824, or with the regulations of November 28, 1828. It is deficient in every particular -- unlike every other case which has been brought to this Court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant

-- supposing it to be such -- to the departmental assembly or territorial legislature, for its acquiescence; nor was an expediente on file in relation to it, according to the usage in such cases.

All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the departmental assembly, for its action upon the grant. The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed,

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particularly in a case where the archives do not show any record of such a grant.

The act 1824 and the regulations of 1828 are limitations upon the power of the governor to make grants of land. They are, and were also considered to be, directions to petitioners for land, before they could get titles. Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded. We proceed to state what they are in the record.

None can be found to establish with a reasonable probability the genuineness of the paper upon which the claimant relies. The only testimony bearing upon the genuineness of the paper is that of Abrego and Castro. Both speak of the signature of Micheltorena, and no further. Abrego says that he knew the governor; that he had frequently seen him write, and that he had examined the signature to the document presented to him, and that he knows it to be the signature of Governor Micheltorena.

Castro is more particular, but not so positive, and he gives a narrative of the origin of the paper, which is certainly peculiar, and from which a reasonable suspicion

may be indulged against his disinterestedness. He says:

"An instrument in writing is now shown to me, purporting to be a grant Jose Maria Fuentes, dated June 12, 1843, and it is attached to the deposition of Jose Abrego, heretofore taken in this case, and marked H.J.T., No. 1. I know the paper; it is in my handwriting. I was at the time secretary in the prefect's office in Monterey, and being on terms of friendship with Secretary Jimeno and Mr. Arce, a clerk in his office, I frequently assisted them in their official duties, at their request, and in that manner I wrote the body of this grant. It was written in June, 1843, at the time of its date. I know the signature of Micheltorena; and the signature purporting to be his *appears*

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like his; and the signature of Jimeno on said paper also appears like his. "

The words of the witness have been given.

The signature of Jimeno, of which Castro speaks, purports to be a certificate from Jimeno that the grant had been recorded, the day after its date, in the proper book of the archives of the secretary's department. It is upon the same paper with the title, and purports to have been put upon it by the order of the governor, "that the title might be delivered to the party interested, for his security and ulterior ends."

Abrego, in a second deposition, says he knew Fuentes and his family, and that he was not of age, but was a minor, on the 7th July, 1846 -- more than three years after the date of the grant.

Such is all the testimony in this record to prove the genuineness of the signature of Micheltorena, unless it be the notarial certificate, given under the seal of the national College in the City of Mexico, which, as it is presented in this case, is not evidence, and of no account at all.

We will now show that the testimony of Abrego to the signature of Micheltorena is insufficient to establish that fact, and that Castro's deposition gives to it no aid. In truth, the whole case has no other evidence in support of the genuineness of the

signature of the governor than what Abrego has said. In showing this, we shall have no occasion to impeach his character as a man, or his truthfulness as a witness, as there is nothing in this record, whatever there may be in others, to justify such an attack. The case must be decided upon what its own record contains, and upon nothing else.

Abrego's deposition has not that foundation which the rules of evidence require a witness to have, to enable him to prove the genuineness of an official signature to a public document, or a signature to a private writing. The document in this instance purports to be genuine; but whether so or not, it discloses the fact that there is upon it an official witness of its execution and record, who should have been called to prove it, if he was living, and if absent beyond the jurisdiction of the court, whose signature should have been proved by a witness who was familiar with his signature and handwriting, before

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secondary evidence could be received of his own signature, or that of the official who is said to have executed the paper.

It was the duty of Jimeno to record all grants which were made by the governor, and to give attestations of that fact, and which it is said Jimeno did give to the paper in this instance. Why was not Jimeno called? It seems that he was overlooked or not thought of.

The simplest and best proof of handwriting is the testimony of one who saw the signature actually written, and inferior evidence as to his handwriting is not competent until it has been shown that his testimony to the execution of the paper could not have been procured. And when a document, either public or private, is without a witness, the best evidence to disprove the signature, and to prove it forged, is the testimony of the supposed writer, if he be not incompetent from interest, and can be produced. In the latter case, the next best evidence is the information of persons who have seen him write, or been in correspondence with him.

Such, however, is not this case, though it was acted upon in the court below as if it was so.

Abrego here, then, is in the attitude of an incompetent witness, who was called and permitted to testify before the party by whom he was introduced, had laid a foundation for the next best evidence, when the paper submitted to him showed the fact that the better could have been had, either primarily or secondarily, in the manner we have already indicated. Abrego swears that he knew Micheltorena; that he had frequently seen him write; that he had examined the signature to the document presented to him, and that he knew it to be the signature of governor Micheltorena. But had Secretary Jimeno been called as a witness, as it was his official duty to test the signature of the governor to grants, his would have been the best testimony to prove its genuineness in this instance, and that the grant had been transferred to him officially, for delivery to the grantee.

Castro's deposition is in the same predicament with that of Abrego but with an aggravation of its insufficiency to prove the signature of Micheltorena, and of his incompetency as a

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witness. He was not asked if he knew Micheltorena, or was familiar with his handwriting or with his signature, or if he had ever seen him write. He only says: I know the signature of Micheltorena, and the signature to the paper appears like his, and the signature of Jimeno appears like his. He does not say how he had become qualified, by comparison or otherwise, to swear to the signature of Micheltorena; and notwithstanding his declared friendship with Jimenoso much so, that he was frequently asked to assist him in the duties of his office, and particularly asked to write out in his own hand the paper in question -- he has left it to be inferred that he only knew enough of Jimeno's handwriting to enable him to say that the signature to the grant which he wrote out in his own hand appears like Jimeno's signature.

If such was the way of doing business in the secretary's office, which we have no cause for believing, it must have been an easy matter to get from it such a paper as that now in question, and not at all difficult to have been accomplished by one who had such familiar access to the office as Castro represents himself to have had, especially if all of the prerequisites of a grant enjoined by the act of 1824 and the regulations of 1828 were allowed to be disregarded.

This narrative of De Castro, instead of bringing the mind to any conclusion in favor of the genuineness of the signatures of Micheltorena and Jimeno, rather suggests caution in receiving it, and that it ought to be corroborated by other witnesses before that shall be done. It seems to us, too, somewhat remarkable that this witness, familiar as he was with the origin and object of this paper prepared by himself, should not have been questioned concerning its delivery to Fuentes, then a minor, to whom it was delivered for him, or what was done with it at the time of its date, or in whose possession it was from that time until it was presented to the land commissioners for confirmation, in 1852.

There is entire absence of all proof of its having been delivered to Fuentes himself, or to anyone for him; but it seems to have found its way to the City of Mexico, as the record shows, and reappears in California years after its cession to

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the United States, and more than eight years after it is said to have been executed. The assertion in the paper itself, that the governor had directed it to be delivered, can be no proof of that fact, until its genuineness shall have been ascertained. If the minority, too, of Fuentes is considered, in connection with the conditions upon which this grant is said to have been made, it may well be inferred that it was not delivered to the grantee, as he was not then in a situation to carry out the conditions of the grant, without the intervention of a tutor or guardian, and nothing was done to perform those conditions at any time afterward.

We do not speak now of such nonperformance as a cause sufficient for denying a right claimed under a genuine grant; but only as a fact in this case accounting for

the nonperformance of the conditions of the grant, and making it probable that Fuentes did not receive this paper until some time after its date from Micheltorena, and not until after the cession of California to the United States. A delivery after the latter event, by a former Governor of California, would not give a grantee a right to claim the land by any obligation imposed upon the United States by the Treaty of Guadalupe Hidalgo.

We have given to this case a very careful examination, and have concluded that no evidence can be found on its record to sustain the genuineness of the paper under which the land is claimed. That there is none to prove its registry in the archives of the secretary's office, at the time of its date or afterwards. That no reliable proof has been given to connect it with the book of records, which had been committed to the care of the witness, Folsom, and was burned in his office. That it does not appear that anyone of the precautionary requirements, before a grant of land could be made by a Governor of California, had been complied with in this case. That there is no proof whatever that such a paper as that in question had been delivered to the claimant at any time before the power of Mexico in California had ceased; and it was admitted, in the argument of the case here, that no such paper had been sent to the departmental assembly for its acquiescence, as a grant from the governor.

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It was, however, urged in the argument, that such prerequisites for a grant of land should be assumed to have been observed, on account of a recital in the paper or grant that they had been. Several cases from the reports of this Court were cited, being supposed by counsel to support the position. None of them do so. We have not been able to find a case reported from this Court, either under the Louisiana or Florida cession, that does. [Peralta's Case](#), 19 How. 343, does not do so. The decision there is that when a claimant of land in California produced documentary evidence in his favor, *copied from the archives in the office of the Surveyor General*, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There, the authenticity of the

documents was admitted, and the validity of the petitioner's title was not denied, on the ground of any want of authority of the officers who made the grant. This Court then said, that the public acts of public officers, importing to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

In the case of [Minturn v. Crommelin](#), 18 How. 88, it was ruled that when a patent for land has been issued by the officers of the United States, the presumption is in favor of its validity, and passes the legal title, but that it might be rebutted by proof that the officers had no authority to issue it, on account of the land not being subject to entry and grant. In [Delassus' Case](#), 9 Pet. 117, [34 U. S. 133](#), the inquiry was, whether the concession was legally made by the proper authority; but the concession, being in regular form, carried *prima facie* evidence that it was within the power of the officer to make it, and that no excess or departure from instructions should be presumed, and that he who alleges that an officer entrusted with an important duty has violated it, must show it. But there was no question in that case about the genuineness of the concession. That was admitted. The genuineness of the grant in *Arredondo's case*, 9 Pet. was not questioned. Nor was the genuineness of the patent in [Bagnet's Case](#), 13 Pet.

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437, a subject of controversy. This Court ruled in that case that a patent for land from the United States was conclusive in an action at law, and that those who claim against it must do so on the equity side of the court. It is not, however, to be supposed that no title in California can be valid, which has not all of the preliminary requirements of the act of the Mexican Congress of 1824, and of the regulations of 1828. But if none of them are to be found in the archives, and it cannot be established by the proof that they were registered there, this Court will not presume that they were preliminary to a grant, because the governor recites in the grant that they had been observed. In what we have said upon this point, we are reaffirming this Court's opinion in [Cambuston's Case](#), 20 How. 59. And we now take this occasion to repeat that when it shall appear that none of the preliminary steps for granting land in California have been taken, this Court will not confirm

such a claim. For the reasons already given, we shall affirm the decree of the district court in this case.

But we also concur with that court in its rejection of this claim, supposing it to be genuine, upon the ground that there was no proof of a survey or measurement of this land, or any performance of its conditions, from which it may be inferred that the grantee had abandoned his claim. It is said that these were conditions subsequent, the nonperformance of which do not necessarily avoid the grant. This is the case as to some of them, but even as to such, when a grantee allows years to pass after the date of his grant without any attempt to perform them and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it, to the United States, such a delay is unreasonable and amounts to evidence that the claim to the land has been abandoned, and that a party under such circumstances, seeking to resume his ownership, is actuated by some consideration or expectation of advantage, unconnected with the conditions of the grant, which he had not in view when he petitioned for the land, and when it was granted. The language just used was suggested in the *Fremont Case*. The

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occasion has arisen in this case, when it becomes necessary to affirm it as a rule, to guide us in all other cases hereafter which may be circumstanced as this is.

The decree of the district court in this case is affirmed.