Mcphaul Vs. Lapsley

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Appellant : Mcphaul

Respondent : Lapsley

Judgement :

McPhaul v. Lapsley - 87 U.S. 264 (1873)
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McPhaul v. Lapsley

87 U.S. (20 Wall.) 264

ERROR TO THE CIRCUIT COURT FOR

THE WESTERN DISTRICT OF TEXAS

SYLLABUS

1. An affidavit filed under the Act of the Legislature of Texas approved May 13, 1846 -- requiring an affidavit as to the fraudulent character of an instrument of writing, properly recorded and filed among the papers of the cause, the purpose of

requiring the affidavit being to relieve the party meaning to offer the instrument introduced from the burden, after be has filed it among the papers in the cause, of proving its execution unless the other side swear that it is a forgery -- is properly rejected when not filed within the time prescribed by the act.

2. A testimonio executed, in 1832, by the proper Mexican authorities, of a power of attorney for the conveyance of lands is within the recording acts of Texas.

3. Such a testimonio, under Spanish law and the adjudications of the Supreme Court of Texas, is considered as a second original, and of equal validity with the first, and is admissible in evidence though not recorded.

4. Evidence of a person who was not the keeper of the archives nor in any way officially connected with the office to which they belonged, and which was offered to prove that such a testimonio was not a copy of the protocol (this not being produced), though the witness had in his hand photographs of certain pages of the protocol which did conform in other respects than that of signature and date with the testimonio, and when it was not offered to follow the evidence up in any way, *held* properly rejected, the testimonio being more than forty years old, much litigation having existed on the title made under it; it never having been previously questioned; it having been received in a former case, by this Court, as valid, and important rights having grown up on the faith of it; and the instrument being now questioned not by the parties to it, but by a defendant setting up a hostile title which he failed to establish.

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The State of Texas has made a succession of statutes on the subject of recording instruments relating to the titles of real estate. They are thus:

1. An Act of 20 December, 1836, after requiring all persons who claim lands by deed, lien, or any other color of title, to record their instruments of title in the clerk's office of the county where the land lies within twelve months from the 1st April, makes it, by the thirty-fifth section, the duty of the clerk to record all deeds,

conveyances, mortgages, and other liens and all other instruments in writing, provided that one of the witnesses shall swear to the signature of the *signer,* or *he, himself, shall acknowledge the same.*

The fortieth section enacts that no deed, conveyance, lien, or *other instruments* respecting lands, shall take effect as to third persons until proved and recorded.

2. An Act of 10 May, 1838, *repealed the limitation of twelve months* in the Act of 1836 just referred to.

These acts are cited by the Supreme Court of Texas in *Guilbeau v. Mays,* [Footnote 1] with the statement that subsequent legislation had not materially changed them.

The subsequent legislation is thus:

3. An Act of January 19, 1839, makes it the duty of county clerks to record all

"deeds, conveyances, mortgages, and other liens affecting the title to land; provided that one of the subscribing witnesses shall swear to the signature of the *signer,* or *he, himself,* shall acknowledge the same before the clerk,"

&c.; All laws in conflict are repealed.

The act further provides in its second section (and the provision bears specially upon this case) that

"copies of all deeds &c.;, when the originals remain in the public archives, and were executed in conformity with the laws existing at these dates, duly certified by the proper officer, shall be admitted to record where the land lies."

4. An Act of May 12, 1846, makes clerks of the county court recording officers for their several counties.

The fourth section makes it their duty to record "all

deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or *other instruments of writing of and concerning any lands.* "

The fifth section makes similar provision for marriage contracts, *powers of attorney,* and official bonds.

The seventh section directs the acknowledgment to be made "by the *grantor or person who executed* the instrument in writing."

The eighth section provides for proof being made by the subscribing witnesses.

The ninth section enacts that when the witnesses are dead, or their residence unknown, or when they reside out of the state, the instrument may be proved by evidence of the handwriting of the "grantor OR person who *executed the same,* " and of one of the subscribing witnesses; and this proof is to be made by "two or more disinterested witnesses."

This act was to take effect July, 1846, and all prior laws in conflict with it are repealed.

In A.D. 1858, commenting on the fourth section, above cited, as descriptive of the instruments to be recorded, the Supreme Court of Texas, in *Henderson v. Pilgrim,* [Footnote 2] said:

"It is the obvious policy to require *all instruments concerning land* to be recorded in the proper county."

And the court therefore held that an *assignment of a mortgage* was within the provision of the act.

In the same year it was held that a *covenant for title,* though a mere executory contract, was within the law. [Footnote 3]

So far as to the recording acts.

Another statute, that of May 13, 1846, [Footnote 4] having for its frequent effect to change the burden of proof as existing at common law, is as follows:

"Every instrument in writing (*properly* recorded) shall be admitted as evidence without the *necessity of proving its execution, provided* that the party who wishes to give it in evidence shall

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file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and *unless such opposite party or some other person for him shall within one day after such notice* file an affidavit stating that he believes such instrument to be forged."

With the different statutes about recording instruments of title, and this last-quoted act as to the effect, in the matter of evidence, of filing among the papers of the suit of any instrument " *properly* recorded," Lapsley, on the 31st of March, 1863, brought trespass to try title against N. A. McPhaul *and eight other persons* in the court below to recover possession of eleven leagues of land described.

The plaintiff claimed under a power of attorney, said to have been executed by Thomas Vega, Jose Maria Aguerre, and Rafael Aguerre, to Samuel May Williams, dated the 5th of May, 1832.

McPhaul answered, pleading an outstanding title to one league in a certain Fleming, but junior in date to the title of the plaintiff, which he mentioned had been perfected, as he alleged, by a title from Thomas *de la* Vega.

Appended to McPhaul's answer was the statement of *de la* Vega that he had sold this league, in 1860, to McPhaul and that this was within the eleven leagues claimed by Lapsley, and he asked to be made a party to defend his title warranty, and prayed for a decree confirming the title to said defendants.

This application was never allowed by the court.

Subsequently to this, on the 16th January, 1872, Lapsley filed among the papers of the cause (giving notice to the other side, *on the same 16th,* that he had done so), a paper thus described:

"A testimonio of a power of attorney from Thomas Vega, Jose Maria Aguerre, and Rafael Aguerre, to Samuel May Williams, *dated the 5th of May, 1832,* the said testimonio being executed by Juan Gonzales, with his proper attesting witnesses, and duly recorded in the Counties of Falls and McLennan, after being duly proved."

The reader not familiar with the Spanish law, prevalent

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until 1836, in what is now the State of Texas -- a region till that date a portion of Mexico, itself formerly a colony of Spain -- may not know exactly what a testimonio is. For any such, it may be stated that in Spain and her colonies, deeds, contracts, and powers of attorney are executed before a regidor, a public officer, a sort of notary or alderman, exercising *quasi-* judicial power. The parties appear before him accompanied by a certain number of their neighbors as "instrumental witnesses." The parties state the matters between them. The officer makes a minute of the terms stated. He then enters in a book the formal agreement. This is the *protocol.* He then furnishes to the party in interest a similar document. This is a testimonio.

What common law lawyers would call the contract itself, but what lawyers of Spain and her colonies call the *protocol* of the contract, remains with the notary *apud acta,* like the original of a will in a surrogate's office. The testimonio is delivered to the parties, as the surrogate gives letters testamentary preceded by a transcript of the will.

The so-called testimonio, filed in this case, was in Spanish, and when translated into English ran thus:

" *Second seal two reals for the two years 1832 and 1833* "

"In the City of Leona Vicaria, on the 5th day of the month of May, in the year 1832, before me, citizen Juan Gonzales, regidor [alderman] of the honorable council of this city, and acting alcadi [mayor] therein, and in its jurisdiction, during the

indisposition of the proper officer who officiates in the treasurer's office, no secretary being allowed him according to the terms of the law, and in the presence of the witnesses who will be named at the close hereof, personally appeared citizens Dr. Jose Maria Aguerre, Thomas Vega, and Rafael Aguerre, residents of this city, well known to me, and declared that, in the most complete form which may be required by law, they grant, give over, and concede unto Mr. Samuel May Williams, a resident of the City of Austin, full power, as much as may be required and as may be necessary in law, especially, in order that in the names of these appearers, and in representation of their own persons, rights, and actions, so far as is allowed by the colonization law of the

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24th March, 1825, he may be able to proceed, and may proceed according to his judgment, to the sales of the tracts of land which, on the 14th June, 1830, the supreme governor of this state granted to them, the appearers."

The document, having given the power of sale, concluded thus:

"Thus have they granted and signed it in presence of these witnesses, citizens Antonio Espinosa, Rafael de Leon, and Francisco de la Fuente, Gonzales, residents of this city."

"THOMAS VEGA"

"JOSE MA. AGUERRE"

"RAFAEL AGUERRE"

"I attest:"

"JUAN GONZALES"

"Copy from the original, with which it agrees, the day of its execution; given on two 'useful' pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby

attest."

"JUAN GONZALES"

"Witnesses:"

"JOSE NAZO ORTIZ"

"J. M. MORAL"

Annexed to the testimonio were certain affidavits, on which it was recorded, in McLennan County, as shown by the certificate of the proper officer, on 7th September, 1856 (twenty years after its date), and again in same county, on 22d September, 1858.

In Falls County, 6th October, 1859.

In Williamson County, 15th October, 1859.

Among the affidavits on the testimonio was one by J. N. Seguin, made on 3d September, 1856, proving the handwriting of Juan Gonzales, by whom the testimonio or copy was made, and of his assisting witnesses, Moral and Ortiz, and that these parties, if living, were residents of Saltillo, in the State of Coahuila.

There was also an affidavit from Gonzales himself, made on the 13th July, 1857, testifying that the testimonio was

executed by him, at the personal request of Jose Maria Aguerre, Rafael Aguerre, and Thomas Vega, and in their presence; that the signature "Juan Gonzales" is his genuine signature, officially signed as regidor of the corporation of Saltillo, and second alcalde in turn, in the year 1832, as expressed therein; and that the signatures of Ortiz and Moral, who signed as assisting witnesses, in his presence, were their genuine signatures; that Thomas de la Vega executed a certain other power of attorney before him to said S. M. Williams, on 28th April, 1832, and that the said Thomas Vega, who was a party to this testimonio, was one and the same

person; that he knew of no other Thomas Vega, or Thomas *de la* Vega, in the City of Saltillo or any other part of Mexico.

Through a deed made on this power of attorney and other conveyances not disputed, the plaintiff made a title apparently regular if the power was genuine.

Previous to the trial, which came on February 5, 1872, all the defendants except McPhaul were, with the plaintiff's consent, dismissed.

On the 3d of February, while the case was a trying, a certain Simon Mussina, representing himself to be "attorney of Thomas de la Vega," filed an affidavit that the testimonio was, "as he verily believed, a forged instrument."

The plaintiff moved to strike this affidavit from the files as made out of season, the statute requiring it should be made within one day after notice of filing the document sought to be used, and the affidavit not having been made until many days afterwards.

This motion the court granted.

The testimonio, therefore, stood without any affidavit against its genuineness, and IF " *properly* recorded," was entitled, under the already quoted act of May 13, 1846, to be used "without the necessity of proving its execution." But the question whether it was " *properly* recorded" remained.

On the trial, the plaintiff, assuming, of course, that it was, offered it in evidence without proof of its execution, and

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the court, under the defendant's exception, received it. Being thus in evidence, the defendant offered one T. J. Walker, to show that it was a forgery. The bill of exceptions said:

"Upon the trial &c.;, the defendant introduced in evidence a witness, T. J. Walker, and offered to show the jury that in the year 1868, he went from Austin, Texas, to

the City of Saltillo, Mexico, formerly called Leona Vicario, in Coahuila, and that he carefully examined the book of protocols in the office of the secretary of the ayuntamiento of the said Saltillo, and that he found in the book of protocols for the years 1832, 1833, an original protocol or matrix of a power of attorney in the Spanish language, of date *May 5, 1832,* from *Jose Maria Aguerre* to Samuel May Williams, giving said Williams the power to sell the land which the government had granted to Thomas de la Vega and Rafael de Aguerre and Jose Maria de Aguerre, to-wit, eleven leagues each; *that said protocol or original has not to it the signature or pretense of the signature of anyone or person except Jose Maria de Aguerre and Juan Gonzales; that the name of neither Rafael de Aguerre or Thomas de la Vega, nor any witnesses, is found on said protocol or original he examined;* that in said protocol book aforesaid, and of date *April 28, 1832,* he found an original protocol of a power of attorney, signed by Jose Maria de Aguirre or Aguerre, and *Thomas de la Vega and Juan Gonzales, and with assisting witnesses Ortiz and Moral;* that this power is to Samuel M. Williams; and that in said book of protocols, from the power of attorney of the 27th of April, 1832, to the power of the 5th day of May, 1832, inclusive, there were seven leaves and no visible evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre or Aguerre, or Thomas de la Vega, to anyone in said seven leaves except the two named above; that he has in his hands, now in court, photographic copies of the said seven leaves of the said book which show exactly what he states."

To the admissibility of these facts in evidence the plaintiff objected, and the court sustained the objection, to which ruling the defendant excepted.

The plaintiff derived title, under the power already mentioned to Samuel May Williams, from a person who in some

parts of his title papers was styled Thomas *Vega* and sometimes Thomas *de la* Vega.

Thus it appeared:

That when Williams, as attorney, applied in 1833 for a title of personal possession, he described himself as "attorney of Jose Maria Aguerre, Rafael Aguerre, and *Thomas Vega,* inhabitants of the town of Leona Vicaria;"

That when Lesassier, alcalde of the town, granted the title, he described the eleven leagues as "denounced by the attorney of Thomas *de la* Vega;"

That when the surveyor made his return, he said he had executed it "by virtue of your decree for the attorney of Thomas *de la* Vega;"

That in the petition of Jose Maria Aguerre he declared it made "on his own behalf, and also in the name of Thomas *Vega* and Rafael Aguerre;"

That when, in conformity to this petition, Lesassier made his decree, he described it as made in favor of "Jose Maria Aguerre, Rafael Aguerre, and Thomas *de la* Vega."

The court charged that the title set up by the defendant in Fleming could not defeat the plaintiffs, because it was junior in date to it, and that they would find for the plaintiff unless they believed from the evidence that the testimonio was a forgery, that the registration was only *prima facie* evidence of its genuineness, and that the fact that the court had admitted the testimonio in evidence did not preclude the defendant from showing that it was forged, and that if the jury believed that Thomas de la Vega never did sign it they would reject it; that there was no evidence of forgery except the difference in the name Thomas Vega and Thomas de la Vega; that the testimonio, "the original and copy of which" was before them, was evidence for their consideration; that it was not necessary that the signature of Thomas de la Vega should be in his own proper handwriting *on the testimonio before the jury,* and that if Thomas de la Vega did sign the original of it in the office at Saltillo then the testimonio given in evidence, with a proof of a conveyance by Williams, under it, would divest Vega of his lands.

The defendant asked the court to charge:

1. That the jury must disregard the paper purporting to be a testimonio;

2. That unless they believed that the original grantee of the land and the person making the instrument (if it ever was made) purporting to be a power of attorney were one and the same person, they must disregard it;

3. That unless they believed as last above-mentioned they must find for the defendant;

The court refused the charge first above requested, and gave the other two, with the qualification that if the jury believed, from either the documentary or oral testimony, that the original grantee was known indifferently by the name of Thomas Vega and Thomas *de la* Vega, the presumption was that he was the person who signed the power, and that the jury would so consider, unless satisfied otherwise from other evidence.

Verdict and judgment having gone for the plaintiff, the defendant brought the case here; the writ of error being in the name of the whole nine original defendants; all of whom, as already said, except McPhaul, had been with the plaintiff's assent dismissed from the case before trial.

"An act to further the administration of justice," passed June 1, 1872, [Footnote 5] enacts,

"That the Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of error when there is a mistake in the teste . . . and in all other particulars of form."

In the assignments of error it was alleged for error that the court erred, among other ways:

1. In admitting the testimonio in evidence.

2. In excluding the testimony of Walker.

3. In charging that the admission in evidence of the testimonio was *prima facie* evidence of its genuineness;

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And further, that there was before them no evidence that *the testimonio* was not genuine, except the evidence of difference of name;

And in improperly withdrawing the mind of the jury from considering the want of genuineness of the testimonio from a failure of the plaintiff to show the existence of or the genuineness of any protocol at Saltillo.

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MR. JUSTICE SWAYNE delivered the opinion of the Court.

The action was ejectment. Lapsley was the plaintiff. The plaintiffs in error were the original defendants. In the progress of the cause, the plaintiff dismissed the action as to all of them except N. A. McPhaul, and judgment was rendered against him for their costs. He recovered against McPhaul, and this writ of error is prosecuted to reverse the judgment.

The writ should have been in the name of McPhaul alone as the plaintiff in error. But as the defect is clearly amendable under the third section of the Act of June 1, 1872, it is unimportant.

There are numerous assignments of error. Except those involving points which we deem material to be considered, we shall pass them by without remark.

The affidavit of Mussina was properly stricken from the files.

The law of Texas provides as follows:

"Every instrument in writing (properly recorded) shall be admitted as evidence without the *necessity of proving its execution, provided* that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and *unless such opposite party, or some other person for him, shall within one day after such notice* file an affidavit stating that he believes such instrument to be forged. [Footnote 6]"

The affidavit was filed by Mussina as the attorney of De la Vega. It set forth that the instrument of writing purporting to be a testimonio or second original of a power of attorney from Thomas de la Vega, by the name of Thomas Vega, to Samuel M. Williams, dated May 5, 1832, was, as affiant verily believed, a forgery. The testimonio was one of the plaintiff's files in the case for the purposes of evidence

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upon the trial. The object of the affidavit was to throw the burden of proof upon the plaintiff.

He had given the proper notice to the defendants on the 16th of January, 1872. The affidavit was filed, not within one day thereafter, as the statute required, but on the 5th of February following, while the trial was in progress. De la Vega, in whose behalf it was filed, was not a party to the record.

It is insisted that the testimonio was improperly admitted to record, and that it was not properly admitted in evidence. These objections present questions of local law.

The instrument is as follows:

It bears date on the 5th day of May, 1832, and sets forth that Thomas Vega, Rafael Aguerre, and Jose Ma. Aguerre, of the City of Leona Vicaria, appeared before Juan Gonzales, regidor of that city and declared that they conceded to Samuel May Williams, a resident of the City of Austin, full power, "in order that in the names of the appearers" he might proceed to sell the lands therein described.

"And to confirm all that may be granted and executed, the appearers bind themselves, their persons, and their property present and to come." It concludes,

"Thus have they granted and signed it in presence of these witnesses, Antonio Espinosa, Rafael de Leon, and Francisco de la Fuentes, Gonzales, residents of this city."

"I attest: Juan Gonzales. Thomas Vega, Jose Ma. Aguerre, Rafael Aguerre."

The following memorandum was affixed:

"Copy from the original, with which it agrees, the day of its execution; given on two 'useful' pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby attest."

"JUAN GONZALES"

"Witness:"

"JOSE NAZO ORTIZ"

"J. M. MORAL "

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Affidavits are annexed upon which it was recorded, in McClennan County, September 7, 1856, and again, September 22, 1858; in Falls County, October 6, 1859, and in Williamson County, October 15, 1859. The affidavits were all sworn to in Texas. Among them are one proving the handwriting of Gonzales and the attesting witnesses -- Moral and Ortiz -- and that, if living, they are residents of Saltillo in the State of Coahuila, one by Gonzales, made July 13, 1857, proving that the testimonio was executed by him at the personal request of the grantors named therein and in their presence and that his signature thereto, and those of Moral and Ortiz, are all genuine; that Thomas de la Vega executed a certain other power of attorney before him to S. M. Williams on the 28th of April, 1832, and that

"the said Thomas de la Vega, who executed this testimonio, is one and the same person."

The testimonio here in question being a copy from the protocol, or original instrument, made by the officer by whom the protocol was executed, was, in the eye of the Spanish law and of the law of Texas, "a second original," and of equal validity and effect with the prior one. [Footnote 7]

That Gonzales had authority adequate to the function he performed, and that the testimonio was valid, was held by this Court in *Spencer v. Lapsley.* [Footnote 8]

In relation to the recording of the instrument, our attention has been called to the following statutes of Texas: the Act of the 20th of December, 1836, sections thirty-five and forty; the Act of May 10, 1838; the Act of January 19, 1839; and the Act of May 12, 1846, sections four, five, seven, eight, and nine. A careful examination of these statutes has satisfied us that the registration was authorized by law. If there could be any doubt upon the subject, it is

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removed by the Texas adjudications [Footnote 9] upon the subject, referred to in the argument of the learned counsel for the defendant in error. A certified copy from the office where the testimonio was recorded would therefore have been competent evidence. The original, with the recorder's endorsement, would as a consequence also have been admissible. In such cases, it would be a solecism to receive the copy and reject the original.

In this case, the plaintiff offered the testimonio in evidence, and it was properly received. It would have been admissible without recording. In *Martin v. Parker,* [Footnote 10] it was objected that an act of sale of real estate, not having been signed by the instrumental witnesses, was inadmissible without proof of its execution. The court replied:

"We do not think the objection well taken. In *McKissick v. Colquhoun,* [Footnote 11] Chief Justice Hemphill said:"

" The signature of a judge or alcalde acting in place of a notary, authenticated by two assisting witnesses, has all the force and effect of the signature and seal or rubric of a notary."

The defendant offered to prove by T. I. Walker, a witness present, that in the year 1868, he went from Austin, Texas, to Saltillo, formerly Leona Vicaria, in Coahuila, Mexico, and there examined the books of protocols in the office of the secretary of the ayuntamiento; that he found in the book of protocols for the years 1832 and 1833, among others a protocol of a power of attorney, in the Spanish language, of the date of May 5, 1832, from Jose Maria Aguerre to Samuel M. Williams, giving Williams the power to sell the land granted by the government to Thomas la Vega and Rafael and Jose Maria Aguerre, to-wit, eleven leagues each; that said protocol had to it no signatures but those of Gonzales and Jose Maria Aguerre, and that it had no signatures

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of witnesses; that in said protocol book, and of the date of April 28, 1832, he found an original protocol of a power of attorney, signed by Jose Maria de Aguirre, or Aguerre, and Thomas de la Vega and Juan Gonzales, with attesting witnesses Ortiz and Moral; that this power was to Samuel M. Williams; and that in said book, from the power of attorney of the 28th of April, 1832, to the power of the 5th of May, 1832, inclusive, there were seven leaves, and no visible evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre, or Aguerre, or Thomas de la Vega, to anyone in said seven leaves except the two named above; and that the witness had in his hands then in court photographic copies of said seven leaves, showing exactly the facts above mentioned as to the protocol book and the said two powers of attorney as of record therein.

The plaintiff objected to the admission of the evidence. The court sustained the objection and the defendant excepted.

It has been shown that the testimonio is "a second original," and of the same effect with the protocol. [Footnote 12] According to an eminent Spanish authority, it is full proof, unless the instrumental witnesses contradict it. [Footnote 13] Here neither Vega, either of the Aguerres, Gonzales, Moral, nor Ortiz was produced; nor was their absence accounted for. The bill of exceptions states that the witness had the photographic copies in his hands in court -- not that they were offered in evidence. But perhaps it is only fair to construe the bill of exceptions so as to give it that effect. Conceding this, the only testimony offered was that of Walker, and the two photographic copies. It does not appear to have been suggested that this was to be followed by any further testimony. The copies had been in the possession of Walker more than three years, yet it is not shown that the plaintiff had any notice

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of them until they were suddenly produced by the witness in the midst of the trial. It is also significant that the agent who went on the visit of exploration to Saltillo did not claim to have discovered anything whatever adverse to the testimonio except the state of the protocol as it appeared of record. Nor did the defendant, enlightened as he must have been by Walker, invoke the testimony of the keeper of the archives or of any other person residing in the locality where they were kept. The plaintiff's petition was filed in 1863. Walker's discovery was made in 1868. The trial was in 1872. There was time between the two periods last mentioned to procure ample testimony from Saltillo and elsewhere touching the fraud and forgery charged, if they were believed to exist. The defendant was silent. The record is a blank as to any such testimony given, offered, or suggested except the isolated circumstances offered to be proved by Walker and the two photographic copies. These are pregnant facts. Copies of the photographs are not given in the bill of exceptions; nor are the contents of the power to Williams of the 28th of April given in whole or part. That is stated to have had upon it the names of Jose Maria Aguerre and Thomas de la Vega as grantors and of Gonzales with those of Moral

and Ortiz as assisting witnesses. It is possible that the testimonio may, by the mistake of the copyist, have the date of the latter instead of the earlier instrument, or that if the fuller and better evidence, which the defendant was bound to give, had been produced, the apparent discrepancies between the two documents in question might have been explained in a manner consistent with the integrity of all concerned and the validity of the testimonio. It should at least have been shown by someone officially connected with the office that the book seen by the witness was the book, and the only book there wherein the instrument could have been properly recorded, and that there was no such protocol *anywhere* in that book or elsewhere in the office. It is also possible it was known in the office that the missing signatures had been removed by some dishonest hand.

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The testimony proposed to be elicited from Walker fell far short of the requisite standard. A party is not permitted to give secondary evidence where it presupposes better evidence within his reach, which he fails to produce. In *Renner v. Bank of Columbia,* [Footnote 14] this Court, speaking of such evidence, said:

"Every case must depend in a great measure upon its own circumstances. The rule of evidence must be so applied as to promote the ends of justice and guard against fraud and imposition."

It appears incidentally by the record that there has been a great amount of litigation, extending through a long period of time, touching the lands to which this testimonio relates. The protocol and testimonio bear date more than forty years ago.

The record does not show that during this long period either of the Aguerres ever questioned the validity of the latter or that La Vega ever assailed it by his own sworn testimony.

Large and diversified interests must have grown up on the faith in its genuineness. In this case, the attack upon the instrument is not made by either of the grantors, but vicariously by the defendant, who claimed under a distinct and hostile title which he wholly failed to establish.

Under all the circumstances, we think the testimony of Walker was properly excluded.

In our judgment, the court was correct as to the instructions given and those refused, to which the exceptions touching that subject relate.

We direct, *sua sponte,* the writ of error to be amended by striking from it the names of all the plaintiffs except McPhaul, and the judgment of the circuit court is

Affirmed.

[Footnote 1]

15 Tex. 414.

[Footnote 2]

22 Tex. 476.

[Footnote 3]

Secrest v. Jones, 21 Tex. 133.

[Footnote 4]

Section 90. Referred to in *Hanric v. Barton,* 16 Wall. 166.

[Footnote 5]

17 Stat. at Large 196, 3.

[Footnote 6]

Section 90, Act 13th May, 1846, p. 387, referred to in *Hanrick v. Barton,* 16 Wall. 166.

[Footnote 7]

1 Partidas 222; *Owings v. Hull,* 9 Pet. 625; *Mitchel v. United States,* 9 Pet. 732; *Smith v. Townsend,* Dallam's Digest 570; *Herndon v. Casiano,* 7 Tex. 332.

[Footnote 8]

61 U. S. 20 How. 274.

[Footnote 9]

Guilbeau v. Mays, 15 Tex. 414; *Henderson v. Pilgrim,* 22 *id.* 476; *Secrest v. Jones,* 21 *id.* 133; *Paschal v. Perez,* 7 *id.* 348; *Edwards v. James, ib.,* 377.

[Footnote 10]

26 Tex. 260.

[Footnote 11]

18 *id.* 151.

[Footnote 12]

Mitchel v. United States, 9 Pet. 732; *Herndon v. Casiano,* 7 Tex. 332.

[Footnote 13]

4 Sala 127, 130, 136.

[Footnote 14]

22 U. S. 9 Wheat. 581.