landlord and tenant exists, and no definite period is fixed for the termination of the estate, but where a lease is to expire at a certain time, a notice to quit is not necessary in order to recover in ejectment, because to hold over would be wrong after the duration of the estate was fixed and well known to lessor and lessee. In an executory contract of purchase the possession is originally rightful, and it may be that, until the party in possession is called upon to restore it, he cannot be ejected without a demand or notice to quit. But the vendee can forfeit his right of possession, and if he fails to comply with the terms of sale, his possession afterwards is tortious, and there is an immediate right of action against him.* It would be an idle ceremony to demand possession, when to a previous demand for the money due on the contract of purchase, the vendee refused to respond. This refusal, unaccompanied by any promise to pay the money at a future day, was equivalent to a direct notice to Von Phul that Gregg declined to execute the contract.

This action is a possessory one, and it settles nothing but the right of possession. The equities between the parties must be determined in another proceeding.

JUDGMENT AFFIRMED WITH COSTS.

MALARIN v. UNITED STATES.

When the validity of a Mexican grant has been affirmed by a decree of the District Court, and an appeal is taken by the claimant seeking a modification of the decree as to the extent of land embraced by the grant, but no appeal from such decree is taken by the United States, the validity of the grant is not open to consideration upon the appeal.

When a grant of land, issued and delivered, is subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant.

When a Mexican grant issued to the claimant is alleged to have been fraudulently altered after it was issued in the designation of the quan-

* Prentice *v.* Wilson, 14 Illinois, 92; Baker *v.* Lessee of Gittings, 16 Ohio, 489.

tity granted, a record of juridical possession, delivered to the grantee soon after the execution of the grant, showing that the quantity of which possession was delivered was the larger quantity stated in the grant, is entitled to great consideration in determining the character of the alteration, particularly when there has been a long subsequent occupation of the premises.

THIS was an appeal by Malarin and another, executors of Pacheco, from the decree of the District Court of the United States, for the Southern District of California; the case being thus:

Pacheco claimed a tract of land in California, known as the *Bolsa de San Felipe*, or Sack of St. Philip, under a grant alleged to have been issued to him in October, 1840, by Alverado, then Mexican Governor of the department.

In 1852, he presented a petition to the Board of Commissioners appointed by the act of Congress of March 3d, 1851, to settle the respective rights of the United States and claimants under the former government, asking for the confirmation of his claim. He produced in support of it, before the board, from the archives of the former government, his petition to the Mexican Governor, Alverado, for the grant specifically of the *Bolsa de San Felipe*, the reports of the local authorities, and their proceedings thereon. He produced, also, a formal grant to him, signed by the Governor and attested by the Secretary of State, bearing date on the 4th of October, 1840, with a record of juridical possession delivered to him.

This record contained,—

A deed by Governor Alverado, dated October 14, 1840, reciting that Pacheco had solicited the land known by the name of "*Bolsa de San Felipe;*" and that the necessary steps and investigations having taken place, and been made in conformity with the law and regulations, he, the said governor, had granted to him the said land, subject to the approval of the Departmental Junta, and to certain "conditions:" among these were two, thus expressed:

"He shall request the respective justice to give him juridical possession in virtue of this decree; *said justice will desig-*

nate the boundaries, at the limits whereof the grantee shall, besides placing the land-marks, plant some fruit trees, or wild ones of some utility.

"The land whereof mention is made comprises *two square leagues* (*dos sitios de ganado mayor*), a little more or less by the plat which accompanies the *expediente*. The magistrate who gives possession shall cause it to be measured according to law, *leaving the surplus which may result to the nation for the necessary uses.*"

Next follows, a memorandum by *Jimeno*, that "this title has been recorded in the respective book on the back of folio 3." Then a petition from Pacheco himself, dated 1st February, 1841, to the Señor judge of the district, reciting "that having obtained ownership of the land called *Bolsa de San Felipe*, which was granted to me on the 14th of October, 1840, as appears by the title and plat which I have the honor to accompany," he, Pacheco, begs that the judge, in virtue of his "attributions," would be pleased to fix a day for giving him, Pacheco, possession. A marginal decree, dated February 12, 1841, then follows. "Proceed," it orders, "to give the possession asked for, to which effect, Friday, the 19th inst., is appointed. Let the neighboring landholders be summoned; appointing previously measurers and counters, informing them thereof, that they accept and take oath."

Accordingly, on the 19th of February, the day which the justices had fixed, the neighboring landholders assembled—the record mentioned—on the ground; two citizens were appointed to measure the land; neighbors consented to the appointment; measurers were sworn "in the name of the Lord our God, and by the sign of the Holy Cross," to perform their duty truly; two other citizens were appointed and sworn as counters; the length of the cord was accurately ascertained in the presence of all parties. These preliminaries being all transacted, recorded, and duly attested, the measuring began. The quantity of the land was ascertained to be *two leagues*, or perhaps a little more, on account of the irregularity of the ground. "Thereupon," continued the record, "the neighbors being all satisfied with the measurement, they went, with the witnesses, the judge, and the peti-

tioner, to the centre of the land, where the judge ordered the petitioner to enter into possession, which the petitioner did by "*pulling up grass and making demonstrations as owner.*" This proceeding was ordered to be recorded, and the original "expediente" to be returned to the party: which order, as the record showed, had been obeyed; the proceedings being entered in the book of possessions.

The claimant proved that he had been in the use and occupation of the premises where he now was since the date of juridical delivery of possession.

The board adjudged the claim valid, and entered a decree confirming it to the extent of *two* square leagues; provided that quantity were contained within the boundaries called for in the grant and a map to which the grant referred; but if there were less than that quantity within such boundaries, then the confirmation was to be for such less quantity. In fact, the boundaries embraced a little more than two leagues.

Appeal was taken by the United States to the District Court, and while the case was pending there Pacheco died, and the executors of his will, Malarin and another, were substituted in his place, and the subsequent proceedings were conducted in their names. The District Court, while holding the title of Pacheco valid, limited it, notwithstanding, to *one* league. The court, it seemed, had been led to this decree by the fact that there was an erasure on the original grant. The Spanish word "*dos*," "two," in designating the quantity preceding the corresponding Spanish word for "leagues," it was plain, had been written upon an erasure, where it was said that the word "*uno*," "one," had been before. Experts being called, one of them, familiar with writing and with the effect of time on ink, thought that if the alteration had been made at the time of the execution it might have the appearance which it now presented, and he did not see anything which led him to believe that the alteration was of a later date, except that it was an erasure. Another expert, judging from the difference in the color of the ink, thought that the alteration had been

made at least five years after the rest was written, although if ink of different consistencies had been used, it might have been written at the same time, and bear the present appearance.

Governor Alverado, who issued the grant, and a clerk in the office of the Secretary of State at the time, were examined. Alverado was examined twice. On his first examination, which was in May, 1858, he said: "I noticed, when the grant was presented to me for my signature, that the clerk had made a mistake by writing *one* league where he should have written two. I sent the grant back to the secretary's office to repair the mistake, and have the word 'two' inserted instead of 'one,' which he did, and reported to me to that effect." Alverado swore, also, that the order which he gave to the secretary was to issue a grant for *two* leagues, more or less; that this he remembered well, as likewise the order to alter the mistake that was made at the time. In his second examination, however, which was in January, 1861, nearly three years after the first one, he testified that the title, as given to Pacheco, was for one league, and that *he* (Pacheco) "made the reflection, that one league was not conformable, but in fact the title should and ought to have been for two leagues." "Then," continued the witness, "I gave the order that the title should be returned to the secretary's office, that that amendment should be made, and I was informed that the amendment was made accordingly." In answer to the question, *when* the title was returned to the secretary's office to be amended? he answered, that it was within *one*, *two*, or *three* days from the time the title was delivered; but that he could not say particularly. This last-given testimony of Alverado conformed to that given by the clerk in the office of the Secretary of State, who was examined on the same day and at the same place when Governor Alverado last testified. Alverado, also, in answer to a question, if he "recollected" by whom the deed was written, answered, by "Francisco Arcé, clerk in the office." Arcé himself swore, however, that it was not written by him, but was written by another clerk named Astrada, whose

handwriting resembled his own. This clerk was not produced, nor explanation offered for his absence.

Mr. Willes, for the United States, relied largely on the evidence of forgery and fraud, as exhibited by the erasures; upon the contradictory and untrustworthy character of Alverado's evidence, and upon the omission to produce the clerk, Astrada, who had drawn the deed.

Mr. J. S. Black, contra.

Mr. Justice FIELD delivered the opinion of the court:

In his petition to the Board of Land Commissioners, Pacheco represented that in October, 1840, a grant of a tract of land, known by the name of *Bolsa de San Felipe*, was issued to him by Alverado, then Governor of the Department of California.

The board adjudged the grant to be valid, and confirmed the claim of the petitioner under it to the extent of two square leagues. On appeal, the District Court modified the decree of the board, affirming the validity of the title of Pacheco, but limiting it to one square league. From this latter decree the present appeal is taken by the executors of the claimant, he having died pending the proceedings. The United States were satisfied with the decree, and did not appeal. The case therefore stands in this court upon the question, whether the parties representing the claimant are entitled under the grant to a confirmation of the title to one or two square leagues.

No question can be raised here upon the genuineness and authenticity of the grant to Pacheco. The Government having declined to appeal, the validity of the grant is not open for consideration.

In modifying the decree of the board, the District Court appears to have been influenced by the opinion that the grant had been fraudulently altered after it was issued, so as to purport to convey to the grantee two leagues, when it originally conveyed only one. It appears that preceding the term leagues the word *one* was originally written in the

instrument, and was subsequently altered to the word *two*, or to be more accurate, an alteration was thus made in Spanish terms, corresponding with these English words. But, as the counsel of the appellants very justly observes, the grant could not be operative for any purpose except upon the conclusion that the alteration was made before its execution, or if subsequently made, that it was made with the sanction of the granting power. If valid therefore to pass one league, it must be held valid to pass the two leagues which it purports on its face to pass.

It is not necessary, however, to rest our decision upon this consideration. Nor is it necessary to invoke the presumption which counsel insist the law raises as to the date of the alteration. The authorities upon the latter point are not uniform. Some of them hold, that where there are no particular circumstances of suspicion connected with the alteration, the presumption of law is that the alteration was made contemporaneously with the execution of the instrument, giving as the reason for the conclusion that a deed cannot be altered after its execution without fraud, which is never to be assumed without proof; other authorities hold the presumption to be the other way, and require an explanation of the alteration before the deed can be admitted in evidence.*

In the case under consideration the proofs remove all suspicion from the alteration, whatever may be the presumption of the law. The governor who issued the grant testifies substantially that the alteration was made by his direction, and that the grant was subsequently delivered or redelivered to the grantee. If this were the case, it is immaterial whether the alteration was made before the grant had received his signature or after it had been once delivered. The redelivery after the alteration, if such were the fact, was in legal effect a re-execution of the grant. That

* See 2 Taylor on Evidence, § 1616; 1 Greenleaf on Evidence, § 564; Doe *v.* Catomore, 16 Q. B., 745; Simmons *v.* Rudall, 1 Simons, N. S., 136; Administrators of Beaman *v.* Russell, 20 Vermont, 205; Jordan *v.* Stewart, 23 Pennsylvania State, 244.

some discrepancy should exist in the statements of the governor at different times, with reference to a transaction which had occurred more than eighteen years before, is not surprising. His statements are consistent and positive to the effect that the alteration was made by his direction, and that the grant was delivered or redelivered afterwards; and they disagree only upon the point whether the alteration was made before or after the grant had been once delivered. The clerk in the office of the secretary, who attested the grant, corroborates the testimony of the governor, that the alteration was made by his direction. The juridical possession of the two leagues, delivered to the grantee soon after the execution of the grant, and the subsequent occupation by him of the premises until his death, a period of nearly twenty years, dissipates whatever doubt might otherwise exist as to the truth of the statement of the governor in this particular.

When the grant to Pacheco was issued there still remained another proceeding to be taken for the investiture of the title. Under the civil, as at the common law, a formal tradition or livery of seizin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurement and segregation in such cases therefore preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance in these matters of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issue of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measurers and counters be appointed. On the day designated the proprietors appeared, and two measurers and two counters were appointed, and sworn for the faithful discharge of their duties. A line

provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the centre of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact "by pulling up grass and making demonstrations as owner of the land." Of the various steps thus taken, from the appointment of the day to the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the "book of possessions." This record was produced and admitted in evidence, no objection being taken to its genuineness or authenticity. The first document in this record is a copy of the original grant produced to the judge, which specifies two square leagues as the quantity granted. That portion of the record which specifies the quantity measured also declares it to have been two square leagues, or a little more on account of the irregularity of the land. The solemnities attending this official delivery of possession were well calculated to make an impression upon the minds of the spectators, and to preserve the recollection of the act. The ownership, extent, and general location of the land were matters thus brought within the knowledge of the neighborhood, and were no doubt afterwards the subjects of frequent reference among the adjoining proprietors. It is possible, but highly improbable, that serious alteration in the grant as to the quantity of the land, would have escaped observation and exposure. No suspicion on the subject having been suggested for eighteen years, is a circumstance of no little weight to show that no grounds for suspicion ever existed.

The decree of the District Court must be reversed, and that court directed to enter a decree confirming the claim of the appellants to two square leagues under the grant to Pacheco.

DECREE ACCORDINGLY.