subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with property of any other kind. *Webbs. Pat. Cases*, 413, *note p.*

Considering that the question has been several times decided by this court, we do not think it necessary to pursue the investigation. The decree of the Circuit Court is therefore .

AFFIRMED WITH COSTS.

UNITED STATES *v.* AUGUISOLA.

Where no suspicion, from the absence of the usual preliminary documentary evidence in the archives of the former government, arises as to the genuineness of a Mexican grant produced, the general rule is, that objections to the sufficiency of proof of its execution must be taken in the court below. They cannot be taken in this court for the first time.

The tribunals of the United States, in passing upon the rights of the inhabitants of California to the property they claim under grants from the Spanish and Mexican governments, must be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They are not required to exact a strict compliance with every legal formality.

The United States v. *Johnson* (*ante*, p. 326) approved.

THIS was an appeal by the United States from a decree of the District Court for the Southern District of California, confirming to one Auguisola a tract of land in California.

After the cession of California to the United States, Auguisola, who deraigned title from two persons (Lopez and Arrellanes) exhibiting a grant that purported to be from the Mexican governor, Micheltorena, laid his claim before the board of commissioners, which the act of Congress of March 3, 1851, appointed to examine and decide on all claims to lands in California purporting to be derived from Mexican grants. He here produced from the archives of the Surveyor-General of California a petition from the grantees; the petition being accompanied by a map of the land desired;

the reports of the different officers to whom the matter was referred for examination, and the concession of Governor Micheltorena, dated March 17, 1843, in which this governor declares that the petitioner is "*proprietad del terreno blanado*," or "owner of the land" in question. He produced, moreover, a formal grant of the governor, dated contemporaneously with the order of concession, and a record of possession delivered by the proper alcade in 1847. None of the parties, however, whose names appeared as grantors or actors in the various evidences of title, were called in the court below as witnesses, proof of all the fundamental documents having been made by a witness, who swore to the genuineness of the various signatures. Neither was the work known as "Jimeno's Index"—a list of Mexican grants between the years 1829 and 1845—introduced as part of the plaintiff's evidence of title, though the present grant purported, by memorandum at its foot, "to be registered in the proper book." The grant was produced from his private possession. Supposing the papers, however, to be all genuine—a matter about which no question was raised before the commissioners—the case was properly enough made out in respect of occupancy, improvement, cultivation, stocking with cattle, and other matters which were required by the Mexican laws; the only difficulty being that the boundaries of the land, as set forth in the papers and on the map, were so undefined that they could not be ascertained nor surveyed; and that the piece of land claimed had never been segregated from the national domain. Auguisola's claim was accordingly rejected by the commissioners. From this decision he appealed to the District Court; and having shown, by new evidence, more definite boundaries than he had shown before, the decree of the commissioners was reversed, and his claim established. To this judgment of the District Court the United States filed thirteen exceptions; being reasons, all of them, to show why the claim of Auguisola was a bad one. They were based on an alleged invalidity of the grant, on an asserted illegality of the juridical possession; on the situation of the land as respected the sea-coast; on the fact that it had

been occupied by missions and could not be colonized; that it was incapable of identification; that one deed was on unstamped paper; that the Departmental Assembly had not approved the grant; that the land had not been properly occupied and improved, and some other reasons of a similar kind. *Not one of the reasons, however, assigned fraud of any kind; of which, indeed, so far as the record showed, there was no suggestion anywhere below.*

Mr. Wills, for the United States:

1. The grant, if genuine, is not legally proved: i, because the evidence offered to authenticate it is secondary; and ii, because no legal basis was laid for its introduction. The parties whose names appear in the documentary evidences of title as grantor, or witnesses, were not called as witnesses. Nor was any legal ground laid for the omission. The only evidence offered to authenticate the paper title is the testimony of a witness, who swears to the genuineness of all the signatures to all the papers, from the grant down to the record of judicial possession.

But this is not sufficient without calling the parties or accounting for their absence: i, because it is a departure from the established order of proof; and ii, because the signatures may be genuine, and yet the papers be forgeries, because antedated.*

2. The grant is fraudulent and void. The first suspicious circumstance against it is the fact before referred to, viz., the failure to call or to account for the absence, as witnesses, of the original parties to the grant and accompanying papers. If fraudulent, it is an ingenious device, whereby forgery may be committed without perjury. In the absence of proof to the contrary, the legal presumption is, that all these parties were living and accessible. The fact that the governor, secretary, and others are not called as witnesses in support of the authenticity and validity of grants, when accessible, is a circumstance entitled to weight against a grant.*

* United States *v.* Teschmaker, 22 Howard, 404, 405; Fuentes *v.* United States, Id. 455, 456; Luco *v.* United States, 23 Id., 534.

The second suspicious circumstance against it is, that this grant is not mentioned in Jimeno's Index, nor is it shown to be registered in any other contemporary record. Registry is required by the regulations of 1828. Evidence of the registration of a grant must be produced, or its absence accounted for.* Jimeno's Index embraces all grants made from and including the year 1830, to December 24, 1844. As the grant purports to have been made March 17, 1843, and to be "registered in the proper book," if it had been made at that date, it must have appeared in that Index, or in some other contemporary record, in common with all other genuine grants of that date. But no such record is produced. Its absence, therefore, from those records, furnishes presumption that the grant is a forgery.

Mr. Justice FIELD delivered the opinion of the court:

The respondent deraigns his title from Lopez and Arellanes, the alleged grantees of the Mexican governor, Micheltorena. In support of his claim before the board of commissioners, created under the act of 1851, he produced from the archives in the custody of the Surveyor-General of California the petition of the grantees for the land, the reports of the different public officers to whom the same was referred for information as to the property and the petitioners, the sketch or map accompanying the petition, and the concession of the governor, made on the 17th of March, 1843, declaring the petitioners "owners of the land" in question. He also produced a formal grant of the governor, bearing the same date with the order of concession, and a record of juridical possession delivered by the alcalde of the vicinage in 1847. No question was raised before the commissioners as to the genuineness of the several documents produced, and with proof of the signatures attached to the above grant and record, and that the grantees had constructed a house upon the premises immediately after receiving the grant; that the house was occupied by one of the grantees until the

* United States v. Teschmaker, 22 Howard, 405; United States v. Bolton, 23 Id., 350.

sale to the claimant, and has been occupied by the claimant ever since, and that the land has been cultivated and used for the pasturage of cattle since its first occupation, the case was submitted. The board rejected the claim, not from any conclusion that the papers produced were not genuine, but solely upon the ground that the boundaries of the land granted were vague and indefinite, and that the land had not been segregated from the public domain. The case being removed by appeal to the District Court, the attorney of the United States, in answer to the claimant's petition for a review of the decision of the commissioners, set forth thirteen grounds for holding the claim invalid. Two of them related to the alleged invalidity of the transfer from the grantees to the claimant; two to the illegality of the juridical possession of the alcalde in 1847, and the remaining grounds were substantially these: that the land was situated within ten leagues of the sea-coast; that it was occupied by the missions of the territory, and therefore could not be colonized; that the grant had not the conditions required by the colonization law of 1824, or the regulations of 1828; that it did not give in itself, or with the aid of the map produced, any description by which the land could be identified; that it was not executed upon lawfully stamped paper; that it had not been approved by the Departmental Assembly, and that the grantees had not complied with the conditions annexed by constructing a house within a year, and inhabiting it and cultivating the land, and soliciting the proper judge for juridical possession. No objection was made that the title-papers produced were not genuine, or not executed at the time they purport to have been executed, and the additional evidence taken in the District Court was intended to show the location and boundaries of the land, and thus remove the objection to the confirmation given by the commissioners. The District Court reversed the decision of the board, and adjudged the claim of the respondent to be valid, and confirmed it to the extent of three square leagues. From this decree the United States have appealed, and in this court for the first time take the grounds, 1st, that the grant pro-

duced, even if genuine, was not legally proved; and, 2d, that the grant is fraudulent and void.

The first objection arises from the fact that the governor who signed, and the Secretary of State who attested the grant, were not called to prove it or their absence accounted for, and that the instrument was admitted upon proof of their signatures. The usual preliminary proceedings to the issue of a Mexican grant in colonization having been produced from the archives, there was no presumption against the genuineness of the grant in question, requiring the strict proof of its execution mentioned in the cases of *The United States* v. *Teschmaker*,* and *Fuentes* v. *The United States*.† Under these circumstances, the objection should have been urged before the commissioners or the District Court, and notice thus given to the claimant to procure further proof by calling the parties, or to show good reason for not calling them. Where no suspicion from the absence of the usual preliminary documentary evidence arises, as to the genuineness of the instrument produced, the general rule is, that objections to the sufficiency of the proof of its execution must be urged in the first instance before the inferior tribunal. In the present case, it is possible that the governor and secretary were without the jurisdiction of the court at the time the grant was produced, or the objection to the proof may not have been urged by the attorney of the government, who was present when it was given, because satisfied himself from other sources that the signatures were genuine, and that the grant was executed at the time it purports to have been executed, or because of his knowledge that the objection could have been readily obviated by testimony within the reach of the claimant.‡

The objection that the grant is fraudulent and void rests mainly upon the allegation of counsel, that it is not mentioned in the list of expedientes known as "Jimeno's Index." We say upon the allegation of counsel, for Jimeno's Index is

* 22 Howard, 392. † Id., 443.

‡ Pelletreau *v.* Jackson, 11 Wendell, 123; Jackson *v.* Waldron, 13 Id., 184.

not in evidence, nor was any proof offered of its contents; and, under the circumstances of this case, if the fact were as alleged, it would not be entitled to much weight.

To the objections urged by the appellants, and to all objections of a similar kind, the observations of Mr. Justice Grier, in the case of *The United States* v. *Johnson*, decided at the present term, are applicable. "In taking objections to these Mexican grants," says the learned justice, "it ought to be remembered, that the case is not brought here on a writ of error with a bill of exceptions to the admission of every item of testimony offered and received below. Nor is it a part of the duty of counsel representing the government, to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners in not requiring proof according to the strict rules of the common law. When there is any just suspicion of fraud or forgery, the defence should be made below, and the evidence to support the charge should appear on the record. If testimony of witnesses is alleged to be unworthy of belief, the record should show some reason to justify the court in rejecting it. The former opinions of this court may be referred to, on questions of law, but cannot be quoted as evidence of the character of living witnesses."

To these observations we will only add, that the United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extend-

ing their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

DECREE AFFIRMED.

SCHUCHARDT *v.* ALLENS.

1. If no exception have been taken below to a question asked on trial, no objection can be made to it here.
2. If the answer to a question asked may *tend* to prove the matters alleged in the *narr.*—if it be a link in the chain of proof—the question may be asked. It is not necessary that it be *sufficient* to prove them.
3. In an action for false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and if averred, need not be proved.
4. Authority without restriction to an agent to sell carries with it authority to warrant.
5. Where a contract of sale is complete, the vendor cannot hold the vendee to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it, as that "no claims for deficiencies or imperfections will be allowed, unless made within seven days from the receipt of goods."
6. Whenever the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. But if there be evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them. It is not necessary, in order for the court properly to leave the case with the jury, that the evidence leads unavoidably to the conclusion that the plaintiff has no case. If there be evidence proper to be left to the jury it should be left; and a remedy for a wrong verdict sought in a motion for new trial.

THIS was an action on the case for false warranty, and for deceit in the sale of one hundred casks of Dutch madder; and was brought in the Circuit Court for the Southern District of New York. The declaration contained seven counts.

The first three were for *false warranty* (without any *scienter*),

1st. That it was a prime article.

2d. That it was pure and unadulterated.

3d. That it was good, merchantable Dutch madder.

The last three counts were for *deceitful representations* (with *scienter*) of the same facts. The fourth count, after stating