vey only to front one-third part on the creek. The surveyor-general certifies that this 10,000 acres is the tract of land granted to the petitioner, on the 6th of April 1816: and although no reliance would be placed on the assertion in the certificate, standing alone, still, taking the return that the survey was on the land granted, in connection with all the facts and circumstances appearing in the record, it tends to confirm the conclusion that the land was laid off on the next land to the head of the lagoon, covered with timber.

One other consideratiou has weight. If it be untrue, that the survey is at the proper place, the United States could have proved the fact to a certainty, with the slightest diligence; and ought to have proved it. This consideration is strengthened by the pleadings and evidence. The petition, filed in 1829, alleges that the surveys were made for lands granted; and sets out the descriptions, courses and distances, to which the *attor-
*168] ney of the United States made no answer; the fact was not admitted for this reason, and necessary to be proved by the complainant (6 Cranch 51); yet it shows that the claim was not resisted on this ground; and such was clearly the case throughout, as George F. Clarke, the surveyor-general, was twice examined as a witness, on many interrogatories, without having been requested to state the locality of the 10,000 acres survey. Upon all these facts and circumstances taken together, we order the decree to be affirmed.

Decree affirmed.

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*169] *Hyde & Gleises and H. Locket, Plaintiffs in error, *v.* Booraem & Company, Defendants in error.

Appellate jurisdiction.—Dependent contract.

The defendants in error, merchants in New York, agreed with the plaintiffs in error, H. & G., merchants in New Orleans, that indored notes should be given by H. & G., for a certain sum, being the amount due by H. & G., to B. & Co., and other notes or drafts of H. & G., payable in New York, which indorsed notes were to be deposited in the hands of L., to be delivered to B. & Co., on their performing their agreement with H. & G.; part of which was to take up certain drafts and notes given by H. & G., payable in New York. The notes, indorsed according to the agreement, were drawn and delivered to L.; B. & Co. performed all their contract, excepting the payment of a draft for $2000, and a note for $1568.74, which, from inability, they did not pay; and the same were returned to New Orleans, and were there paid, with damages and interest, by H. & G., at great loss and inconvenience. The notes deposited with L. amounted to upwards of $7000 beyond the draft for $2000 and the note for $1568.74. B. & Co. filed a petition, according to the Louisiana practice, praying for a decree by which the indorsed notes in the hands of L. should be delivered to them, equal to the balance due to them; the district judge gave a decree in favor of B. & Co., in conformity with the petition: *Held*, that the decree was erroneous; and the court reversed the same, and ordered the case to be remanded, and the petition to be dismissed with costs, by the circuit court of Louisiana.

The supreme court has no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it; that is the proper province of the jury; or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision; the court can only re-examine the law, so far as he has pronounced it, upon a state of facts; and not merely upon the evidence of facts found in the record, in the making of a special verdict, or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the supreme court, by an

appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with the supposed conclusions in matters of fact.

The contract between B. & Co. and H. & G. was, what the French law, the basis of that of Louisiana, calls a commutative contract, involving mutual and reciprocal obligations; where the acts to be done on one side form the consideration for those to be done on the other.

Upon principles of natural justice, if the acts are to be done at the same time, neither party to such a contract could claim a fulfilment thereof; unless he had first performed, or was ready to perform, all the acts required on his own part.

When the entire fulfilment of the contract is contemplated as the basis of the arrangement, the contract, under the laws of Louisiana, is treated as indivisible; and *neither party can compel the other to a specific performance, unless he complies with it *in toto*. [*170

ERROR to the District Court for the Eastern District of Louisiana. Booraem & Co., merchants of New York, agreed with Hyde & Gleises, merchants of New Orleans, who were indebted to them, to give them an extension of time for the payment of the amount due by them, if they would give their notes, payable at subsequent periods, for a certain sum, the notes to be indorsed, and deposited with H. Locket, and to be delivered to them, on their having paid certain engagements, due in New York; the amount of which was included in the amount of the notes deposited in the hands of H. Locket. The notes were given and deposited in pursuance of this agreement; and Booraem & Co. performed all the matters contained in the agreement, excepting that they did not pay a draft for $2000 and a note for $1568.74, due and payable in New York; being unable to pay the same. The draft and note were returned to New Orleans, and Hyde & Gleises, at great inconvenience and loss, paid the same.

Booraem & Co., proceeding according to the practice in Louisiana, filed a petition in the district court, then exercising the powers of a circuit court of the United States, asking that the notes of Hyde & Gleises, in the hands of H. Locket, taking from the same a sufficient amount to repay to them, Hyde & Gleises, the amount of the $2000 draft, and the note for $1568.74, should, by a decree of the court, be ordered to be delivered to them. After a full hearing of the case, on the petition, answer and testimony, the district court gave a decree in favor of the petitioners; and the defendants prosecuted this writ of error. The case is fully stated in the opinion of the court.

Key and *Henderson* argued the cause for the plaintiffs in error; and *Coxe* appeared and argued the cause for the defendants.

**Key* and *Henderson* contended, that the record showed, beyond cavil, that the special contract sued on was executory, and dependent, in its terms, of execution on both sides. Booraem & Co. agreed to cancel and extinguish certain liabilities and evidences of debt then due them by Hyde & Gleises, and to take up and extinguish others to become due, and part of which Booraem & Co. had passed from their hands. On this consideration, Hyde & Gleises undertook to furnish Booraem & Co. with new evidences of debt, payable at a more remote day than that to which any of the former liabilities extended, and to give approved indorsers on most of the new paper. Now, the obvious understanding of the parties to this agreement was, that so soon as the first set of securities was taken up and delivered to Hyde & Gleises, that the second set of securities, prepared and placed in the hands of a mutual depositary, should then be delivered over. [*171

So understood Mr. Locket, the depositary. So did Booraem & Co., as shown by their subsequent letter, of date 26th May 1837; and so it is averred by Hyde & Gleises. This is just; and courts favor the principle of dependent contracts, because most just. 1 Pet. 465.

It will be observed also, that this suit is not to recover money due by contract. Nor is it to recover damages for breach of contract. Nor is it an action of detinue and trover. But it is an attempt to have decreed a partial specific performance of a contract, for delivery of chattels or *choses in action*. Now, the rule is universal, that he who asks a specific performance, must himself have performed, or be be in a condition to perform, his part. 1 Wheat. 178; 2 Ibid. 290. But this record admits the agreement, and acknowledges the default of the plaintiff; and thereupon the court proceeds to reform and remodel the contract, to correspond with the d linquency of the plaintiff. This the defendant, insisting on the terms of his agreement, objects to. The court below has made, in its direction, a new contract, different from what the plaintiffs set forth; adverse to the proof in the case, and to the will of the defendants. This is equally unauthorized by legislative or judicial power. 2 Sumn. 278; 1 Pet 14; 4 Wheat. 316; 8 Ibid. 1.

*172] We submit, too, that, though T. R. Hyde & Brothers, and *W. T. Hepp, the indorsers, are not parties to the action, yet they must be noticed as parties to the contract, and parties whose interests are affected by this judgment. It is not sufficient, that they may defend themselves, when sued on the paper. The court should not expose them to the jeopardy of a suit, by decreeing a delivery of their paper to Booraem & Co.; unless it is found, in the terms of the contract, that the conditions and contingencies have happened on which it should be so delivered. If the decree is to affect their interests at all (as it manifestly does), will not the court look to see what these interests and their agreement are? It is perceived, then, that these persons are the sureties of Hyde & Gleises, on the terms of their contract. And if Hyde & Gleises had consented to change the contract, without consent of the sureties, they would not have been bound, even though beneficial to their interests. There is no equity against a surety; but such have a right to stand on the exact terms of their contract. 9 Wheat. 680; 12 Ibid. 511; 1 Paine 305; 3 W. C. C. 70.

Coxe, for the defendants in error, cited 4 La. 465; 3 Ibid. 1; Code of Practice in Louisiana, 517, 487–9; 7 Mart. 21; 1 Mart. (N. S.) 187; 4 Ibid. 21; 8 Ibid. 379; 1 Pet. 620; Louisiana Code, art. 602, 2040, 2042; 3 Mart. (N. S.) 606–7.

STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the circuit court of the eastern district of Louisiana. The original suit was brought, conformable to the Louisiana practice, by petition, in which Booraem & Co., the original petitioners, state, that two of the original defendants, Hyde & Gleises, merchants of New Orleans, being indebted to the petitioners in a considerable sum, did, in April 1837, deliver to the petitioners certain promissory notes, to wit, three notes drawn by Hyde & Gleises, to the order of, and indorsed by, T. R. Hyde & Brothers, dated the 6th of April 1837, at six, twelve and eighteen months, amounting to $5000; and three notes drawn by the same makers, to the order of, and

indorsed by, William T. Hepp, dated on the 6th of April 1837, at seven, eleven and fifteen months, amounting to $5000; *and three notes drawn by the same makers, to the order of Booraem & Co., dated the [*173 6th of April 1837, at nine, thirteen and seventeen months, amounting to $2750.64. The petitioners then state, that on receipt of the notes, they, the petitioners, agreed to extinguish any and all demands which they had against Hyde & Gleises, or for which the petitioners had become responsible, by account, note or acceptance, previous to the 6th of April 1837, and which, including interest and exchange, amounted to $11,798.64. The petitioners then aver, that they did pay and extinguish the said demands, with the exception of a draft for $2000, and a note for $1568.74, which they were unable to provide the means of taking up, and which have since been taken up by Hyde & Gleises. The petition then goes on to state, that these notes were left in the hands of H. Locket, Esq., the other defendant, at New Orleans, who had been notified not to dispose of them to the prejudice of the rights of the petitioners; that they had demanded the delivery of five of the notes, to wit, three indorsed by Hepp (the others drawn to the order of, and indorsed by, Hyde & Brothers, being omitted in this part of the petition, by mistake), and a balance in cash of $469.12, according to the account annexed; that they had also demanded a delivery of the same five notes, from Locket; but he had refused to deliver the same. The petitioners, therefore, prayed, that they might have a judgment of the court decreeing a delivery to them by Locket of the three notes drawn by Hyde & Gleises, to the order of T. R. Hyde & Brothers, and two of the three notes drawn to the order of William T. Hepp, one at eleven months for $1500, and the other for $2000 at fifteen months; and decreeing Hyde & Gleises to pay the said balance of $469.12; and they also prayed for further relief.

Such is the substance of the petition, which does not seem to be drawn with entire accuracy and precision. Annexed to the petition is a receipt, signed by Booraem & Co., acknowledging the receipt of the nine notes described in the petition, and *that they are given for the purpose of [*174 extinguishing the demands against Hyde & Gleises, before the 6th of April 1837, as stated in the petition; and then adding the following clause: "Should Joshua B. Hyde, of the firm of Hyde & Gleises, now in New York, have settled for the draft of $2000, paid by Booraem & Co., on the 15th of March 1837, or for the sum of $2128.36, by notes or otherwise, the said Booraem & Co. are bound to take them up at maturity, and are included in said arrangement herein first specified."

Hyde & Gleises, in their answer, admit the making and indorsing of the notes, and aver, that they were prepared for delivery to the petitioners, according to the receipt, which contains stipulations binding upon the petitioners, and forming conditions precedent to the delivery of the notes; that to secure a compliance with the agreement, it was mutually agreed, that the notes and receipts should be deposited in the hands of Locket, to be delivered to the petitioners, when the several conditions mentioned in the receipt were performed, and only in that event were to be delivered; that the petitioners totally neglected and refused to perform the conditions; and in consequence of such omission and neglect, the defendants, Hyde & Gleises, were forced to pay and did pay a note of $1564.74, and an acceptance of $2000, with costs and damages, both of which the petitioners had

assumed to pay ; that the friends of the defendants, Hyde & Gleises, were induced to indorse the notes, by the reasonable expectation that the defendants would be enabled to meet the notes from the profits of their business, and save their indorsers from loss, if the extensions stipulated in the receipt were granted upon all the demands of the petitioners; that by reason of the failure of the petitioners to comply with the agreement, and the payments they were forced to make, they exhausted their resources and credit, and their business was destroyed, and their ability to protect their indorsers was utterly at an end ; and they conclude, by denying their indebtment, in the manner stated in the petition, and pray that the petitioners may be cited to answer in reconvention, and be condemned to pay the amount of $5000 to the defendants as damages.

*175] *The defendant, Locket, by his answer, asserted, that the notes were deposited in his hands by the joint consent of the petitioners and Hyde & Gleises, to be delivered to the petitioners by him, when all the conditions in the receipt were fulfilled by the petitioners ; and he avers that the agreement never was fulfilled on the part of the petitioners, and that they are not entitled to the notes. The indorsers also filed a petition of intervention in the cause ; which, however, was afterwards withdrawn. The petitioners replied to the plea of reconvention, denying their indebtment.

Upon this state of the pleadings, the cause came before the circuit court for decision, without the intervention of a jury, by the consent of the parties, and the final decision was made by the district judge, upon an examination of the evidence offered by the parties. The decree was, in effect, that the defendants ought to pay to the petitioners, out of the notes, the balance of $11,789.64, after deducting the amount of the note of $1567.74, and of the acceptance of $2000 paid by the defendants, and the interest thereon ; and that for this purpose, four of the notes in the possession of Locket, to wit, two drawn by Hyde & Gleises to the order of T. R. Hyde & Brothers, of the 6th of April 1837, one for $2000,. payable in eighteen months, and the other for $1500, payable in twelve months, and two other notes drawn by Hyde & Gleises to the order of W. T. Hepp, dated 6th of April 1837, one for $2000, payable in eighteen months, and the other for $1500, payable in eleven months, amounting in all to $7000, to be delivered by Locket to the petitioners, or their attorney ; and that the remaining five notes be delivered to Hyde & Gleises ; and that judgment be for the petitioners against Hyde & Gleises for the remaining unsatisfied sum due to the petitioners, of $776.90, with interest from the decree. It is from this judgment that the present writ of error is brought ; the district judge having, at the request of the defendant's counsel, made a statement of the facts on

*176] which he relied ; *and the record containing, at large, the whole evidence at the hearing.

One of the embarrassments attendant upon the examination of this cause in this court, is from the manner in which the proceedings were had in the court below. We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. We

can only re-examine the law, so far as he has pronounced it upon the statement of facts, and not merely a statement of the evidence of facts, found in the record, in the nature of a special verdict, or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions on matters of fact. Unless this is done, it will be found extremely difficult for this court to maintain any appellate jurisdiction in mixed cases of the nature of the present. The same embarrassment occurred in the case of *Parsons* v. *Armor*, 3 Pet. 413; and was there rather avoided by the pressure of the circumstances, than overcome by the decision of the court. Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question, which we are to dispose of, is, whether, in point of law, upon these facts, the judgment can be maintained? We are of opinion, that it cannot be, and shall now proceed to assign our reasons.

In the first place, it is a material circumstance, that the petition is not to recover pecuniary compensation or damages for any supposed benefit conferred upon Hyde & Gleises under the agreement; but it is in the nature of a bill for a specific performance of that agreement, by a delivery up of a part of the notes deposited in the hands of Locket, not upon the ground of an entire performance of the agreement on the part of the petitioners; *but confessedly, upon the admission, that they have not performed it, except in part; and therefore, seeking a part performance only, [*177 *pro tanto*, from the other side. Now, the present being what in the French law, which constitutes the basis of that of Louisiana (Code of Louisiana, art. 1760–63), is called a commutative contract, involving mutual and reciprocal obligations, where the acts to be done on one side form the consideration for those to be done on the other, it would seem to follow, upon principles of natural justice, that if they are to be done at the same time, neither party could claim a fulfilment thereof, unless he had first performed, or was ready to perform, all the acts required on his own part. And this accordingly will be found to be the rule of the Civil Code of Louisiana (art. 1907), where it is declared, that in commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party, who wishes to put the other in default, must, at the time and place expressed in, or implied in, the agreement, offer or perform, as the contract requires, that which on his part was to be performed, or the opposite party will not be legally put in default. And again (art. 1920 and 2041), on the breach of any obligation to do or not to do, the other party in whose favor the obligation is contracted, is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option; or he may require the dissolution of the contract. But it is nowhere provided, that the party who has omitted to perform the acts which he has contracted to perform, can entitle himself, if the other party has been in no default, either to a specific performance, or to damages, or to a dissolution of the contract. That woul

be to enable the party committing the default to avail himself of his own wrong, to get rid of the contract.

But it is supposed, that where a party has performed his contract only in part, he may, nevertheless, be entitled to a performance, *pro tanto*, from the other side; although it has been by his own default, that there has not been an entire performance. And certain cases in the Louisiana reports have been relied on, to establish this doctrine. But these cases, when examined, will not be found to justify any such broad and general conclusion. They establish no more than this: that where, in a commutative contract, there has been a part performance on one side, from *which a benefit *178] has been derived from the other side, the other party is compellable to make compensation in pecuniary damages, to the extent of the benefit which he has received, deducting therefrom all the damages which he has sustained by the want of an entire performance thereof. There is nothing unreasonable in this doctrine; and although it may not be, in many cases, recognised and acted upon in the common law, it is often enforced in equity. But this doctrine is not applicable to all cases of commutative contracts, generally, but only to cases where the contract is susceptible, from its nature and objects, of divisibility; and where, not a specific performance, but a mere pecuniary claim, in the nature of a *quantum meruit*, is sought to be enforced. Thus, in the case of *Loxeau* v. *Declonat*, 3 La. 1, where A. agreed to build a sugar-house for B., for a certain price, and B. was to pay for it, when the work was completed, and to furnish materials; it was held, that if A. failed to complete the work in the manner stipulated, yet, if B. used the sugar-house, he was bound to pay for it in money, the value of the labor he had expended upon it; that is to say, the value of the benefit he had derived from the labor; for the Civil Code of Louisiana (art. 2740) contemplates that B., in such a case, is entitled to damages for the losses sustained by him from the want of a due fulfilment of the contract. The same decision was made under similar circumstances in the case of *Entre* v. *Sparks*, 4 La. 463.

But, where the entire fulfilment of the contract is contemplated by the parties, as the basis of the arrangement, the contract is treated as indivisible; and neither party can compel the other to a specific performance, unless he complies with *in toto*. Thus, if A. should agree to sell B. a ship for $10,000, or a horse for $500, and B. should pay a part only of the purchase-money, as for example, a fifth or tenth part thereof, it would hardly be pretended, that he would be entitled to a specific performance, *pro tanto*, by a conveyance of a fifth or tenth part of the ship or horse. And on the other hand, the vendor would have no pretence to require, that if he had a good title only to an undivided fifth or tenth of the ship or horse, the purchaser should be compellable to take that part and pay him, *pro tanto*, the purchase-money. In every such case, it would be manifest, the contract of sale would be indivisible; and that *each party would *179] have a right to insist upon an entirety of performance. Now, that is precisely the ground applicable to the present case. The contract between the parties, was, from its character and object, entire and indivisible. Hyde & Gleises, and their indorsers, entered into the new agreement, and gave the notes, upon the faith and confidence that the petitioners would punctiliously perform the whole of it on their side. The object was, to procure a

prolonged credit and delay of payment to Hyde & Gleises for all their debts contracted with the petitioners; and thus enable them to retrieve their affairs, rescue themselves from impending ruin, and to make their indorsers safe. This could be only by the petitioners taking up all the notes and acceptances already given by Hyde & Gleises, according to the stipulations of the petitioners, and thus enabling them to carry on their operations in business: and it seems to have been contemplated on all sides, that by the omission, Hyde & Gleises might be compelled to stop, and their indorsers be brought into peril; and, indeed, the record shows that the event actually occurred. If then Hyde & Gleises have failed to realize the benefits contemplated by the arrangement, by the default of the petitioners, what ground is there to assert, that they, or their indorsers, ought to be compelled to a specific performance of a contract *pro tanto*, when the consideration was a punctilious performance of the entirety? The most that could, under such circumstances, be contended for, would be, to say, not that Hyde & Gleises should be compelled to give up any part of the indorsed notes; but that they should be bound to repay to the petitioners, in money, the amount paid by them for Hyde & Gleises, deducting all damages sustained by the latter, by reason of the non-performance of the contract, as in the cases already cited. But that is not the object or the prayer of the allegations in the present petition.

In the next place, there is another view of the case, still more striking and conclusive. It is not true, as the petition supposes, that there was any actual delivery of the notes to the petitioners (which might have presented another question); but in point of fact, as the evidence fully establishes, the notes were deposited in the hands of Locket, to be delivered over to the petitioners, only upon their full performance of the stipulations on which they were *to have effect. It is admitted, that those stipulations [*180
have never been performed. Upon what ground, then, can the petitioners now demand a delivery of any of the notes, they not having fulfilled the conditions of the deposit? It has been said, that here, by the giving up of the new notes, tbe old debts due by Hyde & Gleises have been extinguished by novation; and therefore, their sole remedy lies upon the new contract, and notes given in pursuance thereof. But that doctrine is by no means true, as it is attempted to be applied to the circumstances of the present case. A novation will, indeed, if it be absolute and unconditional, amount to a direct extinguishment of the original debt, by substituting the new contract in its place. This is sufficiently apparent from the language of the Civil Code of Louisiana, art. 2181–94. But no extinguishment is wrought, if the arrangement is conditional, and the conditions are not fully complied with. Pothier (on Obligations 550–1) states this in the most clear and explicit terms. "It follows," says he, "that if the debt of which it is proposed to make a novation by another engagement, is conditional, the novation cannot take effect, until the condition is accomplished;" therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted; *vice versâ*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct."

Now, that the giving of these notes, by way of novation for the old debts, was conditional, is apparent, from the fact that they were not delivered to the petitioners, but were deposited in the hands of Locket, "subject to the provisions of the receipt," and to be delivered over by him, only when these conditions were complied with by the petitioners. So all parties must have understood the transaction; and the deposit, in any other view, would be as unaccountable as it would be unmeaning. The petitioners have never, as they admit by their petition, complied with these conditions. How, then, can they, consistently with all rules of law, insist upon the transaction being a complete and absolute novation, entitling them to the delivery of the substituted securities, in lieu of the old debts?

*181] *Nor is the consideration to be lost sight of, that the arrangement does not merely limit itself to the immediate interests of the debtors and the creditors. The indorsers have rights also, which must have been intended to be provided for and secured by the deposit; to which, in reason, they must be persumed to have been parties, and given their assent. We have no right to presume, that they would have indorsed these notes, without the entire confidence that the new arrangement would be carried out and fulfilled with the most scrupulous punctuality. Their own recourse over against Hyde & Gleises might otherwise be most materially and injuriously affected. Their object must have been, by securing to Hyde & Gleises the prolonged credit, to have enabled them to meet the new payments, and thereby exonerate themselves from ulterior responsibility. If, therefore, we were to give effect to the present suit, the conditions of the novation not having been fulfilled, we should either deprive the indorsers of all the benefits and securities contemplated in the arrangement; or, at all events, leave them exposed to a responsibility, as indorsers, from which, by the very deposit, they meant guard themselves.

There are other embarrassing difficulties in the frame of the decree, as to the manner in which it disposes of the notes, and divides the responsibilities of the respective indorsers without their consent, and proceeding to adjudge money to the petitioners for the balance. But it is unnecessary to dwell on them, for, upon the grounds already stated, we are of opinion, that the judgment ought to be reversed, and the cause remanded, with directions to the court below to dismiss the suit, with costs for the orginal defendants.

Judgment reversed.

*182] *Mathew Hobson, Appellant, *v.* The Heirs of Duncan McArthur, deceased, Appellee.

Arbitration.—Umpire.—Execution of power.—Relief in chancery.

It was agreed between McA. and H., that McA. should withdraw entries of 10,000 acres, part of 11,666 acres, which had been located for the use of H., and should relocate the same elsewhere; and that the 10,000 acres, the entries of which had been withdrawn, and the 10,000 acres relocated elsewhere by McA., should be valued by two disinterested persons, one to be chosen by each party, and if the two could not agree on the value of the land, or any part thereof, they should choose a third person, who should agree on the value of the land, and that H. should have so much of the land relocated, as should amount to the value of the land for which the locations had been renewed; and also to the value of $2000, in addition to the value of the 10,000 acres. The two persons appointed could not agree as to the value of part