

The Auditor filed his report on the 28th of September, 1847, and on the 13th of November, 1848, at the final hearing of the cause, the following opinion was delivered :]

THE CHANCELLOR :

This case having been submitted on the part of the complainant, and the solicitors of the parties having presented their views, in writing, the proceedings have been read and considered by the Chancellor.

It appears, that upon a bill filed by the defendants, as administrators, with the will annexed, of Alexander Forsyth, against Rachael Forsyth, certain property was decreed to be sold, and the complainants in that case, being appointed trustees to make the sale, sold the same, and that Rachael Forsyth represented by the complainant in this case, became the purchaser. That by the report of the Auditor in the first case, there appeared to be due the said Rachael, the sum of \$1,208 76, which report was ratified by the Chancellor's order, passed on the 10th of March, 1837, and this bill is filed to enforce the payment of the sum.

The answer of the defendants in this case, and the evidence, shows that Rachael Forsyth did not comply with the terms of sale, and that the property was subsequently sold by her, through an agent, to Mrs. Helena Stewart, with an agreement that the purchase money should be applied to the payment of incumbrances and other debts due by the said Rachael Forsyth, and that these incumbrances and debts exceed by \$233 40, the sum which had been awarded her in the case first mentioned, so that, in point of fact, she has been overpaid that sum. It is objected, to be sure, that this agreement being by parol, is void under the statute of frauds, but even if the statute would, under any circumstances, apply to such an agreement (which is not admitted) the acts of part performance by the defendants in the case, would clearly take it out of its operation. It would be making the statute an instrument of fraud, to allow it to defeat an agreement which has been performed to the extent to which this has been.