Neill. The intention to defraud is a more essential element in deceit.* But in contract, by reason of the false representation, that which was contracted for not being acquired, there is in effect no contract: Kerr on Fraud, 17. So here, that which was in fact given to the plaintiff differed in the substance from what he was entitled to receive: *Gompertz* v. *Bartlett*, 2 E. & B. 849. And therefore, even if deceit would not lie, the sale would be void: *Polhill* v. *Walter*,† 3 B. & Ad. 114; *Milne* v. *Marwood*, 15 C. B. 778. No matter how reasonable may have been Neill's expectation of funds, according to the second finding, that does not acquit him of the misrepresentation with which he stands charged by the first finding. The last finding establishes that the defendants are not in the position of innocent third persons. But, even if one or two innocent persons must suffer, it should be he who provided the means by which a wrong was compassed.‡

Hemphill, Q.C., (with him *Martin*,) for the defendants, contra. On the second finding, a verdict should be entered for the defendants. We have now had new evidence as to the dealings between Neill and the Royal Bank; and it appears that the bank frequently met his overdrafts, exceeding the defendants' guarantee. [MONAHAN, C. J.—It was not suggested, at the trial, that the bank of itself would pay this cheque. No question was left to the jury as to that.] It shows that Neill was not criminally liable. He went to the fair with some hundreds of pounds in cash, to purchase cattle. He bought those cattle (amongst others), intending to pay for same, and appointing a place and time to do so. That was a complete sale, a sale upon credit. The sale transferred the property, and the right of property carried with it the right of possession. Before the time for payment had arrived, the possession was vested in the vendee by delivery of the cattle under the contract. The lien of the vendor was at an end, and his right of stoppage *in transitu* determined; nothing remained but his right to recover the price on foot of the contract: *Dixon* v. *Yates*, 5 B. & Ad. 313. The plaintiff could not then have re-taken the cattle, and he was bound by the terms of the credit he had given. Subsequently at one o'clock, as appointed, the parties met for payment, and the plaintiff, without question, accepted 30s. earnest and a cheque for the residue of the purchase money, and a cheque which could not possibly be presented and cashed on that day. [MONAHAN, C. J.—The plaintiff being to be paid in cash, could he have rejected the cheque when tendered, and have re-taken the cattle? LAWSON, J.—The cattle had not been delivered to Neill then.] Whether the plaintiff could have resumed possession, depends on whether the bargain and sale had been completed, the property divested, and the transitus at an end. If the transaction, in its inception, had been vitiated by fraud, and possession had not been given up, the vendee would not have been discharged:* *Owenson* v. *Morse*, 7 T. R. 64. But here, there was the previous design to pay; the acceptance of 30s. part payment, † which of itself would have prevented the plaintiff from following the cattle as against Neill, the transitus being determined; and the delivery of the cattle. Neill had desired that the cattle should be sent to the railway, and the report of the learned Judge states the evidence of the plaintiff, that his "men drove the cattle to the railway station, where they left them for Neill; where they remained till evening, and were then forwarded by cattle train to Dublin." If Neill had re-sold the cattle at the fair, the plaintiff could not have taken possession from the sub-purchaser,‡ the property having passed to Neill by the delivery without demanding the price: *Haswell* v. *Hunt*, 5 T. R. 231; *Milwood* v. *Forbes*, 4 Esp. 173. In order to prevent the property passing, there must have been a pre-conceived design to defraud: *Earl of Bristol* v. *Willsmore*, 1 B. & C. 514. The question is, what was the intention of the purchaser? *Stephenson* v. *Hart*,§ 4 Bing. 476. The passing of a cheque which there are no funds to meet

* See Hammond N. P. 283; *Watson* v. *Poulson*, 15 Jur. 1111.—REP.

† See *Watson* v. *Poulson*, 15 Jur. 1111, 1 C. M. & H. 540.—REP.

‡ So, see *Fowler* v. *Hollins*, (Ex. Ch.) L. R. 7, Q. B. 635; *Ex parte Swan*, 7, C. B. N. S, 440.—REP.

* So, by giving an unproductive cheque, though the debtor had previously tendered cash *Everett* v. *Collins*, 2 Comp. 505. And see cases cited, Benjamin on Sales, 541, 546.—REP.

† As to the effect of part payment, with respect to the right of stoppage *in transitu*, see *Hodgson* v. *Loy*, 7 T. R. 440; *Feize* v. *Wray*, 3 East, 103. In *Dixon* v. *Howeston*, cited *in notis onte*, observe, there had been a payment, but not on account. In *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 32, it has been held that, though goods have been delivered to a railway company for a vendee, and even after the transitus has been determined, the contract may be rescinded by the vendor, by reason of fraud, and the property re-vested in and resumed by the vendor, if no intermediate interest has vested in an innocent person.—REP.

‡ But were Neill subsequently convicted, see *Nickling* v. *Heaps*, 21 L. T., N. S. 754.—REP.

§ It is observed in Benjamin on Sales (as to which, see note, 5 Ir. L. T. R. 192) that this is a very doubtful