On the fourth point I will barely remark, that the record appears to me to be the best evidence to prove the amount which the said Noble intended to defraud the said Rankin of. Therefore on all these matters I am of opinion the judgment of the court below ought to be affirmed.

Judgment affirmed.

JAMES FOLEY, Plaintiff in Error, *v.* THE PEOPLE, Defendants in Error.

ERROR TO MADISON.

The words, "any other offense which by law shall not be bailable," as used in the 40th section of the act defining the duties of justices of the supreme court, apply, not to the ability of an offender to procure bail, but to the character of the offense.
Larceny is an offense bailable by law.
Consent can not give jurisdiction.

Opinion of the Court by Chief Justice REYNOLDS. At a special term of the circuit court held in the county of Madison, on the 25th day of November, 1822, an indictment for larceny was found against the said Foley, upon which indictment his conviction accrued.

There are several errors assigned; but the only one which we deem material, is, the objection to the jurisdiction. In ascertaining the jurisdiction, or what is necessary to authorize a special term of the circuit court, we must look to the 40th section of the act entitled "An act regulating and defining the duties of the justices of the supreme court." By that section it is expressly enacted, "That whenever any person shall be in the custody of the sheriff of any county, charged with any capital offense, or any other offense which by law shall not be bailable, it shall be the duty of the sheriff to give information," &c. It was contended in the argument, and indeed such is the opinion of Justice REYNOLDS, who tried the cause, that this statute ought to be construed to embrace every case where the prisoner was in custody, and unable to give bail. In consequence of this opinion, and the serious manner with which it was contended for by the counsel, we have

though he may be permitted, sworn or unsworn, to explain any change of belief, and leave the court to determine as to his competency. Id.

The authorities on this question are stated fully in the opinion of SCATES, C. J., in this case.

given the subject the most mature consideration. In doing so, we have not been able to give to that statute such latitude of construction. The words of the statute are clear, express, unambiguous and admit of no doubtful construction.

The words of the statute are, "That whenever any person shall be in the custody of the sheriff of any county, charged with any capital offense, or any other offense which by law shall not be bailable," &c. Now to ascertain when any offense is bailable, we must look to the law, and it does seem to us to be a perversion of plain language to say that we must look to the fact of the party's ability to procure bail, to ascertain whether by law he is bailable. But it is contended we must be governed by the intention of the legislature. I ask how is that intention to be ascertained? Must we seek for some hidden intention which the language of the law will not justify, or when the language is plain and admits of no construction, shall we not take it as we find it? If the statute was ambiguous in its provisions, then we might have recourse to construction to ascertain the true meaning; but when otherwise, we are satisfied to take the law as it is, and if it is defective, leave it to be remedied by the legislature, and not by strained constructions. Having settled this question, we will consider whether larceny is bailable by law; if it is, it is a case not provided for by the statute. In settling this question, we need only have recourse to the constitution of our state. By the 13th section of the eighth article of that instrument it is provided, "That all persons shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or the presumption great." Larceny, by our statute, is not made capital; the punishment is by fine and whipping. Hence it comes within the letter and spirit of the constitution. It was urged in the argument, that as the prisoner appeared below and pleaded to the indictment, he waived, or acknowledged jurisdiction.

It will only be necessary to answer to that argument, that where the court has not jurisdiction of the subject matter, consent will not give it. (1) We might then, after settling these questions, proceed to reverse the judgment of the court below, but believing as we do, that the court below having been called for the purpose of taking cognizance of an offense of which they had no jurisdiction, it had no legal existence, and consequently was no court. Hence we can not undertake to reverse the proceedings of that body; having no such control over it; but as an opinion was asked for by the prisoner, and

(1) See note to *Cornelius* v. *Coons et al.*, ante, page 37.

the jurisdiction supported by the attorney general, we conceived it right to give an opinion that the law hereafter may be understood.

BRYAN, MORRISON, AND DAVIDSON, Appellants, *v.* JOHN PRIMM, Appellee.

APPEAL FROM ST. CLAIR.

A *suppressio veri* in relation to any important fact affords ground for the interference of a court of equity to annul the contract. (1)
The assignee of a note, after it becomes due, takes it subject to all the equity existing between the original parties to it.
Notice of an equity, to an agent, is notice to his principal.
Though a bill for an injunction does not pray that the money be refunded, yet such relief can be granted, and a decree therefor is not erroneous.

Opinion of the Court by Chief Justice THOMAS REYNOLDS. This was a suit in chancery, commenced by Primm, for the

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(1) In a sale of land by a guardian, a mere *suppressio veri*, does not constitute fraud in the sale; but if there was a *suggestio falsi* the question would be different. *Mason* v. *Wait et al.*, 4 Scam., 127.

Fraud may consist as well in a *suppressio veri* as in a *suggestio falsi*; for in either case, it may operate to the injury of the innocent party. *Lockridge* v. *Foster et al.*, 4 Scam., 569.

These decisions of our court are apparently conflicting, and, to a casual reader, might be calculated to mislead. Indeed the cases of *Bryan & Morrison* v. *Primm*, and *Lockridge* v. *Foster et al.*, do not justify the syllabus of the reporter. In each of those cases there was a positive false affirmation which authorized the decision of the court; and in the last case the language of the opinion was as stated by the reporter; but it was not called for by the case—was a mere dictum of the court—and with all due deference to the very able judge who delivered the opinion, is not, we think, warranted by the law. How far a person is bound, when dealing with another, to communicate facts purely within his own knowledge, is a question about which great diversity of opinion has existed. CICERO held that a man was bound to communicate every fact within his knowledge, which was unknown to the one with whom he was dealing, and which might operate on the other in making the contract. Some modern jurists and moralists of eminence have adopted this doctrine. Although this may be and is true in morals, yet the courts of America have not seen fit to adopt so rigid a rule. Thus CHANCELLOR KENT says "From this and other cases it would appear that human laws are not so perfect as the dictates of conscience; and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not, and can not undertake directly to enforce." 2 Kent's Comm., p. 490.

To constitute a *suppressio veri* such a fraud as will authorize a court to interfere and declare the contract void, there must be something more than a failure to *communicate* facts within the knowledge of the party—there must be *concealment*. Such concealment may be by withholding the information when asked for it, or by making use of some device to mislead. Or there may be cases in which such suppression would be held to be a fraud when no *act* was done by the party chargeable with it; such as where from the peculiar situation of the parties—"when the person stands in the relation of trustee or *quasi* trustee to another, as agent, fac-