# ABDULIA KAMARA, Appellant *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Argued November 18, 1974. Decided December 13, 1974.

1. Any person charged with a crime is entitled to an impartial and speedy trial by jury.
2. In criminal cases the burden is on the prosecution to prove beyond a reasonable doubt the essential elements of the offense with which the accused is charged.
3. To constitute the crime of obtaining money under false pretense, property must have been obtained by the accused who must be shown to have intended to defraud when he knowingly made some representation to the person defrauded thereby.
4. The trial of a person charged with obtaining money under false pretense cannot be tried in the Magistrate Court or before a justice of the peace, but in the Circuit Court.
5. The Legislature has no power to enact legislation which infringes upon the Constitution.
6. When restitution has been made part of the penalty for a crime, the lawmakers have intended restitution would be part of the punishment to be fixed by the trial court.

The appellant was a roadbuilder and apparently promised to build a road in return for a sum of money to be paid by the private prosecutor acting in behalf of his community. At least part of the money was paid. The road was never built and complaint was made to legal authorities. The appellant was indicted for the crime of obtaining money under false pretense, tried in the Circuit Court before a jury, and was found guilty as charged. He appealed from the judgment to the Supreme Court.

The Supreme Court found that the evidence did not justify the verdict. Moreover, the Court was of the opinion that a civil suit based on breach of contract would have been the more proper approach.

*Moses K. Yangbe* for appellant. The *Solicitor General* for appellee.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

This is an appeal from a conviction in the Circuit Court for the Fifth Judicial Circuit, Grand Cape Mount County, for the crime of obtaining money under false pretenses.

An examination of the record forwarded to this Court reveals that on June 7, 1973, the appellant, Abdulia Kamara was indicted for the crime of obtaining money under false pretense, the charge being predicated upon a complaint made against him by Varnie Sonii, the private prosecutor.

The indictment charged that on March 21, 1972, the appellant, a resident of the Town of Salakor, Taewor Chiefdom, Taewor District, Grand Cape Mount County, with fraudulent design to cheat and falsely obtain money from Varnie Sonii of the Town of Kobolia, Taewor Chiefdom, Taewor District, did unlawfully, wrongfully, intentionally, feloniously, fraudulently and falsely make representation to the said private prosecutor, that in consideration of the amount of $300.00, the appellant would have a motor road built for the private prosecutor's hometown; that relying upon the representation so made, and believing the same to be true, the private prosecutor gave the appellant the $300.00 so requested. Wherefore, the indictment alleged, the crime of obtaining money under false pretense was then and there committed.

Thereafter, a writ of arrest was issued and on August 16, 1973, the appellant was arrested. On September 19, 1973, the case was called before Judge Tilman Dunbar, presiding by assignment. The appellant, having been arraigned, pleaded not guilty to the charge. Whereupon, a jury was empaneled and the trial was commenced. Upon completion of the presentation of evidence by both sides, the jury was charged and sent to their room of deliberation to consider the evidence so presented. They re-

turned with a verdict of guilty against the appellant, to which he excepted. He filed a motion for a new trial, which was resisted and denied. Thereafter, the appellant filed a motion in arrest of judgment, which was also resisted and denied. The court then proceeded to pronounce judgment against the appellant, fining him $100.00, and ordering him to make restitution in the amount of $300.00.

It is from the aforementioned verdict and the pronouncement of judgment that an appeal has been brought before this Court, in the hope of appellant that justice be administered. We accept this challenge, as indeed we have always done. We have never hesitated to mete out justice where justice was due or where, in our opinion, it had been denied.

Our Constitution and statutes grant to each and every individual criminally charged, certain basic rights. In like manner we have been granted and vested with power and authority to protect those rights. Among those rights is the right to an impartial and speedy trial. Constitution, Article I, Section 7th; *Watts* v. *Republic,* 11 LLR 77 (1951); *Republic* v. *Weafuah,* 16 LLR 122 (1964). To effectuate the right to a fair and impartial trial, the law guarantees that each person criminally charged is entitled to a trial by jury. Constitution, Article I, Section 7th; *Mirza* v. *Republic,* 13 LLR 41, 45 (1957). In this process, one who has been criminally charged with an offense which lies beyond the jurisdiction of courts not of record, is judged only by his peers, who are members of the community, who come from all walks of life, and who hold a diversity of opinions. In so judging a person, therefore, the law requires that the jury satisfy itself that the prosecution has proven beyond a reasonable doubt that the defendant is guilty of the offense for which conviction is sought. This we have repeatedly stated, that in all criminal cases the State must prove beyond a reasonable doubt that the person or persons who have been

criminally charged, are guilty of the offense for which they are being prosecuted. *Gouykro* v. *Republic,* 11 LLR 102, 107 (1952); *Johnson* v. *Republic,* 15 LLR 66 (1962). This position finds support in the decisions in most jurisdictions and in the writings of most legal scholars, as set forth below.

> "In a criminal case the burden is on the prosecution to prove beyond a reasonable doubt the essential elements of the offense with which the accused is charged; and if this proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. The burden of proof is never on the accused to establish his innocence or disprove the facts necessary to establish the crime charged. Although the accused is required to assume the burden of proving the affirmative defense upon which he relies, the burden of establishing his guilt rests on the prosecution from the beginning to the end of the trial, even in a case in which the defendant offers an affirmative defense." AM. JUR. 2d, *Evidence,* § 148.

The question in criminal cases, therefore, is not one of mere proof, but proof beyond a reasonable doubt. Thus, where an accused has presented proof or evidence as to raise a strong doubt, as regards the substance of the prosecution's case, the latter is under a duty to rebut evidence, or have a conviction overturned.

In the instant case we are asked to determine whether the criteria which we have laid down herein have been met by the prosecution. The appellant contends that the criteria have not been met; that there is a doubt as to the offense charged, which the prosecution failed to rebut; and that the verdict brought in against him was not in conformity with the criteria which we have laid down.

Of the 13 counts in the bill of exceptions, only counts 9, 12, and 13, which we quote hereunder, are relevant to a determination of this case.

> "9. And also because the verdict of the empanelled

jury was manifestly against the law and the evidence at the trial . . . .

"12. And also because defendant says that according to the evidence introduced by the State it was not proven beyond all reasonable doubt that defendant made misrepresentation in obtaining the amount in question, but rather that he has built five roads in the area and he contracted to build a road for the private prosecutor if he received said amount of $300.00; . . .

"13. And also because Your Honor rendered final judgment against defendant on the 3rd of October, 1973, contrary to the law and evidence, to which defendant excepted and prayed for an appeal to the Supreme Court in its March 1974 Term."

It is clear, therefore, that a determination of this case raises the question of reasonable doubt. Did the prosecution establish a case beyond a reasonable doubt, to warrant the conviction of the appellant? In determining the matter we must resort to a review of the charges brought against the appellant, and the evidence adduced at the trial.

The indictment upon which the appellant was arrested charged him with obtaining money under false pretense, alleging that he had falsely represented to the private prosecutor that in consideration of $300.00 he would have a road built for the said private prosecutor; and that as a result of such false representation, the appellant had obtained $300.00 from the private prosecutor for which no road was ever built.

The crime of obtaining money or goods under false pretense has come down to us from as far back as the reign of King George II of England, when a false pretense statute was first introduced into the law. 30 Geo. II, Chapter 24, Section 1. Legal opinion, in 19 CYC., 393, *False pretenses,* deals with the crime:

"B. Elements in general and degree. To constitute the crime of obtaining property by false pretense there

must be: (1) a false pretense; (2) by defendant or someone instigated by him; (3) knowledge of defendant of its falsity; (4) a reliance on the pretense by the person defrauded; (5) an obtaining of the property by defendant or someone in his behalf; (6) an intent in defendant to defraud; and (7) an actual defrauding. . . .

"In some jurisdictions the offense is a misdemeanor; in others it is a felony; in yet others its degree depends on the character or value of the property obtained and the method of obtaining.

"The pretense must be false. If it is not false the crime is not committed, even though the accused believed it to be false at the time he made it. If the representation is true when made, it is not within the statute, although it is no longer true when the property is obtained, unless defendant has in the meantime either expressly or impliedly reaffirmed its truth. Since the crime consists not only in making a false representation but in obtaining property thereby, it follows that, although the pretense is false when made, yet if it becomes true before the property is obtained the crime is not committed. . . . A mere promise to do something, relating as it does to a future event, is not within the statute."

Our Penal Law contains a relevant section.

"Any person who makes false representations, with a fraudulent design to obtain money, goods, wares or merchandise, with intent to cheat another, or a representation of some fact or circumstance alleged to be existing calculated to mislead, which is not true, or does not exist, with intent to cheat or defraud another of his goods, wares, money, merchandise or other property of value, is guilty of obtaining money under false pretense and punishable by a fine of not more than one hundred dollars; he shall be required to make

restitution of the money or thing of value obtained." 1956 Code 27:302.

From a reading of the above quoted section, it is clear that in order to establish the crime of obtaining money under false pretense, it must be shown and proven that the accused made some kind of misrepresentation, and that the requisite intent was present when such misrepresentation was made. The prosecution argues that these elements were shown or proven at the trial. They maintain that the appellant had misrepresented to the private prosecutor that he was a construction engineer or road builder, when in fact he was neither of these and knew nothing about the building of roads. This alleged misrepresentation, they said, clearly shows the requisite intent of the appellant to defraud the private prosecutor.

The prosecution's first witness, the private prosecutor, was asked to relate all he knew about the case.

> "Some time ago Abdulia Kamara said that anyone who wants a road to connect his town must let him know. I told him that I wanted a road work connecting my town, from Kpeneji to my town, Kobolia. He told me that to request for the road connection you have to pay $10.00. So I gave him the $10.00; upon giving of this $10.00 then I will know that you are really interested in getting the road connection. He told me that we shall go so he can see the road, and we came and he came and he saw the road. After the inspection of the road, he told me that he accept the project and that he will complete it within three days; so for the three days of work on the road you have to give me (defendant) $300.00 in full. I gave him $150.00 as an advance payment; but the defendant insisted that I should pay the $300.00 in full. So I paid the $300.00 in full. He, the defendant, appointed a time for him to come and do the work and we accepted it, but at the time appointed he did not

show up, so I went to him and asked, why you did not show up in keeping with your promise? We told him, that if you cannot do our work you should return our money to us. I complained to the elders in the town to advise the defendant to go and do the work. He told the elders that he will not do the work because I did not give him any money. Defendant said, I will not do your work, go and do what you want to do. We complained to the Magistrate and the Magistrate examined the matter and sent it forward to this Court."

On cross-examination the witness was asked the following question:

"Q. To the best of your knowledge, do you know the defendant to be an engineer or a road builder?

"A. No, I did not know the defendant to be an engineer or a road builder."

Yet, and in spite of this answer, the witness, when asked by the court as to whether the defendant had given any explanation why he did not perform the contract to build the road, replied: "The defendant built five other roads within the area but he did not show me any reason why he did not perform his contract with us."

This testimony of the prosecution's primary witness, seems to have greatly weakened the prosecution's case as to any alleged misrepresentation by the appellant that he was a road builder. For if the appellant had contracted to build five roads in the same area, and had in fact built the roads for which he had contracted, as the witness' testimony showed, we cannot say that it would be unreasonable to conclude that he was a road builder. Thus, by the testimony of the prosecution's own witness, a doubt was raised, and the jury could not be said to have been wrong in so holding. It could very well have concluded that the case had not been proven beyond a reasonable doubt. We particularly maintain this position since the testimony above referred to was corroborated by testimony

of another prosecution witness, Varnie Gotoe, on cross-examination:

"Q. Please say whether you know the defendant to be an engineer or a road builder?

"A. Not an engineer but a road builder.

"Q. Please say whether you know defendant to be in possession of or the owner of a Caterpillar?

"A. I saw Caterpillar with him but I do not know whether it was his own.

"Q. The Caterpillar you saw him carry, did you see him build any road, if you know?

"A. I heard that he built road but I did not see it."

This testimony, we feel, sufficiently raised doubts as to the charge of misrepresentation. Indeed, the testimony by the prosecution's witnesses, placed the indictment in doubt, for, as stated earlier, one of the two characteristics of the indictment was the alleged act of misrepresentation. Once the act of misrepresentation was shown not to have been present, proof of the crime as charged in the indictment was placed in doubt. Under the section of the Penal Law hereinbefore quoted, the crime of obtaining money under false pretense cannot be proven or sustained unless some misrepresentation is shown to have been made in the case; in the matter before us it would have to be to the effect that the appellant was in fact a road builder. We feel, therefore, that any refusal by him to perform the contract which he had entered into with the private prosecutor, and for which he was alleged to have received $300.00, should have been treated as a breach of contract, and not as the crime of obtaining money under false pretense.

But this was not the only doubt cast upon the prosecution's case. Doubts were also cast upon the receipt purportedly executed by the appellant for the $300.00 he was alleged to have received from the private prosecutor. The defendant denied having executed any receipt, and asserted that it was impossible for him to have done so,

since the said receipt was executed in English, for he could neither read nor write English, and that he could only sign his name in arabic.

This assertion was substantiated by the prosecutor's own witness, Varnie Gotoe, who stated on cross examination that the appellant only understood and communicated in arabic, and that he had never been seen reading nor writing English. The prosecution's argument is that the appellant had had witness John Passawe write the receipt for him, and sign appellant's name thereto. But even if we were to accept this argument, we could still have doubts, for why did the witness, John Passawe, sign the receipt, not as a witness thereto, but as co-executor along with the appellant, for his name appears directly below the appellant's name, thereby showing the two of them to have jointly executed the receipt.

But the gretatest doubt cast upon the prosecution's case, and which we feel the jury must have acted upon, was: Who actually received the money in question, and what role did the appellant play in the transaction? The appellant testified that road construction work was being carried on in the area, and that a Caterpillar tractor was being used for this purpose. He stated further:

> "When the road reached to Goo the private prosecutor, Varnie Sonii, went to me and asked if the Caterpillar could do anyboy else's work. I told him, let's go to the owner of the Caterpillar. We went to John Passawe and I asked Varnie Sonii, what you say now; and he explained his mission to John Passawe and Zuana Coleman. John Passawe informed Varnie Sonii that he was the cause of the Caterpillar coming to Goo together with Zuana Coleman, so before you can get consent you have to give us $10.00. . . . When this amount was given to John Passawe, he said, oh, yes, you people really mean business for the road. Zuana Coleman said that the machine is not for me, let me go and consult the owner of the machine. Bear in

mind that after refer [*sic*] this matter of the machine, they have to go and inspect the area of the road before making any charge for it. Then Varnie Sonii said to me, please, brother, when the people get ready to go and inspect the road, you must be present on the site. They appointed the day and we went there. . . . After the inspection of the road Mr. Louis Harris charged Sonii $2,500.00 to build the road and put in pipes and drainage. Varnie Sonii referred the matter to his people and the people said the amount was too much. Then they further said that they wanted the Caterpillar to work for them for only two days. Harris said, okay, since you want the Caterpillar to work for only two days, then the charge is $300.00, $150.00 for each day. Varnie Sonii and his people agreed to this. Harris said, that I am leaving Zuana Coleman here. The money should be paid to him before the work is done, and if the money is not paid then work will not be done. They returned to Goo and after two days Varnie Sonii brought $150.00; when he brought the money, he told us about the money, that is Varnie Gotoe, Abdulia Kamara, Varnah Gbessie and Manna Sasin. So all of us took the money and carried it to John Passawe for Zuana Coleman. Zuana said, okay, I see the half but where is the balance? Varnie Sonii said this is what we have now. Zuana Coleman instructed John Passawe to give Varnie Sonii a receipt. John Passawe made the receipt and gave it to Varnie Sonii. Zuana Coleman also said to Varnie Sonii, that when he gets the balance of $150.00 he should give it to John Passawe who will send it to him with a covering letter. Zuana Coleman carried the $150.00. On the fifth day after the payment of the advance, Varnie Sonii brought $150.00 and we all took it to John Passawe. John Passawe told Varnie Sonii, that the first receipt that was given to you by Zuana, bring it to me which will be my witness that Zuana Coleman

left me here in charge to receive the balance of payment. Before the road could be constructed one day we saw people from Monrovia and they took the Caterpillar and carried it away. . . ."

This testimony of the appellant was not rebutted, but was substantially corroborated by Zuana Coleman, who, after testifying about the negotiations, stated:

"I saw Mr. Varnie Sonii give defendant $150.00 as part payment of the amount of $300.00 charged for the road project from Kpeneji to Kobolia. Defendant took the money and handed it over to Mr. John Passawe. Mr. John Passawe handed the $150.00 to me, and I instructed Mr. John Passawe to write a receipt so I can sign and give same to Varnie Sonii for said amount of $150.00. Mr. John Passawe wrote and signed the receipt as a witness. I asked Mr. John Passawe thereafter about the balance, so I can take it down to Monrovia. Mr. John Passawe referred the matter to the defendant, and the defendant also referred said matter to complainant, Varnie Sonii. Varnie Sonii said, that we do not have any money on hand now to pay more than the amount paid already, so give us a chance to look for the balance. I waited for five days and did not get the money, so I left John Passawe in charge to collect the balance and I went down to Monrovia with only $150.00. After I went to Monrovia, it took about one month, I did not see the money so I went back to Goo, and I met the defendant there and I asked him, where is Mr. Passawe? He said, John Passawe is behind Mambo making road. I asked defendant whether the people of Kobolia had not paid the balance due on the amount of $300.00 for their road, and the defendant said, no. I said, okay, *I* am going back, maybe Mr. Passawe will come and make the people road since I have not received the amount from him."

Undoubtedly, there are discrepancies between the testi-

mony of the appellant and that of his primary witness, as to what became of the second installment of $150.00. But in spite of these discrepancies we fail to see how the jury could have concluded that the appellant was guilty of the offense charged in the indictment, when a witness had taken the witness stand and acknowledged that not only was he a prime negotiator in the transaction, which was legal and legitimate, but also that he had been the one who had received the $150.00 paid as the first installment; further, that the appellant was only a middleman in the negotiations.

Not only did the prosecution fail to prove the guilt of the appellant beyond a reasonable doubt, but its entire case was cast in doubt by the testimony of Zuana Coleman, who admitted that he received $150.00 of the amount involved, which was never rebutted, denied, or disproven. That testimony completely exonerated the appellant of the offense with which he was charged. No man should be made to suffer a penalty for another man's admitted action, unless he contributed to or encouraged it. The appellant was not shown to have made any misrepresentation; and while he might be made to account for the $150.00 not acknowledged by Zuana Coleman, that accountability would not constitute the offense of obtaining money under false pretense. To prove the guilt of the appellant for the offense with which he was charged, the prosecution must have left no room for doubt. Any failure to prove guilt beyond a reasonable doubt warrants reversal of the conviction. And while the jurors are judges of the facts, yet where their verdict is manifestly against the weight of the evidence, we will not hesitate to reverse it.

In the judgment rendered by the trial judge in this case, he referred to the opinion delivered by this Court in its March 1969 Term in *Cooper* v. *Republic,* 19 LLR 269 (1969), in which the appellant had been charged with obtaining money under false pretense. The appellant

filed a motion for the Supreme Court to refuse jurisdiction over the subject matter. In that case the Shell Company complained against Augustus Cooper for having obtained $9,000.00 from it under the pretense that he owned a parcel of land, which he leased to them for a term of years. He received the lease money, and signed the lease agreement as grantor, knowing full well that previous to this transaction he had sold the property to Kaiser Knowlden, and had also signed the warranty deed transferring the title. But he had also leased the same property to a trader before leasing it to Shell. This matter was taken before the Magistrate Court in Monrovia, which refused jurisdiction on the ground that $9,000.00, the subject of the suit, was above its jurisdiction. Consequently, an indictment was sought and returned by the grand jury, and Augustus Cooper was charged with obtaining the $9,000.00 under false pretense.

In this opinion cited above, this Court spoke through Mr. Justice Simpson, at page 276.

> "It is, therefore, established that the crime obtaining money under false pretenses is a petty offense. Therefore, though a misdemeanor, it has been classified by the Legislature as an offense of a low grade. Having thus resolved the issue of the category of the offense, we should now train our attention upon the proper tribunal before which such an offense should be brought."

The Justice referred at page 277 to our Judiciary Law, 1956 Code 18:557.

> "The jurisdiction of stipendiary magistrates. Stipendiary magistrates shall have jurisdiction to try the following matters without jury: . . . (h) cases of petty larceny and of any other crime punishable by a fine of one hundred dollars or less without mandatory imprisonment if no court or officer other than a justice of the peace has jurisdiction by express provision of statute; provided that a stipendiary magistrate shall

not have jurisdiction over (1) any crime committed under section 101 of this Title; or (2) any violation by a judicial officer of section 366 of this Title; or (3) any violation of the income tax provision of chapter 5 of the Revenue and Finance Law; . . ."

Augustus Cooper was tried, convicted after indictment and was sentenced. He appealed, and before his appeal could be heard, he filed a motion for the court to refuse jurisdiction over his case. The Supreme Court reversed the judgment of the trial court on the ground that the Circuit Court did not have jurisdiction over the subject matter.

We are not able to agree with the opinion in the Cooper case, because of several principles which that opinion either ignored and/or violated, one of which was constitutional. Let us review some of these principles for the record.

The Constitution provides that "in all cases, not arising under martial law, or upon impeachment, the parties shall have a right to a trial by jury." Article I, Section 6th. We get the impression from this provision of the Constitution that any one of the parties in any case, civil or criminal, may elect or demand to have his case tried by jury. In other words, the right to such jury trial is no less binding upon a party in civil cases, than it is upon the State or defendant in criminal cases, so long as the desire to have a jury hear and decide is indicated.

In the Cooper case the State's desire to have the case tried by jury is cleary indicated by the indictment which was returned after the Magistrate Court had sent the matter forward to the Circuit Court for want of jurisdiction over the subject matter. There is no indication in the record that the defendant at the trial objected to a trial by jury. On the contrary, he took part in empaneling the jury which heard the evidence and returned a verdict against him. It was within his province to have objected to a Circuit Court trial, and to have emphasized such ob-

jection by seeking a writ of prohibition, had the judge ignored his objection.

Moreover, had the other party, the State, felt that determination of the case could have been legally accomplished without a jury, it was within its right to have by mandamus compelled the Magistrate Court to hear and determine. Going to trial on the indictment instead, which compelled a jury trial, was within its constitutional rights, in keeping with Article 1, Section 6th, quoted above. Therefore, we think the opinion in the Cooper case was in error when it reversed the judgment of the trial court for want of jurisdiction, after trial by jury upon indictment.

No matter what statutory law was or is in respect to jurisdiction over cases of obtaining money under false pretense, if application of any statute is in conflict with the Constitution's mandate, which requires that a party in a case is, upon demand, entitled to trial by jury, the statute cannot stand against the constitutional provision. Consequently, any judgment upholding the statute as against such a constitutional requirement is void in its entirety; and any statute which forbids trial by jury, except those arising from martial law or upon impeachment, is unconstitutional.

The Legislature does not have the power to legislate any laws which infringe upon provisions of the Constitution; and whenever they have done so, the legislation has been declared unconstitutional upon review by the Supreme Court.

> "Power of Legislature to confer and limit jurisdiction. Within constitutional limitations, the Legislature has the power to create courts of criminal jurisdiction, to determine within what particular jurisdiction crimes shall be tried, and to make that jurisdiction exclusive. But it has no power, of course, to limit jurisdiction in violation of constitutional provisions. Where the constitution confers general criminal jurisdiction on a

> superior court, an act of the Legislature infringing such jurisdiction is unconstitutional and void." 12 CYC. 197.

Where a criminal case involving a misdemeanor is tried before a jury in compliance with the request of one of the parties, the fact that the Constitution gives both parties the right to demand a jury trial in all litigation not arising under martial law or upon impeachment, makes it reversible error to deny a requesting party the right to a trial by jury. The constitutional provision quoted herein is not wanting in clarity, is not ambiguous and, therefore, admits of no other interpretation than the plain and literal meaning which the text conveys.

The opinion in the Cooper case handed down in 1969, besides reversing the judgment of the trial court, also recalled the opinion in another case of obtaining money under false pretense, *Yancy* v. *Republic,* 4 LLR 204 (1934). The ground for recall as stated in the Cooper opinion of 1969, was that the Circuit Court did not, in 1934 when the Yancy case was determined, have jurisdiction over the crime of obtaining money under false pretenses, because the fine in such cases was at the time only one hundred dollars, which placed the crime in the category of petty offenses.

Prior to the time when the Yancy case was heard and determined in 1934, the penalty for the crime of obtaining money under false pretense had been a fine of the sum double the amount fraudulently obtained; see Revised Statutes, section 753, set forth.

> "Obtaining money or any personal property by false pretense is the making of false representations and statements with a fraudulent design to obtain money, or any personal property of value with intent to cheat and defraud the owner, or person in possession thereof, such as representing some fact or circumstance to exist, which does not exist, and which misleads the party to whom such representation is made.

> "Any person convicted of obtaining money by false pretense shall be punished with a fine not exceeding two-fold the amount thus fraudulently obtained, nor less than twenty-five dollars, or imprisonment with or without hard labor for a term not exceeding two years. Restitution shall be made to the injured party if the fine should be paid."

There is no indication, for this last section did not say whether the offense was or was not to be tried in the Magistrate Court, but it did provide, however, that punishment for the crime could be twofold the amount obtained by the criminal act. A fine of nine hundred and sixty dollars, the amount involved in the Yancy case, and double that amount as punishment, according to the section just quoted, would certainly seem to place the Yancy case beyond a petty offense, even according to the 1956 section under which the Cooper case was determined in 1969.

If the section quoted above was the law under which Mr. Yancy was charged and tried, it was only proper that he should have been punished under its provisions; as such the section of the 1956 Code relating to the crime of false pretense and which speaks of a fine of $100 only as punishment in such cases, could not have been used as the relevant section under which to handle the Yancy case. It must be borne in mind that such section, 1956 Code 27:302, does not require restitution.

But still further, whereas the section defining petty offenses, 1956 Code 27:5, is a section of general application, covering many offenses and not mentioning any particular crime, section 753 quoted above specifically defines and penalizes false pretense involving money and property. The question now is: could section 5 of the 1956 Code quoted in the 1969 opinion supersede section 753 of the Revised Statutes of 1910, dealing with false pretense, or could any subsequent statute do so, in its application to

the Yancy case? We are of the firm opinion that it could not.

It is our opinion that a section enacted to punish an offense specifically takes precedence over any generally descriptive section which does not enumerate a particular offense. Therefore, it was error to have recalled the Yancy opinion of 1934 in the 1969 Cooper opinion, based probably upon the ground that the 1925 section defining a petty offense was applicable in the Cooper case when that opinion referred to the Yancy case, which arose in 1931.

In neither of the two cases, that is, the Yancy case in 1934 or the Cooper case in 1969, did the defendant question the State's right to have had him indicted and tried by jury in the Circut Court. In each case the defendant had a right to move either to quash the indictment, or to arrest the judgment, using his objection to a jury trial as a ground. It is significant, therefore, that in neither of these two cases did either defendant seek to employ this argument. But what is even more significant is that the motion filed by Augustus Cooper in the Supreme Court in 1969, asking the Court to refuse jurisdiction, did not use as a ground the fact that he had been indicted and tried in the court below by a jury, and that for this reason the trial court had acted without jurisdiction. The Court was, therefore, in error for raising the issue *sua sponte* in the Cooper case.

Another reason why we cannot agree with the Augustus Cooper opinion handed down in 1969, is that this opinion recalled the Yancy opinion of 1934 without regard to the premise laid 35 years earlier, to the effect that fraud is the gravamen of such offenses, and courts not of record cannot try frauds; that the Magistrate Court, not being a court of record, the Legislature did not intend that they should try such cases when the section relating to petty offenses state was enacted in 1925. The 1969 opinion said nothing on this point.

We are in full agreement with Chief Justice Grimes when he stated in the Yancy opinion at page 210 that "it is unthinkable to us that the Legislature of Liberia, in enacting the law defining petty offenses, ever conceived the idea of giving to a justice of the peace the power or privilege of passing upon fraud in any way." We would like to add that we do not believe that any lawmaker would have intended that the crime of obtaining money under false pretense, and especially those involving unusually large sums of money, should be tried by a justice of the peace or magistrate. How could these courts not of record pass upon fraud? And how could they pass upon written contracts, at least two of which formed the basis of the Cooper case? We are not convinced that there was legal ground, either for reversing the judgment in the Cooper case, or for recalling the opinion in the Yancy case.

In the Cooper case, not only was fraud alleged and apparent, but it was also a matter of fraud arising out of conflict between more than two written contracts—the warranty deed from Cooper to Knowlden transferring title to the land, and the subsequent lease agreements between the same Cooper and Shell Oil Company when Cooper leased the same property he had before. Maintaining our full agreement with the Yancy opinion that courts not of record were never intended by the Legislature to try frauds, we also hold that courts not of record cannot try cases resting on written contracts. Consequently, the Magistrate Court could not have convicted Cooper of fraud, for several written contracts formed the basis of the case.

Yet still another reason why we feel that the opinion in the Yancy case should not have been recalled, is the matter of the penalty for the crime, which included restitution as part of the punishment. We have referred to a section earlier in this opinion where it is specifically required that restitution and fine constitute the punishment

for this crime. We have also stated earlier herein that the punishment by fine in the Yancy case amounted to more than a thousand dollars. It is impossible, therefore, for the offense in the Yancy case to have been labeled as a petty offense, when the punishment for petty offenses is only one hundred dollars.

Coming now to the Cooper case, the Legislature acted properly when it enacted a false pretense section which punished the offense by a fine of not more than one hundred dollars. But the fact that the lawmakers required that these crimes be penalized by so small a fine, is no indication that they intended that in every case of obtaining money under false pretenses the courts of first instance would be the courts in which the offense must be tried. Even under the section defining petty offenses, the amount of punishment involved is the criterion as to which court will try such cases. We hold firmly to the opinion that according to the 1956 section applying to Cooper's case at the time the case was argued before the Supreme Court in 1969, the amount exacted as punishment was fine and restitution, which amounted to more than $9,000.00 in the Cooper case. Hence, even under the 1956 Code 28:302 the case could not have been tried by the Magistrate Court.

It is our opinion that restitution is part of the punishment in every criminal case where the law requires restitution. And where an accused is sentenced under a section of the law which requires restitution, until the said restitution is made the intent of the Legislature has not been carried out with respect to the punishment it has fixed. The Supreme Court has decided in more than one case besides the Yancy case, that restitution should be made as part of the punishment in certain cases. *Davies* v. *Republic*, 4 LLR 177 (1934); *Williams* v. *Republic*, 15 LLR 99 (1962). Sometimes penalties for crimes provide that in addition to fine and/or imprisonment, restitution of the amount involved should also be made; it is

literally the intent of the lawmakers, and this intent should be carried out by the trial courts. We are also of the opinion that courts have no authority to withhold inflicting the penalty provided in a criminal statute under which the case is tried. *Browne* v. *Republic,* determined in October 1973 Term. Nor can a court impose more of a penalty than the statute prescribes, unless the section specifically leaves it to the judge's discretion. This is not the case in the crime of obtaining money under false pretense.

What the Legislature intended is of primary importance in constructing statutes, and legal writers are all agreed thereon. In construing statutes, an interpretation which avoids inconsistencies or which would work injustice, is the responsibility of the court. It is our responsibility to see that the interpretation of a statute conforms as closely as is possible to legislative intent, and that no doubtful meanings which might work injustice be allowed. With this as a legal basis we have found it difficult to adjust our thinking to accord with the view that the $960.00 fraudulently obtained in the Yancy case, or the $9,000.00 in the Cooper case, permitted them to be tried as petty offenses.

The section in our Penal Law under which Cooper was tried, clearly makes restitution part of the punishment.

> "Any person who makes false representations, with a fraudulent design to obtain money, goods, wares or merchandise, with intent to cheat another, or a representation of some fact or circumstance alleged to be existing calculated to mislead, which is not true, or does not exist, with intent to cheat or defraud another of his goods, wares, money, merchandise or other property of value, is guilty of obtaining money under false pretense and punishable by a fine of not more than one hundred dollars; he shall be required to make restitution of the money or thing of value obtained." 1956 Code 27:302.

It is our opinion, as stated before, that any criminal section which requires restitution to be made as part of the penalty for the crime, has made restitution a part of the punishment intended by the lawmakers. Accordingly, we hold that both in the Yancy case, determined in 1934, as well as in the Cooper case, determined in 1969, the punishment required by law for obtaining money under false pretense far exceeded the definition for petty offenses, when we include restitution involved in each case.

Therefore, the judgment of the trial court in the Yancy case determined in 1934 was correctly upheld by the appellate court, and in the Cooper case decided in 1969, the judgment was erroneously reversed. It was also error for the Cooper opinion to have recalled the Yancy opinion. We therefore hereby reinstate the Yancy opinion and restore it to all of its validity and effect as if it had never been recalled; and we also hereby recall the Cooper opinion because the Magistrate Court did not have jurisdiction to try a case involving $9,000.00.

We have reviewed the evidence in this case now on appeal before us, as we have considered the law, and we are of the opinion that the judgment of the trial court should be and hereby is reversed. It is so ordered.

*Reversed.*