fraud, but it is necessary that there should be the intent to defraud the person with whom the accused dealt. I think that any other view would give a forced construction to the language of the statute, and would make it include cases that were not intended by the Legislature to be included.

I think it will not do in framing the indictment merely to follow the words of the statute, but it must be shown in the indictment that the alleged offence comes under the statute, including the intent to defraud. Now, I do not find that here. Take these words again, "obtains credit," what does that mean? Does that mean that it would be an offence under the statute if he received credit from anyone without soliciting it, or must he apply for or do something to get credit? Now, the language which is used in describing the particular offence says the accused "being an undischarged bankrupt within the meaning of section 4 of the said Act, did on the 11th or 12th day of May 1885, or on one or other of the days of that month, or of April immediately proceeding, or of June immediately following, in or near the premises in St Enoch Square, Glasgow, then or recently before occupied by him, or elsewhere in or near Glasgow to the complainer unknown, obtain credit from the firm of James Adam, Son, & Company, fruit broker, Temple Court, Liverpool, to the extent of £25, 14s. 6d." Now, I asked in the course of the debate what did he do to obtain this credit from James Adam; nobody knew. Nobody in fact could tell us what the accused had done so as to render him liable to be charged with an offence under the Act. It is not stated in the indictment what he did to obtain credit, or what kind of credit it was, nor how it was procured. There is no information on these subjects given in the indictment. If no credit was given, if it was a ready-money transaction, and if in such a transaction the bankrupt failed to pay, he would not be liable under the statute. It is a curious observation on the section, but there is no doubt that it is so. Now, I do not know what are the facts of the case, but we ought to have them so set out in the indictment that it would be plain that they constituted an offence within the scope of the statute, and that the case is not one of those to which the Legislature never intended the statute to apply. If one is to conjecture, we may conclude that the case did come under the scope of the statute, but in a case of that sort it is not easy to charge fraud against the accused, and to charge the acts done in obtaining credit as having been done fraudulently. I quite see the difficulty of framing a relevant indictment on such lines, but that points rather in the direction indicated in Lord Craighill's opinion, that the provision in clause 4 might prove unworkable. If that were so, I would not be very sorry, and it would not be the first time that a clause attempting to make a new crime by the words of the statute had proved unworkable. There is plenty of law to punish anyone who is really guilty of fraudulently obtaining goods—that is, of obtaining goods in an immoral and discreditable way. But I think that under this section there may be cases where a revelant charge of fraud could be charged, but it must always appear from the statements in the libel as to the prisoner's conduct, and the facts stated in the indictment as attributed to the accused, that he acted with a fraudulent intent and purpose.

In this case I am very far from being free of a suspicion as to the integrity of the purpose of the accused, but I do not think that this is a safe conviction. I am very far from saying here that the accused's fraudulent intent was made out. No one could tell whether the Sheriff-Substitute in his charge to the jury told them that the fraudulent mind must be proved as a necessary part of the crime before they could convict the prisoner; there was no information on that point. That does not give me any confidence to proceed to uphold the conviction that such evidence was adduced, and the recommendation to mercy which the jury gave, on the ground that he was ignorant of the Act of Parliament, supports that view. On these grounds my opinion coincides with that of Lord M'Laren, and that being so, the conviction will be quashed.

Conviction quashed.

Counsel for Complainer—Guthrie—Cosens. Agent—W. R. Patrick, Solicitor.

Counsel for Respondent—J. A. Reid. Agent—Crown Agent.

COURT OF SESSION.

Wednesday, March 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CORPORATION OF RUTHERGLEN *v.* BAINBRIDGE.

Servitude — Extinction of Servitude — Road — Abandonment.

A right of servitude constituted by possession will be held abandoned by disuse for less than forty years if it clearly appears that the disuse was intended as an abandonment of the servitude.

Burgh—Royal Burgh—Road—Servitude.

In a dispute between the magistrates of a royal burgh and a proprietor therein, relative to the property of a private road therein, the magistrates produced a title which *prima facie* included it, while the latter produced none. It appeared that his predecessors had formerly enjoyed a servitude over it, but that one of them had, between twenty and thirty years before the question arose, abandoned the use of it and formed a new access to his lands. *Held* that the magistrates were proprietors of the road, because it lay within the burgh and they were not shown to have parted with it, but, on the contrary, had a title which *prima facie* included it; (2) that any right of servitude which the proprietor's predecessors had over it had been abandoned by them.

This was an action relating to the right to the *solum* and the use of a road within the royal burgh of Rutherglen. In 1876 the Corporation acquired from James Graham, trustee of the deceased Mr and Mrs George Thomson, certain lands within the burgh, conform to disposition dated 15th, and recorded in the Register of

Sasines for the burgh of Rutherglen the 17th, days of August 1876. The disposition conveyed to the burgh "All and Whole the lands called Low Corsehill acquired by Major-General John Spens of Stonelaw from sundry proprietors. . . . *Item*—All and Whole the lands called North and South Sheriff Ridges . . . and extending to 8 acres 2 roods and 12 falls or thereby, bounded by the road to Castlemilk [afterwards known as Mill Street] and lands of Adam Johnston respectively on the west, the lands of Clincarthill on the north, and the lands of Low Corsehill on the east, and the lands of Walter Whyte on the south . . . which several subjects and others before disponed lie contiguous within the burgh of Rutherglen and county of Lanark . . . and whole parts and pertinents thereof, and free ish and entry to and from the said lands."

George Bainbridge, tobacconist in Rutherglen, the defender of this action, acquired by disposition, dated and recorded in November 1877, from David Warnock, flesher in Rutherglen, and sometime Provost of the burgh, a plot of ground in the burgh adjoining that conveyed to the burgh as above-mentioned, conform to disposition by Warnock in his favour, and which was described as "bounded on the north-by-east by an old private road leading from Mill Street, along which it extends for 295 feet 6 inches or thereby."

The old private road here mentioned was the road in dispute in this action. The Corporation maintained that the defender's land did not include it or any part of it, and that it was wholly in their property, and had been so held by them and their authors for over 40 years, and formed an access to their conjoined lands of Sheriff Ridges and Low Corsehill, and the only access to their separate lands of Sheriff Ridges. The defender, on the other hand, denied the right alleged by the Corporation to the property or exclusive use of the road, and he maintained that so far as they used it, it was only by sufferance; and that even assuming that they had any right of property in it, he had a servitude over it which had been exercised by him and his predecessors for upwards of 40 years prior to the raising of this question between the parties, for all purposes necessary to the full enjoyment of his property. The question arose in consequence of the defender opening up a new access to his land from the road in question in 1880, and closing the access from Mill Street which had been made in 1856 by his predecessor as after stated.

This action was brought by the Corporation in the Sheriff Court, craving the Court "*First*, To find and declare that the pursuers are the sole owners or heritable proprietors, *a centro usque ad cœlum*, of the *solum* of the access to their lands of Sheriff Ridges, lying in the burgh of Rutherglen and county of Lanark, by the road leading into said lands from the highway to Castlemilk, now known by the name of Mill Street, which road forms the north or north-by-eastern boundary of the defender's lands, adjoining those belonging to the pursuers: *Second*, To interdict the defender from using or interfering in any way with said access or road: And *Third*, To ordain the defender to remove a gate erected by him at the western end of said access or road, and to restore the same to the condition in which it was before his interference therewith."

The pursuers pleaded—"(1) The pursuers' Corporation being a royal burgh, has, in virtue of its charters, a title to all lands within the burgh not embraced in any title showing divestment by them. (2) The pursuers being the sole proprietors of the *solum* of the access or private road condescended on, are entitled to decree of declarator as concluded for. (6) In any event, the use, if any, had by the defender or his predecessors, being temporary, interrupted, and on the sufferance of the pursuers and their predecessors, he has acquired no rights, either of property or servitude, in the said road or access."

The defender pleaded that the pursuers had no title to sue the action; that they had no right of property or servitude in the road, and that, assuming them to be proprietors, he had a servitude over it.

A proof was led. With regard to the use before 1856, it appeared that before Warnock acquired the ground in that year his predecessors had used part of the road in dispute, consisting of about 60 feet from the west end (marked A on the plan hereafter referred to) chiefly for driving up it their cows when letting them into the park of which the defenders' lands formed part, and which was called Johnstone's park. They did not use the road eastward of that 60 feet. Shortly after Warnock acquired the land in 1856 he shut up the entrance from the disused private road and made a new one from Mill Street, the main road from Rutherglen to Castlemilk, and thereafter used the new entrance. [Warnock being insane was not examined]. When the defender acquired the lands from Warnock in 1877, the entrance was by this gateway in Mill Street which had been made by Warnock in 1856. In 1880 defender closed this entrance to the lands, which he then occupied as a nursery garden, from Mill Street, and formed a new entrance from the private road in dispute about 68 feet up from Mill Street. He also erected a gate at the end of the private road nearest Mill Street, and put a lock on it.

The pursuers produced other titles in support of their claim to the *solum* of the road in dispute, but these need not be referred to or quoted, since the view of the Court was, as found in the interlocutor quoted *infra*, that the road was included in the disposition to them of 1876 above quoted.

The Sheriff-Substitute (Lees) pronounced this interlocutor:—"The Sheriff-Substitute having considered the cause, finds that the titles produced by the pursuers do not explicitly instruct that the road in question, between the points A and B on the plan, falls within the ground conveyed to them by the said titles: Finds that the pursuers have failed to prove that they have had exclusive possession of the said road: Finds, in these circumstances, as matter of law—(1) That the evidence, documentary and oral, adduced by the pursuers is inept in law to qualify a right of property in the said road in their favour; (2) that the pursuers not being the proprietors of the said road, have no title in law to have the defender interdicted from making use of the same or making an entrance thereto; therefore sustains the first plea-in-law stated by the defender; assoilzies him from the conclusions of the action as laid; and decerns.

"*Note.*—At the closing of the record the case was carefully debated by parties on the pleadings and the titles produced by them, and the conclu-

sion at which I then arrived was—Firstly, that the defender had no title of property to the said road; and secondly, that the writs produced by the pursuers did not expressly instruct that the road belonged to them, or, at any rate, instruct it so distinctly as to justify me in holding that the defender must be restrained from using the road unless he established a right of servitude. I referred the parties at the debate to the case of *Begbie's Trustees* v. *Thomson*, December 13, 1871, 9 S.L.R. 156, and allowed the pursuers the opportunity of establishing, if they could, at the proof that was to take place, that they had had such possession of the road as sufficed to interpret their titles, as including within their scope the *solum* of the ground in question. Now, possession adequate to qualify such a right must be either exclusive possession, or possession such that the use or possession had by others was plainly to be ascribed to a right not inconsistent with the right of property asserted by the pursuers. On a consideration of the evidence I am of opinion that the pursuers have failed to establish possession of the necessary character, and, indeed, it may be questioned whether their proof instructs any very distinct possession at all. That being so, the pursuers' case fails, and they have no title to sue. But as a great deal of evidence has been led in regard to the character of the defender's right, I may shortly say that it seems to me the preponderance of evidence goes distinctly to set up the right of servitude over the road in question that the defender claims."

On appeal the Sheriff-Principal (CLARK) adhered.

The pursuers appealed to the Second Division of the Court of Session.

Argued for them—(1) The Burgh of Rutherglen was a royal burgh. The portion of land constituting the road in question was originally a part of their land, and as no title was produced showing that they had parted with their right of property in it, the title still remained in them—*Jamieson* v. *Magistrates of Dundee*, December 10, 1884, 12 R. 300. (2) The defender had not shown any right of servitude. Now, for the defender to prove his case it was necessary for him to show that for at least forty years prior to 1856 the proprietors of the piece of ground he held had exercised a right of servitude over it; for it was admitted that in 1856 Warnock gave up using that road as a means of entrance to this ground, and from that time until the defender tried to exercise a servitude over it, *i.e.*, from 1856 to 1880, it had not been used by the proprietor of that ground. In *Hill* v. *Ramsay*, 30th March 1810, a servitude by possession, without written title, was claimed, and it was proved that there had been forty years' possession, but interruption for between twenty and thirty years by ploughing over the road was also proved, and the servitude was held to have been abandoned—5 Paton's App. 299; *Campbell Douglas* v. *Hozier*, October 19, 1878, 16 S.L.R. 14.

Argued for the defender—The pursuers could not show a good title to the *solum* of the road. The evidence showed that a servitude had existed over this road at least for some 68 feet up from Mill Street, as an access to the defender's land, for more that forty years. A servitude could not be extinguished by disuse for less than forty years —*Mann* v. *Brodie*, May 4, 1885, 12 R. (H.L.) 52.

At advising—

LORD YOUNG—This action is substantially a declarator affirmative of property over the road which is the subject of dispute, and negative of a servitude over it, and it concludes for an order on the defender to remove a gate which he has put up as an entrance to his ground from the road in question. The action was originally brought in the Sheriff Court of Lanarkshire, and the Sheriff-Substitute, and on appeal the Sheriff, have held that the pursuers, who are the Corporation of Rutherglen, have not sufficiently established their title to the property—that is, the road—by the titles they produce, and have dismissed the action on that ground. But they have expressed an opinion that the defender has established the fact that he has a right of servitude over that road. The note appended to the Sheriff-Substitute's judgment contains these words—"But as a great deal of evidence has been led in regard to the character of the defender's right, I may shortly say that it seems to me the preponderance of evidence goes distinctly to set up the right of servitude over the road in question that the defender claims." The judgment of the Sheriffs therefore is, *first*, that the pursuers have no right of property in the said road, and *secondly*, that as they are not the proprietors of the road they have no title to prevent the defender from so using it, or from putting up a gate as an entrance from it to his own land.

Now, I am of a different opinion, and I think that the pursuers' right of property in the road is sufficiently instructed by the titles produced. The Corporation of the royal burgh of Rutherglen are the pursuers in this action, and the *solum* of the defender's property lies within the boundaries of the burgh, and the *solum* of the road, the right to which is in dispute, also lies within the burgh. It lies within the boundary of the burgh and belongs to the burgh, unless indeed it can be shown that the burgh has parted with the right to it, and that has not been shown. There is nothing indeed to indicate that except the disposition dated in 1876, and that title seems very clearly to show that the road in question is the property of the burgh. This is at least a good *prima facie* title to it, and there is no prior or better title produced in opposition to it.

That being so, the question is reduced to the point on which the Sheriff-Substitute and the Sheriff-Principal did not decide the case, whether the defender has established a right of servitude over this road? At the debate before us the contention that he had established a right of servitude over more than 68 feet of the road was abandoned. There is no doubt evidence in the case tending to show that prior to the year 1856 there was an entrance to the field now occupied by the defender, and that that entrance was situated some 60 feet up this road. Now, it appears that so far as the evidence goes with regard to the period prior to the year 1856 the entrance to this field was 60 feet up the road, and that the cow or cows that required to be put in or taken out of this field were driven along this road. In the absence of anything to show the contrary, an action raised in 1856 to have a right of servitude over this road declared might have been successful, as showing the exercise of the servitude right of driving a cow up this road for 68 feet. But in 1856 the then pro-

prietor of the field shut up that entrance to it, and went to the expense of opening another for his own uses, which opened on to the public road, just a few yards off. His predecessors in title had not done so, but he opened a new entrance at his own expense. That being so, there was no occasion to use the old entrance, and we have no occasion to inquire whether the right to use the road before 1856 was acquired by right or only by tolerance. Now, these facts show that this entrance from the road to the defender's field has been disused for a period of nearly thirty years, and the question now is, whether we are to affirm now in 1886 that that use was grounded on a right to use the road, and to negative the argument that if there was any right to use the road prior to 1856 that right had fallen by disuse since that year. Now, I think that the cessation of the use of this entrance in the way in which it has been established it was done has a bearing upon the use prior to 1856, and it also indicates that that use may have been by tolerance and not by right. But further, I think that the shutting up of the old entrance, the making of a fence up the road so as to afford a continuous barrier to all passage along, and the opening of the new entrance into the public road, and its use for a long period, will, upon the authorities, operate as an abandonment of that burden upon the property. I think the whole system of abandonment of this entrance for a long period has a very material bearing upon the question of whether abandonment really was intended. I think that it was, and that Provost Warnock did not intend to transmit any such right to his successors in title. I think further, that even if we assume a right of servitude, it might be abandoned—if constituted otherwise than by deed—and that such abandonment might be made by disuse of the right for less than forty years, if it is made clear that that disuse was really meant as an abandonment of the right. I think that Warnock by his proceedings really meant this, even if he ever had a right of servitude over this road, and that he did not intend to convey this burden on the land when he sold it.

On the whole matter, I am of opinion that we should alter the judgment of the Sheriff, repel the defences, and find the pursuers entitled to decree in terms of the conclusions of the action.

LORD CRAIGHILL—I concur.

LORD RUTHERFURD CLARK—I agree. I think on the question of title that that is settled by the sasine of 1876. I am content to take that as a good *prima facie* title for the pursuers, and no more is wanted in this case.

With respect to the question of servitude, I agree with what your Lordship has said, and only wish to add, I am afraid that Warnock did not think that he had any right of servitude over this road, but owing to his mental condition he cannot be examined, and we have no statements to that effect, so we must take it that he was satisfied that the right prior to 1856 was due to tolerance and not to any right. When he made the new access to his field from the public road he must have given up all intention to use the other access to which he thought he had no right.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor :—

"Find (1) that the road in question, being the road from A to B on the plan No. 9/2 of process, is included within the subjects conveyed to the appellants by the disposition No. 9/1 of process [the disposition to the burgh granted by Graham (Thomson's trustee) in 1876, as quoted above], and that the *solum* thereof belongs in property to them; (2) that for forty years prior to 1856 the predecessors of the respondent in the subjects conveyed to him by the disposition No. 10/3 of process, used the said road between the point A and a point 60 feet or thereby eastwards thereof, but no further, as an access to their said subject; (3) that in or about the year 1856 the respondent's predecessor Provost Warnock made an entrance to the lands now belonging to the respondent from the public street, at the point C on the said plan, and thereupon ceased to use the said road or any part thereof as an access to the said lands, and that from and after the said year 1856 no part of the road now in question was used by the said Provost Warnock or the respondent until the respondent in or about the year 1880 made an entrance to the said lands from the road now in question, and closed the entrance made by Provost Warnock in 1856; (4) that in these circumstances any right of access acquired by the respondent's predecessors in the said subjects has been lost by abandonment: Therefore sustain the appeal, recal the interlocutor appealed from, repel the defences, and find the pursuers entitled to decree in terms of the conclusions of the action: Find the pursuers entitled to expenses in the Sheriff Court and in this Court," &c.

Counsel for Pursuers—Pearson—Hay. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Thursday, March 11.

SECOND DIVISION.

SHANKS, APPLICANT.

Process—Poor Roll—Probabilis Causa—*Division of Opinion among Reporters—Act of Sederunt, 21st December* 1842.

A applied to be admitted to the benefits of the poor roll in order to bring an action of damages against the presbytery of the church of which he was a probationer. The reporters on the *probabilis causa* were equally divided in number as to whether he had a *probabilis causa* or not. The Court, having regard both to the division of opinion among the reporters and to the peculiar nature of the action proposed to be brought, *refused* the application.

In this case the Rev. W. M. Shanks, who was a probationer of the Reformed Presbyterian Church and resided in Lanark, lodged an application that he might be admitted to the benefit of the