that the estate is to be conveyed to certain persons who cannot be ascertained until after the lapse of a certain time, then there is a very clearly implied power and direction to the trustees to retain until that time. And if they can do nothing else with the money, it follows of necessity that they must accumulate the income for the benefit of the persons who may ultimately be entitled to it when they are ascertained. The only point therefore is, that the absence of any direction to accumulate or to make any use of the money indicates an intention that, in the event which has happened, the children shall take although their mother is still in life, and therefore, that we must assume that by "heirs of the body" the testator meant nothing more than "children." But after giving full force to the considerations which I have mentioned, I confess I do not think that they are sufficient to displace the plain meaning of the words "heirs of the body." I entirely agree with Lord Adam as to the signification in which these words must be accepted. They are, as his Lordship has said, technical words, having only one meaning, and the persons described by them cannot possibly be ascertained during the lifetime of the ancestor whose heirs are to be benefited. That being so, it does not appear to me that it is material to decide the question whether we are to proceed upon any admission of the parties as to the probability of Mrs Humphrey's having any more children than she has already. That would not enable us to know a bit better than we do now whether her existing children will be her heirs or not, because the contingency which would displace them from that position is not merely the birth of other children, but the possibility of their failing to survive their mother. We cannot hold, and I suppose that even the learned counsel who asks us to proceed upon an admission, as of fact, that there will be no more children, would hardly ask us to accept an admission that as matter of fact the existing children will not die before their mother. But if they do, they will not be their mother's heirs. Apart altogether, therefore, from that point, I agree with Lord Adam that the question should be answered in the negative.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First and Second Parties—W. Campbell, K.C.—Craigie. Agents—Forbes, Dallas, & Co. W.S.

Counsel for the Third Parties—Jameson, K.C.—Kennedy. Agent—Lockhart Thomson, S.S.C.

Tuesday, July 9.

SECOND DIVISION.

GLASGOW CENTRAL STORES *v.* GOODSON.

Process—Appeal—Competency—Interlocutor Limiting Proof to Writ—Court of Session Act 1825 (*Judicature Act*) 6 *Geo. IV. c.* 120, *sec.* 40.

A sheriff pronounced an interlocutor allowing a proof by writ, and containing no finding as to expenses. The defender appealed under section 40 of the Judicature Act. *Held* that the interlocutor was not appealable, and appeal *dismissed* as incompetent.

The Glasgow Central Stores, Limited, having their registered office at 8 Hill Street, Edinburgh, proprietors of certain heritable subjects in Glasgow, brought a petition in the Sheriff Court of Lanarkshire at Glasgow praying the Court to ordain Alfred Goodson, mantle manufacturer, Glasgow, to flit and remove himself, servants and gear furth the premises under pain of ejection.

The pursuers averred that certain agreements for lease entered into between the pursuer's author Hugh Hutchison Gardiner and the defender, and proponed by the defender as his title to occupy the premises, constituted no title in the defender to remain in the subjects in defiance of the rights or contrary to the desire of the pursuers, in respect that these agreements for lease contained no definite ish, or any ish capable of definite ascertainment, and therefore were not binding on the pursuers as singular successors of the granter.

The defenders averred that the ish in the agreement of lease had been fixed by a separate agreement between the pursuers' authors and the defender, to the effect that the lease should be for three years, and that this had been followed by possession and *rei interventus*. The defenders also averred that the agreement of lease appeared *ex facie* of the defenders' disposition, and that the defenders were personally barred by their knowledge of the existence of the agreement of lease at the date of their acquisition of the property from questioning the pursuers' title or insisting in the action of removing.

The Sheriff-Substitute (GUTHRIE) on May 10th 1901 repelled certain of the defenders' pleas-in-law, *quoad ultra* allowed the defender a proof by writ of the lease for three years averred in the defences, and fixed a diet for the proof. There was no finding as to expenses in the interlocutor.

On appeal the Sheriff (BERRY) on May 24th 1901 adhered to the judgment of the Sheriff-Substitute, and remitted to him for further procedure.

The defender appealed to the Court of Session. The pursuers objected to the competency of the appeal.

Argued for the pursuers — The appeal was incompetent. The interlocutor was

not a final judgment, but merely an interlocutor allowing a limited proof. Such an interlocutor was not appealable—*Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660; *Wilson* v. *Brakenridge*, March 15, 1888, 15 R. 587.

Argued for the defender—The appeal was competent under section 40 of the Judicature Act (Court of Session Act 1825), and section 73 of the Court of Session Act 1868. The cases quoted on the other side—*Shirra* v. *Robertson* (*supra*), and *Wilson* v. *Brakenridge* (*supra*), were decisions on the Sheriff Court Act 1853, section 24, and did not decide the competency of appeal under section 40 of the Judicature Act. The observations in *Shirra* as to the appeal being incompetent under the Judicature Act were entirely *obiter*. The case of the defender here was that the Sheriff was wrong in limiting the proof to writ, inasmuch as the defender was entitled to a proof *prout de jure* of his averments as to the pursuers being personally barred by their knowledge of the lease, and as to the ish of the lease having been rendered definite by oral agreement followed by *rei interventus*. That being so, the case came directly within the principle laid down and followed in *Robertson* v. *Earl of Dudley*, July 13, 1875, 2 R. 935, *per* Lord President Inglis at p. 937. If the defender acted on the allowance of proof granted by the Sheriff, it might be held that he had acquiesced in the restriction of the mode of proof, and on the principle laid down in *Robertson* (*supra*) it was the duty of this Court to decide whether the Sheriff was right in his limitation of the proof.

LORD JUSTICE-CLERK—I have no difficulty in holding that this appeal is incompetent. Mr Irvine frankly admitted that he had no case except under the provisions of section 40 of the Judicature Act. I think that this appeal is practically in the same position as the appeal in *Shirra* v. *Robertson*. The only difference is that in *Shirra* the proof was limited to writ or oath, while here, the pursuers being a limited company, the proof is limited to writ, but practically the two cases are identical. I can see no ground for holding that such an interlocutor is appealable for jury trial under section 40 of the Judicature Act. I agree with the Lord President in *Shirra's* case where he says that "all the authorities are against that view." I therefore move your Lordships to refuse this appeal as incompetent.

LORD YOUNG—It is not contended that this is a final interlocutor; the competency of the appeal is rested on this sentence in the interlocutor—"Allows the defender a proof by writ of the lease for three years averred in answer 10 of the defences." Now, I do not see why the defender appealed against that interlocutor, and I can see no competency in the appeal. If the defender has proof by writ, then he can produce it; if he has none, then he can say that he has none, and the Sheriff, if he thinks that no other mode of proof is competent, will decide the case on the footing that the defender has no proof—that is to say, he will decide the case finally, and that final decision can be appealed to this Court if the defender thinks fit to do so. I assume that the Sheriff is of opinion that the only competent proof is proof by writ, and that in the absence of such proof he will decide against the defender. By appealing against that decision the defender can raise the question whether the Sheriff was right in thus limiting the mode of proof, but I can see neither reason nor competency in raising that question now.

LORD TRAYNER—I agree in thinking that this appeal is incompetent. I think the question is ruled by authority. I appreciate the difficulty of the appellant. On 10th May 1901 the Sheriff-Substitute allowed the appellant a proof by writ of his averment of a lease for three years. Now, I quite see that the appellant if he proceeded to act on that allowance might be held to have acquiesced in that restriction of the mode of proof, but if he felt the danger of that, and doubted his ability to support his defence by writ, his proper course was to decline to proceed in terms of the Sheriff-Substitute's interlocutor, and the Sheriff-Substitute would then decide the case against him. That would be a final interlocutor, which if appealed to this Court would bring up all prior interlocutors, including, of course, the interlocutor against which this appeal is brought.

LORD MONCREIFF was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Pursuers and Respondents—Graham Stewart—Lyon Mackenzie. Agents—M'Neill & Syme, S.S.C.

Counsel for the Defender and Appellant—Salvesen, K.C.—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

BRICKMANN'S TRUSTEE *v.* COMMERCIAL BANK.

Bankruptcy — Sequestration — Valuation and Deduction of Securities—Security over Property Held on Joint-Account — Bill of Exchange—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 65 *and* 66.

Bills drawn by A and accepted by B were discounted by a bank, and delivery-orders for certain parcels of whisky, standing in the joint names of A and B, were assigned to the bank in security thereof. In a letter sent with the bills A stated that the whisky was held on joint-account by B and himself, and that it was to be held by the bank