was the case of a family business, where all worked for its success, and in the success of which, if it succeeded, all would participate. The case was similar to that of *Miller*. The remarks of Lord President Boyle in *Anderson* were wider than necessary to decide the case, and were opposed to older decisions.

LORD JUSTICE-CLERK—It is not necessary to call for any further reply. This is one of those unfortunate cases where services have been rendered by a member of a family but no definite arrangement has been entered into as to remuneration. I quite assent to the view that in such cases to some extent there is a presumption in favour of wages being due, but the presumption is slight. The facts here are that when the daughter came to assist her father in his business she had no arrangement by which she was to receive remuneration in the form of wages. At first she was in charge of one department, and after her sister married she went to another. It seems likely that the view was that if the business was successful all the family would profit by it. In the event of their father's death, if the business had proved profitable, it would be a good thing for the family. But that there was any arrangement for wages being paid to the pursuer is not proved by the evidence. The evidence is rather to the effect that there was no such arrangement. She got board and lodging and clothing and such pocket money as she required, but no wages. I think the principle of the case of *Miller*, 25 R. 995, applies. This was a family arrangement. It may very well be that in such cases an arrangement by which services are given by the members of the family without wages is the only means of carrying on the family. There may be no profit, but there is support for the family from the business so carried on. I think here that the pursuer has no case. I come to this conclusion not without regret, but in my opinion the judgments of the Sheriffs are right and must be affirmed.

LORD KYLLACHY—I agree, and have nothing to add.

LORD LOW—I am of the same opinion. The dictum of Lord President Boyle in the case of *Anderson*, 9 D. 1222, at p. 1227, although unimpeachable when read as applicable to the circumstances of that particular case, cannot be taken as laying down any absolute or general rule. It is impossible to say that when a father is tenant of a farm or a shop which he carries on with the assistance of members of his family who receive board and lodging, clothes, and pocket-money, there is any presumption that those members of the family are also entitled to claim money wages. Indeed, my impression is that the presumption is rather the other way, although after all there is perhaps little to be gained by considering the question of presumption in such cases, because each case must be decided on its own merits. In the circumstances of this case I think the Sheriffs have come to the right conclusion.

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal.

Counsel for Pursuer — Hunter — Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for Defender—Dean of Faculty (Campbell, K.C.) — Wilton. Agents — Mackay & Young, W.S.

Saturday, October 28.

SECOND DIVISION.

[Sheriff Court of Lanarkshire, at Glasgow.

M'KINLAY *v.* M'CLYMONT.

Reparation — Landlord and Tenant — Defective House—Known Danger—Promise of Landlord to Repair Defects — Relevancy.

The tenant of a house as tutor for his pupil child, and his wife in her own interest with his consent, raised an action against the landlord to recover damages for personal injury. They averred that the ceiling of the said house was old and rotten and dangerous to the inmates; that the factor when calling for rent saw or ought to have seen the ceiling's condition; that on 10th December about two feet square of the ceiling fell; that the same day the factor was shown what had happened and urged to repair the ceiling, and "indicated that the matter would be attended to;" that relying on this assurance, and daily expecting the ceiling to be repaired, pursuers continued to occupy the house; that nothing was done; that on Thursday 15th December a further portion of the ceiling fell on the female pursuer and her daughter, aged eleven, and severely injured them.

Held that the action must be remitted to proof.

On 30th December 1904 Mrs Isabella M'Kinlay, wife of Alexander M'Kinlay, with her husband's consent, and Alexander M'Kinlay as tutor for his pupil child Mary M'Kinlay, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against John M'Clymont to recover damages for personal injuries.

The pursuers averred that the pursuer, Alexander M'Kinlay, a labourer, resided at 81 Lambhill Street, Glasgow; that the female pursuer, his wife, resided there with him; and that the defender, who resided at 91 Pollock Street, Southside, Glasgow, was the owner of the house in which the pursuers resided.

The pursuers further averred—"(Cond. 2) The house in question is a single apartment, with a small sleeping apartment off it, and is occupied by the pursuers and their young family. Pursuers, Alexander M'Kinlay and his family, have resided in said house for over four months, and defender's father, James M'Clymont, who held himself out as proprietor, and with whom pursuer, Mr

M'Kinlay, had all his dealings, usually called for the house rent. (Cond. 3) The ceiling of the said house was old and rotten and dangerous to the inmates, and defender or his father, the said James M'Clymont, who acted as factor of pursuer's house, and for whom the defender is responsible, on the occasions of his calling for the rent, saw, or ought to have seen, that the ceiling was old and needed renewing, or at least repaired; but he negligently failed to have it renewed or repaired. The said James M'Clymont was continually about the tenement in the tenants' houses, in particular in the house of the pursuers. (Cond. 4) On the morning of Saturday, 10th December 1904, a portion of the ceiling, about two feet square, fell and gave the female pursuer and her family a severe shock, besides causing the pursuers' family great annoyance and inconvenience. Later on the same day the said James M'Clymont called at the house on his usual rounds for the rent. Mr M'Kinlay pointed out to him what happened, and urged him to have the ceiling at once repaired. The said James M'Clymont, notwithstanding that he saw the condition of the ceiling and indicated that the matter would be attended to, walked out muttering that what he wanted was rent. Mr M'Kinlay was daily expecting to have the ceiling repaired, but nothing was done. He relied on its being put into a condition of safety every moment, and accordingly he did not remove from the premises. On the Thursday following, a further fall of the ceiling took place. Large pieces of the falling plaster struck the female pursuer and the daughter Mary, a girl of about eleven years of age. It struck them on the head, neck, and shoulders, and severely injured them. They were then under the necessity of receiving medical treatment, and are so still. They are, each of them, suffering from nervous shock, and it will be a considerable time before either has recovered. The girl Mary M'Kinlay is unable to go to school, and will not be able to do so for a further considerable time. The female pursuer is unable to attend to her domestic duties, and her children suffer in health in consequence. . . ."

The defender pleaded that the action was irrelevant.

On 10th February 1905 the Sheriff-Substitute (DAVIDSON) repelled this plea and allowed a proof.

The defender appealed to the Sheriff (GUTHRIE), who on 7th April 1905 recalled the Sheriff-Substitute's interlocutor of 10th February and dismissed the action as irrelevant.

Note.—"The pursuer's averments in article 3 of the condescendence show that he was aware that the ceiling of his house was dangerous (see *Fraser* v. *Hood*, 1887, 15 R. 178, 25 S.L.R. 164, a case decided in the best days of the First Division), and yet he continues to live in it. The alleged fall of part of the ceiling, 'two feet square,' on Saturday 10th December last, was a pregnant proof of the state of rottenness which he sets forth. He is told the same afternoon by the factor that it would be attended to; but although it is not attended to, no further complaint is made, and he and his family remain in the house till another serious fall of plaster took place on the following Thursday. They still remain there, or at all events he describes himself as residing there on December 30th when this action was served, and after a summons of sequestration for rent had been served on December 22nd, and, it must be presumed, on January 25th, when the record was closed on a statement that the defender had obtained a warrant to eject the pursuer 'after a long process.' No doubt it is averred that the pursuer's wife and children could not remove on account of their health, and by reason of the *nexus* placed on the furniture by the defender's sequestration. These, perhaps, are not averments of much importance to the present question of relevancy, but point to the dilemma either that the pursuer's averments as to the dangerous and dilapidated condition of his house, or his averments as to the state of his wife and child's health, must be grossly exaggerated.

"It is enough, however, for the decision of the question of relevancy that the pursuer and his family remained in the rotten and dangerous house, which had already begun to fall about their ears, for four days, instead of betaking themselves to a place of refuge, and that without again demanding that the house should be made habitable. The recent decisions on this subject have become rather numerous and a little bewildering. Yet, I doubt not, through these cases one consistent purpose runs, viz., that men are not to get damages for injuries which they should have foreseen, and could have avoided by moderate prudence."

The pursuers appealed to the Court of Session, and argued—The pursuers had complained that the ceiling was unsafe, and the defender had undertaken to repair it. The averment that the defender's factor "indicated that the matter would be attended to" was sufficient averment of an undertaking to repair it. It was relying on this undertaking that pursuers continued to occupy the house. The present case was very like but more in pursuer's favour than that of *Shields* v. *Dalziel* (May 14, 1897, 24 R. 849, 34 S.L.R. 637), where the pursuer was held entitled to rely on the factor's promise in spite of his continued procrastination for many months. If the pursuer had removed in face of this offer to repair he would have been, on the authority of *M'Kimmie's Trustees* v. *Armour* (November 23, 1899, 2 F. 156, 37 S.L.R. 109), acting unreasonably, and probably would have been liable in damages for breach of contract.

The defender (respondent) argued—The averment in this case "indicated that the matter would be attended to" was not a sufficient averment of a promise; it fell far short of the averment in *Shields* v. *Dalziel* (*cit. sup.*), which was "undertook and promised to put it right." The shorter interval here between the promise (if it were a pro-

mise) and the fall of the ceiling was really in defender's favour. The pursuer on his own statement had occupied the house for four months apparently without complaint; in view of this he was not entitled to rely on a mere indication that the matter would be attended to, especially if it were so urgent that the ceiling fell only five days after the complaint. The present case was analogous to the cases of *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631; *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5, 36 S.L.R. 8; *M'Manus* v. *Armour*, July 10, 1901, 3 F. 1078, 38 S.L.R. 791.

At advising—

Lord Justice-Clerk—No doubt there are several reported cases in which a person has been held not to be entitled to claim damages from his landlord in respect of injury suffered owing to a defective condition of the premises. In all these cases the danger was visible and the tenant was held to have undertaken the risk of the injury which he suffered. In these cases of visible danger it also required some action on the part of the person himself to cause the accident which did the injury. That was so in each of the cases cited to us by the defender's counsel. There was some act by which the party claiming damages turned what had been a visible risk into a real danger, and doing so caused the injury to himself.

I think this case is very like *Shields* v. *Dalziel*, 24 R. 849. It is alleged that there was a dangerous condition of the ceiling, but in itself it was not such a palpable danger as to make it obvious that there was great risk in remaining in the house. It is said that the defender or his factor on his behalf "indicated that it would be attended to," and the pursuer relied on this being done. In the course of a few days the accident happened. I must say that this is much too delicate a case to allow it to be decided on mere relevancy, and that we ought to remit it to the Sheriff Court for proof.

Lord Kyllachy—I am of the same opinion. I say nothing for or against the decisions which have been cited to us, each of which of course depended on its own circumstances. Having regard to the alleged circumstances of the present case I think it enough to say that it appears to me to be too delicate a case to be decided without proof.

Lord Low—I agree. I think the case is a very narrow one, but I do not think it would be safe to dispose of it without inquiry.

Lord Stormonth Darling was absent.

The Court sustained the appeal and remitted to the Sheriff-Substitute to allow a proof.

Counsel for Pursuers (Appellants)—J. A. Christie. Agents—M'Nab & Hart, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Campbell, K.C.—Hunter. Agents—Carmichael & Miller, W.S.

Friday, July 21.

OUTER HOUSE.

[Lord Johnston.

RUTHVEN AND OTHERS *v.* RUTHVEN.

(*Ante*, vol. xlii, p. 562.)

International Law—Jurisdiction—Foreign Heritage Owned by Domiciled Scotsman—Refusal of Owner to Implement Order of Court to Convey Foreign Heritage—Motion for Order on the Principal Clerk of Court to Execute Conveyance in Owner's Name Considered and Refused.

In an action where the defender had been ordered by the Court to execute a conveyance of a certain heritable subject in Ireland in favour of the pursuers, but had refused to do so, a note craving the Court to authorise and ordain the Principal Clerk of Court to execute the required conveyance on behalf of the defender *refused.*

This was an action raised against Lord Ruthven at the instance of (1) the Master of Ruthven, and (2) Charles James George Paterson, chartered accountant, and Archibald Robert Crawfurd Pitman, Writer to the Signet, trustees acting under a certain agreement. By said agreement Lord Ruthven had, *inter alia*, undertaken to execute and deliver to the said trustees a valid and sufficient conveyance of the estate of Harperstown, in the county of Wexford, Ireland, but when called upon to do so he had refused to implement the said agreement by executing the required conveyance.

By interlocutor of the Lord Ordinary dated 30th May 1905 Lord Ruthven was ordained to execute and deliver to the trustees the conveyance required by them. Having failed to do so, and the days of charge having expired without his having rendered obedience thereto, a note was presented to the Lord Ordinary craving the Court to authorise and ordain the Principal Clerk of Court to execute the required deed on behalf of Lord Ruthven, and to deliver the same to the trustees, and further to authorise the Keeper of the Seal of the Court to affix the said Seal to the conveyance.

The Lord Ordinary refused the note.

The circumstances of the case and the arguments of the parties sufficiently appear from the opinion of the Lord Ordinary.

Lord Johnston—"In this case Lord Ruthven has been, after some months litigation, by my judgment of 30th May 1905, following on a judgment of my predecessor Lord Stormonth Darling of 16th May 1905, corrected (owing to an accidental error) by their Lordships of the Inner House on 25th May 1905, ordained to execute and deliver to the trustees under the agreement of 1892, to which Lord Ruthven by his constituted attorneys was a party, a conveyance, with memorial and abstract for registration affixed thereto, of certain