with one apparent but not real exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed.

The apparent exception is the case of *Shields* v. *Dalziel*, 24 R. 879, in the First Division. There it is quite true that the claim which the Court allowed was that of the wife of the tenant and not of the tenant. I must, however, point out that neither in the written pleadings nor in the oral argument did the landlord question or object to the title or instance of the wife, the defence being rested on totally different grounds. The pleadings were written and the argument was conducted by very able counsel, and presumably they deliberately abstained from stating this plea. Suffice it to say that the present question was not before the Court, and the decision in *Shields* v. *Dalziel* is not a judgment adverse to the doctrine of *Cavalier* v. *Pope*.

The other case which I have called an exception is *Hall* v. *Hubner*, 24 R. 875, decided by the Second Division. There the landlord argued that the pursuer being the tenant's wife was . . . a stranger to the landlord, and must seek her remedy not against him but the tenant. The learned Judges in their reported opinions take no notice of this argument, but their judgment allowing issues to be lodged amounted to its rejection. This decision I therefore think cannot be supported, but this is the only and the slender support of the appellants' case to be found in the Scotch cases prior to *Cavalier* v. *Pope*.

I am of opinion that the appeal ought to be dismissed.

LORD ATKINSON—I concur.

LORD COLLINS—I concur.

Their Lordships dismissed the appeal.

Counsel for the Pursuers (Appellants)—C. D. Murray. Agents—Murray, Lawson, & Darling, S.S.C., Edinburgh—Walter H. Guthrie, London.

Counsel for the Defenders (Respondents)—Macmillan—Beveridge. Agents—Mathie, Macluskie, & Lupton, Stirling—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—A. & W. Beveridge, Westminster.

COURT OF SESSION.

Friday, February 7.

SECOND DIVISION.

[Lord Johnston, Ordinary.

RUDMAN *v.* JAY & COMPANY.

Reparation—Wrongous Use of Diligence—Decree ad factum præstandum—Alleged Impossibility of Performance—Imprisonment.

A obtained furniture from J. & Co. upon a hire and purchase agreement, and placed it in the house he occupied. Subsequently his landlord sequestrated the furniture in the house for rent. A having failed to pay the stipulated hire, J. & Co. sent to A's house and demanded redelivery of their furniture, but were met by the production of the decree and schedule of sequestration. Shortly afterwards decree of cessio was pronounced against A at the instance of another creditor. J. & Co. raised an action against A, concluding for delivery of the furniture. A did not appear to defend, but the trustee in his cessio, who was sisted, consented to decree. J. & Co. charged A on the decree, and A having failed to implement the charge, obtained a warrant for his imprisonment in ordinary course, and he was imprisoned.

A brought an action of damages against J. & Co. for wrongous arrestment and imprisonment, in which he stated the facts above narrated, and while condescending on no special fact suggesting malice, averred generally that the diligence had been used maliciously, in bad faith, and without probable cause, inasmuch as J. & Co. knew that, owing to the sequestration and cessio, it was impossible for him to implement the decree.

Held (*rev.* Lord Johnston) that the action was irrelevant, J. & Co. having obtained A's imprisonment under a legal warrant regularly obtained and executed, and A having made no relevant averment of malice, or facts from which malice might be inferred.

Trevor Inglis Rudman, civil engineer, Edinburgh, raised an action against Jay & Company, cabinetmakers and furniture dealers, Glasgow, in which he sued for £1500 as damages for wrongous arrestment and imprisonment.

The defenders pleaded, *inter alia*—"(2) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The pursuer having been arrested and imprisoned under a legal warrant regularly obtained and executed, the defenders are entitled to decree of absolvitor."

The facts as averred by the pursuer are stated in the following narrative taken from the opinion of the Lord Ordinary

(JOHNSTON):—"This is an action for damages for wrongous arrestment and imprisonment on a warrant to imprison obtained after an expired charge *ad factum præstandum*. The alleged circumstances are these — The pursuer Rudman states that in November 1905 he obtained from the defenders Jay & Company, cabinetmakers, Glasgow, upon a hire and purchase agreement, certain articles of furniture which in November 1906 were still in his possession, and constituted the whole plenishing of his house, 12 Inverleith Gardens, Edinburgh. At the latter date the pursuer was in arrear both with the rent of his house and with the instalments due under the hire and purchase contract. Accordingly, on 20th November 1906, his landlord sequestrated the furniture in said house for rent past due and to become due. There was included in the inventory under this sequestration the whole of the articles belonging to the defenders and possessed by the pursuer under said hire and purchase contract. They remained under the sequestration till a point of time posterior to the circumstances upon which this action of damages is founded. The pursuer next states that in the end of November, and after the landlord's sequestration had attached, the defenders, as they were entitled to do, he being in arrear with the instalments under the hire and purchase contract, sent their representative with a waggon to his, the pursuer's, house to remove their furniture, but that, on his wife informing him of the landlord's sequestration, and exhibiting to him the schedule of sequestration, their representative declined to intermeddle with the furniture. The pursuer further states that on 20th November 1906 one of his creditors presented a petition for cessio against him in the Sheriff Court at Edinburgh, on which decree of cessio was pronounced on 22nd January 1907. The pursuer alleges that in consequence of the said decree of cessio he left his house at Inverleith Gardens, leaving the furniture in question in it, and informed the trustee in his cessio that he had done so. This, however, was not sufficient to vest the trustee in the cessio in possession of the furniture, or in any way to vest him with a title to it. It is not averred that the pursuer has executed a disposition *omnium bonorum*, nor that the trustee has actually taken possession of the furniture.

"In these circumstances the defenders on 4th February 1907 raised an action in the Sheriff Court at Edinburgh against the pursuer for decree, ordaining him to deliver the articles of furniture in question to them. That the pursuer was personally served with this summons he impliedly admits, as he alleges that he handed the citation to the trustee in his cessio, and did not himself defend the action. It is common ground that the trustee in the cessio was sisted in this action, and, for his interest, consented to decree being pronounced as concluded for, and that decree in absence was pronounced against the pursuer, with £18, 1s. 10d. of taxed expenses. On 3rd May 1907 the defenders gave the pursuer a charge on the decree, and, he not having implemented the decree, they on 13th May applied for a warrant of imprisonment, which they obtained on the same day and executed on 14th May 1907, and the pursuer was imprisoned accordingly. He at once presented a note of suspension and liberation, when the defenders consented to liberation, and the note was dismissed, the Lord Ordinary finding the respondents, the present defenders, entitled to expenses. These expenses have not been paid. . . ."

The following averments (bearing on the questions of malice and want of probable cause) were made by the pursuers, *inter alia*—"(Cond. 9) At the time of obtaining and executing the said warrant, implement by the pursuer of the said decree was, to the knowledge of the defenders, impossible, and arrest and imprisonment of the pursuer was wrongously and unjustifiably caused by the defenders. The defenders knew that the pursuer could not personally give delivery as he was not in possession. The defenders, after notice of the transfer of possession to the trustee by the decree of cessio, were bound to take delivery in his hands, but the defenders have refused to take such delivery. The defenders also arrested and imprisoned the pursuer under the said warrant in the knowledge that the pursuer could not intermeddle with the said articles without being guilty of contempt of Court, both for breach of poinding and for breach of the decree of cessio. The defenders also acted in bad faith in imprisoning the pursuer. He intimated to them that he wished to suspend the decree and charge if they were to enforce the charge by imprisonment, and he relied on their answering his letter in order to do so. No answer of any kind was sent. The defenders in hiring the furniture undertook the risk of its being sequestrated under the landlord's hypothec, and of its being affected by the pursuer's bankruptcy, and the liability of the pursuer under the said agreement was qualified by that fact as an implied condition thereof; and the defenders were not entitled to execute the said warrant after the sequestration and cessio. Further, the use of the said diligence was an unwarrantable device to force the pursuer to pay his rent, and when it was no longer possible for him to do so, the defenders persisted in the said diligence, and the arrest and imprisonment of the pursuer was part of a scheme to annoy and injure the pursuer. It was not diligence carried out in good faith to enforce the said decree, but imprisonment used to compel the payment of rent, and it was due to malice and was without probable cause."

On 18th December the Lord Ordinary (JOHNSTON) pronounced an interlocutor allowing the parties a proof.

Opinion . . . [After the narrative already quoted] . . .—"The present action is for damages for wrongous imprisonment. To the relevancy of the action the defenders object. They maintain that they acted

within their legal rights; that they personally served this action on the pursuer, and, he not opposing, obtained the decree of a competent court, and followed up that decree by legal and competent diligence, everything being done regularly and with judicial authority. And they maintain further that there can be no actionable wrong in following out a legal right (*Allen* v. *Flood*, [1898] A.C. 1), and that it is no answer on the part of the pursuer that it was impossible for him to implement the decree without breach of the standing sequestration, for it was always open to him to pay his rent and free the sequestrated articles from the nexus laid on by the landlord. They say that there can be no wrong in putting a man in prison on a competent decree, followed by a competent warrant of imprisonment, though there may be good ground, in the discretion of the court, for letting him out if he applies in the recognised way for liberation.

"I agree with the defenders that their case is quite different from that of a defender who has proceeded on *ex parte* diligence. I also discard consideration of certain averments of the pursuer founded on his cessio. His cessio, there being no divestiture by disposition *omnium bonorum*, or even possession given to and taken by the trustee, was no bar to the pursuer implementing the decree. The effect of cessio and of sequestration are quite different in the matter of divestiture of the bankrupt and investiture of the trustee (*Simpson* v. *Jack*, 16 R. 131). Still I am not able to sustain the defenders' contention, as I think their argument misses the true ground of action.

"The case of *Graham* v. *Dundas*, 7 S. 876, indeed lays down in unmistakable terms that if a party has 'right to obtain decree, he must also be entitled to enforce that decree by the forms and executorials allowed by law,' without being liable in damages. This was followed in *Aitken* v. *Finlay*, 15 S. 683. In both these cases the original decrees were found ultimately to have been erroneous on the merits, but it was held that this did not give relevancy to the claim. In *Bell* v. *Gunn*, 21 D. 1008, the same conclusion was arrived at, though the decree, which was the foundation of the diligence, was found not erroneous on the merits, but on a technical objection to the instance, which had not been stated by the defender, who made no appearance though personally cited. See also *Kinnes* v. *Adam & Son*, 9 R. 698, and other cases referred to. But in *Wolthekker* v. *Northern Agricultural Company*, 1 Macph. 211, the Lord Justice-Clerk (Inglis) predicates an important condition to the freedom from consequences of the litigant who uses any legal right or remedy to which he is absolutely entitled, in these words, 'unless he was shown to have resorted to it maliciously and without probable cause,' and less definitely where he speaks of such litigant using 'his legal right moderately and in good faith.'

"It is there that the true case of the pursuer arises. He cannot and does not object to the defenders having taken decree against him, nor can he object to their following up the decree by personal diligence *per se*, but he does object to their doing so in the circumstances in which they and he found themselves, which he says was not the following out of their legal rights moderately and in good faith, but oppressively and maliciously.

"What then are the circumstances alleged? The defenders were apprised of the sequestration. Apart from averments of special intimation at an earlier date, they admit that they did learn of the subsistence of the sequestration on 12th May 1907, the day on which they applied for their warrant for imprisonment, and two days before they executed it. They also knew at the time, 19th March 1907, when they took the decree, which was the foundation for the warrant to imprison, that the pursuer was under cessio, for the trustee was a consenting party for his interest to their taking such decree. They must further be held to have known that it was an incident of their contract of hire and sale, of which they took the risk, that their furniture in the pursuer's possession would be subject to the hypothec of the pursuer's landlord. They must therefore have known that their debtor, the pursuer, could not, unless he was able to pay the rent, implement the decree without breach of the landlord's sequestration, and that being a bankrupt under cessio he could not be expected to pay the rent in order to release the furniture. This seems to me a relevant averment to distinguish the case from the general rule of *Graham* v. *Dundas* and the other cases above quoted, and from which it is possible to infer the malice which is averred.

"I do not think it is necessary to follow the interesting argument which the defenders maintained, on the question whether the impossibility of fulfilment excused from contract liability (*Gillespie & Company* v. *Howden & Company*, 12 R. 800; *Jones* v. *St John's College, Oxford*, L.R. 6 Q.B. 115; *Lord Clifford* v. *Watts*, L.R. 5 C.P. 577). There are cases in which undoubtedly it does not. But they depend on the terms of the contract and the cause of the impossibility. But while in many such cases the impossibility of performance will form no defence to an action for breach, it would, I think, form an adequate defence to an action for specific implement, and even if a decree for specific implement was obtained, I think it would be a very dangerous proceeding to attempt to enforce it by personal diligence.

"The case is in some of its aspects not unlike that of *Bottger* v. *The Globe Furnishing Company*, decided by me in June 1906, 14 S.L.T. 117, to the judgment in which I refer. But I desire to add that I had not the benefit in that case of such a full argument and such an exhaustive citation of authority, and to admit that consideration of the question of malice, to which no argument was addressed, escaped me. I understand that the case did not go further.

"I am unable, as I think there is a suffi-

cient foundation laid for the pursuer's averment of malice, to sustain the defenders' plea to the relevancy. The action must therefore go to proof. But I do not think that in the exercise of my discretion I should send the case to a jury. There are, to my mind, several reasons why it will be better disposed of by a proof before a judge.

"There remains to consider the defenders' contention that the case should not be allowed to proceed without the pursuer as an undischarged bankrupt being required (*a*) to find caution, and (*b*) to pay the expenses found due in the note of suspension and liberation. As regards the first point, I accept of the general rule of practice what is stated by the Lord President (Inglis) in *Clarke* v. *Muller*, 11 R. 418, and acknowledge that though exception from the general rule is in the discretion of the judge, that discretion should be sparingly exercised. But I think that in this case there are circumstances which justify the exercise of that discretion in favour of the pursuer. And as regards the second point, while I think it doubtful whether on the information before me expenses should have been given in the suspension and liberation, I think the case bears to be distinguished from the cases of *Irvine* v. *Kinloch*, 13 R. 172, and *M'Murchy* v. *Maclullich*, 16 R. 678."

The defenders reclaimed, and argued—The pursuer had failed to state a relevant case. The defenders had obtained a lawful decree by ordinary lawful means, neither the pursuer nor the trustee in his cessio having so much as attempted to oppose it. Having obtained their decree, they had done nothing beyond taking the ordinary lawful means to enforce it, including imprisonment. They could not be subjected to an action of damages for merely availing themselves of their legal rights—*Graham* v. *Dundas and Others*, July 9, 1829, 7 S. 876; *Aitken* v. *Finlay*, February 25, 1837, 15 S. 683; *Bell* v. *Gunn*, June 21, 1859, 21 D. 1008. Their attitude of mind was an irrelevant consideration. If the act done was lawful the motive was immaterial—*Allen* v. *Flood*, [1898] A.C. 1. Accordingly the pursuer's averments of malice even if specific, which they were not, were quite irrelevant. The cases of *J. & W. Kinnes* v. *Adam & Sons*, March 8, 1882, 9 R. 698, 19 S.L.R. 478 (wrongous sequestration), and *Wolthekker v. Northern Agricultural Company*, December 20, 1862, 1 Macph. 211 (wrongous arrestment) were quite different from the present, which dealt with the enforcement of a decree *in foro*. The suggestion, too, that the defenders were actuated by malice was absurd. Their object clearly was to get the furniture, and although the pursuer could not hand it over so long as the landlord's sequestration remained in force, still a short period of imprisonment was just the thing to stimulate him and his friends to somehow or other raise the money necessary to pay the landlord, and so remove the *nexus* on the furniture and prepare the way for its return to the defenders. Further, the mere fact that the pursuer might not be able to implement the decree did not affect the defenders' right to attempt to enforce it—*cf. Gillespie & Company* v. *Howden & Company*, March 7, 1885, 12 R. 800, 22 S.L.R. 527. In any case the pursuer should not be allowed to proceed with the present action until (*a*) he had paid the expenses decerned for in the suspension and liberation—*Irvine* v. *Kinloch*, November 7, 1885, 13 R. 172, 23 S.L.R. 112; *M'Murchy* v. *Maclullich*, May 21, 1889, 16 R. 678, 26 S.L.R. 421; (*b*) had found caution for the defenders' expenses in the present action—*Clarke* v. *Muller*, January 16, 1884, 11 R. 418, 21 S.L.R. 290. The case of *MacRobbie* v. *M'Lellan's Trustees*, January 31, 1891, 18 R. 470, 28 S.L.R. 322, was also cited.

Argued for the respondent—The sequestration and the cessio, by depriving the pursuer of all control over his furniture or funds, made it entirely impossible for him to obey a decree for delivery of the furniture. The defenders knew this when they raised the action and put their diligence into force; their use of diligence was accordingly malicious, and in bad faith, and rendered them liable in damages, even although the diligence followed upon a regular decree regularly obtained—*Wolthekker* v. *Northern Agriculture Company*, (*cit. sup.*); *M'Gregor* v. *M'Laughlin*, November 17, 1905, 8 F. 70, 43 S.L.R. 77; *Sturrock* v. *Welsh & Forbes*, November 14, 1890, 18 R. 109, 28 S.L.R. 108. It was really an attempt to secure the pursuer's imprisonment for debt by a roundabout method, and by an unfair use of a decree *ad factum præstandum*—*Mackenzie* v. *Balerno Paper Mill Company*, July 12, 1883, 10 R. 1147, 20 S.L.R. 757. If special averments of malice were necessary they were to be found in Cond. 9, but they were not, whereas here the whole circumstances of the case pointed to it. The course which the defenders should have followed was indicated in *Lindsay* v. *Earl of Wemyss*, May 18, 1872, 10 Macph. 708, 9 S.L.R. 458, viz.—they should have appeared before the Sheriff and claimed to have their furniture withdrawn from the sequestration. There should be no order as to caution or expenses—*Stuart* v. *Moss*, February 6, 1886, 13 R. 572, 23 S.L.R. 532. The Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. cap. 114), sections 2 and 6, was also referred to.

LORD JUSTICE-CLERK—This case is somewhat peculiar. The defenders are furniture dealers who supplied certain furniture to the pursuer on the hire-purchase system. When the instalments due for the furniture were not paid, the defenders sent to the pursuer's premises and demanded redelivery of the furniture. They were met by production of a decree of court by which the furniture was sequestrated for rent due for the house in which the furniture was. No doubt that took the furniture out of the control of the pursuer. Then the present defenders as pursuers brought an action against the present pursuer as defender, and took a decree in that action for delivery of the furniture. They were quite entitled

to take such a decree. That is shown conclusively by the fact that no one opposed the granting of the decree—neither the present pursuer nor the trustee in his cessio nor anyone else. We must assume that this decree was rightly granted. No one has impugned it. Having a decree *ad factum præstandum*, the present defenders —then pursuers—proceeded to enforce it, and the only way open to them for enforcing it was imprisonment. Accordingly the present pursuer was imprisoned under the decree. He was liberated the next day. The question now is whether the person who was so imprisoned has a good claim of damages in respect of such imprisonment. A number of ingenious arguments have been stated to us in support of the pursuer's case, but I am satisfied that none of these arguments are well founded and that the pursuer has no relevant case. Further I am satisfied that the pursuer was imprisoned under a legal warrant regularly obtained and executed, and that the defenders are entitled to decree of absolvitor. I do not go further into details, except to say this, that I do not think there is any relevant averment of malice in the pursuer's record, and there is nothing alleged from which malice could be inferred. I think, therefore, that we should recal the interlocutor of the Lord Ordinary, sustain the second and fourth pleas for the defenders, and assoilzie them from the conclusions of the action.

LORD STORMONTH DARLING and LORD LOW concurred.

LORD ARDWALL—I agree with your Lordship in the chair that the pursuer has set forth no relevant case, and that the Lord Ordinary's interlocutor ought to be recalled, the second and fourth pleas-in-law for the defenders sustained, and the defenders assoilzied.

The facts are sufficiently set out in the Lord Ordinary's opinion, and it is unnecessary to recapitulate them at any length.

The defenders, who are furniture dealers in Glasgow, raised an action against the pursuer for delivery of articles of furniture which belonged to them. The present pursuer did not appear to defend the action, but the trustee in his cessio was sisted in the action, and for his interest consented to decree being pronounced as concluded for. The pursuer in the present action not having appeared at all, decree for delivery *ad factum præstandum* in absence was pronounced against him, with expenses. The defenders gave the pursuer a charge, on this decree, and he having failed to implement the decree within the days of charge, on 13th May 1907 they applied in ordinary course for a warrant for imprisonment on which the pursuer was imprisoned. What the present defenders did was entirely within their rights. They merely carried out the decree which they had obtained without objection on the part of the pursuer. The whole proceedings were orderly proceeded, and perfectly regular.

This is not one of the proceedings which the party setting them in motion is held to adopt *suo periculo*, such as a summary application for interdict or the arrest of a person *in meditatione fugæ;* and although it is said that the diligence was due to malice, and was without probable cause, yet there are no relevant averments of malice or want of probable cause. The pursuer's allegations, so far as they have even a semblance of relevancy, seem to be founded on this, that there was no reason for the diligence of imprisonment being put in force, because, the furniture in question being sequestrated, the pursuer did not have it in his power to deliver it to the defenders, and being under a cessio he had no money wherewith to pay his rent and release the furniture from the landlord's sequestration.

I cannot accept this view of the situation. Under the old law of imprisonment for debt, debtors were frequently put in prison although they had no effects or money in their possession, simply as a *compulsitor* to make them or their friends find the money to pay the debt, and in the same manner the defenders in this case used imprisonment as a *compulsitor* to induce the pursuer, by raising money, to get rid of the landlord's sequestration and to deliver the furniture in terms of the decree. This was a perfectly intelligible piece of procedure, and was, as I have said, entirely within the rights of the defenders; and while I am not prepared to say that in no case might it be possible that malice could be relevantly averred against a person using such diligence, such averment would require to be very distinct and specific, and I do not think that any such exists in the present action. I regard it as wholly out of the question that any person should be subjected to an action of damages for executing the appropriate lawful diligence following on a decree *ad factum præstandum* of a competent Court on bare averments that the diligence was used maliciously and without probably cause.

It is unnecessary to consider the other question as to whether the pursuer is bound to pay the defenders' expenses in the suspension and liberation as a condition of being allowed to proceed with the action.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second and fourth pleas-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for the Pursuer (Respondent) —T. B. Morison, K.C.—A. M. Stuart. Agent—Robert White, Solicitor.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Mitchell. Agents—Graham, Pole & Lawrence, S.S.C.