is precluded from pronouncing a sentence of imprisonment for a fixed period in default of payment, the cause must be regarded as civil *quoad* review.

I read it, however, in another sense. In my opinion the test depends, not upon the manner in which the complainer thinks fit to frame his complaint, nor upon the position or special circumstances of the respondent, but upon the punishment which is authorised by the special or general statute for such a statutory offence. In short, I think that the punishment of imprisonment for a fixed period which is adopted as a test of criminal jurisdiction is a quality of the offence charged and not an accident dependent on the terms of the complaint before the Court or the position of the respondent. I think that a party to such a process in deciding which is the appropriate Court of review should only have to consider what punishment the magistrate is authorised by statute to inflict in general in respect of the offence charged. It would be anomalous that a complaint brought against a company should be regarded as a civil cause *quoad* review; and that a complaint on the same grounds brought against one of their officials as an individual should be regarded as criminal. Again, suppose that in the present case the respondents had stated the objection that it is not competent to sue a corporation in a summary prosecution for a statutory penalty for what is a criminal or *quasi*-criminal offence. I do not say that such a defence would have been successful; but to which Court of review should an appeal have been taken? I cannot doubt that the High Court of Justiciary would be the proper Court to decide that question, the offence charged being one to which in general the punishment of imprisonment for a fixed period is attached as an alternative, and as to which accordingly the High Court of Justiciary is the appropriate appellate tribunal.

The question is, can the prosecutor by restricting the prayer of his complaint or by selecting a respondent who cannot be imprisoned shift the court of review? To hold this would, I think, lead to confusion and inconvenience, and therefore personally I should sustain the jurisdiction of this Court.

The Court sustained the objection and dismissed the appeal.

Counsel for the Appellants — Dean of Faculty (Asher, Q.C.)—Grierson. Agent—James Watson, S.S.C.

Counsel for the Respondents—Salvesen, Q.C.—Cook. Agents—Dove, Lockhart, & Smart, S.S.C.

COURT OF SESSION.

Wednesday, January 17.

FIRST DIVISION.

BERWICKSHIRE COUNTY COUNCIL *v.* MIDDLEMISS.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7—*Engineering Work—Repairing Roads with Steam Roller—Employment "on or in or about a Work."*

A section of road was under repair by a steam roller, with a water-cart which was used to water those parts of the road which had been previously blinded, in order that they might be rolled. The work was stopped for the dinner-hour at a place where the Dunbar and Haddington roads met. After the dinner-hour the steam-roller proceeded to roll part of the Haddington Road where ruts had been filled up, for which water was not required, and the water-cart was directed to proceed to water a part of the Dunbar Road about a quarter of a mile away. As the driver of the cart was yoking his horse it bolted, from some unknown cause, with the result that the driver was run over and killed. *Held* (1) that the work of repairing roads on which a steam-roller was employed was an "engineering work" under section 7 of the Workmen's Compensation Act 1897, and (2) that the driver of the cart was employed on or in or about that work at the time of the accident, and his representatives were therefore entitled to compensation.

The Workmen's Compensation Act 1897 provides, section 7—"(1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work. (2) 'Engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used."

In a case stated for appeal by the Sheriff-Substitute of Berwickshire (DUNDAS) at the instance of the Middle District Committee of the County Council of Berwickshire, in an action against them at the instance of Margaret Purves Middlemiss, widow of the deceased James Middlemiss, labourer, for herself and as the administrator for her pupil children, for compensation for his death, the following facts were stated to be admitted or proved—"The appellants are the authority having control of the roads in the middle district of Berwickshire, which includes the parish of Cranshaws, and as such execute the work necessary to keep the same in repair. For this purpose they possess and use a steam-roller and a water-cart for conveying the

water for the steam-roller and for sprinkling the water on the road under repair. The appellants contracted with William Middlemiss, the brother of deceased, to supply a horse for the water cart and a man to drive it, and to do any other work in connection with the repair of the roads with the steam-roller, and who was to be entirely under the orders of the appellants' surveyor, and liable to dismissal by him. The deceased was the man supplied under said contract, and for nine months prior to the accident had been employed in connection with the repair of the roads by the appellants. The wages of the deceased during that period were £1 per week, and were paid by the appellants to the said William Middlemiss. The deceased was also entitled to lodge in a van belonging to the appellants, with fire and light, which was of the value of 3s. 6d. per week. The duties of the deceased included the carting and sprinkling of water for the repair of the roads and for supplying the steam-roller, carting coals for the engine, and, when required, spreading and sweeping the blinding on the metal in front of the roller. At the time of the accident the appellants were repairing the section of roads in the neighbourhood of Cranshaws Schoolhouse. At that part the road leading to the north, past the smithy and manse, divides immediately to the north of the schoolhouse, the right-hand branch being known as the Playhaugh or Dunbar Road, and the left-hand branch as the Haddington Road. On the 11th day of July last, in the forenoon, a patch on the Dunbar Road, immediately beyond Cranshaws Schoolhouse, was being repaired by the appellants, metal having been put on with blinding, and watered and rolled by the steam-roller, the deceased having been engaged thereat. This patch was finished about twelve o'clock, when the men stopped for dinner, and the steam-roller and water-cart were left standing at the side of the Dunbar Road, close to the schoolhouse. At the end of the dinner-hour the steam-roller proceeded to roll the Haddington Road from the schoolhouse northwards, on which metal had been spread to fill up the ruts and hollows where required, and for which operations water was not being used; and the deceased at the same time, on the instructions of appellants' foreman, proceeded to yoke his horse to the water-cart for the purpose of driving water to sprinkle on a part of the road under repair south of the schoolhouse and about a quarter of a mile therefrom, and on which the roller was to be used after finishing the Haddington Road. While the deceased was yoking his horse to the water-cart the horse, from some unknown cause, bolted, and ran with the cart for a distance of about forty yards along the Dunbar Road, which had been under repair that day, and the deceased was knocked down in trying to stop the horse, and a wheel of the cart passed over his body, causing serious injuries from which he died a few hours afterwards. At the time of the accident the steam-roller was on the Haddington Road, but there was no evidence to show how far it was from the place where the accident happened, but about ten minutes afterwards it was working on that road about 500 yards from the schoolhouse."

The Sheriff-Substitute found that the appellants were the undertakers of an engineering work in terms of the Workmen's Compensation Act 1897, section 7 (2), on which the deceased James Middlemiss was employed when the accident took place by which he was killed, and that the said accident arose out of, and was in the course of, his said employment; that the respondent and her two pupil children were the only dependents on the deceased within the meaning of the Act, and as such were entitled to compensation; assessed the same at £183, 6s. sterling.

The following were the questions of law stated in the case—"(1) Were the appellants the undertakers of an engineering work in terms of section 7 (2) of the Act? (2) Were the operations of the appellants an engineering work within the meaning of section 7 (1) (2) of the Act? (3) Was the deceased at the time of the accident employed in on or about an engineering work within the meaning of section 7 (1) of the Act? (4) Did the injury to deceased arise out of and in the course of his employment at an engineering work within the meaning of section 1 (1) of the Act?"

Argued for the appellants—(1) The question to be looked at was, what was being done at the time of the accident, and the answer was that the steam-roller was rolling-in stones which had been placed in ruts. Although road-making might be within the definition of "engineering work" in section 7 (quoted *supra*), rolling the ruts was not. It was analogous to painting the outside of a house, or the joists and beams, which had been held not to be repairing—*Wood* v. *Walsh & Sons* (1899), 1 Q.B. 1009; *M'Donald* v. *Hobbs & Samuel*, October 17, 1899, *ante* p. 4, *per* Lord Young. (2) Even if repairing the road with the steam-roller was an engineering work, Middlemiss was not, at the time of the accident, engaged "on or in or about" it. He was engaged in yoking his horse in order to water a different part of the road, where no mechanical means were being employed, and which was therefore not an engineering work in the sense of the Act. It could not be maintained that the presence of the steam-roller turned the whole roads in the neighbourhood into an engineering work. The case was ruled by the decisions where it had been held that a person employed in bringing material to a work was not engaged on or in or about that work—*Chambers* v. *Whitehaven Harbour Commissioners* (1899), 2 Q.B. 132; *Holtness* v. *Mackay & Davis* (1899), 2 Q.B. 319; *Bell & Sime* v. *Whitton*, June 16, 1899, 1 F. 942.

Argued for the respondent—(1) Both the steam-roller and the water-cart were jointly engaged in repairing the road. Repairing a road with the employment of mechanical power was undoubtedly an engineering work under section 7. They were not merely preserving the fabric, as in the

painting cases cited by the other side, but actually repairing. (2) The whole section of the road which was under repair constituted the work, and those repairing it were engaged on that work whether the engine was at that particular place or not—*Durham* v. *Brown Bros. & Co.*, December 13, 1898, 1 F 279; *Devine* v. *Caledonian Railway Company*, July 11, 1899, 36 S.L.R. 877. The Act did not confine compensation to cases of accident owing to the steam-engine employed, it was enough that the steam-engine was used.

LORD PRESIDENT—I think that the judgment of the Sheriff-Substitute is right. Two main questions arise for consideration—(1) Whether the work of road repair described in the case was an engineering work within the meaning of section 7 (2) of the Workmen's Compensation Act 1897; and (2) whether the deceased was at the time of the accident employed in on or about such work within the meaning of section 7 (1) of the Act. If "engineering work" had not been defined, it might have been thought that it related only to the making and repairing of machinery, but its scope is very much wider. It is declared that it "means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The work in question was the repair of a road, and what was done was this.—metal was put on with blinding; it was watered by the water-cart and rolled by the steam-roller. All these operations were parts of one process, the object and result of the process was the repair of the road, and in that process machinery driven by steam was used. So far, therefore, as the general process is concerned, the statutory definition in the section appears to me to be satisfied.

In considering the second question it is proper to keep in view the statement in the case that throughout the forenoon the deceased had been engaged in the work just described, and that his duties included, when required, spreading and sweeping the blinding on the metal in front of the roller, that when the men separated after the dinner-hour the steam-roller proceeded to roll a part of the road on which metal had been spread to fill up ruts, and that for that particular operation water was not required, as also that the deceased went with his water-cart to another part of the road which was to be sprinkled with water. The steam-roller and water-cart were, however, each part of the machinery or plant generally required and used in the composite process of road repair, and accordingly the deceased was employed in that composite process. It does not seem to me that he had ceased to be so employed because at the time when the accident occurred the steam-roller had gone to do a piece of work for which water was not required. If it had been proved that the horse of which the deceased had been in charge had bolted owing to the noise of the steam-roller, it would have been difficult to say that the accident was not due to the use of machinery driven by steam, although the Act does not require that it shall be proved that the accident was caused by the use of such machinery, no doubt upon the view that the use of such machinery is attended by dangers not incident to machinery in which steam is not used.

Cases were referred to in the course of the discussion which do not seem to have any bearing on the question before us, *e.g.*, the case of *Chambers* v. *Whitehaven Harbour Commissioners*, L.R. (1899), Q.B.D. 133, in which where a workman had fallen from a hopper in which dredgings were being removed to about a mile and a-half out at sea, and been drowned, it was held that he was not at the time of the accident employed on in or about an engineering work within the meaning of sec. 7 of the Act. The engineering work in that case was dredging, and in removing the dredgings to so great a distance the workman was not even "about" the work. In contrast with that case reference may be made to *Devine* v. *Caledonian Railway Co.*, 36 S.L.R. 877.

LORD ADAM—I am of the same opinion. The deceased workman was employed to drive a water-cart, and to do other work in connection with the repairing of the roads under the charge of the appellants. His duties included the bringing of water to the engine, and the soaking of the newly metalled parts of the road in preparation for the roller. The steam-engine and its tender in the shape of the water-cart were both engaged in a common work upon the road, to which the deceased and his cart were as necessary as the engine. On the day of the accident the deceased was working in connection with the steam-roller upon a particular section of the road under the appellants' charge, and after dinner the deceased was yoking his horse with the intention of driving water for the purpose of soaking a part of the road in preparation for the roller, when his horse bolted and he was run over.

The question is whether the deceased was employed in an engineering work? The first part of the definition would not appear to include work upon a road, but the clause goes on to define the term as including "any other work for the construction alteration or repair of which machinery driven by steam . . . is used." Accordingly, the question is, whether the deceased was employed on work for the repair of which machinery driven by steam was used, and I think it is beyond doubt, not only that machinery driven by steam was used, but that all the men and the engine were engaged in the repair of the road, and therefore in an engineering work in the sense of the Act. I do not think that in this case we have anything to do with the meaning or construction of the word "about." A consideration of the meaning of that word would only be material if the deceased had not been employed in an engineering work.

Thus in *Chambers* the workman drowned was not employed in the dredging work for which machinery was used, but merely in removing material brought up by the dredger.

I therefore agree with your Lordship that the decision of the Sheriff-Substitute is right.

LORD KINNEAR concurred.

The Court answered the questions in the case in the affirmative.

Counsel for the Appellant — Solicitor-General (Dickson, Q.C.)—Glegg. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondent—Baxter—Guy. Agents — Cunningham & Lawson, S.S.C.

Wednesday, January 17.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* GILCHRIST.

Interdict—Interdict on Caution—Wrongous Use of Interdict—Reparation.

When an interdict is granted on caution it is not operative until caution is found, and therefore a person who has sustained loss by obedience to an interdict on which caution never was found, has no relevant claim of damages against the person at whose instance the interdict was granted.

A landlord obtained interim interdict, on condition of finding caution, against his tenant ploughing certain lands. He failed to find caution, and ultimately abandoned the interdict. The tenant brought an action of damages for the loss sustained by him through being prevented from ploughing the land. *Held* that the action was irrelevant, as the interdict had never become effectual, and the tenant had been free to plough if he chose.

James Gilchrist, proprietor of the lands of Thornice, near Braidwood, Lanarkshire, applied in the Sheriff Court of Lanarkshire for interdict against William Thomas Wilson, his tenant, to prevent him from ploughing or breaking up the said lands. On 28th March 1899 interim interdict as craved was granted, with this clause, "on the condition that the petitioner find caution for any consequent damage to the respondent." Gilchrist never found caution, and on 3rd April abandoned the interdict.

Wilson brought an action in the Sheriff Court of Lanarkshire for £63, 4s., and averred that the interdict had been obtained wrongously, illegally, and unwarrantably, and had prevented him from having the beneficial use of the lands let to him, with the result that he had suffered damages to that amount.

He pleaded—"(1) The pursuer having suffered loss and damage through the interdict libelled or wrongfully obtained by the defender is entitled to compensation from the defender for the loss so sustained."

The defender pleaded, *inter alia*—"(4) The interdict complained of never having become effectual to prevent the pursuer from ploughing, he can have suffered no loss or damage in consequence, and the defender is entitled to absolvitor with expenses."

On 11th July 1899 the acting Sheriff-Substitute (MITCHELL) pronounced the following interlocutor:—"On the motion of the pursuer and of consent in respect there is a contingency between this action and the one presently pending in this Court between the same parties, No. A 16/1899, Remits this process thereto for conjunction therewith."

On appeal the Sheriff (BERRY) pronounced, on 4th November 1899, the following interlocutor:—"In respect of an appeal in the action A 16/1899, submitting the above interlocutor to review, and having heard parties' procurators and considered the case, recals the above interlocutor, closes the record, and having heard parties' procurators thereon, finds that it was a condition-precedent of the interim interdict attaching that caution should be found by the pursuer in that action: Finds that caution was not found, and that therefore the interdict never applied: Finds therefore that the pursuer could not be damaged by the interdict, and that the action is irrelevant, therefore dismisses the same: Finds the pursuer liable to the defender in expenses," &c.

Note.—"The interim interdict complained of was granted in these terms—'Grants interim interdict as craved, but on the condition that the petitioner find caution for any consequent damage to the respondent.' No caution was found, therefore the interdict did not apply."

The pursuer appealed to the Court of Session, and argued — The pursuer was bound to assume that caution would be found. He could not be expected to inquire every day to see whether the interdict had become operative. The person who wrongfully obtained an interdict was liable for all damage sustained by the party interdicted—*Kennedy* v. *Police Commissioners of Fort-William*, December 12, 1877, 5 R. 302. It had been decided that obtaining an illegal warrant of ejectment was a relevant ground of damages, although the warrant was never executed — *Bisset* v. *Whitson*, July 27, 1842, 5 D. 5. The present case was on the same principle.

Counsel for the pursuer was not called upon.

LORD PRESIDENT—In this action the pursuer claims damages from the defender on the ground that the defender prevented him by interdict from ploughing certain land which he held on lease from the defender, and the question is, whether the defender really obtained an effective interdict against the pursuer ploughing the land. The Sheriff-Substitute's interlocutor is in the following terms—"Grants interim interdict as craved, but on the condition that