pronounced, with the expenses incurred by them in the Court of Session."

Counsel for Messrs Ligertwood and Daniel now asked for expenses, together with the expenses of this application.

Counsel for Mr Watt appeared, and stated that he desired to draw the attention of the Court to two points. (1) That the practice in such cases was not to allow the expenses of an application such as the present. (2) That in the first of the two appeals (*see previous reports*) taken to the House of Lords, Mr Watt had been successful, and accordingly this did not fall under the finding in the judgment sought to be applied. No expenses were given in the Court of Session on the interlocutor reviewed under the first appeal.

On the second point—[LORD JUSTICE-CLERK—That is a matter which will properly come up hereafter, and can be discussed before the Auditor.]

On the first point, it was argued—This is an application which has been already made and refused, as reported in the case of *Dunnet*, where the Lord President observed that the expenses of the petition for applying the judgment of the House of Lords were never granted to the petitioner. It was necessary for him to apply; and where no opposition was offered, he must himself bear the expense of that step. The prayer of the petition in that case *quoad ultra* was granted.

Authority—*Dunnet*, March 8, 1839, 1 D. 689.

LORD JUSTICE-CLERK—In the case of *Dunnet* it may be observed there was no opposition made to the application. Here, if there is not exactly opposition, there is at least criticism. I see no reason why, if there is a necessary expense caused by the unsuccessful party, he should not be found liable for it.

LORD ORMIDALE—An application of this kind is a necessary part of the expense of a litigation in which the petitioners have been successful; and I am disposed upon that ground to hold that they are entitled to the expenses of it as against the unsuccessful party.

LORDS BENHOLME and NEAVES concurred.

The Court granted the prayer of the petition.

Counsel for Petitioners—Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mr Watt—Rhind. Agent—W. Officer, S.S.C.

Thursday, July 9.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE REV. JOHN BELL LORRAINE AND OTHERS *v.* THE MAGISTRATES OF PEEBLES.

Church—Burgh—Parish—Bells—Interdict.

Interdict granted (*diss.* Lord Ardmillan) against the magistrates of a burgh authorising the bell of the parish church to be rung on Sundays for other purposes than calling the congregation of that church to worship.

Mr Lorraine, the minister of the parish of Peebles, as representing the Kirk Session, raised an action of suspension and interdict against the Magistrates of the Burgh, the object of which, as stated in the prayer of the petition, was "to interdict, prohibit, and discharge the said respondents from causing the bells in the steeple of the parish church of Peebles, or any of them, to be rung, and from granting any warrant or order to ring the same on Sundays, or national or parochial fast-days, except for the purpose of calling the public to worship in the parish church, or in the case of funerals or of fires, unless with the consent of the complainers, or at least from causing the said bells to be rung, or granting any warrant or order to ring the same for the purpose of summoning meetings of Voluntary Church Associations, or similar associations, without the complainers' consent, and to interdict, prohibit, and discharge the respondents from causing the said bells to be rung, or granting any order to ring the same at fifteen minutes before six o'clock, or about that time in the evening on said days, unless when public worship is to commence at that hour in the parish church, or at any other hour on said days when public worship is not about to commence in the parish church, except with consent of the complainers."

The steeple of the parish church in which the bells hang was built by and was the property of the town council, and formed part of the church. There were three bells, one of which was almost unserviceable. It had never been rung on Sundays or national or parochial fast-days, excepting on one occasion, and then under instructions from the complainers. The smaller of the other two bells was placed in the steeple in or about 1843. The bell had never been rung on Sundays or national or parochial fast-days, but it had been the custom to ring it at stated hours on other days for the use and convenience of the inhabitants of the burgh. The remaining bell had been in the steeple since it was built, and from time immemorial it had been rung on Sundays and national and parochial fast-days at the times fixed for public worship at the parish church. The practice had always been to ring the bells for about a quarter of an hour before the time for the commencement of public worship in the parish church. It had been used exclusively as a parish church bell—and had been wholly under the control of the minister and kirk session, and it had been rung on Sundays and national fast-days at, and only at, such times as were appointed by them.

At a meeting of the town council on 13th October 1873 it was resolved by a majority that in future the bells in the steeple of the parish church should be rung on Sundays at eleven o'clock in the forenoon, at a quarter before two in the afternoon, and at a quarter before six in the evening, communion Sundays excepted, and that the officers should be instructed to begin on Sunday, 19th October, at the hour fixed.

The complainers objected, on the ground that "the said resolution was contrary to uniform and immemorial practice in regard to the ringing of the church bells in Peebles. It was contrary to such practice for the town council to fix the hours for ringing the bells; and it was contrary to such practice to ring the said bells when public worship was not about to commence in the parish church. The object of the resolution to ring the bells at fifteen minutes before six o'clock on Sunday even-

ings was to use said bells for the purpose of notifying the commencement of public worship in the Free Church, and it was the intention of the respondents to use the bells for the purpose of notifying the commencement of worship in all the other places of worship in the town, and for other and secular purposes. They intended to exercise full control as to the times and occasions on which the said bells should be rung on Sundays, and on national and parochial fast-days. Such control over the bells and such use of them would be very inconvenient to the parishioners and inhabitants of Peebles, and would greatly interfere with the conduct of public worship in the parish church, and with the complainers' right thereto."

The magistrates, however, adhered to their resolution, and the complainers raised this action.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, March* 25, 1874.—The Lord Ordinary having considered the cause, Finds that the parish church of Peebles was erected shortly after February 1779, in terms of an arrangement embodied in a minute of meeting of the heritors held on 16th February of that year, at which the Provost, as representing the magistrates and town council of the burgh of Peebles, was present, by which it was *inter alia* provided, 'that a steeple is to be carried up on the east end of the church, which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town.' Finds that, in conformity with the arrangement then made, a steeple was erected on the east end of the church at the expense of the burgh, and that two bells and a town clock belonging to the burgh were then placed in the steeple: Finds that, in terms of said minute, while the church has been kept in repair from the commencement of the present century down to the present date at the joint expense of the heritors and burgh, in proportion to their possessions as therein explained, the steeple, resting on the church, and the bells and clock therein, have been upheld and kept in repair at the sole expense of the burgh, and continue to be so maintained at the present time; and that in or about 1844 an additional bell belonging to the burgh, which was removed from the old belfry of the burgh prison, was put up in the steeple by the order of the magistrates: Finds that, since the said church and steeple were erected, and down to the present date, one of the bells above-mentioned has been employed as required for the use of the parish church by being regularly rung on Sundays and other days shortly before service took place in the church: Finds that the said bells had not, before the occasion complained of in the present proceedings, been used for the purpose of divine service, excepting when such service was to take place in the parish church, but that they have continued to be the property of the burgh, and have been under the control of the magistrates and town council, and have been used as the property of the burgh, and by their orders, at times of public rejoicings, and also at funerals and on the occurrence of fires, and that the bell removed and put up in the steeple as aforesaid in 1844 has been rung by order of the magistrates on week-days at certain hours in the morning and evening convenient for the inhabitants: Finds that the respondents, while maintaining their right to use the said bells on Sundays or fast-days, on occasions or at times when there is no service in the parish church, do not dispute their obligation to continue to ring the bell which has hitherto been rung for the parish church at all times when the same is required for the services of the church: Therefore refuses the Note of Suspension and Interdict, and decerns: Finds the complainers liable in expenses; allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and report.

"*Note.*—The proof in this case, which extended over the greater part of two days, has not added much to the facts as stated in the record, and was scarcely referred to at the debate. It is to be regretted that the parties did not avoid the expense which has been thus incurred by agreeing on a short minute of admissions with a plan of the church, if thought necessary, for there does not now appear to be a dispute on any material matter of fact. It was not maintained by the complainers that if the bells in question had been placed by the magistrates in a burgh steeple erected in some other position than over the parish church, the use of them by the magistrates for the general convenience of the inhabitants on Sundays and fast-days in connection with church service, even when such service did not take place in the parish church, could be characterised as illegal. But it was said that, by the arrangement under which the steeple and bells were put up in this case, and the usage which has followed, the complainers are entitled to the interdict asked—that is, an interdict against the respondents causing any of the bells to be rung on Sundays or fast-days unless for the purpose of the services of the parish church, excepting only on the occurrence of funerals or fires. The respondents were agreed that the case must be determined according to their rights and obligations under the arrangement just referred to, and the usage which has followed, in so far as it throws light on the meaning of the parties. The arrangement, to the terms of which both parties thus refer, is embraced in the minute of meeting of the heritors held on the 16th February 1779. It was thereby stipulated that in building the new parish church, the whole burden of which was undertaken by the burgh, subject to a contribution of £300 by the landward heritors, a steeple should be put on the east end of the church, 'which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town.' The church and steeple having been erected under this arrangement, it follows that the steeple, which for the purposes of the present question should be taken, according to the Lord Ordinary's view of the proof, as embracing only that part of the building which the town has exclusively maintained, beginning at the roof of the church, and not at the foundation, and the bells and clock therein, furnished by the magistrates, are and have always been the property of the burgh, and not the property of the present complainers, the heritors of the parish. The heritors, however, it is conceded, have right to the use of the bells; and the question between the parties really is, whether the heritors have right to the exclusive use of the bells on Sundays and fast-days, so as to prevent the magistrates from making use of them even at times when they are not required for the parish church. The Lord Ordinary has not seen cause to alter the opinion which he formerly expressed when the question of interim interdict was discussed before

him. The minute provides that the bells 'are to be employed for the parish as well as the town;' and if the complaint here were that the bells were not employed for the parish at any time when they were required in connection with the parish church, the complainers would be entitled to succeed. It is not said, however, that the bell used in connection with the church has not been rung whenever it was required, or that it has been rung at any time when its use could in any way disturb or interfere with service in the church, and the respondents admit that a well-founded complaint on either of these grounds would entitle the complainers to redress. They contend, however, that as the steeple and bells are the property of the burgh, and that as it was provided that the bells were to be used for the town, they are subject to the town's uses,—that is, for what the magistrates conceive to be for the general convenience of the inhabitants at all times when not required for the use of the parish church, and when their use would not disturb the services of the church. The words of the minute of meeting which embodies the arrangement between the parties certainly do not expressly give the complainers the absolute and exclusive use of the bells which they claim,—that is, the right to prevent the use of the bells even when that use is not wanted in connection with the parish church. The words, 'to be employed for the parish,' give expressly a right to the use of the bells when required, but nothing more. The complainers, however, contend that by implication it was part of the arrangement that the church should have the sole and exclusive use on Sundays and fast-days, and this argument is rested on the fact] that the bells are within a steeple which is attached to the church, and on the statement that it must have been the intention of the parties that the church should have the sole and exclusive use claimed. The intention of the parties must be gathered from the words of the minute, with the light, it may be, of the usage which has followed as explaining anything that may be ambiguous in these words. The Lord Ordinary is unable to give to the terms used the interpretation which the complainers ask. He thinks it is reasonable to hold that if it had been intended that the heritors should have the sole and exclusive right to the use of the bells on Sundays and fast-days, this would have been expressed; and he does not feel warranted in giving to the words a meaning beyond that which they actually bear—the meaning, namely, that the parish church should have the use of the bells whenever they were required for the use of the church services. It may be true that neither party, the heritors on the one hand, or the magistrates on the other—contemplated at the time that at some future day, in the view of the magistrates it might be of convenience to the public that the bells should be rung in connection with meetings or services other than the service in the parish church. This state of matters having, however, now occurred, the minute containing the arrangement between the parties cannot, in the opinion of the Lord Ordinary, be properly read as containing by implication a prohibition of the use of the bells by the proprietors which is not in any way indicated in the words used. Nor can the fact of the steeple being attached to the church give the complainers the right of interdict which they claim, when it is kept in view that it is stipulated that the steeple and bells shall in all time coming be the property of the burgh, and that while the bells are to be employed for the parish, this use is to be only 'as well as the town.' In regard to the usage which has followed, it is, in the first place, to be observed that one bell of the three now attached to the steeple has never been used in connection with the parish church services, while the interdict asked applies to the use of any of the bells. But, in the next place, the usage which has followed has only been conform to the obligations which the magistrates undertook. One of the older bells has been rung regularly at all times when it was required for the use of the parish church. It appears that the minister, the church officer, or one of the elders, mentioned to the burgh officer from time to time when the hour of service was to be altered, but the parties who had the control of the bells were the magistrates, by whose officers they were always rung. The usage does not go further than to show that the magistrates fulfilled their obligations. There has been no usage adverse or contrary to the right now claimed and exercised. It is true that the magistrates have not on any previous occasion caused the bells to be rung on Sundays or fast-days, except in connection with the service of the parish church, but this circumstance cannot deprive them of their right to do so under the arrangement between the parties when, in their opinion, an occasion for doing so arises, even although this should for the first time be after the lapse of a considerable time from the date of the arrangement."

The kirk-session reclaimed, and pleaded—"(1) The use of the bells in the steeple of the church on Sundays and national and parochial fast-days, except in connection with the parish church and public worship therein, being illegal and unwarrantable, the complainers are entitled to interdict as craved. (2) The use of the bells complained of being contrary to law and to immemorial custom, ought to be prohibited. (3) The respondents did not acquire any right to said bells inconsistent with the dedication thereof (on Sundays and national and parochial fast-days) to the use of the parish church. (4) If the terms of the arrangement in reference to said bells when the church was about to be built should be held to import any such right, it was *ultra vires* of the parties thereto and ineffectual."

Authorities—*M'Naughton* v. *Magistrates of Paisley*, Feb. 7, 1835, 13 S. 432; *Inverkeithing* v. *Rosyth*, M. 7914.

Pleaded or the respondents—"(1) The bells in question being, along with the steeple, the property of the respondents, they are entitled to regulate their use, and the complainers have no title to insist in the present proceedings. (2) In any view, the respondents are vested with the charge and management of the said bells, subject to the uses of the parish church, and the resolution complained of not involving any interference with these uses, the note of suspension ought to be refused. (3) Generally, the complainers' statements being unfounded in fact, the note of suspension should be refused, with expenses."

Authorities—*Kirk-Session of St Andrews* v. *Magistrates of Edinburgh*, Jan. 31, 1835, 13 S. 391. *Easson* v. *Magistrates of Dundee*, July 20, 1843, 5 D. 1430.

At advising—

Lord Deas—It appears that the parish church of Peebles has a steeple, and in the steeple there is a bell, which was placed there in 1782, when the church and steeple were built; that from that time down to October 1873 the only ecclesiastical purpose for which this bell was rung was to summon the congregation of that church to public worship on Sundays and fast days, at hours fixed from time to time by the minister and kirk session, but that on 13th October 1873 the magistrates and town council of the burgh, by a majority, passed a resolution fixing the hours at which this bell should in future be rung on Sundays, viz., eleven forenoon, a quarter before two afternoon, and a quarter before six evening, the professed object being to suit all the religious denominations in the town, viz., the United Presbyterians, the Relief, the Episcopalians, the Free Church, and the Roman Catholics, as well as the Established Church. There are other two bells in the steeple, one a comparatively worn out bell, rung only at funerals or fires, and the other a small bell, removed to where it now is from the old prison in or about 1843, and used for summoning workmen to their work. But the magistrates and council are not understood to contemplate using either of these two last mentioned bells for any other than their accustomed purposes, and they do not therefore enter into the present question further than that the resolution complained of is general in its terms, and the right asserted by the magistrates and council to the control of the bells is unlimited, although they profess themselves to have no intention of causing any annoyance to the congregation of the parish church, and I can see no indication hitherto of any invidious or emulous purpose on their part. The question on both sides is one of legal right. The magistrates and council were quite entitled to assert their supposed right on the one hand, while the minister and kirk session might naturally think it their duty to resist the attempted innovation on the other hand. In answer 14 of the record the magistrates and council state their case thus:—"Admitted that the respondents claim right to control and regulate the ringing of the bells in the steeple. Admitted that they have fixed the hours specified in the resolution as being the usual hours of public worship within the burgh, and as thus suitable for all denominations, including the established church;" and their pleas in law go the full length, accordingly, of asserting an absolute right of control over the bells, which, along with the steeple, they say belong to them in property, and with the use of which the complainers have no title to interfere. The complainers, on the other hand, while they do not object to the bells being used for burgal purposes according to use and wont, maintain that the resolution is contrary to usage, and illegal in so far as ecclesiastical purposes are concerned.

It may contribute to clearness if I state at once what my opinion is, before I explain the grounds of it, which involve some detail, the bearing of which will then be better understood. The substance of that opinion is, that the only bell about which there is substantially any dispute has been legally and effectually dedicated, together with the use of the steeple in which the bells are hung, to the exclusive use of the parish church so far as ecclesiastical purposes are concerned.

I found that opinion upon the contract of parties made at the time when the church and steeple were built, and the usage which has followed, whereby the contract is explained in a manner inconsistent with any other view than that of such dedication.

The parish of Peebles is partly landward and partly burgal. The magistrates and council, in their corporate capacity, were, and I presume still are, heritors in the parish as well as invested with municipal authority. The minutes of a meeting of the heritors held on the 14th May 1778 bear that "Provost Ker, in name of the town council of Peebles, represented to the meeting that, as the present church is not only ruinous but situated without the town, by which many old and infirm persons could not attend divine service in it during the winter, and that, therefore, the town of Peebles, for the better accommodation of all persons in the parish, were desirous that a new and commodious church should be built in the town, in which the whole parishioners could attend divine service with safety to their health every season of the year, and would willingly pay no less than two thirds of the sum of money that should be found necessary for building the said church, or according to the proportion in which they shall occupy, besides the expense of building the steeple."

At the next meeting, held on 4th June 1778, the general body of heritors proposed to give £200 towards the expense of the church if the magistrates and council not only build it but "support said church in all time coming, according as the generality of other royal burghs do."

An act of council was thereafter passed on 28th December 1778 agreeing to build the church if the general body of heritors would contribute £300 and allow the corporation certain specified accommodation,—also "that a steeple is to be carried up on the east end of the church, which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever; the bells however to be employed for the parish as well as the town; and that the council shall give as much of their ground between the Bowling-green and street as shall be necessary for building said church and steeple, and fully empowering Provost Reid to attend the meeting of heritors and contract with them for building said church."

The Provost attended accordingly at a meeting of the heritors held on 16th February 1779, and as empowered by the burgh, bound himself and the town council "to build a new church and steeple upon the piece of ground mentioned" according to a plan and elevation which he produced, and which was agreed to on the stipulated conditions, it being understood that the burgh should support the church for twenty years, "after which it is to be kept in repair upon the joint expense of the heritors and burgh in proportion to their possessions, excepting the steeple, which the burgh is to uphold at its own expense for ever, and excepting also the glass of the windows, which the burgh is likewise to uphold and keep in repair in all time coming."

In conformity with this contract (so it is expressly called in the minutes) the church and steeple were erected, the old and venerable bell now in dispute, bearing the town's arms cast upon it, was transferred from some other position to the new steeple, and there, from January 1784, when the church was finished and the area divided, till October 1873, when the resolution objected to was passed,—a period of about ninety years,—it was hebdomadally rung at hours fixed from time to time by the parish minister and kirk session, to convene the congregation for divine service on

Sundays, as well as at the hours fixed by them for the same purpose on public and sacramental fast days and for no other ecclesiastical purposes whatever.

Now, if the question had been put *de recenti*, what was the meaning of the stipulation that although the bells were to remain the property of the burgh for ever, they were nevertheless "to be employed for the parish as well as the town," I do not believe it would have occurred to any one in those days that anything else was meant than that the bells were to be employed by the parish for ecclesiastical purposes and by the town for burgal or public purposes. But we are not left to construe the contract by its mere words. We have nearly a century of usage to explain the true construction of it, and with that aid I find it impossible to doubt its true meaning. The principal bell has been found sufficient for ecclesiastical purposes. The "dead bell" as it is called, which is shrewdly suspected to be cracked, seems to have been used only for funerals, and "the little bell," which was only put up about 1843 or 1844, seems to have superseded the more classical "echoing horn" which Dr William Chambers mentions in his recent memoir as still in use in Peebles in his youth (as I can myself remember it to have been in a different locality) to rouse the labourers "from their lowly bed." It may be, therefore, that the use of these two bells has been monopolized for town purposes. But that will not entitle the magistrates and town council to use even these two bells for ecclesiastical purposes, not parochial, and in no point of view will entitle them to use the principal bell now in dispute for such purposes.

The magistrates and council have, no doubt, all along paid the bell-ringer and the watchmaker who keeps in repair the clock which strikes upon the principal bell. We see from the printed excerpts (p. 24) that in 1786 the allowance to Robert Bryden for ringing the bell for a year was 7s. 6d., and the allowance to George Law for cleaning the clock for a year was £4, 2s. 9d., and a notandum is added to the effect that there follow in the books a number of similar entries in succeeding years,—implying that these or some such allowances were annual. The keeper of the clock is obviously the same poor but pompous "Geordie Law" mentioned by Dr Chambers, in the book just referred to, as still rejoicing in his office in the early years of this century—spending most of his time gossiping in front of the clock,—and of whom it was invidiously said by one of his compeers "There goes Geordie Law swaggering up the street in his ruffles as if half the toun were his ain." But all this superintendence, I think, only strengthens the fact of the dedication of the bells, or at least of the principal bell, to the ecclesiastical uses of the parish church. For while thus taking charge of the bells and paying all the expense, the magistrates and council never until now acted otherwise than upon whatever directions were given by the minister and kirk session as to ringing the usual bell for the purposes of divine worship, nor asserted the right they now assert, and which has occasioned this litigation. It was not doubted in those days that a church of this kind was under the patronage of the magistrates and council of the burgh in which it was situated, and it was quite as naturally incidental to the dedication of a bell or bells to the use of the church that the burgh should undertake (as the usage proves to have been done here) the necessary expense of making that dedication serve its purpose, as that in making a dedication of the ground on which the church and steeple were to be built the burgh should agree (as was also done here), to bear the whole expense of upholding the church for a certain number of years—the half of that expense thereafter—and the whole expense, from first to last, of upholding the steeple in which the bells are placed. Such obligations as these are just as binding upon the burgh as the dedications themselves.

The fact that the burgh reserved the abstract right of property of the steeple and bells makes it only the more natural that the burgh should have undertaken the burden of upholding them as incidental to the right of property. In other respects that fact does not affect the present question any more than the fact that there is no conveyance denuding the burgh of the abstract right of property of the *solum* on which the church and steeple have been built. It is a dedication of the right of use, and not a dedication of the abstract right of property, which we are here concerned with, just as it was in the case of *Musselburgh Links*, where the dedication was to the enjoyment of the public, the property remaining in the burgh. The evidence of dedication in that case was, if I remember rightly, usage only Here it consists both of writing and usage.

The circumstances in the case of *M'Naughton* v. *The Magistrates of Paisley*, 7th July 1835, 13 S. & D. 432, were less favourable to the plea of dedication than those which occur here. The High Church of Paisley had been erected in 1755. About twenty years afterwards (as mentioned in Lord Meadowbank's opinion) the steeple and bell were added to the church by public subscription. The bell, however, for nearly sixty years after it was put up had always been rung for summoning the congregation of the High Church to public worship and for no other ecclesiastical purpose whatever, although, at the same time, it had been used for certain town purposes, such as national rejoicings and summoning labourers to and from their daily work. In Autumn 1834 the magistrates, on the application of some one of the established clergymen of the town, authorised the bell to be rung for public worship on the occasion of opening a new church in connection with the establishment, and at same time passed a declaration to this effect "The principle being admitted that the bells be rung on like occasions on the application of any other religious body for the purpose of public worship, and also for any public meeting." In conformity with this resolution, they, in the following month of November, ordered the High Church bell to be rung for summoning a meeting of a voluntary church association. The attempt to act upon this order was frustrated *via facti* by the members of session of the High Church who happened to be sitting at the time, but an order of the magistrates in December same year to ring the bell for public worship in a dissenting meeting house having been acted on, a bill of suspension and interdict was presented by the minister and kirk session, the result of which was that the bill was passed and interdict granted, prohibiting the magistrates from granting any order to ring the bell except for warning work people to proceed to and leave their work, and on occasions of national rejoicing, as had previously been customary. It does not appear that anything further was done in the case, and I presume the interdict so granted is still in force

The fact that in that case the subscription for the steeple and bell came from a body of subscribers, while here the money and dedication came from the magistrates and council themselves, cannot render the case less in point than it otherwise would have been; and the fact that the Paisley corporation had a second steeple and bell in the burgh obviously neither did nor could affect the principle of the judgment one way or other. But except in these two particulars it has not been suggested that any destinction whatever can be drawn between the circumstances of that case and the circumstances of the present case. All the Judges recognised the usage as sufficient in the Paisley case to warrant the interdict, and Lord Medwyn brings out the principle of dedication as very clearly applicable when he says—"it is of little consequence even though the bell were put up for the decoration of the town alone. The very circumstances of having it placed in the steeple, attached to the church, confers upon it all the characters which it would have had if it had been the ancient church bell, or erected at the same time with the church, and by those who built the church. It in fact becomes church property though not expressly given to the church. This is common sense, and it has been so held in England."

This was all that it was necessary to decide in that case, and the observations made by their Lordships to the effect that no dissenters were legally entitled to have bells in their meeting houses, however entitled to respect, and backed up as they seem to have been by the high authority of President Blair in the opinion given by him when Solicitor-General, can only be regarded as *obiter dicta*. There was no such thing in dispute there as a bell on a dissenting meeting-house. Nor is there any such bell in dispute here, and accordingly the question of right to have such a bell was not argued to us. I should not think it judicial therefore, after the opinions given in the *Paisley* case, to do otherwise than reserve my own opinion upon that question if it ever occurs. All I shall say of it in the meantime is, that if it be the law that dissenters can have no bells in their meeting houses, I think the sooner that law is altered or modified the better. For the purposes of the present case it may be assumed that every dissenting meeting-house in Peebles or elsewhere may lawfully have a bell. My opinion on that assumption remains the same as it is. The bell here in dispute is the parish church bell, and not the bell of any dissenting meeting-house.

It was ably argued to us that, assuming the bell to be dedicated to the parish church, this is not inconsistent with the right of the magistrates and council to cause it to be used for other congregations so long as this does not materially interfere with the use of it for the parochial congregation, which it is said would be sufficiently served by the bell being rung at an hour suitable for that congregation as well as for the others. But I cannot say that this would be so slight an interference with the dedication of the bell as a parish bell as to be unworthy of consideration. The bell is proposed to be rung every Sunday evening at a quarter before six, although admittedly there is very seldom divine service at that hour in the parish church, and it is proposed to be rung forenoon and afternoon every Sunday, whether there is divine service in the parish church on that Sunday or not. Now it appears from the evidence of one of the witnesses for the magistrates and council (the Rev. Alexander Thompson, p. 73,) that frequently during the summer season the parish minister of Peebles is called away to officiate at neighbouring sacramental communions after officiating in his own church in the forenoon, and that on these occasions he has to get some neighbouring clergyman for the afternoon, who, after doing his own duty in the forenoon at home, cannot arrive at Peebles till after the usual hour of meeting, so that the afternoon bell has to be rung half an hour or upwards later than usual. To give the right to regulate and vary the hours of ringing the bell to the magistrates and council, however discretely they may be disposed to exercise it, would plainly be a very different arrangement from leaving that power, as it has been hitherto, in the hands of the parish church authorities themselves, and if the power should happen not to be carefully exercised with exclusive reference to the convenience of the parochial congregation (for which there would be no security) frequent disputes and even legal proceedings would be the natural result. Nor is it in any view the same thing to have a bell upon a place of worship for the exclusive benefit of that particular place of worship, and to have a bell upon it for the use and benefit of many scattered places of worship. It may be open to doubt how far the Bow Bells of London called out intelligibly "turn again Whittington," but there can be no doubt that the bell in dispute has hitherto called out intelligibly "come to the parish church of Peebles." It would by no means be so convenient for the parochial congregation if the bell were to call parties to come to some place or other of worship in the town, which they were left to find out as they best could.

It has been made matter of controversy in the course of the proceedings whether the entrance hall of the church is part of the church or part of the steeple, and the *esprit de corps* among the witnesses has been carried so far that the architects are ranged on opposite sides of that question according to the supposed views of those who adduced them. That is not a question requiring architectural skill, and does not seem to me to be a question of any consequence if it were. I should say that the hall is not exclusively parte either of the church or of the steeple, but rather that it is common to both, and that church, hall and steeple are parts and portions of one common building. Undoubtedly the main door, which is the only security of the church, is passed through before the bell is reached. There are no locked doors to exclude any one from the church after that. The pillars of the archway over the hall are stronger than they would have been had they not been intended to support the steeple, but the magistrates and council do not claim the property of the hall, nor of the pillars and archway, but only of the steeple so far as the steeple rises above the archway. The only fact of any materiality on this part of the question is the clear and undoubted fact that the walls of the church and the walls of the steeple are to a certain extent the same, and that the steeple is, in the strictest sense, part and portion of the same solid structure with the church, and just as much dedicated to the use,—although not the exclusive use,—of the congregation as the body of the church itself. Moreover, the stair to the steeple leads also to portions of the church, and is so constructed that nobody can pass up to or down from the steeple when the congregations are

assembled without being visible to a great portion of the congregation. Upon the whole, I regard the question, not as one which we are entitled to leave to the discretion of the magistrates and council, however reasonably they may be disposed to deal with it, but as a question of legal right, which it is our duty to decide in the ordinary way; and upon that question of legal right my opinion is in favour of the complainers.

LORD ARDMILLAN—I cannot concur in the judgment now proposed. I regret that this case has arisen. I value peace so highly that I am sorry that the magistrates stirred this question.

It appears that they may have supposed that the complainers could hear without offence the sound of the bells break on the stillness of a sabbath evening to summon to christian worship other congregations than their own. In that supposition they were mistaken. The complainers demand interdict; and we must dispose of that demand.

The facts are few and simple, and scarcely admit of dispute.

In the town of Peebles there is a parish church and a steeple. There are in that steeple three bells and a town clock. A serious, and as I think an unfortunate, dispute has arisen in regard to the use of the bells. One thing, lying at the root of this case, is in my opinion quite clear from the minutes of the heritors of the parish and the minutes of the town council of Peebles, and that is, that the steeple and the bell have been from the erection of the steeple the property of the burgh, and that the bells have been rung by the hands of a burgh officer, and the bells and the clock have been kept in repair at the expense of the burgh. At the same time, it has all along been the understanding, and the recognised custom, that the bells are used to summon worshipers to the parish church. In the minutes of council of 1779, on which the heritors acted, it is stated that the bells are to be "the sole property of the burgh for ever," but, at the same time, to be employed "for the parish as well as the town,"—not exclusively for the one or the other, but for both,—for parish purposes and for town purposes. Is this use, which is directed by the magistrates, an unlawful use?

The case before us has not arisen out of any attempt by the magistrates to deprive the parish minister, or session, or congregation of the use of the bells. Nothing of the kind has been done, or proposed, or suggested; and this fact is important. It is not against any diminution, or limitation of the use of the bells by the parish church that interdict is craved.

The origin of the present application for interdict,—the grievance of which the parish minister and kirk session complain,—is to be found in the following resolution, adopted by a large majority of the town council of Peebles on the 13th of October 1873, and approved of by, I think, the same majority on the 15th of October 1873.—*(Reads Resolution).*

This resolution has given offence;—the complainers seek redress as from a wrong,—and interdict against procedure in terms of the resolution is demanded. It is not said that the magistrates are interfering without right. They have often directed the ringing of the bells at festival seasons, and on occasions of local rejoicing. Their right to do so was never disputed. No objection is taken to the resolution to ring the bells at eleven o'clock and at a quarter before two, these hours being convenient and suitable for worship in the parish church. But the ringing of any of the bells in the steeple at a quarter before six in the evening is seriously complained of as a wrong and a grievance. At that hour there is no worship in the parish church,—as regards the congregation of the parish church these evening bells are not required; but they do not disturb the complainers, they are harmless if not useful. There are, however, in Peebles, other denominations of christians, and of Presbyterian christians, who meet for evening worship at six o'clock, and to whom the magistrates have thought it right to give the privilege of being summoned to worship by the steeple bells, which are the property of the burgh, in the custody of the burgh, and are rung by a burgh officer. It is against this use of the bells, as a call to evening worship, that interdict is craved. It is alleged to be "illegal and unwarrantable" for the magistrates to direct such use; and the complainers maintain that they have an exclusive right to the use of the bells, and that it is a wrong to them that any nonconformist congregation should be called to worship by these evening bells.

If the respondents, the magistrates, were depriving, or proposing to deprive, the parish minister, and session, and congregation, of the full use of the bells as a call to worship in the parish church, I should be of opinion that they were acting illegally, because the service of the parish church,—the call to worship there at hours convenient—was one of the purposes—indeed the primary, though not the exclusive—purpose to which the bells were originally dedicated.

I should also think that in so doing the magistrates were acting unbecomingly, for it would indeed be a misfortune and a scandal, if, in the summoning of christians to worship, any disrespect were shown to the parish minister, or any triumph given to sectarian bitterness. But the magistrates have not done, and have not proposed to do, anything of the sort. The bells are rung, and will be rung, whenever required for the parish church. They are not rung, and will not be rung, at any time or in any manner disturbing or interfering with service in the parish church. All this is clear. The Lord Ordinary is satisfied of it. The complainers do not dispute it. I should regret if there were any reason to doubt it. Then, no man can enforce a restriction on the use of property unless he has a legitimate interest. The only objection taken, the only wrong complained of, the only ground for craving this interdict, is that the bells which are rung at a quarter before six do summon, or may summon, one or more nonconformist congregations to evening worship. I cannot recognise that as a grievance to be complained of, or a wrong to the parish minister, or the parish church, or as a ground for interdict in the circumstances of this case. It is sad that it should be thought so. I am of opinion that these bells are "the sole property of the burgh,"—that they are primarily, but not exclusively, dedicated to the purpose of summoning to worship the congregation of the parish church, and that there has been no attempt or proposal, and apparently no wish, to withhold or limit that use; and then, I am of opinion that, such use being acknowledged and retained, the resolution of the magistrates on the 13th October 1873 was not illegal or unwarrantable,

unless the rule and principle stated by some of the Judges in the *Paisley* case in 1835 was now held to be sound law.

If nonconformists can be lawfully summoned to worship by a bell,—if the use of a bell of their own is not denied to them by law,—then I am of opinion that the magistrates of this burgh, while maintaining the uses of the bells for the parish church, and protecting against disturbance, are entitled to authorise their use for summoning to worship the congregations which met in the evening, though those congregations may be nonconformists.

The magistrates are owners,—sole owners, and municipal custodiers of the bells. They respect the rights of the complainers. They preserve to the complainers all uses customary or required, and they protect the complainers against disturbance and inconvenience. That being the case, nothing in the resolution remains to be challenged or complained of, except that nonconformists may, by the sound of the bell, receive notice of the hour for Sabbath evening worship.

The decision in the *Paisley* case, with the opinion of the Judges, was quoted and founded on by the counsel who opened this case for the complainers, and undoubtedly judicial opinions were given in that case negativing the right of dissenters to use a bell,—to use any bell. This was broadly and most emphatically stated by Lord Meadowbank and Lord Medwyn.

I was satisfied that if this decision in the *Paisley* case is not here founded on and held to be an authority, then the complainers are not entitled to succeed in the present demand for interdict, for the bells in this case are, and have been for nearly a century, the sole property of the burgh, and the magistrates have authorised their use.

On the other hand, if we are called on now to recognise and enforce the law as declared in the Paisley case, and to proclaim now that the right to use a bell,—any bell,—summoning to worship, was limited exclusively to the established church, while the prohibition to use a bell as a call to worship is a penalty on nonconformity, I must decline to do so. I think that such a proposition is opposed to the constitutional toleration which law recognises and justice demands. The magistrates direct the using of their own bells. Their authority sustains the lawfulness of the use, unless it be altogether unlawful to use a bell to summon to worship a nonconformist congregation. I do not admit the unlawfulness of such a use of this bell, and we all know that it is not uncommon. The plea that this use of a bell belonging to the town is unlawful, the demand for the exclusive right of the established church to use such a bell, is in my view worthy only of the days when the Curfew Bell enforced the putting out of light, and proclaimed the sway of darkness.

The Lord Ordinary has, in my opinion, rightly disposed of the case by refusing the interdict.

The Lord President and Lord Jerviswoode concurred with Lord Deas.

The Court pronounced the following interlocutor:—

"Repel the first objection stated in the said note; sustain the objection, and therefore disallow the charges of £23, 2s. paid to Mr M'Gibbon; with that exception, approve of the Auditor's report, and decern against the respondents for payment to the complainers of £372, 11s. 8d., being the amount of the said account as taxed, after deducting therefrom the sum disallowed."

Counsel for the Complainers — Watson and Gloag. Agents—Gillespie & Paterson, W.S.

Counsel for the Respondents—Dean of Faculty (Clark), Q.C., and Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, July 9.

FIRST DIVISION.

WHYTE *v.* SCHOOL BOARD OF HADDINGTON.

Schoolmaster—Burgh School—School Board—Education Act 1872 (35 *&* 36 *Vict. c.* 62) *secs.* 23, 24.

In a burgh school the dwelling-house of the teacher and the class-room formed one tenement—*held* that the whole building vested in the School Board under the 24th sec. of the Education Act of 1872, and that the master on being dismissed by the School Board as "inefficient, unfit, and incompetent," lost the dwelling-house.

This was a Note of Suspension of certain decrees in the Sheriff Court of Midlothian and Haddington, brought by the Rev. William Whyte, rector or head master of the Haddington Burgh School, against the School Board of the burgh of Haddington, in the following circumstances:—

The burgh schools of the Royal Burgh of Haddington, which were averred to have existed from time immemorial, were under the patronage of the magistrates and council of the burgh. The school buildings belonged to them, and they appointed the teachers. The school buildings consisted of a large tenement which, beside school-rooms &c., contained the dwelling house of the rector or head master. In September 1843 the complainer was appointed rector of the schools. He received a salary of £45, (out of which certain sums were payable to the masters), one half of the whole school fees, and a free house. One of the conditions of the appointment was that the schools should "remain as at present, united into one seminary." On 12th April 1873 the respondents, seeing that there was accommodation for 200 pupils in the burgh school, and that for three years there had not been one pupil in attendance, felt it to be their duty to enquire whether the complainer was not "incompetent, unfit, or inefficient." The respondents therefore obtained a report from the Inspector of Schools for the district, and a copy of this report was sent to the complainer, who, although he addressed a letter to the respondents, gave no explanation of the fact that the school was without scholars. On 30th August 1873 the respondents declared that the complainer was unfit or inefficient as a teacher, and removed him from the school-rooms, dwelling-house, and other premises. The minutes of the School Board (respondents) in regard to these transactions are to the following effect:—"14 May 1873.—The Board, as narrated, after full consideration of all the circumstances of the case, felt constrained to declare that they consider the Rev. William Whyte, the present rector of the Burgh Schools, to be 'unfit or inefficient,' and instructed the clerk to