Tuesday, May 11.

REV. J. B. LORRAINE & OTHERS *v.* MAGISTRATES OF PEEBLES.

(*Ante*, vol. xi, p. 655.)

Church—Burgh—Parish—Bells—Interdict.

Interdict granted (*aff.* judgment of the Court of Session) against the magistrates of a burgh authorising the bells of the parish church to be rung on Sundays for other purposes than calling the congregation of that church to worship.

This was an action of suspension and interdict raised at the instance of the Kirk-Session against the Magistrates of the Burgh, with the object of interdicting the respondents from causing the bells in the steeple of the Parish Church from being rung on Sundays, or national or parochial Fast Days, for the purpose of calling the public to worship in the Parish Church.

The case originated in a resolution adopted by a majority of the Town Council, in October 1873, to the effect that the bells in the Parish Church steeple should be rung every Sunday, except half-yearly Sacrament Sundays, at 11 A.M., 1.45 P.M., and 5.45 P.M. This resolution being regarded by the minister and Kirk-session as an encroachment on their right, they presented a note of suspension and interdict. Two questions were raised by the action—whether the Council had the right to regulate the ringing the bells on Sundays, and whether they were entitled to cause them to be rung on Sunday evenings for the use of Dissenting congregations, when there was no service in the Parish Church. The church and steeple were built by the Council under a joint arrangement between the burgh and the heritors, the latter contributing only £300. The site belonged to them, and the property in the steeple and its contents were expressly reserved to the burgh, but the arrangement was that the bells should be "employed" for the parish as well as the town. The bells had always been rung by an officer appointed and paid by the Council. The bells were rung three times a-day during winter, and four times a-day during summer—in the morning and at the meal hours to summon people to their work. The respondents insisted that the bells should not be rung at 5.45 on Sunday evening when there was no service in the Parish Church, for the sole benefit of the Dissenting congregations.

The Lord Ordinary (SHAND) found for the respondents, but on reclaiming note the First Division, by a majority, reversed and granted the interdict craved.

The Magistrates appealed.

At delivering judgment—

The LORD CHANCELLOR said—My Lords, in disposing of this case your Lordships will not, as it seems to me, be called upon to decide some questions of common law of some nicety, which are referred to in the cases and proceedings; much less will your Lordships be called upon to entertain the question of any peculiar right which the Established Kirk of Scotland may be supposed to have as to the possession or use of bells in their kirks in contradistinction to those who are termed Dissenters. The case, my Lords, appears to me to rest upon grounds altogether apart from considerations of that description, and upon grounds which are extremely simple in themselves. My Lords, what, as it seems to me, your Lordships will really have to consider is the proper construction to be placed upon a contract, contained in a very few sentences, entered into in the year 1779, between the Parish of Peebles and those who represented it, on the one hand, and, on the other hand, the Town, represented by the municipal authorities. That contract appears to constitute what in this country would be termed a trust for public or charitable uses. And in this country possibly the case might have assumed the form of a proceeding for the administration of that trust. But in the form in which the case comes before your Lordships the same end will have to be arrived at through the construction of the contract to which I have referred. Now, in order to place that construction upon the contract, your Lordships, as it seems to me, will have to look, in the first instance, at the position in which the parties to the contract stood at the time when it was entered into. Let us take, upon the one hand, the town of Peebles. The town, at the time in question had an old building or belfry in which were two bells which clearly belonged to the town, and were used for the purposes of the town. That belfry had fallen into disrepair, and apparently the time had arrived at which the belfry must either be reconstructed or some other provision made for the housing and use of the bells—on the other hand, the parish and the heritors of the parish (and among the heritors the town itself was included) were in this position: The church was in a ruinous condition—it was an old church and had to be rebuilt. It does not appear very clearly whether there were any bells or what bells there were in the old church, or whether they were in a condition which would have made them available for the use of the new church. It was desired to erect a new church. The obligation to erect a new church would fall by the law of Scotland upon the heritors, including the burgh, so far as it was itself an heritor. The same law would have thrown upon the heritors the obligation of providing or furnishing the new church with a proper bell; but the law would cast no obligation upon the heritors to provide a steeple for the reception of the bell, or to ornament the church in any way with a steeple as part of its architecture. My Lords, under these circumstances it appears to have been considered desirable by the town to secure a habitation for their bells which obviously would be a not unnatural one, and which, architecturally, might probably be made the best habitation which could be procured for them; and in order to do this, it appears they were not unwilling to provide for the expense of constructing the steeple to the new church, which could not have been thrown upon the heritors against their will. The arrangement which was proposed by the town for this purpose is evidenced in the first instance by a minute of the 12th May 1778—"Then the Council appointed the Provost and Bailies of the burgh to meet with the heritors of the parish on Thursday first, in name of the Council and community of the burgh of Peebles, and to agree with said heritors either to repair the old or to build a new church, and to pay their proportion of the building thereof or reparation, as shall be agreed on, according to

what part of the same they shall possess, and in case of a new church to be built on the Castlehill, they allow the said Provost and Bailies, or any of them that shall attend the meeting in their name, to become bound to pay their said proportion of the building, providing that the steeple for their clock and bells shall be carried up with the building of the church, and the town shall be obliged in that case to pay any additional expenses that said steeples shall occasion." My Lords, this minute, which obviously is in the nature of an offer, is perfectly clear in its construction. It amounts to this — There is a site, which is from its nature the most desirable site for the erection of a church and for the housing of these bells. If you, the heritors, will abandon the scheme of repairing your own church, and will build a new church, and not only build a new church, but build it on the Castlehill, we, the town, will contribute our share of the expense; and, more than that, if that is made a place where our bells shall be received, we will provide the steeple and carry up the steeple to the proper height as a part, architecturally, of the church, providing the funds to meet the expense of doing that. It is therefore an offer in which a town asked, as it were, as the consideration which was to move them, a right to erect upon the situation, as part of the church, a steeple to receive the bells. My Lords, that is a little more fully elaborated in the minute of the 29th of December 1778. That minute was made on the eve of the meeting which was to be held with the heritors. It will not be necessary for me to read the whole of it, but about the middle of the minute it runs thus —"That the heritors are to have their third set off on either end of the kirk they please, to be divided among them as they shall judge proper. That, besides the said £300 to be paid by the heritors, the town are to have the benefit of the old kirk and seats thereof, and to have power to take down the same to within 6 feet of the bottom, to enable them to rear up the new one. That the town shall be obliged to keep up in a sufficient repair the said new kirk after it is finished for the space of years upon their own expense, and from that period the repairs of the kirk shall fall upon the heritors and the town in proportion to their several possessions, as above. That the steeple is to be carried up on the east end of the kirk, and make part of the gable thereof so far as the kirk wall goes," that is to say, the gable kirk-wall was to be the foundation of the steeple—the steeple was to rest upon that—"and when the whole is finished, the steeple, bells, and everything therein, are to be the sole property of the town for ever; that the Council agree to give as much of their ground betwixt the bowling green and the street as will be necessary for building said kirk and steeple upon." And then your Lordships find that on the 16th of February 1779 the meeting, in view of which this last minute had been made, took place between the heritors and those who represented the town. "Provost Reid laid before the meeting an act of the Town Council of date the 28th [that is obviously a mistake for the 29th] December 1778, mentioning their opinion that a new church ought to be built, and the burgh should contract with the heritors for building it, in case the heritors should give £300 sterling as their proportion for building and finishing said church, and flooring and breasting the galleries" and so on, and that a steeple was "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;" and then comes this next stipulation, which appears to have been inserted in the proposal of the town on the part of the parish—"The bells, however, to be employed for the parish as well as the town." Now, my Lords, it is the construction of those last words which I have read that is in question; and upon that construction the controversy in this case appears to me really to turn. What was the meaning, under the circumstances I have detailed, of this stipulation—"the bells to be employed for the parish as well as the town?" I apprehend that the meaning clearly was this:—We, the town, have bells, which are now in our own separate belfry, and we use them for town purposes,—they are there for that end and object. We have no desire to use them for any other purposes, but we consider that a most desirable site to obtain possession of for these bells would be in a steeple which architecturally will become part of the Parish Church. We offer to the Parish Church to build that steeple, to incorporate it with the Parish Church, and to do this at our own expense, provided they will receive the steeple and allow it so to be incorporated. In that steeple we shall have our own bells, we tell the parish that we shall use them, as we have done hitherto, for town purposes, and we make a right on our part so to use the bells part of the bargain. Says the Parish, on the other hand:—We are about to erect a new Kirk. We are willing that the steeple which the town requires shall be incorporated in the new Kirk. We should be entitled to assess the parish for the purpose of providing a bell for parish purposes, and providing for its suitable accommodation in some way in the Kirk, but we are willing to take this offer of the Town Council provided the Town Council will put us in as good a position as we should have been in if we had had a bell provided by ourselves and at our own expense,—that is to say, we shall have the use of these bells put by the town into the steeple for parish purposes, as we should have had the use of our own bell if we had provided it, and put it up in the Kirk. My Lords, that appears to me to be both the natural meaning of the words which I have read, and also exactly the natural arrangement which would have been made under those circumstances between two such bodies as the town and the parish. My Lords, the agreement was acted upon accordingly. The Kirk was built, and the steeple was built, and in the steeple were placed the bells of the town. Everything appears to have gone on harmoniously until a very recent date; and what is claimed now by the town, and what was sought to be controlled by the action upon which this appeal arises, was this—the Parish Kirk had divine service on Sundays at a quarter past eleven (as I understand it), and at two. The bell was rung for these services at eleven and at a quarter before two. On that there is no dispute. In the Parish Kirk there is no service in the evening, but there is service in the evening in some other places of worship in the town, and notably, as I understand, in the Free Kirk, at 6 o'clock. And the Town Council have come to a resolution that the bells in the steeple of the Established Kirk shall

be rung at a quarter before six, with reference to the worship which is to take place in the Free Kirk at six o'clock. It was this claim on the part of the Town Council which led to the institution of the action in this case, for the purpose of restraining that ringing of the bells. My Lords, it appears to me that there are two points of view in which that claim of the Town Council of the right to ring the bells is to be looked at. In the first place, if I am right in saying that the contract was that the town should have the right of ringing these bells for town purposes, and only for town purposes, is this purpose to be called a town purpose? Is it to be called a town purpose that the Town Council should say—We will look to the interests of one denomination or of more denominations that one. We will observe the time at which they have public worship on Sundays, and we will insist upon our right of ringing the bells in the steeple of the Established Kirk for the purpose of summoning those members of the public who wish to attend the worship of those other denominations to that worship. My Lords, I asked the learned counsel who appeared for the burgh whether they contended that that was a town purpose. I think the learned counsel felt some embarrassment in answering the question, and I rather think I am right in saying that the counsel for the appellants preferred to rest their claim upon the absolute right of the Town Council to control the ringing of these bells, provided they rang them for the worship of the Established Kirk, rather than upon the argument that ringing them for the worship of another denomination was to be called a town purpose. But, my Lords, if I am right as to the construction of the contract, the question to be solved is—Is the ringing for the worship for a particular denomination other than that of the Kirk of the parish a purpose of the town? It appears to me that it cannot be considered to be a municipal purpose. It appears to me that it is impossible to say that it is part of the duty of the municipality to provide a bell for the purpose of summoning to the worship of a particular denomination those who are anxious to attend that worship. But the case does not end there. Another consideration arises—Is it consistent with the stipulation made on behalf of the parish that the parish should have the bells for parish purposes, that they should be rung on Sunday with reference to the worship of other denominations? Now, my Lords, I took the liberty of saying that it appeared to me that the result of the agreement with regard to the parish was this: that it must be taken that it was said in substance by the words of the contract which I have read that the parish should be in as good a position *quoad* these bells for the parish purposes, as if they had a bell or bells of their own, and provided at their own expense, in the Kirk. Now, my Lords, what is the purpose, with regard to public worship, of parish bells? The purpose obviously is this—that they are to sound forth upon the day or days appropriated to puplic worship, in a way which shall indicate to those who hear them, that as soon as the bell or bells cease ringing the worship in the church over which the bells are ringing is to commence. And, my Lords, if in the church over which the bells are placed the bells are rung at a time which has no reference to the worship in that church, but has reference to something which is taking place elsewhere, you not merely are not satisfying the purpose of the parish, but you are defeating the objec of the parish, and the object with which the bell is placed above the Parish Church. So far as the ringing of the bells at eleven and a quarter to two is concerned no question arises. Those hours happen to harmonise with the hours of worship of other denominations in the town, and the bell which rings for the Parish Church at those hours may well answer the purpose of informing the public that the hour is approaching when there will be service in the other places of worship. But observe the consequence with regard to the ringing of a bell at a quarter to six o'clock. Any person who hears that bell ought to be under the impression, and probably would be under the impression, that that is an announcement made from the Parish Church that at the end of the tolling of the bell worship will commence there. He goes to the Parish Church; he finds it shut up. If he can procure any information of what the state of things really is, he is told that the bell is ringing there, not for the worship at the Parish Church, but for the worship to take place in some different building in some other part of the town. Therefore, not only is the ringing of the bell not serving a parish purpose, but it is defeating a parish purpose, for it is misleading the parishioners into the belief that there is going to be worship at the Parish Church, where there is not going to be any such worship. Therefore, my Lords, both upon the ground that the town is claiming to use the bells for a purpose which is not a town purpose, and also upon the ground that it is using the bells for a purpose which interferes with and defeats the object of the bells as parish bells—upon both of these grounds it appears to me that the use claimed to be made of these bells by the Town Council is not a use warranted by the contract of 1779. My Lords, that really exhausts all that I will trouble your Lordships with upon the merits of the case. The interlocutor of the Court of Session appears to me in substance to be correct. I am inclined, however, to submit to your Lordships that the interlocutor has not assumed the most happy form, and that it has unnecessarily concerned itself with the question of funerals and of fires, upon which really no evidence has been adduced which is material, and by the introduction of which words it appears to me that some confusion and difficulty might hereafter arise. If your Lordships concur with me upon the main question in the case, I shall submit to your Lordships that the interlocutor of the 10th of July 1874 should be varied thus—That it shall restrain the Town Council from ordering the bells to be rung on Sundays or national and parochial Fast-days for the purpose of intimating worship or calling the public to worship elsewhere than in the said parish church, at such hours as may be fixed by the minister and Kirk-Session, and decern, &c., following the words of the interlocutor thenceforward. My Lords, I have only one other observation to make, which is this—Some distinction was attempted to be drawn between the two bells which were placed in the steeple at the time it was built, and a third bell, which has since then, and in more modern times, been added to the original two bells. As to this third bell, it was contended that it clearly belonged to the burgh, and that it did not come within the contract or trust which was created by the minutes of the year 1779. My Lords, as to that, it appears to me that the ap-

pellants must choose between one of two things: either this third bell must be taken to be an accretion to the cumulus of bells which are spoken of in the contract of 1779, and to have become subject to the trusts and obligations of that contract; or, if it is to be held free from that contract, the only result will be that the Town Council must remove the bell from the steeple. I give no opinion as to their right to do that. But whether they have the right to remove it, or whether it is allowed to remain there, it appears to me clear that it cannot be used except as one of the bells which are to be rung in the steeple, and subject to the same rules which must govern the original two bells. My Lords, I shall move your Lordships that the interlocutors complained of be not reversed, but that the interlocutor of the 10th of July 1874 be varied in the way I have mentioned. And inasmuch as the alteration deals with that which was not the real subject of the appeal, and as the appellants appear to me to have been in the wrong in their appeal, I shall submit to your Lordships, and move your Lordships, that the interlocutors be affirmed in other respects, with costs.

Lord Chelmsford—My Lords, the question of the Town Council's claim of right to control and regulate the ringing of the bells in the steeple attached to the Parish Church depends entirely upon the terms of the agreement between the heritors and the Town Council of the 16th February 1779. The Church was built at the joint expense of the burgh and of the heritors, the heritors agreeing to contribute £300, and they were to possess one-third part of the Church, and the burgh the other two-thirds, and the parties stipulated that a steeple should be carried up on the east-end of the Church, which steeple, when finished with the bells, &c., therein, was 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 steeple in which the bells are placed is structurally part of the Parish Church. If the burgh had not placed any bell in the steeple, the heritors would have been bound by law to have provided a bell for the purpose of summoning the congregation to public worship in the Parish Church. The burgh having placed their own bells in the steeple and stipulated that they were to be their sole property, the heritors would not have been discharged from their legal obligation unless the Town Council had appropriated the bells to the same purpose as a bell placed in the church by the heritors must have been applied to. They therefore agreed that the bells should be employed for the Parish as well as for the Town, which can have no other meaning than this, that the bells were to be used for the same purpose as if they had been put up by the heritors, which of course would be for the use of the Parish Church only. The parochial use of the bells is distinct, and is distinguished from the town use. To say that the ringing of the bells on Sunday at hours to suit the different congregations of various denominations is for the benefit of the town generally, and therefore a town purpose, is to confound the two uses for which the bells may be employed—the parish use, which is necessarily ecclesiastical, and the town use which is necessarily secular. Although the exclusive use of the bells in connection with the worship in the Parish Church for nearly 100 years cannot control the words of the agreement, nor perhaps interpret its meaning, yet it is impossible not to feel fortified in the construction which I have put upon the agreement by the fact that it has been adopted and acted upon for so long a period by both the contending parties without doubt or question. I agree with my noble and learned friend that the interlocutors ought to be affirmed, with the variation in one of them which he has proposed.

Lord Selborne—My Lords, the only material facts (beyond the agreement of 1779 itself) appear to me to be these—first, that the bells in question have been lawfully placed in a steeple which, though vested in point of property in the Magistrates, is still an inseparable part of the structure of the church, and is accessible only through other parts of that structure; and secondly, that by the arrangement for providing in this steeple bells to be 'employed for the parish,' the heritors were in a lawful manner fulfilling an obligation incumbent upon them by law, to provide at least one bell for the purposes of the parish church. Under these circumstances, it appears to me impossible to doubt that when the agreement says the bells are "to be employed for the parish, as well as the town,' it means that they are to be used for such purposes as are properly and truly parish purposes and properly and truly town purposes, and for no other purpose whatsoever; and that the regulation of the use of the bells for those purposes respectively was to belong, as to each kind of purpose, to the proper legal authority, *i.e.*, as to the parish purposes to the kirk-session, and as to the town purposes to the Magistrates; and that, as, on the one hand, the powers of the Magistrates as to Town purposes ought not to be usurped or encroached upon by the kirk-session, so, on the other hand, the powers of the kirk-session as to parish purposes ought not to be usurped or encroached upon by the Magistrates. This being so, I think it is reasonably plain that by assuming to regulate the hours of ringing those bells on Sundays for purposes of public worship, the Magistrates have in two respects trespassed upon the proper province of the Kirk-Session, and have violated the substance of the contract as to the employment of the bells "for the parish." First, by fixing the particular hours at which the bells shall be rung for such purposes, whereas the right to fix these hours belongs properly to the Kirk-Session; and, secondly, by doing this with a view to other worship than that of the Parish Church, for which it would be wrong and unlawful both on principle and according to the decision in the *Paisley* case to ring any bell or bells which had been lawfully provided by the heritors in discharge of their legal obligation for the purposes of the parish. It further appears to me that there is no legal ground on the construction of this agreement for making any distinction for these purposes between one bell and another, so long as it is lawfully placed and remains in this steeple, and that there is no usage in this case by which the rights of parties, according to the legal construction and effect of the original agreement of 1779 have been in any way restricted or altered. While, however, I agree with the majority of the judges in the Inner House on the merits of this case, I think it will be proper that the interlocutor should be varied, without prejudice to the costs of

the appeal, in the manner proposed by the Lord Chancellor.

Interlocutor of 10th July 1874 varied; with this variation, case remitted to the Court below. Appellants to pay to respondents the costs of the appeal.

Appellants' Counsel—H. Cotton, Q.C.; C. J. Pearson (Scotch Bar). Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Respondents' Counsel—John Pearson, Q.C; Gloag (Scotch Bar). Agents—Gillespie & Paterson, W.S.

COURT OF SESSION.

Thursday, March 18.

FIRST DIVISION.

JARVIE *v.* CALEDONIAN RAILWAY CO.

Railway—Negligence.

In a case where a block on the railway made it necessary for the passengers to change from one train to another at a place where there was neither station nor platform,—*held* that failure by the company to give notice of the block to intending passengers was negligence.

The pursuer in this action was injured on the railway between Glasgow and Greenock on September 19, 1873. A block had occurred on the line near Paisley, and the pursuer was obliged to leave her train in the dark and change to another at a place where there was neither station nor platform. In doing this she fell and was injured, and in respect of her injuries obtained from a jury damages to the extent of £100. The company obtained a rule on the pursuer to show cause why a new trial should not be granted, but the Court, after hearing counsel, refused to disturb the verdict.

At advising—

Lord President—My Lords, the circumstances of this case are somewhat peculiar, and raise a question of some novelty and importance. The verdict of the jury is challenged on two grounds, (1) that there is no evidence of fault on the part of the defenders, and (2) that assuming fault on their part, that there was contributory fault on the part of the pursuer. On the 19th December 1873 there was a block on the line, caused by an accident which is not attributed to any fault on the part of the railway company, but which produced great disturbance of the traffic. I am not disposed to hold that the block disabled the company from carrying on their passenger traffic. I think it would be dangerous and inconvenient to hold that the company was not entitled, or I might even say bound, to carry it on, for its entire cessation would cause great public loss, but it is quite obvious that they would have to carry it on at great risk, and that implies the necessity of unusual care. It seems to me, in the first place, that if the company started a train from Glasgow to Greenock, they were bound to let intending passengers know the extra risk attending the journey, a risk necessarily connected with getting out of one train at a place where there was neither station nor platform, walking along the line, and getting into another train. There must be considerable risk in that, and many people necessarily travel by railway who are very ill-fitted to encounter that risk, and most of them, if they were sensible of weakness, would probably decline to encounter it. I think it was the duty of the company in the first place to make the passengers aware that they were not starting on an ordinary railway journey from Glasgow to Greenock, but on one which was unusual and dangerous. Now, it is proved by Mrs Jarvie and the porter that she was not made aware of it. I do not say that the porter represented that the line was clear, but it is quite plain that he did not inform her that it was blocked. The line, however, was blocked, and there was extra risk in passing from one train to the other. Mrs Jarvie says that if she had known this she would not have gone, and it is proved that she had the option of staying with her sister. Now, I think that failure to give information was negligence on the part of the company which exposed Mrs Jarvie to unusual and quite unnecessary risk. It seems to me, further, that if it is proved that in encountering that risk Mrs Jarvie was injured, the company must be held responsible, because, but for their failure, she would not have been there at all. There was another duty incumbent on the company, and that was, at the place where the block took place, to use all means in their power to insure the safety of the passengers in going from one train to another. It was dangerous to get out and in at a place where there was no platform, especially for women and old people, and so the company was bound to give assistance, but so far as that is concerned I do not think the verdict wrong. The case depends then on the evidence of the pursuer. There are no witnesses or circumstances corroborating her testimony as to the invitation to jump, and the jump was made. The presiding Judge was not asked to direct the Jury that the evidence of one witness was insufficient. It is not every fact that requires two witnesses to prove it. Again, it may be doubted whether there was anything so far wrong in the porter's advice. The place was dark, the lights not steady, and to get out of the carriage was necessarily attended with risk, and it may be a question whether it was safer to jump or to try to climb down. It might have raised a different question if the former had been necessary. The ground on which I hold that there was fault on the defenders' part was their failure to give the pursuer warning of her risk. It has been said that there was contributory negligence on the part of the pursuer, but unless the jump was a great mistake there could be no contributory negligence; but it is not necessary to enter into that question, for the only evidence on that point is the pursuer's own statement, and it will not do to extract from that the one fact that she did jump, without taking the whole facts together. I am satisfied that no case has been made out for challenging the verdict of the jury.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties, Discharge the rule formerly granted, and refuse to grant a new trial."

Counsel for Railway Company—Dean of Faculty