as mere criticism of the Lord Ordinary's judgment, because I think it enters into the essence of the whole question between the parties. If a disponee tables a disposition and says it is in itself conclusive of the contract between him and the disponer, he is in a very strong position; but when he says, Compare the disposition with an independent contract and you will find that the contract contains nothing which is not dealt with in the disposition, and therefore that the contract is superseded, his position is totally different. That cannot be determined without interpreting both instruments. I therefore cannot agree with the Lord Ordinary's statement that the rights of parties depend entirely on the disposition. There is no doubt as to the soundness of the proposition, that when a disposition has been delivered and accepted in performance of a contract for the sale and purchase of land, it is final and conclusive as the expression of intention of the parties in regard to all rights which it is intended and adapted to carry. But a disposition is not a habile mode of transferring corporeal moveables, except such as have been so attached to the soil as to be made part of it, and accordingly, where there is a sale of land and of separate moveables together, the proper method of completing the purchaser's right, according to our former practice, was to execute a conveyance of the land and to deliver the moveables, and if in any such case the property of the moveables must now be held to pass without delivery, still where anything beyond the contract itself is required to transfer the right, it is quite certain that it cannot be transferred, and the moveables cannot be delivered by conveyance and infeftment. Accordingly, a sound conveyancer in framing a disposition for carrying out such a sale will not think it necessary to insert a futile conveyance of the moveables which would carry nothing. It seems to follow that the mere omission to mention moveables in this disposition affords no indication of a departure by the purchaser from his right to obtain delivery of any moveables he was entitled to under the missives. But then it was said that there is more than mere omission, and the argument is deserving of consideration. It is said that the disposition conveys the land and fixtures for a price of £1475 which has been paid; and when the previous contract is looked at, we find that exactly the same price in a lump sum is agreed to be paid for the subjects included in the missives, and that, accordingly, it would seem to follow that the subjects conveyed by disposition are all that the purchaser was entitled to under the missives. I am not prepared to say that this argument is sound on other grounds, but the true answer to it is, that it is a mere inference of fact, which must yield to the actual fact as ascertained by the contract which, *ex hypothesi* of this argument, is the proper record of the transaction. Nor will it do to say that this contract cannot be looked at because of the subsequent disposition, because it is only by looking at it that the argument arises at all; and secondly, because for the reasons stated by your Lordship the disposition does not supersede the contract in this matter. The disposition is a written instrument for its own purposes, and has nothing to do with the sale of corporeal moveables, as to which the rights of parties must depend on the terms of the original missives, which constitute the contract, and which are the only writings having any bearing on this part of the subject-matter.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Allow to both parties a proof of their respective averments, and decern," &c.

Counsel for the Pursuer and Reclaimer—Craigie—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

Counsel for the Defender and Respondent—W. Campbell, Q.C.—Welsh. Agents—Welsh & Forbes, W.S.

Tuesday, November 20.

SECOND DIVISION.

[Sheriff of Ayrshire.

FERGUSSON *v.* FERGUSON.

Nuisance—Rifle Range—Interference with Use of Foreshore by Public — Army — Volunteers.

The use of a rifle range, leased by certain corps of volunteers and yeomanry, and sanctioned by the Secretary of State for War, rendered the foreshore in the vicinity of the targets unsafe for persons passing along there while firing was going on. The public had from time immemorial enjoyed a right of passage and recreation on the foreshore at the place in question. The consent of the Board of Trade had not been obtained to any bye-laws made by a Secretary of State restricting the rights of the public in order to enable the range to be used.

Held that a member of the public was entitled to interdict against the use of the range for rifle practice.

Nuisance — Rifle Range — Firing Points near Public Road—Army—Volunteers—Road.

Two of the firing points upon a rifle range used by certain corps of volunteers and yeomanry were situated 10 and 20 feet respectively from a public road, and were found in fact to be a source of danger to horse traffic on the road. The use of the range had been sanctioned by the Secretary of State for War, but no bye-laws with regard to the use of it had been issued by a Secretary of State with consent of the road authority.

Held that a member of the public was entitled to interdict against the use of the range for rifle practice.

Nuisance—Rifle Range—Danger to Adjoining Lands—Army—Volunteers.

Where from the conformation of the ground it was possible that a bullet, fired from the firing points on a rifle range used by certain corps of volunteers and yeomanry, might fall upon or ricochet on to certain adjoining lands, but it was highly improbable that any bullet fairly fired in the direction of the targets should do so, *held* that the owner of the adjoining lands was not entitled to interdict against the use of the range.

This was an action brought in the Sheriff Court at Ayr by Mrs Mary Kirkland Galloway or Fergusson, heritable proprietrix of certain lands lying in the parishes of Newton, and Monkton and Prestwick, between Ayr and Prestwick, against the proprietors of certain other neighbouring lands, and also against the commanding officers (1) of the Ayrshire Yeomanry Cavalry, (2) of the 2nd and 3rd Batteries of the First Ayr and Galloway Artillery Volunteers, and (3) of A and B Companies of the Second Volunteer Battalion Royal Scots Fusiliers, who had leased the lands last mentioned for use as a rifle range.

The pursuer prayed the Court (1) to find that the shooting ranges erected on the last-mentioned lands, and the shooting which took place at the ranges, were nuisances, and dangerous, noisome, and disagreeable to the pursuer and her tenants; that the shooting operations created danger to life, material discomfort, and annoyance to the pursuer and her tenants, and caused real and substantial injury to the pursuer's properties; and were dangerous, noisome, and disagreeable to the pursuer and her tenants and the public generally when they had occasion to use the Kingcase public road and the foreshore; (2) to interdict the defenders the commanding officers and the volunteers then under, or that might be at any time under, their command, or under the command of their successors in office, conjunctly and severally, and individually, from shooting with rifles or guns upon or over the lands leased by them; (3) to interdict them from shooting over the foreshore; and (4) to interdict them from shooting within a radius of 500 yards of the Kingcase public road. The pursuer's husband as her curator and administrator-in-law was subsequently sisted as a pursuer in the action.

The volunteers lodged defences.

The action was brought in April 1894, but in June 1894 it was sisted in view of the fact that proceedings were said to have been taken under the Artillery and Rifle Ranges Act 1885 (48 and 49 Vict. c. 36), sec. 3, for the purpose of obtaining the consent of the Board of Trade to bye-laws which would entitle the volunteers to use the range notwithstanding that the use of it might interfere with the public in their use of the foreshore. No such consent was obtained, and no bye-laws were made under the section referred to; nor was the consent of the road authorities obtained to any bye-law providing for the restriction of the use of the Kingcase public road under section 16 (1) of the Military Lands Act 1892 (55 and 56 Vict. c. 43). After long delays the case proceeded, and a proof was allowed, which was taken on 3rd, 4th, 5th, and 8th November 1898.

From the proof it appeared that the ranges had existed and had been used as such for upwards of thirty years, but had latterly been used to a greater extent than formerly. No member of the public had ever been injured by rifle bullets fired on the ranges. The Kingcase road ran from the road between Ayr and Prestwick to the sea. A portion of the road was bounded on its south-west side by a wall about four feet in height, which also formed the north-eastern boundary of part of the lands in which the shooting was carried on. The ranges were two in number. The north range was wholly in the field which was bounded on the north-east by the Kingcase Road, and the south range was partly in that field and partly in another. The direction of the line of fire from the firing points towards the targets was in the direction of the foreshore and the sea. The conformation of the ground and the sandhills next the foreshore and the position of the targets was such that the foreshore behind the targets and for at least 100 yards at each side of them was in the line of fire, and that persons passing along the foreshore were in danger from direct fire, or from bullets that ricochetted. The public had from time immemorial used the foreshore between Ayr and Prestwick, including the portion of it behind the targets, for recreation, and as a means of communication between these places. To the south of the north target the ground fell away and exposed the foreshore. The ground also fell away and exposed the foreshore to fire directed from the firing points towards the south targets at a point about 50 yards to the south of these targets. The 600 yards firing point of the south range was within 10 feet of the Kingcase public road, and the 500 yards firing point of the north range was within 20 feet of the said road. These firing points were not screened in any way from the road, except by the wall above mentioned which bounded the road and the ranges. It was ultimately found in fact by the Court that the proximity of these firing points to this public road was a source of danger to the horse traffic passing along the road.

The ranges were passed as safe by the District Inspector of Musketry in 1886, and again in 1897 when the Lee-Metford rifle was introduced, and they were approved by the Secretary of State for War. The District Inspector of Musketry in office at the date of the proof (whose predecessors had passed the ranges) deponed that he considered the range a very safe range. He admitted that it would not be safe to pass along the shore behind the targets while firing was going on.

When the ranges were in use as such, a flag was hoisted on a danger flag-post

between the north and south ranges, and flags were hoisted at points 100 yards on each side of the targets. Look-out men were posted on each side of the targets, and firing was stopped when anyone came within the danger zone. When firing was going on at the 600 yards firing point, a man was placed on the bridge by which the Kingcase public road crossed the railway between Ayr and Prestwick with a flag, and with orders to show the flag and pass the word so as to stop the firing when a vehicle was approaching, and until it had passed.

With regard to the danger to persons on the pursuer's own land, it appeared that while it was possible, having regard to the conformation of the ground, that a bullet fired from the firing points might reach them, it was highly improbable that any bullet fired more or less in the direction of the targets should do so, and that there was no reasonable probability that a bullet fired in the direction of the targets would ricochet on to them. A witness deponed that in 1886 or 1887 a rifle bullet ricochetted on to, or in some way landed on the pursuer's ground.

The lines marking the danger zone upon these ranges, as fixed in conformity with the Musketry Regulations of 1898, gradually diverged from the extreme flank firing points, and passed at a distance of 100 yards on each side of the targets. No part of the pursuer's lands was within these lines.

By interlocutor dated 23rd December 1898 the Sheriff-Substitute (ORR PATERSON), after sundry findings in fact and law, granted interdict against the volunteers "shooting over said ranges in the manner hitherto practised by them, or in any other manner whereby nuisance may be caused to the pursuer or to the public using the said foreshore for recreation or as a public way, or using the said Kingcase Road for horse traffic, or to the pursuer as proprietor of said lands in Newton," and found the pursuer entitled to expenses.

The defenders appealed to the Sheriff (BRAND), who by interlocutor dated 30th March 1899 adhered, and dismissed the appeal with additional expenses.

The defenders appealed.

Counsel for the defenders and appellants the volunteers and for the pursuer and respondent having been heard,

At advising—

LORD JUSTICE-CLERK—This case has been for a long time before the law courts. Being a litigation relating to a military rifle range, as to which it is alleged that its use is dangerous to persons who may frequent the foreshore in front of it for the purposes of passage and recreation, it was thought desirable that there should be opportunity for the matter being brought before the Board of Trade, that the Department might consider whether regulations could not be made which would ensure safety in the use of the range. After a long delay the Court is informed that nothing has been done affecting the position of the case since it was taken to avizandum. The pursuer is therefore well entitled to ask that the case be now disposed of.

There are three grounds of complaint by the pursuer—(first) that the use of the range is directly a nuisance to her from the risk of bullets fired on the range falling on her property; (second) that the use of the range interferes with the safe use of the foreshore by foot-passengers, in consequence of bullets fired in the direction of the targets passing over the ground behind the butts, and either directly or by ricochetting falling on the shore; and (third) that certain firing points are so near to a public road that the shots fired tend to alarm persons and to excite horses so as to cause danger.

As regards the first ground of complaint, I have come to the conclusion that the pursuer is not entitled to succeed. I cannot hold on the evidence that it discloses any case of injury present or prospective of which she can complain or ask that in anticipation she should be protected. It is not possible to doubt that in the regular use of the range for target practice there is no likelihood of bullets coming on to her ground. That such a thing may happen must be admitted. For of course at any rifle range it is possible that on some occasion an accident may occur by which a shot may go in some direction from a firing point on a range, not being the direction of the target. If that were a sufficient ground for interdict, then no range could be kept open where there was inhabited ground any where all round within the extreme range of the firearm used there. The matter is dealt with in a practical fashion by ascertaining the reasonable margin on either side of the target within which danger may be apprehended in the ordinary use of the range. In practice this is found to give all reasonable safety, and the large number of rifle ranges throughout the country which are passed by authority, on which a very large quantity of ammunition is being constantly fired at the target, without there being any indication of danger calling for legal interference, proves that this recognised margin for safety is sufficient, although, of course, in very rare cases accidents may occur, the use of firearms at all having always an element of risk if due care is not observed.

In this case, although the range has been in regular use for many years, there is no evidence tending to show that the range has in any true sense been a cause of danger on the pursuer's property. There is evidence that once a bullet did fall within the lines of her lands, but that is all, and there is no evidence in regard to the circumstances. I cannot hold therefore that any such danger has been proved from the occupancy of the range as to entitle the pursuer to a judgment in respect of her own property.

The second question relates to the foreshore *ex adverso* of the ranges. The case must be taken upon the footing that at the present time those using the rifle range

have no authority from the Crown to use the foreshore by making it a background to a range from which bullets may pass over or fall on the foreshore. The Board of Trade has issued no regulations, and therefore the question is purely between a member of the public who has the public right of going on the foreshore, and persons who interfere with the safety and comfort of those so going. Whatever power the Board of Trade may have in the matter, the Board of Trade is not interfering, and has done nothing to solve the question whether the range can be used with safety to the public under regulations framed for the purpose of securing it. Whether any such arrangements can be made we do not know, but in the meantime the case must be dealt with as we find it. Now, I can have no doubt that at these ranges, both at ordinary individual practice, and still more at collective firing of any kind, bullets will pass over the butts and ground intervening between the targets and the shore. That is a state of matters of which I think the pursuer has a right to complain, and to demand that it be interdicted by a court of law.

The last question relates to the firing points. These are in one or two cases within fifteen or a few more feet of the road. This must I think be an interference with traffic on the road, and may cause annoyance to passengers and even danger in connection with horse traffic. There may be many places where the public, from good nature, and a desire for patriotic reasons not to interfere with the musketry of troops, are content to allow such firing near a road to take place, provided the firing is stopped when required by persons who have to ride or drive along the road. But I cannot hold that, if a member of the public objects to such practice he is not entitled to have it stopped by a court of law. Accordingly I think that upon this part of the case the pursuer is also entitled to interdict.

LORD TRAYNER—I think the pursuer has failed to show that she as an individual is entitled to interdict against the defenders on the ground of nuisance or infringement of private rights. On the other hand, the claim for interdict on the ground that the proceedings complained of are a nuisance to and infringement of the rights of the public is, in my opinion, made out, and to that extent ought to be granted.

LORD MONCREIFF—Except in one particular I entirely agree in the carefully considered judgments of the Sheriffs. The one point as to which I differ is the finding to the effect that the use by the defenders of the existing ranges for rifle-shooting in the manner hitherto practised by them involves a risk of injury to persons on the western portion of the pursuer's lands adjoining the sea-shore, and that the pursuer's property has materially depreciated in value through the proximity of the rifle ranges. It is not proved to my satisfaction that there is any risk of injury to persons upon the pursuer's lands. The only evidence offered in support of that contention is, that in 1886 or 1887 a bullet ricochetted and landed on the pursuer's ground. There is nothing to show that such an accident ever occurred again, or is likely to occur again, and the conclusion from the evidence is that it cannot have been the result of a shot fired fairly at the targets.

In regard to the foreshore and roads adjoining the rifle-range, I am of opinion that the pursuer has made good her right as a member of the public to the interdict she asks. We can only dispose of the case according to the existing law and statutory regulations applying to such ranges. There is distinct evidence of danger to the public, from the proximity of the ranges in their present position, in their use of the foreshore and the adjoining public roads, against which they are entitled in law to be protected by interdict. It is satisfactory to know that in this matter we are, in a sense, not final, because, as the Sheriff-Substitute points out, statutory provision has been made for the restriction of public rights where land appropriated to military purposes abuts on the sea, or where its use interferes with a highway. From section 3 (1) of 48 and 49 Vict. cap. 36, it appears that if the consent of the Board of Trade is obtained, the rights of the public on the foreshore may be restricted if this is required for the exigencies of the military purpose to which the land abutting on the sea is appropriated; and by the Military Lands Act 1892, section 16, provision is made for the regulation of the use of land acquired for military purposes, as in a question with the public, where a bye-law framed by authority of the statute interferes with any highway.

I am therefore of opinion that, subject to a slight alteration in regard to injury to the pursuer's own lands, the Sheriff's judgment should be affirmed and the appeal dismissed.

LORD YOUNG concurred.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Ayrshire, dated respectively 23rd December 1898 and 30th March 1899: Find in fact that the defenders are lessees of lands in Prestwick and Newton which they use as rifle-ranges, on the lines delineated on the plan No. 125 of process; That the foreshore behind the targets, and for at least 100 yards on each side of the targets, is in the line of fire, and that persons passing along the foreshore between these points are in danger from direct fire or from bullets which ricochet: That the public have for time immemorial used the foreshore between Ayr and Prestwick, including this portion of it, for recreation and as a means of communication between these places; That the 600 yards firing point of the south range is within 10 feet of the Kingcase public road, and the 500 yards firing point of the north range is within 20 feet of the said road; That the near proximity of these firing

points to this public road is a source of danger to the horse traffic passing along the road; That the use by the defenders of the existing ranges for rifle-shooting in the manner hitherto practised by them is to the nuisance of the pursuer and of the public using said foreshore for the purpose of recreation, and of passing between Ayr and Prestwick, and of the pursuer and of the public using said Kingcase Road for the purpose of horse traffic: Find in law that the pursuer is entitled to interdict against the defenders using these ranges in the manner hitherto practised by them: Therefore interdict, prohibit, and discharge the defenders [then followed the names of the commanding officers], and the volunteers at present under, or that may be at any time under, their command, or under the command of their successors in office, conjunctly and severally and individually, from shooting from the said firing points and over said ranges in the manner hitherto practised by them, and decern: Find the pursuer entitled to expenses in this and in the Inferior Court, and remit the same to the Auditor to tax and to report."

Counsel for the Pursuer and Respondent —Campbell, Q.C.—Hunter. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defenders and Appellants —Sol.-Gen. Dickson, Q.C.—Guy. Agents —Irons, Roberts, & Cosens, W.S.

Friday, November 30.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

BUCHANAN *v.* MAIN.

Payment — Appropriation of Payments— Bank Account — Overdraft — Separate Accounts—Guaranteed Account of Company Closed and Amount Received from Call Placed in New Account—Bank—Cautioner.

A limited liability company was incorporated in 1893, its shares being of the value of £1, of which 10s. was called up. In 1894, the company being in need of financial assistance, their bankers allowed an overdraft on receiving a letter of guarantee, by which five directors of the company jointly and severally guaranteed payment of all sums for which the company were or might become liable, the amount not to exceed £12,500.

In January 1896 two of the guarantors intimated to the bank that they withdrew from the guarantee, and the bank closed the account, which stood at that time with a debit balance of over £12,000. Immediately thereafter the directors of the company made a call on the shareholders, payable at the bank, for the unpaid amount of their shares. This brought in over £6000, which was placed by the bank in a new account, headed, "No. II. Call Account," which was a credit account entirely.

In March 1896 the bank opened a new current account with the company. This account contained no entry of the debit balance on the guaranteed account, and no reference to that account.

In May 1896, there being then a debit balance on the new current account of over £2000, the company went into liquidation.

A question being raised as to the amount due by the guarantors to the bank—*held* that the bank at the time when the amount raised as the result of the call on the shareholders for the unpaid portion of their shares was paid to them, were not bound to apply this fund to the extinction of the balance due on the guaranteed account.

Cautioner — Relief — Joint and Several Liability — Liability of Co-Cautioners inter se—Extent of Liability inter se.

Five persons jointly and severally guaranteed to a bank payment of all sums for which a company might become liable to the bank. The company thereafter went into liquidation, and the bank called upon two of the five guarantors to pay up the debit balance due to the bank by the company. These two guarantors paid the amount claimed by the bank. *Held* that they were entitled to claim payment of one-third of the amount so paid by them from one of the three other guarantors.

In 1893 a limited liability company was incorporated called the United Gutta Percha and Rubber Company. The shares allotted to the public were 25,000 *A* shares of the nominal value of £1 each, and upon these 10s. per £ was called up. The company not being successful, and money being required, Andrew Buchanan, William Stevenson Brown, John Main, Robert Hutcheson, and Alexander M'Dowall, who were all directors of the company, by letter of guarantee, dated 18th, 26th, and 28th May, and 1st and 22nd June 1894, jointly and severally guaranteed to the Bank of Scotland due payment of all sums for which the company were or might become liable to the bank, the amount for which the guarantors became liable being declared not to exceed £12,500, with interest from the dates or date of advance.

On 28th January 1896 John Main, who had resigned his position as director of the company on 30th October 1895, and Robert Hutcheson, intimated to the bank that they withdrew from the guarantee. The bank thereupon closed the guaranteed account, in which there was a debit balance of £12,283, 5s. 3d. Immediately thereafter a call, payable at the bank, was made upon the shareholders for the amount still remaining due upon the *A* shares, and between 3rd February and 19th May 1896 this produced