have enabled her other friends to bring those views to the test, and I am happy to say the result has been to exonerate her from that construction of all or any of the appearances. But, my Lords, I cannot but believe Dr Stark, who, if he is to be believed, distinctly proves that these ideas in the husband's mind originated at a time and under circumstances which are absolutely inconsistent with the hypothesis of his motives which the Court of Session thought it right to adopt.

My Lords, in that state of things, I do not think that the conduct of this gentleman, bad as in many respects it has been, has been such as to give your Lordships good reasons for apprehending that the moral, any more than the material, interest of the boys will suffer if they are, upon the terms and under the safeguards which have been recommended to your Lordships, left under their father's care.

Interlocutor of 20th March 1874 affirmed, subject to a variation.

Counsel for the Appellant — The Solicitor-General (Sir John Stolker) and Dr Spinks, Q.C. Agents—William Robertson, Westminster, and J. Galletly, S.S.C.

Counsel for the Respondent—Mr Cotton, Q.C., and the Hon. Mr Thesiger, Q.C. Agents—Grahames & Wardlaw, Westminster, and J. & R. D. Ross, W.S.

Monday, May 3.

(Before Lord Chancellor Cairns, Lords Hatherley and O'Hagan.)

LEARMONTH AND OTHERS *v.* MILLER.

(*Ante*, vol. ix, p. 95.)

Husband and Wife—Postnuptial Contract—Interest—Retention—Bankruptcy—Conjugal Rights Act.

In 1852 a husband and wife executed a postnuptial contract whereby they conveyed to trustees £2600, being the amount of legitim to which the wife was entitled from the estate of her deceased father. The husband, on the other hand, bound himself to pay on or before 1862, £1999 to the trustees for the trust purposes, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favour for that sum. He also renounced his *jus mariti* over the whole means and estate of his wife, declaring the same to be unaffectable by his creditors or by his debts or deeds. The second purpose of the trust was "for payment of the free yearly proceeds of the trust-estate to the said husband during his life, for his liferent use allenarly." It was declared that these provisions "shall be nowise attachable for debt, but the same shall be considered alimentary." The husband did not implement his obligation by granting security or otherwise, and he became bankrupt in 1860.

In a question between the marriage-contract trustees and the trustee on the husband's sequestrated estate—*Held* (1), that the husband's right to the annual proceeds of the £2600 was vested in the trustee on his sequestrated estate; (2) that the marriage-contract trustees were not entitled to retain the income on the ground that the husband had failed to implement his obligation, and (3), that the provisions of the Conjugal Rights Act 1861 did not apply to the case.

This was an appeal against the judgment of the Second Division in an action of declarator and payment at the instance of John Miller, trustee on the sequestrated estate of Mr Finlay, against Mr and Mrs Finlay's marriage-contract trustees. The following were the circumstances of the case—

On 28th February 1852 Mr and Mrs Finlay executed a postnuptial contract, whereby they conveyed to the defenders, as trustees, the whole estates, both heritable and moveable, belonging or which might thereafter belong to Mrs Finlay, and particularly, "all right, title, and interest which she, or the said John Finlay, her husband, now have or may hereafter have in the succession or estates" of her deceased father. Mr Finlay, on the other hand, bound himself to pay on or before 1st January 1862, £1999, to the trustees for the trust purposes therein mentioned, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favor for that sum. He also renounced his *jus mariti* over the whole means and estate of his wife, declaring the same to be unaffectable by his creditors or by his debts or deeds. The second purpose of the trust was "for payment of the free yearly proceeds of the trust-estate to the said John Finlay during his life, for his liferent use allenarly." It was also expressly declared by the contract that the whole provisions therein contained "shall be nowise attachable for debt, but the same shall be considered alimentary.'

In an action raised in 1863 the House of Lords decided that the trustees under the postnuptial contract were entitled to recover and receive the sum of 2600, being the amount of legitim due to Mrs Finlay from the estate of her father, with interest from 15th December 1851, and to hold and administer the same for the purposes of the trust declared in said deed—all questions in reference to the right to the interest or annual proceeds of the said legitim fund from that date being reserved entire.

The present action was raised for the purpose of having it found and declared that Mr Finlay had right to the whole annual proceeds of the said sum of £2600 from 15th December 1851, and so long as the sequestration shall subsist during Mr Finlay's life, and of obtaining decree against the postnuptial contract trustees, ordaining them to make payment of the same to him accordingly.

The Lord Ordinary (MACKENZIE) pronounced an interlocutor finding in the pursuer's favour on the declaratory conclusions of the summons, and the Second Division on a reclaiming-note adhered.

The defenders appealed to the House of Lords, and argued that, regard being had to the nature of the postnuptial settlement, and the reasonable amount of provision for the benefit of the wife, husband, and children of the marriage, Mr Finlay being in a perfectly solvent state at the date of the deed, it was a contract for valuable consideration, and being purely alimentary could not, contrary to the express declaration of the deed, be held to be subject to his debts.

Counsel for the respondent were not called on.

At delivering judgment—

LORD CHANCELLOR—The case now brought before your Lordships on appeal has already pro-

duced an amount of litigation which is much to be wondered at and much to be regretted, and I greatly fear that in course of that litigation much of the subject matter concerning which the parties are in dispute will be found to have disappeared. But the questions which are now submitted for the consideration of your Lordships appear to me to lie in a very small compass, and to present no feature of real difficulty. I will ask your Lordships' attention to the question which was argued in the first instance at the bar, namely, the character and the effect of the provision contained in the post-nuptial contract of marriage of the 28th of February 1852, so far as regards the life-interest of the spouse Mr Finlay. My Lords, at the time that this post-nuptial settlement was executed Mr Alexander, the father of Mrs Finlay, had died, and as one of his children she was entitled to a certain sum under the head of legitim, a sum which was afterwards ascertained to be £2600, and which I will therefore speak of as a sum of that amount. That being the right of Mrs Finlay under the head of legitim, the legitim to which she was entitled was in law the property, at the time to which I am referring, of her husband. He might have done anything that he pleased with it. It was as much his money, and disposable by him, as any other sum of money of the same amount which might have been in his possession. I shall first refer to the trust which was declared in the deed of 1852 concerning this sum, in order to ask your Lordships to put a construction upon it as to its meaning, and I will read the trust of the deed only as if it related to this sum of £2600 in the first instance. Reading it in that way, the second head of the trust is this—"In trust for the payment of the free yearly proceeds of the sum of £2600 to the said John Finlay during his life for his liferent use allenarly, and after his death, in the event of his being survived by his wife, in trust for the payment to the said Mrs Mary Ann Alexander or Finlay in like manner of the free yearly proceeds of the £2600 during her lifetime for her liferent use allenarly, and, after the death of the survivors of the said spouses, in trust for the whole children born or to be born of the marriage between the spouses." Then it says further on—"It is hereby expressly provided and declared that the whole of the foresaid conditions, as well those in favour of the spouses as those in favour of the children of this present marriage, and their interest in the present trust, shall be nowise attachable for debt, but that same shall be considered alimentary." Now, my Lords, a question was raised upon this by the Lord Advocate, which, as I understand it, was of this nature,—Whether this provision, that the condition of the trust should be considered alimentary, amounted to a stipulation that the liferent use of the husband should be considered alimentary, not merely for his own benefit, but for the benefit for the aliment of the wife and children. My Lords, I apprehend that no such construction could be put upon the deed. There is a cumulative provision that all the trusts should be considered alimentary, and the meaning of that is that they should be considered alimentary for each of the persons in succession who were to benefit by the trusts. Applying that to the case of the husband, it is a stipulation with regard to his liferent use that that liferent use of his should be in nowise attachable for his debts, but should be considered alimentary for his benefit.

That being the construction of the deed, there arises the question—Is a stipulation of this kind in a post-nuptial contract permissible and valid according to the law of Scotland? According to the law of England it clearly would be invalid, and, my Lords, as I understand the law of Scotland it is invalid equally by the law of Scotland. It is an attempt made by an owner of property to place his property in such a position that on the one hand he shall have the benefit of it until he becomes bankrupt, and on the other hand he shall prevent his creditors or his assignee or trustee in bankruptcy or sequestration from taking it and using it for the payment of his debts.

As a general rule that clearly could not be done by Scotch law, but then it is said that it ought to be held valid in this case, because according to the law of Scotland a provision of that kind may be made for valuable consideration. But, my Lords, when that proposition comes to be examined, although it is perfectly true in its form and in its statement, it appears to mean this, and only this—It is possible by the law of Scotland (and the same end might by the law of England be arrived at, although by different means), in a contract for valuable consideration for a person who is making a settlement upon another, by which that other shall have an interest given or assigned to him for his or her life, to stipulate at the same time that the provision shall be alimentary, and that the creditors of that other person shall not benefit by it. That is allowable by the law of Scotland, and can be done in a case such as I have described. But is that done in the present case? Clearly not; there is no person by this deed creating a life interest in favour of Mr Finlay and limiting it in the way I have described. This is a case in which Mr Finlay is disposing of his own property, placing it in the hands of trustees, making of it a life interest for himself, and endeavouring at the same time to limit that life interest so that his creditors shall not affect it.

My Lords, I asked whether there was any instance where the owner of property, in a contract for valuable consideration, could be found entitled to make a provision of that kind. I do not desire, my Lords, to express any opinion whether it could or could not be done, but no instance has, as a matter of fact, been adduced at your Lordships' bar where it has been held valid. Desiring, as I say, to express no opinion as to whether it could be done or could not be done, what I desire to direct your Lordships' attention to is this, that even although it may be considered that this post-nuptial contract is an onerous contract, and has consideration in it for some of its provisions, yet it appears to me that in that sense it cannot in any shape or form be maintained that, for this provision made by Mr Finlay with regard to his own property and for his own benefit, there was any consideration whatever moving him or influencing him in making that disposition. It was a disposition of trust made and created by him for his own benefit, and which he was not moved to create by any consideration paid to him for so doing. It was therefore, my Lords, a disposition to be viewed in every respect as one of those dispositions not admitted by the Scotch law, where a man withdraws or attempts to withdraw his own property from the reach of his creditors, or his trustee in the case of sequestration.

My Lords, I arrive therefore at the conclusion, and I submit it to your Lordships, that this is a

case in which the proviso against the right of creditors in the liferent provision of the husband cannot be held to operate.

Then, my Lords, the next question which was argued at your Lordships' Bar was this—Supposing, said the appellants, it is so, and that this provision against the intervention of a trustee in sequestration cannot operate, still (say the appellants), here is a contract containing various provisions,—there is the provision for the liferent of the husband, there are provisions by the husband by which he is bound to give a bond for £1999 to pay that sum for the purpose of the settlement at the end of ten years, to insure his life in the meantime, or give heritable security for the purpose of implementing his obligation. Then (say the appellants), the husband, the spouse, has not done any of these things, it is not right that he should claim the advantage and benefit of the post-nuptial contract, and at the same time be a defaulter in the fulfilment of the obligations which it imposes upon him. Now, my Lords, there is no doubt that there is a principle in the Scotch law, as there is a principle in the law of England, as administered in the Courts of Equity, that any person who is a party to a complex contract or obligation cannot be permitted to take the benefits of that contract, carry them away and enjoy them, and at the same time repudiate and reject the obligations placed upon him by the contract, and refuse to fulfil those obligations. That is a principle depending not merely upon any technical rule of law, but upon the first principles of equity and of justice.

But now, my Lords, let us see how it is proposed to apply that rule to the present case. I turn to the pleas in law for the defenders, and I find the first plea describes very aptly the process of reasoning by which that proposition is sought to be supported. That plea says—"The post-nuptial contract being a mutual and onerous deed, and neither the husband nor the pursuer as coming in his place having fulfilled or being ready to fulfil the obligations thereby undertaken by him as the consideration and counterpart of the liferent alimentary provision, the pursuer is not entitled to recover the sums sued for."

Now, my Lords, is it the fact that the obligations undertaken by the spouse in this case—viz., to provide the £1999, and to insure his life, and to give heritable security, were undertaken by him "as the consideration and counterpart of the liferent alimentary provision,"—that is to say, that in order to bribe and induce him to undertake to provide the £1999 he retained for himself and put in trust the liferent provision of his own money? My Lords, the statement in this compendious form of the proposition shows at once how absurd the proposition is. If the liferent had been given him by some one else, then it might well have been said that that was valuable consideration for the obligations which he undertook. But when your Lordships consider that the truth and substance of the matter is this, that he merely failed to denude himself to the extent of his liferent of that which was his own absolute property, you see at once that there was no consideration whatever moving to him as the counterpart of the obligation which he undertook.

And, my Lords, I might illustrate the real position of the matter still further in this way:—Suppose that in place of its being a case where there was a carving out of a life interest, and a disposition by way of trust of the remainder *ultra* the life interest, this legitim fund of £2600 had been divided into two halves, and suppose that the deed had provided that the trustees of this post-nuptial contract should receive the £2600, and then, having the whole in their hands, should pay over to the spouse one half of the whole, and should hold the other half in settlement for the wife and for the children; in that state of things, could any person contend for a moment that that £1300 of the spouse's own money, simply placed in his own hands where it ought to be, was a consideration paid to him to induce him to enter into the obligation to pay £1999, and to insure his life? And, my Lords, what difference does it make that the division of the interest of the £2600 is not made by way of placing £1300 upon the one side and £1300 on the other, but is made by way of carving out a life interest and disposing of the remainder?

Therefore your Lordships, I think, will find that the general principle which upon this argument is founded—an excellent salutary and well recognised general principle—has really no application to the present case, and is only attempted to be applied from the circumstance that this deed may perhaps rightly be called an onerous deed, which it may be as regards some of its provisions. But although it may be an onerous deed, it does not by any means follow that the consideration of the deed runs to and governs the carving out of the life interest which was reserved to the husband. Therefore, my Lords, when the matter is considered in its true bearing it really comes to this, that the assignee or trustee in the sequestration is not claiming this money—the life interest of the husband under the deed—at all, he is claiming it as that interest which no doubt is mentioned in the deed because it was necessary to mention it to show the succession in which the property was to be enjoyed, but is mentioned in the deed only for that purpose, and is nothing more than a share, a portion, a payment of the original absolute dominium which the truster, the spouse, had over the whole of the property. It is that which the trustee claims, and he claims it in that right, and not as something conferred upon the spouse by means of this post-nuptial settlement.

Well then, my Lords, that brings me to the question which was raised, whether, if the appellants failed upon the first and second grounds, they are not still entitled to something under the Conjugal Rights Act. That Act came into operation in 1861. The bankruptcy in this case occurred, I think, in the year 1860. If we were to look to those dates alone, it appears to me that the bankruptcy having occurred before the Conjugal Rights Act it would almost be impossible, if not altogether impossible, having regard to the mode in which that Act is worded, to apply it to a bankruptcy which had occurred previously, because what it provides is this,—"When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband, or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf." Then there is a proviso—"Provided always that no claim

for such provision shall be competent to the wife if before it be made by her the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property; or, in the case of a creditor of the husband, where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment." And then we have the Scotch Bankruptcy Act, which was read at the bar, providing that the title of the sequestration in bankruptcy was to be judged and attested by the hypothesis that he had proceeded to obtain, and had obtained, possession of the moveable property. My Lords, I apprehend that if it were necessary to decide the question it would be found that these considerations would make it altogether impossible to apply the Act of 1861 to a bankruptcy which occurred in the year 1860.

But I doubt, my Lords, whether it is at all necessary to consider that question in the present case, because what your Lordships have got here is a fund legitim to which the husband is entitled during his lifetime *jure mariti*. He might have possessed and spent the whole of it. In place of that, by an arrangement between him and his wife, covering other property, covering the £1999 which I have referred to, which he covenanted to provide, covering all other property which the wife might become entitled to or was entitled to at the time, it was arranged that the husband, according to the view I have already expressed, should retain upon the £2600 a life interest out of his dominium, that then that trust fund should be limited in liferent to the wife in remainder, and then the corpus of it to the children of the marriage. It appears to me that thereby there was effected by the parties themselves, when they were competent to do so, and when the husband was solvent, an arrangement which operated as a settlement of this £2600, and that thereby out of that sum the wife obtained that amount of provision which she was satisfied to take, having regard to all the provisions of the deed of trust.

It appears to me that it would be a proposition which it would be impossible to maintain that the Conjugal Rights Act was intended to undo an arrangement of that kind, to have a new settlement of property which had thus been settled once for all, and to give to the wife a greater amount of interest in property of that kind than she obtained in virtue of the settlement. Upon that ground alone, my Lords, I submit to your Lordships that it would be impossible to apply the Conjugal Rights Act to the present case.

Upon the whole, therefore, I advise your Lordships that the interlocutors appealed from ought to be affirmed and the appeal dismissed, with costs.

LORD HATHERLEY—I entirely agree in the opinion that has been expressed by my noble and learned friend the Lord Chancellor. It is certainly greatly to be regretted that this point could not have been determined once for all when the previous appeal was before your Lordships' House. It seems not to have been decided on that occasion what should be done with reference to the income of the trust fund under this settlement, and there being some little variation between the interlocutor of the Lord Ordinary and the interlocutor of the Judges of the Inner House as to the question of the right in this income, there appearing to be at all events a possible conflict as to the wording of the interlocutors in that respect, this House, I think upon the suggestion of my noble and learned friend the present Lord Chancellor, inserted a special saving clause in deciding upon the former appeal, which has now left it open to the parties to raise the present contest, namely, an express reservation of all rights as regards the interest of the legitim funds.

Now, as regards the matter in dispute here, namely, the interest of the husband by way of liferent in the sum of £2600, the moment it is distinctly understood how that sum was affected by the deed it appears to me that there must be an end of all controversy, because there is no question of law really in dispute upon the present occasion. It is admitted on all hands that the law of Scotland allows that to be done which cannot be done *modo et formâ* in the same way in this country, the law of Scotland allows provision *aliunde* to be made for a man, which shall at the same time vest in him the property, and also declare that the provision is alimentary and not attachable by creditors. On the other hand, it is equally clear that by the law of Scotland a man cannot so deal with his own property as to make a provision of that description to the detriment and defeating of his creditors. When you once understand that all you have to ask with reference to the present deed is this—Is this a provision coming *aliunde* as a part of the bargain made between the parties to the deed, or is it simply a portion of his own dominium over his own property, which portion he has not alienated, and which therefore remains of the same quality as it was before he proceeded to deal with the property by the deed? My Lords, the House by its former decision has affirmed the validity of the deed as regards the wife and children. The House has said that as regards them the provision made was not excessive, and although that provision was post-nuptial, it has affirmed its validity in regard to the wife and children. But the question as to the husband was left open. However, when you look to what was done by the deed it is impossible, as it appears to me, to contend that the husband has parted with anything more than all the right to the fund which may accrue after his death, for the benefit of the parties who are to take it, subject to his reserving to himself a life interest in it. He parts, in other words, with the reversion; he retains the life interest, and that life interest so retained remains his property, as it appears to me, just in the same manner (as it was put by my noble and learned friend the Lord Chancellor) as if it were half the fund instead of being the life interest in the fund. When once you arrive at that conclusion you cannot fail to see that the law, for which so many authorities were cited, that a man cannot make a provision for his own benefit as alimentary against his creditors, in order to defeat his creditors out of his own property, does not apply to this case, because this is not a fund which can be taken as having been so disposed of by virtue of the deed; in other words, it is his old interest which remains in it. It is that portion so remaining in it which is not touched or affected by the deed. He retains that life interest, and so retaining that life interest it passes to his trustee on the sequestration. That trustee says—"I do not want anything whatever under the deed. I claim that which the deed has not disposed of, namely, that which remains in my debtor undisposed of, that is to say, the life interest in the fund the whole of which he had originally,

but the reversion to which he has parted with by means of the operation of the deed.

That being so, my Lords, the second question does not arise—that is the question as to the retaining the fund on the part of the trustees to answer some other obligations under the deed. The trustee under the sequestration is in a position to say, as the owner would have said previous to his bankruptcy—I do not come here to claim anything by virtue of the deed. I come here to claim all that which, notwithstanding the deed, still remains in me, the spouse, and to which I have an unquestionable right. No such right of retention arises as will arise both by the law of Scotland and the law of England, or in any country where jurisprudence is entertained, namely, a right under the deed I claim paramount to the deed. As to this life interest, all that passes under the deed is simply the reversion.

Mr Pearson raised an ingenious argument which is really absolutely untenable. Indeed I would hardly go so far as to say it is ingenious, for I do not think it is possible for anybody to hold that such an argument would be accepted.

He says that by the law of Scotland a man may renounce the *jus mariti*, and he may renounce it as against creditors; then having renounced the *jus mariti*, as he does by the anterior part of this deed, any right coming to him through the medium of his wife ceases to be his and becomes the wife's, and becoming the wife's it is settled in such a way as to give him a life interest in it under the deed. That is transparent, and no Court could for a moment be misled by it. It is quite clear that he cannot by that sort of shifting of his cards make that to be not his which is his. If he renounces his *jus mariti* on the one hand, and takes it back immediately on the other by means of a life interest, I apprehend that is not such a settlement of property on his behalf as could possibly be maintained as a settlement made for him by some third party, upon which he could rely as being a protection in consequence of the particular form of the donation, namely, a donation of an alimentary character.

As to the third and only remaining point, with reference to the Scotch Act of Parliament, the Conjugal Rights Act, I think it is certainly quite a sufficient answer to that to say that that Act was passed in 1861, and that the bankruptcy in this case took place in 1860, because although the Act may be held to have been retrospective as to a woman married before the Act, and so on, yet it would be very difficult to suppose that the Act would have been intended to have such effect as this, no such effect being pointed out by it; that although a right had actually become vested in the trustee under the sequestration, just as if he had purchased the right for valuable consideration from the liferenter, yet he should be divested of it and a fresh settlement made. I apprehend that that would be a sufficient answer to the argument founded upon the Act; but perhaps a still more complete answer is that given by my noble and learned friend the Lord Chancellor, who says that the Act does not contemplate cases where deeds of arrangement have been previously entered into between the husband and wife, but only those cases where, no arrangement having been made, it was thought proper that the wife should not be deprived of all interest in the husband's property without some provision being made for her. But when the parties have themselves made such provision there is no necessity for calling in the Act. On these grounds, therefore, my Lords, I think the appeal should be dismissed.

Lord O'Hagan—My Lords, I am of the same opinion. The case appears to me to be tolerably clear in all its branches. On the first and main question the law is not disputed, and there is no controversy of fact. An eminent Judge (Lord Deas) in *Ker's Trustee* v. *Justice* (5 Macph. p. 4) states the legal principle very lucidly—no one is entitled to protect his own income against his own onerous obligations and the claims of his lawful creditors. That principle is adopted equally by Scotch and English jurisprudence, and is so based on common sense and justice that it must find acceptance in every rational system of law. But the argument of the Lord Advocate invites us to violate it by holding that the undoubted property of the bankrupt here has been relieved by his own act from the just demands of his creditors. It cannot be so. The words of the deed are unequivocal. The trustees are to hold "in trust for the payment of the free yearly proceeds of the trust estate to the said John Finlay during his life for his liferent use allenarly." It is impossible to deny that the liferent so became his own—his own absolutely—and if so, it could not be enjoyed by him disburthened of the obligation to answer honest demands against him. The subsequent clause on which so much stress has been laid operates so far as it can have legal operation, but no further, and it was mistakingly argued that because the deed generally had been sustained, every provision in it must be legally effective.

Applying therefore plain principle to plain words, I am of opinion that the Court below was well warranted in refusing to defeat the claims of the creditors, and I think the authorities produced by the Lord Advocate and Mr Pearson sustain the conclusion at which it arrived. In *Lewis* v. *Anstruther* (14 Dunlop, 857) the facts bore no resemblance to those with which we have to deal. There, for abundant consideration, a son obtained an annuity charged on his father's property. In *Macdonald* v. *Macdonald* (1 Macph. 1065) a provision for a wife and children was most properly protected. But in neither of these cases, nor in any other case, has a man been permitted to filch his own income from the hands of his creditors. On the main question, therefore, it seems to me that the decision of the learned Judges was perfectly correct.

The second question seems to me to be answered by the reply to the first, and on the third I can add nothing of value to the observations already made by my noble and learned friends; and, on the whole, I have no doubt that the appeal should be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.