F. Effect of Lapse of Time

In Scotland, on the expiry of the ten-year period, the person in possession acquires an unassailable title to the subjects, unless the deed is a forgery or is *ex facie* invalid. In the case of registered land, at the time of first registration of the title the Keeper of the Registers of Scotland[59] will exclude indemnity, because there is a previously registered and hence competing title. If, however, on the expiry of the period, the possessor is able to demonstrate that he has been in possession continuously for the requisite period and that the possession has been open, peaceable and without judicial interruption, the Keeper will remove the exclusion of indemnity. In England the position is that the squatter does not become the true owner, at least in the case of unregistered land.[60] All that the expiry of the period of limitation does is to exclude a claim by the proper owner. In the case of registered land, the opinion has been proffered that the registered estate may be vested in the adverse possessor[61] by virtue of section 75 of the Land Registration Act 1925, but the courts have not yet expressed a view on the matter. However, in *Fairweather* v. *St Marylebone Property Co. Ltd*[62] Lords Radcliffe and Denning did not think that that was the effect, because, in the words of Lord Denning, the effect of the Statute of Limitations is negative and not positive.[63]

G. Conclusion

While there are undoubtedly different bases for adverse possession, and different consequences which follow from the expiry of the periods of such possession, the results in cases with the same facts could be the same. The Scottish and English courts have faced similar issues, e.g. what weight to give to certain acts of possession, and dealt with them in ways which are not substantially different. No one would argue that cases decided in the context of prescription are necessarily to be decided in the same way in England, or that cases on adverse possession in England can be looked to in a Scottish context; nevertheless, the issue of possession is central to both systems and it is in that context that one system may in appropriate cases provide useful guidance to the other.

D. J. CUSINE*

TRINIDAD AND TOBAGO: A CASE FOR REFORM IN THE LAW OF SUCCESSION

A. Introduction

It is rather distressing, if not tragic, that the Republic of Trinidad and Tobago, with a relatively large legal population and a somewhat litigious reputation, has earned itself the dubious distinction of having the most archaic, if not the most inequitable, succession laws in the English-speaking Caribbean, second only to the Bahamas.

59. Which include the Register of Sasines and the Land Register.
60. *Tichbourne* v. *Weir* (1892) 67 L.T. 735.
61. Megarry, *Manual of Real Property* (6th edn), p.528.
62. [1963] A.C. 510.
63. *Idem*, p.544.

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What makes the situation particularly scandalous is that the Succession Act No.27 of 1981, which can redress many of the inequities of the present inheritance laws of these countries, is in fact in existence but has yet to be proclaimed. The official explanation given for its non-proclamation is:

(1) that the Succession Act is viewed as one in a package of yet to be proclaimed revised and amended land and land-related laws;
(2) that the machinery necessary for the implementation of these land laws (most notably the Land Registration Act No.24 of 1981) is yet to be put in place, primarily because of financial constraints.

In the interim (15 years have since elapsed), it is this writer's suggestion that Part VIII of the Succession Act—the Family Provision section—can be proclaimed. And there is precedent for this. In 1972 by Act No.2 of 1972, Second Schedule, the Family Provision section of the Wills and Probate Ordinance Ch. 8 No.2 was repealed and was replaced with provisions which, *inter alia*, expanded the class of persons eligible to apply for family provision out of a deceased person's estate.

Proclamation of this Part of the Act certainly would alleviate some if not all of the inequities and social injustices of the present inheritance laws of these territories.

When speaking of the role of the law as that of giving effect to the presumed intention of a person who has died intestate, Lord Cairns, a judge of the English House of Lords, remarked that the provisions of intestate succession should be regarded "as in substance no more than a will made by the Legislature for the intestate".[1] The veracity of Lord Cairns's remark is, however, seriously challenged when one considers the state of the intestate inheritance laws of Trinidad and Tobago, laws which date back, in certain instances, to the seventeenth century, laws which only serve to highlight the urgent need for legislative reform; and consequently the absolute necessity of making a will and not, as Lord Cairns's remark would seem to suggest, placing any reliance on the law to effectively do so on one's behalf.

B. Mother of an Intestate Child Born out of Wedlock

Let us by way of illustration consider the following scenario. You are an attorney-at-law. A distraught mother comes to your chambers and informs you that her only child, a 30-year-old bachelor, has recently died intestate. She tells you that her son died childless, but had accumulated substantial savings and property during his lifetime. She further informs you that when her son was born the father accompanied her to register the birth of the child, but a few months later he ended the relationship and married someone else. She also tells you that she is unemployed and that her son was her sole financial support.

Unfortunately, if you are that attorney you will have the unenviable duty of informing her that in Trinidad and Tobago she is entitled to absolutely nothing from her son's estate and that it is her son's father who is solely and absolutely entitled to the estate—the substantial savings and other property, real and personal. Indeed you must inform the mother that it is only if the father had prede-

1. *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53, 66, on the Statute of Distribution.

ceased the intestate child that she—together with the intestate's brothers and sisters, if any—would then have been entitled to share in her intestate child's estate.

This is so because the English Statute of Distribution 1670, which governed the distribution of the personal estate of an intestate in England and which contains the aforementioned rules of distribution, is still partly applicable to Trinidad and Tobago and governs not only personal but real estate of an intestate. This is by virtue of section 23 of the Administration of Estate Ordinance Ch. 8 No.1, which provides:

> Subject to the provisions of this Ordinance where any person shall die intestate or partially intestate the undisposed of residuary estate of such person whether real or personal shall be distributed among the same persons being of kin within the meaning of s.3 in the same manner and in the proportion as the personal estate of such persons dying domiciled in England and intestate would be distributed by the law of England.

Section 1 of this Ordinance provides that it shall be read as one with the Wills and Probate Ordinance Cap. 8 No.2, in which the "Law of England" is defined in section 2 as meaning the law of England in force on 16 May 1921. According to Kelsick J, in the case of *Mohammed* v. *Mohammed*, section 23 of the Administration of Estate Ordinance provides an example of where "the law or practice in England is applied simpliciter or as at a specific date".[2]

The law in force in England on 16 May 1921 in respect of the distribution of the personal estate of an intestate was the Statute of Distribution 1670. (Indeed this Statute was repealed in England in 1925 by the Administration of Estates Act.)

Further, section 24 of the Administration of Estate Ordinance provides:

> the widow or surviving husband of an intestate person dying after the commencement of this Ordinance shall be beneficially entitled as follows:
> a) if there is no lawful issue of the deceased to the whole estate of the deceased; and
> b) if there is lawful issue of the deceased to one third thereof.

The combined effect of sections 23 and 24 of this Ordinance is that, for the purpose of determining inheritance rights and priorities with respect thereto, the Statute of Distribution is applicable to all persons save the intestate's surviving spouse and issue (including issue born out of wedlock since March 1983).[3]

Surprisingly, the Status of Children Act Ch. 46:07 and its repealing Act No.17 of 1981 are responsible for this present state of affairs.

Firstly, the Status of Children Act *inter alia* equated an illegitimate child's rights of inheritance with those of the father's legitimate offspring. As a consequence, the Statute of Distribution was for the first time applicable to a child born out of wedlock.

Secondly, section 20 of the Repealing Act No.17/1981 expressly repealed the Legitimation Ordinance Ch. 46:04. According to, *inter alia*, section 11 of this repealed Ordinance the mother of an illegitimate child who died intestate without spouse or child would have been exclusively entitled to that predeceasing child's

2. (1968) 12 W.I.R. 125, 128 where the meaning of the phrase "the law of England" was discussed and distinguished from ambulatory phrases used in local legislation such as "for the time being in force" or "from time to time". See also *Re Schuler's Estate, Schuler* v. *Powell and Another* (1985) 37 W.I.R. 371, 387–388.

3. This is by virtue of the Status of Children Act Ch.46:07.

estate as if the child had been born legitimate and she had been the only surviving parent.

The cumulative result of these two pieces of legislation is that the father of an illegitimate child is now for the first time entitled to his intestate child's estate to the exclusion of the mother, subject to section 5 of the Status of Children Act.

According to section 5 of this Act:

> for the purpose of the administration or distribution of the estate of any deceased person or any other property held upon trust—
>
> a person born out of wedlock shall be presumed not to have been survived by his father or any other paternal relative unless the contrary is shown.

Evidence that a person who has survived an intestate was his or her father need be no more than that person's name appearing on the child's birth certificate.[4]

This clearly cannot be the intention of this enlightened piece of legislation. Indeed one presumes the intention was to enact the Trinidad and Tobago Succession Act No.27 of 1981 concurrently with the Status of Children Act. Had it been enacted, the Succession Act would have dealt with this apparent lacuna in the law as its section 88(1)(c) provides, *inter alia*, that: "If an intestate leaves no spouse and no issue but both parents then the estate of the intestate shall be held in trust for the father and mother in equal shares", subject of course to section 5 of the Status of Children Act.

By way of comparison, Barbados also has in force status of children legislation,[5] which also expressly repealed its legitimation ordinance. However, Barbados's Succession Act Cap. 249 makes provision for both the mother and father of an intestate child who is born out of wedlock to share equally in that child's estate. Section 50 provides:

> If an intestate dies leaving neither spouse nor issue his estate shall be distributed between his mother and father in equal shares if both survived the intestate but if only one of them survived the intestate, the survivor shall take the whole estate.

St Vincent also has status of children legislation.[6] However, section 62(d) of St Vincent's Administration of Estate Act Cap. 277 provides: "Where a child born out of wedlock dies intestate, each of the parents if surviving shall be entitled to take any interest therein to which that parent would have been entitled if that child had been born legitimate." Thus according to the above section both mother and father would be entitled to equal shares subject to the provision of section 61 "that the father is presumed not to have survived the child born out of wedlock unless the contrary is shown".

C. Mother of an Intestate Child Born in Wedlock

Unfortunately, the mother of a child born in wedlock is not spared the negative impact of Trinidad and Tobago's archaic succession laws. This is so because the

4. See the Report of the Committee on the Law of Succession in relation to illegitimate persons (1966, UK), in which the identical provision and its effect and meaning were considered and discussed and where it was decided that proof of paternity would be satisfied, *inter alia*, by voluntary recognition or acknowledgement by the father, e.g. by formal signature on the register of birth or some other document.

5. The Status of Children Reform Act Cap.212.

6. The Status of Children Act Cap.180.

rules governing distribution of the estate of a legitimate child who has died unmarried and childless are also governed by the Statute of Distribution 1670. (Indeed, until the Status of Children Act was passed, the Statute of Distribution was applicable only to a child born in wedlock.) As a consequence, the father of an intestate child born in wedlock is also entitled to his intestate child's estate to the exclusion of the mother.

The yet to be proclaimed Succession Act 1981 remedies this situation as the aforementioned section 88(1)(c) applies to intestate children whether born in or out of wedlock. Thus in accordance with section 88(1)(c), if an intestate legitimate child dies without spouse or child surviving him, both the mother and father would be entitled to that intestate child's estate in equal shares.

Clearly these situations are equally distressing. In the case of the mother of an intestate child born out of wedlock, the stark reality in Trinidad and Tobago—as is true for many other Caribbean territories—is that many of these children are the products of common-law unions where the mothers are often forced to assume complete responsibility for their offspring yet at the same time can by law be completely disinherited in favour of the father should the child die intestate without spouse or issue.

And for the mother of a child born of a lawful union, the situation is no better when one considers the alarming rate of divorce and the failure of fathers to maintain their legitimate children (as evidenced by the numerous maintenance applications which are made to the magistrates and the High Court). Indeed, one may consider their position to be even more disturbing since there is no presumption (as in the case of illegitimate children) that the father did not survive the intestate child unless the contrary is shown.

D. Common Law Spouse

We have examined up to this point the position of the mother of an intestate child whether that child is born in or out of wedlock. Let us now examine the position of a common law spouse. On this issue, in his landmark decision in the case of *Harrinarine* v. *Azziz, Azziz*,[7] Mr Justice Sharma had this observation to make: "In our society the common law marriage has been institutionalized. In this jurisdiction when there is a common law marriage there is little or no difference in substance between it and a lawful marriage." So what then are the rights of a common law spouse? According to the laws of Trinidad and Tobago, a common law spouse has absolutely no inheritance rights on an intestacy. To date, in Trinidad and Tobago, a common law spouse has the sole recourse of applying to the court for a beneficial interest in the property in which she and her common law spouse cohabited and which property is in the deceased spouse's name. This remedy is granted by the court only if it is satisfied that there is sufficient evidence of a common intention—an intention at the time of acquisition of the property that the applicant/surviving spouse would have a beneficial interest in that property. If the court is

7. H.C.A. No.1992 of 1982.

satisfied that there is sufficient evidence of this common intention, a resulting trust will be established in favour of the applicant.

As Justice Sharma noted, after observing that frequently the husband squanders his money while the common law wife carries the financial burdens of the home: "The common law wife has a legitimate expectation that ... she would have a beneficial interest in the property where they live." But this remedy is of unfortunately limited application because:

(1) The court's power to grant the common law spouse a beneficial interest in property is limited in general to the "matrimonial home", i.e. the property where the couple cohabited.
(2) The applicant must be able to prove to the satisfaction of the court some contribution in order to establish evidence of a common intention.

On this point Justice Sharma again observed that, although he was not called upon to decide this issue, he rejected the direct contribution test (applied in England in respect of a common law union) as being the sole indicator of this common intention.[8] He made the point that direct contribution, that is, money contributions to the purchase of the property by the surviving spouse, should not be the only indicator. He noted that the indirect contribution test applied in property settlement matters in respect of lawful marriages was equally relevant within the West Indian context to a common law union. He observed:[9]

> I am prepared to hold that, in our jurisdiction, living together in a common law relationship over an extended period of time during which the "wife", out of her earnings, looks after the children and looks after the household and other expenses constitutes prima facie evidence of a common intention that she should have a beneficial interest in the property which is usually in the name of the common law husband. This in my judgment will be a common intention inferred by reason of the unique position of the common law marriage in our society.

Again the yet to be proclaimed Succession Act makes provision for a common law spouse, within the limits of the statutory definition of spouse, to be equated with a lawful spouse for inheritance purposes. According to section 2 of this Act, reference to a "spouse" includes:

(a) a single woman who has been living together with a single man as his wife for a period of not less than five years immediately preceding the date of his death;
(b) a single man who has been living together with a single woman as her husband for a period of not less than five years immediately preceding the date of her death;

8. The direct contribution test has been relaxed somewhat in recent years in England. See *Grant* v. *Edward* [1986] 2 All E.R. 426 and *Hammond* v. *Mitchell* [1992] 2 All E.R. 109. In both cases, which concerned an unmarried couple, the applicants successfully claimed a beneficial interest in property based on the indirect contribution test. However, both cases appeared to turn on their special facts, *inter alia*, that there was evidence of express discussions that the property would be shared beneficially. On the other hand, where the only way of establishing an agreement to share the property is by inference from conduct, indirect contribution will rarely, if ever, be taken into account: see the House of Lords decision in *Lloyds Bank* v. *Rosset* [1991] 1 A.C. 107. See also the Guyanese case of *Abdool Hack* v. *Rahieman* (1976) 27 W.I.R. 109 where it was held, *inter alia*, that the common law spouse/applicant's indirect contribution by way of undertaking substantial housekeeping expenses was sufficient evidence of a common intention.

9. See also on this point *Abdool Hack*, *ibid.*

> and for these purposes a reference to a single woman or a single man includes a reference to a widow or widower or to a woman or man who is divorced.

Thus any person who answers the description of spouse within the above statutory definition, which can include a common law spouse, would be entitled to share in the estate of the intestate spouse as if that person were a lawful spouse.

E. Child of the Family

A member of the family circle of the deceased who is not a natural or adopted child of the deceased is a "child of the family".

It is ironic that although a child of the family is recognised under Trinidad divorce laws[10] as a statutory dependant and thus entitled to be maintained in the event of a divorce or judicial separation, such a child (as is the case with the common law spouse) has no rights of inheritance on an intestacy.

F. Family Provision

In Trinidad and Tobago, by virtue of the family provisions contained in the Wills and Probate Ordinance Ch. 8 No.2 as repealed and replaced by Act No.2 of 1972, Second Schedule, qualifying members of a deceased's family (whether the deceased has died testate or intestate) are entitled to apply to the court for reasonable provision out of the deceased's estate. This in effect gives the court the power in the case of intestacy to vary the statutory rules of distribution and, in the case of testacy, virtually to rewrite the testator's will and thus redistribute the deceased's estate in a manner which in its opinion is more in accord with equity and good conscience.

Guyana provides an excellent example of the scope and effect of family provision legislation. Like those of Trinidad and Tobago, the laws of Guyana do not recognise a common law spouse's right to inherit on an intestacy. However, the Family and Dependant Provisions Act 1990, which was recently passed in Guyana (and which is in fact based on the English Inheritance (Provision for Family and Dependants) Act 1975) entitles a common law spouse to apply to the court for reasonable provision out of the estate of the deceased whether that common law spouse died testate or intestate. Indeed, in Guyana the class of statutory dependants includes a child of the deceased whether born in or out of wedlock, a child of the family or any person *being immediately before the death of the deceased maintained either wholly or partly by him.*

Further, because in Guyana the statutory definition of spouse in the Family and Dependant Provisions Act includes a common law spouse (within the defined statutory limits), a common law spouse is equated with and treated as a lawful spouse for the purposes of this Act. The significance of this is that, like in England where there is now a statutory recognition of the common law spouse,[11] a common law spouse in Guyana, as is the case for a lawful spouse, is entitled to provision out of the deceased's estate, and the extent of entitlement is not limited to mainten-

10. Matrimonial Proceedings and Property Act Ch.45:51, s.2(3), (6).

11. See Clause 2 of the Law Reform (Succession) Act 1995 which has added common law spouses to the category of possible applicant under the Inheritance (Provision for Family and Dependants) Act 1975.

ance provisions. This provision is perhaps based on the legislative recognition of "the unique position of the common law marriage in our society".[12]

Unfortunately, the family provisions contained in the Wills and Probate Ordinance Ch. 8 No.2 are not as wide and generous in their scope as those in Guyana.[13] This is because the class of statutory dependants in Trinidad and Tobago is limited to:

(1) an unmarried daughter;
(2) a son under the age of 21;[14]
(3) a wife or husband;
(4) a disabled child who by reason of some physical or mental disability is incapable of maintaining himself or herself, until the cesser of that disability;
(5) a former spouse who has not remarried.[15]

However, by virtue of section 95 of the yet to be proclaimed Succession Act, a mother, a common law spouse, a child of the family and indeed any person being immediately before the death of the deceased maintained either wholly or partly by him are entitled to apply to the court for reasonable provision out of the estate of the deceased.

G. Anti-Avoidance Legislation

In giving effect to the family provision legislation, the court has been empowered to make various orders in favour of the applicant out of the net estate of the deceased. These orders include a periodical payment order and a lump sum order in a specified amount.

However, the efficacy of these orders is to a large extent rendered impotent by the ease with which the present family provision rules can be defeated. By simply disposing of his property during his lifetime and at the same time retaining a life interest in that property a person can effectively defeat any court order for reasonable provision made after his death. As a result, anti-avoidance provisions were enacted in England[16] and Guyana.[17] These provisions entitle the court to review the deceased's lifetime dealings with his property which were intended to defeat an application for reasonable provision and empower the court, *inter alia*, to order a donee of property disposed of with such intention to transfer that property to the applicant or to provide such sums in lieu thereof as the court deems fit.

Further, the property subject to such an order has been extended in England and Guyana to include property held on a joint tenancy or joint account, and statutory nominations, e.g. credit union shares.

In Trinidad and Tobago anti-avoidance provisions apply to only one qualifying member—a former spouse who has not remarried.[18] Once again, the yet to be

12. *Supra* n.7 (*per* Sharma J). See also *Abdool Hack*, *supra* n.8.
13. See Act No.2 of 1972, Sch.2, which repealed and replaced Part III, Family Provision, of Wills and Probate Ordinance Ch.8 No.2.
14. Age of Majority Act Ch.46:06, s.4.
15. Matrimonial Proceedings and Property Act Ch.45:51, s.42.
16. Ss.10–13, Inheritance (Provision for Family and Dependants) Act 1975.
17. S.12, Family and Dependant Provision Act 1990.
18. See Matrimonial Proceedings and Property Act Ch.45:51, s.44.

proclaimed Succession Act[19] deals with this lacuna in the law as it contains similar anti-avoidance provisions to those found in England's and Guyana's family provision legislation.

H. Rules of Distribution

Although a lawful spouse is entitled by law to share in his or her spouse's estate in the event of an intestacy, the present rules of distribution, particularly when considered in the light of the Status of Children Act, put that spouse in a decidedly disadvantageous position.

According to section 24 of the Administration of Estates Ordinance Ch. 8 No.1, the lawful widow/widower of an intestate is entitled to only one third of the intestate's estate in the event that there is or are lawful issue of the deceased. By way of illustration, this can mean that if a couple have been married for a number of years, and the husband dies and there is only one child, that child is entitled to two-thirds of the father's estate and the mother to only one third. The situation may be even more distressing from the surviving spouse's point of view if the child is not the child of the surviving spouse but the child of the deceased, whether or not from a common law, extra-marital or lawful union.

The Succession Act again addresses this imbalance in the distribution rules (similar to Barbados, St Vincent and other territories) and provides, *inter alia*, that the surviving spouse is entitled to half the estate if there is only one child (the other half going to the child); if there is more than one child the surviving spouse is entitled to a third and the children to two-thirds in equal shares.[20]

It is painfully apparent from the illustrations above that the statutory rules of distribution in respect of intestate succession in Trinidad and Tobago are not in accord with the realities of today's society, to say the least, and the situation becomes even more critical when one considers how comparatively easy it is to die intestate in Trinidad and Tobago—more so than in other Caribbean territories.

In this regard it must be pointed out that a person can die intestate not only where he has failed to make a will but also, *inter alia*, when the will he has made is invalid.

I. Invalid Will

A will can be invalid because the formalities necessary for its due execution have not been complied with. Trinidad and Tobago, unlike the other Caribbean territories, still have in force the equivalent of section 9 of the Wills Act 1837 (England), which requires rigid compliance with the formalities in so far as the execution of a will is concerned. In particular, section 42 of the Wills and Probate Ordinance Ch. 8 No.2 requires that the signature of the testator must be at the foot or end of the will—otherwise the entire will, regardless of the testator's intention, is deemed invalid and of no effect. In England, because of the hardship caused by this provision, particularly in the case of home-made wills, in 1852 the requirement as to the placement of the testator's signature was relaxed considerably with the passage of an amending Act.

19. S.104 of the Succession Act No.27/1981. But see also ss.94–116.
20. See *idem*, s.88.

This Act—the Wills Act Amendment Act 1852—was eventually enacted in the Caribbean territories except Trinidad and Tobago. It provides, *inter alia*, that anything appearing above the testator's signature would be given effect to and admitted to probate provided it was in keeping with the testator's intention. The equivalent of the 1852 amendment is to be found in section 5 of the Succession Act. Indeed, since then, there has been a further amendment to this provision in England,[21] in which the emphasis is placed on intention rather than on the physical placement of the testator's signature. (It is noteworthy of mention that the equivalent of this provision has also been enacted in St Vincent.[22])

J. Conclusion

The law of succession is one branch of the law which touches and concerns us all, irrespective of our socio-economic background. In this regard it is suggested that the illustrations above provide cogent evidence that the time has long passed for making the Succession Act No.27 of 1981 part of the laws of Trinidad and Tobago, if only to address and, in some measure, alleviate the social and indeed individual injustices which the present inheritance laws continue to facilitate.

KAREN TESHEIRA*

THE POLISH OMBUDSMAN AND THE TRANSITION TO DEMOCRACY

A. Introduction

A great deal has happened since the first Polish Commissioner for Citizens' Rights Protection discussed the role of her office in this journal in January 1990.[1] At that time, the communist regime had given place to Eastern Europe's first non-communist government, led by Tadeusz Mazowiecki, after the elections of June 1989. Following the Polish United Workers' Party's defeat then, communism collapsed throughout Eastern Europe. Poland itself has since moved somewhat shakily towards a pluralist democratic regime, with a directly elected president and two chambers of Parliament in which multi-party systems now operate. However, despite some suggestions that the institutions created during the communist period should be swept away after communism fell, several of them have made the transition to the new liberal-democratic State. These institutions include three that were created by the Jaruszelski regime during the 1980s in order to try to win

21. Administration of Justice Act 1982, s.17.
22. Wills Act Cap.384, s.12.

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1. Ewa Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)" (1990) 39 I.C.L.Q. 206–217.