

ESSEX COURT CHAMBERS
BARRISTERS

‘BREAKING UP IS HARD TO DO’

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LONDON

PART 1:

- **Repudiation, rescission and affirmation – unfinished business & current issues**

PART 2:

- **Charter party / bills of lading incorporation of arbitration & jurisdiction clauses – a work in progress**

REPUDIATION, RESCISSION AND AFFIRMATION

- **Commercially uncertain process**
- **Fast moving - limited information – extensive disinformation from counterparties – sudden death, no second chances**
- **Fluctuating commercial motives of parties**
- **Actual breach**
- **Anticipatory breach: - reading the mind of counter party**
- **Procedural trip wires & unmeritorious outcomes**

LAW IS A WORK IN (SLOW) PROGRESS

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- **Law creates more chances for fatal errors, than guidelines for legal certainty**
 - **Necessary certainty is lacking in key areas.**
 - **Particular problem areas which still not clear:**
 - (1) non-payment of money**
 - (2) passive renunciation/anticipatory breach**
 - (3) affirmation – temporary or permanent**

Sports Connection Private Limited v Deuter Sports GmbH - [2009] SGCA 22 (1 June 2009)

- Sets out the basic principles of Singaporean Law on rescission.
- UK law is similar
- But many loose ends remain

THINGS FALL APART.... HOW TO NAVIGATE, AND WHEN TO ABANDON SHIP'

Matters currently in judicial debate

- When is non-payment repudiatory?
- How to read a silent defaulter's 'signals'?
- How can one press for/on with performance without affirming irrevocably?
- How to spot continuing breaches?

Uncertainty on the above can be an advantage as well as a problem

Current debate in the English Commercial Court re: whether the payment of hire under a charterparty is a condition of the contract or an innominate term (9, ftnt 1).

- *Kuwait Rocks Co v AMN Bulkcarriers Inc (The Astra)* [2013] at [109] **per Flaux J held that the obligation was a condition.**
- In *Spar Shipping AS v Grand Chine Logistics Holding (Group) Co Ltd* [2015] [95] to [207], **Popplewell J disagreed with Flaux J and held that it was an innominate term (*Brimnes* applied).**

THE TWO VIEWPOINTS

ENE 1 Kos Ltd v Petroleo Brasileiro

‘[37] The point is not straightforward: as Rix LJ said in [Stocznia Gdanska SA v Latvian Shipping Co \[2002\] 2 Lloyd's Rep 436](#) at para 80, there must be a good argument that ‘the express right to withdraw in the case of unpunctual payment under such a clause is a breach of a condition of the contract, breach of which is in itself repudiatory’. However, the general view is, I think, that a failure to pay hire when it is due is a breach of an intermediate term, and not necessarily repudiatory and does not in itself entitle the owner to claim damages for loss resulting from the termination of the charterparty’

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- Does a right to cancel/withdraw suggest that the triggering breach was ‘repudiatory’ (bringing loss of bargain damages)

Or

- Does it suggest the opposite (and no loss of bargain damages)?
- The UK Court of Appeal will decide in 2016

HOW TO READ THE 'SIGNALS'

WHITE ROSEBAY AT [38]

Eg: uncertainty from case to case as to what constitutes a repudiation/renunciation:

- ***“Evidence which one tribunal may judge to be ‘clear evidence’ that the innocent party has chosen to go on with the contract notwithstanding the other party’s renunciation of the contract may be judged by another tribunal not to be such ‘clear evidence’.*** [Teare J.] See *The Chrysalis* per Mustill J.

Eg: uncertainty as to what constitutes waiver or affirmation:

‘Similarly, conduct which one tribunal may consider to be an unequivocal act capable of one construction only, namely, that the innocent party has chosen to waive its right to terminate the contract may be regarded by another tribunal as an equivocal act, capable of more than one construction.’ [Teare J.]

See *The Chrysalis* per Mustill J.

Affirmation and continuing breaches - 'meditation' of Rix LJ

- ***'Two views might therefore be taken as to the effect of an affirmation of an anticipatory breach. One is that it is a waiver for the future as well The other is that the affirmation prima facie relates only to the past, leaving open the question of a continuing or renewed anticipatory breach.....I wonder whether each case does not in truth have to be decided on its own facts. I express these thoughts...but it is not necessary to decide the issue and I refrain from doing so.'*** [Rix LJ]

Eg the tricky question of the ‘sound of silence’:

*‘The silence was not mere silence, it was overlaid by all that had gone before it. **It was a speaking silence.** The difficulty with silence is that it is normally equivocal. Where however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of this silence.’ Rix LJ*

So, same set of facts can lead to a range of different outcomes: eg

- **Silence may (or may not) ‘speak’**
- **Affirmation may (or may not) be final**
- **Breaches may (or may not) be continuing**

How do these uncertainties fit into the busy checklists of ‘innocent’ and ‘guilty’ parties as they struggle with each other on the precipice of termination?

MAKING SENSE OF THINGS: THE PLAYERS – 4 POSSIBLE ROLES

- **the paying party (customer)** the charterer / the buyer under a shipbuilding contract;
- **the performing party** - the owner/disponent owner performing the charterparty / the yard
- **the “innocent” party** - who has been wronged by a repudiatory or renunciatory/anticipatory breach by other party;
- **the “guilty” party** – the wrongdoer who repudiated/renounced the contract.

AN 'EASY' EXAMPLE: THE FACTS,
AND THE CLIENT'S WISHES ARE
CLEAR CUT

- **Client's instructions** : *'..had enough, frankly we don't need the ship/these builders/charterers/owners any more, they are so irritating to deal with, market has moved, my broker has found some new people who.....'* etc. etc.

(Client can be either payer or performer.)

EXAMPLE 1: AN 'EASY' CASE

Definition:

- A 'clear case' is where the breach is actual, repudiatory, undeniable, provable, not subject to a 'prevention' defence, not subject to limitation, nor exclusion, nor *force majeure*, and is either of a clear condition or sufficiently grave of an innominate term. **BUT**
- Even where clear case of repudiatory breach 'on the table': pitfalls abound

BASIC CHECK LIST FOR 'INNOCENTS' WHERE CLEAR REPUDIATORY BREACH

- Speak up, but ensure down tools – *White Rosebay*
- Termination notice: clarity, simplicity, less is more – good to keep options open – unless 'reasons' requirement in termination clause.
- Generous latitude to innocents re: stated reasons (*Stocznia*), no form (*Vitol*), motives irrelevant (*Lomas*), no duty to mitigate (?) (*White & Carter* point left open in *Stocznia Gdanska* (HL)) or to accept a cure (*Bournemouth*)

BASIC CHECK LIST FOR 'INNOCENTS' WHERE CLEAR REPUDIATORY BREACH (2)

- Check for prior affirmation (in past pressed for action or made time of essence)? Has that 'expired'?
- Get sequence right: first at common law, then use termination clause – *Stocznia Gdanska/ Gdynia v Shell v Dana Gas* – to avoid technical affirmation.

BASIC CHECK LIST FOR 'INNOCENTS' WHERE CLEAR REPUDIATORY BREACH (3)

- Whether to risk affirmation by awaiting next performance/ payment milestone by 'guilty'?
- 'ladder' = damages into debt;
- 'snake' = affirmation: see failed keel laying gambit in *Stocznia Gdanska* HL pp 598,602

BASIC CHECK LIST FOR 'INNOCENTS' WHERE CLEAR REPUDIATORY BREACH (4)

- NB: no 'third choice' to suspend performance: to affirm or not rescind beyond a reasonable time: is to have to perform: *Ferrometal* – if not done, there is a cross-rescission risk.
- So, to perform is to affirm - *White Rosebay* - at least where breach is actual (but perhaps not with renunciatory breach— see below)
- Can perhaps try to perform under reserve/ use *quantum meruit* as a narrative – but very doubtful.

BASIC CHECK LIST FOR 'INNOCENTS' WHERE CLEAR REPUDIATORY BREACH (5)

- Plan B – if gone too early, back up rescissions?
- Multiple contracts – multiple rescissions/affirmation risks
- (Paying parties only) – think (very briefly) as to whether one can get prior payments back for total failure of consideration (*Hyundai v Papadopoulos & Stocznia Gdanska* cf *Dies v BIMFC*).

EXAMPLE 2: CLIENT 'PESSIMISTIC BUT HOPEFUL' AND A REAL LIFE CASE: LIKELY FACTORS IN PLAY

- The extent of the breach is not entirely clear.
- Innominate term is involved – maybe (performance/payment, conflict between *Astra* and *Spar*)
- A contract-type which the Courts have held that decision-time period for the innocent party is short (eg C/P: *Northern Pioneer* (19))
- Contract could still be a good one, if performed soon.

A NOT-SO-EASY CASE: IE REAL LIFE (2): LIKELY FACTORS IN PLAY (CONT.)

- Other side's bad track record of prior (but waived) breaches
- No further performance/payments due for a while
- Messages not being answered. Negative market rumours.
- Performance/payment due shortly from 'innocent' side.

See earlier check list plus assessing the nature of the breach.

Specific challenges to consider:

I Pressing for performance without affirming

II Exploiting ‘continuing’ breaches

III Reading ‘the silence’ in context to see if there has been a repudiation

I HOW TO PRESS
FOR PERFORMANCE
WITHOUT AFFIRMING
(OR AFFIRMING
PERMANENTLY

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- A ticklish letter-drafting challenge.
 - No affirmation without full knowledge, so ‘innocent’ must manage language used to describe state of mind carefully/narrowly.
 - WP and rights reservations, of course.
 - Much easier task in face of continuing repudiatory breaches – but how does one identify those?

II THE CONTINUING BREACH PROBLEM

Telling a completed breach from a continuing one:

- Eg are Yard's quality breaches continuing or completed or repeated if not fixed per NCRs?
- Are all renunciatory/anticipatory breaches continuing or repeated or once for all? *Stocznia* (HL) p 594, *Stocznia* (CA)
- Cf *Safehaven* – no principles developed
- Cf *White Rosebay* – no principles developed

III FINAL FRONTIER: ‘SOUND OF SILENCE’

- Does silence speak louder than inaction?
- See the arbitrators’ decision, repeated in *Primera Maritime*, in which they stated “***[i]t would be a strong thing to hold that a fresh anticipatory breach of contract was committed by silence. No doubt, this can be done. In some cases, in the context of the dealings between the parties, the silence may be taken as an unequivocal re-iteration of a previous express renunciation.***”

See *Stozcnia Gdanska* (40)[96]

- ***‘Where however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally.’***

See *White Rosebay*:

- ***[51] ‘The answer to that question is clearly a matter of fact for the tribunal. If the charterers were silent after the owners' affirmation of the charterparty, it is for the tribunal to decide whether such silence was a “speaking silence”.’***

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- How to interpret the silence of ‘guilty’ party?
 - Does it reveal an intention not to perform? Is it equivocal?
 - Is there (i) any renunciation, (ii) a once-for-all renunciation, or a (iii) continuing/repeated renunciation?
 - No principles yet developed: just random cases

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- All of the above uncertainties can be deployed and exploited when advising allegedly 'guilty' parties
 - eg orchestrating communications and/or lack of communications, and generally diluting the message of breach, or using silence to create an equivocal situation (to buy time or set a trap for affirmation, or too-early rescission)

Accordingly, there is an important need for robust clarification in respect of the limits of:

- Repudiation (inc. non-payment)
- Affirmation, in particular in the face of renunciatory breaches which may or may not be continuing / repeated
- Analysing renunciatory breach situations where there is significant silence/inaction

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- The uncertainty gives both sides plenty of room for manoeuvre in border line cases.

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- *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436 at [87] [96] (“**Stocznia Gdanska**”)
 - *Trade and Transport Inc v Ino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210 at p.219 *per* Kerr J.
 - *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at p. 436
 - *Kuwait Rocks Co v AMN Bulkcarriers Inc* [2013] 2 All ER 689 at [109].
 - *Spar Shipping AS v Grand Chine Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm) at [95] to [207]
 - *ENE 1 Kos Ltd v Petroleo Brasileiro (The Kos)* [2012] 1 AC 164

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- *Force India Formula One Team Ltd v Etihad Airways PJSC and Aldar Properties PJSC* [2010] EWCA Civ 1051 [112-3]
 - *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391
 - *Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at p. 396
 - *Fercometal v Mediterranean Shipping Co SA* [1989] AC 788 at 801
 - *Yukong Line Ltd of Korea v Rendsburg Investments Corp* [1996] 2 Lloyd's Rep 604

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- *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 at p810-811
 - *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at p. 526-527
 - *CMA CGM SA v Beteiligungs-KG MS “Northern Pioneer” Schiffahrtsgesellschaft mbH & Co and others* [2003] 1 WLR 1015
 - *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm) [], [21-22]
 - *Shell Egypt West Manzala GMBH v Dana Gas Egypt Limited* [2010] ECH 465 at [31(ii)] *per* Tomlinson J; cf *Stocznia Gdanska* at [88].

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- *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2010] QB 27 at [44-6]
 - *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm).
 - *Bournemouth University Higher Education Corpn v Buckland* [2011] QB 323 at [36] to [43] *per* Sedley LJ.
 - *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC Civ 63 at [131] *per* Clarke J.
 - *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (HL) at pp. 946-947

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- *Howard v Pickford Tool Co. Ltd* [1951] 1 KB 417 at p. 421 *per* Asquith LJ.
 - *Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066 (Comm)
 - *Safehaven v Springbok* [1996] 71 P&CR 59 at p. 68
 - *Johnson v Agnew* [1980] AC 367
 - *Galafassi v Kelly* [2014] NSWCA 190 at [83]-[83]
 - *The Chrysalis* [1983] 1 WLR 1469 at p.1475,

Part 2

CHARTER PARTY / BILLS OF LADING INCORPORATION OF ARBITRATION & JURISDICTION CLAUSES

SPECIFIC ISSUES AS TO BILL OF LADING DISPUTES

THE CHALLENGE:

- The cargo is ruined or half missing or both.
- Where and how to sue?

BILLS OF LADING - MIRACULOUS MULTI-FUNCTIONALITY

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Bills of Lading [B/Ls] are many things to many parties:

- Receipts for the goods
- Documents of title
- Contracts of Carriage, and
- (above all) *assignable*.
- They have arbitration clauses in them.
- Complexity no 1: what is an '*assignable*' *arbitration clause*?

BILLS OF LADING – ARBITRATION & JURISDICTION CLAUSES

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- **Assignability is not the only challenge**
 - **B/Ls sit within a crowded landscape of other contracts –**
 - **Head charters, sub-charters, [C/Ps] etc., plus other B/Ls**
 - **B/L arbitration clauses attempt to mirror (incorporate) C/P arbitration clauses**
 - **= Complexity no 2**

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- Arbitration requires consent - meeting of minds
 - But how can minds meet if parties down the C/P, B/L chain don't negotiate or even meet?

HOW THE LAW COPESES WITH CONSENT

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- **For 100 years a high hurdle is placed in the way of incorporation of Arbitration Clauses into B/Ls**
 - **Because they are not ‘germane’ to the contract of carriage?**
 - **Special judicial field of incorporation of C/P dispute resolution clauses in B/Ls**
 - **Arbitration**
 - **Exclusive jurisdiction**
 - **Putative proper law is allowed – if none is obvious**

THE PROBLEM – CROWD CONTROL: UNAVOIDABLE CONFLICTS OF INTEREST

- **Owners, disponent owners, sub-charterers, insurers etc. -**
- **Owners (etc.) want single venue chosen in the C/P (eg arbitration at *X* or Commercial Court at *Y*)**
- **B/L holders, assignees, consignees, possessors, insurers ('Cargo')-**
- **Cargo wants disport AND often Courts**

THE PROBLEM AGGRAVATED – SLACK DRAFTING: (AVOIDABLE ASPECTS)

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- **Failure to identify which C/P is meant**
 - **Ambiguous incorporation language (cases)**
 - **Well known front of B/L, but nothing on the back**
 - **Saying ‘arbitration’ when meaning ‘Court’**
 - **Etc.**
 - **Someone is trying to incorporate something, somehow....but what?**

JUDGES' SOLUTION – CONFLICTING CONSIDERATIONS

- **Developing techniques to maintain stability in the C/P and B/L chains**
- **New approach of 'manipulation' and flexibility favours Owners over Cargo, since it makes incorporation of dispute resolution clauses from C/Ps much easier – but it is very subtle, and merits careful understanding.....**

ANALYSING CONSENT – OLD SCHOOL - ‘HANDS OFF’

- From *Thomas v Portsea* (1912) to *Merak* (1964)
- C/P arbitration/jurisdiction clauses are not mainstream (*‘germane’*) enough to be incorporated by general words in the B/L – eg the word ‘terms’ will not be sufficient
- Even obvious errors (eg wrong cl. number) wont be corrected
- Analysis can only start from the B/L and read backwards up th chain (but *Cf : Merak*)

OLD SCHOOL – FROM 1970’S SLIGHT CRACKS

- *Annefield* (1970), ‘manipulation’ emerges
- *Rena K* (1978) – C/P arbitration clause incorporated, with ‘manipulation’
- *Varenna* (1983), still very old school, but ‘surplus’ or ‘inconsistent’ provisions can be ‘ignored’
- *Miramar* (1984), last gasp of old school
- - followed in *Nai Matteni* (1987)

MIDDLE SCHOOL GLOVES OFF, HANDS ON

- What is the ‘intention’ of the parties to be taken to have been?
- *Oinoussin Pride* (1990) & *Nerano* (1995): manipulate & adapt – even by writing in words (eg adding ‘shippers or receivers’ to ‘owners & charterers’)
- New trend: try to make it work, to give effect to the expressed intention of the parties

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- ***Federal Bulker* (1988)** - while 'terms' is too weak to incorporate C/P arbitration clause '*clauses*' is good enough (cf *Merak*) (!)

BUT

- C/P terms as to intended terms of B/L irrelevant (*Siboti* (2003)) – wrong direction of analysis

NEW SCHOOL – LEANS MORE TOWARDS INCORPORATION

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- ***Kallang No 2 (2008)***: starts as a text-book incorporation – ‘*all terms & conditions ... of C/P dated X incorporated, including the Law and Arbitration clauses*’ BUT 2 C/P on same date
 - Court makes the choice of which C/P.
 - ***YM Mars Tankers (2012)***: ‘*law and arbitration*’ clause (up to \$50k), Ct. holds that implies litigation in Court beyond \$50k. (B/L holder was on notice of some kind of Dispute Resolution clause...)

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- *Lucky Lady* (2013) – B/L incorporates ‘*all conditions, liberties and exceptions whatsoever*’ of the sub/C/P – still not good enough for Arb. Clause. Unlucky.
 - *Caresse Navigation* (2014-5) – ‘*All terms, and conditions, liberties and exceptions of the C/P dated as overleaf, including law and arbitration clause are .. incorporated.*’ but....

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-no arbitration clause existed, just an English law and exclusive Commercial Court jurisdiction clause.
 - In *Merak*-world, it would have failed.
 - But it worked, and a much looser approach was inaugurated.
 - **‘Settled constructions’** to be respected, but not at the cost of **‘unhealthy’ ‘fine distinctions’** with nothing to do with intentions of parties

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- Court leaves open question of looking from C/P towards the B/L
 - *Merak* said to be ‘unusual’ ‘very old-fashioned and outdated approach to interpretation’

(Sellers LJ’s dissent in *Merak* was the modern approach - just many years ahead of its time)

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- *Golden Endurance* (2015) – law & arbitration clause incorporated, notwithstanding ‘a muddle’ whereby, one Congenbill edition referred to on front, another on back of B/L.
 - No signed C/P, just recaps, with missing details
 - Actual terms on B/L preferred to referred terms
 - Sufficient critical mass in recap for a C/P to exist, and English to possibly apply

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- What about time bar clauses?
 - Are these 'germane', and in need of special language to incorporate from C/P to B/Ls ?

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- Tide gently flowing towards Owners
 - Tidier world in one sense
 - But there are limits
 - And Cargo will keep fighting
 - Drafting errors will never stop
 - Nor will the cases

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- *Thomas v Portsea* [1912] AC 1
 - *The Merak* [1965] P 223
 - *The Annfield* [1971] P 168
 - *Rena K* [1979] QB 377
 - *The Varenna* [1984] QB 599
 - *Miramar* [1984] AC 676
 - *Oinoussin Pride* [1991] 1 LI R 126

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- *Nerano* [1996] 1 LI R 1
 - *Federal Bulker* [1989] 1 LIR 103
 - *Siboti* [2003] LIR 264
 - *Kallang No 2* [2009] 1 LIR 124
 - *YM Mars Tankers* [2012] EWHC 2652
 - *Lucky Lady* [2013] 2 LIR 104
 - *Caresse Navigation* [2015] 1 LI R 256

- *Golden Endurance* [2015] 1 LI R 266