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CHAPTER 6

Commercial Law

ALFRED I. MALESON

§6.1. **Consumer protection: Unfair Sales Act.** The Unfair Sales Act, a part of the Massachusetts General Laws since 1938, prohibits retail advertisements or sales of individual items at less than cost if the purpose is to injure competitors or destroy competition.[1] Provision is made, however, for exemption from this prohibition if any of a number of exceptional circumstances should exist. Among these is the permission to cut the price below cost "in good faith to meet competition."[2] The legislature has this SURVEY year made it clear that this exception permits price cutting only to meet *lawful* competition.[3] Price cutting to below cost in order to meet the price set by a competitor's *unlawful* "loss leader" is not permissible.

The constitutionality of this type of restriction has already been considered by the United States Supreme Court. In upholding a similar statute of Oklahoma, the Court refused to permit a chain store to cut prices below cost to meet unlawful competition, saying: "There is no constitutional right to employ retaliation against action outlawed by a State. . . . [The defendant] had no constitutional right to embark on the very kind of destructive price war the Act was designed to prevent."[4]

In the event that a merchant should discover that a competitor has cut his price to a figure below his cost, the proper procedure is not a price war but an injunction. The Massachusetts courts have indeed already demonstrated their willingness to grant such injunctive relief,[5] and the complaining merchant may have the assistance of a district attorney in his efforts.[6]

§6.2. **Consumer protection: Cancellation by buyer.** The defendant in *Security Safety Corp. v. Kuznicki*[1] had contracted with the plaintiff for the installation of a fire detection system, agreeing in the written contract to liquidated damages of 33⅓ per cent of the contract price

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§6.1. [1] G.L., c. 93, §§14E-14K.
[2] Id. §14G(h).
[3] Acts of 1966, c. 232, amending G.L., c. 93, §14G(h).
[4] Safeway Stores, Inc. v. Oklahoma Retail Grocers Association, 360 U.S. 334, 336-337, 79 Sup. Ct. 1196, 1199, 3 L. Ed. 2d 1280, 1283 (1959).
[5] See Fournier v. Troianello, 332 Mass. 636, 127 N.E.2d 167 (1955).
[6] G.L., c. 93, §14H.

§6.2. [1] 350 Mass. 157, 213 N.E.2d 866 (1966).

in the event of cancellation. The defendant then cancelled the contract on the morning after he had signed it, before the plaintiff had had any opportunity to begin performance. The Supreme Judicial Court held that, as there had been no opportunity for the plaintiff to incur much expense, the liquidated damages were unreasonable and would not be awarded. As there was no evidence of actual damages, damages were assessed at $1.00.

Since this case did not involve a "sale of goods," but rather a contract for work and labor, the Uniform Commercial Code was not involved. Had the Code been apposite, the Court would have found ample support for its position, since the Code provides: "A term fixing unreasonably large liquidated damages is void as a penalty."[2] Yet, whether the amount of 33⅓ per cent is so unreasonably large would seem to be a question that could have been decided rather easily if the plaintiff had introduced any evidence, despite the lack of opportunity to incur expenses.

The measure of a seller's damages could have been the profit which the seller would have made from full performance[3] plus the commissions for which it became obligated to its salesman.[4] Such profits and commissions are generally believed to be substantial in this type of transaction. The lesson to be learned is not that a seller cannot get damages if a contract is cancelled quickly, but rather that he must introduce evidence of his expected profits. He may not rely on a liquidated damage clause.

If a social policy protecting unwary consumers requires a greater freedom for consumers to cancel orders promptly without liability for damages, such a policy needs legislative — not judicial — promulgation. The newly enacted Retail Installment Sales Act[5] does give lip-service to such a policy, by providing as follows:

> A. A buyer shall have the right to cancel . . . for other than the seller's breach: . . .
>
> (2) When, there not having been receipt or tender of a substantial part of the goods, services, or goods and services which the seller is required to furnish under a retail installment sale agreement, signed by the seller, which has been consummated by a party thereto at a place other than the address of the seller, which may be his main office or branch thereof, the buyer, not later than five o'clock postmeridian on the next business day, notifies the seller that he is cancelling, and such cancellation shall be effective thereupon.
>
> B. Notice of cancellation under this section shall be given to the seller at the place of business of the seller as set forth in

[2] G.L., c. 106, §2-718(1).

[3] Id. §2-708(2).

[4] Id. §2-710.

[5] Acts of 1966, c. 284. This extremely important legislation is discussed in detail in Chapter 7 of this SURVEY.

> the agreement by certified mail, return receipt requested, which shall be posted not later than five o'clock postmeridian on the next business day following execution of the agreement.[6]

The fulsome language of this meretricious section is quoted extensively so that the enormity of its form of expression as well as of its devious purpose may be realized. Happily, it is not representative of the general style of expression or purpose of the balance of the act.

§6.3. **Consumer protection: Small loans.** The distinction between the service charge added to a time payment sale, which is not regulated, and interest on the loan of money, which is, requires a rather unsatisfying analysis of situations which combine elements of sales and loans. During the 1965 SURVEY year, the Supreme Judicial Court had held that the general financing of sales by the issuer of a credit card was not equivalent to engaging in the business of making loans.[1] This 1966 SURVEY year, the definition of a time sale was stretched even thinner in order to exempt a finance company from the licensing requirement of the Small Loan Act.[2]

Commonwealth v. Security Acceptance Corp.[3] involved a dealer and a finance company in a transaction which started as a pure sale, but which acquired serious loan overtones. In order to induce a buyer to purchase composition siding for $1900, the dealer agreed to advance $700 to the buyer to enable the buyer to liquidate other indebtedness. The dealer then took a single installment note for the total and subsequently sold this note to the finance company. The interest rate, as found by the Court, was 14.5 per cent. The Small Loans Act, however, requires licensing of persons engaged in the business of making loans of under $3000 at rates above 12 per cent.

The Court held that this transaction did not violate the statute, since the advance of money became an integral part of the transaction of sale. It relied upon several prior cases which had held that an advance could be made by an unlicensed lender even though it was below the minimum, if it brought the total indebtedness to the lender to above the minimum when added to an existing debt.[4] While this analogy is far from perfect, it does provide some element of precedence to support a result which looks a little unusual. It is to be hoped that this result will be sharply limited to cases in which the advance is incidental and closely related to the sale, and that it will not be followed if the sale can be found to be incidental to the loan.

The newly enacted Retail Installment Sales Act would require

[6] Id. §14. See §7.18 *infra*.

§6.3. [1] Uni-Serv Corp. of Massachusetts v. Commissioner of Banks, 349 Mass. 277, 207 N.E.2d 887 (1965), noted in 1965 Ann. Surv. Mass. Law §7.1.

[2] G.L., c. 140, §96.

[3] 1966 Mass. Adv. Sh. 123, 214 N.E.2d 47, also noted in §3.7 *supra*.

[4] Skinner v. Kapples, 320 Mass. 269, 60 N.E.2d 1 (1946); Skinner v. Cederberg, 317 Mass. 773, 60 N.E.2d 92 (1945).

licensing of the finance company engaged in financing transactions such as this without regard to whether a cash advance is made.[5] This act, however, does not require licensing of the seller himself, although it would require disclosure of the "annual finance charge." It is interesting to note that while the Court in the principal case stated that the interest rate was 14.5 per cent the annual finance charge computed under the formula required to be used by the Retail Installment Sales Act is 16.8 per cent.

§6.4. Consumer protection: Mortgage prepayment. Mortgage notes secured by first mortgages on dwellings containing not over three households and occupied at least in part by the mortgagor may have clauses requiring penalties on prepayment only as permitted by statute. In the past, such penalties could be the *greater* of three months interest or, if prepayment occurred during the first year, the balance of the interest for the first year.[1] This has now been changed so that such penalties may not be more than the *lesser* of the balance of the interest for the first year or interest for three months.[2] This change effectively prohibits penalties for prepayments beyond the first year. An exception is made, however, for prepayments made to refinance the mortgage at another financial institution. In such a case, a penalty of three month's interest is permitted if the prepayment occurs within three years.

Since interest rates currently are at a level higher than they have been for many years, this new legislation may prove to be quite beneficial to people who for the first time are getting mortgages today, if the rates should decline after three years. For those who prepay because of a sale of their dwelling, the advantage to a borrower of the new legislation is obvious, whatever may be the market for money.

§6.5. Sales: Warranty of title. Two cases arising this 1966 SURVEY year involved warranty of title. The first was concerned with the extent of liability of an auctioneer when admittedly the title received by the buyer was defective. The second raised the question of how the buyer proves that title is defective in order to hold the seller liable, when the buyer himself has settled with the claimant of paramount title.

The plaintiff in the first case, *Stan Cross Buick, Inc. v. Concord Auto Auction, Inc.*,[1] had purchased an automobile at an auction conducted by the defendant auctioneer. He received with the automobile a document captioned "Title Warranty and Bill of Sale." This document was signed by the seller (a dealer in Maine) as seller and also by the defendant auctioneer as "guarantor" of buyer's title. The buyer was subsequently held liable for the value of the vehicle in an action for conversion brought by the claimant of paramount title to the

[5] G.L., c. 255D, §2, added by Acts of 1966, c. 284. See §7.19 *infra*.

§6.4. [1] G.L., c. 183, §56.
[2] Id., as amended by Acts of 1966, c. 664.

§6.5. [1] 350 Mass. 14, 212 N.E.2d 862 (1965).

vehicle. In the present action, he seeks to recover from the auctioneer for breach of warranty of title.

The Supreme Judicial Court held that the guaranty of title of the auctioneer was a warranty running directly to the buyer, upon which the buyer could recover without first attempting to recover from the seller. Since the circumstances of the sale were such as to give the buyer ample reason to know that the auctioneer did not claim title in himself, no warranty of title by the auctioneer arose either under the Uniform Sales Act, which was in force when the transaction occurred, or under the Uniform Commercial Code.[2] His liability was rather like that of a manufacturer who makes an express warranty which is, in effect, an offer that may be accepted when the buyer purchases the goods from a seller other than the manufacturer. Since such a warranty is not created by the statute governing sales, but is simply a collateral contract, a court must construe it as such. In the present case, the Supreme Judicial Court found that the intent of the agreement was that the auctioneer guarantee title rather than that he merely guarantee payment by the seller if the seller's liability were first established.

The second case involved the problem of vouching-in. Liability of a seller to a buyer for breach of warranty, whether the warranty is of quality or of title, may depend upon a determination of liability vel non of the buyer to a third party. The fact that the buyer has been found to be liable to a third party, however, may not be determinative of his rights against the seller, as was learned by the defendant buyer in *Mid-Continent Refrigerator Co. v. Neilsen.*[3]

The plaintiff in that case had sold a florist's cooler to the defendant after having repossessed it from a previous buyer by virtue of an unrecorded security agreement. The previous buyer subsequently was adjudged bankrupt. The trustee in bankruptcy then claimed the cooler, apparently contending that the unrecorded security agreement was ineffective against him. After a notice to the plaintiff-seller of a petition to sell this cooler free of the security interest of the plaintiff, the trustee sold the cooler free of the interest to the defendant. The Supreme Judicial Court held in a rescript opinion that the buyer could not show a breach of warranty of title from these facts. Despite the notice to the seller of the proceedings in the bankruptcy court, there had been no effective notice to require him to come in and defend.

The Uniform Commercial Code provides explicitly for the substance and effect of a notice vouching in a seller when the seller may be required to indemnify a buyer who has himself been sued.[4] The notice must be written; and for the seller to be bound by any determination in the case against the buyer, the notice must state that the seller may

[2] G.L., c. 106, §2-312(2).
[3] 1965 Mass. Adv. Sh. 1520, 213 N.E.2d 389.
[4] G.L., c. 106, §2-607(5).

come in and defend and that if he does not do so he will be bound by any common determination of fact. Failure to give such explicit notice should not bar the buyer from attempting to prove the breach of warranty independently, but the mere fact of the first determination will not be proof of such breach, as was held in the principal case.

§6.6. Commercial paper: Enforcement by one of two payees. Instruments payable to the order of two or more payees in the alternative are enforceable by any one of them. If not payable in the alternative, however, it may be negotiated, discharged, or enforced only by all of them. The comments to the Uniform Commercial Code section which states this rule explain the effect of the rule by saying, "Likewise, both must join in any action to enforce the instrument."[1] In *Marlboro Supply, Inc. v. Webb Supply Co.*,[2] the Supreme Judicial Court was called upon to determine what remedy, if any, might be available to one of two payees if he wants to enforce the instrument by suit and if the other payee does not want to join in the action.

The payee who wanted to enforce the note brought a bill in equity asking either that the other payee be compelled to join in the suit or that there be a partition. The Court decided that the case was within its equity jurisdiction by virtue of General Laws, Chapter 214, Section 3, which provides for jurisdiction over "(3) Other cases in which three or more parties have distinct rights or interests which cannot be justly and definitely decided and adjudicated in an action at law." The Court then held that the proper remedy was to order the reluctant payee to join in the suit.

Negotiable paper includes instruments payable in the first instance to the order of payees "together or in the alternative."[3] Divisive interests are not recognized, so that instruments payable to two persons, for example, may not be payable half to each. Partial assignments (though not partial negotiations) of existing instruments, however, are recognized.[4] Therefore, partition also might have been a permissible remedy. However, in view of the fact that the notes in question were secured by mortgages which were to be foreclosed, the choice of remedy made by the Court would certainly seem to be the proper one under the circumstances of this case.

§6.7. Commercial paper: Impairment of recourse. The Uniform Commercial Code abolished distinctions between discharge of classes of parties to instruments and discharge of the whole instrument, substituting instead a logical set of rules to deal with the interrelationship of the various parties. Thus, if the holder of an instrument discharges any party, the result is that all parties who had a right of recourse to

§6.6. [1] G.L., c. 106, §3-116. This section does not use the terms "joint" or "several." The purpose of eliminating these familiar terms was to remove the possibility of contentions of survivorship.

[2] 350 Mass. 43, 213 N.E.2d 248 (1965),

[3] G.L., c. 106, §3-110.

[4] Id. §3-202.

the party discharged are automatically discharged.[1] If the holder reserves his rights against these other parties, however, they are not discharged. Such a reservation of rights, though, preserves not only the holder's rights against these other parties, but also the rights of these parties against the party whom the holder purported to discharge in the first place.

The plaintiff in *Priggen Steel Buildings Co. v. Parsons*[2] was the payee of a note that had been endorsed by the defendants for the accommodation of the maker. After the maker defaulted in payment of this note, he executed an assignment for the benefit of creditors. Although the payee assented to this assignment and subsequently received as a final dividend from the assignee a portion of the amount of the note, he expressly reserved his rights against the accommodation endorsers. The Supreme Judicial Court applied the Uniform Commercial Code and gave effect to the reservation by deciding that the endorsers were still liable.

Although the case did not involve the rights of recourse which the endorsers might now have against the maker, such recourse by an accommodation party who pays is provided for expressly.[3] This recourse should have been preserved despite the assent by the holder of the note to the assignment for the benefit of creditors, since a purported discharge by a holder who reserves his own rights against such endorsers, as explained above, is only partially effective as a discharge of the maker.

§6.8. Commercial paper: Proof of discharge. The discharge of a party to a negotiable instrument may take place by a variety of means besides payment. The decision in *Sherman v. Koufman*,[1] however, reached conclusions which at times might make it difficult for the maker of a note to prove that a discharge did occur. The testimony of the defendant (the maker of several notes) was to the effect that the proceeds of the notes were in fact an advance toward payment for expected services in connection with the sale of certain real property. These services were later performed, and, the defendant testified, the payee told the defendant that she would not enforce the notes. (These notes plus an additional sum received by the defendant in cash amounted approximately to the agreed compensation.) At the time of the closing, the defendant signed a broad release from all claims on account of the real estate in question.

The Supreme Judicial Court held that by this release the defendant gave up his right to a return of the notes for cancellation. The Court added: "We find no evidential basis for a defense of accord and satisfaction or payment." It then determined that the defendant was still liable on the notes, affirming the decree which was based on a verdict directed for the plaintiff, the representative of the now deceased payee.

§6.7. [1] G.L., c. 106, §§3-601(3)(b), 3-606.
[2] 350 Mass. 62, 213 N.E.2d 252 (1966).
[3] G.L., c. 106, §3-415(5).

§6.8. [1] 349 Mass. 606, 211 N.E.2d 220 (1965).

This result is very unsatisfying, although from the report of the conflicting evidence in the case, it can hardly be determined whether justice was actually served. The defendant's pleadings were so full of objections that were completely without merit, such as that the notes were not negotiable, or that there was a lack or failure of consideration, that the actual claim must have become obscured.

Methods of discharging negotiable instruments are set out in Section 3-601 of the Uniform Commercial Code. Of all the methods, the only one which requires delivery of the instrument to the person discharged is renunciation.[2] Renunciation requires no consideration, but it must be shown by a signed and delivered writing or by a surrender of the instrument. It is thus only partially like a "release," since a release may be supported by consideration. If a release is supported by consideration, then, as stated by Corbin: "The problem is not one of delivery, but one of bargaining agreement or of a communicated expression actually inducing action in reliance."[3]

Among the other methods prescribed by the Code to discharge a party is "any other act or agreement with such party which would discharge his simple contract for the payment of money."[4] An "accord and satisfaction," as to which the Court found no evidence, is not a separate method but comes within this broader provision. Surely if the defendant's version of the facts were believed, it would seem that payment for services rendered by giving up a contractual debt would be sufficient to discharge such a simple contract. A note, the maker of which is discharged in this manner, does not need to be returned in order for the discharge to be effective vis à vis the payee. Thus, it would seem that the Court may have placed too much importance on the release which it determined gave up any rights of the defendant to a return of the instruments. The case is somewhat unfortunate for if the defendant's obligation has been satisfied he should not be required to pay again. If his obligation has not been satisfied, the issue should not be clouded by the release which he signed.

§6.9. Banks and banking: Organization and officers. Branch banking generally is not permitted without specific statutory authority. This year, the legislature extended the power of the Commissioner of Banks to authorize branches to include "mobile branch banking," within the county where the main office of the bank is located.[1] Reportedly, there are now two such mobile branches operating in the western portion of the state, filling geographical voids in areas which could not support permanent bank buildings. These "bankmobiles" operate at specified places on specified days and hours, under regulations of the Commissioner designed to provide adequate security.

[2] G.L., c. 106, §3-605. This is the only section mentioned in the decision. The all-important §3-601 seems to have been lost in the shuffle.
[3] Corbin, Contracts §1238 (one vol. ed. 1952).
[4] G.L., c. 106, §3-601(2).

§6.9. [1] Acts of 1966, c. 245, adding G.L., c. 167, §60.

If the Board of Bank Incorporation refuses to certify that the formation of a proposed trust company will promote the public convenience and advantage, the applicant may renew his application without consent of the Board after one year has elapsed. Further proceedings may now be taken even during that year, if the Board approves. Petitions for the establishment of branch offices of trust companies, if denied, may now also be renewed before the lapse of a year if the Board approves.[2]

Trustees or officers of savings banks have long been prohibited from serving two savings banks, and more recently from serving co-operative banks or savings and loan associations. They are now prohibited as well from serving trust companies or national banking associations.[3] A grandfather clause for those serving before the effective date (April 4, 1966) is provided.

Trustees of savings banks must be citizens of Massachusetts, depositors of the corporation, and under 72 years of age. In the past, these qualifications were waived for any trustee who was also president of the bank. This exception has now been removed, so that every trustee must now meet these qualifications.[4]

Officers of trust companies used to be flatly prohibited from borrowing from their corporations. They may now borrow up to $5000 in general, and up to $30,000 on a loan secured by mortgage on their own single family dwellings, provided that the interest and other terms give them no preference and that a majority of the entire board of directors approve.[5]

§6.10. **Banks and banking: Loans and investments.** Ad hoc changes in permissible loans and investments continue to be made on a large scale. These are summarized briefly in this section.

Individual personal loans permitted to be made by co-operative banks have been increased from $1500 to $2500, and the aggregate loans of this type from 2 to 10 per cent of deposits.[1]

Individual personal loans permitted to be made by savings banks have been increased from $1500 to $3500, and the aggregate loans of this type from 5 to 10 per cent of deposits up to $50,000, and 5 per cent of deposits over $50,000.[2]

The maximum permissible amount of individual loans made by credit unions for notes secured by responsible endorsers is $1000 or $1500, depending upon the size of the credit union. These limits have been increased to $1500 and $2000 if the credit union is a member of the Massachusetts Credit Union Share Insurance Corporation.[3]

The aggregate amount of loans by co-operative banks secured by

[2] Acts of 1966, c. 200, amending G.L., c. 172, §§7, 11.
[3] Acts of 1966, c. 852, amending G.L., c. 168, §10(3).
[4] Acts of 1966, c. 225, amending G.L., c. 168, §10.
[5] Acts of 1966, c. 186, amending G.L., c. 172, §18.

§6.10. [1] Acts of 1965, c. 814, amending G.L., c. 170, §26(8).
[2] Acts of 1965, c. 810, amending G.L., c. 168, §37.
[3] Acts of 1965, c. 784, adding G.L., c. 171, §24, par. 3A.

mortgage on real estate and exceeding 80 per cent of the value of the mortgaged property has been increased from 10 per cent of deposits to 20 per cent.[4]

The limit of individual mortgage loans of not over 75 per cent of the value of the real estate that may be made by savings banks has been increased from $30,000 to $35,000. For loans of not over 80 per cent, the limit has been raised from $25,000 to $30,000, and for residential development loans for financing construction, from $20,000 to $30,000. In addition, permission to make such residential development loans and loans of 80 to 90 per cent of the value of the property has been extended from single family dwellings to four family units, if one unit is owner occupied.[5]

Real estate loans made by trust companies which formerly could not exceed 75 per cent of the appraised value of the property and could not be outstanding for over 20 years may now be made for up to 80 per cent of the appraised value and be amortized over 25 years. In addition, construction loans for industrial or commercial building which formerly were not classed as real estate loans if for not over 18 months will now be so treated if for not over 24 months.[6]

To the extent that investments by co-operative banks may be made by making deposits in other banks, the statutes now permit investments in certificates of deposit.[7]

Changes were made in several types of investments in various federal agencies that may be made by savings banks, by substituting a detailed list of federally established agencies and securities for the prior general provisions. In addition, details were given for investments in obligations of other banking corporations and in bank holding companies.[8]

Savings banks, co-operative banks, and trust companies have been permitted since 1960 to participate with one another in loans secured by the Federal Housing Administration. They may now participate as well with National Banking Associations, Federal Savings and Loan Associations, and domestic life insurance companies.[9]

§6.11. Banks and banking: Miscellaneous. The Commissioner of Banks must examine all banks at least annually, and may make or have made further examination at the expense of the banks. An amendment of the section authorizing this makes it clear that this may be by outside certified public accountants or public accountants, not otherwise employed by the bank, who are subject to the direction of the Commissioner.[1]

[4] Acts of 1966, c. 169, amending G.L., c. 170, §24(3A).
[5] Acts of 1966, c. 218, amending G.L., c. 168, §§35(5), (6), (6A), (7).
[6] Acts of 1966, c. 220, amending G.L., c. 172, §55(A)(4), (C).
[7] Acts of 1966, c. 167, amending G.L., c. 170, §§26, 40.
[8] Acts of 1966, c. 295, adding G.L., c. 168, §42(6), and striking §§49(3), (4); Acts of 1966, c. 288, amending G.L., c. 168, §§47(3), 49; Acts of 1966, c. 227, amending G.L., c. 168, §47(3).
[9] Acts of 1965, c. 705, amending G.L., c. 167, §51.

§6.11. [1] Acts of 1966, c. 296, amending G.L., c. 167, §2.

Reports of monthly meetings of the directors of trust companies are required by statute. This statute now requires these reports to be retained for six years. The change also permits modifications, in the discretion of the Commissioner, of the list of transactions required for the report.[2]

While withdrawal of deposits from special notice accounts may depend upon notice, withdrawal of dividends may not be so restricted if the depositor signs a permanent dividend order or demands the dividend within one year. The order must now be signed before the date on which the dividend is payable, or the demand must be made within one year of that date. Prior to this statutory change, the crucial date was that of declaration of the dividend.[3]

Interest on loans against special notice accounts used to require an interest premium at a rate of *not less than* 2 per cent more than that paid on the account. A drastic statutory change now permits but does not require an interest premium, and limits the rate to *not more than* 1 per cent more than that paid.[4] This severe limitation on the cost of making a "withdrawal" without notice, in the guise of a "loan against the account," should make the higher yield of special notice accounts especially attractive.

[2] Acts of 1966, c. 177, amending G.L., c. 172, §17.
[3] Acts of 1966, c. 106, amending G.L., c. 168, §22(a)(1)(b).
[4] Acts of 1966, c. 206, amending G.L., c. 168, §40.