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## Municipal Corporations—Presentation of Notice As Condition Precedent to Recovery

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seems, to the writer, to be the more logical common law interpretation of the rule. Obtaining money under false pretenses is, in all of our jurisdictions, a complete and distinct offense; the policy of some of our courts in construing such an offense to be forgery appears to be a usurpation of authority by the courts and an undue infringement on the law-making body of the state.

W. G. S., '28.

MUNICIPAL CORPORATIONS—PRESENTATION OF NOTICE AS CONDITION PRECEDENT TO RECOVERY.—Plaintiff was injured while riding as a passenger for hire in a bus owned and operated by a municipal corporation. Charter provided that no action for personal injuries could be maintained against the city unless notice was given in writing to the city clerk within fifteen days of the occurrence of the injury. Plaintiff failed to file such notice. *Held*, that charter provision applies only when the municipality is charged by law with some corporate duty, and is exercising functions of that character when the injury occurs, and does not apply when it is engaged in an ordinary private business for hire. *Borski v. City of Wakefield*, 215 N. W. 19, (Mich. 1927).

Notice of claim is not a prerequisite in the absence of a statutory provision. *Globe v. Rabogliatti*, 24 Ariz. 392, 210 Pac. 685, 19 R. C. L. 1040, and cases there cited. The language of such provisions must always be noted carefully, for they differ widely in the various states and hence a number of cases are decided solely on the particular language of the statute. Provisions requiring notice are in derogation of the common law, and should be construed with reasonable strictness. *Cawthom v. Houston*, 231 S. W. 701 (Tex.); *San Antonio v. Pfeiffer*, 216 S. W. 207 (Tex. Civ. App.); *Tattan v. Detroit*, 128 Mich. 650, 87 N. W. 894.

Where the statute makes no exception in favor of persons physically or mentally incapable of giving notice during the statutory period, the weight of authority holds that the court cannot supply it. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Touhey v. Decatur*, 175 Ind. 98, 93 N. E. 540, 32 L. R. A. (N. S.) 350; *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830. A contrary rule is followed in *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, and *Webster v. Beaver Dam*, 84 Fed. 280, on the ground that the law does not seek to compel a man to do that which he cannot possibly perform. In general, infancy does not excuse failure to comply with the statutory requirement. *Baker v. Manitou*, 277 Fed. 232; *Dechant v. Hays*, 112 Kans. 729, 212 Pac. 682; *Hurley v. Bingham*, 63 Utah 589, 228 Pac. 213. It has been held that the requirement of notice was not intended to apply to the relations between a municipal corporation and its employees, when the latter are injured by reason of a failure of the former to provide a safe place to work. *Gaughan v. St. Paul*, 119 Minn. 63, 137 N. W. 199; *Giuricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908. The reason given is that it must be presumed that the city had notice of the injury of its servant. A contrary result is reached in *Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976. It is well established that actual knowledge by the municipality does not excuse failure to present notice. See for example, *Reid v. Kansas City*, 195 Mo. App. 457, 192 S. W. 1047; *Touhey v. Decatur*, *supra*. It is generally held that want of notice may not be waived by municipal authorities. *Touhey v. Decatur*, *supra*; *Dechant v. Hays*, *supra*; *Walters v. Ottawa*, 240 Ill. 259, 88 N. E. 651, and cases therein cited. In *Cawthom v. Houston*, *supra*, it was held that the city may waive the charter requirement or may be estopped by the conduct of its officers from requiring a strict compliance when the city is acting in a private as contradistinguished from a governmental capacity.

In the principal case, the statute did not make any distinction between govern-

mental and business functions, but the court implies one, and quoting *Andrews v. South Haven*, 187 Mich. 29, 153 N. W. 827, "In exercising its business powers, a city is governed by the same rules which control a private individual or business corporation under like circumstances." The court further says that inasmuch as the city voluntarily goes into the same business as private citizens, there is no good reason why it should be given special privileges not enjoyed by others who are compelled to meet its competition. Cases in accord with the principal case are: *Henry v. Lincoln*, 93 Nebr. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174; *D'Amico v. Boston*, 176 Mass. 599, 58 N. E. 158; *Cook v. Beatrice*, 207 N. W. 518 (Nebr. 1926).

A contrary view is expressed in *Dickie v. Centralia*, 91 Wash. 467, 157 Pac. 1084; *Western Salt Co. v. San Diego*, 181 Cal. 696, 186 Pac. 345; *O'Neil v. Richmond*, 141 Va. 168, 126 S. E. 56; *Shear v. Everett*, 134 Wash. 389, 235 Pac. 789; *Frasch v. New Ulm*, 130 Minn. 41, 153 N. W. 121.

It is submitted that the principal case is wrongly decided. Perhaps the ends of justice were served, but the court by judicial legislation, flies in the teeth of the express words of the statute. The purpose of the statute requiring notice is to advise the city in what its alleged negligence exists, and to afford it an opportunity at an early date to investigate the nature and cause of the injury while the conditions remain substantially the same. *Canon City v. Cox*, 133 Pac. 1040 (Colo.) And it is as important that the city have notice of a claim for injury caused by it while acting in a business capacity as when it acts in a governmental capacity. *Frasch v. New Ulm*, *supra*. The fact that the city and private corporations have similar liabilities does not preclude the legislature from making distinctions between them in respect to conditions precedent to suit. More and more cities are buying and managing public utilities; such action is deemed beneficial and convenient to its inhabitants. Every reason which calls for the service of a written notice of claim upon a municipality before suit in any case where it acts in a governmental capacity applies in this case. The funds of a city pay both types of claims. J. N., '29.

**NEGLIGENCE—VIOLATION OF ORDINANCE AS NEGLIGENCE PER SE.**—The plaintiff was struck by a street car of the defendant, driven at the time at a speed greater than that allowed by a city ordinance. *Held*, that that violation of the ordinance constituted negligence *per se*. *Unterslachner v. Wells*, 296 S. W. 755 (Mo., 1927).

There is a division of authority on this question. Some courts hold that the violation of an ordinance is not of itself negligence, but merely evidence from which the jury may infer negligence, taking into consideration other facts of the case. This is the rule in Massachusetts, *Harlan v. Railway Co.*, 129 Mass. 310; Michigan, *Rotter v. Detroit U. R. Co.*, 171 N. W. 514; New York, *McGrath v. N. Y. C.*, 63 N. Y. 52; and Ohio, *Meek v. Penna. Ry. Co.*, 38 Ohio St. 632.

The reasoning in such cases is that the ordinance is merely a police regulation subjecting the violator to penalties, and that it cannot serve to create a liability where none existed before. To hold violation to be negligence in itself is to permit the city council to legislate concerning civil liability, a matter outside of its power and intention. But the courts do hold that the violation characterizes the conduct of the defendant, and is therefore evidence of his lack of care.

The other view, that the violation is negligence *per se*, is followed principally in Alabama, *S. & N. Ala. R. Co. v. Donovan*, 84 Ala. 141; Georgia, *Cent. R. Co. v. Tribble*, 112 Ga. 863; Indiana, *Union Traction Co. v. Wynkoop*, 154 N. E. 40; and in Texas, *Tex. etc. R. Co. v. Ball*, 85 S. W. 456. The theory underlying this