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. Unterlachner 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

view is that the city, for the protection of the public, has established a standard of care, to which it is the duty of the defendant to conform. The carrier owes this duty to the injured party, as a part of the public, and a breach of it gives rise to a cause of action in his favor.

Besides these two main rules there is an intermediate holding in Illinois, that the violation of the ordinance creates a *prima facie* case of negligence rebuttable by other evidence, *C. & E. I. R. Co. v. Crose,* 214 Ill. 602. The Illinois rule is followed in *McElhinney v. Knittle,* 201 N. W. 586 (Iowa). Kentucky has an extreme holding that the ordinance is inadmissible for any purpose in a civil action. *Ford v. Paducah City Ry. Co.,* 99 S. W. 355, and *L. & N. R. Co. v. Dalton,* 102 Ky. 290.

Logically the Massachusetts rule is correct. A public wrong does not create a private right, and violation of a police regulation is mere evidence of want of care. But as a matter of public policy, the doctrine of negligence *per se* is more likely to enforce obedience to municipal ordinances, and the tendency is to change that rule.

The history of this ruling in Missouri shows a rather interesting development. The early cases, *Liddy v. Ry. Co.,* 40 Mo. 516, and *Karle v. R. R. Co.,* 55 Mo. 476, held that the violation of a statute was negligence *per se.* Then came the case of *Fath v. Tower Grove etc. Ry. Co.,* 105 Mo. 537, in which the court said that the ordinance, when accepted by the railway company, became a contract between it and the city and under the authority of *Mayor of Lime Regis v. Henley,* 1 Bing. 222, held that the city's right of action for the breach of this contract inured to the benefit of the plaintiff, Fath. This case was followed by *Byinton v. St. L. & Sub. Ry. Co.,* 147 Mo. 673, in which the plaintiff was not allowed to recover because it was not shown that the railway had ever accepted the ordinance in question. *Murphy v. Lindell Ry. Co.,* 153 Mo. 252, and *Holwerson v. St. L. & Sub. Ry. Co.,* 157 Mo. 245, in accord.

Shortly after the Holwerson case, *supra,* the case of *Jackson v. Ry. Co.,* 157 Mo. 635, was decided, expressly overruling *Fath v. Ry. Co., supra,* and re-establishing the doctrine of *Karle v. Ry. Co., supra.* It held that an ordinance is a police regulation and not a contract; and its violation is negligence *per se.* This rule has been followed down to date in Missouri. *Sluder v. Transit Co.,* 189 Mo. 107, *Henderson v. St. L. & S. F. R. Co.,* 248 S. W. 987, and *Unterlachner v. Wells,* 296 S. W. 755. C. J. E. '28.

WEAPONS—PISTOLS—AIRGUNS.—The defendant was convicted under a New York statute for having a "pistol, revolver, or other firearm of a size which may be concealed upon the person, without a written license therefor." Upon appeal his conviction was reversed and he was discharged. An examination of the "pistol" proved that the projectile used was propelled by compressed air, and was in no way connected with a projectile moved by gun powder or other similar inflammable material. *Held,* that the possession of an air pistol does not warrant conviction of unlawfully possessing a firearm. The basis of this distinction was that the court felt unwilling to read a forced or subtle meaning into the statute as it used the term "firearm." *In re People v. Schmidt,* 222 N. Y. S. 647 (1927).

In *Harris v. Cameron,* 81 Wis. 239, 51 N. W. 437 (1892), the supreme court was called upon to make a distinction between an air gun and a firearm in deciding on the negligence of a father in buying an air gun for a minor son. They held that an air gun was not a firearm, on the ground that a firearm is a weapon which acts by the force of gun powder, and that it was intended as a toy and did not have a dangerous character.