Comment on Recent Decisions

ANIMALS—WHO CONSTITUTES "KEEPER" OF A DOG ON EXHIBITION AT A SHOW.—The plaintiff, a patron of an agricultural society, was bitten by a dog on exhibit. At the time the owner held the chain on the dog, and had actual physical control over it. *Held,* the society could not be assessed double damages under statute as "owner or keeper" of the dog. *Cruickshank v. Brockton Agricultural Society,* 157 N. E. 357. (Mass., 1927.)

Whether or not a person is the keeper of a dog depends on the peculiar facts and circumstances of each individual case. *Boylan v. Everett,* 172 Mass. 453, 52 N. E. 541; *Snyder v. Patterson,* 461 Pa. 98, 28 Atl. 1006. To be keeper of a dog, one must harbor the animal, and the word "harbor" in its meaning signifies protection. *Hagenan v. Millard,* 182 Wis. 544, 195 N. W. 718. Thus one who treats a dog as being at his home, and undertakes to control his actions or allows a child, wife or servant to control his actions is undoubtedly the "keeper" within the meaning of the statute. *Strouse v. Leipf,* 101 Ala. 433, 14 So. 667; *Chicago Ry. Co. v. Kuckkuck,* 197 Ill. 304, 64 N. E. 358; *O'Donnell v. Pollock,* 170 Mass. 441, 49 N. E. 745; *Jenkinson v. Coggins,* 123 Mich. 7, 81 N. W. 974; *Holmes v. Murray,* 207 Mo. 413, 105 S. W. 1085; *Duval v. Barnaby,* 77 N. Y. S. 337; *Schaller v. Conners,* 57 Wis. 321, 15 N. W. 389.

However, in the case under consideration the owner had possession and physical control of the animal at the time of the accident. It has been said that to charge one as the harborer of a dog he did not own, it must appear that he harbored it and treated it in the same manner as owners usually treat their own dogs. *Trumble v. Happy,* 114 Iowa 624, 87 N. W. 678. Certainly the mere casual presence of the dog on the defendant's premises could hardly be said to constitute the defendant the "keeper" under the statute. *Fitzgerald v. Brophy,* 1 Pa. Co. Ct. 142; *Boylan v. Everett,* 172 Mass. 453, 52 N. E. 541; *McCosker v. Weatherbee,* 100 Me. 25, 59 Atl. 1019; *O'Donnell v. Pollock,* 170 Mass. 441, 49 N. E. 745.

The decision in this case is in line with the holding on this point in *Buch v. Wathen,* 104 Ky. 548, 47 S. W. 599, in which the facts are the same.

F. A. E., '28.

AUTOMOBILES—INJURIES FROM OPERATION OR USE OF HIGHWAY—NATURE AND GROUNDS OF LIABILITY—RIGHT OF WAY AT CROSSING.—Plaintiff was driving south on a highway while defendant was proceeding north on the same road; defendant, while proceeding north, ran into and injured plaintiff's car, which was being turned left into an intersecting highway. This suit is for damages incident to that collision. *Held,* that it is the position of the cars as their paths cross and not priority in reaching the intersection that determines the application of the rule prescribed by ordinance here that the driver on the left shall yield the right of way, and therefore defendant is not liable since he had the right of way. *Boyd v. Close,* 257 Pac. 1079 (Colo., 1927).

At old common law before the modern days of the many and speedy horseless carriages, the right of way rule now generally prescribed by statute throughout this country was unknown, and it was generally held that where two persons are approaching each other at a crossing of two streets, their rights are equal and each is bound to exercise reasonable care to avoid any and all injuries. *Gilbert v. Burque,* 72 N. H. 521, 57 A. 927. Of course, with the development of

modern American life with its "necessity" for speedy transportation, its low cost of automobile operation, and its consequent traffic congestion with the ever present possibility, and too often probability, of serious accidents, some definite codified rule became essential. Such a rule has been settled upon, and the ordinance, the construction of which is here under consideration, is an example of such rule. Previously, the main points of dispute have been as to whether or not the fact that a man has the right of way will excuse what ordinarily would be actionable negligence, whether relative position only and not distance from the intersection were to be considered, etc. *White v. Pupillo,* 263 S. W. 1011 Mo.; *Bollinger v. Greenaway,* 83 Pa. Sup. Ct. 217; *Shirley v. Larkin Co.,* 239 N. Y. 94, 145 N. E. 751. The present question had not previously been decided, and it would seem that the right construction is entirely dependent upon the intent of the legislature as expressed in the wording of the statute. Of course, when statutes provide rights of way for those traveling on streets running in certain directions, in preference to those traveling on streets running in other directions, as the early statutes did, it is obvious that such statutes require strict construction; even the majority of the modern statutes, when outlining this rule, refer to vehicles traveling on intersecting highways, and under them it is apparent that the construction given in the instant case would be faulty. Laws Mo. 1921 (Extra Session), p. 95, section 21, L. Assuming, however, that the Denver ordinance in question was the same as the Colorado statute on this subject, this construction might be justified. Comp. Laws of Colorado (1921), section 1270, provides that a driver shall yield the right of way at the intersection of their paths to a vehicle approaching from the right at the same time; a logical construction of such an unusually general statute might possibly go as far as that of the Colorado court did.

Thus, it can be seen that the construction of this statute by the Colorado court may be justified in view of the unusual wording of the statute, but it also seems as if such construction transcends the limits laid down by legislative intent however carelessly such intent was expressed. E. L. W., '28.

COMMERCE—POWER TO REGULATE ADVERTISING IN PERIODICALS.—Statute prohibiting advertising of cigarettes in any paper, magazine or pamphlet published within the state of Kansas *held* unconstitutional as being repugnant to the commerce clause of the Federal Constitution. *Little et al v. Smith,* 124 Kan. 237, 257 Pac. 959.

The present action was brought in behalf of the Kansas Press Association who alleged, in substance, that their publications were interstate in character and the statute in question limiting the field of advertising was a direct burden on interstate commerce. See *State v. Salt Lake Pub. Co.,* 249 Pac. 474. The contention for its validity was based on a legitimate exercise of the police power. Prior to the present action the Kansas anti-cigarette statute was repealed and by the laws of 1927, chapter 121, cigarettes were made fit subjects of barter and sale subject only to stringent revenue laws; the constitutionality of this statute was upheld in *State v. Nossaman,* 107 Kan. 715, 193 Pac. 347, 20 A. L. R. 921.

The competency of state legislatures to regulate, and even prohibit, the sale of cigarettes within their respective states is well settled. *Gundling v. Chicago,* 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Austin v. Tennessee,* 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 255. Iowa, Nebraska, and possibly New York, Oklahoma, and Wisconsin are in accord. The nature of cigarettes as articles of commerce clothed with federal protection has long presented a mooted situation. It was held in *Blaufield v. State,* 103 Tenn. 593, 53 S. W. 1090, that cigarettes were not legitimate articles of commerce and that a sale in an original package would not