167 (1963). In *Worobey* the lower court refused to refer a divorce back to the master to allow defendant to present a defense for the first time for this purpose.

The heart of defendant's exceptions are that she is prejudiced because she has not had the opportunity to appear and present her evidence or to cross examine the plaintiff. It is clear from the record that she had timely notice of the master's hearing. Despite the claimed problems of communication in getting a power of attorney signed, there is no indication that the defendant could not have come to Pennsylvania to appear at the hearing in person if she really wanted to testify.

We conclude that defendant's exceptions must be dismissed.

ORDER OF COURT

June 17, 1980, the defendant's exceptions to the Master's Report are dismissed and it is ordered that George C. Kemple, Plaintiff and Jean Kemple, Defendant, are divorced from the bonds of matrimony arising out of their marriage heretofore contracted in accordance with the Act of 1929 P.L. 1237, 23 P.S. Sec.1, et seq, as amended. The Plaintiff is awarded his costs against the defendant.

LAMAN v. HELMAN, P.C. Franklin County Branch, A.D. 1980 - 158

Trespass - Dog Bite - Standard of Care - Extension of Time to File Answer

1. Where a child goes to a farm to purchase eggs and is bitten by a dog, the standard of liability for the owner is whether he has knowledge of the dog's vicious propensities and fails to control the dog in accordance with such tendencies.

2. It is now negligence per se to have a dog on a farm, and the standard of reasonable and ordinary care required for a business invitee is not appropriate.

3. Despite the fact plaintiff granted defendant an extension of time to file "an answer", and defendant filed preliminary objections, the court may consider the preliminary objections as a motion for judgment on the pleadings and dispose of the matter.

Stephen E. Patterson, Esq., Attorney for Plaintiffs

David W. Rahauser, Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., September 11, 1980:

This case raises the question whether a dog is a dog or is a puddle of oil. The unique issue arises because in the third and fourth counts of the complaint after alleging Holly Laman was bitten by the Helmans' dog on the Helmans' farm when the girl went there with her grandmother to buy eggs, the plaintiffs omit the usual allegation that the Helmans knew or had reason to know that the dog was vicious or dangerous.[1]

Defendants' demurrer to these counts is met with the contention that they are not based on the failure of defendants to curb a dog with known vicious propensities. Instead they are founded on the theory that the defendants failed to exercise reasonable care to make their premises safe for business invitees. The legal concept plaintiffs espouse is stated in Pennsylvania Legal Encyclopedia as follows:

> "The owner, occupant or person in charge of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from a breach of such duty." 27 P.L.E., Negligence Sec.45.

It is in this connection that plaintiffs say the dog is like a puddle of oil. In *Robb v. Niles-Bement-Pond Company*, 269 Pa. 298, 112 A.459 (1921), there had been a puddle of oil two feet in diameter on a cement floor for five hours. Plaintiff fell because of the puddle and the court said that the defendant had a duty to use reasonable care to keep the premises in such condition as not to expose the plaintiff to unnecessary danger. The plaintiffs in this case contend that the mere fact that the dog is on the farm premises is like a puddle of oil on a cement floor and violates this duty, even though the farmers had no knowledge that the dog was vicious.

Poulos v. Brady, 167 Pa. Super 150, 74 A.2d 694 (1950) is surely interesting. Brady owned a taproom, Poulos was a customer. Poulos said he was going to the restroom when he was bitten by a mother dog with puppies. When Poulos sued the case was tried not on the theory that Brady harbored a known vicious dog, but on a duty owed by an innkeeper to a patron or guest.

The controlling principle relied upon by the plaintiff was stated in *Rommel v. Shumbacker*, 120 Pa. 579, 582, 11 A. 779 as follows:

"When one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that his is properly protected from the assaults or insults, as well of those who are in this employ, as of the drunken and vicious men whom he may harbor."

In *Poulos* an analogy that is unkind to dogs and may be specious, the appellate court quoted a paraphrase of that principle made by the trial judge:

"If there is liability for acts of human beings who act like dogs, then there should be no question about the liability for acts of dogs, particularly when they belong to the innkeeper."

Then the lower court added:

"It was clearly for the jury to decide whether the defendant has discharged her duty by allowing a *large dog to roam the premises particularly in view of the puppies about which she might feel apprehensive and protectice.*" (emphasis added).

It is important to immediately distinguish the *Poulos* case from ours. First, Helmans' dog is a *miniature* collie; second she was not said to be protecting puppies and third the customer was buying eggs on a farm, not booze from a barroom.

We started out by asking whether a dog is a dog or a puddle of oil. We conclude that a dog is a dog and that therefore the owner of a dog is not liable for the consequences of his dog's acts unless he has knowledge of the dog's vicious propensities and fails to control the dog in accordance with such tendencies. *Andrew v. Smith*, 324 Pa. 455, 188 A. 146 (1936).

But we must deal with *Poulos*. Essentially what plaintiffs are saying in this case is that having a dog on a farm is failure to maintain the farm in a safe manner. Paraphrasing Judge Ditter of the Montgomery County Court of Common Pleas (now of the United States District Court for the Eastern District of Pennsylvania): "This case presents a very simple question: Is it negligence per se to have a dog on a farm?"

In *Sarubin v. Goldberg*, 41 D. & C. 2d 567 (1966) Judge Ditter was offered the same theory, the one presented by plaintiffs in this case, only a child was set upon and injured by a German shepherd dog running loose and unattended at a camp. He opined that while it might be negligent to keep a dog which had just had pups in a tavern, it did not follow that the presence of a dog at a children's camp would lead to injury. Nor does it follow that the presence of a dog on a farm

will lead to injury. So the mere presence of a dog on a farm does not constitute a breach of duty on the part of the owners.

Our Supreme Court in *Groner v. Hedrick*, 403 Pa. 148, 169 A.2d 302 (1961) held that a big friendly dog may be dangerous when jumping up on a small person, knocking her down. The court reached its conclusion, however, by saying it could make no distinction between dogs dangerous from viciousness or dangerous from playfulness. The owner must restrain the dog when he knows the animal's propensities.

While does not seem the Court in *Groner* went this far, Mr. Justice Bell (later Mr. Chief Justice Bell) was alarmed enough in his dissent to say:

"It will come as a bitter blow to all dog lovers, and their numbers are legion, to learn that man's best friend is malum in se and that the only dog they can safely keep, even in their own home, is a sleeping dog or a dead dog."

If we subscribed to the plaintiff's theory in this case, we would be in effect saying dogs are malum in se on the farm. We will not, so we will treat the demurrers to Counts three and four as Motions for Judgment on the Pleadings and grant them as to those counts.

The plaintiffs object to our considering this matter at all. The preliminary objections, a motion for a more specific pleading, the demurrers and motions to strike counts three and four were filed after the defendant was granted an extension of time to file "an answer." Instead defendants filed these preliminary objections. There is authority for plaintiffs' position. In *Hahnemann Medical College and Hospital of Philadelphia v. Hubbard*, 6 D & C 3d 120 (1978) defendant was granted an extension of time to file an answer and instead filed preliminary objections. The court struck the preliminary objections and granted the defendant leave to file an answer.

However, as defendants correctly point out, a demurrer is an assertion that the complaint does not set forth a cause of action, *Balsbaugh v. Wrowland*, 447 Pa. 423, 426, 290 A.2d 85, 87 (1972) and Pa. R.C.P. 1032(1) provides that defense of failure to state a cause of action may be made by motion for judgment on the pleadings or at trial on the merits. In *Commonwealth v. Atlantic and Gulf Coast Stevedores, Inc.*, 422 Pa. 442, 221 A.2d 128 (1960) where a lower court dismissed preliminary objections because they were filed late, the Supreme Court instucted us to consider the preliminary objections as though they were a motion for judgment on the pleadings and thereby dispose of the matter.

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on or after October 13, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of CAROL AND BENJI'S SHEAR DELITE BEAUTY SALON with its principal place of business at P. O. Box 157, Willow Hill, Pa. 17271. The names and addresses of all persons owning or interested in said business are Carol A. Baker, P. O. Box 157, Willow Hill, Pa. 17271; Brenda Baker, P. O. Box 132, Willow Hill, Pa. 17271.

(10-10)

NOTICE IS HEREBY GIVEN, That Articles of Incorporation have been filed with the Commonwealth of Pennsylvania, Department of State, at Harrisburg, Pennsylvania, on August 19, 1980, for the purpose of obtaining a Certificate of Incorporation.

The name of the corporation, organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended, is CMP Products, Inc.

The purpose or purposes for which the corporation has been organized are: To engage in a general manufacturing business and to engage in and to do any lawful act concerning any and all lawful business for which corporations may be organized under the Business Corporation Law of Pennsylvania.

(10-10)

NOTICE IS HEREBY GIVEN that Green Valley Dairy Farms, Inc., a Pennsylvania corporation having its registered office at Route No. 2, Chambersburg, (Greene Township) Franklin County, Pennsylvania, and its principal place of businses at the same place, has filed a Certificate of Election to Dissolve with the Department of State of the Commonwealth of Pennsylvania, in Harrisburg, Pennsylvania, pursuant to and in accordance with the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania, approved May 5, 1933, as amended, and that said corporation is winding up its affairs in the manner prescribed by said law, so that its corporate existence shall be ended upon the issuance of a Certificate of Dissolution by the Department of State of the Commonwealth of Pennsylvania.

William R. Davis, Jr.
of Davis and Zullinger
Suite 410
Chambersburg Trust Company Bldg.
Chambersburg, PA 17201

(10-10, 10-17)

NOTICE OF AMENDMENT OF ARTICLES OF INCORPORATION

NOTICE IS HEREBY GIVEN that Orrstown Bank, having its principal place of business at Orrstown, Pennsylvania 17244, has filed Articles of Amendment to its Articles of Incorporation with the Pennsylvania Department of Banking on October 8, 1980, pursuant to the provisions of Act of November 30, 1965 (P.L. 847, No. 356), known as the Banking Code of 1965. The amendment to the Articles of Incorporation is as follows: "The amount of capital stock which the corporation is authorized to issue shall be 50,000 shares of common stock with a par value of Five ($5.00) per share."

JOEL R. ZULLINGER
of Davis and Zullinger
1 West King Street
Shippensburg, PA 17257

(10-10)

NOTICE OF BRANCH BANK APPLICATION

NOTICE IS HEREBY GIVEN that Orrstown Bank, Orrstown, Pennsylvania, has filed an application for approval of a branch banking facility with the Department of Banking of the Commonwealth of Pennsylvania, on October 8, 1980. The location of the proposed branch banking facility is the corner of Oak Lane and Lurgan Avenue, Borough of Shippensburg, Franklin County, Pennsylvania 17257.

JOEL R. ZULLINGER
of Davis and Zullinger
1 West King Street
Shippensburg, PA 17257

(10-10)

CITATION

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF FRANKLIN)

TO

The heirs, beneficiaries, legatees and next of kin of Miguel Gomez, greeting:

At the instance of Harvey E. Whittington, Administrator of the Estate of Wallace W. Orndorff, Deceased, a creditor of the Estate of Miguel Gomez, Deceased, you and each of you are hereby cited to appear before David W. Bowers, Register of Wills of Franklin County, on November 7, 1980 - 10:00 A.M. and to show cause why you should not apply for and take out letters of administration on the Estate of Miguel Gomez, Deceased, or failing this to show cause why such letters should not be granted unto Harvey E. Whittington, Administrator of the Estate of Wallace W. Orndorff, Deceased, or his nominee.

WITNESS, David W. Bowers, Register of Wills, and the seal of his office at Chambersburg, Franklin County, the 1st day of October, 1980.

DAVID W. BOWERS, Register

(OFFICIAL SEAL)

(10-10, 10-17, 10-24, 10-31)

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA — ORPHANS' COURT DIVISION

The following list of Executors, Adminis-

In *Commonwealth v. Shelton*, 260 Pa. Super. 82, 393 A.2d 1022 (1978), the Superior Court adopted a statement made by Judge Shughart in *Commonwealth v. LeFevre*, supra, that the rules of criminal procedure outlined a specific method to institute summary proceedings, and that these rules are not to be disregarded. However in that case, where appellant was discharged by the Superior Court, the police officer filed a citation with the District Justice who then sent a copy to the defendant. This was error, the Superior Court said, because under Rule 51A(1) (a) upon receiving the citation the issuing authority should have sent out a summons, the form of which is contained in Rule 58 and gives the defendant notice of four options "regarding pleas of guilty or not guilty and consequent courses of action, lest a warrant of arrest issue for failure to respond." The Court concludes by saying: "We will not look for less than strict compliance with Rule 51." We do not have the benefit of President Judge Jacobs' dissent.

In *Shelton* the Justice of the Peace failed to comply with the rule. The officer, the Court said, properly filed the citation with the District Justice and the latter erred in sending a copy of the citation. We are not able to tell from the opinion whether the officer who observed the violation was in uniform and stopped the car or not. If he did and did not immediately hand the driver a citation, then the case is like ours and the procedure was approved because the Superior Court said the proceedings were properly instituted. If not - if the officer was not in uniform - then the case is clearly distinguishable.

But even that is not a complete answer. The District Attorney, in his argument, goes beyond Rule 51 and questions the right of this court to impose the sanction of dismissing the charge for the officer's failure to comply with the strict language of the rule. The strict language we mention is that an officer in uniform *shall* issue a citation.

But before we discuss that, we must examine the meaning of that language. Does *shall* in Rule 51A(1) (a) mean shall or may it mean may. *Shall* under certain circumstances may mean *may* if this is what is clearly intended, *Commonwealth v. Lang*, 55 Del. 183 (1967), as when no right or benefit to anyone depends on its imperative use, when no advantage is lost, or when no right is destroyed. *Commonwealth v. Bell*, 249 Pa. 144, 94 A. 746 (1915). *Shall* can be interpreted as mandatory or merely directory, though it is generally considered mandatory, except when relating to the time of doing something. But it is the legislative intent which must govern and this depends on a consideration of the entire act, its nature, its object and the resulting consequences if it was construed one way or the

other. *Francis v. Corleto*, 418 Pa. 417, 211 A.2d 503 (1965) citing *Pleasant Hills Borough v. Carroll*, 182 Pa. Super. 102, 125 A.2d 466 (1956).

In *Francis v. Corleto* plaintiffs claimed compensation for a period of time when they were actively working to the detriment of their public employer. Their claim was based on civil service regulations that declared terminal vacation pay *shall* be paid, arguing that the language imposed on the defendant a legal obligation to make such a payment. The Court said:

> Under the circumstances here presented, we will not construe the word in this mandatory sense, thereby taking from the City its right to recoup at least some of its losses incurred by reason of the plaintiffs' misconduct in office.

As we view Rule 51A(1) (a) the officer is permitted, or may, issue a citation because he is in uniform. The immediate issuance of a citation expedites the proceedings and cuts through the steps that marked summary violation prosecutions before these rules. Under the Vehicle Code, the Act of 1929, May 1, P. L. 905, Sec.1202; 1931, June 211, P.L. 751, Sec.2; 1937, June 29, P.L. 2329, Sec.3, summary proceedings were commenced when the officer filed an information with the Justice of the Peace who, within seven days, had to send the defendant a notice in writing of the filing of the information, with a copy of the information and notice to appear within ten days. The procedure was obviously a cumbersome one.

We conclude that Rule 51A(1) (a) and (b) were adopted for the convenience of the Commonwealth and not to protect any right of the defendant. When an officer is in uniform his authority as an officer and right to issue a citation is clear and so it is permissible. But not if he is not in uniform. Then he must go to a Justice of the Peace and file the citation with proceedings markedly similar to those under the Vehicle Code of 1929 to follow. But again, for the convenience of the Commonwealth, if the officer is in uniform but must hurry along to something else, such as to investigate an accident, *Commonwealth v. Xakellis* 73 D&C 2d 207 (1976) or interview another witness, *Commonwealth v. Lombardo*, 4 D&C 3 106 (1977) the officer may proceed through the Justice of the Peace.

In the context of Rule 51, *shall* cannot be construed as mandatory and thus deprive the Commonwealth of the right to prosecute a summary motor violation.

Now to the District Attorney's point, that to impose a sanction by dismissing the case is beyond the purview of this

This is what we have done. The motions to strike duplicate the demurrers, leaving only the motion for more specific pleading. We will not require more specific pleading, so the case may proceed. We are obliged, however, to grant the defendant time in which to file an answer.

ORDER OF COURT

September 11, 1980, the Defendants' Demurrers to Counts Three and Four are treated as Motions for Judgment on the Pleadings and are granted. The other Motion for More Specific Pleading is denied. The Defendants are given twenty days from this date to file a responsive pleading to Counts One and Two of the Complaint if Defendants deem to appropriate to do so.

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[1] Counts one and two contain such an allegation.

COMMONWEALTH v. CHATMAN, C.P. Franklin County Branch, No. 272 of 1980

Criminal - Driving at Unsafe Speed - Pa. R. Crim. P. 51

1. In Pa. R. Crim. P. 51A(1) (a), the use of the word "shall" in referring to the issuance of a citation at the scene of a violation for a summary offense is interpreted to be directory and not mandatory.

2. Pa. R. Crim. P. 51A(1) (a) and (b) were adopted for the convenience of the Commonwealth to avoid filing an information with a District Justice. It was not intended to protect any right of the defendant.

3. It is beyond the purview of the Court of Common Pleas to impose the sanction of dismissing the case for failure to issue a citation at the scene of a violation.

4. Where a State Trooper stopped an unmarked State Police car driven by an off duty corporal in uniform, it was not feasible for the arresting officer to immediately issue a citation to the defendant in that the defendant was the arresting officer's superior, driving a state police car, who may or may not have been on duty.

John F. Nelson, Assistant District Attorney, Attorney for the Commonwealth

Larry E. Stoner, Esq., Attorney for Defendant

OPINION AND DECISION

EPPINGER, P.J., September 19, 1980: