courtesy which could have been accorded the defendant or the defendant's insurance adjuster.

In any event, the statement in *Kraynick v. Hertz*, supra, applies equally to the instant case:

> "Viewing the totality of circumstances herein presented, particularly the entry of the default judgment at 8:39 on the morning of the twenty-first day--a time when most court offices are not yet open for business--indicates that in good conscience the defendant should be let into a defense."

The plaintiff has not alleged or proved that any prejudice would be done him by the opening of the judgment

We conclude that a default judgment in an action in trespass will be opened where, as in the instant case, all of the following factors are present: (1) the failure of a defendant to answer or appear is due to an inadvertent mistake by his insurer; (2) the plaintiff takes a judgment in default, without notice of his intention to do so, shortly after the expiration of the answer's due date; (3) the defendant moves promptly to petition for the judgment to be opened; and (4) the prejudice to the defendant by not opening the judgment would be out of proportion and greater than that caused to the plaintiff by opening the judgment.

ORDER

NOW, this 13th day of March, 1978, the defendant's petition to open the judgment is granted, the rule issued thereon is made absolute, and the judgment is opened for the purpose of permitting the defendant to enter a defense to the same.

RICKER v. FICKES ET. AL., C.P., Franklin County Branch, No. 54 November Term, 1974

Assumpsit - Permissive Counterclaim - Pa. R.C.P. 1031(a)

1. Under the express language of Pa. R.C.P. 1031(a), counterclaims are permissive and not mandatory, whether or not related to the subject matter of the action.

Harvey C. Bridgers, Jr., Esq., Attorney for Plaintiffs

Kenneth E. Hankins, Jr., Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., September 8, 1975:

The matter before the Court is a demurrer by plaintiffs to a preliminary objection raising the defense of pendency of a prior action.

Plaintiffs are the owners and defendants are the contractors under a contract for the construction of a house. The complaint alleges that the contractors breached the contract by building the roof improperly. The defendants' preliminary objection is a petition raising the defense of pendency of a prior action. Plaintiffs' demurred to this preliminary objection.

Defendants filed a complaint some five months before the present action against the owners based on a breach of the same contract by the latter. The contractor claimed the owners failed to pay sums due under the contract and for extra items and work. The owners filed an answer in that action denying that the contractors had fully performed and specifying several defects including, inter alia, that the roof leaks. It did not include a counterclaim. The narrow question then is whether one who is a defendant in a prior assumpsit action may institute an assumpsit action against the plaintiff in the prior action based on a cause arising out of the subject matter of the earlier action in which he had the option of asserting that cause as a counterclaim.

There appears to be no appellate court authority on this precise question but the lower courts and the commentators unanimously take the position that on such facts as are alleged here, the prior action is no ground for abatement of the later. Under the express language of Pa. R.C.P. 1031(a) counterclaims are purely permissive and not compulsory or mandatory, whether or not related to the subject matter of the action. Cf. F.R.C.P. 13(a) and (b). The choice of whether to counterclaim or not being completely discretionary with the defendant, his failure to do so can constitute no impediment to later assertion of the claim by a separate action, subject, of course, to the constraints of the statute of limitations. *LaRose v. Plastico Industries, Inc.*, 59 D. & C.2d 536, 32 Beaver L.J. 186 (1972); *Schmidt v. Schmidt*, 39 D. & C.2d 473 (1966); *Fritz v. Evans*, 12 Chester 111 (1964); *Lech v. Smith*, 53 Schuy. 30 (1957); *Kaye v. Penn Aluminum Construction Co.*, 2 D. & C.2d 205 (1954); see also *McGowin V. Montgomery*, 44 D. & C.2d 787 (1968); *Gross v. Fantechi*, 15 D. & C.2d 160 (1958); *Deane v. Greenbaum*, 77 D. & C. 569 (1951); Anderson, Sect. 1031.3; Goodrich-Amram, 1031(b)-1.

It is true that the owners' answer denied with some specificity the fullness of the contractor's performance under the contract and thus created questions of law and fact common to both actions. But it is inconceivable that the bare assertion of certain facts in defense of the contractor's claim can amount to a counterclaim such that a subsequent action identical to it could abate by reason of the pendency of the former action.

Even were this so, it is doubtful whether the pendency of a counterclaim is such as to cause an action brought on the same claim to abate. Where a prior action by a defendant is pending when the defendant asserts the same claim as a set-off in a subsequent action, the pendency of the first action does not cause the abatement of the set-off. *Baugh v. Mitchell*, 166 Pa. 577 (1895); *Gilmore v. Reed*, 76 Pa. 462 (1875); *Filbert v. Hawk*, 8 Watts 443 (1839); *Cochran v. Cutter*, 18 Pa. Super. 282 (1901). The language of the Act of 1705, 1 Sm.L. 49 Sect. 1, 12 P.S. 601 (. . . "it shall be lawful" . . .) appears to have the same meaning as the word "may" in Rule 1031(a). Similarly, where the assertion of the counterclaim precedes the independent action on the cause presented by the counterclaim, the counterclaim does not cause the latter action to abate. *Price v. Davis Coal & Coke Co.*, 208 Pa. 395 (1904); *Stroh v. Uhrich*, 1 Watts & Sergeant 57 (1841).

The justification for the rule of these last two cases is less than clear. In light of the optional nature of the set-off, it may follow simply as the converse of the rule announced in *Filbert v. Hawk*, supra. Its formulation may have been motivated by consideration of the effect which a plaintiff's right to suffer a non-suit could have on a defendant who asserted a set-off but did not have pending an independent action within the period of the statute of limitations. See *McCredy v. Fey*, 7 Watts 496 (1838) and cf. Pa. R.C.P. 232(a). There is, however, authority to the contrary: *Pennsylvania Railway Co. v. Davenport*, 154 Pa. 111 (1839). This case seems to have been strictly limited (*Cochran v. Cutter*, supra; *National Metal Edge Box Co. v. American Metal Edge Box Co.*, 246 Pa. 78 (1914), if not tacitly overruled (*Price v. Davis Coal & Coke Co.*, supra.). We need not concern ourselves with the question of the continuing validity of these rules, but, even if questionable, the cases point up the difficulty with defendants' position.

Defendants stress the policy against multiplicity of litigation as militating in favor of abating the present action. Statements from factually inapplicable cases (*Penn Bank v. Hopkins*, 111 Pa. 328 (1885); *Dempsey's Estate*, 288 Pa. 458 (1927); *Speir v. Locust Laundry, Inc.*, 56 Pa. Super. 323 (1914)) suggest tension between this policy and the idea of

a permissive counterclaim. But this argument must fall before the plain and simple word "may" in Rule 1031(a).

Under this analysis, plaintiffs need not show any justification for failing to plead a counterclaim and for asserting their claim as this action. Therefore we sustain the demurrer in the preliminary objections to preliminary objections and overrule the preliminary objection raising the defense of the pendency of a prior action.

ORDER OF COURT

NOW, September 8, 1975, defendants' preliminary objections in the nature of a petition raising the defense of pendency of a prior action are overruled and plaintiffs' demurrer thereto is sustained. Exception to the defendants.

ROMALA INVESTMENT CORPORATION v. PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, C.P., Franklin County Branch, No. 207 November Term, 1976

Eminent Domain - "Taking" - Flooding Caused by Highway Construction

1. When highway improvement results in drainage alteration and flooding of adjoining property, there is no "taking" in the constitutional sense and there is therefore no right to compensation under the eminent domain law.

2. Compensation at the time of the original taking of real property for use as a public highway includes compensation for damages to the adjoining property caused by subsequent highway improvements.

William D. Miller, Esq., Assistant Attorney General, for the Defendant

Donald L. Kornfield, Esq., Attorney for the Plaintiff

OPINION AND ORDER

Argued before Eppinger, P.J., Keller, J., Opinion by EPPINGER, P.J., February 25, 1977:

Romala Investment Corporation (Romala) filed a petition for the appointment of Viewers as the owner of land along Legislative Route L.R. 28025 in Washington Township, Franklin County. This road was formerly a township road and accepted as a state highway under the Act of 1931, P.L. 594, Sect. 1, et seq., 36 P.S. 1738-1, et seq.