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.

Before these proceedings, Romala sold off various tracts to other people leaving it with a remainder of 18.4 acres. This remaining tract is bounded in part by a creek and has over 1,400 feet of road frontage. It is Romala's contention that since 1972, as a direct result of the maintenance of the road by the Commonwealth of Pennsylvania, (Department), of Transportation (Department); water has been discharged from the road onto the property causing regular and permanent flooding of certain portions of it.

The Commonwealth filed preliminary objections. The first was a demurrer alleging that the petition fails to state a claim or cause of action in eminent domain against the Department. The second is a petition raising the question of jurisdiction of the Court in eminent domain, arguing, in effect, that the intrusion alleged in the complaint represents a trespass or nuisance depending upon the permanency or the nature of it. The third preliminary objection is a motion for more specific pleadings.

We find the demurrer must be sustained. In a case very similar to this one, *Brewer v. Commonwealth*, 345 Pa. 144, 27 A.2d 53 (1942), our Supreme Court held that the claimant had no right to compensation under the Eminent Domain law. The Court went on to state:

> "Obviously, drainage is essential to the proper enjoyment of a street or country road: Lewis on Eminent Domain (1st Ed.) Sect. 127. The land in front of plaintiffs' property was taken long since for a particular public use. Changed conditions made it necessary, in the judgment of the highway department, that a new and better road should be constructed, and this required changes in the drainage system. This was a use of the land of the same character and for the same purpose for which it was originally taken. It was for that use that the owners were compensated when the land was taken originally for public purpose: 18 Amer. Juris., Eminent Domain, Sect. 180."

More recent cases in the Commonwealth Court have confirmed this rule established by the Supreme Court. In *Commonwealth v. Township of Palmer*, 16 Pa. Commonwealth Ct. 270, 171, 329 A.2d 871 (1974), a petition was filed alleging that as a result of highway construction, surface waters were "altered, collected, diverted and concentrated" upon some township roads which interfered with their use and maintenance thereby giving rise to a compensable damage. The Commonwealth Court ordered the trial court to dismiss the

petition for appointment of viewers as there was no "taking" in a constitutional sense but merely a nonsequential injury for which the Commonwealth was not liable. The case of *Berkshire Street*, 20 Pa. Commonwealth Ct. 601, 343 A.2d 67 (1975), found that the landowner was not entitled to recovery even if the damage came as a result of the exercise of the Commonwealth's right of eminent domain, because the landowners alleged only damages to their property and not a taking.

In the case of *Lehan v. Commonwealth*, 22 Pa. Commonwealth Ct. 382, 349 A.2d 492 (1975), where a petition for viewers alleging a "de facto taking" was dismissed, it was noted that the taking resulted from the Commonwealth permitting sewerage to be introduced into the highway drainage system which in turn produced the alleged injuries to the claimant's land. "We have reiterated the rule that acts not done in the exercise of the right of eminent domain and not the immediate, necessary, or unavoidable consequence thereof cannot be the basis of any claim in an eminent domain proceeding", the Court said.

Under all of these circumstances, we find that the demurrer must be sustained and we will not consider the other matters raised in the preliminary objections.

ORDER OF COURT

NOW, February 25, 1977, the demurrer of the Commonwealth of Pennsylvania, Department of Transportation, is sustained and the petition is dismissed at the cost of the petitioner.

RAILING v. RAMSEY, C.P. Franklin County Branch, Equity Docket Vol. 7, Page 8

Easements - By Prescription - Continuity of User Required - By Implication - Existence at time of severence and necessity to Beneficial Enjoyment - By Grant - Reference in Deed or Draft - Reservation in Stranger to the Deed - Dorand, Ozehoski Rationale

1. To establish an easement by prescription, adverse user must be for a continuous twenty-one period, and while the user need not have occurred every day or be constant, evidence of use during various periods of time over the twenty-one years, without clear and positive proof of continuity throughout the twenty-one years is insufficient.