foreclosures are similarly inadequate, since the benefits of the act extend only to those contracts in existence prior to October 17, 1940. Furthermore, the act fails to mention foreclosure by entry and possession and statutory foreclosure by advertisement and sale.[45] Not much is offered in the way of protection for life insurance policy holders, since the act doesn't apply if fifty per cent or more of the loan value of the policy has already been borrowed. If there is fifty per cent of the loan value left, it would generally be sufficient to carry the policy for the year regardless of this law. The act would be beneficial to holders of new policies because their policies' loan values would be low, but to practically all others nothing advantageous is gained under the act. Moreover, the act applies to a maximum of $5,000 insurance. The section on taxes provides for deferment of real property and income taxes during the period of military service, but personal property taxes are entirely disregarded. Either more adequate compensation should be paid by the government or further protection ought to be granted. In the interest of justice to the man in the service and of high morale in the ranks, these shortcomings in the present act provide reason enough for the enactment of remedial legislation. H. M. M.

PLEADING AND PROCEDURE

Joinder of Negligent Defendants

Plaintiff alleged in his petition that he sustained damage as a result of injuries to his wife which she was alleged to have received through the combined negligence of the defendants. The negligence charged against the father, Harry Seff, was that he permitted his minor son to operate his automobile contrary to a city ordinance of Akron. The negligence charged against Robert Seff, a minor, was that he violated a city ordinance in the manner in which he made a left hand turn and also that he failed to keep a look out and to control the speed of the car. Each of the defendants demurred to the petition on the grounds of misjoinder of parties. *Held:* That the two defendants were properly joined in the same action.[1]

As a general rule, a party suing in tort has the right to join or not to join the different joint tort-feasors as parties to his action for damages.[2] The reason for this is that a liability in tort is joint and several.[3]

[45] Under a similar provision in the Act of 1918 it has been held that foreclosure by entry and possession and statutory foreclosure by advertisement and sale were not prevented by the federal law. Bell v. Buffington, 244 Mass. 294, 137 N.E. 287 (1923); Taylor v. McGregor State Bank, 144 Minn. 249, 174 N.W. 893 (1919), *dictum*.

[1] Wery v. Seff, 136 Ohio St. 307, 25 N.E. (2d) 692 (1940).

[2] Brownfield v. Clapham, 25 Ohio C.C. (N.S.) 443, 27 Ohio C.D. 424 (1916).

[3] Lindemann v. Eyrich, 21 Ohio App. 314, 153 N.E. 221 (1926).

A difficult problem is whether two or more parties whose negligent acts concur in causing a single injury to the plaintiff may be classed as joint tort-feasors for the purpose of uniting them as defendants in one action.

Many courts have refused to permit joinder because the duty which was owed by one defendant to the plaintiff was not the same as the duty owed by the other defendant or defendants. Thus it was held in the case of *Morris* v. *Woodburn*[4] that a municipality and a lot owner were not jointly liable to the plaintiff for the duty owed by the municipality to the plaintiff was different from that owed by the lot owner. The more recent case of *Bello* v. *City of Cleveland*[5] laid down a rule similar to that of the *Morris* case. Joinder was not permitted in the *Bello* case for the duty of one defendant was statutory and that of the other defendant was a common law duty. The court reasoned that the different types of duty would involve different matters of fact and of law. The defendants in the principal case owed the plaintiff a similar duty but there is dicta to the effect that it isn't necessary that the defendants owe a common duty to the plaintiff.

In many of those cases in which the courts deny joinder because there is not a common duty, the courts could as easily put their decisions on the grounds that the liability of one defendant is primary while that of the other defendant is secondary. A party who is secondarily liable is liable because of his relationship to the wrongdoer. Such tort-feasors are known as related tort-feasors and not joint tort-feasors. Where a primary and secondary liability exist, there can be no joinder for there is not joint accountability, because if recovery is had against the party secondarily liable he may recover from the defendant who is primarily liable. A master whose liability is predicated on the doctrine of *respondeat superior* cannot be joined in Ohio with his servant for the master is only secondarily liable.[6] A plaintiff might avoid the sustaining of a demurrer to his petition if he alleges that the master participated in the act which constituted the wrong. A negligent retailer of foodstuffs cannot be joined with the negligent wholesaler for the wholesaler is primarily liable and the retailer is only secondarily so.[7] There was only primary liability in the principal case for the father was liable for his own negligent act and not because of his relationship to the other wrongdoer, his son.

Numerous courts in refusing to permit joinder of negligent defend-

[4] Morris v. Woodburn, 57 Ohio St. 330, 48 N.E. 1097 (1897).
[5] Bello v. City of Cleveland, 106 Ohio St. 94, 138 N.E. 526 (1922).
[6] Losito v. Kruse, 136 Ohio St. 183, 187, 24 N.E. (2d) 705, 707 (1938).
[7] Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935); Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E. (2d) 734 (1938).

ants have given among their reasons the fact that there is an absence of concert of action between the defendants. Dicta in *Stark County Agricultural Society* v. *Brenner* will serve to illustrate this point. There it was stated that, "There is joint liability only where there is concert of action and a common intent and enterprise."[8] On this point the Court of Appeals for Franklin county observed that it was appropriate to speak of concert of action and common purpose in torts wherein volition or purpose is one of the essentials, but volition or purpose is not an essential of negligence.[9] It is submitted that it would be less confusing if the courts, in refusing to permit joinder of negligent defendants, did not give as one of their reasons the absence of concert of action.

There is also some authority in Ohio to the effect that the same degree of negligence must be charged against each defendant in order to join them. Thus, in the recent case of *Smith* v. *Fisher*,[10] it was held to be a misjoinder where one defendant was charged with wanton negligence and the other defendant with ordinary negligence. The court in that case reasoned that the two degrees of negligence would involve different issues of fact and of law. The instant case, while not passing on that point, takes a liberal view of joinder which makes it doubtful whether the *Smith* case would be considered good authority today.

The principal case goes a long way in solving some of the difficulties of joint liability in Ohio and in removing some of the confusion which has heretofore existed by now holding that two or more persons may be joined as defendants under circumstances creating primary accountability, directly producing a single, indivisible injury by their concurrent negligence, even though there is no common duty, common design or concerted action. It is apparent that the plaintiff should be permitted to do this in order to avoid multiplicity of suits.

R. L. R.

[8] Stark County Agricultural Society v. Brenner, 122 Ohio St. 560, 573, 172 N.E. 659, 664 (1930).

[9] Dash v. Fairbanks Morse & Co., 49 Ohio App. 57, 195 N.E. 413 (1934).

[10] 15 Ohio Op. 325 (1939).