8 per cent per annum; loans by non-licensees of less than $300.00 at more than 8 per cent per annum), and (2) the statute is a police regulation, *State* v. *Powers*, 125 Ohio St. 108, 180 N.E. 647 (1932); *People* v. *Stokes*, *supra*; aimed at the protection of the small borrower which should include the "economically absurd luxury" of litigation as well as usury. It would not, under the circumstances, seem to be too harsh to require purchasers of such paper from licensees to inquire as to its validity. Finally General Code section 8307 was probably never intended to be applied to void instruments. Extended search fails to show a single occasion where it has been invoked to save the holder of a void instrument. The fact that the indorsee is not a party to the illegal transaction carries no weight. General Code section 8307 specifically declares the victim of usury not a *particeps criminis*. The indorsee seeks to invoke a part of the Interest Law to give life to an instrument declared void by the legislature as a police measure. It is hard to believe that the legislature would have intended to have this police measure circumvented by mere indorsement to a *bona fide* purchaser.

J. GARETH HITCHCOCK

PLEADING

ELECTION OF REMEDIES — MASTER-SERVANT RELATIONSHIP

The plaintiff brought an action against the defendant on the theory of *respondeat superior* for injuries received in an automobile accident caused by the negligence of the defendant's servant. While the action was pending, the plaintiff filed an action directly against the servant. Service was had but no answer was filed and the case went to default judgment. The court, upon motion, dismissed the suit against the master on the ground that the plaintiff's judgment against the servant constituted an election of his remedies and was a bar to his recovery against the master. On appeal it was held that the granting of such motion was error. In refusing to require election, the court said that the plaintiff had two *consistent* substantial remedies which are not repugnant to each other and he might pursue each separately, that is, he might pursue the master and he might pursue the servant separately but he can have only one satisfaction. *Land* v. *Berzin*, 26 Ohio L. Abs. 703 (1938).

The doctrine of election of remedies may be broadly defined as a choice made with knowledge between two *inconsistent* substantial rights, either of which may be instituted at the instance of the chooser, who

cannot, however, enjoy both. *Frederickson* v. *Nye*, 110 Ohio St. 459, 144 N.E. 299, 35 A.L.R. 1163 (1924). In a jurisdiction applying the doctrine of election of remedies, if the remedies are inconsistent, the plaintiff logically should be required to elect and having done so, would be barred in a subsequent action against the master. But if the remedies are consistent, there is no room for the application of the doctrine. The doctrine of election of remedies does not apply where the proceedings are against different persons and are consistent. *Herd* v. *Wade*, 63 S.W. (2d) 253 (Tex. Civ. App. 1933); *Maple* v. *Railroad*, 40 Ohio St. 313, 48 Am. Rep. 685 (1883). The same rules apply to joinder. Joinder of inconsistent causes of actions cannot be permitted in the same petition. Therefore, if the plaintiff's remedies against the master and servant are inconsistent, joinder should not be had. But if they are consistent, there is no reason for not permitting a joint action. *Byers* v. *Rivers*, 3 Ohio Dec. Rep. 231 (1860); 1 Ohio Jur. p. 351.

There is a conflict in the cases as to whether or not the plaintiff's remedy against the master and his remedy against the servant are consistent. The Vermont Supreme Court has gone a long way in advocating the inconsistency of the plaintiff's remedies. In a case decided in 1935 it was held that where the master is liable under the doctrine of *respondeat superior*, he and his servant are not joint tortfeasors, hence are liable jointly but in the alternative. They may not be joined as defendants and the plaintiff's election to sue the servant bars him from the proceeding against the master. The court, as indicated in the above statement, based its decision on the theory that the vicarious liability of the master is only a substituted or alternative one which cannot exist concurrently with that of a servant. This case represents the view that the plaintiff's remedies are inconsistent and naturally joinder is refused and the doctrine of election of remedies is applied. *Raymond* v. *Capobianco*, 107 Vt. 295, 178 Atl. 896 (1935). The decision of the case has been severely criticized. 45 Yale L. J. 920 (1936); 36 Col. Law Rev. 324 (1936). Some of the Ohio cases have adopted the theory of the *Raymond* case, *supra*. In Ohio a joint action cannot be maintained against the master and servant because, it is said, the master's liability arises solely from the relationship between them, under the doctrine of *respondeat superior*, and not by reason of the master's personal participation in the wrongful or negligent act. Under such circumstances, since the remedies are viewed as inconsistent, the plaintiff is required to elect against which of the defendants he will proceed. *Clark* v. *Fry*, 8 Ohio St. 358, 72 Am. Dec. 590 (1858); *French* v. *Central Construction Co.*, 8 Ohio C.C. (N.S.) 425, 18 Ohio C.D. 524 (1906);

French v. *Central Construction Co.*, 76 Ohio St. 509, 81 N.E. 751, 12 L.R.A. (N.S.) 669 (1907); 26 Ohio Jur. p. 671. A judgment against the servant whom the plaintiff, with knowledge of the master-servant relationship, has elected to sue may be pleaded in bar to his subsequent action against the master. *Cordes* v. *Deopke*, 19 Ohio N.P. (N.S.) 561 (1917).

Under the codes, however, a large majority of the states have adopted a different theory. They hold that the remedies are consistent and that the plaintiff may join the master and servant in an action where the master is liable only under the doctrine of *respondeat superior*. 98 A.L.R. 1057 (1935); 39 C.J., p. 1314; MECHEM, AGENCY, p. 1580 (1914). There is some authority in Ohio to the effect that the remedies are consistent, even though joinder is denied. The Ohio Supreme Court refused to apply the doctrine of election of remedies in a case where a judgment was taken against an agent for fraud committed while acting within the scope of his agency but upon which no satisfaction was had. The court held that such judgment was no bar to a subsequent action against the principal for the same fraud. *Maple* v. *Railroad, supra;* MECHEM, AGENCY, p. 1586 (1914). Such a decision indicates a belief on the part of the court that the remedies are consistent. In a more recent court of appeals case there is *dictum* to the effect that the plaintiff's remedies are consistent. *Schulz* v. *Brunhoff Mfg. Co.*, 22 Ohio App. 220, 225, 153 N.E. 924, 926 (1926).

What are the arguments generally advanced by those advocating the inconsistency of the remedies of the plaintiff against the master and servant where the master is liable solely because of the master-servant relationship? One which could be used is by way of analogy. In contract cases where the plaintiff, with knowledge of the existence of the principal, and with the power to choose between him and the agent, takes a judgment against either one, that constitutes a conclusive determination to hold that one only. Mechem, *Agency*, p. 1320 (1914). One might say, by analogy, that such reasoning should also apply to tort actions. But the law is otherwise; in contract cases the rule is more one of substantive law than of procedure. In tort cases, following the general rule respecting joint wrongdoers, it is held that an unsatisfied judgment against the agent is no bar to a subsequent proceeding against the principal. *Maple* v. *Railroad, supra*; Mechem, *Agency*, p. 1586 (1914). Probably the real basis for the belief that the remedies are inconsistent lies in the old common law rules of pleading which would not permit the joinder of actions in trespass with actions in case. An action against the servant was in trespass and an action against the master

was in case, therefore joinder was denied. Such an argument is outdated and has no place in modern code procedure. It is no reason to deny joinder and find the remedies inconsistent simply because such was the case at common law. 98 A.L.R. 1058 (1935). The reason given in Ohio for finding the remedies inconsistent and denying joinder is that the master has a right against the servant for recovery of such damages as he may be compelled to pay by reason of the servant's negligence. *Clark* v. *Fry, supra*; 15 Ohio Jur. p. 289. The reason seems to be a poor one when it is recognized that the master's liability is really in the nature of a surety, although a non-consensual one. In a suit on a suretyship contract the principal and the surety may be joined in the same action even though the surety has the right of indemnity for payment against his principal. 38 Ohio Jur. p. 478.

What are the arguments advanced by those advocating the consistency of the plaintiff's remedies? It seems that the courts which allow joinder and refuse to require the plaintiff to elect do so simply because it is in harmony with the paramount idea of the codes, namely, to litigate all causes which may legitimately be joined, in order to avoid a multiplicity of actions. The master and servant are liable to the plaintiff for the same wrongful or negligent act; and if the master personally participated in the act, directed it or ratified it, they clearly would be joint tortfeasors; the remedies would be viewed as consistent and joinder would be permitted in almost all jurisdictions. 39 C.J. p. 1315; Mechem, *Agency*, p. 1580 (1914). Such is the rule in Ohio. *French* v. *Central Construction Co., supra*; *Tishler* v. *Taxicabs of Cincinnati, Inc.*, 11 Ohio Op. 17, 26 Ohio Abs. (1938); 30 Ohio Jur., p. 775. In a case where the master is liable to the plaintiff for the act of the servant because of the master-servant relationship and not because he concurred in the wrongful or negligent act, there is no merit in the argument that the remedies become inconsistent and should not be joined. To draw such a distinction is not justified. The purpose of the codes is to facilitate pleading and get away from technical rules which can result in nothing but injustice to a party who has been injured. Furthermore, it is difficult to imagine how the defendant master could be prejudiced or caught by surprise simply because joinder was permitted and the election of remedies denied application.

In conclusion, it seems clear that the more sensible theory and the one adopted in most jurisdictions is that the remedies are consistent. It would follow that joinder should be permitted and the doctrine of election of remedies denied application. But what is the state of the law in Ohio? Where the master is liable solely because of the master-

servant relationship, do the courts of Ohio consider the plaintiff's remedies against the servant and against the master as being consistent or as being inconsistent? The answer to that question seems to be that the Ohio cases are in a state of confusion. There is one line of cases which refuses joinder of master and servant and requires election of remedies on the theory that the plaintiff's remedies are inconsistent. *Clark* v. *Fry*, *supra*; *French* v. *Central Construction Co.*, *supra*; *Cordes* v. *Deopke*, *supra*. Another line of cases recognizes that the remedies are consistent, and even though joinder cannot be permitted because of contrary precedent, the application of the doctrine of election of remedies is denied. *Maple* v. *Railroad*, *supra*; *Schultz* v. *Brunhoff Mfg. Co.*, *supra*; *L'Archer* v. *Rosenberger*, 3 Ohio Op. 101, 103 (1935); *Land* v. *Berzin*, *supra*, the principal case. The holding of the principal case, as indicated, follows the theory of the latter group of cases recognizing the consistency of the remedies. In light of the foregoing discussion, such a holding is to be commended. Where one rule prohibited joinder and another rule required election of remedies, a situation would be created whereby the chances of the plaintiff's recovery would be largely determined by the application of technical procedural rules. It is the group of cases finding the remedies consistent and refusing to apply the doctrine of election of remedies which saved the Ohio law from getting into such a predicament. The solution to the problem, of course, lies in the abrogation of both the rule against joinder and the doctrine of election of remedies in master-servant situations. It is hoped that the supreme court will see fit not only to affirm the rule laid down in the principal case, but also to overrule the cases which have refused joinder.

PHILIP AULTMAN

ALTERNATIVE PLEADING IN OHIO

In an action founded on the breach of a contract to lease property, plaintiff's prayer was that the court decree specific performance or alternatively, if equitable relief should be denied, award damages in lieu thereof. The trial court found the plaintiff disentitled to specific performance because of laches but assessed damages in his favor. Neither party at this first trial requested a jury. On appeal the judgment relative to laches and the right to specific performance was affirmed, but the case was reversed and remanded because of the application of an improper measure of damages. The court denied defendant's request for a jury made early in the second trial stating as its reason "the equitable rule that where a court of equity has once acquired jurisdiction, it will retain