James Beaty supported the summons.

DRAPER, C. J.—I do not look upon the second and sixth pleas as pleaded merely to damages. They appear to me to answer parts of plaintiff's causes of action, and, taken *in connection with* the other pleas proposed to be pleaded, the whole of plaintiff's causes of action are answered. The only plea I have any real doubt about, is the eighth plea. The want of a statement that the rescission of the first agreement was by writing is the cause of my doubt. If defendants desire, they may insert the statement that it was by writing. If they decline, I will, on the authority of the *Solvency Mutual Guarantee Co* v *Frony*, 7 Jur. 8. 99, and the cases therein cited, allow the plea; but if plaintiff desire to traverse, reply and demur he may do so; the demurrer, if any, to be first argued. Defendants' second summons must also, I think, be made absolute; but as what defendants by that summons ask should have been made part of the first summons, defendants must pay the costs of the second application. The costs of the first application will, as is usual, be costs in the cause.

Order accordingly.*

HENDERSON v. CHAPMAN AND GEREAU.

Master and servant—Action for negligently setting fire to plaintiff's barn—Pleading—Materiality of allegations in declaration—Effect of not guilty—Evidence.

The first count of a declaration for setting fire to plaintiff's barn, &c. alleged that plaintiff *at the time when*, &c., was possessed of a farm, &c., that defendant Chapman was *at the said time*, possessed of the southerly portion of the lots of which plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, &c., and that by reason of negligence and carelessness the fire spread to plaintiff's land and burned his barn, &c.

The third count alleged possession of plaintiff and Chapman as in the first count, it then described the defendants premises as adjoining the plaintiff's premises, and then alleged that defendant Gereau by the order, instructions, sanction and permission of Chapman, he the said Gereau, *being at the time* in the service and employ of Chapman, set fire to a brush heap, &c., and the defendant did not use due care, &c., whereby, &c.

Held 1. That the allegation that Gereau was at the time when, &c., was a material allegation.

Held 2. That the allegation of Gereau *being*, &c., in the first count referred to the *time* stated, namely, at the time of the committing, &c., was sufficiently certain.

Held 3. That the allegation distinctly appeared in the first count, and was quite distinct from the wrongful act alleged.

Held 4. That the allegation that Gereau was at the time when, &c., was not in issue under the plea of not guilty, and should if intended to be disputed, have been specially traversed.

(Chambers, May 2nd, 1864.)

The first count of the declaration stated that plaintiff, at the time when, &c, was possessed of a farm, &c., that the defendant Chapman was at the said time, possessed of the southerly portion of the lots of which the plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, for the purpose of clearing a portion of said land, and that by reason of negligence and carelessness, the fire spread to plaintiff's land and burned his barn, stable and shed, &c. The second count stated that plaintiff when, &c., was possessed as in first count, and defendants negligently set fire to a bush heap on a particular lot, for the purpose of clearing the said lot, and by reason, &c. The third count alleged the possession of plaintiff and Chapman as in the first count, it then described the defendants premises as adjoining the plaintiff's premises, and that there was only a concession road between them, and then it alleged that defendant Gereau, by the order, instructions, sanction and permission of Chapman, he the said Gereau being at the time in the service and employ of Chapman, set fire to a brush heap, &c., and the defendants did not use due care, &c., but by reason of the negligence of both the defendants, &c., and concluded as in the first count.

The defendants pleaded separately not guilty.

The cause came on for trial at the last Kingston Assizes, before Mr Justice Adam Wilson, when he determined that the pleas of not guilty did not put in issue the fact of Gereau being the servant of Chapman, and allowed a plea to be added denying the same, and as the plaintiff said he could not proceed with the trial if this new issue were raised, the learned judge put off the trial on payment of costs by the defendant.

Afterwards, the learned judge not being satisfied that his ruling was correct, and thinking that as the declaration was framed, the fact of Gereau being such servant was not positively and affirmatively alleged as "*at the time* of the committing of the grievance," he told the defendants attorney he would grant him a summons, calling on the plaintiff to shew cause why the defendant should not be relieved from the payment of costs, if he desired it.

Accordingly a summons was granted by the learned judge at Kingston, returnable before him there, but was enlarged before him in Toronto.

S. Richards, Q. C., for plaintiff.

Sir H. Smith, Q. C., for defendant.

Mitchell v. *Crassweller*, 13 C. B. 237, was cited during the argument.

ADAM WILSON, J.—I have examined the different authorities bearing on this question, and it appears that the test whether the allegation of a person being the servant of another is put in issue or not, is this, if the allegation be that at the time when the wrongful act was committed, such a person was such servant, and that such servant did the wrongful act, then the fact of being such a servant is made a material allegation, and if not traversed, is not in issue, but is admitted.

In actions for criminal conversation or seduction where it is alleged that the defendant had carnal knowledge of the plaintiff's wife or seduced the plaintiff's servant, the fact of the person being the wife or servant is not disputed, unless specially denied; because such fact is distinctly asserted, and is a fact distinct from the wrongful act complained of.

It is said in the cases that the plaintiff alleges his rights have been invaded, and that that the defendant is the person who has invaded them, that there are thus two propositions presented, and if both are meant to be disputed, the *right* of the plaintiff as well as the *wrongful act* of the defendant, must be traversed, and that not guilty only denies the defendant did this wrongful act, *i. e.* committed the seduction, &c., and does not deny that the plaintiff's *right* has been invaded, or in other words, does not deny that it was the plaintiff's *wife* or his *servant* who was the person seduced. See *Kenrick* v. *Horder*, 7 El. & Bl., 628; *Torrence* v. *Gibbins*, 5 Q. B. 297; *Ford* v. *Laugeois*, 19 U. C. Q. B., 312.

So it would seem to follow that when the plaintiff says, the defendant by one A B, *then* being his servant, wrongfully set fire to a brush heap, by which the plaintiff's property was destroyed, he states two propositions:—

1. That A B. *was then* the defendants servant, and
2. That the defendant by A B, wrongfully set fire to the heap.

The wrongful act is the negligently setting fire to the brush heap by the defendant. The allegation that A B was the defendants servant at the time, is no part of the wrongful act, but is altogether a distinct allegation. See *Patten* v. *Rea*, 2 C. B. N. S. 606; *Hart* v. *Crowley*, 12 A. & E. 378.

It is not necessary that such a statement to be material, should be set out in an inducement to the court, as appears by the cases of *Dunford* v. *Trattles*, 12 M. & W., 529; *Grew* v. *Hill*, 3 Ex. 801; and *Kenrick* v. *Horder*, in which the whole allegation is contained in the charging part of this count, but if an inducement is used, it appears to be of no consequence in what part of the declaration it is contained, whether at the beginning or at the end.

Applying these views to this declaration, does it appear that it is anywhere distinctly alleged that *at the time of the wrongful act*, Gereau was the servant of Chapman? I think it does so appear expressly in the third count, however, it may be in the first count. This substantially settles the question. The fact of Gereau being Chapman's servant *at the time of the alleged negligence*, is expressly asserted, and was not therefore in issue at the trial under the plea of not guilty. The order, therefore, which was made at the trial, ought to be allowed to stand.

The argument both at the trial and in Chambers, took place chiefly on the first count, and I may say that I think my first impression was correct, and that the allegation of Gereau *being* the servant, &c., refers to the time stated, namely, *at the time of the* committing of the grievances, just as in the case of *Mitchell* v. *Crassweller*, 13 Q. B., where the word *being* was held to apply to

* Plaintiff rather than lose a trial simply took issue, recovered a verdict, but was afterwards nonsuited in term, on the ground that the contracts sued upon in the first and second counts were executory, and not proved to be under the seal of defendants, a corporation.—EDS. L. J.