[66 b] EDWARD CROGATE'S CASE.

Mich. 6 Jacobi 1.

[See *Bowler* v. *Nicholson*, 1840, 12 Ad. & E. 351; *Reg.* v. *Ashwell*, 1885, 16 Q. B. D. 226.]

In an action of trespass for driving plaintiff's cattle, &c. defendant pleaded that a house and two acres in B. in the county of N., were parcel of the manor of T. in the same county, and demised and demiseable, &c. by copy, &c. in fee-simple, &c. according to the custom of the manor, of which manor W. late Bishop of N., was seised in fee in right of his church, and prescribed to have common of pasture for him and his customary tenants of the said house, and two acres of land in a great piece of pasture land called B. common, for all cattle, &c. at every time of the year; that the said bishop at such a Court, &c. granted the said house and two acres of land by copy to one M., to him and his heirs, &c.; that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant as servant to the said M., and by his commandment, *molliter* drove the said cattle out of the said place, &c. The plaintiff replied *de injuria sua propria absque tali causa;* and upon demurrer the replication was held to be bad. And resolved, 1. *Absque tali causa* refers to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. 2. When the defendant in his own right, or as servant to another, claims any interest in the land, or any common

---

1 Strange 70. *Vid.* stat. 6 Geo. 4. c. 50. § 23. And in *Davy* v. *Hobson*, 6 Taunt. 460. where a person not summoned on the jury was sworn at Nisi Prius in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded, the irregularity being noticed before verdict, the Court of Common Pleas awarded a *venire de novo*. *Vid.* note (A) *Codwell's case*, 5 Co. 43. a.

(*b*) Acc. 3 B. and C. 870.

(*a*) Fitz. Process 94. Br. Replead. 30. Br. Venire Facias 2, 35.

(*b*) Br. Enq. 47.

(*c*) Cr. Jac. 210, 211.

(*d*) *Ant.* 50 a.

or rent going out of the land, or any way or passage upon the land, &c. *de injuria sua propria* generally is no plea. But if the defendant justifies as servant, *de injuria sua propria* in some cases with a traverse of the commandment that being made material is good; for the general plea *de injuria sua propria* is properly, when the defendant's plea consists merely upon matter of excuse, and of no matter of interest whatsoever. 3. When by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, although no interest be claimed, the plaintiff ought to answer it, and not reply generally *de injuria sua propria*. 4. In the principal case, the issue would be full of multiplicity of matter, where an issue ought to be full and single.

Edward Crogate brought an action of trespass against Robert Marys, for driving his cattle in Town Barningham in Norfolk, &c. The defendant pleaded, that a house and two acres in Bassingham in the said county, were parcel of the manor of Thurgarton in the same county, and demised, and demisable, &c. by copy, &c. in fee-simple, &c. according to the custom of the manor, of which manor William late Bishop of Norwich was seised in fee in the right of his bishopric, and prescribed to have common of pasture for him and his customary tenants of the said house and two acres of land *in magna pecia pasturæ vocat'* Bassingham Common, *pro omnibus averiis, &c. omni tempore anni*, and the said bishop at such a Court, &c. granted the said house and two acres by copy to one William Marys, to him and his heirs, &c. And that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant, as servant to the said William, and by his commandment, *molliter* drove the said cattle out of the said place, where the said William had common *in præd' villam de* Town Barningham, adjoining to the said common of Bassingham, &c. The plaintiff replied, *de injuria sua propria absque tali causa*: upon which the defendant demurred in law. And it was objected on the plaintiff's part, that the said replication was good, because the defendant doth not claim any interest, but justifieth by force of a commandment; to which *de injuria sua propria absque tali causa* may be fitly applied: and this plea, *de injuria sua propria*, [67 a] shall refer only to the commandment, and to no other part of the plea, and they cited the books in 10 H. 6. 3 a. b. 9 a. 16 H. 7. 3 a. b. &c. 3 H. 6. 35 a. 19 H. 6. 7 a. b. &c. But it was adjudged, that the replication was insufficient. And in this case divers points were resolved. 1. That *absque tali causa*, doth refer to the (*a*) whole plea, and not only to the commandment, for all maketh but one cause, and any of them, without the other, is no plea by itself. And therefore in (*a*) false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant to him there, *de injuria sua propria* generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause) and matter of (*b*) record ought not to be put in issue to the common people; but in such case he may reply, *de injuria sua propria*, and traverse the warrant, which is matter in fact. But (*c*) upon such a justification by force of any proceeding in the Admiral Court, hundred or county, &c. or any other which is not a Court of Record, there *de injuria sua propria* generally is good, for all is matter of fact, and all makes but one cause (A). And by these differences you will agree your books in 2 H. 7. 3 b.

(*a*) Cr. Jac. 599. 2 Leon. 81. 3 Bulstr. 285. Cr. Car. 138.
(*a*) Doct. pl. 114. 2 Leon. 81. 2 E. 4. 6 b.
(*b*) 4 Co. 71 b. 9 Co. 25 a. Co. Lit. 260 a. Hard. 6. Com. Dig. Plead. F. 20.
(*c*) Doct. pl. 114. Com. Dig. Plead. F. 19.

(A) In *Robinson* v. *Bayley*, 1 Burr. 316. the defendant in trespass pleaded a right of common for his cattle, levant and couchant. The plaintiff replied, that they were not his own commonable cattle levant and couchant. The defendant demurred specially, because the replication was multifarious: but the Court held the replication good, the rule being not that issue must be joined on a single fact, but on a single point; and that it was not necessary that this single point should consist only of a single fact. So in *O'Brien* v. *Saxon*, 2 Barn. and Cress. 908. S. C. 4 Dow. & Ryl. 579. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100l., became bankrupt, wherefore defendant sued out

5 H. 7. 6 a. b. 16 H. 7. 3 a. 21 H. 7. 22 a. (33). 19 H. 6. 7 a. b. 41 E. 3. 29 b. 17 E. 3. 44. 18 E. 3. 10 b. 2 E. 4. 6 b. 12 E. 4. 10 b. 14 H. 6. 16. 21 H. 6. 5 a. b. 13 R. 2. Issue 163.

2. It was resolved, that when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common, or rent going out of the land; or any (*d*) way or passage upon the land, &c. there *de injuria sua propria* generally is no plea (B). (*e*) But if the defendant justifies as servant, there *de injuria sua propria* in some of the said cases with a traverse of the commandment, that being made material, is good; and so you will agree all your books, *scil.* 14 H. 4. 32. 33 H. 6. 5. 44 E. 3. 18. 2 H. 5. 1. 10 H. 6. 3. 9. 39 H. 6. 32. 9 E. 4 22. 16 E. 4. 4. 21 E. 4. 6. 28 E. 3. 98. 28 H. 6. 9. 21 E. 3. 41. 22 Ass. 42. 44 E. 3. 13. 45 E. 3. 7. 24 E. 3. 72. 22 Ass. 85. 33 H. 6. 29. 42 E. 3. 2. For the general plea *de injuria sua propria*, &c. is properly when the defendant's plea doth consist merely upon matter of (*a*) excuse, and of no matter of interest whatsoever; *et dicitur de injuria sua propria*, &c. because the injury properly in this sense is to the person, or to (*b*) the reputation, as battery or imprisonment to the person; or scandal to the

---

the commission. The plaintiff replied *de injuria sua propria*; the defendant demurred, assigning for cause, that the plaintiff by the replication had attempted to put in issue three distinct facts, the act of bankruptcy, the trading, and the petitioning creditor's debt: the Court held, that these three facts connected together constituted but one entire proposition, and that the replication was good. *Vid.* Stephen on Pleading 274.

(*d*) Cr. Jac. 599.

(B) This resolution in *Crogate's case* has never been disputed, nor called in question: but has always been considered as a leading case upon this subject, *Jones* v. *Kitchen*, 1 Bos. and Pul. 76. *Bell* v. *Wardell*, Willes 202. *Langford* v. *Wagham*, 7 Price 670. Serjt. William's note 1. *White* v. *Stubbs*, 2 Saund. 295. 7 Vin. Ab. 503. Com. Dig. Pleader F. 19. Doct. Plac. 114. Accordingly where, in trespass for taking a gelding, the defendant pleaded that J. S. was seised in fee of the *locus in quo*, and that he as his servant, and by his command, took the gelding, damage-feasant, it was held that the plaintiff could not reply *de injuria sua propria*. *Cockerill* v. *Armstrong*, Willes 99. S. C. Comm. 582. Bull. N. P. 93. So a plea *de injuria sua propria*, &c. to a cognizance for rent in arrear is bad. *Jones* v. *Kitchen*, *ub. sup.* *Cooper* v. *Monke*, Willes 52. And *vid. Kilburne* v. *Valence*, 2 Lutw. 1347.

But if the title alleged be only inducement, *de son tort*, &c. may be replied generally; as in battery, if the defendant pleads that he was seised in fee of a close, and had cut the trees, and the plaintiff came to take away his corn, and he in defence, &c; *de injuria sua propria absque tali causa* is a good plea. *Taylor* v. *Markham*, Yelv. 157. S. C. 1 Brownl. 215. S. C. Cro. Jac. 225. *Hale* v. *Gerrard*, Latch. 221.

A replication *de injuria*, where it ought not to be used, is cured by verdict. *Banks* v. *Parker*, Hob. 76. *Collins* v. *Walker*, T. Raym. 50. But it was held to be bad on general demurrer. *Fursdon* v. *Weeks*, 3 Lev. 65. This case, however, was before the stat. 4 Ann. c. 16. which directs "that where any demurrer shall be joined and entered in any action or suit, in any Court of Record within this realm, the Judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, and other pleading, process, or course of proceedings whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect, might have heretofore been taken to be matter of substance, and not aided by the abovementioned statute, so as sufficient matter appear in the said pleadings upon which the Court may give judgment according to the very right of the cause." It seems therefore, very doubtful, whether advantage can be taken of *de injuria sua propria* being improperly replied, in any other way than by special demurrer. In recent cases the objection seems to have been made uniformly by special demurrer.

(*c*) Doct. pl. 114 g.

(*a*) Doct. pl. 115.

(*b*) Doct. pl. 115. Cr. Eliz. 607.

reputation; there, if the defendant excuse himself upon his own assault, or upon hue and cry levied, there, properly (*c*) *de injuria sua propria* generally is a good plea, for there the defendant's plea consists only upon matter of excuse (C). 3. It was resolved, that (*d*) when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, [67 b] the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*. The same law of an (*e*) authority given by the law; as to view waste, &c. (D). *Vide* 12 E. 4. 10. 9 Ed. 4. 31. 20 Ed. 4. 4. 42 Edw. 3. 2. 16 H. 7. 3.

Lastly, it was resolved, that in the case at Bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single for parcel of the manor, demiseable by copy, grant by copy, prescription of common, &c. and commandment would be all parcel of the issue (E). And so, by the rule of the whole Court, judgment was given against the plaintiff.

(*c*) Doct. pl. 115.

(C) Accordingly, where, in an action for maliciously suing out a commission of bankruptcy, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100l. he became bankrupt, wherefore the defendant sued out the commission, and the plaintiff replied *de injuria sua propria*, the Court held that the plea consisted of matter of excuse only; and, therefore, the replication was good. *O'Brien* v. *Saxon*, 2 Barn. and Cress. 909. S. C. 4 Dow. and Ryl. 579. *Vid.* Com. Dig. Pleader F. 18. Vin. Ab. De Injuria sua Propria, A. *Jones* v. *Kitchen*, 1 Bos. and Pul. 76.

(*d*) Doct. pl. 115. Cro. Car. 164.

(*e*) Doct. pl. 115.

(D) Acc. *Jones* v. *Kitchen*, 1 Bos. and Pull. 76. Com. Dig. Pleader F. 22, 23. But *de injuria sua propria* is a good replication when the defendant justifies by virtue of authority by the common law, as a constable by arrest for breaking of the peace, &c. and so it is; and by the same reason when one justifies by an authority of an Act of Parliament; for, being a general law, the statute can be no part of the issue. Per Holt, C.J. *Chance* v. *Weeden*, 2 Salk. 628. S. C. 1 Lord Raym. 700. S. C. 12 Mod. 580. *Vid.* Com. Dig. Pleader F. 23.

(E) Acc. *Cooper* v. *Monke*, Willes 52. *Bell* v. *Wardell*, *ib.* 202. *Vide ante*, note (A).