give no light. Some other cases were cited to shew that these subsequent words do not amount to a condition, as they affect both the grantor and the grantee. But I take them to be words denoting, though a little obscurely, when the term in one instance is to determine.

The rules of construction are that no words in a deed shall be rejected if any sense can be put upon them, and that the words of a deed are to be taken most strongly against the grantor.

Now let us consider the present case according to these rules. Here is no notice given according to the lease, for the notice is not given by the representatives of the lessee, nor said to be in writing (*a*)[1], so the notice must be laid **[45]** out of the case. If therefore the lease be deemed to be determined, all the subsequent clause, after the words 'if both of them shall so long live' must be rejected as superfluous: but I think that a reasonable sense may be put upon them.

There are two instances put;

1. In case both of them live to the end of the term, then it is undoubtedly to continue;

2. In case one of them die; and then I think it is to continue until the representatives of the person dying give twelve months' notice.

The words are 'then the heirs executors administrators or assigns of such persons so dying shall give twelve months' notice in writing of their quitting &c.;' which I think may be construed thus, 'until the heirs executors &c. of such person so dying shall give twelve months' notice &c.' This seems to me to be the only reasonable sense that can be put on these words; that if the lessor die, his representatives may not turn out the lessee without due notice; and if the lessee die, that his representatives may not throw up the estate on the landlord without the like notice. This seems to me to be the intent of the parties. And this construction is supported by these words in the clause, 'in case either of them die before the expiration of the term,' which seems to suppose that the term might continue after the death of one of them: whereas if any other construction be put on the words, it must determine on the death of either of them. The word 'their' at the latter end of the clause seems the only word in the clause that does not quite tally with this construction, and is not quite sense: but that (*a*)[2] though not a very proper word, must be taken to mean the persons who are to quit and surrender the premises.

We are therefore of opinion that the lessors of the plaintiff have no right to recover; and that a nonsuit must be indorsed on the postea."

[46] JOHN DAVIES *against* THOMAS POWELL AND SIX OTHERS.
Friday, Feb. 3d, 1737-8.

Deer in an inclosed ground may be distrained for rent. Sr. G. Co. 146. 7 Mod. 249, oct. ed. S. C.

The following opinion of the Court was thus given by

WILLES, LORD CHIEF JUSTICE. "Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing six hundred acres of land, in the parish of Caversham in the county of Oxford, for treading down the grass, and for chasing taking and carrying away diversas feras, videlicet, one hundred bucks one hundred does and sixty fawns of the value of 600l. of the said plaintiff inclusas et coarctatas in the said close of the said plaintiff. Damage 700l.

The defendants all join in the same plea; and as to the force and arms &c. they plead not guilty: but as to the residue of the trespass they justify as servants of

(*a*)[1] If a lessee be restrained, by his lease, from underletting during the term without leave in writing from the lessor, a parol license to underlet does not discharge the former from the restriction. *Roe d. Gregson* v. *Harrison*, 2 Durnf. & East, 430.—So where Mr. Barry had covenanted with Mr. Garrick to perform at Drury-Lane, and not to absent himself without leave in writing, a parol license given by the latter was holden to be no answer to an action of covenant brought on the articles; cited in 3 Durnf. & East, 592.

(*a*)[2] The word "their" seems to have been introduced to apply to the event of there being more than one representative of either the lessor or lessee.

Charles Lord Cadogan; and set forth that the place where &c. at the time when &c. was and is a park inclosed and fenced with pales and rails, called and known by the name of Caversham Park &c.; and that the said Lord Cadogan was seised thereof and also of a messuage &c. in his demesne as of fee, and being so seised on the 3d of August 1730 by indenture demised the same to the plaintiff by the name (inter alia) of all the said park called Caversham Park from Lady-Day then last past for the term of seven years under the rent of 124l. 2s. The deer are not particularly demised, but there is a covenant that the plaintiff his executors and administrators should from time to time during the term keep the full number of one hundred living deer in and upon the said demised premises or in or upon some parts thereof. And Lord Cadogan covenants to allow the plaintiff in the winter yearly during the term twenty loads of boughs and lops of trees for browse for his deer to feed on, calling them there, as he does in other parts of the lease, 'the deer of the said John Davies;' and likewise covenants that if the plaintiff shall on the Feast of St. Michael next before the expiration thereof pay Lord Cadogan all the rent that would be due at the **[47]** expiration of the lease, then the plaintiff his executors &c. might sell or dispose of any or all of the deer that he or they should have in the said park at any time in the last year of the said term, any thing in the said indenture to the contrary in any wise notwithstanding. And the defendants justify taking the said deer as a distress for 186l. rent due at St. Thomas-Day 1731; and say that they did seize chase and drive away the said deer in the declaration mentioned then and there found, 'being the property of and belonging to the said John Davies' in the name of a distress for the said rent; and then set forth that they complied with the several requisites directed by the Act concerning distresses, (and to which there is no objection taken;) that the deer were appraised at 161l. 15s. 6d., and that they were afterwards sold for 86l. 19s. being the best price they could get for the same; and that the said sum was paid to Lord Cadogan towards satisfaction of the rent in arrear; and that in taking such distress they did as little damage as they could.

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

And the single question that was submitted to the judgment of the Court, is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted (*a*) for the plaintiff that they were not;

1st, Because they were feræ naturæ, and no one can have absolute property in them.

2dly, Because they are not chattels, but are to be considered as hereditaments and incident to the park.

3dly, Because, if not hereditaments, they were at least part of the thing demised.

4thly, Their last argument was drawn ab inusitato, because there is no instance in which deer have been adjudged to be distrainable.

First; To support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited Finch, 176; Bro. Abr. tit, 'Property,' pl. 20; Keil-**[48]**way, 30 b. Co. Lit. 47 a. 1 Rol. Abr. 666, and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of *Mallocke* v. *Eastly*, 3 Lev. 227, where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 Inst. 109, 110, and 1 Hawk. P. C. 94, to prove that it is not felony to take away deer, conies &c., unless tame and reclaimed.

I do admit that it is generally laid down as a rule in the old books that deer, conies &c., are feræ naturæ, and that they are not distrainable; and a man can only have a property in them ratione loci. And therefore in the case of swans, 7 Co. 15, 16, 17, 18, and in several other books there cited, it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, &c., he shall not say suos, because he has them only for his game and pleasure ratione privilegii whilst they are in his park, warren, &c. But there are writs in the Register, fo. 102, a book of the greatest authority, and several other places in that book which shew that this rule is not always adhered to. The writ in fo. 102, is 'quare clausum ipsius A. fregit et intravit, & cuniculos suos cepit.'

The reason given for this opinion in the books why they are not distrainable is

(*a*) This case was argued in Michaelmas 1737 by Wright Serjt. for the plaintiff and Eyre King's Serjt. for the defendants.

that a man can have no valuable property in them. But the rule is plainly too general; for the rule in Co. Lit. is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

And that this is the case of the deer which are distrained in the present case is admitted in the pleadings. The plaintiff by bringing an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be in-**[49]**-clusas et coarctatas in his close, which at least gave him a property ratione loci; and they are laid to be taken and distrained there: but what follows makes it still stronger; for in the demise set forth in the plea, and on which the question depends, they are several times called the deer of John Davies the plaintiff, and he is at liberty to dispose of them as his own before the expiration of the term on the condition there mentioned. And it is expressly said that the defendants distrained the deer being the property of the said John Davies: it is also plain that he had a valuable property in them, they having been sold for 86l. 19s.: both which facts are admitted by the demurrer. The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value. Besides it is expressly said in Bro. Abr. tit. 'Property,' pl. 44, and agreed in all the books, that if deer or any other things feræ naturæ become tame, a man may have a property in them. And if a man steal such deer, it is certainly felony, as is admitted in 3 Inst. 110, and Hawk. P. C. in the place before cited (*a*)[1].

Upon a supposition therefore, which I do not admit to be law now, that a man can have no property in any but tame deer, these must be taken to be tame deer, because it is admitted that the plaintiff had a property in them.

Secondly; As to their not being chattels but hereditaments and incident to the park and so not distrainable, several cases were cited; Co. Lit. 47 b. and 7 Co. 17 b.; where it is said that if the owner of a park die the deer **[50]** shall go to his heir and not to his executors; and the Statute of Marlbridge, 52 Hen. 3, c. 22, where it is said that no one shall distrain his tenants de libero tenemento suo nec de aliquibus ad liberum tenementum spectantibus. I do admit the rule that hereditaments or things annexed to the freehold (*a*)[2] are not distrainable; and possibly in the case of a park,

(*a*)[1] The Legislature have also made provisions at different times for the protection of deer in forests and open as well as inclosed grounds. But by the stat. 16 Geo. 3, c. 30, all the former Acts relating to this subject (except that of the 9 Geo. 1, c. 22) are expressly repealed by name; and it has been since holden by all the Judges that that also, as far as it made it a capital offence to kill destroy or steal deer, was virtually repealed; *R.* v. *Davies*, 1783. The stat. 16 Geo. 3, c. 30, inflicts a penalty of 30l. on persons who kill wound or destroy, or take in any snare &c. or carry away any red or fallow deer in any forest chase purlieu or ancient walk, whether inclosed or not, or in any inclosed park paddock wood or other inclosed ground where deer are usually kept without the consent of the owner &c., or aid therein; and a penalty of 20l. on persons who course hunt shoot at or otherwise attempt to kill wound or destroy any such deer &c., or aid therein &c.; and a double penalty on the keepers for either of those offences; and it subjects the offender to transportation for seven years for a second offence.

(*a*)[2] Furnaces caldrons and the like fixed to the freehold, or the doors or windows of a house and the like, cannot be distrained. Co. Lit. 47 b. Bro. Abr. "Distress," pl. 43.—Neither can a lime kiln, if affixed to the freehold, be distrained. But where the plaintiff in replevin declared for taking his goods and chattels, to wit, a lime kiln; and the defendant avowed taking it as a distress for rent in arrear; and the plaintiff in his plea in bar said that the lime kiln was affixed to the freehold, it was holden, on demurrer, that the plea in bar was a departure from the declaration which asserted it to be a chattel; though, had it been a portable oven, it might have been distrained; and judgment was given for the defendant. *Niblett* v. *Smith*, 4 Durnf. & East, 504.

properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park: but it does not appear that this is such a park, nay it must be taken not to be so. In the declaration it is stiled the close of the plaintiff, called Caversham Park. In the plea indeed it is stiled a park, called Caversham Park; but it is not said that it is a park either by grant or prescription; and it cannot be taken to be so on these pleadings, but must be taken to be a close where deer have been kept, and which therefore has obtained the name of a park, because the deer, as I mentioned before, are called the deer of John Davies, and because he is at liberty to sell them, and so to sever them from the park before the expiration of the term. And in Hale's History of the Pleas of the Crown, 1 vol. fo. 491, cited for the defendants, it is expressly said that there may be a park in reputation, 'as if a man inclose a piece of ground and put deer in it, but that makes it not a park without a prescription time out of mind or the King's charter.' Vid. Stat. 21 Ed. 1, De Malefactoribus in Parcis there referred to.

Thirdly; As to the third objection that the deer are part of the thing demised, and consequently not distrainable; the only case which was cited to prove this was the case of *Tithes* (*b*) which is nothing to the purpose; because where tithes only are let a man cannot reserve a rent, it being only a personal contract. Without denying the rule, **[51]** which I believe is generally true, the fact here will not warrant it, for they are not part of the thing demised. They are not mentioned in the description of the particulars, and cannot be part of the thing demised for the reason before given, because they may be sold and disposed of by the plaintiff before the expiration of the demise.

Fourthly; The last argument, drawn ab inusitato, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses cows sheep or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in Courts of Law and Equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom.

Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining any thing with respect to deer in forests and chases or parks properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear.

There must therefore be judgment for the defendants" (*a*).

[52] JAMES COOPER *against* W. MONKE AND THREE OTHERS.
Hill. 11 G. 2. Saturday, Feb. 4th, 1737, 8.

[E. 10 Geo. II. Rol. 623, 4, 5.]

Replication de injuriâ suâ propriâ absque tali causâ is bad where the defendant insists on a right.—When defendant (in an action of trespass) justifies in his plea taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrears; replying de injuriâ suâ propriâ &c. is improper.—Where defendant justifies (in trespass for taking the plaintiff's goods and converting them &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent to plead a

(*b*) Vid. Bro. Abr. tit. "Distress," pl. 81; tit, "Dette," pl. 234; 1 Rol. Abr. 667; pl. 18; and Finch, 135-6.

(*a*) Vid. *Simpson* v. *Hartopp*, M. 18 Geo. 2, post.