illicit transactions with regard to the guns, Mr. Irvine might fairly have accepted the statement of the defendants' counsel that no dishonest motives were imputed. That course was not, however, adopted, and I do not see that I have any option but to give judgment for the defendants, with costs.

1880.
May 20.
„ 25.

Irvine *vs.* Impey & Co.

DWYER and SMITH, J.J., concurred.

[Attorneys for Plaintiff, FAIRBRIDGE, ARDERNE, & SCANLEN.
Attorneys for Defendants, J. & H. REID & NEPHEW.]

DE VILLIERS *vs.* VAN ZYL AND ANOTHER.

Measure of damages in an action for trespass.—Animals feræ naturæ.

Z. trespassed upon the land of V. and drove off from it and appropriated certain young wild ostriches which had been reared upon it. Held, *on action for trespass being brought by V., that in an action for trespass the Court is not bound to award merely the amount of the pecuniary loss caused by the actual trespass, but may take into consideration all the circumstances of the case, and that therefore, though the ostriches being* feræ naturæ *had not been the property of V., it was justified in making their value the measure of the damages awarded.*

This was an action for damages sustained by reason of trespass.

1880.
June 1.
„ 2.

De Villiers *vs.* Van Zyl & Another.

Plaintiffs alleged that they and another were the joint owners of a certain farm; that in February 1879 the defendants A. van Zyl and G. van Zyl had trespassed upon the said farm, damaged the grass and herbage thereon, and taken possession of and driven away fourteen young wild ostriches which were grazing upon the farm; and that by reason thereof plaintiffs had suffered damage to the amount of £150.

Defendants A. and G. van Zyl admitted that the farm was owned as alleged by plaintiffs, and that on the date in question six wild ostriches had been captured by A. van

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,, 2.

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Zyl on the joint behalf of the said defendants, but they denied that these ostriches had been taken upon the farm in question, or that they had been driven off from it by defendants. Defendant A. van Zyl admitted that he had trespassed on the farm on the date alleged, by riding over it, and tendered in satisfaction of the damage thereby caused the sum of £5 together with costs up to date of service of plea.

The point of law in dispute between the parties was whether plaintiffs were entitled to claim damages for the loss of the ostriches. Defendants maintained that even supposing the ostriches in question had been captured on plaintiffs' land, or driven off it in order that they might be captured elsewhere, their value could not be claimed by plaintiffs, inasmuch as the ostriches were *feræ naturæ*, and plaintiffs thus had no property in them.

Leonard (with him *Gregorowski*), for plaintiffs. It is important to owners of land that the point now in dispute should be settled.

Upington, A. G. (with him *Giddy*), for defendants. Plaintiffs have no right to claim damages for the deprivation of property which never belonged to them (*Pritchard* vs. *Long*, 9 M. and W., p. 666; *Blades* vs. *Higgs and Another*, 34 L. J. N. S. Com. Pleas, p. 286). In this case the measure of the damages should be the injury done to the grass of plaintiffs. The tender of £5 was made in order that there might not be any difficulty as to the trespass on the *veldt*. Defendants only offered the amount as nominal compensation.

[De Villiers, C. J.:—We must look at all the surrounding circumstances. As Chief Justice Gibbs puts it in the case of *Merest* vs. *Harvey* (5 Taunt. 442): "Suppose a man has a paddock in front of his dining room, and while he is at dinner another man walks up and down in front of the window, and keeps looking inside. Would it be sufficient for the trespasser to say, 'Here is a halfpenny for you?' Would that be sufficient compensation?"]

At any rate, in the present case, the judgment of the Court ought to be confined to the damage done.

De Villiers, C.J.:—This is an action for trespass, and

must be treated entirely as such. If the action had been for the recovery of the young birds or their value, the plaintiffs would have failed. The ostriches are admitted to have been wild, and therefore the plaintiff had no property in them, although they may originally have been driven from his land. By the Civil Law, as remarked by LORD CHELMSFORD in *Blades* vs. *Higgs*, the person who took or reduced into possession any animal *feræ naturæ*, although in so doing he might trespass on the land of another, acquired the property in the animal. It is clear from that case that the same rule does not prevail in the law of England, although it is not equally clear what the rule of the English law would be where the game is driven by a trespasser from the land of one person and killed on the land of another. But if, by our law, a trespasser acquires the property in animals *feræ naturæ* which he kills upon the land of another, it follows *a fortiori* that he acquires the property if he drives the animals away and kills them on the land of a third person. These principles of the Civil Law have been retained in our law except in so far as they have been modified by the Game Laws and the Acts relating to wild ostriches.

But does it therefore follow, as contended by Mr. *Upington*, that the owner of the land trespassed upon has no remedy beyond nominal damages for the bare trespass? Fortunately not. In an action of trespass, without any circumstances of aggravation, the plaintiff is no doubt entitled only to recover for his actual injury in respect of the trespass itself. But I have always understood that in assessing the damages the Court should consider all the circumstances attending the trespass and may give damages for collateral acts which aggravate the trespass. In the present case the defendants were guilty of most unneighbourly, if not almost fraudulent conduct. Knowing that the birds had been hatched on the plaintiff's land, and that he would, in the usual course, capture them for domestication, they forestalled him, and, after driving the young birds from the plaintiff's land, they caught and kept the birds. Very little damage was done to the herbage, but we are not bound to confine our verdict to that amount. The value of the young birds was quite £60, and for that amount we may fairly and reasonably give judgment in favour of the plaintiff, with costs.

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DWYER, J.:—I am of the same opinion. The moment the defendant, Adriaan van Zyl, heard the young birds were hatched, he went upon the land, and it was evident that he went for the purpose of driving them to his own land. It appears, moreover, that he thought that, if he could get the young birds, no matter how, upon his own land, he would be justified in taking them. Whether he intended or not to drive the birds, the very fact of his servants wandering about in different directions had the effect of driving the birds away. I quite concur with the observation of the CHIEF JUSTICE that the plaintiffs are entitled to some substantial damages. There was a case which I tried, I believe, at Prince Albert, similar to this case, where the evidence was to the effect that the defendants drove the ostriches from the land of the plaintiff to their own land. I had some doubt in that case as to whether I could give damages in accordance with the value of the ostriches, but, on consideration, I decided that I could do so, and I gave damages for the value of the young birds which were caught.

SMITH, J.:—I am quite of the same opinion. With regard to the measure of damages in cases like the present one, there is no better rule of law than that the jury are not to be restrained to the mere pecuniary loss sustained by the plaintiff. If the trespass be a malicious one substantial damages may be recovered. Therefore I am of opinion that substantial damages may be given in this case, and I think a fair measure which may be taken is the amount of which the plaintiffs have been deprived by this act of the defendants. I think £60 is a reasonable amount at which to fix the damages.

[Plaintiffs' Attorney, I. HORAK DE VILLIERS.
Defendants' Attorney, C. H. VAN ZYL.]