Chapter IX

TORT AND THE LAW OF PROPERTY

IT may be a matter of speculation to students of English law why the Law of Tort and the Law of Property should overlap to some extent in point of literary treatment. Those who are familiar with Dr Cheshire's book on the *Modern Law of Real Property* may have been puzzled to find there topics which might just as well be placed under the law of tort, and indeed are often so placed. Such are limitations on rights with respect to water[1] which are also handled in Salmond's *Law of Torts*;[2] so too the rights of a tenant in fee simple in general. Is there any need to describe the same things under both heads of the law? The question is of some importance on both theoretical and practical grounds. On the theoretical side it is of interest from the point of view of jurisprudence; and it is certainly a practical consideration for those who propose to write books on either of these subjects and who wish to ascertain their correct boundaries. The object of this chapter is to probe the relations of the Law of Property to the Law of Tort, and it will be seen that the upshot of the investigation is that repetition of the sort which we have described is probably unnecessary either in theory or in a practical exposition of English law.

In theory, one might expound the law solely by reference to legal rights, leaving all legal duties to be inferred from the statement of rights. Thus, if it is stated that I may lawfully abstract water from a stream, as riparian owner, the inference is that all other people are under a duty not to prevent me from abstracting it. If it is

[1] 2nd ed. (1927), 119.
[2] 7th ed. (1928), §§ 74–80.

stated that I am lawfully entitled to personal security, the inference is that all other people are under a duty not to meddle with my person. If it is stated that I am entitled to my good reputation, the inference is that all other people are under a duty not to cast aspersions on my character. On this hypothesis the law of tort could be eliminated as a separate division of the system. All the duties comprised in it could be deduced from statements of the various rights *in rem* comprised under the rights to property, to personal security and to reputation. But, for historical reasons, English law has never reached this abstraction. To begin with, like any other legal system, it has been compelled to plod along from the simple idea of a "wrong" to the complicated idea of a "right". A legal right is such a commonplace conception to a modern lawyer that he can scarcely imagine that it has ever been otherwise. Yet people in early times cannot grasp what is really a complicated matter, and it is a long journey that must be traversed before they can either acquire the capacity, or feel the need, for understanding it.[1] The Register of Writs, the importance of procedure until comparatively recent times, and the evolution of trespass and trespass upon the case, all testify to this. "Wrongs" and "remedies" are much more simple and intelligible things than are "rights".

But even when the idea of legal rights did become familiar, English law has wavered from beginning to end between adopting rights or wrongs as the *clou* of legal exposition. This is strikingly illustrated by the Law of Tort. Roughly speaking, it deals with injuries, (i) to property, (ii) to the person, (iii) to reputation. Now, with respect to (i), the books on real property law generally deal with the *rights* relating to such property and practically ignore the wrongs by which such rights

[1] Street, *Foundations of Legal Liability* (1906), iii, 6–7.

may possibly be infringed. These are, and long have been, treated under the Law of Tort (e.g. trespass, nuisance, breaches of strict duties). At least this is so as regards breaches of rights *in rem*. Breaches of rights *in personam* (e.g. waste), are more within the province of a book on real property law than of one on tort. As to personal property, the hesitation of writers in deciding whether this shall be explained solely from the point of view of right, or whether it shall include also infractions of such rights, is still more noticeable. The leading textbooks, with more or less consistency or felicity, emphasize the "rights" side. Yet conversion of chattels and trespass to them are important chapters in the Law of Tort and, on the whole, had better be left to that subject.

Next, as to (ii) and (iii). Here there is practically no attempt to analyse these from the "rights" standpoint. In general, they are examined under the law of "breaches of duties" or "wrongs"; that is to say, so far as civil remedies are concerned, under the Law of Tort. Examples are assault, battery, false imprisonment, defamation.

Thus, there has been a curious divergence in the treatment of (i) as compared with that of (ii) and (iii). In (i) the oscillation in favour of "rights" has been marked, though it cannot be said that there has been a definite and exclusive selection of this mode of exposition. In (ii) and (iii), emphasis is definitely and almost exclusively laid on "wrongs" or "breaches of duties". Why, then, should "rights" have secured such a prominence in real property law? Perhaps because of the extreme importance of land in our early law and indeed at the present day. Personal security and reputation may seem equally important, but from the view-point of "right" there is not so much to say about them as there is about land. At any rate this was so in our

earlier history. The answer to "what may I do?" is much longer in land law than in the law affecting personal security and reputation. Or, to put the converse, in the latter it is much easier to answer the question, "what am I forbidden to do to my neighbour?" than the question, "what may I do?" Again, Sir Frederick Pollock has clearly shewn us why much of "what really belonged to the law of property was transferred, in forensic usage and thence in the traditional habit of mind of English lawyers, to the law of torts".[1] He points out that the remedies for restitution of property (the writ of right, and the like, and the writ of debt), were so clumsy and perilous to the plaintiff that they were thrust into the background by the adaptation of writs of penal redress, i.e. the writ of trespass and the writs cognate to it. So too, detinue was superseded to a large extent by trover. "In this way the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries where the right was assumed not to be in dispute, became quite obliterated."[2]

The result then seems to be that breaches of rights *in rem* connected with property fall within the domain of tort rather than within that of the law of property. Historical antecedents and practical convenience are too strong to be ignored, even if logic might dictate otherwise. It would be tempting to set out a framework of the law based upon rights as an ideal for a code, but that would be more relevant in a book on jurisprudence and, in any event, it would take in many other topics which are beside the purpose of these lectures.

[1] *Law of Torts* (13th ed. 1929), 14. [2] *Ibid.* 13.