BOOK REVIEW

JOHN TARRANT, LEGAL AND EQUITABLE PROPERTY RIGHTS (THE FEDERATION PRESS, 2019)

JOSEPH SABBAGH*

Shortly before his death on 6 June 1832, English philosopher Jeremy Bentham bequeathed his body to one Dr Southwood Smith, with directions that it be preserved as an 'auto icon' – a type of skeletal mummy with wax features.[1] His body, contained in a purpose-built glass case, was to be wheeled out '*if my personal friends and other disciples should be disposed to meet together….for the purpose of commemorating the founder of the greatest happiness systems of morals and legislation*'.[2] Today, Bentham, adorned in his black suit and cane, watches blankly over the ground floor of University College London's student centre as students shuffle past his corpse, sipping flat whites and adjusting their headphones.[3] This bizarre spectacle neatly encapsulates Bentham's own view of property – '[i]*t is not material, it is metaphysical; it is a mere conception of the mind*'.[4]

Professor Tarrant's book proceeds on a similar assumption: that all property rights and property law concepts are created by the courts and the legislature. However, from this, he extracts a further premise: that analysis of the decisions and statutes of these bodies can reveal a compelling theory of property rights *as they are actually conceived and applied*. Committed to this ground-up approach of inductive reasoning, Tarrant sets off on his monumental task with gusto.

The book begins by addressing the definitional issue – what is a property right? Tarrant argues that the phrase is shorthand for a relationship between persons and things. If a thing is a permissible object of property *and* society at large can be excluded from interfering with or benefitting from it, then, he says, a property right may exist. The book refers to this as a '*thinghood*' approach to property (in contrast to, presumably a 'personhood' or 'person-person' approach; that property rights are the exclusive result of sociolegal interactions between persons). This argument is explored in detail, with chapter two highlighting the very real policy considerations which courts engage in to determine whether a resource can (or indeed should) be privately owned. To that end, the book's discussion on property rights to human

* BCL Candidate, University of Oxford; JD (Dist), BA (Hons) (W Aust); Solicitor, Herbert Smith Freehills.
[1] University College London, *Auto-Icon* (Web Page, 2023) <https://www.ucl.ac.uk/bentham-project/about-jeremy-bentham/auto-icon>.
[2] Ibid.
[3] One of the more unusual stops on a trip to London, but highly recommended by this author.
[4] Jeremy Bentham, *Theory of Legislation* (Trübner & Co, 1864) 111-113.

body parts will no doubt be of interest to the general reader and University College London alike.

Having tackled the definitional issue, Tarrant moves on to the more contentious issue of scope. The book argues in favour of a broad conception of property rights, encompassing (*inter alia*) property rights associated with the duty of non-interference (such as freehold title to land or a tangible object) and property rights that represent the benefit of an obligation between two or more persons (such as a debt). Perhaps the most interesting thread of argument here is Tarrant's characterisation of the benefit of an obligation as a 'property right'. His challenge to the well-trodden distinction between rights *in rem* and rights *in personam* is informed by the case law, and appropriately supplemented by history and theory.

The book's argument in favour of a wide scope is drawn together via chapter four's capstone analysis, which promises to place the proffered conception of property rights within the overarching private law structure. This chapter is, in effect, a sketch of Tarrant's own framework structure of the private law, and proceeds on the basis that private law comprises three categories of rights: rights to personal integrity, property rights, and procedure and evidence. Comparable to the Roman law categories of people, things and actions (a concession Tarrant himself makes), the book draws on the work of Peter Birks, and offers a multi-step amendment to Birks' seminal classification of the private law which is in itself worthy of a separate treatise. Commendably, this chapter was supplemented by a number of well-designed and helpful tables to aid reader comprehension along the way.

As the title of the book suggests, it is divided into two thematic aspects: *legal* and *equitable* property rights. The latter half of the book therefore unsurprisingly advances the argument that there are two 'levels' of property rights – legal and equitable, and that this dual-level system of legal and equitable property rights is an incident of the historical development of the case law since the Judicature Acts. This, the book argues, has had the helpful impact of importing a degree of remedial flexibility into the system, by providing a person at the second level with the power to obtain ownership of a thing at the first level and become sole owner. To illustrate the point, chapter seven offers a number of interesting case examples from the law of contract, trusts, insolvency, succession, and more.

By way of observation (and not criticism), it is clear that Tarrant's broad definition of a 'property right' has wide-ranging ramifications for the way we conceptualise private law. Indeed, his theory has the potential to subsume much of what we think of as the law of obligations into the law of property. Commendably, Tarrant not only accepts, but embraces this. Large swathes of contract and tort law, he says, are simply part of the broad category of enforceable property rights correlating with obligations. In his view, many tortious wrongs are simply breaches

of the duty of non-interference with respect to property (e.g. trespass to land and nuisance). Other areas of law are simply concerned with how property rights may be held in different business structures (e.g. company and partnership law), or how property rights are to be transferred upon death (e.g. succession law). While unjust enrichment scholars in particular may find it difficult to conceive of a right to restitution in this way, chapter seven's brief discussion of mistaken payments within the dual-level system of legal and equitable property rights is of great interest, and poses questions that certainly warrant further exploration. Nonetheless, the book does not deal with any of these issues in great detail. I mention them only in passing here, not to detract from or criticise Tarrant's work or to suggest they should have been a greater focus, but simply to illustrate that this field of inquiry remains one of contention, laced with controversy.

Reasoning inferentially from the cases and legislation, Tarrant has waded head-first into the metaphysical mud in pursuit of what has described as a '*hopeless ideal*'[5] – the identification and elucidation of a unifying theory of property rights. This is a task that has been occupying legal minds since the Roman era, and as this book illustrates, continues to stir fruitful discussion. The book's strength is in its ability to pare back concepts like 'property' and 'ownership' that in a theoretical analysis are often insurmountably burdened with normative baggage. Getting us 'back to basics', Tarrant wrangles with the law to successfully uncover for the reader a reasoned theory of property rights in Australia. And indeed, while the book's primary focus is Anglo-Australian authority, that is not to suggest that his analysis is not of broader relevance – indeed, it will be of interest to lawyers of any comparable legal tradition.

Professor Tarrant's unitary theory of property rights is both cogent and compelling, and, brought to bear upon the elaborate social institution that is property, it should be of great interest to private law practitioners and academics alike.

[5] James Edelman, 'Property Rights to Our Bodies and Their Products' (2015) 39(2) *University of Western Australia Law Review* 47, 53.