

## Contents

<i>Preface</i>	v
<b>I Classification in Private Law</b>	<b>1</b>
INTRODUCTION	1
JUSTIFICATORY CATEGORIES	3
<i>Justificatory Classification</i>	3
<i>Deductive and Analogical Legal Reasoning</i>	4
<i>Justificatory Categories in Analogical Reasoning and Errors of Classification</i>	6
<i>What are the Justificatory Categories of Private Law?</i>	9
<i>Some Objections to Justificatory Categories</i>	11
<i>Spurious Justificatory Categories</i>	13
SOME OTHER TYPES OF CLASSIFICATION	16
<i>Classification by Remedy</i>	16
<i>Procedural Classification</i>	18
<i>The Old 'Forms of Action'</i>	18
<i>Source-based Classification</i>	19
CLASSIFICATION BY MODALITY OR NORMATIVE TYPE	20
<i>Modalities of Legal Relation</i>	20
<i>Two Types of Claim</i>	22
<i>Some Objections to Primary Right-liability Relations</i>	26
THE CONTROVERSY OVER CLASSIFICATION	30
<i>Opposition to the Idea of Classification</i>	30
<i>Mutual Exclusivity and Justificatory Categories</i>	31
<i>Independent Dimensions of Classification</i>	32
<b>2 Rights, Remedies and Remedialism</b>	<b>35</b>
INTRODUCTION: RIGHTS IN PRIVATE LAW	35
THE RELATIONSHIP BETWEEN PRIMARY AND REMEDIAL RIGHTS	37
<i>Primary and Remedial Rights or Relations</i>	37
<i>'Monism' and 'Dualism' and the Dualist Fallacy</i>	39
<i>Some Possible Objections to the Monist Principle</i>	40

viii	CONTENTS	
	Enforcement	40
	Abstract and Concrete Rights and Relations	42
	<i>New Circumstances, the Hardship Argument, and Compensation</i>	43
	<i>Contract Law and the Dualist Fallacy</i>	45
	The Remedial Issue in Contract	45
	Avoiding the Dualist Fallacy in Contract	47
	The Contractual Reliance Explanation	48
	Two Measures of Damages and the Dualist Fallacy	52
	<i>Discretionary Remedialism</i>	53
	<i>'Freestanding' Remedies</i>	56
	NON-REMEDIAL RESPONSES: PUNISHMENT AND	
	DISGORGEMENT	57
	<i>Remedies and Non-remedial Responses</i>	57
	<i>Punishment and Disgorgement in Contract</i>	59
	<i>Civil Proceedings and Private Law</i>	61
	<i>A Misconceived Argument against Non-remedial Responses in</i>	
	<i>Private Law</i>	63
	THE MONIST PRINCIPLE, CORRECTIVE JUSTICE, AND	
	PRIVATE LAW	65
	<i>The Monist Principle as the Principle of Corrective Justice</i>	65
	<i>Private Law</i>	67
	JUSTIFICATORY AND REMEDIAL CATEGORIES CONFLATED	69
	<i>Examples of the Remedy-as-justification Fallacy</i>	70
	<i>Punishment and Disgorgement Conflated with Justification</i>	72
	TWO FALLACIES OF REMEDIALISM	74
	<b>3 Property and Property Claims</b>	76
	PRIVATE PROPERTY AS A JUSTIFICATORY CATEGORY	76
	<i>Private Property</i>	76
	<i>The Justificatory Category and the Fundamental Principle of</i>	
	<i>Private Property</i>	77
	<i>Objects of Private Property</i>	81
	The Fallacy of Labour as an Object of Property	82
	Contract Rights as Objects of Property	82
	Abstract Value	84
	Money	84
	Intellectual Property	85
	<i>Transfer and Grant</i>	86
	SOME OTHER ASPECTS AND THEORIES OF PRIVATE PROPERTY	88
	<i>The 'Bundle of Rights' Theory of Property</i>	88
	<i>Property and Persons</i>	89

CONTENTS	ix
<i>A Right 'Against the Whole World'</i>	90
PROPERTY-BASED CLAIMS	93
<i>The Property-based Restitutionary Claim</i>	93
The Nature of the Claim	93
Proprietary and Personal Claims	95
An Unjust Enrichment Claim?	96
<i>The Property-based Unauthorised Use Claim</i>	99
PROPERTY AND TORT	103
<i>Property and Tort as Distinct Justificatory Categories</i>	103
<i>Non-property Interests Conflated with Interests in Property</i>	107
<b>4 Law and Equity</b>	<b>111</b>
THE ORIGIN OF THE LAW OF EQUITY AND THE PROBLEM OF FUSION	111
A DIFFERENCE OF APPROACH?	113
<i>A Methodological Distinction</i>	113
<i>Equity as a Discretionary Jurisdiction</i>	115
<i>Is a Two-stage Process Justified?</i>	116
EQUITY AS A JUSTIFICATORY CATEGORY AND THE ANTI-FUSION FALLACY	117
<i>Equity as a Substantive Area of Law</i>	117
<i>A Fundamental Principle of Unconscionability?</i>	118
<i>Substantive Fusion and Analogical Reasoning</i>	119
<i>Remedies and Fusion</i>	122
<i>A Problem in Achieving Substantive Fusion</i>	123
<i>A Comparison with the Theory of Unjust Enrichment</i>	123
DIFFERENT POSITIONS ON SUBSTANTIVE FUSION	124
EQUITY AND PROPERTY LAW	126
SUMMARY	128
<b>5 The Trust</b>	<b>130</b>
INTRODUCTION	130
THE CONTRACTUAL DIMENSION OF THE TRUST	131
<i>Is the Trust a Matter of Contract Law?</i>	131
THE PROPERTY DIMENSION OF THE TRUST	133
<i>The Problem with the Contractual Analysis</i>	133
<i>The Property Dimension and 'Separation of Title'</i>	135
<i>The Two Dimensions of the Trust</i>	137
<i>The Nature of the Beneficiary's Property Right</i>	137
<i>The Trust Fund as the Object of Property</i>	139
<i>In Rem Rights and Bona Fide Purchase</i>	140

X	CONTENTS	
	<i>Conflict between Equity and the Common Law</i>	141
	THE TRUST IN TWO DIMENSIONS AND IN ONE DIMENSION	142
	‘TRUSTING’ AND FIDUCIARY RELATIONSHIPS AS THE BASIS	
	OF THE TRUST	144
	<i>The Relevance of ‘Trust’ and Fiduciary Relationships</i>	144
	<i>Disgorgement in a Fiduciary Relationship</i>	146
	<i>The Fiduciary No-conflict Rule</i>	148
	THE TRUST AND THE FUSION OF LAW AND EQUITY	150
	SUMMARY: THE NATURE OF THE TRUST	152
<b>6</b>	<b>Invalid Transfers and Proprietary Claims</b>	<b>155</b>
	INTRODUCTION	155
	<i>The Nature of the Claim to Recover an Invalid Transfer</i>	155
	<i>The Effect of an Invalid Transfer</i>	155
	<i>Proprietary and Personal Claims</i>	158
	TRACING AND THE OBJECT OF THE PROPRIETARY CLAIM	158
	<i>The Problem with the Transactional Theory of Tracing</i>	159
	<i>The Proprietary Claim to Abstract Value</i>	161
	<i>Some other Difficulties with the Transactional Theory of Tracing</i>	164
	<i>Tracing and Change of Position</i>	166
	<i>The ‘Swollen Assets’ Theory and the Nature of the Proprietary</i>	
	<i>Claim</i>	168
	<i>Tracing into Mixtures</i>	169
	SOME OBJECTIONS TO THE AVAILABILITY OF A PROPRIETARY	
	CLAIM	172
	<i>‘Priority’ and Contract and Tort Claims</i>	172
	<i>The Apparent Wealth Argument</i>	175
	<i>Tracing as Redistribution in Favour of the Proprietary</i>	
	<i>Claimant</i>	176
	<i>The ‘US Remedial Constructive Trust’</i>	177
	COMMON LAW CLAIMS	180
	<i>Common Law and Equity</i>	180
	<i>Money Claims at Common Law</i>	181
	The Nature of the Claim	181
	Overlap of the Claims in Law and Equity	183
	<i>Goods Claims</i>	184
	THE DEVELOPMENT OF AN INTEGRATED REGIME	185
<b>7</b>	<b>Wrongful Disposals</b>	<b>188</b>
	PROPERTY CLAIMS AND TORT CLAIMS	188
	THE KNOWING RECEIPT CLAIM	188

CONTENTS	xi
<i>The Knowing Receipt Claim as a Restitutionary Claim</i>	188
<i>The Knowing Receipt Claim as a Composite Claim</i>	190
<i>Some Problems arising from the Composite Claim</i>	192
<i>The Origin of the Composite Claim</i>	193
KNOWLEDGE, CONSTRUCTIVE KNOWLEDGE AND THE DUTY	
OF REASONABLE CARE	194
<i>The Subjective and Objective Concepts of a Duty and the Role of</i>	
<i>Constructive Knowledge</i>	194
<i>Two Ways to Understand the Standard of Reasonable Care</i>	196
<i>The Test for Knowing Receipt</i>	198
<i>The Unconscionability Test for Knowing Receipt</i>	200
<i>A Positive Duty to Act?</i>	201
THE COMMON LAW CLAIMS	203
<i>Money Claims</i>	203
<i>Goods Claims</i>	205
FUSION	209
<b>8 Restitution and the Unjust Enrichment Fallacy</b>	<b>211</b>
THE THEORY OF UNJUST ENRICHMENT	211
BENEFIT-BASED CLAIMS CLASSIFIED BY JUSTIFICATORY	
CATEGORY	213
<i>Property-based Claims</i>	213
<i>Claims to Recover Invalid Transfers</i>	213
<i>Claims for Reasonable Payment for Unauthorised Use</i>	213
<i>Contractual Reliance Claims</i>	213
<i>Claims for Reasonable Payment in Respect of Non-contractual</i>	
<i>Exchange</i>	215
<i>Unjust Enrichment Claims as Primary Liability Claims</i>	216
<i>Restitution</i>	216
<i>Disgorgement</i>	217
IS THERE A PRINCIPLE OF UNJUST ENRICHMENT?	217
<i>What is meant by a Principle of Unjust Enrichment?</i>	217
<i>A Remedial Principle</i>	219
<i>Unjust Enrichment and the Disgorgement Principle</i>	222
<i>'Unjust Factors'</i>	222
<i>'Failure of Condition'</i>	223
<i>'No Legal Basis'</i>	225
<i>An 'Organising Principle' of Unjust Enrichment</i>	225
<i>A 'Supplementary' Principle of Unjust Enrichment</i>	226
<i>Is there a Principle?</i>	227
SOME PROBLEMS OF INCOHERENCE	227

xii	CONTENTS	
	<i>False Differentiation and other Forms of Incoherence in the Law of Contract</i>	228
	<i>False Differentiation in the Law of Property</i>	231
	<i>False Assimilation of Transfer and Exchange</i>	234
	<i>False Assimilation in 'Restitution for Wrongs'</i>	235
	BIRKS'S CLASSIFICATION OF UNJUST ENRICHMENT AND PRIVATE LAW	236
	<i>Birks's Scheme of Classification and his Concept of Unjust Enrichment</i>	236
	<i>The Role of Property in Birks's Scheme</i>	240
	CONCLUSION: THE FALLACY OF UNJUST ENRICHMENT	241
<b>9</b>	<b>Constructive Trusts</b>	<b>242</b>
	INTRODUCTION	242
	INVALID TRANSFERS OF PROPERTY	242
	DISGORGEMENT	245
	CONSTRUCTIVE TRUSTS AND AGREEMENT	247
	<i>Agreements to Take Property on Trust</i>	247
	<i>Protecting Contractual Rights against Third Parties</i>	249
	Sale Contracts	249
	Contractual Licences	250
	CONSTRUCTIVE TRUSTS OF MATRIMONIAL PROPERTY	252
	WHAT IS A CONSTRUCTIVE TRUST?	254
	<i>Types of Constructive Trust</i>	254
	<i>Some Theories of the Constructive Trust</i>	256
	A General Instrument to Achieve Fairness and Justice	256
	Constructive Trusts and Unjust Enrichment	257
	Constructive Trusts and Unconscionability	257
	<i>Resulting and Constructive Trusts</i>	258
	<i>Index</i>	263