Contents

| Frequently Cited Works | | XV | |
|------------------------|----------|--|------|
| Tab | le of Ca | ises | xvii |
| Intı | oductio | on | 1 |
| | | PART I PROPERTY AND PROPRIETARY REMEDIES | |
| 1. | Explo | ring the Idea of Remedial Trusts | 5 |
| | Ī. | From Remedy to Property: the Development of the Trust | 7 |
| | II. | Different Uses of the Constructive Trust | 10 |
| | III. | The Remedial/Institutional Dichotomy | 12 |
| | | 1. Rights and Remedies | 13 |
| | | 2. The Constructive Trust as a Device for Protecting Fiduciary | |
| | | Relationships | 16 |
| | | 3. The Content of the Constructive Trust | 20 |
| | | 4. Is the Remedy Discretionary? | 24 |
| | | 5. Does the Trust Arise Automatically? | 26 |
| | | 6. Remedial Constructive Trusts as Redistributive | 31 |
| 2. | Redist | tribution and Property Rites | 33 |
| | | Two Conceptions of Property | 33 |
| | II. | Property in English Legal Thought | 34 |
| | | 1. The Absolutist Conception of Property | 34 |
| | | 2. The Absolutist Conception of Property in English Law | 36 |
| | III. | The Influence of these Understandings on the Law of | |
| | | Proprietary Remedies | 38 |
| | | 1. The Influence of Positivism | 38 |
| | | 2. The Persistence of Absolutist Assumptions | 39 |
| | IV. | Orthodox and Redistributive Proprietary Remedies | 40 |
| | | 1. Orthodox Proprietary Remedies | 40 |
| | | 2. Redistributive Proprietary Remedies | 42 |
| | V. | Reason and Ritual in the Law of Prorietary Remedies | 42 |
| | | 1. Ritual in Legal Discourse | 42 |
| | | 2. Property Rites | 44 |
| | | 3. Rituals and the Normative Framework of the Private Law | 46 |
| | | 4 The Cost of these Rituals | 47 |

| 3. | . The Legacy of Legal Realis | sm: Instrumentalist Approaches to | | |
|----|---|---|----|--|
| | Property | | | |
| | Property in Americ | an Legal Thought | 49 | |
| | 1. The Rise and Fa | ll of Universal Principles of Common Law | 49 | |
| | 2. The Shift to a Po | ositivist Understanding of Property | 51 | |
| | 3. Notions of Prop | erty and the Law of Eminent Domain | 52 | |
| | 4. Property and Du | ie Process | 53 | |
| | The Disintegrati | on of Property | 54 | |
| | 6. The Influence of | f these Understandings on the Common | | |
| | Law | | 55 | |
| | II. Instrumentalism in | Proprietary Remedies in US Law | 57 | |
| | 1. The Formalism | of Early Remedial Constructive Trust | | |
| | Theory | | 57 | |
| | Realism about P | | 59 | |
| | | the Unravelling of the Remedial | | |
| | Constructive Tr | ust | 60 | |
| | III. Instrumentalism in | other Common Law Jurisdictions | 63 | |
| | 1. The Liberation of | of the Constructive Trust | 63 | |
| | Determining wh | nen Proprietary Relief should be Available | 64 | |
| | IV. Formalism and Ins | trumentalism Contrasted | 67 | |
| 4. | . The Normative Foundation | ons of Proprietary Claims and Remedies | 69 | |
| | Considerations of J | ustice and Efficiency for giving Owners | | |
| | Relief against Third | l Parties | 69 | |
| | Rights against R | emote Recipients of Misappropriated | | |
| | Assets | | 69 | |
| | 2. Rights against T | hird Parties in Respect of Bitiated Transfers | 73 | |
| | II. Rights to Profits | | 75 | |
| | III. Should these Reme | dies be Specific? | 75 | |
| | Justifying Specif | ic Relief | 75 | |
| | 2. To what Extent | does the Law Recognise these Concerns? | 76 | |
| | Rights to Specifi | c Recovery and Bankruptcy | 76 | |
| | IV. Should these Reme | dies have Priority in Bankruptcy? | 77 | |
| | 1. Justifying Remed | dies in Bankruptcy | 77 | |
| | 2. The Swollen Ass | ets Rationale | 79 | |
| | 3. The Assumption | n of Risk Rationale: Distinguishing | | |
| | Contract and Re | estitution Plaintiffs | 81 | |
| | Part II Redis | TRIBUTIVE PROPRIETARY REMEDIES | | |
| 5. | The Metaphysics of Traci- | ng: Substituted Title and Property | | |
| ۶. | Rhetoric | ig. Substituted Title and Troperty | 89 | |
| | I. Analysing Tracing | | 90 | |
| | i. manyoning maching | | 70 | |

| | | Contents | ix |
|----|--------|--|-----|
| | | 1. Is Tracing a Claim or Remedy? | 90 |
| | | 2. Tracing as Part of a Remedial "Process" | 91 |
| | | 3. Do Rights to Proceeds Arise Automatically? | 93 |
| | | 4. Does Tracing Create New Property Rights? | 96 |
| | II. | The Metaphysics of Tracing: The Denial of the Remedial | |
| | | Nature of Tracing in Legal Discourse | 98 |
| | | 1. Tracing Things | 98 |
| | | 2. Tracing as Ratification | 100 |
| | | 3. The New Orthodoxy: Tracing Value | 101 |
| | III. | An Explanation of Tracing Rhetoric: The Reconciliation of | |
| | | Tracing with Axiomatic Notions of Property Rights | 106 |
| | | 1. The Function of Tracing Rhetoric | 106 |
| | | 2. The Power of Tracing Rhetoric | 107 |
| | IV. | The Normative Basis for Substituted Title | 108 |
| | | 1. Reasons for Allowing the Assertion of Proprietary Rights | |
| | | over Substitutes | 108 |
| | | 2. Dissonance Between Tracing's Normative Foundations | |
| | | and the Positive Law | 110 |
| | V. | The Consequences of Tracing Discourse for the Substantive | |
| | | Law: The Dangers of the Metaphysics of Tracing | 114 |
| | | 1. The Privileging of Transactional Tracing | 115 |
| | | 2. The Suppression of Normative Analysis | 117 |
| | | 3. Illustrations of the Dangers of Formalism | 120 |
| | | Some Realism About Tracing | 125 |
| | VII. | Conclusion | 126 |
| 6. | The P | roprietary Consequences of a Vitiated Intention to Transfer | |
| | | rty: "An Intolerable Reproach to Our System of | |
| | Jurisp | rudence"? | 127 |
| | I. | The Possible Legal Responses to a Vitiated Consent to Pass | |
| | | Title | 127 |
| | | 1. Transfers Void at Law | 127 |
| | | 2. Voidable Transfers | 129 |
| | | 3. Transfers Giving Rise to a Beneficial Interest | 130 |
| | | 4. Transfers Pursuant to which Title Passes but a Right to | |
| | | Personal Relief Arises | 131 |
| | | 5. Transfers where Title Passes and the Transferor is Denied | |
| | | Any Remedy | 131 |
| | II. | Vitiated Intent and Equitable Title: Doctrinal Responses | 132 |
| | | 1. The Availability of Proprietary Relief: Millett J's Framing | |
| | | of the Issue in El Ajou v. Dollar Land Holdings | 132 |
| | | 2. Three Attempts to Determine the Availability of | |
| | | Proprietary Relief in Response to a Vitiated Intention to | |
| | | Transfer Property | 133 |

| | | 3. Millett J's analysis in <i>El Ajou</i> : The Proprietary | 1.46 |
|----|--------|--|------|
| | | Consequences of Rescission | 140 |
| | *** | 4. Millett's New Analysis | 146 |
| | III. | Proprietary Relief for Vitiated Transfers: Relevant Policy | |
| | | Considerations | 149 |
| | | 1. The Importance of Identifying Involuntary Restitution | |
| | | Claimants | 149 |
| | | 2. Distinguishing between Involuntary Creditors | 150 |
| 7. | Quali | fied Consent to Transfer Property: The Mysterious Basis of | |
| | the Q | uistclose Trust | 153 |
| | I. | Conceptualising the <i>Quistclose</i> Trust | 153 |
| | | 1. Barclays Bank v. Quistclose Investments | 153 |
| | | 2. Interpretations of the basis of the <i>Quistclose</i> Trust | 154 |
| | | 3. Proprietary Remedy or Orthodox Trust? | 160 |
| | II. | Considerations of Justice and Efficiency | 161 |
| 8. | Obliga | ation into Ownership: Constructive Trusts and Liens in | |
| | _ | gements to Assign Property | 165 |
| | | The Distribution of Entitlements in Sale of Goods | |
| | | Transactions | 165 |
| | II. | The Passage of Title in Equity: Constructive Trusts and Liens | |
| | | arising in the Context of Contracts of Sale | 167 |
| | | 1. Equitable Interests Arising in Anticipation of a Legal | |
| | | Conveyance of Property where the Contract is Specifically | |
| | | Enforceable or Consideration has been Paid | 168 |
| | | 2. Equitable Proprietary Interests in Incomplete Property | 172 |
| | III. | Conclusion | 175 |
| 9. | Propr | ietary Relief for Enrichment by Wrongs: the Shifting Boundary | |
| | | en Ownership and Obligation | 177 |
| | | Proprietary Relief for Enrichment by Wrongs: a Normative | |
| | | Analysis | 178 |
| | | 1. Justifications for Priority in Bankruptcy | 178 |
| | | 2. Limitations in the Law's Ability to do Justice: Difficulties in | |
| | | Identifying Unjust Enrichment | 180 |
| | | 3. Proprietary Relief Sought for Reasons other than Priority | 181 |
| | II. | Lister v. Stubbs and The Ownership/Obligation Distinction | 182 |
| | | Secret Commissions and the Limits of Proprietary Relief | 182 |
| | | 2. Policy Concerns Motivating the Principle | 183 |
| | | 3. Divergence between the Formal Principle and Normative | |
| | | Justifications | 183 |
| | | 4. The Premises and Methodology Underlying the Principle | |
| | | in Lister v. Stubbs | 186 |

| | III. | Deducing Ownership from Obligation: AG for Hong Kong v. | |
|-----|--------|---|-----|
| | | Reid | 188 |
| | | 1. The Principle in <i>Reid</i> | 188 |
| | | 2. The Interests of Creditors | 188 |
| | | 3. Divergence between Formal Principle and Policy Concerns | 190 |
| | | 4. The Premises and Methodology Underlying <i>Reid</i> | 191 |
| | IV. | Proprietary Relief for Enrichment by Wrongs in North | |
| | | American Legal Thought | 195 |
| | V. | Conclusion: The Limits and Price of Formalism | 196 |
| 10. | The D | Division of Assets on the Breakdown of Intimate | |
| | Relati | onships: the Limits of Private Ordering | 197 |
| | I. | Introduction | 197 |
| | II. | From Contract to Status: Justifications for Judicial | |
| | | Intervention | 199 |
| | | 1. "The Cold Legal Question": the Requirement of an | |
| | | Agreement or Promise | 199 |
| | | 2. A Shift Away from the Intention of the Legal Owner: | |
| | | Restitution and Estoppel | 202 |
| | | 3. Focusing upon Objective Expectations | 206 |
| | | 4. Analogies with Joint Ventures and Commercial | |
| | | Partnerships | 207 |
| | III. | | |
| | | this Area | 208 |
| | IV. | The Limits of the Private Ordering Paradigm: the Case against | |
| | | Applying Conventional Property Norms in the Context of | |
| | | Intimate Relationships | 212 |
| | | 1. Spheres of Justice: Distributive Norms in Intimate | |
| | | Relations | 212 |
| | | 2. The Treatment of Intimate Relationships in Legal | |
| | | Doctrine | 213 |
| | | 3. The Premises of the Absolutist Conception of Private | |
| | | Property | 220 |
| | | 4. The Premises Controverted | 221 |
| | | 5. Intimacy as Market Failure | 225 |
| | | 6. Institutional Considerations | 230 |
| | V. | Is Proprietary Relief Justified? | 230 |
| | | The Significance of a Causal Connection between | |
| | | Contributions and Assets | 231 |
| | | Plaintiffs' Psychological Connection with Property | 235 |
| | | 3. The Danger of Strategic Behaviour | 238 |
| | | 4. The Interests of Third Parties | 240 |
| | VI. | Conclusion | 244 |

| 11. | Subro | gation: Stepping into the Shoes of Secured Creditors | 245 |
|-----|-------|--|-----|
| | I. | Explaining Subrogration | 245 |
| | | 1. The Function and Effect of Subrogation Reasoning | 245 |
| | | 2. Traditional Explanations for the Provision of Proprietary | |
| | | Relief | 248 |
| | | 3. Subrogation as Restitution | 249 |
| | | 4. Shifting the Focus to Third Party Creditors | 250 |
| | II. | Identifying Creditors' Enrichment in Subrogation Cases | 253 |
| | III. | Determining whether Creditors would be Unjustly Enriched I: | |
| | | Cases in which the Plaintiff may be Characterised as an | |
| | | Involuntary Unsecured Creditor | 255 |
| | | 1. Where Plaintiffs' Property is Used without their Consent to | |
| | | Discharge a Secured Debt | 255 |
| | | 2. Subrogation and Mistakes | 257 |
| | | 3. Practical Compulsion as a Ground for Subrogation | 262 |
| | IV. | Determining whether Creditors would be Unjustly Enriched II: | |
| | | Cases in which the Plaintiff Cannot Readily be Characterised | |
| | | as an Involuntary Unsecured Creditor | 263 |
| | | 1. Sureties' Acquisition of the Rights of Secured Creditors | 263 |
| | | 2. Bills of Exchange: An Indorser's Right to a Holder's | |
| | | Securities | 266 |
| | | 3. Subrogation of Creditors of a Trust Business to the | |
| | | Trustees' Lien | 267 |
| | | 4. Subrogation and the Doctrine of Marshalling | 269 |
| | V. | Protecting Third Parties: Defences and Registration | 269 |
| | | 1. A Change of Position Defence? | 269 |
| | | 2. Subrogation and Registration | 272 |
| | VI. | Conclusion | 273 |
| | | | |
| 12. | Const | ructive Trusts over Sums Obtained from Third Parties to | |
| | Preve | nt Over-compensation | 275 |
| | | Insurers' Rights Against an Indemnified Assured | 275 |
| | | 1. The Nature of Insurer's Rights against an Indemnified | |
| | | Assured | 275 |
| | | 2. Justifying the Insurer's Proprietary Interest in Money | |
| | | Recovered by the Assured from Third Parties | 276 |
| | | 3. Rights Arising from an Overpayment by the Insurer | 283 |
| | II. | An Assured's Rights against an Over-indemnified Insurer | 284 |
| | | 1. Lonhro v. Export Credit Guarantee Department | 284 |
| | | 2. Formal Justifications | 285 |
| | | 3. Policy Arguments | 286 |
| | III. | Constructive Trusts over Sums Recovered for the Benefit of | |
| | | Another | 286 |

| | IV. | Constructive Trusts arising in Favour of Carers of Tort | |
|-----|--------|--|-----|
| | | Victims over Damages due from Tortfeasors | 288 |
| 13. | Propr | ietary Estoppel | 291 |
| | | Rule of Evidence or Substantive Doctrine? | 291 |
| | II. | The Basis for Intervention: is Proprietary Estoppel Limited to | |
| | | the Enforcement of Consensual Arrangements? | 293 |
| | | 1. Enforcing Informal Transfers | 293 |
| | | 2. Estoppel in Unilateral Mistake Cases | 293 |
| | | 3. Estoppel in Common Mistake Cases | 294 |
| | III. | Remedial Discretion | 297 |
| | | 1. The Measure of Relief | 298 |
| | | 2. Personal or Proprietary Relief? | 303 |
| | IV. | The Proprietary Status and Effect of these Remedies | 304 |
| | | 1. Proprietary Estoppel and Third Parties | 304 |
| | | 2. The Nature of Plaintiffs' Rights Prior to any Judicial | |
| | | Declaration | 307 |
| | V. | Conclusion | 310 |
| 14. | Liens | arising from the Acquisition, Preservation or Improvement | |
| | of Ass | | 311 |
| | I. | Maritime Liens | 311 |
| | | 1. Liens in Maritime Law | 311 |
| | | 2. The Nature of the Maritime Lien | 313 |
| | II. | Equitable Liens: "A Themeless Ragbag"? | 314 |
| | | 1. Introduction | 314 |
| | | 2. A General Right to a Lien over Salvaged Property? | 315 |
| | | 3. Particular Equitable Liens arising from the Acquisition, | |
| | | Preservation or Improvement of Assets | 316 |
| | | PART III RESTITUTION AND PROPERTY RITES | |
| 15. | Dropr | ietary Relief as Restitution | 325 |
| 13. | - | Birks' Account of Proprietary Remedies | 325 |
| | 1. | Tracing Value | 326 |
| | | 2. Vitiated Transfers | 329 |
| | | 3. Enrichment by Wrongs | 330 |
| | | Quasi-Matrimonial Property Relief | 331 |
| | | 5. Subrogation | 331 |
| | | Rights Preventing Over-indemnification or | 001 |
| | | Over-compensation | 333 |
| | | 7. Proprietary Estoppel | 334 |
| | II. | | |
| | | Remedies | 335 |

xiv Contents

| | III. | Rationalising Restitution: the Limits of the Project | 336 |
|------|-------|--|-----|
| | IV. | Conclusion | 338 |
| | | PART IV CONCLUSION | |
| 16. | Concl | usion: Redistributive Proprietary Remedies and the Moral | |
| | Limit | s of Property | 343 |
| | I. | Redistributive Proprietary Remedies and the Absolutist | |
| | | Paradigm of Property | 343 |
| | | 1. The Diversity of Property and the Implausibility of the | |
| | | Absolutist Paradigm | 343 |
| | | 2. The Obfuscation of Redistribution and its Consequences | 343 |
| | II. | The Need for a Normative Discourse of Property | 344 |
| | | 1. Property and Justice | 344 |
| | | 2. From the Absolutist Paradigm to a New Discourse | 345 |
| | | 3. The Nature of the New Discourse | 346 |
| | | 4. Toward a Jurisprudence of Redistribution | 347 |
| Inde | x | | 349 |