Contents

Table of Cases	XIX
Table of Legislation	xxix
1. Introduction	1
2. Instability of 'Remedy'	7
A Introduction	7
B Literal and Non-Legal Meanings of Remedy	8
C Broad Functional Definition of Legal Remedy	9
D Narrow Meanings of Legal Remedy	11
1 An action or cause of action as a remedy	11
2 A substantive right as a remedy	13
(a) Kinds of substantive rights: primary and secondary	13
(b) Confusion as to secondary rights	15
(c) A secondary right as a remedy	16
(d) A primary right as a remedy	16
3 A court order as a remedy	17
(a) An order made 'as of right'	17
(b) An order given in court's 'strong' discretion	18
4 Means of enforcing a court order as a remedy	18
5 Final outcome as a remedy	21
E Conclusion	22
3. Writers on 'Remedies'	23
A Introduction	23
B Lawson — Remedies of English Law	23
1 The work	23
2 Scope of the concept of a remedy	24
3 Taxonomy of remedies	25
4 Summary	28
C Burrows — Remedies for Torts and Breaches of Cont	ract 29
1 The work	29
2 Scope of the concept of a remedy	29
3 Taxonomy of remedies	30
4 Summary	31

	D Meagher, Gummow and Lehane — Equity: Doctrines	
	and Remedies	31
	1 The work	31
	2 Scope of the concept of a remedy	31
	3 Taxonomy of remedies	33
	4 Summary	33
	E Tilbury — Civil Remedies	33
	1 The work	33
	2 Scope of the concept of a remedy	33
	3 Taxonomy of remedies	35
	4 Summary	37
	F Walker — The Law of Civil Remedies in Scotland	37
	1 The work	37
	2 Scope of the concept of a remedy	38
	3 Taxonomy of remedies	39
	4 Summary	41
	G Conclusion	41
4.	Stable Core Meaning of 'Remedy'	43
	A Introduction	43
ال	B Stable Core Meaning of Remedy	44
	1 Core usage of remedy	44
	2 The nature of a court order or pronouncement	45
	3 A note on self-help 'remedies'	47
	C Rejection of Various Definitions	48
	1 Broad definition of remedy not adequate	48
	2 Rejected narrow meanings of 'remedy'	49
	(a) An action or cause of action ought not to be	
	called a remedy	50
	(b) A secondary right ought not to be called a remedy	50
	(c) A primary right ought not to be called a remedy	52
	(d) Means of enforcement of a court order ought not to be	
	called a remedy	52
	(e) Final outcome ought not to be called a remedy	53
	D Relationship Between Substantive Rights and	
	Remedies	53
	1 Line between substance and remedy	53
	2 Fitting substantive rights, remedies, and enforcement	
	together	54
	3 Existence of substantive rights	56
	4 Substantive rights before remedies or vice versa?	57
	5 Remedies without substantive rights	59
	6 Substantive rights without remedies	59
	E Conclusion	61

Contents	X

5. Classification of Remedies	63
A Introduction	63
B Classifications of Remedies	64
1 Most common classifications	64
2 Received classification	65
C What is Being Classified?	65
1 Effect of imprecise definition on taxonomy	65
2 Definition of 'remedy'	66
3 Foreign matter must be excluded	66
D What Criterion Operates?	67
1 What is the criterion for the categories of compensation,	
restitution, and punishment?	68
2 Are specific enforcement, coercion, and declaration	
goal-based categories?	70
3 What are the criteria for the specific enforcement category?	70
4 What is the criterion for the coercion category?	72
5 What is the criterion for the declaration category?	74
6 Criteria must not be mixed	75
E What Could a Disciplined Classification of Remedies	
Look Like?	75
1 First principles of taxonomy	75
2 Features of remedies and possible criteria	76
3 The summa divisio or first level	77.
4 Lower levels of the hierarchy	81
F Conclusion	82
G Appendix	84
6. Discretion and Remedies	85
A Introduction	85
B A Closer Look at Discretion	86
1 Definition of discretion	86
2 Discretion and rules	86
3 Constraints on discretion	87
4 Reasons for discretion	87
C Discretion as to Replicative Remedies	88
1 Introduction	88
2 Discretion as to common law remedies	89
3 Discretion as to equitable remedies	91
(a) Characterized as discretion to grant or refuse the remedy	91
(b) Characterized as discretion as to whether a 'bar' to the	
remedy operates	92
(c) Downplaying the term 'discretion' in relation to	
equitable remedies	94
(d) 'Discretion' to impose conditions	96

.

	D Remedial Discretion as to Transformative Remedies	97
	1 Introduction	97
	2 Remedial discretion distinguished from discretion as to	07
	equitable replicative remedies	97
	3 Remedial discretion distinguished from judicial	0.0
	development of the law	100
	(a) Law-making at the institutional level (or 'rule-making')	100
	(b) 'Law'-making at the instance-specific level	100
	(or 'remedy-making') E Conclusion	100
	E Conclusion	102
7.	Replicating Primary Rights: Common Law	
	Remedies	103
	A Introduction	103
	B Replication of Primary Rights	104
	1 Primary rights capable of replication	104
	2 Primary rights not capable of replication	104
	3 Primary rights not replicated for policy	
	reasons (bars)	105
	C Replication at Common Law and in Equity	105
	D Award of Sum Due Under a Contract	106
	1 Form of the order	106
	2 Nature of the remedy	108
	(a) Function of the remedy	108
	(b) Effect on substantive rights	108
	(c) Advantages of the remedy	109
	3 Nature of the substantive right replicated	109
	(a) Right to the payment of an agreed sum	110
	(b) Right to the payment of an unspecified sum	111
	4 Enforcement of the remedy	112
	E Award of Restitution for Unjust Enrichment at the	
	Expense of Another	112
	1 Form of the order	113
	2 Nature of the remedy	113
	3 Nature of the substantive right	
	replicated	114
	4 Enforcement of the remedy	114
	F Order for the Recovery of Land	115
	1 Form of the order	115
	2 Nature of the remedy	116
	3 Nature of the substantive right replicated	117
	(a) The claimant's substantive right	117
	(b) The nature of the right's replication	118
	4 Enforcement of the remedy	110

	• • •
Contents	X111

Replicating Primary Rights: Equitable Remedies	121
A Introduction	121
B Injunction Replicating a Primary Right	121
1 Form of the order	122
2 Nature of the remedy	124
(a) Duration of operation	124
(b) Function of the remedy	124
(c) Advantages of the remedy	125
(d) Effect on substantive rights	126
3 Nature of the substantive right replicated	127
(a) Negative primary right (prohibitory injunction)	128
(i) Common law rights	128
(a) Replication of negative contractual rights	128
(b) Replication of negative non-contractual legal rights	129
(ii) Equitable rights	129
(iii) Statutory rights	129
(b) Positive primary non-contractual right (mandatory injunction)	130
(i) Common law rights	130
(ii) Equitable rights	130
(iii) Statutory rights	133
4 Enforcement of the remedy	133
C Decree of Specific Performance of a Contract	134
1 Form of the order	134
2 Nature of the remedy	135
(a) Function of the remedy	135
(b) Advantages of the remedy	137
(c) Effect on substantive rights	137
3 Nature of the substantive right replicated	138
(a) Right to the transfer of an asset	139
(b) Right to the provision of a service	139
(c) Right to the payment of money	141
(d) Two senses of 'specific performance'	141
4 Enforcement of the remedy	142
D Order for the Execution of a Trust and Order for a	
Common Account	142
1 Form of the order	143
(a) Order for execution of a trust	143
(b) Order for a common account	143
2 Nature of the remedy	144
(a) Function of the remedy	144
(b) Advantages of the remedy	144
(c) Effect on substantive rights	145
3 Nature of the substantive right replicated	145
4 Enforcement of the remedy	146

xiv

E Rectification 'Order'	146
1 Form of the order	147
2 Nature of the remedy	147
(a) Function of the remedy	147
(b) Effect on substantive rights	147
3 Nature of the substantive right replicated	148
4 Enforcement	148
F 'Order' for Rescission	148
1 Form of the order	148
2 Nature of the remedy	149
3 Nature of the substantive right replicated	150
4 Enforcement	151
9. Replicating Primary Rights: Statutory Remedies	153
A Introduction	153
B Order for the Recovery of Goods	
(or their Value)	153
1 Form of the order	154
2 Nature of the remedy	155
(a) Function of the remedy	155
(b) Advantages of the remedy	155
(c) Effect on substantive rights	155
3 Nature of the substantive right replicated	155
4 Enforcement of the remedy	157
C Declaration of Primary Right	158
1 Form of the judgment	158
2 Nature of the remedy	159
(a) Function of the remedy	159
(b) Advantages of the remedy	159
(c) Effect on substantive rights	160
3 Nature of the substantive right replicated	160
(a) Common law rights	162
(i) Contractual rights	162
(ii) Property rights usually protected by the law of tort	163
(b) Equitable rights	163
(c) Statutory rights	163
4 Enforcement of the remedy	164
10. Replicating Secondary Rights: Common	
Law Remedies	165
A Introduction	165
B Replication of Secondary Rights	166
C Award of Damages	167
1 Form of the order	167

Contents	XV

2 Nature of the remedy	168
(a) Function of the remedy	168
(b) Effect on substantive rights	169
(c) Advantages of the remedy	170
3 Nature of the substantive right replicated	170
(a) Compensation	172
(i) Arising from a breach of contract	172
(a) Loss of expected enrichment	173
(b) Loss of bargain	173
(c) Reliance loss	174
(ii) Arising from a tort	174
(b) Restitution	175
(i) Arising from a breach of contract	175
(ii) Arising from a tort	176
(c) Punishment	176
(i) Arising from a tort	177
(ii) Arising from a breach of contract	177
4 Enforcement of the remedy	177
11. Replicating Secondary Rights: Equitable Remedies	179
A Introduction	179
B Award of Equitable Compensation	179
1 Form of the order	180
2 Nature of the remedy	180
3 Nature of the substantive right replicated	181
(a) Beneficiary's secondary right to direct payment	181
(b) Beneficiary's secondary right to have the trust	
fund restored	182
4 Enforcement of the remedy	183
C Orders Giving Effect to Secondary Rights to an Account	183
1 Order for an account on the basis of wilful default	183
(a) Form of the order	183
(b) Nature of the remedy	183
(c) Nature of the substantive right replicated	184
(d) Consequential remedy (equitable compensation)	184
2 Order for an account of profits	185
(a) Form of the order	185
(b) Nature of the remedy	186
(c) Nature of substantive right replicated	186
(i) Arising from an equitable wrong	186
(ii) Arising from a breach of contract	187
(d) Consequential remedy (equitable restitution)	188
3 Enforcement of the remedies	189

xvi Contents

	D	Mandatory Injunction to Undo or Prevent a Wrong	189
		1 Form of the order	189
		2 Nature of the remedy	190
		3 Nature of the substantive right replicated	191
		(a) Arising from a breach of contract	194
		(b) Arising from a tort	195
		(c) Arising from an equitable wrong	195
		(d) Arising from an infringement of an intellectual	
		property right	195
		4 Enforcement of the remedy	196
12.	R	eplicating Secondary Rights: Statutory Remedies	197
	A	Introduction	197
		Order for the Recovery of the Value of Goods	
		(or the Goods Themselves)	197
		1 Form of the order	197
		2 Nature of the remedy	198
		3 Nature of the substantive right replicated	198
		4 Enforcement of the remedy	198
	C	Award of Damages 'in Addition to' Specific Relief under	
		Section 50 of the Supreme Court Act	199
		1 Form of the order	199
		2 Nature of the remedy	199
		3 Nature of the substantive right replicated	200
		4 Enforcement of the remedy	201
	D	Declaration of a Secondary Right	201
		1 Form of the order	201
		2 Nature of the remedy	201
		3 Nature of the substantive right replicated	201
		(a) Arising from a breach of contract	201
		(b) Arising from an equitable wrong	201
		4 Enforcement of the remedy	202
13.	T	ransformative Remedies	203
	Α	Introduction	203
		1 Distinction between constitutive and immediately	
		enforceable remedies	204
		2 Example of statutory power to grant transformative remedies	205
		3 Discretion and transformative remedies	206
	В	Statutory Transformative Remedies	207
		1 Constitutive remedies	207
		(a) Jurisdiction to grant the remedy	207
		(b) Form of the 'order'	208

Contents	xvii
2 Enforceable transformative remedies	210
(a) Jurisdiction to grant the remedy	210
(b) Form of the order	213
C Equitable Transformative Remedies	214
1 Constitutive remedies	214
(a) Jurisdiction to grant the remedy	214
(b) Form of the order	216
2 Enforceable transformative remedies	216
D Common Law Transformative Remedies	217
E Enforcement of Transformative Remedies	217
1 Constitutive remedies	217
2 Enforceable transformative remedies	217
14. Conclusion	219
Bibliography	225
Index	231

and the same of th