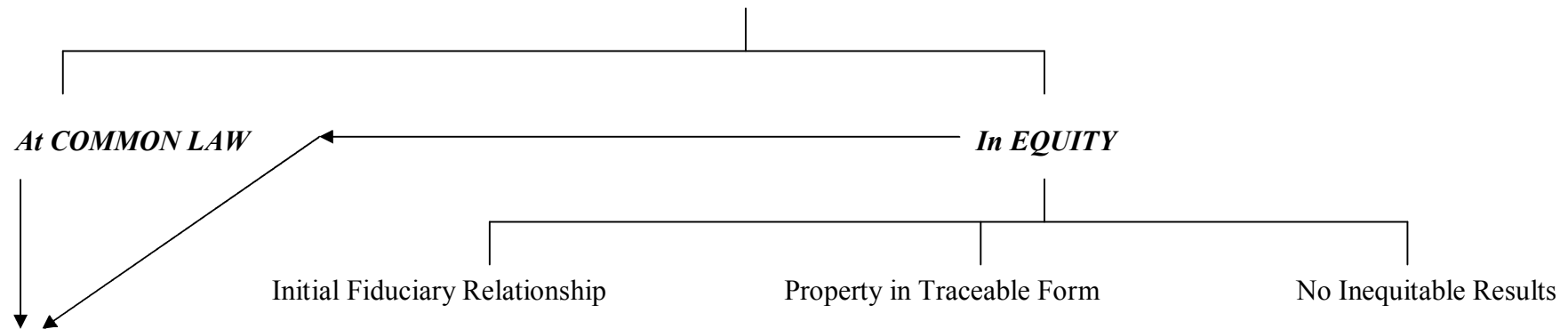


TRACING & FOLLOWING



'Following is the process of following the same asset as it moves from hand to hand.'

'Tracing is the process of identifying a new asset as the substitute for the old.' – Lord Millett in *Foskett v Mckeown*



Examine the judicial/academic debate as to these elements remaining separate or being unified in some way.

See your lecture notes: pp. 1-2. And Lordship's commentary in *Foskett v Mckeown*.

At COMMON LAW



General Rules:

- Only legal owner of property may trace.
- Cannot trace into mixed accounts.
- May be able trace into mixed property where it is intangible.
- Some property may still be identifiable despite a change of form.

Clayton's Case: The rule of 'First in First Out'

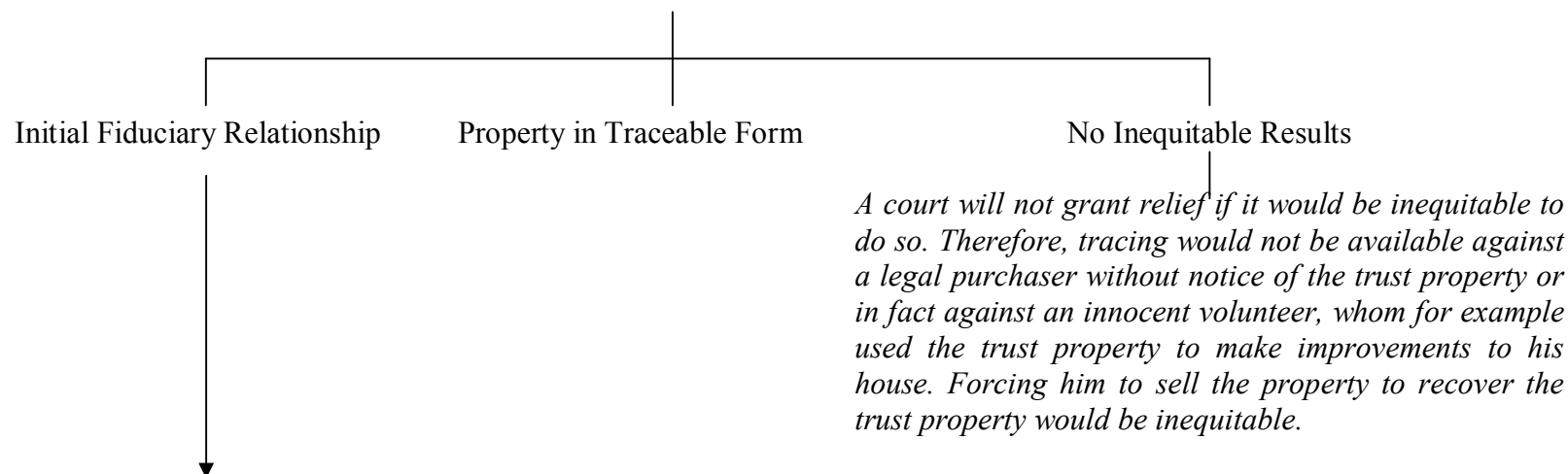
Bank Account 'A'

Description	Debits	Credits	Balance
01.02.07			5,000
02.02.07 Deposit		10,000	15,000
03.02.07 Withdrawal	10,000		5,000

Purchase of a Yacht for £10,000.



In EQUITY



Traditionally, there was a need to provide evidence for an initial fiduciary relationship; however, ***Lord Millett in Foskett v Mckeown***, now suggests it is not completely necessary. BUT: examine the history –

- *Sinclair v Broughman* established necessity for fiduciary relationship.
- *Re: Diplock* confirmed S v B.
- The circumstances of the constitution of a fiduciary relationship seemed to be very wide: E.g. Employer and Employee (*Banque Belque v Hambrouck*); a contract for sale (*Aluminium Industrie v Romalpa*); from a mistake (*Chase Manhattan*); a thief becoming a constructive trustee (*Lipkin Gorman, Bishopsgate Inv Mgt Ltd*)
- Most obvious: Trustee & Beneficiary (*Re: Hallett's Estate*)

Property in Traceable Form

MIXED FUNDS

If trustee mixes trust property with own the trust is entitled to the value of the trust property used and as to doubt over quantity of trust property, it is to be resolved in favour of trust. Indian Oil v Greenstone.
If trust monies mixed with trustees in a bank account and amounts withdrawn, trustees monies are deemed to have been used first. Re: Halletts.
However, if this becomes inequitable rule modified in Re: Oatway, where the trust will have a charge over both the funds in the bank account and traceable property.

DEBTS

If trust property or its proceeds are used to discharge a specific debt, trust will not be traceable. Re: Diplock.

OVERDRAFTS

If an innocent volunteer pays trust funds into an overdraft account tracing will not be available. Bishopsgate Inv Mgt Ltd.

However, if Trustee does so there is a possibility of tracing into overdrawn account. Re: Tilleys Wills Trust

IMPROVEMENTS

Property is only traceable if improvements result in an increase in value of the property. Re: Diplock

PROFITS

If a person in possession of the trust property makes a profit on it, whether he will be liable depends on his relationship with the beneficiary.
If he is the trustee he will be liable. If acted honestly he may be able to keep some of the profits. (O'Sullivan v Mgt Agency.)
If IV and the fund unmixed then can keep profit but must account to beneficiaries. Re: WT.