The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land

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'The rule in the Mozambique case is hardly one of the things that trip off most lawyers' tongues each day as they pass through the courts in their legal lives'.[1]

JURISDICTION: THE BACKGROUND

In an action which contains a foreign element, the first question a court may have to decide, before it can determine the substance of the dispute, is whether the court is competent to adjudicate.[2] The common law doctrine that a writ 'does not run beyond the limits of the state'[3] has been extended in Western Australia to permit service out of the jurisdiction, with the leave of the court, where there is some connection between the forum and the subject matter of the dispute.[4] The jurisdiction

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1. Statement of the Attorney-General on presenting the Law Reform (Miscellaneous Provisions) (Amendment) Bill 1995, together with explanatory memorandum: *Hansard* (LA) 18 Oct 1995, 1816.
2. See generally EI Sykes & MC Pryles *Conflict of Laws: Commentary and Materials* 3rd edn (Sydney: LBC, 1988) 3, 299.
3. *Laurie v Carroll* (1958) 98 CLR 310, Dixon CJ, Williams and Webb JJ 322.
4. Supreme Court Rules (WA) 0 10, r 1.

of the courts of Western Australia has also been extended by the federal,[5] state[6] and territory[7] cross-vesting scheme, which vests in the Supreme Court of Western Australia original and appellate jurisdiction in relation to 'state matters',[8] although service of process on defendants in other Australian jurisdictions must still be effected under the Service and Execution of Process Act 1992 (Cth).[9] The cross-vesting scheme also provides for the transfer of proceedings from another state or territory Supreme Court to the Supreme Court of Western Australia.[10]

LIMITATIONS ON JURISDICTION

The jurisdiction of the Supreme Court of Western Australia is governed by the relevant common law and statutory provisions. In questions of jurisdiction and conflict of laws, each Australian state and territory is treated as a 'distinct and separate country or law area'.[11] A common law limitation to jurisdiction is that a court does not have jurisdiction to determine the title or the right to possession of an immoveable situate outside the forum, and will not award damages for trespass to such an immoveable. This is commonly referred to as 'the Mozambique rule'.[12] The application of the Mozambique rule has been accepted in Australia as between the states, between the Commonwealth and the states and in relation to foreign states,[13] although the High Court has recently reserved for future consideration the status of the rule.[14] The High Court has accepted that the rule 'represents a resolution of the problems thought to result from the intersection between what can be seen as two competing systems of law – the law of the place in which the land is situated and the law of the forum'.[15] The High Court did not decide whether the rationale for the Mozambique rule, that great inconvenience might follow if courts were to

5. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4 (2).
6. Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW), (Qld), (SA), (Tas), (Vic) s 4 (3).
7. Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT), Jurisdiction of Courts (Cross-vesting) Act 1987 (NT), s 4 (3).
8. A State matter is a matter 'in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State': Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 3 (1).
9. *David Syme & Co Ltd v Grey* (1992) 115 ALR 247, Neave J 247, Gummow J 275.
10. Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 5 (2).
11. *Laurie v Carroll* above n 3, 331.
12. *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 625, Lord Herschell LC 629. Note, this is also less commonly referred to as the 'Moçambique rule': see eg *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 197 ALR 461, Beaumont J 522.
13. *Nudd v Taylor* [2000] QSC 344, Holmes J para 4.
14. *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 498.
15. *Commonwealth v Yarmirr* (2001) 208 CLR 1, Gleeson CJ, Gaudron, Gummow & Hayne JJ 45.

exercise jurisdiction in claims involving foreign land, was correct.[16] The rule has received judicial support in Australia for its continued application for 'reasons of convenience and comity',[17] and despite the uncertainty of its ambit and the exceptions to which it is subject.[18] English courts have criticised the rule,[19] but refused to change it on the basis that it had been established for too long and that it had received significant international approval.[20]

STATE JURISDICTION OVER FOREIGN LAND

Following a report of the New South Wales Law Reform Commission, which recommended that the rule be abolished,[21] the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) came into operation on 5 October 1990[22] to remove the Mozambique limitation to jurisdiction.[23] In 1995, the Australian Capital Territory also enacted legislation to partially abrogate the Mozambique rule on the basis that the denial of jurisdiction to entertain a personal action merely because foreign land was incidentally involved was illogical.[24] However, despite further recommendations by the Australian Law Reform Commission[25] and the Victorian Law Reform Advisory Council,[26] that the Mozambique rule be abolished, and the substantial abolition of the rule in the United Kingdom, 'except where the proceedings are principally concerned with a question of the title to, or the right to possession of, property',[27] the rule has not been expressly abolished in other states, including Western Australia.

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16. *Yarmirr* ibid.
17. *Inglis v Commonwealth Trading Bank of Australia* [1972] 20 FLR 30, Woodward J 42.
18. *Dagi v BHP Co Ltd (No 2)* [1997] 1 VR 428, Byrne J 432.
19. See eg *Hesperides Hotel Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205, Lord Denning MR 221.
20. *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 902; *Hesperides v Aegean Turkish Holidays* ibid; *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, 543-544, where Lord Fraser observed that the rule was difficult to justify except on historical grounds and may leave the plaintiff without a remedy.
21. NSWLRC *Jurisdiction of Local Courts Over Foreign Land* Report No 63 (Sydney, Jun 1988).
22. Note s 5 which provides that 'This Act applies whether the course of action concerned arose before, or arises after, the commencement of this Act'. See also Family Provision Act 1982 (NSW) s 11(1)(b), which now permits an order for provision out of the estate of a deceased person in respect of property outside NSW.
23. Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) s 3. See eg *Atkinson v Atlas Investments Ltd* [2004] NSWSC 63, BC200400541, Burchett JA 16.
24. Law Reform (Miscellaneous Provisions Act) 1995 (ACT) s 34(1). This Act came into effect on 31 October 1995. S 34(2) preserves the title and possession aspect of the Mozambique rule in the ACT, which A-G Humphries held to be founded on commonsense. See *Hansard* above n 1.
25. ALRC *Choice of Law* Report No 58 (Sydney, Mar 1992) 111.
26. VLRC *Jurisdiction over Foreign Land* Project 23 (Melbourne).
27. Civil Jurisdiction and Judgments Act 1982 (UK) s 30(1). See also *Re Polly Peck International* [1998] 3 All ER 812, 828-829.

The Rules of the Supreme Court of that state, while having the force of law as rules of practice and procedure, cannot confer, take away, alter or diminish any existing jurisdiction.[28] As Western Australia is a party to the cross-vesting scheme, it can be argued that the rule is no longer applicable to its Supreme Court as the cross-vesting scheme confers the jurisdiction of the respective Supreme Courts on each other.[29] As Professor Davis has observed:

> By section 4 of each of the State and Territory cross-vesting Acts, the jurisdiction of the Supreme Court of each polity is vested in the Supreme Court of each of the others. Furthermore, there is no reason to doubt that section 4 is ambulatory in character. Thus the jurisdiction that any particular State Supreme Court has at any time is (subject to any contrary provision in any particular State or Territory) vested in each of the other Supreme Courts. It must necessarily follow from these propositions that when, on 5 October 1990, the jurisdiction of the New South Wales Supreme Court was expanded, by the coming into force of the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW), and the consequent removal of the fetters which had theretofore prevented the court from entertaining proceedings relating (compendiously) to foreign land, the jurisdiction of the other States, and of the mainland Territories, was also expanded, by force of section 4 of the Jurisdiction of Courts (Cross-vesting) Act 1987.[30]

It has also been queried whether the same decisions would have been reached by courts regarding pre-1987 decisions in relation to the Mozambique rule, after passage of the cross-vesting scheme.[31] However, this view has not yet gained general endorsement[32] and the Attorney-General of Western Australia has recently stated that the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) did not have the effect, by virtue of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA), of abolishing the Mozambique rule in Western Australia.[33]

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28. *TK v Australian Red Cross Society* (1989) 1 WAR 335, Malcolm CJ 340, citing the Mozambique rule.
29. See EI Sykes & MC Pryles *Australian Private International Law* 3rd edn (Sydney: Law Book Co, 1991) para 4.1; JA Riordan (ed) *Laws of Australia* Vol 9 (Sydney: LBC, 1991) 5, para 11.
30. JLR Davis 'The OK Tedi River and the Local Actions Rule: A Solution' (1998) 72 ALJ 786, 788.
31. M Davies, S Ricketson & G Lindell *Conflict of Laws: Commentary and Materials* (Sydney: Butterworths, 1997) para 7.31 suggest *Inglis* above n 17 may have been decided differently under the cross-vesting scheme.
32. See eg *Halsbury's Laws of Australia* (Sydney: Butterworths, 2000) para 85-410, which ignores the issue of cross-vesting and gives general endorsement to the Mozambique rule. See also PE Nygh *Conflict of Laws in Australia* 6th edn (Sydney: Butterworths, 1995) 114, n 20 who argues that the cross-vesting scheme has abolished the title rule, but not the local actions rules.
33. *Hansard* (LC) 8 Apr 2003, 827. The Attorney-General deferred providing reasons for the same. See also *Hansard* (LC) 19 Nov 2003, 1541 where the Attorney-General affirmed the application of the Mozambique rule in Western Australia, but provided no reasons for his position.

ARGUMENT OF THIS PAPER

In this paper, the content and scope of the Mozambique rule will be examined, and its application to the Supreme Court of Western Australia will be reviewed. It will be argued that the Mozambique rule is illogical; that its rationale is untenable; that the cross-vesting scheme does not abolish the rule; and that sui generis legislation should be enacted now to abolish it.

THE MOZAMBIQUE RULE

Content of the rule

In the *Mozambique* case,[34] the plaintiff sought a declaration that it was in lawful possession of land, mines and mining rights in South Africa The plaintiff also sought an injunction restraining the defendant from asserting title, occupation and possession to the land, mines and mining rights. The House of Lords determined that this claim was not justiciable in an English court of plenary jurisdiction, on the basis that 'the ground upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before'.[35]

While it is unfortunate that neither Lord Herschell nor Lord Halsbury explained what these 'substantial' grounds were,[36] the House of Lords' decision was based exclusively upon the historical development of the circumstances in which, and reasons for which, jurisdiction would be taken by an English court to adjudicate upon a matter.[37]

During the 12th century development of the doctrine of venue, juries were drawn from persons acquainted with the facts in issue from their own knowledge, rather than from the evidence of witnesses. To ensure empanelment of the right jury, the venue had to be laid down exactly, so that the jury might be summoned from this place.[38] Consequently, jurisdiction was barred to actions where the facts occurred abroad. The inconvenience of this rule regarding actions involving more than one locality (which would have increased with the increase of trade),[39] resulted in this

34. Above n 12.
35. Ibid, Lord Herschell 629.
36. JHC Morris *The Conflict of Laws* 4th edn (London: Sweet & Maxwell, 1993) 304.
37. For a detailed summary, see NSWLRC above n 21, para 2.14 et seq; see also WS Holdsworth *History of English Law* Vol 5 (London: Sweet & Maxwell, 1972) 140-142.
38. NSWLRC ibid. See also AV Dicey & JHC Morris *The Conflict of Laws* Vol 2 (London: Stevens & Sons, 1987) 926.
39. See NSWLRC ibid, para 2.16, n 37.

rule being relaxed in relation to transitory actions (ie, actions where the facts might have occurred anywhere – for example, breach of contract).[40] It was soon strictly applied to local actions[41] (ie, actions where the facts could only have occurred in a particular place, for example, actions relating to foreign land), having a necessary connection with a particular locality.[42] When Rule 28 of the Judicature Act 1873 (UK) abolished the need for a local venue to be laid, it was arguable that the disability of the court in relation to local actions was extinguished.[43] This view was supported by the majority in the Court of Appeal in the *Mozambique* case, where Fry J considered that, in relation to foreign land, jurisdiction would not exist if the matter related to title, since the court could not enforce its order; however, if the issue related only to trespass to foreign land, the court could now assume jurisdiction since a local venue was no longer required.[44] The House of Lords rejected this view. The Mozambique rule has since been formulated as follows:

> The inhibition of that rule does not bar the jurisdiction of an English court except where the action raises one or other of the two issues to which the rule relates – namely, (1) the title to, or right to possession of, land in a foreign country; or (2) damages for trespass to such land.[45]

Dicey and Morris have formulated the rule in more restrictive terms: 'The court has no jurisdiction to entertain proceedings for the determination of title to, or the right to the possession of, immovable property situated outside England'. This formulation has been criticised as being outside the findings made by the House of Lords in the Mozambique case.[46] The Dicey and Morris formulation was accepted as correct in *Hesperides Hotels Ltd v Muftizade*,[47] where the House of Lords rejected an invitation to overrule or limit the rule, with Lord Wilberforce stating that any action which is based upon the plaintiff's right to possession of foreign land, whether

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40. Ibid, n 38, citing *Mostyn v Fabrigas* (1774) 98 ER 1021, 1029-1032. See Dicey & Morris, above n 38 on the fiction of videlicet.
41. See eg *Doulson v Matthews* (1792) 100 ER 1143 where Buller J and Lord Kenyon CJ rejected Lord Mansfield's view that the rule would not apply where there were no local courts and it would otherwise leave the Plaintiff without a remedy (see *Mostyn v Fabrigas* ibid).
42. See Lord Herschell in *Mozambique* above n 12, 618 on the distinction between local and transitory actions.
43. See eg *Whitaker v Forbes* (1875) 1 CPD 51, cited by Dicey & Morris above n 38, n 51, and NSWLRC above n 21, para 2.18, nn 46, 47.
44. [1892] 2 QB 358, 414; see also Lopes LJ 417.
45. *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 38, 396, cited in *Dagi v BHP (No 2)* above n 18.
46. Dicey & Morris above n 38, para 23-021, cited in *Nudd v Taylor* [2000] QSC 344, para 4. See J Willis 'Jurisdiction of Courts – Action to Recover Damages for Injury to Foreign Land' (1937) 15 Canadian Bar Review 112, 113-115.
47. Above n 20.

framed in trespass, conspiracy to commit trespass, negligence or nuisance, is outside the jurisdiction of English courts.[48]

The Mozambique rule in Australia

In *Potter v Broken Hill Proprietary Co Ltd*,[49] the Supreme Court of Victoria held that it had no jurisdiction to hear an action concerning an alleged infringement of a patent granted in New South Wales. Hodges J affirmed Lord Herschell's determination in the Mozambique case, that 'if the facts relied on as the foundation of the plaintiff's case have a necessary connection with a particular locality, the action is a local action';[50] questions concerning title to foreign land were merely illustrations of the rule as to local actions.[51] On appeal, the High Court affirmed the application of the title and/or possession rule, unless the question of title arose merely incidentally in relation to a personal, contractual or quasi-contractual obligation.[52] The title rule was held by the Supreme Court of the Australian Capital Territory to deny jurisdiction to entertain an action for a declaration that rights under a mortgage of land in Tasmania were statute-barred.[53] The Supreme Court of Queensland also applied the title rule to justify the court's refusal to adjudicate on native title claims to the extent that the claims extended to waters beyond three nautical miles from the low water mark on the Queensland coast.[54]

The second part of the Mozambique rule, the 'local actions rule', was applied by the High Court as between Australian states to hold that a claim for statutory compensation for the acquisition of land outside New South Wales was not maintainable in the New South Wales Supreme Court. It was a local matter arising outside New South Wales and, therefore, the court was without jurisdiction.[55]

The title rule and the local actions rule were both reviewed by the Supreme Court of Victoria in *Dagi v Broken Hill Pty Co Ltd (No 2)*.[56] The plaintiffs brought an action in trespass, nuisance and negligence in relation to the defendant's operation of a mine near the Ok Tedi River in Papua New Guinea. The defendants opposed the plaintiff's claim primarily on the basis that the Supreme Court of Victoria lacked jurisdiction to entertain the plaintiff's claim. Byrne J examined the Mozambique rule in detail and held that —

48. *Hesperides v Muftizade* above n 20, Lord Wilberforce 536.
49. [1905] VLR 612.
50. Ibid, 638.
51. Ibid, 639.
52. (1906) 3 CLR 479, Griffiths CJ 498-499.
53. *Inglis* above n 17, Woodward J 42.
54. *Jones v Queensland* [1998] 2 Qd R 385, Ambrose J 397; see also *Elder v Queensland* (1997) 141 FLR 467.
55. *Commonwealth v Woodhill* (1917) 23 CLR 482, Barton J 487.
56. Above n 18.

> the distinction between local and transitory actions, in so far as they concern foreign land, does underlie the principle for which the *Mozambique* case stands as authority.... At common law the court will apply the principle underlying the substantive distinction between claims which are local and those which are transitory to determine justiciability. They show that at common law, the court will refuse to entertain a claim where it essentially concerns rights, whether possessory or proprietary, to or over foreign land, for these rights arise under the law of the place where the land is situate and can be litigated only in the courts of that place. The claim must not merely concern those rights; it must essentially concern them. This is because the rights must be the foundation or gravamen of the claim. [57]

Accordingly, Byrne J found that the plaintiff's claim for damages and other relief in trespass, nuisance and negligence for damage to land was not justiciable, but that the plaintiff's causes of action in negligence for loss of amenity or enjoyment of their land, the OK Tedi River and the floodplains were justiciable as they were not founded on any possessory or proprietary right to this land, water or the floodplains.[58] The High Court has since reserved the Mozambique rule 'for further consideration in an appropriate case',[59] leaving uncertainty as to whether it will remain law in Australia.

Practical points on the Mozambique rule

The Mozambique rule is a rule of public policy and accordingly the better view is that parties cannot by mutual agreement avoid the application of the rule.[60] The personal amenability of a defendant to a jurisdiction will not be sufficient to give a court jurisdiction.[61] The question of locality is a matter of both substance and form,[62] locality being a matter of substance where location is essential to the court's authority to resolve the dispute and enforce judgment, and a matter of form where it relates to the mode of trial and associated procedural matters.

Exceptions to the Mozambique rule

It is generally accepted that there are three rather imprecise exceptions to the Mozambique rule where a court may assume jurisdiction and make determinations to disputed title to foreign land.[63] These are:

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57. Ibid, 440, 441. Byrne J adopted this broad formulation of the Mozambique rule, having regard to the exceptions to it: 439-440.
58. Ibid, 451.
59. *Regie Nationale Renault v Zhang* (2002) 187 ALR 1, 76.
60. Morris above n 36, 305, n 15, citing *The Tolten* [1946] 135, 166. Cf *Re Duke of Wellington* [1948] Ch 118.
61. See *Corvisy v Corvisy* [1982] 2 NSWLR 557.
62. *Dagi v BHP (No 2)* above n 18, 438.
63. Ibid, Byrne J 433. See also *Petrotimor Companhia de Petroleos SARL* above n 12, Black CJ and Hill J 472.

(a) Where the conscience of the defendant is affected by some contract, trust or breach of fiduciary duty[64]

This exception has its historical foundation in two separate principles.[65] At common law, an action for damages for breach of contract or in debt to enforce a promise for payment of an agreed sum was regarded as a transitory action, even if the contract related to foreign land. Therefore, it was not subject to the jurisdictional limitations placed upon local actions. In equity, the Court of Chancery acted in personam on the conscience of a defendant, who was properly before the court in accordance with the normal rules on amenability of the parties to the jurisdiction of the court,[66] even though the nature of the order might affect the title to, or right to possession of, foreign land.[67] Where the relief sought could be given by enforcing a personal obligation arising out of an express or implied contract, a fiduciary relationship or fraud, or other conduct which, in the eyes of equity would be unconscionable, and which did not depend for its existence on the law of the locus of the immovable property, equity would exercise its jurisdiction.[68] Thus, the High Court has upheld jurisdiction to enforce a trust over foreign land,[69] and the Family Court of Western Australia has exercised its jurisdiction to restrain dealing in land in New South Wales by a party to a marriage.[70] In a matter involving foreign land, a party may also give an undertaking to the court not to press a suit in another venue, so as to permit the court to resolve the matter, notwithstanding that the matter involves a foreign immoveable.[71] Overall, the obligations which the court will enforce cannot be easily brought under one definite head.[72] The exception is important as it serves to mitigate the rule that actions for trespass to foreign land are not justiciable, as such actions can often be framed in contract or implied contract to bring the action within the court's jurisdiction.[73]

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64. Ibid.
65. See NSWLRC above n 21, para 4.2 et seq.
66. See M Tilbury, G Davis & B Opeskin *Conflict of Laws in Australia* (Oxford: OUP, 2002) 919.
67. See *Penn v Lord Baltimore* (1750) 27 ER 1132.
68. See *Deschamps v Miller* [1908] 1 Ch 856, Parker J 863, cited with approval in *Inglis* above n 17, Woodward J 38-40. See also *Tritech Technology Pty v Gordon* (2000) 481 PR 52, 58 where Finkelstein J held that 'Courts of equity have jurisdiction to enforce in personam claims against a party within the jurisdiction notwithstanding that the in personam action arises out of the ownership of a foreign immoveable.'
69. *Dawson v Perpetual Trustee Co Ltd* (1953) 89 CLR 138. See also *Atkinson v Atlas Investments Ltd* above n 23, Burchett JA 15, that a claim to a resulting trust is a recognised exception to the Mozambique principle.
70. *In the Marriage of Allison* (1981) 1 SR (WA) 248, Ferrier J 252. See also *Nudd v Taylor* above n 13.
71. *Handler v Handler* BC 9800922, Young J 11; *Re McLean* [1976] PNGLR 360, Williams J 375.
72. Dicey & Morris above n 38, 929.
73. Sykes & Pryles above n 29, 62.

Limitations also exist in relation to this exception. Jurisdiction cannot be exercised if the lex situs would prohibit the enforcement of the court's order,[74] although it has been suggested this rule must be taken with a grain of salt.[75] Jurisdiction can also not be exercised against strangers to the equity unless they have become personally affected thereby,[76] although it is difficult to determine the degree of privity which will prevent a defendant from being a stranger to the equity.[77] Jurisdiction cannot be exercised if the court cannot effectively supervise the execution of its decree; for example, the court will not order a sale of foreign land upon application by a mortgagee.[78] Jurisdiction cannot be exercised without some personal equity running from the plaintiff to the defendant.[79] Not every equitable obligation arises from a personal obligation,[80] and it is not enough merely to assert an equitable proprietary interest. The court must also have personal jurisdiction over the defendant, although this limitation, which traditionally required personal service upon the defendant, is now relaxed as the defendant may be served out of the jurisdiction.[81] A party may also be taken by his or her actions to have submitted to the jurisdiction of the court.[82]

(b) The issue as to title arises incidentally[83]

In the *Mozambique* case, Lord Herschell observed:

> It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded upon a disputed claim of title to foreign lands.[84]

Although doubt has been expressed as to whether this exception is merely part of the second exception,[85] it has been held to constitute a separate and independent exception that can arise without any contract, fiduciary relationship or equity between

74. *Re Courtney, Ex P. Pollard* (1840) Mont & Ch 239, 250.
75. Morris above n 36, 306.
76. Ibid, citing *Norris v Chambers* (1861) 29 Beav 246; 3 DF & J 583; *Mercantile Investment Co v River Plate Co* [1892] 2 Ch 303.
77. Dicey & Morris above n 38, 930.
78. *Grey v Manitoba Ry Co* [1897] AC 254.
79. Dicey & Morris above n 38, citing eg *Deschamps v Miller* [1908] 1 Ch 856.
80. See eg *Tulk v Moxhay* [1861] All ER 696.
81. See eg *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812; see also Supreme Court Rules (WA) O 10 r 1.
82. See *Nudd v Taylor* above n 13.
83. *Dagi v BHP (No 2)* above n 18, Byrne J 433.
84. *Mozambique* above n 12, 626, cited by Byrne J ibid, 434.
85. *Nudd v Taylor* above n 13, Holmes J 3, citing Sykes & Pryles above n 29, 62.

the parties.[86] As to what is so fundamental as to constitute a determination of title, and what is merely incidental, this has been held to be a question of degree, which can be difficult to resolve.[87] Both the first abovementioned exception and this exception have been important in determining the breadth of the Mozambique rule. Byrne J observed of both exceptions:

> If the remaining two be true exceptions, then the Mozambique principle must be formulated in terms broad enough to encompass those causes of action which would otherwise have been caught by it but for these exceptions.[88]

Byrne J concluded that, by virtue of the second exception, the Mozambique rule only prohibited claims that 'essentially concern rights whether possessory or proprietary, to or over foreign land . . .',[89] which are the foundation of the claim. More recently, the Federal Court held that 'there may be . . . cases where a question relating to foreign land, even to the title to foreign land, may either be capable of determination, as a matter of fact . . . or may arise incidentally or collaterally to some other question, and may be decided'.[90]

Thus, title to foreign immovables can be determined if it arises incidentally in relation to the administration of a trust or an estate which includes property situated in the forum, even though no personal obligation is involved.[91] Dicey and Morris suggest that this exception may be justified on the basis that the court can adjudicate effectively, albeit indirectly, through its control of the trustees or of the other assets situated in the domestic forum.[92]

(c) The issue arises in the admiralty jurisdiction[93]

The Mozambique rule has no application to actions in rem in admiralty, where a court may entertain an action in rem against a ship for damage done to a foreign immovable. Sykes and Pryles suggest that the rule as to foreign land may be inapplicable to all admiralty actions whether in rem or in personam.[94]

(d) Property disputes between de facto spouses

The New South Wales Law Reform Commission has suggested that, upon the hearing of a property dispute between de facto spouses, the Supreme Court of New

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86. *Nudd v Taylor* ibid, 5-6 where Holmes J applied the views of Dicey & Morris above n 38.
87. *Nudd v Taylor* ibid, Holmes J 4.
88. *Dagi v BHP (No 2)* above n 18, Byrne J 440.
89. Ibid, Byrne J 441, cited with approval in *Nudd v Taylor* above n 13, Holmes J 4.
90. *Petrotimor Companhia de Petroleos SARL v Commonwealth* [2003] FCAFC 3, para 219.
91. See eg *Couzens v Negri* [1981] VR 824.
92. Dicey & Morris above n 38, 932.
93. *Dagi v BHP (No 2)* above n 18, Byrne J 434, citing *The Tolten* above n 60; *Nudd v Taylor* above n 13, Holmes J 3.
94. Sykes & Pryles above n 29, 62. See also NSWLRC above n 21, para 4.12.

South Wales should not be limited in the exercise of its jurisdiction by reason only of the real property of one of the parties being foreign land.[95]

The Family Court may make personal orders for the payment of money in respect of parties to divorce proceedings, even though the amount of the order might be made taking into account the value of foreign land,[96] but no jurisdiction will exist to make declarations as to the title or interest of parties in foreign land.[97] It is suggested that having regard to reported decisions[98] this 'fourth exception' is not a separate exception at all, but is merely part of the exception in relation to personal obligations enforceable in equity.

CRITICAL REVIEW OF THE MOZAMBIQUE RULE

Rationale

The conventional justification for the Mozambique rule is a practical one, that only the court of the situs can make an effective decree regarding the land.[99] Dicey regarded the rule as a 'rule of effectiveness'; since it was not possible for an English court to enforce its decree as to title or possession of foreign land, it ought not to embark upon a futility.[100] This has been stated as the 'brutum fulmen' principle.[101] The justification for this principle has been described as 'unconvincing'.[102]

The Mozambique rule is not limited to cases where title is in dispute, as demonstrated in *Hesperides Hotels Ltd v Muftizade*,[103] and a foreign court that is able to enforce a judgment against the defendant can make orders in personam that will simulate the effect of a decree from the situs court (excluding orders based on jurisdiction in rem).[104]

Lord Fraser doubted this argument, observing that:

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95. NSWLRC above n 21, para 4.12 referring to the De Facto Relationships Act 1984 (NSW); see also *Hamlin v Hamlin* [1986] Fam 11.
96. NSWLRC above n 21, citing *In the Marriage of Allison* (1981) 1 SR (WA) 248.
97. *In the Marriage of Allison* ibid, Ferrier J 252. See also *In the Marriage of Perry* (1978) 3 Fam LN 77; R Chisholm & J Dewar *Australian Family Law* Vol 1 (Sydney: Butterworths, 1999) 1080, s 4.69 on property outside jurisdiction.
98. See eg *In the Marriage of Allison* above n 96; *Hamlin v Hamlin* above n 95.
99. See Sykes & Pryles above n 29, 60. See also *Hesperides* above n 20, Lord Fraser 543-544.
100. See *Dagi v BHP (No 2)* above n 18, Byrne J 439.
101. See eg *Hesperides v Aegean Turkish Holidays* above n 19, Roskill LJ 225.
102. MJ Whincop & M Keyes, *Policy and Pragmatism in the Conflict of Laws* (London: Ashgate, 2001) 114; *Hesperides v Muftizade* above n 20, Lord Fraser 544. The NSWLRC accepted the basis of this rule upon the practical consideration of making an effective decree, but did not agree it justified the state of the law: NSWLRC above n 21, para 6.11.
103. Above n 20.
104. MJ Winchop & M Keyes above n 102,114, nn 31, 32.

> As regards effectiveness, a judgment awarding damages against a defendant is generally regarded as effective if the defendant is subject to the court's jurisdiction, because it can normally be enforced against him by order of the court. The effectiveness of the award has nothing to do with the ground on which it was made; an award of damages for trespass to foreign land is no less effective than an award of damages for any other wrong. Moreover the courts ... have asserted jurisdiction in actions to enforce contracts relating to foreign land although enforcement can only be by indirect means.[105]

The Mozambique rule is also thought to represent a 'resolution of the problems thought to result from the intersection between what can be seen as two competing systems of law – the law of the place where the land is situated and the law of the forum'.[106] This argument is based upon what Lord Herschell in the *Mozambique* case saw as the obvious great inconvenience that might follow if English courts were to exercise jurisdiction in matters concerning title to foreign land.[107] The High Court is undecided on the merits of this conclusion,[108] but the foundations for Lord Herschell's argument are certainly somewhat anachronistic:

> Supposing a foreigner wishes to sue in this country for trespass to land situate abroad.... What would there be to prevent his leaving this country after obtaining damages and re-possessing himself of the land? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might?[109]

To some extent, these concerns could be overcome by the parties agreeing not to initiate proceedings in the foreign forum after submitting to the exercise of the jurisdiction of the lex fori,[110] but it is acknowledged that, ultimately, only the lex situs can control the land and rights of the parties thereto.[111] This closely ties in with a further argument advanced in justification of the Mozambique rule, that of the comity of nations.[112] Lord Herschell considered that while principles of international law could not conclusively determine jurisdiction, such principles had found general acceptance as defining the limits of jurisdiction.[113] From the judgment in the *Mozambique* case, it was concluded that 'English courts should not claim jurisdiction to adjudicate upon matters which, under generally accepted principles

105. *Hesperides v Muftizade* above n 20, Lord Fraser 544.
106. *Yarmirr* above n 15, Gleeson CJ, Gaudron, Gummow & Hayne JJ 45.
107. *Mozambique* above n 12, Lord Herschell LC 625.
108. *Yarmirr* above n 15, 45.
109. *Mozambique* above n 12, Lord Herschell LC 625-626.
110. See eg *Handler v Handler* (unreported) NSW Sup Ct, 10 Mar 1998, No 2277 of 1997, Young J 11; *Re McLean* [1976] PNGLR 360, Williams J 375.
111. See Dicey & Morris above n 38, 931.
112. *Hesperides v Muftizade* above n 20, Viscount Dilhorne 541, Lord Fraser 544.
113. *Mozambique* above n 12, Lord Herschell 624, cited in *Inglis* above n 17, 37.

of private international law, were within the peculiar province and competence of another state'.[114] Byrne J also understood the title rule within the context of a sovereign state having exclusive jurisdiction to determine questions of title to its own land.[115] While the pursuit of the comity of nations principle is laudable, it is unclear why exceptions to the Mozambique rule, such as where the defendant's conscience is affected by a contract, trust, or breach of fiduciary duty, should not also offend this argument. The basis of international law forming a sound platform for the Mozambique rule has also been arguably discredited, with any rule of international law prohibiting the adjudication of title to foreign land being frequently overlooked in practice.[116] Lee observes that any similarity between the (questionable) maxim of international law that no state can by its laws directly affect property out of its own territory, or bind persons not resident therein, is coincidental since the local actions rule developed as a domestic rule of venue.[117] Lord Fraser also found the comity of nations justification only affording 'some support for the rule'.[118] A further and related justification for the Mozambique rule is that it is 'a principle of public policy based on the undesirability of our courts adjudicating on issues which are essentially foreign and local'.[119] It is also feared that exercise of such jurisdiction might raise grave constitutional questions if the lex fori made determinations on such matters, which could be more conveniently and more effectively determined in the locus situs.[120] The Mozambique rule also assists in defining the scope of the common law, and 'demonstrates that the common law does not have only a limited territorial operation'.[121]

The most explicit justifications for the Mozambique rule were propounded by Lord Wilberforce in *Hesperides Hotels v Aegean Holidays*.[122] The first reason advanced was that the rule 'is accepted with differing degrees of force and emphasis in other jurisdictions of the common law'.[123] Lord Wilberforce cited substantial Australian, Canadian and United States authority which, he maintained, accepted this rule.[124] Lord Fraser also supported this view.[125] However, the New South Wales

114. *Pearce v Ove Ltd* [2000] Ch 403, Roch LJ 431.
115. *Dagi v BHP (No 2)* above n 18, Byrne J 428.
116. S Lee 'The OK Tedi River: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap?' (1997) 71 ALJ 602, 610, n 63, citing *In Re Duke of Wellington* [1948] Ch 118.
117. Lee ibid, 609. Lee acknowledges, however, that this principle of international law became entrenched in Anglo-American law. See the recent discussion by the Federal Court in *Petrotimor Companhia de Petroleos SARL* above nn 12, 90.
118. *Hesperides v Muftizade* above n 20, 544.
119. *Coin Controls Ltd v Suzo International (UK) Ltd* [1999] Ch 33, Laddie J 43.
120. *Potter v BHP* [1905] VLR 612, 640.
121. *Yarmirr* above n 15, Gleeson CJ, Gaudron, Gummow & Hayne JJ 46.
122. Above n 20, 536-538.
123. Ibid, 536.
124. Eg *Potter v BHP* above n 120; *Inglis* above n 17.
125. *Hesperides v Muftizade* above n 20, Lord Fraser 545.

Law Reform Commission[126] is correct in its observation that in relation to the Australian and Canadian authorities to which Lord Wilberforce referred,[127] these authorities only considered the ambit of the application of the rule. That the authorities cited assumed that the Mozambique rule was binding cannot be described as an acceptance of the justification for the rule.[128] Lord Wilberforce himself acknowledged in his judgment that other states in the United States had departed from the rule.[129]

The second reason advanced by Lord Wilberforce for refusing to revise the Mozambique rule was that 'the nature of the rule itself, involving . . . possible conflict with foreign jurisdictions, and the possible entry into and involvement with political questions of some delicacy, does not favour revision (assuming such to be logically desirable) by judicial decision, but rather by legislation.'[130] This argument may be appreciated better in the context in which it was made. The House of Lords was aware that there was already a new European Convention dealing with the jurisdiction of national courts in preparation, so that legislation would not be long in coming.[131] The argument is weakened, however, by the preparedness of the courts to establish rules which may conflict with foreign jurisdictions, such as the enjoining of a party from continuing with proceedings that it has commenced in a foreign court, if the local court is the more appropriate forum.[132] It is also somewhat curious to the writer, that the House of Lords should refuse to bring judicial reform to the rule, but that it should then readily pass a Bill to bring legislative reform to the rule.[133]

The third reason advocated by Lord Wilberforce in his refusal to revise the Mozambique rule was that 'revision of the rule may necessitate consequential changes in the law'.[134] Lord Wilberforce was concerned that 'forum shopping' may be the result, and that there would need to be changes made to the then nascent doctrine of 'forum non conveniens', with any extended jurisdiction of the courts requiring legislative definition.[135] The doctrine of 'forum non conveniens' has since been developed by English (and Australian) courts;[136] and the New South Wales Law

126. NSWLRC above n 21, para 5.2.
127. *Potter v BHP* above n 120; *Inglis* above n 17; *Gray v Manitoba and NW Railway Co* (1896) 11 Man R42; *Albert v Frazer Companies Ltd* [1937] 1 DLR 39.
128. NSWLRC above n 21, para 5.2.
129. *Hesperides v Muftizade* above n 20, Lord Wilberforce 536.
130. Ibid, 537.
131. Ibid, Lord Fraser 545. Cf *Levison v Patent Carpet Cleaning Co Ltd* [1978] QB 69, 79 where Lord Denning MR sought to act without waiting for Parliament to pass its Bill.
132. See NSWLRC above n 21, para 5.9, n 12, citing *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; *In the Marriage of Takach* (1980) 47 FLR 441.
133. See *Hansard* (HL) 5th Series, Vol 426, cols 721, 722 (14 Dec 1981–4 Feb 1982).
134. *Hesperides v Muftizade* above n 20, Lord Wilberforce 537.
135. Ibid.
136. See eg *Spilada Maritime Corp v Cansulex Ltd* [1987] AC 460, 476; *Oceanic Sun Line*

Reform Commission notes that upon review of the Bill to enact the Civil Jurisdiction and Judgments Act, Lord Wilberforce saw no need for any legislative definition of the doctrine of forum non conveniens.[137]

The fourth reason advanced by Lord Wilberforce to justify his refusal to revise the Mozambique rule was that 'it cannot be said that since 1893 there has been such a change of circumstances as to justify this House in changing the rule.'[138] Again, it is curious that the House of Lords should then approve the passage of legislation to reform the Mozambique rule, in its legislative capacity. It is also doubtful whether the House of Lords even considered itself capable of assessing whether there had been 'such a change of circumstances', Lord Fraser observing:

> I do not think that the House in its judicial capacity has enough information to enable it to see the possible repercussions of making the suggested change in the law.[139]

What is most unfortunate about the House of Lords' decision is that while the court had serious doubts whether the Mozambique rule was 'either logical or satisfactory in its result'[140] and that 'considerations of logic and justice'[141] might lead elsewhere if the matter was tabula rasa and the court was not fettered by earlier authority, it was now 'far too late' to inquire whether the distinction between local and transitory actions was wise or politic.[142] Thus, the House of Lords abrogated notions of logic and justice to the principle of stare decisis. The writer notes that since 1966, the House of Lords has not been bound by its own decisions, and accordingly their Lordships could have revisited the Mozambique rule.[143] Viscount Dilhorne was well aware of this.[144] The principles laid down in the *Hesperides Hotels* case for refusing to alter the Mozambique rule have now been accepted in Australia as applicable to the principles of private international law.[145]

Special Shipping Inc v Fay (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

137. See NSWLRC, above n 21, para 5.6, n 9, citing *Hansard* above n 133.
138. *Hesperides v Muftizade* above n 20, 537, citing *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443. Cf Lee above n 116, 603 who argues that trends in offshore investment and international environmental damage mean the rule has outlived its usefulness.
139. *Hesperides v Muftizade* above n 20, Fraser J 544.
140. Ibid, Fraser J.
141. Ibid, Lord Wilberforce 536.
142. Ibid, Viscount Dilhorne 541. Cf *Inglis* above n 17, 38. Woodward J held that 'It is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted.'
143. See 'Practice Statement by Lord Chancellor' 26 Jul 1966 in [1966] 1 WLR 1234, although it has been noted that the House of Lords has been most reluctant to use this judicial freedom. See eg *Jones v Social Services* [1972] AC 944.
144. *Hesperides v Muftizade* above n 20, Viscount Dilhorne 539.
145. *Re Doyle* (1993) 112 ALR 653, Burchett J 670, commenting on *Hesperides v Muftizade* above n 20, 537, 544.

The existence of the Mozambique rule may also have assisted the courts in providing a discretion to refuse jurisdiction at times when the common law applied a strict principle for the granting of stays of proceedings.[146] Whincop and Keyes examine the lex situs principle as a superior rule for resolving conflicts involving foreign land and note that, if the situs is the forum which minimises litigation costs, the Mozambique rule barred the cases that a court would be likely to stay.[147] However, while the law on stays has since been relaxed, the Mozambique rule remains in full force.[148] That rule may also have an economic rationale. Whincop and Keyes argue that it may be better understood by 'cost externalisation', observing:

> Courts may be willing to exercise jurisdiction in respect of certain multistate cases on the basis that parties who repeatedly enter relevant transactions may move parts of their business to that forum. Substantive law and forum may be part of the attractions offered by jurisdictions competing for business. But if the subject matter of these transactions is immovable, there can be no competition for the primary business. For a court to accept jurisdiction would be for the state in which it sits to subsidise the litigation costs of resolving foreign land disputes, without any hope that that state might capture the primary business. However, local lawyers wanting to act for foreign plaintiffs would prefer fewer constraints on jurisdiction – relaxing Mozambique would be akin to an implicit subsidy paid by taxpayers to lawyers.[149]

Whincop and Keyes also note that the Mozambique rule has applied chiefly to litigation brought by foreign plaintiffs against defendants with substantial connections to the lex fori, so that if the court were to admit jurisdiction, it would do so for the benefit of foreign plaintiffs at the expense of domestic defendants.[150] Thus, the practical effect of the *Mozambique* case is to strengthen the jurisdictional monopoly over land and further the interests of domestic defendants.[151] The recognised exceptions to the Mozambique rule also support this argument; admitting jurisdiction in equity to adjudicate on contracts involving foreign land is more likely to benefit domestic interests, particularly for those investing in foreign land, as opposed to admitting jurisdiction to determine foreign land title and torts cases.[152]

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146. Whincop & Keyes above n 102, 114, n 34, citing *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382; *Hesperides v Muftizade* above n 20, 537.
147. Whincop & Keyes ibid. See eg *Jacobus v Colgate* 111 NE 837 (1916) 839 where Cardozo J observes: 'The House of Lords held that the Judicature Acts were not intended to confer upon the owners of foreign lands a right of action in this country which they would not otherwise have possessed.'
148. See eg *Voth v Manildra Flour Mills* above n 136, *Spilada Maritime Corp v Cansulex Ltd* above n 136, cited by Whincop & Keyes above n 102, 114, n 35.
149. Whincop & Keyes ibid, 114-115. The authors do not cite any authority or data to support this argument.
150. Ibid, 115.
151. Ibid, 114-115.
152. Ibid, 115.

Early decisions do show some recognition of the need to facilitate trade, in admitting jurisdiction,[153] without which the litigation costs of domestic parties would be increased. Whincop and Keyes conclude that the Mozambique rule represents 'an equilibrium legal rule for most states', with most states not wanting to break the monopoly on jurisdiction, except to the extent of contract enforcement and trade facilitation.[154]

Criticisms of the Mozambique rule

The Mozambique rule has been criticised as being 'an arbitrary vestige of medieval procedure'[155] with its adherence to the ancient common law distinction between local and transitory actions, and also as being 'so riddled by evasions and exceptions as to be unrepresentative of the true extent of jurisdiction over foreign land'.[156]

The New South Wales Law Reform Commission has noted that, in relation to the denial of jurisdiction in actions for damages for trespass or other torts concerning foreign land, the Mozambique rule has 'evoked universal criticism throughout the common law world'.[157] The Commission identified four heads under which criticisms of this part of the Mozambique rule could be grouped.[158] The first head was that the rule was an anachronism, having as its foundation the assumption that jurors must have personal knowledge of the facts in issue, with the rule remaining in effect long after the requirement had been dispensed with.[159] The law relating to jurisdiction has also changed so much since the Mozambique case, at least in the United Kingdom, that it may be dangerous to rely on the case.[160] The historical origin of the rule has been a fundamental ground for justification of the rule,[161] and also a basis for formulating the content and scope of the local actions rule.[162] The obsolescence of the historical underpinnings to the action have not been accepted as a basis for

153. Ibid, n 38, citing *Lord Cranstown v Johnston* (1796) 3 Ves 170, 171, approved in *Mozambique* above n 12, 626. Whincop & Keyes, ibid, also note that the extension of the Mozambique rule to foreign intellectual property rights also prevents foreign plaintiffs gaining monopoly rights at the expense of local parties.
154. Whincop & Keyes ibid, 116.
155. Ibid, 114, n 28, citing Welling & Heakes (1980) 'Torts and Foreign Immovables: Jurisdiction in Conflict of Laws' (1980) 18 UW Ont L Rev 295.
156. Ibid, n 29, citing Lee above n 116 (1995, 1997a, 1997b).
157. NSWLRC above n 21, para 6.1.
158. Ibid, para 6.2.
159. Ibid, para 6.3.
160. JJ Fawcett & P Torremans *Intellectual Property and Private International Law* (Oxford: OUP, 1998) 286.
161. *Hesperides v Muftizade* above n 20, Lord Fraser 543.
162. *Dagi v BHP (No 2)* above n 18, Byrne J 441.

avoiding the rule in Australia,[163] although in the United States, as early as 1896 some courts had regarded the limitations imposed by the rule as the product of ancient legal fictions which should not bind contemporary courts.[164] The relevance of the rule has also been doubted by Australian academic commentary:

> A century has passed since Dicey promulgated his title rule. Clearly the world has become a much smaller place.... Just one facet ... is the increasing trend of offshore investment in the developing countries of Asia ... another germane example is the looming battle in the United States arising out of environmental damage caused by the American conglomerate ... in ... New Guinea. The title rule (as presently understood) and the local actions rule have outlived their usefulness. Defendant residents should not be compelled to conduct litigation in inconvenient fora; neither should the doors to justice be closed automatically to aggrieved foreigners. On the contrary, it makes good economic, political and social sense for Australia to be encouraged as a regional centre for the resolution of international commercial disputes.[165]

Thus, the rise of environmental degradation in developing countries by multinational corporations leads environmentalists to argue that foreign courts should accept jurisdiction.[166] The *Ok Tedi* case serves to illustrate that through domestic legislation,[167] the lex situs may be unable to provide relief to the plaintiff.

The second related head of criticism of the rule by the New South Wales Law Reform Commission was that because it arose out of judicial development over centuries which did not always form a coherent whole, the rule was prone to haphazard application and created anomalies and arbitrary distinctions.[168] The Commission points to proceedings between an original lessee and the assignee of the reversion constituting a transitory action, but proceedings between the original reversioner and the assignee of the lessee constituting a local action.[169] Anomalies were admitted by Fry J in the *Mozambique* case[170] that if a plaintiff brings an action for damages to foreign land, his chattels situate thereon, and his person, the court will have jurisdiction to adjudicate in relation to the damage to chattels and person, but not to the land.[171] The distinction between local and transitory actions has, therefore,

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163. Ibid.
164. *Little v Chicago, St Paul Rly Co* 67 NW 846 (1896) Mitchell J 847-848 (Minnesota Sup Ct).
165. Lee above n 116, 603.
166. Whincop & Keyes above n 102, 117.
167. Compensation (Prohibition of Foreign Legal Proceedings) Act 1995 (PNG). This made the seeking of compensation in a foreign court a criminal offence.
168. NSWLRC above n 21, para 6.5.
169. Ibid, para 4.3, 6.6, n 5, citing *Smith's Leading Cases* 7th edn Vol 1 (1876) 691.
170. *Mozambique Case* [1892] 2 QB 358, Fry J 414. See also *The Tolten* above n 60, 135, 146-147.
171. See NSWLRC above n 21, para 6.7.

been described as 'outmoded and analytically dubious'[172] and shrouded in mystery. The decision of Byrne J in the *Ok Tedi* case[173] that the court had jurisdiction to hear the plaintiff's negligence claim for loss of amenity because the plaintiffs merely 'lived on' or 'used the land and rivers' has been criticised as a legal fiction which circumvented the local actions rule to afford practical justice by subterfuge and semantics.[174] Solomon concludes that Byrne J's decision is unsound as, properly characterised, the plaintiff's actions were located in a foreign place and were not justiciable.[175] Byrne J's reasoning, however, appears to have now been accepted on the basis that, in negligence, title to land was not an essential ingredient of the claim.[176]

The third head of criticism of the rule by the New South Wales Law Reform Commission was that the rule may be productive of injustice.[177] It may result in denying a plaintiff any meaningful remedy for a wrong done to foreign property owned by the plaintiff. The defendant may have no assets in the foreign country where the wrong is committed. The exercise of jurisdiction by the foreign country over the defendant may not be recognised in the jurisdiction where the defendant's assets are situated, so that any judgment given cannot be enforced, and the courts of the place where the defendant's assets are located will not continue jurisdiction to hear the matter by reason of the Mozambique rule.[178] The exceptions to the rule may also lead to injustice. The assumption of jurisdiction to enforce a personal equity against a defendant possessed of foreign land may result in the defendant being forced to do something the lex rei sitae would not have otherwise forced him to do, since the existence of the equity is determined by the lex fori.[179] The exercise of this equitable jurisdiction is also anomalous, and may lead to conflicts with the courts of the situs.[180] This makes the foundation for the equitable exceptions to the

172. PB Carter 'Decisions of British Courts During 1990' (1990) 61 British Year Book of Int'l Law 395, 402, cited by Fawcett & Torremans above n 160, 288, n 254.
173. *Dagi v BHP (No 2)* above n 18.
174. Lee above n 116, 602, 603, 614- 615. Lee notes that the claims for 'loss of amenity' were in substance claims for negligent injury to land.
175. P Solomon 'The Ok Tedi: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap?' (1998) 72 ALJ 231, 238. See also PE Nygh & M Davies *Conflict of Laws in Australia* 7th edn (Sydney: Butterworths, 2002) para 7.33 who describe Byrne J's findings as dubious.
176. See *Petrotimor Companhia de Petroleos SARL* above n 90, 16, para 42.
177. NSWLRC above n 21, para 6.9.
178. Ibid, para 6.9. Note, however, that a judgment given against the defendant in another state or territory in Australia could be enforced: see Service and Execution of Process Act 1901 (Cth).
179. See PE Nygh *Conflict of Laws in Australia* (Sydney: Butterworths, 1968) 159-160. Nygh sees the solution as a stricter application of the court's discretion in the exercise of equitable jurisdiction; see also *Re Smith* [1916] 2 Ch 206.
180. Dicey & Morris above n 38, 931.

Mozambique rule, that public policy requires the application of the exceptions in equity, whatever law would otherwise govern,[181] of questionable merit. That the Mozambique rule should be capable of producing injustice, should, however, not be surprising, given the courts' continued adherence to the presumption that there is an inherent difference between local and transitory actions, and that policy considerations pertinent to 18th century England remain relevant today.[182] The question for the court should not be to determine whether an action is local or transitory by mere examination, but rather to consider what considerations of legal policy should limit the plaintiff's freedom to obtain adjudication of the action in a court which is otherwise competent.[183] Lee observes, on the local actions rule, that it –

> denies justice to plaintiffs unless they get it at the situs. Justice at the situs may not always be possible for a variety of reasons. A defendant may not be amenable to courts of the situs. Even if jurisdiction is exercised over the defendant ... by the situs court, the resulting judgment may not be enforceable.... [R]elief may not be available at the situs for substantive, procedural, or choice of law reasons. Further, there may be cases where the situs is not the most appropriate forum, for instance where the connection of the parties with the situs is fortuitous; mass environmental disasters involving damage to land in several countries, cases involving parties resident in a wide number of non situs jurisdictions, cases involving multiple causes of action, some of which are transitory and most appropriately tried at some non-situs forum, but some of which are local ... where to compel a plaintiff to litigate at the situs would be to deprive the plaintiff of a procedural advantage or expose the plaintiff to the risk of an unfair or prejudiced trial.[184]

It is unfortunate that general acceptance by academics of the rule being productive of injustice has been dismissed by the judiciary in favour of obedience to stare decisis, notwithstanding that earlier academic commentary had been responsible for the popular formulation of the Mozambique rule.[185] This is also disappointing given that, historically, the major text writers have been instrumental in assisting in the formulation of private international law.[186]

The fourth head of criticism of the rule by the New South Wales Law Reform Commission was that the rule was illogical.[187] For example, the exception to the rule to enforce a contract or equity between litigants was justified on the basis that the court was only acting in personam; yet, if jurisdiction were also extended to hear an

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181. AJE Jaffey *Introduction to Conflict of Laws* (London: Butterworths, 1988) 195.
182. See B Currie *Selected Essays on the Conflict of Laws* (Durham, USA: Duke UP, 1963) 314.
183. Ibid, 313.
184. Lee above n 116, 605.
185. It was Dicey's formulation which was generally accepted by the courts: see Willis above n 46.
186. See Sykes & Pryles above n 29, 7.
187. NSWLRC above n 21, para 6.10.

action in tort for damage done to foreign land, any consequent judgment in the plaintiff's favour would only operate on a personal level, being made against the defendant personally and satisfied out of such of his assets as are located within the court's territory.[188] The justification for the common law's refusal to accept jurisdiction is, therefore, difficult to maintain.

The Commission noted that the title rule had not been subject to much academic or judicial criticism, due to recognition of the lex situs only being capable of making an effective decree, but did not think this justified the present state of the law.[189] It objected to the rule extending beyond the seeking of a decree regarding ownership of land, to a decree which was connected with foreign land but could be effected by an order binding the defendant personally, and not requiring execution against the foreign land.[190] The first main head of criticism of the title rule by the Commission was the lack of clarity in the law, particularly in relation to what constituted a recognised 'equity' such as to fall within the court's power to make an order against the defendant personally, even if it impugned the title or right to possession of foreign land.[191] Lee argues that the title rule has outlived its usefulness, has a dubious historical foundation being an invention of 19th century lawyers, and that Byrne J's considerations of sovereignty, effectiveness and choice of law as justifications for the title rule were unpersuasive.[192] Byrne J's assumption, that the title rule may be used to define the distinction between local and transitory actions,[193] is also dubious, given the separate evolution of the title and local actions rules. The judiciary has also, at least on one occasion, accepted that the conclusions reached by application of the rule are anomalous, since the denial of jurisdiction depended upon the way in which proceedings were instituted and by whom, rather than the nature or substance of the plaintiff's claim.[194]

The second head of criticism of the title rule recognised by the Commission was that it may lead to unnecessary expense and delay (and even to a denial of justice) in relation to relief under the Family Provisions Act 1982 (NSW).[195] These concerns may still be applicable in Western Australia, which may remain bound by the common law jurisdiction rule that a court has power to make an order for family

188. Ibid, citing Welling & Heakes 'Torts and Foreign Immovables: Jurisdiction in Conflict of Laws' (1980) 18 UW Ont L Rev 295.
189. Ibid, para 6.11.
190. Ibid, citing *Corvisy v Corvisy* above n 61.
191. Ibid, para 6.14, referring to Dicey & Morris above n 38, 930. The NSWLRC also noted (para 6.15) the lack of clarity of the law in relation to the exception regarding the administration of deceased estates.
192. Lee above n 116, 603, 606.
193. See *Dagi v BHP (No 2)* above n 18, Byrne J 440.
194. *Inglis* above n 17, Woodward J 42; NSWLRC above n 21, para 6.16.
195. NSWLRC above n 21, para 6.18.

provision only in respect of immovables located within the jurisdiction.[196] This argument has been challenged, however, in light of the cross-vesting legislation.[197]

IMPACT OF THE CROSS-VESTING LEGISLATION

Australian land

When the New South Wales Law Reform Commission made its adverse findings on the Mozambique rule, a further reason given for recommendation that the title rule be abolished was that the jurisdiction of the Supreme Court of New South Wales was shortly to be expanded by the cross-vesting scheme.[198] The Commission noted that an effect of the cross-vesting scheme would be that –

> the jurisdiction of the New South Wales Supreme Court will no longer be barred or limited by the operation of the Mozambique rule, if the relevant 'foreign' land were elsewhere in Australia.... The reason is that in relation, say, to land in Western Australia, the effect of the Mozambique rule is to permit only the Supreme Court of that state to exercise jurisdiction. But, under the complementary scheme of cross-vesting, each of the other State Supreme Courts will have the same jurisdiction as that of the Western Australian Court, in relation to matters concerning title, etc, in Western Australia.[199]

This argument has been endorsed by some academic commentary[200] and Beech argues that the cross-vesting scheme has effectively removed the limitation on jurisdiction in relation to foreign land within Australia.[201] Davis observes, however, that there is a significant divergence of academic opinion as to whether only the title rule is abolished or whether the cross-vesting scheme abolishes both the title rule and the local actions rule.[202] Unfortunately, with the exception of Davis[203] and Tilbury,[204] few commentators have advanced reasons in support of the argument that the cross-vesting scheme abolishes part or all of the Mozambique rule.[205] The answer to whether the Mozambique rule has been abrogated by the cross-vesting

196. See A Dickey *Family Provision After Death* (Sydney: Law Book Co, 1992) 63. In New South Wales and South Australia, specific statutory provision has overcome this jurisdictional limitation: Family Provision Act 1982 (NSW) s 11(1)(b); Inheritance (Family Provision) Act 1972 s 7(1)(a) (SA).
197. See Dickey ibid, 209.
198. NSWLRC above n 21, para 6.12.
199. Ibid, para 7.3.
200. See eg Sykes & Pryles above n 29, 61; Riordan above n 29, para 5.11
201. A Beech 'Conflictual Aspects of the Law of Family Provision' in Dickey above n 196, 209.
202. Davis above n 30, 787-788, n 11-14, noting this distinction is dubious.
203. Ibid.
204. Tilbury, Davis & Opeskin above n 66, 921-922.
205. See eg Sykes & Pryles above n 29, 61.

scheme must lie in the cross-vesting legislation itself. In arguing in favour of abrogation of the Mozambique rule, Mortensen notes:

> Important to this position is the finding in Mozambique itself that the rule is one of substantive law and not procedure. For, while there are doubts as to whether personal or procedural jurisdiction of the Supreme Courts has been cross-vested, there is no doubt that the substantive jurisdiction of the Supreme Courts has been.[206]

However, it is argued that the Mozambique rule needs to be considered in the light of the purpose of the cross-vesting scheme, which was principally to overcome the inconvenience and expense caused to litigants by jurisdictional limitations to federal, state and territory courts.[207] The Supreme Court of Western Australia has, therefore, noted that, 'It is not intended by the Act that jurisdiction be exercised willy nilly by the courts of other states as if each should, without more, exercise the jurisdiction of the Supreme Court of Victoria'.[208] Ipp J noted that section 9(a) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) provided that the court 'may exercise jurisdiction' conferred on it by a provision of a law of a state relating to cross-vesting of jurisdiction,[209] which, therefore, afforded the court discretion in determining whether to apply cross-vested jurisdiction. As the plaintiff's application was not brought because of jurisdictional uncertainties, he declined to exercise cross-vested jurisdiction. In a later decision, Ipp J further noted that the ordinary rules of private international law were not precluded by the cross-vesting legislation, and the provisions of the Act would be construed so as to give effect to the purpose of the Act expressed in the preamble.[210] The application and scope of the principles of conflict of laws, in particular forum non conveniens, remains uncertain in relation to the cross-vesting Act in Western Australia, with conflicting decisions of the Supreme Court.[211] However, the purpose of cross-vesting legislation as expressed in the preamble will determine whether the court exercises its discretion to apply cross-vested jurisdiction; if the exercise of cross-vested jurisdiction is declined, or does not apply, then the Mozambique rule will still be considered.[212] This limitation of cross-vesting legislation by reference to the purpose of the scheme is also consistent with the proper construction of legislation as recognised by the state

206. R Mortensen *Private International Law* (Sydney: Butterworths, 2000) para 3.2.4.
207. See eg preamble to Jurisdiction of Courts (Cross-vesting) Act 1987 (WA).
208. *Bond Brewing Holdings Ltd v Crawford* (1989) 1 WAR 517, Ipp J 522.
209. Ibid.
210. *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* (1990) I WAR 531, 536; cf *Bankinvest v Seabrook* (1988) 14 NSWLR 711.
211. See eg *Platz v Lambert* (1994) 12 WAR 319, 323: Malcolm CJ stated that forum non conveniens applies to the cross-vesting Act. Cf *Hoddell v Hoddell Pty Ltd* [1999] WASC 156, Murray J para 29, adopting *Bankinvest v Seabrook* ibid, Street CJ 714.
212. See *Rowe v Silverstein* [1996] IVR 509.

and federal Interpretation Acts.[213] The transfer of proceedings in the interests of justice under section 5(2)(iii) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) may also be more difficult for a party seeking to transfer proceedings in Western Australia to another superior court, since the Supreme Court starts off with the premise that the plaintiff's choice of forum has to be respected.[214] A final possible concern is the constitutional validity of the power of state parliaments to vest jurisdiction in the courts of other states, in the light of the *Wakim* decision.[215] Constitutional restraints on the exercise of state legislative power, in relation to matters affecting foreign property, by requiring that there be connection between the subject matter of the legislation and the state[216] may also impact upon a state's legislative competence to adjudicate on matters concerning title to foreign land.[217]

Finally, it is noted that the cross-vesting scheme will not prevent the Mozambique rule continuing to deny inferior courts of all states (except New South Wales) and territories any jurisdiction in matters concerning title to, possession of, or trespass to, land in another state or territory.

Foreign land

It has been argued that the effect of the cross-vesting scheme in combination with the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) is to confer the jurisdiction afforded by this Act to other superior courts in Australia, such that Byrne J might have been able to take jurisdiction in all actions in *Dagi v The Broken Hill Proprietary Co Ltd (No 2)*.[218] Tilbury notes this would give a surprisingly far-reaching impact on the cross-vesting legislation, even after the *Wakim* decision.[219] There is no doubt that the effect of the New South Wales Act was to abolish the Mozambique rule in New South Wales.[220] It has also been suggested that the general law rule denying jurisdiction of a supreme court to adjudicate upon a right of

213. See s 15AA Acts Interpretation Act 1901 (Cth); Interpretation Act 1987 (NSW) s 33; Interpretation of Legislation Act 1984 (Vic) s 35(a); Acts Interpretation Act 1954 (Qld) s 14A; Acts Interpretation Act 1915 (SA) s 22; Interpretation Act 1984 (WA) s 18; Interpretation Act 1931 (Tas) s 8A; Interpretation Act 1967 (ACT) s 11A; Interpretation Act (NT) s 62A. See generally DC Pearce & RS Geddes *Statutory Interpretation in Australia* (Sydney: Butterworths, 2001) para 2.7.
214. See eg *Whyalla Refiners Pty Ltd v Grant Thornton* (2001) 182 ALR 274, Miler J 280. In other states, the test in *Bankinvest v Seabrook* above n 210 applies. See generally, Nygh & Davies above n 175, para 6.13
215. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, Gummow and Hayne JJ para 108. Nygh & Davies above n 175, suggest such jurisdiction is constitutionally valid.
216. See *Balajan v Nikitin* (1994) 35 NSWLR 51, Windeyer J 60-61.
217. See Tilbury, Davis & Opeskin above n 66, 922 who state that the constitutional validity of the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) cannot be discounted entirely.
218. Above n 18. See also Davis above n 30, 788.
219. Tilbury, Davis & Opeskin above n 66, p 924.
220. *Heuston v Barber* (1990) 19 NSWLR 354, Master Windeyer 360.

possession of foreign land has been done away with by the cross-vesting legislation.[221] However, while this interpretation is consistent with a literal reading of the cross-vesting legislation and the New South Wales Act,[222] it is argued that the state and territory cross-vesting legislation must again be read subject to the purpose of the cross-vesting scheme, which was to avoid the inconvenience and expense associated with exclusive state and federal jurisdictions, and to ensure that no proceedings would fail for want of jurisdiction but that each court would continue to exercise its jurisdiction within its traditional fields through the exercise of the transfer powers.[223] If Davis is correct in his argument,[224] then this would mean the cross-vesting scheme creates a primacy of interstate statute law over the common law of the forum, which is clearly unintended and outside the purpose of the cross-vesting scheme.[225] Accordingly, it is suggested that the views expressed recently by the Attorney-General of Western Australia that the New South Wales Act has not abolished the Mozambique rule, because the Jurisdiction of Courts (Cross-vesting) Act 1987 does not have this effect, is correct if this Act is construed in accordance with the purpose of the cross-vesting scheme.[226] Even if Davis is correct, his argument must be qualified by the discretionary limits on jurisdiction, such as forum non conveniens.[227] The considerations discussed in the *Voth* case will also determine whether the Supreme Court of Western Australia may invoke jurisdiction under the New South Wales Act to make a determination on land outside Australia.[228]

CONCLUSION

The origin of the Mozambique rule is steeped in the development of the ancient common law doctrine of venue, which has no contemporary relevance. The Mozambique rule as formulated by Dicey may not be supported by the conclusions reached in the *Mozambique* case itself,[229] and remains the subject of imprecise exceptions. The rule has been the subject of much curial and academic criticism but has remained in existence, chiefly due to judicial adherence to stare decisis. Justifications for continued adherence to the rule are questionable, and have lead

221. See *David Syme & Co Ltd v Grey* (1992) 38 FCR 303, Gummow J 328.
222. See each state and territory cross-vesting Act s 4; Jurisdiction of Courts (Foreign Land) Act 1989 s 3.
223. See Tilbury, Davis & Opeskin above n 66, 488.
224. See Davis above n 30, 788.
225. See D Kelly & J Crawford 'Choice of Law under the Cross-vesting Legislation,' (1998) 62 ALJ 589, 603.
226. See *Hansard* above n 33.
227. See NSWLRC above n 21, para 6.13.
228. *See Voth v Manildra Flour Mills* above n 136; see also Nygh & Davies, above n 175, para 7.35.
229. See Willis above n 46.

New South Wales to abrogate it by statute, and the Australian Capital Territory to abrogate it partially. A literal reading of the cross-vesting scheme suggests that the rule has been abrogated for all superior courts in all states and territories in relation to land in Australia. The enactment of the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) may also abrogate the Rule in relation to land outside Australia. Such views are, however, contrary to the intended purpose of the cross-vesting scheme and would be at variance with the purposive approach to statutory interpretation required by the federal and state Interpretation Acts. The provisions of the cross-vesting legislation do not mean that the adoption of cross-vested jurisdiction can be automatically assumed, as the doctrine of forum non conveniens may continue to operate. The Mozambique rule also continues to bind inferior courts. The High Court of Australia has most recently been noted for its abstention from giving close examination to such jurisdictional matters.[230] Accordingly, a critical review should now be undertaken by the Western Australian Parliament, as to whether the Mozambique rule should continue to apply in this State. In the light of academic and judicial commentary, and interstate legislative reform, it is suggested that sui generis legislation should now be enacted to abrogate the Mozambique rule.

230. See *Petrotimor Companhia de Petroleous SARL* above n 90, Beaumont J 82.