NSW Law Reform Commission REPORT 63 (1988) - JURISDICTION OF LOCAL COURTS OVER FOREIGN LAND

Table of Contents

Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable JRA Dowd, LLB, MP

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

JURISDICTION OF LOCAL COURTS OVER FOREIGN LAND

Dear Attorney General,

We make this Report pursuant to the reference from the Honourable TW Sheahan, BA, LLB, MP, then Attorney General for New South Wales to this Commission dated 22nd December 1986.

Helen Gamble

(Chairman)

The Honourable Mr Justice Andrew Rogers

(Commissioner)

Professor Colin Phegan

(Commissioner)

Mr J L R Davis

(Commissioner)

June 1988

Terms of Reference

On 22nd December 1986, the then Attorney General of New South Wales, the Honourable T W Sheahan BA, LLB, MP, made the following reference to the Commission:

To inquire into and report on:

1. whether the rules of private international law stated in and derived from *British_South Africa Co v Companh* (1893) AC 602 should be wholly or partially abolished; and

2. any related matter.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman, in accordance with s 12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

Helen Gamble (Chairman)

Mr Justice Andrew Rogers

Professor Colin Phegan

Mr J L R Davis

Research Director

Mr William J Tearle

Research Assistance

Leanne O'Shannessy

Secretary

Mr John McMillan

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1. Community Law Reform Program and This Reference

I. INTRODUCTION

This is the Sixteenth Report in the Community Law Reform Program. The Program was established by the Attorney General, The Hon , F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the. community at large, The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act 1967.

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Report for 1982.

II. BACKGROUND TO REFERENCE

1.2 In response to publicity about the Commission's Community Law Reform Program, Mr J L R Davis, a Reader in Law at the Australian National University wrote to the Commission in 1986 drawing attention to the need for reform of a rule of the law, as set out in the case of *British South Africa Co v Companhia de Mozambique.*[1] The rule of private international law now known as the rule in the *Mozambique Case*, provides that, subject to various exceptions, a court has no jurisdiction to entertain an action for the determination of title to, or the right to the possession of, any foreign land or other immovable. Nor can a court hear an action for the recovery of damages for trespass to such land or immovable. Jurisdiction cannot be created by the agreement of the parties and it makes no difference that the defendant is not amenable to the jurisdiction of any court in the jurisdiction in which the. land or immovable is situated. The rule has been extended by analogy to patents registered outside the jurisdiction.

1.3 Preliminary research showed that the rule originated in a technical doctrine of pleading which is no longer relevant, although its continued existence could be justified to some extent by the principle that a local court should not assume jurisdiction in a matter in which its judgment cannot be enforced, However this rationale was found to be no longer universally acceptable within Australia since the passage of Part IV of the Service and Execution of Process Act 1901 (Cth) and the greater readiness of courts to recognise judgments of foreign courts, a phenomenon reflected in the practice of private international law throughout the world during this century.

1.4 A further reason for believing that the rule no longer has any justification is the recent development of the doctrine of *forum non conveniens* which provides a basis for a local court to decline jurisdiction where a foreign court is the more natural and appropriate forum. That doctrine has yet to be accepted as part of Australian common law (see para 1.8) but the Commission proposes that it should be embodied in legislation (see Appendix A) . The Mozambique rule allows a local court no discretion in the matter regardless of the wishes of the parties and regardless of the convenience of litigating here a matter which has some connection with land or immovables situated outside of the state. Reform has occurred in other jurisdictions such as the United Kingdom.[2]

III. TERMS OF REFERENCE

1.5 A background paper was prepared on the matter by the then Commissioner in Charge of the Community Law Reform Program, Helen Gamble, and was made available to the Attorney on 22nd October 1986. On the 22nd December 1986, the then Attorney General, the Hon Terry Sheahan BA, LLB, MP, made the following reference to the Commission.

To inquire into and report on:

(i)whether the rules of private international law stated in and derived from *British. South African Co v Compahia de Mozambique* (1893)AC 602 should be wholly or partially abolished; and

(ii) any related matter.

1.6 Thereafter the Commission engaged Mr Davis to prepare a draft report. This was completed by early 1987. The Commission wishes to place on record its debt to Mr Davis, whose extensive work on the subject forms the major part of this Report.

1.7 The draft report by Mr Davis was considered by the Commission in 1987, and the report was kept in substantially its present form (apart from Introductory Matters and the legislation in Appendix A). For the purpose of the reference a Division was constituted, consisting of the Chairman, Helen Gamble, Justice Rogers of the NSW Supreme Court, Professor Colin Phegan and Mr JLR Davis.

1.8 With the exception of this paragraph the, report in its present form was substantially completed in June 1988 when it was delivered to the Attorney General as a Memorandum. It is now printed for tabling and publication. The Commission records that its stated expectation that the High Court would endorse the doctrine of forum non conveniens was disappointed when a majority rejected the application of the doctrine in Australian common law.[3] This decision has received a less then enthusiastic reception [4] and it is not surprising that the High Court has recently granted special leave to allow the issue to be reconsidered.[5] The cross-vesting scheme (discussed below in paras 7.2-7.4) has provisions for transfer which have been interpreted as conferring within Australia the same broad discretions as are part of the forum non conveniens doctrine. [6] Our recommendation ensures that these discretions will be available in any case where jurisdiction is conferred as the result of the proposals made in this Report (see para 8 .2) .

IV. IMPACT OVERSEAS

1.9 As part of a consultation process, the Division sought guidance from the Federal. Attorney General's Department and the Department of Foreign Affairs as to the ramifications any abrogation or limiting of the rule may have in overseas countries. The Commission would like to thank Ms Alison Pert, and Messrs Owen James and Henry Burinester of the Attorney General's Department for their help in this respect.

1.10 The Report will, in the succeeding section, describe the existing state of the law both in New South Wales and other parts of the common law world. Consideration will then be given to the reasons which have been advanced for the continued acceptance of the rule, followed by a discussion of the criticisms levelled at the rule and the arguments supporting its abolition. The Report concludes with a proposal for a legislative amendment to abrogate the rule. Chapters 2 and 3 of the report give an outline of the current law in New South Wales and overseas, based on the *Mozambique* principle. Chapter 4 sets out some of the exceptions to the rule, while Chapters 5 and 6 examine the various arguments for and against its retention. Chapter 7 comments on the implications the new cross vesting legislation has for the reference. Finally Chapter 8 considers the application of the particular reforms proposed. Appendix A contains draft legislation to implement our proposals: we are grateful to Mr D R Murphy QC, Parliamentary Counsel, for his assistance in preparing this legislation.

FOOTNOTES

1. [1893] AC 602.

2. The rule was partially abrogated in the United Kingdom by s30(1) of the Civil Jurisdictions and Judgments Act 1982.

3. See Chapter 2, footnote 11.

4. See M C Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 *ALJ*. 389.

5. *Voth v Manildra Flour Mills Pt.v Ltd*, 7 August 1989 (special leave granted: see [1989] 14 *Leg Rep SL* 1.

6. *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711.

2. The Law In New South Wales

I. INTRODUCTION

2.1 As a general rule of common law, the Supreme Court of-New South Wales does not have jurisdiction to entertain an action for the determination of the title to, or the right to possession of, land (including buildings etc on the land) outside the State, whether that land is in another part of Australia or overseas. In addition, the court has no jurisdiction to hear an action for damages for trespass to land outside the State, and quite possibly lacks the power to adjudicate on a claim for damages for other torts affecting land outside the State, such as nuisance or negligence. This principle is generally known as "the Mozambique rule", from the judgment of the House of Lords in the case in which it was established, *British South Africa Co v Companhia de Mozambique.*[1] As will be explained below,[2] this rule is subject to a number of ill-defined exceptions in those cases in which:

(a) there is a contract or equity between the litigants;

(b) the matter concerns the administration of a deceased's estate; or

(c) the action is brought in the Supreme Court's Admiralty jurisdiction.

A further limitation on the rule is that, on the commencement of the Jurisdiction of Courts (Cross-Vesting) Act 1987, the Supreme Court will have jurisdiction to hear and determine any matter relating to title etc to land within other parts of Australia (including the external Territories).[3]

2.2 Despite the comparatively limited nature of this rule of non-.jurisdiction, its existence has led to decisions which may be regarded as anomalous, arbitrary and unsatisfactory. One such decision is that of McLelland J in *Corvisy v Corvis,*[4] in which interim injunctions were sought by the plaintiffs, restraining the defendant from entering or remaining in the first plaintiff's home in Wollongong or the second plaintiff's home in Canberra. The judge held that, although he had jurisdiction, by virtue of s66(l) of the Supreme Court Act 1970, to grant the injunction in relation to the Wollongong property, he was precluded, by the *Mozambique* rule, from taking jurisdiction in respect of the Canberra property. It was considered that the proceedings were founded upon title to, or the right to possession of, property outside the State. Another example of the difficulties created by the *Mozambique* rule occurs in the decision of Woodward J, in the ACT Supreme Court, in *Inglis v Commonwealth Trading Bank of Australia.* [5] The plaintiffs, who had mortgaged land in Tasmania to the defendant Bank, sought a declaration that the power of sale in the mortgage could no longer be exercised by the defendant, and that its right to enforce payment against the plaintiffs personally had become statute-barred. The judge held[6] that the claim was one directly affecting title to land, and thus not justiciable by the ACT Supreme Court. However, he also observed[7] that it seemed anomalous that the defendant Bank could have sued the plaintiffs, in the ACT Supreme Court, for foreclosure or for the recovery of money under the mortgage (such actions not being within the *Mozambique* rule), to which the plaintiffs could have raised, b y way of defence, the matters on which they sought to rely in the action before Woodward J.

2.3 If facts similar to those in the above two cases were to come before the Supreme Court of New South Wales after the coming into force of the cross-vesting legislation,[8] the Court would not be limited by the *Mozambique* rule, In *Corvisy v Corvisy*, for example., the Supreme Court of the. ACT was the ,only court which would have had jurisdiction to grant the injunction sought in relation to the Canberra house. The cross-vesting legislation will vest that jurisdiction in the Supreme Court of' this State. But the cross-vesting legislation provides no answer to cases in which the facts transcend national rather than state boundaries. If the *Mozambique* rule is to be abrogated with regard to actions relating to land elsewhere in Australia by the cross-vesting legislation, perhaps consideration should be given to its abrogation so far as concerns suits relating to land outside Australia. The fact that there have been very few decisions in this country in which the *Mozambique* rule has been applied to such suits may indicate no more than that persons who have considered commencing such suits have been advised against doing so. There may also be some doubt as to the constitutional validity of the cross-vesting legislation. Although both this State and the Commonwealth Parliaments have considered it proper to abrogate the rule in part, by the passage of the cross-vesting legislation, that Act may be found by the High Court to be invalid, thus frustrating the purpose of the two Legislatures. Both the rule and its exceptions are ill defined. Reform will impart a greater degree of certainty to this area of' the law than exists at present.

2.4 This Report proposes abolition of the *Mozambique* rule, and the granting to the Supreme Court of jurisdiction to determine matters relating to or involving land outside the State or the right to possession thereto and to grant damages for any wrong done to such land. As will be mentioned (see paras 7.5 et seq) , such an extension of the Court Is power would be subject to its obligation to determine whether New South Wales is the appropriate forum for the resolution of the dispute between the parties.

II. EXCLUSION FROM JURISDICTION

2.5 The rule established by the *Mozambique* case is one of a set of principles of private international law that operate to exclude a court from exercising jurisdiction in an action, even though the court has otherwise acquired jurisdiction over the defendant. Four of these rules are mandatory, and one is discretionary. A brief outline of these rules provides a context for consideration of the *Mozambique* principle.

A. Forum Non Conveniens

2.6 The doctrine of forum non conveniens was developed in Scotland and the United States and is a discretionary principle. It requires that the court "find that forum which is more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends".[9] While the Scottish doctrine has now been expressly adopted in England, that result has come about only through a series of' decisions of the House of Lords, commencing in 1974. The state of the law in New South Wales cannot be stated with certainty at present, as the opportunity has not arisen for a full consideration by the courts of the most recent decision of the House of Lords. However, the High Court has heard an appeal from a decision of the New South Wales Court of Appeal[10] which raises the issue of forum non conveniens. it is to be hoped that when it delivers judgment on that matter, the High Court will take the opportunity of formulating the relevant principles for all Australian courts. In view of the fact that, to date, judges both of the Supreme Court and the Court of Appeal in this State have adopted the position taken in England as it has developed, the following review of English authority is premised on the assumption that the law in New South Wales is substantially the same as in England.[11]

2.7 Prior to 1974, the position in England was that, if the court there had jurisdiction as of right by reason of the physical presence of the defendant within the jurisdiction at the time of service of the writ - an action would be stayed only if it were oppressive and vexatious.[12] If it were not such, the court was prepared to exercise its jurisdiction despite the lack of any connection between the parties or the dispute and England.[13] In 1974, a bare majority of' the House of Lords , in *The Atlantic Star*, [14] was prepared to give to the notion of "oppressive and vexatious" a more liberal interpretation than it had previously received. This decision was followed (with varying degrees of enthusiasm) by a unanimous House of Lords in *Rockware Glass Ltd v MacShannon*,[15] in which Lord Diplock[16] propounded a revised formulation of the circumstances in which English courts might decline to exercise a jurisdiction which they had as of right, a formulation which was accepted as correct by all the members of the House of Lords in *The Abidin Daver.*[17]

2.8 At much the same time as the decision in *The Abidin Daver*, the House of Lords also reconsidered, in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,[18] the grounds on which the English court might decline to exercise its extended jurisdiction under the equivalent in that country of Pt 10, rl, of the Rules of the Supreme Court of New South Wales The House took the view that the decision whether to exercise jurisdiction rested on essentially the same grounds, whether that jurisdiction had arisen as of right or by virtue of the Rules of Court. This development has now culminated in the House of Lords' decision in *Spiliada Maritime Corp v Cansulex Ltd*,[19] in which the tests for the exercise of (or refusal to exercise) jurisdiction have been refined and reformulated. These tests depart to some extent from the principles stated by Lord Diplock in *Rockware Glass Ltd v MacShannon* and rely explicitly on earlier Scottish authority since the law in Scotland and England has now been stated to be in all respects identical

2.9 The principles stated by Lord Diplock in *Rockware Glass Ltd v MacShannon* had been adopted in New South Wales prior to their acceptance in The Abidin Daver. In *A v B*[20] Powell J summarised those principles as follows:

> (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in (a New South Wales Court) if it is otherwise properly brought. (2) In order to justify a stay, two conditions must be satisfied, one positive, and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of (the New South Wales Court).[21]

Yeldham J also accepted the rule as stated in *McShannon's* case and applied it in *Garseabo Nominei v Taub P v Ltd*.[22] although he declined to detail the rule further than to quote passages from the judgments of members of the House of Lords in the case.

2.10 More recently, in *Evers v Firth*,[23] Samuels JA (with whom Priestley JA concurred) had no doubt that the law as stated in *The Abidin Daver* is applicable in New South Wales. His Honour considered[24] that the reasons which had led the House of Lords to its decision in that case would be adopted by Australian courts.

2.11 The cases referred to in the preceding two paragraphs were concerned with the exercise of (or refusal to exercise) a jurisdiction which the court has as of right, by virtue of the presence of the defendant in the State at the time of service of the writ. Doubt still remains whether the same or similar principles apply when the jurisdiction of the court is based on Pt 10, r 1, of the Rules of the Supreme Court. It is to be hoped that such doubts will be resolved when the High Court delivers judgment in *Fay v Oceanic Sunline Special Shippinng Co Inc*, the case which has gone on appeal from the Court of Appeal in New South Wales.[25] (See now para 1.8)

B. Actions by Enemy Aliens

2.12 A court will ref use jurisdiction in any action brought by an alien enemy unless the Crown gives leave to proceed.[26] The aim of' this doctrine is to mount an economic blockade of the enemy, and it will only apply when economic interests are involved.[27] The rule will not prohibit actions against alien enemies, and only suspends a right of action for the duration of hostilities.[28]

C. Sovereign Immunity and Acts of State

2.13 These final two doctrines are closely related. Sovereign immunity attaches to foreign heads of state and foreign governments once it was possible to plead absolute immunity regardless of the nature of the act involved.[29] Now, however, the common law has been codified in the *Foreign States Immunity Act* 1985 (Cth), and immunity is generally available only in respect of actions of the foreign state that have been undertaken in the course of its government activities, and not for instance, as part of a commercial transaction.[30] The doctrine and defence of "act of state" is built on the principle that

> Municipal Courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign State done within its own Territory, in the execution of sovereign power, so as to criticise their legality or to require their justification.[30]

It can be pleaded by persons not entitled to sovereign immunity. There are some restrictions on the doctrine however, as Nygh points out:

> It cannot be pleaded in respect of any act done on British soil (including a British colony) whether against a British subject or an alien: *Johnstone v Pedlar* [1921] 2 AC 262. It can be pleaded of an act done by or on behalf of British authorities to an alien abroad: *Buron v Denman,* or by or on behalf of a foreign sovereign on his own territory whether against his own or foreign (including British) nationals: *Carr v Fracis Times & Co* [1902] AC 176 . It is not certain whether it can be pleaded in respect of an act done by or under the instructions of British authorities against a British subject on foreign soil: *Nissan v Attorney-General* [1970] AC 179.[32]

III. HISTORICAL DEVELOPMENT

2.14 The decision of the House of Lords in *British South Africa Co v Companhia de Mozambique*[33] was based exclusively on the historical development of the circumstances in which, and reasons for which, a court in England would take jurisdiction to hear any matter. It is therefore necessary to pay some regard to that history.

2.15 In the very earliest times during which the law was developing in England-during the 12th century and the early years of the 13th century the jury, both in civil and criminal matters, performed a role more as witnesses than as judges of fact. They were drawn from the locality -the particular village, or the hundred of a shire in which the cause of action had arisen, because they were assumed to be acquainted with the facts in issue from their personal knowledge.[34] For this reason, the parties to an action were obliged to specify with the greatest particularity the venue or place at which the event alleged had occurred, so that the sheriff might summon the jury from the place[35] A law of Henry I (1100-1135), for instance, declared that juries from other than the venue stated were not to be permitted in any circumstances.[36]

2.16 However, as early as the end of the 13th century or the beginning of the 14th, with a measure of increasing sophistication in transactions and dispositions, this rule caused considerable inconvenience, especially when the facts alleged occurred partly in one locality and partly in another[37] It was this inconvenience which led the courts to draw a distinction between “local” and “transitory” actions. A local action was one in which the facts relied on the plaintiff had a necessary connection with a particular place (such as an action for ejectment from land, or a bill for the partition of property), whereas a transitory action (such as for breach of contract or for trespass to the person) had no such necessary connection. In the case of a transitory action, the plaintiff might, at this early stage of the development of the law, lay the venue in any county he pleased. This right was, however, abused, and by the early years of the 15th century statutes of Richard II and Henry IV reimposed strict requirements of laying the correct venue. The effect of these statutes was, in turn, diminished by the development of a legal fiction, as the courts realised the advantages of taking jurisdiction over mercantile matters which might have arisen outside England. By the end of the 18th century, it could be said that notions of venue, with regard to transitory actions, remained only as a limitation on the verbal formula by which the plaintiff might frame a cause of action.[38]

2.17 But with regard to local actions, the requirement on the plaintiff of laying the venue truly remained a pre-eminent aspect of the pleading. Despite the fact that, by the 16th century at least, the role of the jury was that of the trier of fact, and the practice of relying on the sworn testimony of witnesses had become general,[39] if the matter had a necessary connection with a particular place, that locality was the venue of the action. The jury was still to be drawn from the county (although not necessarily from the precise locality) in which the venue was laid. If the matter had arisen outside England, the fictions employed with regard to transitory actions were not regarded as applicable, no jury could be summoned to try the facts in issue, and hence the matter could not be heard. Thus, in *Skinner v East India Co*[40] which came before the House of Lords in 1666, the Judges who were summoned to advise the House stated[41] that the matters complained of by the petitioner “touching the taking away of the petitioner’s ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon his majesty’s ordinary courts at Westminster”, since they were regarded as transitory in nature. But, “as to the dispossessing [the petitioner] of his house and island, ...he was not relievable in any ordinary court of law”, by reason of the facts being local in nature, and occurring outside England. Similarly, in *Pike v Hoare*,[42] decided almost a century later, the reporter’s note puts the matter bluntly[43] that “Courts of law have no jurisdiction in local actions respecting lands lying in Ireland, the Isle of Man, the colonies etc”, Although Lord Mansfield did not accept this rule as applying absolutely and without qualification,[44] his views were not accepted by his brother judges. In *Dulson v Matthews,*[45] the opinions expressed by Lord Mansfield we relied on in argument, but were unequivocally rejected by the Court of King’s Bench, comprising Lord Kenyon CJ and Buller J.

2.18 On the passing of the *Judicature Act* 1873 (Eng), r28 of the Rules of Court scheduled thereto abolished the need for a local venue to be laid. The suggestion was therefore advanced by the editor of *Smith’s Leading Cases*,[46] Collins, subsequently a Master of the Rolls and Lord of Appeal, that this legislative change might remove the disability of the English courts in relation to local actions, especially where the parties were domiciled in England and in the Court of’ Appeal in the *Mozambique* case,[47] majority (Fry and Lopes LJJ, Lord Esher MR dissenting) took a similar view of the effects of that Act. Thus Fry LJ, relying principally on the statements of Lord Mansfield in *Mostyn v Fabrigas*[48], considered[49] that the issue of jurisdiction in actions relating to land outside England could be resolved into two parts. First, if: the matter were one requiring adjudication as to title, the court

could not take jurisdiction, since it would have no power, to ensure the execution of its order. But where, on the other hand, the issue. related to no more than trespass to foreign land, and judgment might be given by way of an award of damages against the defendant, the only bar, in his Lordship's view , to the exercise by the English court of jurisdiction was the technical one that the action was a local one for which, prior to the *Judicature Act*, a local venue was required to be laid. He therefore concluded[50] that, with the abolition of local. venues by that Act , and the consequent abolition of that fetter, there was nothing to prevent the Court from taking jurisdiction.

2.19 However, when the *Mozambique* case was taken on appeal to the House of Lords,[51] Lord Herschell LC, delivering the leading opinion, observed[52] that lawyers of a previous age had been able to expand the jurisdiction of the court, with regard to transitory actions, by the invention of a fiction. This led him to doubt that, with regard to local matters involving no more than a claim f-or damages, "the Courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and which it was proper for them to adjudicate upon." After a consideration of earlier, decisions both in England and in the United States , he stated that:

> the grounds 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.[53]

The claim, originally made by the respondents to the appeal, for damages for trespass to land in southern Africa was consequently dismissed.

IV. THE POSITION IN AUSTRALIA

2.20 The decision in the *Mozambique* case has been accepted by the High Court, in *Commonwealth v Woodhill*, [54] as part of the common law in this country. That court has also, in *Potter v Broken Hill Pty Co Ltd*,[55] extended the rule by analogy to foreign patents, although the effect of the decision in *Potter's* case has been rendered virtually obsolete by the Patents Act 1952 (Cth) and the international conventions relating to foreign patents to which Australia is a party.

2.21 It would appear that the decision in Woodhill's case has clarified, for Australia, a matter, which was in some doubt in England prior to the statutory amendments made there in 1982. The opinion had been expressed, both by judges and academic writers[56] in England, that the *Mozambique* rule precluded the court from adjudicating on actions not only for, trespass to foreign land , but also for other torts, such as nuisance , negligence and the rule in *Ryland's v Fletcher*[57] It is a reasonable inference from *Woodhill's* case that a court in Australia does not have jurisdiction to hear any matter which is necessarily connected with a particular locality beyond its State or Territorial boundaries.

2.22 The respondent in Woodhill's case had owned land, in the neighbourhood of Huskisson, NSW, which had been compulsorily acquired by the Commonwealth, on 1 May 1915, under the Lands Acquisition Act 1906 (Cth). The land became part of the Jervis Bay Territory on 4 September 1915. By a writ issued out of the Supreme Court of New South Wales on 7 March 1917, the respondent sought compensation for that resumption.[58] The Lands Acquisition Act provided, in s37, for such an action to be instituted in the High Court or in "any State Court of competent jurisdiction". It was held on appeal that the Supreme Court of New South Wales did not come within this term. Although much of the reasoning of the members of the Court was based on the words of the Commonwealth Act, Barton J observed[59] that the matter involved in the respondent's action "is in substance the failure [on the part of the Commonwealth] to give a sufficient price for the land". Relying, inter alia, on the *Mozambique* case, he continued by saying that the action "was therefore a local matter arising outside the State of New South Wales, in which the courts of that State are without jurisdiction ". Similarly, Issacs J (with whom Rich J concurred) included[60] as one of the matters that led to his conclusions adverse to the respondent the fact that the latter's claim was riot transitory but local.

2.23 If it is correct to draw the inference from *Woodhill's* case that the courts in this country cannot take jurisdiction whenever the matter is local., and arises outside the State or, Territory concerned, it would mean that the Supreme Court of New South Wales would be unable to adjudicate on an action in negligence or nuisance, or

one under the rule in *Rylands vFletcher*, if the action related to land in another State or Territory. This view derives from the expressions of opinion by Boyd CJ in the Supreme Court of Ontario in *Brereton vCanadian* Pacific Railway Co.[61] The plaintiff had commenced proceedings in Ontario to recover damages for the loss of his home, which had been destroyed in a fire allegedly caused by the defendant's negligence. The plaintiff's house was situated in Manitoba. The Ontario court refused to take jurisdiction, the Chancellor saying[62] that once "it is found that trespass on the case for injury to land through negligence is of the same local character as trespass to the land, the controversy is covered by the *Mozambique* case". This decision was followed by the Court of Appeal in Manitoba, in *Winnipeg Oil Co v Canadian Northern Railway Co*,[63] and conclusions to the same effect have been arrived at by McDonald J in the Supreme Court of British Columbia in *Boslund v Abbotsford Lumber Mining & Development Co Ltd*[64] and by a majority of the Appellate Division of the New Brunswick Supreme Court in *Albert v Fraser Co Ltd*[65] In both these cases the respective courts refused to take jurisdiction in actions for damage caused by negligence to land outside the Province. It may also be observed that, in *Corvisy v Covisy*,[66] the jurisdictional. question of wether the Supreme Court of New South Wa1es "has power to restrain apprehended trespass *or nuisance* in relation to real. property in the Australian Capital Territory", [67] although his statement of the principle to be derived from the House of Lords decisions was confined to proceedings "founded upon the title to or, possession of real property" outside the State.

2.24 A rule which denies jurisdiction even in the case of negligent damage to immovable property outside the State may have unfortunate consequences for the person seeking recompense, This may be illustrated by two examples, one hypothetical but the other an extrapolation from a litigated dispute.

2.25 The latter concerns a fire which allegedly commenced at an electricity substation in the ACT in February 1979, but which spread to nearly a hundred properties both in the Territory and in New South Wales. The landowners commenced proceedings against the ACT Electricity Authority, some in the Supreme Court of New South Wales, some in the District Courts at Queanbeyan and Goulburn, and the remainder in the Territory Supreme Court. In *Hall v ACT Electricity Authority,*[68] Master Sharpe held that the plaintiff's statement of claim, issued out of the Supreme Court of New South Wales, be stayed, the principal. reason being that the defendant was "the Commonwealth" within the meaning of s56(l)(b) of the Judiciary Act 190 3 (Cth), and that the claim had not arisen within New South Wales. The landowners then commenced fresh proceedings in the ACT Supreme Court. The Electricity Authority has so far settled many of the claims, and has not taken the point of the possible applicability of the *Mozambique* rule to deny jurisdiction to the Territory Supreme Court.[69] If the Authority were to take the point, and the ACT Supreme Court to follow the arguments advanced in para 2.21 above, those plaintiffs whose claims have not been settled would be left without a remedy·[70]

2.26 A hypothetical example may also serve to illustrate the difficulties which would arise if the courts in this country expressly adopt the interpretation of the *Mozambique* rule apparently to be derived from the decision of the High Court in *Commonwealth v Woodhill*. Suppose that P, a resident of New South Wales, owns a house in New Zealand, which he lets for a month to D, also a resident of New South Wales, and that, while in occupation of the house, D negligently causes damage to the house. On D's return to New South Wales, P would not be able to bring an action in the Supreme Court of this State, on the above view of the *Mozambique* rule (although, as will be mentioned below at para 4.3, if D's default were a breach of the terms of the tenancy, P's cause of action would apparently fall within one of the exceptions to the *Mozambique rule*).[71] Furthermore, P would be denied any effective remedy against D, even if the former were to commerce proceedings in the New Zealand High Court. That court would have the power to entertain the matter, despite the fact that D was no longer, present in that country, by virtue of r48(a) of its Code of Civil Procedure [72] But if D did not appear, and took no part, in the New Zealand proceedings, the default judgment which (it may be assumed) would be made in P's favour could not be enforced against D in New South Wales, since the Supreme Court of this State would not regard the New Zealand High Court as having had sufficient jurisdiction over D.[73] It may be observed that if P's house were in another, State or Territory of Australia, a judgment given in P's favour in that other jurisdiction could be enforced in New South Wales by virtue of Part IV of the Service and Execution of Process Act 1901 (Cth).

FOOTNOTES

1. [1893] AC 602

2. See Chapter 4.

3. See paras 7.2-7.4.

4. [1982] 2 NSWLR 557.

5. (1972) 20 FLR 30.

6. *Id* at 41.

7. *Id* at 42.

8. See paras 7.2-7.4.

9. *Society Du Gaz de Paris v Armateurs Francais* [1926] SC (HL) 13 at 22, per Lord Summer.

10. *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242.

11. This is how the law stood at the time this report was prepared. The High Court has since overturned the decision in *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242 in so far as it relates to *forum non conveniens.* In *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197; 79 ALR 9 the High Court by majority returned Australian law the “pre-1974” position, citing as authority *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194 and *St Pierre v South American Stores (Garth &Chaves) Ltd* [1936] 1 KB 382.See now parra 1.8 above.

12. *St Pierre v South America Stores (Garth &Chaves Ltd* [1936] KB 382

13. *See for example Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 440; *Mahranee of Baroda v Wildestine* [1972] 2 QB 283.

14. [1974] AC 436

15. [1978] AC 795

16. *Id* at 811-812.

17. [1984] AC 398.

18. [1984] AC 50

19. [1987] AC 460

20. [1979] 1 NSWLR 57.

21. *Id* at 61.

22.[1979] 1 NSWLR 663 at 670.

23. (1986) 10 NSWLR 22.

24. *Id* at 25

25. This appeal was considered in the *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 179; 79 ALR 9; See footnote 11.

26. *Porter v Freudenberg* [1915] 1 KB 857.

27. *Maseman v Maseman* [1917] NZLR 769.

28. *Porter v Freudenberg* [1915] 1 KB 857.

29. *The Porto Alexandre* [1920] P 30.

30. For discussion of the terms of the 1985 Act, see Edward I Sykes and Michael C Pryles, *Australian Private International Law* (2nd ed, 1987) at 62-8.

31. Johnstone v Pedlar [1921] 2 AC 262 at 290 per Lord Summer.

32. P E Nygh, *Conflict of Law of Australia*(4th ed, 1984) 72.

33. [1893] AC 602

34. W Holdsworth, *A History of English Law* Vol 1 (7th ed, 1956) 332-4

35. Holdsworth, op cit, Vol 5 (2nd ed, 1937), 117; *Smith's Leading Cases* Vol 1 (7th ed, 1876) 688-9

36. The Law is quoted in *Smith's Leading Cases*, note 34, as providing that "Peregrina judicia modis omnibus submovemus."

37. *Reeve's History of the English Law*, Vol 2 (rev ed, Finlayson, 1869) 409-12, refers to a large number of causes, of ten conflicting, which attempted to settle the venue in such circumstances

38. See for example the discussion by Lord Mansfield, in *Mostyn v Fabrigas* (1774) 1 Cowp 161 at 176- 181; 98 ER 1021 at 1029-1032.

39. Holdsworth, note 34, Vol 1, at 334.

40.6 St Tr 710.

41. *Id* at 719.

42. (1763) 2 Eden 182; 28 ER 876.

43. Id at 185, 686.

44. See the cases referred to by him *Mostyn v Fabrigas* (1774) 1 Cowp 161 at 176; 98 ER 1021 at 1029.

45. (1792) 4 TR 503; 100 ER 1143.

46. (7th ed, 1876) 698.

47. [1892] 2 QB 358.

48. (1774) 1 Cowp 161 at 176; 98 ER 1021 at 1029.

49. [1892] 2 QB 358 at 408-9.

50. *Id* at 414; see also Lopes LJ at 417.

51. [1893] AC 602.

52. *Id* at 619.

53. *Ibid.*

54. (1917) 23 CLR 482.

55. (1906) 3 CLR 479.

56. The Tolten [1946] P 135 at 141-142 per Scott LJ; *Tito v Waddle (No2)* [1977] Ch 106 at 271 per Megarry J; *Dicey and Morris* on the Conflict of Laws (11th ed, 1987) Vol 2, 927, n56; *Cheshire and North's Private International Law* (10th ed, 1979) 493.

57. (1868) LR 3 HL 330 (such actions are now justiciable in England, by virtue of Civil Jurisdiction and Judgements Act 1982 (UK) discussed below parra 3.3).

58. Although Isaacs and Rich JJ regarded the date of the issue of the writ as relevant (see 23 CLR at 489) BartonJ said (at 486) that the respondent's cause of action had arisen on 5 May 1916, when he refused an offer of compensation made by the Minister for Home Affairs

59. (1917) 23 CLR 482 at 487.

60. *Id* at 494.

61. (1898) 29 OR 57).

62. *Id* at 62.

63. (1911) 21 Man R 274 at 248 per Richards JA, at 296 per Perdue JA (Howell concurred on this issue, at 284).

64. [1925] 1 DLR 978 at 981.

65. [1937] 1 DLR 39 at 45 per Baxter CJ, with whom Grimmer J concurred; Harrison J dissented, although the only Canadian decision to which he referred was *Boslund's* case (at 55).

66. [1982] 2 NSWLR 557; see above, para 2.2

67. *Id* at 558, emphasis supplied.

68. [1980] 2 NSWLR 26.

69. This information has been provided by P L R Shields, QC, counsel for various landowners.

70. Although s56(1)(a) of the Judiciary Act 1903 (Cth) would have permitted the plaintiffs to commence an action in the original jurisdiction of the High Court, and in such an action Land in New South Wales is not "foreign" for the purpose of the *Mozambique* rule, such an action would now be statute-barred: see the Statute of Limitations 1623(21 JacI,c 16), s3 and the Limitations Ordinance 1985 (ACT) s3, both of which are applicable to the proceedings commenced in the High Court, by virtue of s79 of the Judiciary Act 1093 (Cth) .

71. See *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382 (action to recover rent due under a lease of foreign land justiciable) and the comment of Woodward J in *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30 at 41, that is no bar to jurisdiction if the plaintiff's claim involves the enforcement of a contract.

72. See generally Nygh, note 32 at 35-37.

73. Foreign Judgements (Reciprocal Enforcement) Act 1973 (NSW), ss8 (1) (a) (ii) and 8(2) (a), on which see Nygh, note 32 at 108-110.

3. Overseas Jurisdictions

I. CANADA

3.1 Reference has already been made, in par a 2.23 above, to the decision in Canada which have adopted the view that the *Mozambique* rule prevents the courts in one Province from taking jurisdiction not only when the issue concerns the title to or right to possession of land outside that Province, but also when the matter in dispute is an action for negligent damage to such land.

II. STATUTORY RESTRICTIONS OF THE RULE IN THE UNITED KINGDOM

3.2 In England, the House of Lords was invited in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd*[1] either to overrule its earlier, decision in the *Mozambique* case, or at least not to apply it where there was no dispute as to title to foreign land, and no real dispute as to the right to its possession.[2] The House, however, declined that invitation (for reasons which are discussed below, paras 5.1 et seq) and held, in what might be regarded as an extention to the *Mozambique* rule, that the rule applied even when, as occurred in the case, the plaintiff's claim was for damages for a conspiracy (entered into in England) to effect or to procure trespass to land in Cyprus.

3.3 Subsequently the United Kingdom Parliament abrogated the effect of the *Hesperides Hotels* case, and restricted the rule of non-jurisdiction to those matters in which the principal issue is the right to possession of, or title to, foreign land, by the enactment of s30 of the Civil. Jurisdiction and Judgements Act 1982. Sub-section (1) thereof provides:

> "The jurisdiction of any court in England and Wa1es or, Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property"

The sub-section, it will be observed, makes no reference to the jurisdiction of courts in Scotland. The reason doubtless lies in the fact that those courts, having had a different historical development from the courts of England, had no cause to adopt a denial of jurisdiction based on whether the action was "local" or "transitory". The only limitation put upon the Scottish courts jurisdiction is that they "will not entertain an action whose primary purpose is to put in issue the defender's title to foreign immovables".[3]

3.4 The primary purpose of the United Kingdom Act of 1982 was to enable that country to ratify a Convention agreed on by the member states of the European Community relating to the jurisdiction of the courts of those countries, and the enforcement, within the Community, of judgments given by courts in other parts of the Community.[4] However, in view of the unwillingness of the House of Lords, in its judicial capacity, to make any change to the *Mozambique* rule, the opportunity was also taken to enact s30.[5]

III. JUDICIAL DEVELOPMENTS IN THE UNITED STATES

3.5 Until relatively recent times, the position in most jurisdictions in the United States was the same as that in Australia (discussed at paras 2.20 to 2.23), in that the courts in one State would decline to take jurisdiction not only in matters affecting title to land in another State, but also in respect of damage done to land so situated. However, under the pressure of consistent academic and other extra-judicial opinion, it would appear that the law is tending to adopt a rule similar to that achieved by legislation in England, in which matters of title to or possession of foreign land are the only ones regarded as not justiciable.

3.6 The first settlers in the then American colonies brought with them the common law of England, including the distinction, for jurisdictional purposes, between local and transitory actions (referred to above, para 2. 17).[6] Thus, in 1811, some 80 years before the House of Lords handed down its decision in the *Mozambique* case, the United States Circuit Court for the District of Virginia delivered an equally seminal judgment in *Livingston v Jefferson*.[7] It was held that the court had no jurisdiction to hear an action for trespass alleged to have been committed by, or on the orders of, the then President of the United States to land in New Orleans.

3.7 That decision was regarded as formulating the law for State as well as Federal Courts, and applying to any action which was local in nature, despite the fact that the plaintiff's right to possession of the land in question was not in dispute. Hence, in *Brisbane v Pennsylvania Rail Road Co*,[8] a case decided in 1912, in which the plaintiff sought recompense for the allegedly negligent destruction by fire of his property situated in New Jersey, Cullen CJ, in the New York Court of Appeals, said:[9]

> " The authorities in the highest courts of this State are uniform to the effect that our courts have no jurisdiction of an action for damages for injuries to real estate lying without the State ...Such also is the rule in the great majority of the States".

3.8 In the light of judicial pronouncements such as this, it is not surprising that the original *Restatement of Conflict of Laws*, adopted by the American Law Institute in 1934, stipulated as a general rule, in sec 614, that "no action can be maintained in one State to recover compensation for, a tr,espass upon or harm done to land in another State".

3.9 But even at the time of the promulgation of the *Restatement*, the principle stated in sec 614 did not command universal support among the States of the Union. As early as 1896, the Supreme Court of Minnesota had held that an action in negligence for damage done to land outside the State was justiciable by its courts.[11] Furthermore, the denial of jurisdiction in respect of local actions arising outside the State had been changed by statute in Virginia in 1819;[12] similar legislation was subsequently passed in New York and Texas.[13] And, although the court in *Livingston v Jefferson* had felt obliged by the weight of earlier English authority to arrive at its decision, at least Chief Justice Marshall was of the opinion that the rule of non-jurisdiction was anomalous, and might give rise to a "defect of justice".[14]

3.10 In the period after the publication of the Restatement academic writers were generally opposed to the rule stated therein, and argued in favour of the courts taking jurisdiction in local actions arising outside the State, unless title or the right to possession were clearly in issue.[15] the Supreme Courts in both Arkansas [16] and Missouri [17] also refused to follow the old rule, and accepted jurisdiction in relation to actions in negligence affecting interstate land, or other circumstances in which title was only incidentally in issue.

3.11 In the formulation of the *Restatement, Second, of Conflict of Laws*, the American Law Institute paid full regard to the criticisms which had been levelled at the rule of non-jurisdiction, such as that it was anomalous and an outmoded product of the historical development of the law, and that it acknowledging that, at the date of promulgation of the. Second Restatement in 1969, "the majority of courts have refused to entertain actions for trespass to foreign land "[18] the Institute sought to change this approach It declared, in sec, 87 that:

> "A State may entertain an action that seeks to recover compensation for a trespass upon or harm done to land in another state".

3.12, To date, only the Supreme Court [19] has adopted the principle advanced in the *Restatement*, and obiter comments are still to be found which acknowledge the continued existence of the "local action rule of common law as applied to complaints seeking money damages for trespass to land".[20] Such is the persuasive authority of the Restatement however that it may well be only a matter of time and the chances of litigation, before the views expressed in sec 87 come to be accepted among at least a majority of the States of the Union.

IV. NEW ZEALAND

3.13 The courts in New Zealand [21] have accepted the applicability in that country of the *Mozambique* rule in relation to matters brought under the New Zealand equivalent of the Family Provision Act 1982 (discussed below, para 4.8) and have also adopted[22] the exception to the rule developed by the English Court of Chancery see below, para 4.4). There have been no moves, either by the legislature or the courts, to modify or restrict the application of the rule.

FOOTNOTES

1. [1979] AC 508.

2. See the arguments of counsel at 513, and the comments of Lord Wilberforce at 533.

3. A E Anton, *Private International Law: A treatise from the standpoint of Scots Law* (1967) at 125; see also, eg, *Cathcart v Cathcart* (1904) 12 SLT 182 at 184 per Lord Low.

4. For a commentary on the Convention see, eg, Michael Pryles and A Trindale, "The Common Market Convention on Jurisdiction and Enforcement of Judgments" (1974) 48 *ALJ* 185.

5. *Hansard, House of Commons*, 6th Series , Vol 20, Col 950. The clause was clearly not regarded as in any way controversial, since there was no debate on it in either House of the United Kingdom Parliament.

6. See, eg, the comment, "Venue Problems in Wisconsin" (1972) 56 *Marquette Law Rev* 73 at 87-89.

7. 15 Fed Cases 660;the report o f the decision not available in this country, but it is discussed fully by the Supreme Court of Wisconsin in *Mueller v Brunn* 313 NW 2d 790 (1982) at 794-796.

8. 98 NE 752.

9. *Id* 753 .

10. Note though that the Restatement acknowledged a minor exception to this rule, in sec 615, stating that if an act were done in one State which caused injury to land in another State, an action could be maintained in either the former jurisdiction or the latter,

11. *Little v Chicago, St Paul etc Rly Co* 67 NW 846.

12. See the comment by Cullen CJ in *Brisbane v Pennsylvania Railway Co* 98 NE 752 at 7 5 3 and Kuhn, "Local and Transitory Actions in Private International Law" (1918) 66 *U Pa L Rev* 301 at 306, nl5.

13. See Kuhn *id* 306, nn 16 and 17.

14. See the discussion by the Supreme Court of Wisconsin in *Mueller v Brunn* 313 NW 2d 790 at 795, of the judgments in *Livingston v Jefferson*, note 7.

15. J H Beale, Conflict of Laws (1935), Vol 3 at 1652-1659; Hancock, M Torts in the Conflict *of Laws* (1942) at 95-100; A A Ehrenzweig, *Conflict of Laws* (1962) at 140-141.

16. *Reasor-Hill Corp v Harrison* 249 SW 2d 994 (1952) where an action for damage to crops in Mississippi caused by insecticide spray purchased in Arkansas was found justiciable in the latter States.

17. See the comment in *Ingram v Great Lakes Pipe Line Co* 153 SW 2d 547 (1941) at 550.

18. *Restatement, Second*, sec 87, comment a.

19. *Mueller v Brunn* 313 NW 2d 790 (1982).

20. *Ramirez de Arellano v Weinberger* 745 F 2d 1500 (US Court of Appeal, DC Cir 1984) at 1529. The court regarded the rule as inapplicable, since the plaintiff was seeking riot the common law remedy of damages but the equitable remedy of an injunction to prevent the defendant, the US Secretary of Defence, from continuing to trespass on land in Honduras by operating a large military training camp thereon; the injunction was discharged in further proceedings: see 788 F 2d 762 (1986); see also *People of the State of Illinois v citv of Milwaukee* 731 F 2d 403 (US Court of Appeals, 7th Cir, 1984) at 411, fn 3.

21. *Re Butchart* [1932] NZLR 125; *Re: Bailey* [1985] 2 NZLR 656.

22. *Re Fletcher* [1921] NZLR 46.

4. Exceptions To The Mozambique Rule

I. INTRODUCTION

4.1 The courts in England and in other jurisdictions reviewed above have developed a number of exceptions to the general principle stated in the *Mozambique* case. The ambit of each exception is by no means precisely defined, and varies in some instances from country to country. The circumstances in which the courts are prepared to hear a matter, even though foreign land is involved, comprise suits in which:

(a) there is a contract or, equity between the parties;

(b) the court otherwise has jurisdiction in the administration of a deceased person's estate;

(c) the court's admiralty jurisdiction is invoked; or

(d) there is a dispute regarding property between de facto spouses.

II. CONTRACT OR EQUITY BETWEEN THE PARTIES

4.2 This exception comprehends two distinct strands of historical development, although it is often treated as being unitary both by text-writers[1] and courts.[2]

4.3 First, an action at common law on a contract either for damages for breach or in debt to enforce the promise of payment of an agreed sum was regarded, even in medieval England as, transitory in nature. It was therefore never subject to the jurisdictional limitations placed upon local actions. And the action retained its characterisation as transitory even though the contract in question related to foreign land, such as a lease.[3] Furthermore, the passing of the Grantees of Reversions Act 1540 (Eng) [4] created a curious anomaly with regard to actions on convenants in a lease. By virtue of the statutory provisions, proceedings between thee original lessee and an assignee o f the landlord were also regarded as transitory, whereas proceedings between the original lessor and an assignee of the lessee were (and presumably still would be) classified as local, and therefore subject to the *Mozambique* rule.[5]

4.4 Secondly, the Court of Chancery in England regarded itself as acting only *in persona* on the conscience of the defendant. It therefore considered that it was able to make a decree against a person properly before the court, even though the nature of that decree might have been such as to affect the title to or right to possession of land outside England. This jurisdiction was established by Lord Hardwicke LC, in *Penn v Lord Baltimore*,[6] when he decreed specific performance of an agreement relating to the boundaries between the then American colonies of Pennsylvania and Maryland. It was recognised by Arden MR, in *Lord Cranstown v Johnston*[7] as including situations in which there was not necessarily a contract between the parties, but an equitable obligation arising (in that case) from the unconscionable conduct of the defendant, thus allowing the Master of the Rolls to order the recoveyance to the plaintiff of his plantation in the West Indies,

4.5 With the advent of the judicature system, it has been recognised, both in Australia[8] and England,[9] that a court in the exercise of its equitable jurisdiction may issue an order directing the defendant to deal in some way with land outside the country. If the defendant should fail to comply with the decree, it may be enforced by committal or sequestration of assets, until the order is carried out. Although some of the older cases referred to this jurisdiction as being exercisable only over a defendant who was personally present (or resident) within the jurisdiction, it has subsequently been recognised as being available so long as the defendant, although personally outside the country, may be served with notice of a writ under the local equivalent of Part 10, r 1 of the Rules of the Supreme Court.[10]

4.6 The major limitation on this equitable jurisdiction is that it depends not merely upon the plaintiff seeking the aid of an equitable remedy, but upon "the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the

Court of Equity... would be unconscionable".[11] It has therefore been held in this country that the exceptional jurisdiction does not avail a plaintiff who seeks a declaration that the rights of a mortgagee of land in another country are statute-barred,[12] nor a plaintiff who wishes to enjoin the defendant from trespassing on real property inter-state.[13] It may, however, be observed that in the United States this exception has been applied whether the plaintiff seeks an equitable remedy, including an injunction to prevent further trespassing on foreign land.[14]

III. ADMINISTRATION OF DECEASED ESTATES

4.7 A further exception to the rule in the *Mozambique* case or on occasions a blatant derogation from that rule- relates to the administration of the estate of a deceased person. So long as the local court has jurisdiction to administer the estate (which it may take longer by virtue of the presence of the legal personal representative within the jurisdiction, or by reason of the domicile there of the deceased at the date of death [15]), and the estate includes property, whether immovable or movable, situate within its territory, that court may take jurisdiction to determine questions of title to land situate outside its territory. Although this exception has not been expressly adopted by a court of England or Australia,[16] its existence to be derived from decisions such as *Nelson v Birdport*[17] and *Re Duke of Wellington*[18] in which the English court determined the devolution of land in, respectively, Sicily and Spain forming part of the estate of, respectively, Admiral Nelson and the Duke of Wellington. There is no reason to doubt that the exception is part of the law in this country also.[19]

4.8 The exception relates, however, only to the administration of a deceased's estate, and not necessarily to the substance of rights to succession. The exception clearly does not apply to the discretionary power of the court to make further provisions for the dependants of a deceased, under the testator's family maintenance legislation (ie. Family Provisions Act 1982.) The jurisdiction of the court to make an order under this statute was stated by Sholl J in *Re Paulin*[20] as depending exclusively, in the case of movables, on the deceased being domiciled in the territory of that court at the date of death and, in the case of immovable, on the situation of that property within that territory. Although the court's power has been extended, by s11(1)(b) of the Family Provisions Act, to include movable property in New South Wales of a deceased who was not domiciled in the State, the Act apparently accepts the limitations stated by Sholl J with regard to land. Thus in the case of a person who dies domiciled in New South Wales but possessed of immovable property in an other State or country , any order made under the Family Provision Act cannot affect in any way, whether directly or indirectly, the immovable property outside the State.[21]

4.9 It may be observed that the statement of the law by Sholl J in *Re Paulin* may lead to a part of the deceased's estate not being affected in any way by such family provision legislation. For example, the Inheritance (Provision for Family and Dependants) Act 1975 (Eng), s1(1), restricts the applicability of the legislation to the estates of persons who die domiciled in England and Wales If, therefore, a person were to die domiciled in New South Wales, but having previously converted the greater proportion of his or her estate into realty in England, and devised that property to persons other than his or her immediate family, the family would be unable to seek any substantial further provision from the estate. The New South Wales court, by virtue of the above judicially developed rules, could make an order that would relate only to such of the estate as was situated in this State (or was movable property located elsewhere) , while the English court would lack the power to make an order by reason of the above legislative provision.[22] Even if, in the above example, the deceased's real estate were situated in New Zealand, rather than in England, the family would, as the law now stands, be obliged to make two applications for further provision - one in New South Wales and the other in Now Zealand.

IV. ADMIRALTY ACTIONS

4.10 If those in control of a merchant ship, by failing to exercise due care, permit the ship to cause damage to another's property, the latter may bring proceedings, at their option, either *in personam* against the owners of the ship (in which case jurisdiction is established by personal service on the owners), or in *rem* against the ship itself (in which case jurisdiction is established by service of the writ on the ship, when it is within the territory of the court). In the latter circumstance, the proceedings may take the form of the enforcement of a maritime lien on the ship, but in both situations the action is heard in the Admiralty Division of the Supreme Court.

4.11 The jurisdiction of that Division is derived originally from the Colonial Courts of Admiralty Act 1890 (Imp) [23] which, by s2(2), declared that its jurisdiction should be the same as the Admiralty jurisdiction of the High Court of

England. The latter court, by virtue of the unanimous decision of the English Court of Appeal in *The Tolten*,[24] has the power to enforce a maritime lien on a ship for damage done to land or fixtures out of England; and a majority of the Court in that case (Scott and Somervell LJJ) concluded, although the issue was not necessary for their decision, that the admiralty jurisdiction extends to hearing an action *in personam* against the owners of a ship for damage done to foreign land. There is no reason to doubt that the Admiralty Division of the Supreme Court of New South Wales has the like power to hear actions, whether in *rem* or *in personam*, for damage done by a ship to land outside the State.

V. PROPERTY DISPUTES BETWEEN DE FACTO SPOUSES

4.12 It is probable that, in the hearing of a property dispute between de facto spouses, the Supreme Court would not be limited in the exercise of its powers under the De Facto Relationships Act 1984 by reason only of the fact that real property of one of the parties was located outside the State. In *Hamlin v Hamlin*, [25] the English Court of Appeal held that it had the power to restrain a husband from disposing of a house in Spain, on being satisfied that the husband's intentions in making the disposition were to defeat the wife's claim for financial relief ancillary to divorce proceedings. The court regarded the statutory power of restraint (similar to that contained in s42 of the De Facto Relationships Act 1984) as being analogous to the power exercised by the court in it's equitable jurisdiction (considered above, paras 4.4 et seq) to make an order *in personam*, if there is a contact or equity between parties, even though the order may impinge upon the title to foreign realty. It also appears that in the family Court of Australia would have little hesitation in making personal order for the payment of money in respect of the parties to divorce proceedings, even though the amount of the order might be ascertained having regard to the value of real property outside the country.[26]

FOOTNOTES

1. *Dicey and Morris, on Conflict of Laws* (11th ed 1987), 928: Cheshire and North's *Private International Law* (10th ed 1979), 495 Cf P E Nygh, *Conflict Laws in Australia* (4th ed 1984), 66-67, who distinguishes between actions arising out of a contract and the jurisdiction of courts of equity.

2. *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382 esp at 396 per scott LJ.

3. Smith's Leading Cases (7th ed, 1876) vol 1 at 691.

4. The sustance of this act is contained in the Conveyancing Act 1919 (NSW), ss117 and 118

5. Smith's Leading Cases (7th ed, 1876) vol 1 at 691.

6. (1750) 1 Ves Sen 444; 27 ER 1132.

7. (1796) 3 Ves 170 at 182- 183; 30 ER 952 at 959.

8. See *Inglis v Commonwealth Trading bank of Australia* (1972) 20 FLR 30 at 38-40 per Woodward J; *Couzens v Negri* [1981].

9. *Companthia de Mozambique v British South Africa Co* [1892] 2 QB at 364 per Wright J; *Deschamps v Miller* [1908] 1 Ch 856 at 863 per Parker J.

10. *Jenny v Mackintosh* (1886) 33 ChD 595; *Duder v Amsterdamsch Trustee Kantoor* [1902] 2 Ch 132.

11. *Deschamps v Miller* [1908] 1 Ch 856 at 863 per Parker J; for illustrations of cases within this rubric see for example Dicey and Morris, note 933-935; Nygh, note 1 at 68.

12. *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30.

13. *Corvisy v Corvisy* [1982] NSWLR 557.

14. *Ramirez de Arellano v Weinberger* 745 F 2d 1500 at 1529 (see, above para 3.12. note 19 to chapter 3).

15. Nygh, note 1, 485.

16. But see *Jubert v Church Commissioners for England* 1952 SC 160, in which Scots Court of Sessions approved (at 162) the formulation in Dicey and Morris note 1 at 924.

17. (1846) 8 Beav 547; 50 ER 215.

18. [1948] Ch 118.

19. See *Dawson v Perpetual Trustee Co Ltd* (1953) 89 CLR at 150- 151 per Dixon CJ, Kitto and Taylor JJ.

20. [1950] VLR 462 at 465.

21. *Re Donnelly* (1927) 28 SR (NSW) 34 at 37 per Harvey CJ in Eq; *Re Osborne* [1928] St R Qd 129 at 132 per Woolcock J; *Re Paulin* [1950] VLR 462 at 465 per Sholl J; *Re Butchart* [1932] NZLR 125; *Re Bailey* [1985] 2 NZLR 656; *Solomon v Hatti* (NSW Court of Appeal, 10 February 1987, unreported.

22. This illustration is based on the facts which were considered by Prichard J in *Re Bailey* [1985] 2 NZLR 656.

23. *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175; see now the Admiralty Act 1988 (Cth).

24. [1946] P 135.

25. [1986] Fam 11.

26. See *In the Marriage of Allison* (1981) 1 SR (WA) 248.

5. Reasons For Continued Adherence To The Rule

I. INTRODUCTION

5.1 As recently as 1978 the House of Lords was invited, in *Hesperides Hotels Ltd v Agean Turkish Holidays Ltd*,[1] either to overrule or considerably to limit the width of that rule. The House declined to do so. It is therefore necessary to consider the four reasons which were advanced by their Lordships for retaining the *Mozambique* rule. The Commission believes however, that none of these reasons is in any way compelling to dissuade the Parliament of New South Wales from legislating for the abolition of the rule.

II. GENERAL ACCEPTANCE OF THE RULE IN COMMON LAW JURISDICTIONS

5.2 In the *Hesperides Hotels* case, Lord Wilberforce, delivering the leading judgment of the House, gave as his first reason for declining to depart from the *Mozambique* rule that the latter is accepted with differing degrees of force and emphasis in other jurisdictions of the common law.[2] These sentiments were echoed by Lord Fraser in slightly different words,[3] This argument is, however, of doubtful validity. With regard to the cases from Australia and Canada to which Lord Wilberforce referred,[4] no argument was raised in any of them that the decision in the *Mozambique* case was not binding on the various courts, and the only issue for consideration was its ambit of application. The fact that various courts have assumed that they are obliged to follow the *Mozambique* decision is scarcely to be described as “acceptance” of the rule.

5.3 The phraseology adopted by Lord Wilberforce is rather more applicable to the situation as it existed in the United States. It has been remarked above (see para 3.6) that in 1811 a Circuit Court in that country, in *Livingston v Jefferson*, independently arrived at the conclusion which the House of Lords was subsequently to reach in the *Mozambique* case. However, Lord Wilberforce himself acknowledged[5] that courts in Arkansas, Minnesota and Missouri had refused to follow *Livingston v Jefferson* , and it has been noted above (see para 3.12) that, more recently, the Supreme Court of Wisconsin has also departed from the Circuit Court decision. Lord Wilberforce did not refer to the *Restatement, Second, of Conflict of Laws* in which the American Law Institute has put forward the proposition that all the States of the Union ought to accept jurisdiction, at least in actions for trespass to foreign land, if not for suits which seek to determine title to, or right to possession of, foreign land (see para 3.11).

III. THE NEED TO DEVELOP A DOCTRINE OF FORUM NON CONVENIENS

5.4 A further reason given by Lord Wilberforce, in the *Hesperides Hotels* case, for refusing to limit or overrule the *Mozambique* case may be quoted in full: [6]

> “Revision of the rule may necessitate consequential changes in the law. In order to prevent ‘forum shopping’ and overlapping, one such change would have to relate to ‘forum non conveniens’ a principle not yet fully developed in England (see *The Atlantic Star* [1974] AC 436 and *McShannon v Rockware Glass Ltd* [1978] AC 795) and, if English courts were to be given an extended jurisdiction, requiring legislative definition.”

5.5 Two answers may be given to this argument. First, the House of Lords has, subsequent to the decision in the *Hesperides Hotels* case, developed a principle of “forum non conveniens”, under which the courts will decline to exercise jurisdiction when they are satisfied that:

> There is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all. the parties and the ends of justice.”[7]

This judicial development the House of Lords has been adopted in recent decisions of the New South Wales Court of Appeal.[8]

5.6 The second answer to Lord Wilberforce’s argument is that his Lordship has subsequently seen no need for legislative definition of the notion of forum non conveniens in relation to the extended jurisdiction of the English High Court to determine question of trespass to foreign land. Reference has already been made to s3O of the

Civil Jurisdiction and Judgments Act 1982 (UK), which limited the *Mozambique* rule to those circumstances in which title to or right to possession of foreign land is the principal issue before the court. When the bill for that Act was being debated in the House of Lords, Lord Wilberforce spoke to another of the clauses, but not to the clause which was to become s30.[9]

IV. NO RADICAL CHANGE OF CIRCUMSTANCES

5.7 Lord Wilberforce, in the *Hesperides Hotels* case, gave further support to his conclusion not to depart from the *Mozambique* decision in the following words:

> It cannot be said that since 1893 [the date of the *Mozambique* case] there has been such a change of circumstances as to justify this House in changing the rule: see *Miliangos v George Frank Textiles Ltd* [1976] AC 443.[10]

But while the House of Lords in its judicial capacity did not consider that there had been a sufficient change in the surrounding circumstances to justify a departure from one of its own previous decisions the House of Lords in its legislative capacity is not subject to such restrictions and, as noted in the preceding paragraph, the *Mozambique* rule was substantially limited by the Act of 1982.

V. NEED FOR REFORM BY LEGISLATION RATHER THAN JUDICIAL DECISION

5.8 The fourth reason advanced by Lord Wilberforce in the *Hesperides Hotels* case[11] for the House of Lords, in its judicial capacity, refraining from disturbing the *Mozambique* rule was that:

> The nature of the rule itself, involving, as it clearly must, 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.

5.9 This reason is, of course, of no relevance so far as this Report is concerned, as we are concerned to argue for abrogation of the rule by Parliament. It may, nevertheless, be observed that the legislative change made to the *Mozambique* rule by s3O of the Civil Jurisdiction and Judgments Act 1982 (UK) was not preceded by any form of independent review (such as a report from the English Law Commission), nor did it excite any comment during its passage through both Houses of the United Kingdom Parliament. The point may also be made that, in other areas of the law, the courts, no less than the legislature, have been prepared to establish rules which involve "possible conflict with foreign jurisdictions". Most notable among such rules is that derived from the court's inherent jurisdiction whereby it may enjoin a party before it from continuing with proceedings which that party has already commenced in a foreign court, if the local court is regarded as a more appropriate forum.[12]

FOOTNOTES

1. [1979] AC 508.

2. *Id* at 536.

3. *Id* at 545.

4. *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479; *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30; *Gray v Manitoba and NW Railway Co* (1896) 11 Man R 42; *Albert v Frazer Companies Ltd* [1937] 1 DLR 39.

5. [1979] AC 508 at 536.

6. [1979] AC 508 at 537; see also Lord Fraser at 544.

7. *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 476 per Lord Goff.

8. *Evers v Firth* (1986) 10 NSWLR 22; *Batchelor v Dahlia Mining CO Ltd*, 19 August 1986 (unreported); *Oceanic Sunline Special Shipping Co v Fay* (1987) 8 NSWLR 242;the High Court has since overturned this last case, see *Oceanic Sunline Special Shipping Inc v Fay* (1988) 165 CLR 197.

9. See *Hansard, House of Lords,* 5th Series, Vol 426, cols 721, 722.

10. [1979] AC 508 at 537; in the *Miliangos* case, the House of Lords departed from the rule, re-affirmed as recently as 1960 in *Re United Railways of the Havanna and Regla Warehouses Ltd* [1961] AC 1007, that an English court could give a judgement expressed only in English currency.

11. [1979] AC 508 at 537.

12. The most recent discussion by a court of final appeal of this power is to be found in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (Privy Council on appeal from Brunei); in Australia, see *In the Marriage of Takach* (1980) 47 FLR 441 (Family Court of Australia has power to enjoin the respondent to Australian matrimonial proceedings from continuing with similar matters in Hong Kong).

6. Arguments For The Abrogation Of The Rule

I. INTRODUCTION

6.1 The rule which was affirmed by the House of Lords in the *Mozambique* case and regarded by the courts in this country as stating the law for Australia has two aspects. Jurisdiction is denied (a) in actions for damages for trespass or other torts concerning foreign land; and (b) in actions for the determination of other matters relating to or affecting foreign land. The first of these aspects has evoked universal criticism throughout the common law world. This criticism is considered in the immediately succeeding paragraphs. The second aspect, although not causing such widespread condemnation from commentators, may also be regarded as an unnecessary restriction on the power of the New South Wales Courts. The reasons for suggesting the abolition of the second aspect are set out in paras 6.11 et seq below.

II. DAMAGES FOR TRESPASS AND OTHER TORTS

6.2 The criticisms of this aspect of the *Mozambique* rule, and consequent reasons in support of its statutory abolition, may be grouped under four heads.

A. The Rule is an Anachronism

6.3 The American Law Institute, in its *Restatement, Second, of Conflict of Laws*, s87, comment a, sums up the thrust of this criticism, As the comment points out this aspect of the rule limay be explained only in the light of history "in the assumption made in medieval. England that jurors had personal knowledge of the facts in issue. The comment then observes:

> What is surprising is that the rule remained in effect long after jurors were no longer required, or even permitted, to have personal knowledge of the facts of the case.

The same point was made rather more forcefully by Professor Beale, in his Treatise on the Conflict of Laws.[1] Referring to the seminal United States decision of *Livingston v Jefferson* which had stated the same rule, he said that both that case and those which had followed it were "an example of stare decisis in its worst aspect- namely, blind adherence to precedents."

6.4 It is not only academic writers who have regarded the rule as depending for its validity on an historical development that has had no relevance for many centuries. In *Little v Chicago, St Paul etc Rly Co*,[2] the Supreme Court of Minnesota declined to follow *Livingston v Jefferson,* In giving the reasons for coming to this conclusion, Mitchell J said:

> If the courts of England, generations ago, were at liberty to invent a fiction in order to change the rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day (sc 1896) should deem themselves slavishly bound by those limitations.[3]

B. The Rule creates Anomalies and Arbitrary Distinctions

6.5 Because the *Mozambique* rule is so much a product of judicial development over the centuries, and because that development does not always form a coherent whole, it is not surprising that authors have been able to criticise the rule for its apparently haphazard application.

6.6 One such example has been referred to earlier in this Report (see para 1.13). While proceedings between an original tenant and the assignee of the reversion, in relation to matters affecting the subject matter of the lease, are regarded as transitory, and thus not within the rule, proceedings between the original landlord and the assignee of the lessee in relation to the same matters are classified as local, and the *Mozambique* rule applies.

6.7 A further example has been given both by Fry LJ in the *Mozambique* case[4] when it was before the Court of Appeal and (in a slightly modified form) by Scott LJ in *The Tolten*.[5] it is that if the same act or omission in a foreign country by A causes damage to B's house, to his chattels and to him personally, and both A and B subsequently came to New South Wales, B may sue A in the courts of this State for the damage to his chattels and to his person, but not for the damage to his house.[6]

6.8 A final illustration of the fine distinctions which have arisen as a result of the *Mozambique* decision was adverted to by the Canadian writer, Professor Hancock.[7] That decision is concerned only with actions relating to "land", so that, if the subject matter of the suit is not the immovable property, or a fixture thereon, the suit may be classified as transitory. Thus, a suit in trover for cutting timber in Ireland has been held by the court of King's Bench in England to be transitory,[8] as has an action in England for conversion of sand dug out of Ocean Island, in the Pacific.[9]

C. The Rule may be Productive of Injustice

6.9 Reference has already been made to the circumstances in which the rule may be one reason for denying a person any effective remedy for a wrong done to property which he or she owns overseas (see above, para 2.26). If the wrongdoer has no assets located in the country in which he or she committed the trespass or negligence then, although the courts of that country may assert jurisdiction over the wrongdoer, that exercise of jurisdiction may well not be recognise by the courts of the country in which the assets are located, and any judgment given cannot be satisfied. The courts of the country in which the defendant's assets are situated will not, however, themselves take jurisdiction to hear the action, by reason of the *Mozambique* rule.

D. The Rule is Illogical

6.10 The argument has been advanced [10] that for the courts to decline jurisdiction to hear an action in tort for damage done to foreign land, yet to accept jurisdiction to enforce a contract or equity between the litigants, cannot be founded on any rational principle. This argument proceeds from the proposition that the exception to the *Mozambique* rule developed by the Court of Chancery was justified on the basis that the court is acting only in personam, on the "conscience of the defendant". But, it is then pointed out, an action in tort for damages, whether the plaintiff seeks reparation for personal injury or for damage to his real property, also operates on a purely personal level. Any judgment is awarded against the defendant personally and must be satisfied from such of his assets as are located within the court's territory, whatever the substance of the wrong done. If, therefore, the Equity Division considers itself capable of making an order, directed to the defendant personally, the effect of which may impinge upon foreign land in the defendant's possession, there appears to be no basis in principle for the Common Law Division refusing to entertain proceedings, the result of which would be a judgment against the defendant personally, when the cause of action on which that judgment would be based is trespass or another tort relating to foreign land.

III. ACTION FOR POSSESSION OF LAND

6.11 In so far as the *Mozambique* decision is authority for the proposition that a court in one country or State will not entertain an action to determine title to, or the right to possession of, foreign land, it has been subjected to little criticism either academic or judicial. Thus, one of the leading English textbooks on the conflict of laws[11] accepts that this aspect of the rule is "based upon the practical consideration that only the court of the situs can make an effective decree with regard to land". While this proposition cannot be denied, it scarcely provides a justification for the present state of the law. The *Mozambique* rule prohibits the acceptance of jurisdiction, not only when the plaintiff seeks a decree relating to the ownership of land, but also when he or she seeks the resolution of issues which have some connection with land outside the court's territory, even though that resolution may be effected by an order binding on the defendant personally and not requiring execution against the land itself. For example, in *Corvisy v Corvisy*[12] McLelland J declined to issue an injunction against the defendant, simply because the land upon which it was sought to enjoin the defendant from trespassing was outside New South Wales. The plaintiffs sought only a decree addressed to the defendant, and not an order which would in any way have affected rights in relation to land, but were denied even judicial consideration of that matter by reason of the *Mozambique* rule.

6.12 The principal reason for recommending legislative abrogation of this aspect of the Mozambique rule is that the law as it now stands, taking account of the exceptions to the rule which have been employed by the court when exercising jurisdiction in equity or in the administration of deceased estates, is far from clear and has led to the drawing of distinctions which appear to have little rational basis. Furthermore, there are circumstances in which the operation of the *Mozambique* rule leads to unnecessary expense and delay for litigants. A final reason for the recommendation is that the jurisdiction of the Supreme Court will shortly be expanded considerably, on the coming into force of the complementary scheme for the cross-vesting of State and federal jurisdictions; but will, by that same scheme, be subject to limits based on the Court regarding itself as the most appropriate forum for the resolution of a dispute. The Commission therefore regards the time as opportune to recommend a further expansion of the court' s jurisdiction, but subject to the same restriction, that such increased power would be exercised only if it were the most appropriate forum. Each of these reasons will be dealt with in turn.

6.13 While the Commission proposes the abolition of the *Mozambique* rule, it does not suggest that a New South Wales Court should determine matters which would entail it making orders as to the title to land outside Australia because such orders are likely to be ineffective. The Commission's recommendation is that, if a matter before the Court involves, directly or indirectly, land outside the country, the judge should first determine the most appropriate forum for the resolution of the issues between the parties. only if a court of this State is the most appropriate forum should the matter be resolved in that Court. If that Court is not the most appropriate forum, the action before it should be stayed in order that proceedings may be commenced in the courts of ,another country. This issue is considered more fully in paras 7.5 et seq below.

A. Lack of Clarity in the Law

6.14 It has been explained above (see paras 4.4-4.6) that, based on the decisions in *Penn v Lord Baltimore* [13] and *Lord Cranstownb v Johnston*[14] the court in its equitable jurisdiction has the power to make an order, directed to the defendant personally, the effect of which may well impinge on the title to, or right to possession of, foreign land. But it has also been pointed out that this exception to the *Mozambique* rule depends upon there being an "equity" between the litigants. The lack of clarity in the law arises from the fact that the circumstances for the fulfilment of this condition are difficult to determine. As Dicey and Morris [15] point out, if "A agrees to sell foreign land to B, and instead conveys the land to C, who has notice of the contract, C is [for these purposes] a stranger to the equity" and the equitable exception does not apply.[16] However, "if a company creates an equitable charge on land in favour of debenture-holders, and sells the land to a purchaser subject to the mortgage lien or charge now subsisting, and the purchaser expressly undertakes to pay the debentures and interest, the court has jurisdiction to entertain an action by the debenture-holders against the purchaser".[17] The authors go on to observe that the distinction between those two situations is tenuous and difficult to reconcile with equitable doctrines of constructive notice.

6.15 A further example of lack of clarity in the law relates to the exception to the *Mozambique* rule created in relation to the administration of deceased estates. As has been mentioned above (para 4.7), if the court has jurisdiction for the purpose of such administration, it is prepared to determine questions of title to foreign land. But the limitation on this exception appears to be that the court must possess some control in relation to the estate, by virtue of the presence of property of the deceased (whether real or personal) within its territory. It is on this basis that rationalisation can be achieved between, on the one hand, *Nelson v Birdport*,[18] this jurisdiction was assumed, and *Pike v Hoare*,[19] where it was not. However, the precise formulation of the exception, and its rationale, have not been undertaken by the courts, leading consequently to doubt as to its limits.

6.16 A final example in this general category is the decision of Woodward J, in Inglis v *Commonwealth Trading Bank of Australia*,[20] to which reference has already been made (see para 2.2). In that case, the Judge himself accepted[21] that his conclusion was anomalous, because of the fact that the denial of jurisdiction depended on the way in which, and the party by whom, proceedings were instituted, and not on the nature or substance of the plaintiffs claim.

6.17 If the *Mozambique* rule were to be abolished in its entirety, the courts would no longer be required to come to somewhat artificial conclusions as to whether the plaintiff's action fell on one side or the other of a

"jurisdictional line",[22] but would need only to determine whether their court was the appropriate forum for the resolution of the dispute, applying the notions of forum non conveniens discussed below (see paras 7.5 et seq).

B. Unnecessary Expense and Delay

6.18The principal situation in which the application of the *Mozambique* rule may lead to unnecessary expense and delay (and perhaps even to a denial of justice) relates to applications for relief under the Family Provision act 1982 (NSW). It has already been noted that if a person dies domiciled in New South Wales, but possessed of immovable property outside the State, the court in this State must entirely disregard the existence and value of that immovable property in determining whether the deceased has made adequate provision for his or her dependents. The latter must commence fresh proceedings, before the courts at the location of that immovable, for relief in relation thereto, and, at least if the immovable property were in England and Wales, the court in that country would lack jurisdiction.

6.19 The statutory abrogation of the *Mozambique* rule, together with a consequential amendment to the Family Provision Act, would enable the Supreme Court of New South Wales to take into consideration the existence and value of immovable property outside the State, in determining whether (and, if so, to what extent) it should make further provision for the dependents of a deceased person.

FOOTNOTES

1. (1935) Vol 3 1657.

2. 67 NW 846 (1896).

3. *Id* at 847-848.

4. [1892] 2 QB 358 at 414.

5. [1946] P 135 at 146-147.

6 It may, however, be observed that in the *Hesperides Hotels* case, the House of Lords did not remark on the arbitrariness or technicality of their decision, which denied jurisdiction to hear the action in relation to trespass to the plaintiff's hotel, but allowed to proceed that part of the action which sought damages for trespass to chattels in the hotel.

7. *Torts in the Conflict of Laws* (.1942) 99.

8. Brown v Hedges (1708) Salk 290; 91 ER 257.

9. *Tito v Waddell (No 2)* [1977] Ch 106 at 271-272 per, Megarry J.

10. Most recently and forcefully by Welling and Heakes, "Torts and Foreign Immovables: Jurisdiction in Conflict of Laws" (1980) 18 *UW Ont L* Rev 295; see also Willis, (1937) 15 *Can Bar Rev* 112.

11. *Cheshire and North's Private International Law* (11th ed, 1987) 255; see also Sykes and Pryles, *Australian Private International Law* (2nd ed, 1987) 59; *Duke v Andler* [1932] SCR 734; [1932] 4 DLR 529.

12. [1982] 2 NSWLR 557.

13. (1750) 1 Ves Sen 444; 27 ER 1132.

14. (1796) 3 Ves 170; 30 ER 952.

15. Conflict of Laws (11th ed, 1987), Vol 2 at 930.

16. Norris v Chambres (1861) 29 Beav 246; 54 ER 621; affirmed 3 DeG F & J 583; 45 ER 1004.

17. *Mercantile Investment & General Trust Co v River Plate Trust, Loan & Agency Co* [1892] 2 Ch 303.

18. (1846) 8 Beav 547; 50 ER 215.

19. (1763) 2 Eden 182; 28 ER 867.

20. (1972) 20 FLR 30.

21. *Id* 42,

22. The phrase used by Woodward J in *Inglis'* case note 19 at 42.

7. Discretionary Limits on Jurisdiction

I. INTRODUCTION

7.1 On the coming into force of the complementary scheme for the cross-vesting of jurisdiction, and provided that scheme survives any challenge to the High Court as to its validity, the jurisdiction of the Supreme Court will be greatly expanded. But a further aspect of that scheme is that any superior court in the country will be able to transfer a matter that has been commenced before it to another superior court, if the latter is regarded as the more appropriate forum. In view of this expansion of jurisdiction (which includes the abrogation of the *Mozambique* rule with regard to land within Australia), the Commission regards it as the proper time to recommend a further expansion of the jurisdiction of courts in New South Wales, subject nevertheless to limitations relating to their appropriateness to hear any particular matter.

II. CROSS-VESTING SCHEME

7.2 In October 1986, the Commonwealth Attorney General introduced into the Federal Parliament the Jurisdiction of Courts (Cross-Vesting) Bill 1986. It is stated in the Explanatory Memorandum to that Bill that the Standing Committee of Attorneys General has agreed that the Federal Parliament, will vest in each of the State Supreme Courts jurisdiction currently reserved exclusively to federal courts or Territory courts, and that, by complementary legislation, each of the State Parliaments will vest the jurisdiction of their State Supreme Courts in federal and Territory courts. A further aspect of this complementary scheme is that each of the State courts will have vested in it the jurisdiction of each of the other State courts. The necessary legislation has been enacted by the Commonwealth, all the States and the Northern Territory, but will not come into force until Rules of Court have been made to give effect to the provision.

7.3 When the scheme as outlined in the previous paragraph comes into operation,[1] 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 (including the external Territories). 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 Australia court, in relation to matters concerning title etc to land in Western Australia.

7.4 The Explanatory Memorandum to the Commonwealth Bill also makes the point that while all the superior courts in the country will have a substantially increased power to hear matters, that power will, it is hoped, be exercised only by the Court which is the most appropriate forum for the resolution of the issues in dispute between the litigants. The legislation includes provisions enabling the transfer of a matter from one superior court to another, the latter is regarded by the former as the more appropriate forum.

III. THE MOST APPROPRIATE FORUM

7.5 Reference has already been made in Chapter 2 to the fact that the English courts have now fully adopted a doctrine of forum non conveniens, which had its origins in Scots law last century. The essence of that doctrine is that, whether the court has jurisdiction as of right (by reason of the presence of the defendant in the country) or is requested to take jurisdiction as a matter of discretion under its Rules of Court, it will decline to exercise that jurisdiction if there is another forum, to which both parties are amenable, in which the case may be tried more suitably for the interests of the parties and the ends of justice.[2] If the *Mozambique* rule were abolished in its entirety, it is suggested that, when a matter before the Supreme Court relates to foreign land, that Court might still decline to exercise jurisdiction, but on the basis that it is not an appropriate forum rather than because of the principle to be derived from that decision of the House of Lords.

7.6 In order to assist in clarifying the suggestion just made, we offer illustrations of the way in which the court might approach its task of determining whether it is the most appropriate forum for the resolution of a dispute.

7.7 Suppose that A dies domiciled in New South Wales, possessed of personal property in the State and real property in England. Members of his or her family claim that A has not made adequate provision for them in the

will, and commence proceedings under the Family Provision Act 1982. It has already been indicated (see para 4.9) that the court in England does not have jurisdiction to hear a family provision action in such circumstances. The New South Wales court should take jurisdiction in the matter and should include the value of the English realty in determining whether (and, if so, to what extent) further provisions should be made for members of A's family. Providing that the executors of A's will are resident in New South Wales, the Supreme Court would be able to make an effective order requiring the executors to transfer the English realty to members of A's family, or to sell that property and distribute the proceeds among members of the family; such an order would not purport to do more than place a personal obligation on the executors to comply with it.

7.8 Suppose that B dies domiciled in New South Wales, possessed of personal property in the State and real property in country X, and that members of B's family commence proceedings under the Family Provision Act. Whether the Supreme Court should hear those proceedings, and include the value of the foreign real estate in A's estate for those purposes, would depend on such factors as: whether the law of country X included provisions analogous to the Family Provision Act; if so, whether the courts of country X would have regard only to the land in country X, or to the whole of A's estate, in arriving at a determination; the proportion which the value of the foreign land bears to the total value of B's estate; whether the executors of B's will reside in this State, and are more clearly amenable to an order made by the Supreme Court, or, reside in country X, rendering an order made against them less likely to be effective.

7.9 Suppose that C, a resident of this State, owns premises in country Y which are leased to D, a resident of country Y, but the lease is then assigned to E, a resident of this State. Disputes arise between C and E relating to a failure to fulfil covenants in the lease which touch and concern the land. An action between C and E would be classified as local and not transitory (see para 4.3), but the Supreme Court should take jurisdiction to hear the action; both parties are amenable to that jurisdiction and, provided that the only relief sought were the payment of monetary compensation, the Court's order would be effective If, however, E were resident in country Y, or the relief sought were forfeiture of the lease, or relief against that forfeiture, or for any other reason there was no real and substantial connection between the action and this State, or an order made by the Court might not be effective, the Court should decline to exercise jurisdiction.

7.10 Suppose that F, a resident of this State, enters into a contract in Sydney with G for the sale by F of a block of land in country Z, but one of the parties fails to fulfil its obligations thereunder, whereupon the other seeks a decree of specific performance of the contract in the Supreme Court. Although the Court would, as the law now stands, be entitled to hear the matter (see paras 4.4-4.5) it is suggested that whether it should take that power should depend on such factors as the degree of connection between both parties and the State, the probable effectiveness of any order made, and the availability (or lack thereof) of effective remedies in country Z.

FOOTNOTES

1. At the time this report was prepared, the cross vesting scheme had not yet come into operation. The scheme commenced 1 July 1988.

2. *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, esp at 476, per Lord Goff. See now para 1.8 above.

8. Recommendations For Reform

8.1 It is recommended that the jurisdiction, not only of the Supreme Court of New South Wales but of all other courts in the State, be extended so that those courts have the power to hear and determine a matter, even though that matter relates to or may otherwise concern land outside the State.

8.2 The above recommendation is subject to the condition that courts in the State should exercise that jurisdiction only if the court is of the view, in the light of all the surrounding circumstances, that it is the most appropriate forum for the resolution of the matters in dispute.[1]

8.3 It is further recommended that the Family Provision Act 1982 be amended so as to make it clear that, in an application under that Act, the court may have regard to land or other immovable property outside New South Wales owned by the deceased at the date of his or her death.

8.4 Draft legislation to give effect to these recommendations is attached in Appendix A.

FOOTNOTES

1. In the light of the High Court' decision to reject the doctrine of forum non conveniens which was announced after this report was completed it is in retrospect fortunate that our recommendation contains an express statutory provision which gives the Court power to decline jurisdiction along these lines. See para 1.8 above.

Appendix A - Draft Legislation

Jurisdiction of Courts (Foreign Land) Bill 1988
Family Provision (Foreign Land) Amendment Bill 1988

JURISDICTION OF COURTS (FOREIGN LAND) BILL 1988

NEW SOUTH WALES

[STATE AIMS]

A BILL FOR

An Act to remove the limitation on the jurisdiction of the courts of the State with respect to land situated outside the State.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Jurisdiction of Courts (Foreign Land) Act 1988.

Jurisdiction with respect to foreign land (the Mozambique rule abolished).

2 The jurisdiction of any court is not excluded or limited merely because the proceedings relate to or may otherwise concern land or movable property situated outside New South Wales.

Court may decline jurisdiction with respect to foreign land

3. A court is not required to exercise jurisdiction conferred by this Act if the court considers that it is not the appropriate court to hear the proceedings.

Application of Act

4. This Act applies whether the cause of action concerned arose before, or arises after, the commencement of this Act.

FAMILY PROVISION (FOREIGN LAND)
AMENDMENT BILL 1988

NEW SOUTH WALES

[STATE AIMS]

A BILL FOR

An act to amend the Family Provision Act 1982 with respect to the application of that Act to land situated outside New South Wales.

The legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Family Provision (Foreign Land) Amendment Act 1988.

Amendment of Act No. 160, 1982, s11 (Orders for provision)

The Family provision Act 1982 is amended---

(a) by inserting ins section 11(1)(b) before the words “New South Wales” the words “or outside”,

(b) by omitting section 11(2).