THE LEGAL CONCEPTION OF LAND, RIGHTS AND INTERESTS THEREON*

Abstract
Land is a great gift of nature to mankind. However, the ever-increasing rise in world population tends to place great pressure on the limited available land. Considering the above, most organised societies and states have over time evolved a conception of land within their jurisdiction that further their developmental aspirations. The implication of the foregoing is that the legal conception of land varies among different jurisdictions as well as changes over time. In Nigeria, land in its legal sense is not limited to the earth surface itself but also extends to the rights which may, by law, be enjoyed over such land. The legal conception of land in Nigeria has also changed with time. It is against the foregoing background that this work conducts an inquiry into the general overview of the legal conception of land in Nigeria as well as the rights and interest thereon.

Keywords: Land, Rights, Interests, Law

1. Introduction

The fact that land is the greatest gift of nature to mankind cannot be over-emphasized. This is predominantly because whether as a factor of production or as a store of value or wealth, land is a veritable cum indispensable tool for national development. However, the ever-increasing rise in world population tends to place great pressure on the limited available land. Considering the above, and more especially the fact that land use and management greatly affects national development, most organised societies and states have over time evolved different systems of land management and control towards achieving an equitable distribution of the various rights and interests that may accrue on land. It may be observed that property generally, is a legal concept which relates to ownership and enjoyment of rights in wealth of any kind. Thus, property is not a natural right but a deliberate construction by the State to regulate private and public rights.[1] The implication of the foregoing is that the legal meaning of property is therefore not limited to the physical thing itself but also extends to the rights which may, by law, be enjoyed over such things. It is in view of the foregoing that it must be observed, that the conception of property changes with time and also differs from one jurisdiction to another.[2] Of course land has always been with us; so too have other types of tangible chattel. The enormous variations in the understanding and conception of these items are revealed by the different laws that have regulated them over time as well as the practices which obtained in different jurisdictions and at different times within the same jurisdiction. However, it is generally accepted that property connotes the physical chattel or thing and the interests attached to it as allowed by the State. It is against the foregoing background that this work conducts an inquiry into the general overview of the legal conception of land in Nigeria as well as the rights and interest thereon in.

2. An Overview of the Legal Conception of Land

It has rightly been asserted that in traditional African jurisprudence, land, like air and water is conceived as the free gift of Almighty God to humanity. Human beings are therefore at best, only entitled to the use and occupation of land.[3] Consequently, it is generally perceived that land belongs to the ancestors, the living and even generations unborn and it is therefore accorded great respect.[4] It is pertinent to emphasize at this stage that the legal conception of land differs from its ordinary meaning and also varies with the different types of *corpus juris.* Generally, at common law, land covers the earth's surface, i.e. the top soil, things attached to land and the subsoil.[5] Land has also been defined to include the airspace above the soil based on the application of the maxim

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[1]T Ajala, 'Private Property Right: A Vanishing Concept?' (2003) *Vol 22, JPPL,* 79, L S Underkuffler, 'On property: An Essay' *The Yale Law Journal Vol.* 100:127 <http://www.scholarship.law.duke.edu/cgi/viewcon tent.cgi?article=1098&context=faculty_scholarship> last accessed on 2/03/2023;

[2]F S Philbrick, 'Changing Conceptions of Property in Law' (1938) *University of Pennsylvania Law Review and American Law Register vol. 86 No*. 7<http://www.jstor.org/stable/3308734?seq=1#page_scan_tab_ contents> last accessed on 2/03/2023.

[3] I A Umezulike, *ABC of Contemporary Land Law in Nigeria,* (Enugu: Snapp Press Nig. Ltd, 2013) pp. 5-6.

[4] S N C Obi, *The Ibo Law of Property* (London: Buttersworth, 1963) p.30.

[5]*The New Lexicon Webster Dictionary* (USA: Lexicon Publications Inc, 1987) Vol. 1, p. 553; I O Smith, *Practical Approach to Law of Real Property in Nigeria* (1st edn, Lagos: Ecowatch Publications Ltd, 1999) p.5; W J Stewart, *Collins Dictionary of Law* (3rd edn, Great Britain: Davidson Pre-press Graphics Ltd, 2006, p. 258; L B Cruzon, *Dictionary of Law* (5th edn,

c*uius est solum eius est usque ad coelum.*[6] This definition appears to have been adopted by the interpretation Act[7] which defined land as including any building, and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals.[8] It has been observed however, that the word 'includes' as adopted by this definition does not help in construing the extent of this definition; for although it suggests that other things may be land which are not included in the definition what those other things are remain a moot point.[9] The Property and Conveying Law[10] defines land as including the earth's surface and everything attached to the earth otherwise known as fixtures and all chattel real. It also includes incorporeal rights like the right of way and other easements as well as profits enjoyed by one person over the land and building to another.[11] This definition, though an improvement on the provision of section 18 of the Interpretations Act, is nevertheless faulty as it fails to recognize the space below and above the earth's surface as being a constituent of land.

It is the position of this work that a definition of land, to be sufficiently descriptive and definitive, must recognize all the different interest that exist on land as well as all the different parts of the earth that forms part of it. Land is not just the corporeal hereditament i.e. the physical part of the earth's surface but also includes also the incorporeal hereditaments, i.e. the intangible rights and interests over the land such as easements profits etc.[12] As Peter Butt succinctly puts it;

> In its legal significance, 'land' is not restricted to the earth's surface but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids. A definition of 'land' along the lines of 'a mass of physical matter occupying space' also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as part of his 'land' the space that remains.[13]

The constituents of land as manifest from the above definition are as follows: (i) the earth surface; (ii) subjacent things of a physical nature; (iii) everything attached to the earth's surface; (iv) the airspace above the soil; (v) ncorporeal rights.

The Earth Surface

This consists of the top soil i.e. the mass of physical matter occupying space. It is the immovable and indestructible three dimensional areas consisting of a portion of the earth's surface.[14] It consists of all the surface of the earth which is not covered by the sea. It appears in different forms and may include rocks, bushes, hills, etc.[15]

Subjacent Things of a Physical Nature

This consists of minerals or treasures found below the earth's surface. However, in most countries of the world, title to such minerals or treasures belong to the government who harness, process and sell them and the money gotten therefrom applied or utilized for the benefit of the whole nation. In Nigeria for instance, title to such minerals is vested in the Federal Government of Nigeria.[16] At common law, such minerals or treasures which constitute "treasure troves" belong to the crown.[17]

It must be stated however that the extent to which subjacent things of physical nature constitute part of land depends on whether they are found at the subterranean areas which the owner can subject to his control.[18] Where such things can be subjected to the control of the owner of the land, the ownership vests in him. However, where

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London: Pitman Publishing, 1998) p. 213; W P Statsky, *West Legal Thesaurus/Dictionary* (Special Deluxe Edn, St Paul Minnesota: West Publishing Co., 1986) p. 446.

[6] This literally translates to 'the person who owns the soil owns up to the sky'.

[7] CAP I 23 LFN 2004.

[8] Interpretation Act s. 18.

[9] I O Smith, *Practical Approach to Law of Real Property in Nigeria* (Lagos, Ecowatch Publications Ltd., 1999) .p.6.

[10] Laws of Western Nigeria Cap 100, 1959.

[11] Property and Conveyance Law s. 2

[12] D Chappelle, *Land Law* (6th edn, England: Pearson Education Ltd, 2004) p. 24.

[13] P Butt, *Land Law* (2nd Edn, Australia: Law Book Co. of Australasia, 1988) p. 9.

[14] B A Garner (ed.), *Black's Law Dictionary* (9th edn, St. Pauls – Minnesota: Thomson West, 2006) p. 955.

[15] I O Smith, *op cit,* p. 7.

[16]Minerals Act Cap M12, Laws of the Federation of Nigeria, 2004 s.1. Constitution of the Federal Republic of Nigeria Cap C23 LFN, 2004 s. 44(3)

[17] *Dupa & Mayo* (1669) I Saund 282.

[18] *Bull Minning Co. v Osborne* (AC) 351; *Stoneman v Lyons* (1975) 133 CLR 550.

such things cannot be subjected to the control of the owner of the land, the ownership of such thing will vest in him.

Things Attached to the Earth's Surface

Generally those things attached to the body of earth forms part of the land. However, the attitude of common law and customary law seems to be at variance on whether such artificial things like building or other structures which are added to land constitute part of the land so as to accrue to the owner of the land. The basic rule at common law is that all things attached to the land forms part of the land and entitle the owner of the land to the same right of property as the soil itself[19] based on the principle of *quic quid plantatur solo solo cedit.* It must be emphasized however, that this maxim does not apply inflexibly in all situations. Its application in any particular case depends upon the facts and circumstances of each case such as the nature of the objects and upon any statutory enactment modifying the operation of the maxim. As to the nature of the object, concrete structures such as building unquestionably forms part of the land. However, difficulty has always arisen mainly with respect to chattels which are affixed or attached to the ground or to a building known as fixtures. Though fixtures become part of the land, fittings do not and it is therefore imperative, at all times, to distinguish between the two.[20] There is no hard and fast rule as to determining when a chattel is a fixture or a fitting. The difficulty in determining whether or not a chattel is a fixture or fitting was vividly exemplified by Professor E. H. Burn when he asserted thus:

> A brick in a builder's yard is a chattel; once used to build a wall it becomes part of the land; and if the wall is knocked down the bricks becomes chattel again. When land is sold, the conveyance includes the land but not the chattel, but includes those things which were once chattel but which have become land.[21]

In order to resolve this reoccurring confusion the courts have developed the rule that chattels do not become part of the land unless they are actually fastened to or attached to the ground or a building with a view to enabling the land or building to be more conveniently used and not merely to facilitate the more convenient use of the chattel, as chattel. In this wise, the court in order to ascertain whether or not a chattel forms part of the land would usually consider the degree of annexation[22] and the purpose of annexation[23]. Blackburn J. Succinctly put the principle thus:

> Perhaps the true rule is that articles not attached to the land otherwise by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land...on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was so intended all along.[24]

Under the Nigerian Customary Law, the law is not settled as to the applicability or otherwise of the principle of *quic quid plantatur solo solo cedit.* More so, there is no consensus among text writers on the subject. However, as Umezulike has rightly observed, it is more practical, valid, and consistent with existing customary laws of the people of Nigeria to define land as detached from the projects, improvements, crops, trees and other things affixed or growing on it.[25] In Igbo customary law, for instance, land does not include the things on it or attached to it. [26] Thus neither the economic trees nor houses on it form part of the land on which they stand. On the other hand however, some law text writers have argued that land includes the buildings or improvements on it.[27] The only case in which the maxim was expressly applied was *Okoiko v Esaldalue*[28] where that proposition of law was made with particular reference to customary pledge, same being the main subject of determination in that case. Thus though the case may be taken as an authority for the applicability of the maxim to customary pledge, it cannot be an authority for the applicability of the maxim to customary law generally. The conflict of opinions on this issue is also manifest in the plethora of conflicting decisions of the court on the issue.[29] In the light of

[19] I O Smith, *op cit,* p. 10*; Francis v Ibitoye* (1936) 13 NLR II; *UAC Ltd v Apaw* (1936) WACA 114; *Adeniyi v Ogunbuji* (1963) NMLR 396.
[20] D Chappele, *Land Law* (6th edn, England: Pearson Education Ltd, 2004) p. 28.
[21] E H Burn, *Maudley & Burn's Land Law Cases and Materials* (5th edn, London: Butterworths, 1986) p. 89.
[22] *Berkley v Poulett* (1976) 242 EG 39; *Holland v Hodgson* (1972) LR 7 CP 382.
[23] *Legh v Taylor* (1902 AC 157; *Re Whaley* (1908) 1 Cl 615; *TSB Bank PLC v Bottom* (1995) ECGS 3.
[24] *Holland v Hodgson* (*Supra*).
[25] I A Umezulike, *op cit,* p. 6.
[26] S N C Obi, *The Ibo Law of Property* (London: Butterworths African Law Series No. 15, 1965) p. 32.
[27] G B A Coker, *Family Property Among Yorubas* (2nd edn, London: Sweet & Maxwell, 1966) pp 39-40; N A Ollennu, *Principles of Customary Law in Ghana* (London: Sweet & Maxwell, 1962) p. 1.
[28] (1946) SC 15
[29] *Sarteng v Darkwa* (1940) 6 WACA 62; *Okoiko v Esaldalue* (supra); *Alao v Ajani* [1989] 4 NWLR (Pt. 113) 2.

the complex nature of varieties of facts that may constitute any particular case; the application of the maxim to any particular case would invariably depend on the circumstances of that particular case. It is pertinent to state however, that it is the position of this work that the application of this maxim is inconsistent with the authorities and the general principle of customary law of the, Igbo people of Nigeria. It is the customary practice that economic trees and other structures on land may be owned separately from the land on which they stand, and may be transferred independent of the land.[30] In Igbo customary law, for instance, though land may belong to the family or community as a whole, individuals are given the rights to build or farm on such family land. In such instances, title to such improvements on the land always resides in the individuals. Even where the family or community wishes to recover such land from the individual, they would normally give such individual time to remove such improvements. The principle does not also apply under the institution of customary tenancy.[31] Under Islamic law, a person has no title to building erected on his land even by a trespasser but may require the trespasser to restore the land to its original state or claim compensation for the restoration.[32] The building or other structures attached to a land, or crop or trees planted thereon are subject of ownership distinct and separate from the land itself and are commonly held by a separate title.[33]

The Airspace above the Soil

This consists of the earth's surface up to the sky. By virtue of the maxim c*uius est solum eius est usque ad coelum* which literally translates to 'the person who owns the soil owns it up to the sky', land includes the air space above the soil. However, this maxim may not be true in the present day as International Law and Common Law has qualified this apparently limitless entitlement especially with regard to the right to the outer space. The right to airspace above the soil now extends only to such height as is necessary for the ordinary use and enjoyment of the land and structures upon it.[34] The remaining airspace is owned by the State.[35] This position of the law is reflected in the 1919 Paris Convention for the Regulation of Aerial Navigation, which recognized the full sovereignty of States over airspace above their land and territorial sea.[36] It is pertinent to observe however, that the principle of the complete sovereignty of the airspace by a State is further qualified, not only by the multilateral and bilateral conventions which permit airliners to cross over the territories of contracting States under the recognized conditions and in the light of accepted regulations, but also by the development of the law of outer space.[37] The development of the law of outer space also brought to light the inadequacy of the *ad coelum* rule. Thus, the jurisdiction of a country to the airspace was also limited in height, at most, to such point where the airspace meets the space itself.[38] However, it has not been precisely determined where this point lies. Beyond this point separating the air from the space, the States have agreed to apply the International Law principle of *res communis* so that no portion of the outer space may be appropriated to the sovereignty of individual State.[39] This also applies to the moon and other celestial bodies.[40]

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[30] *Otogbolu v Okeluwa* (1981) SC 99. See also S N C Obi *op cit* I A Umezulike, *op cit,* p. 7.
[31] I O Smith, *op cit,* p. 11; *Etim v Eke* (1941) 16 NCR P. 43.
[32] *Ibid*
[33] A A Qadri, *Islamic Jurisprudence in the Modern World* (India: Taj Publishers, 1999) p. 316.
[34]*Berneistein v Skyviews and General Ltd* (1978) Q.B. 479 Per Lord Griffiths; *Corbett v Hill* (1870) LR 9 Eq 671 at 673; *Wandsworth Board of Works v United Telephone Co*. (1884) 13 QBD 904 at 915; C Harpum *et al*, *Megary & Wade The Law of Real Property* (6 edn; London: Sweet & Maxwell, 2000) p. 57.
[35]*Nicaragua v United States* (1986) ICJ Rep. 14 at 128 or (1986) 76 ILR 1; *Benin v Niger* (2005) ICJ Rep. 90 at 142. See also R Jennings & A Watts (eds) *Oppenheim's International Law* (9th edn, England: Oxford University Press, 2008) p. 625.
[36] *Pan Am Airways v The Queen* (1981) 2 SCR 565 or (1981) 90 ILR, 213.
[37] M N Shaw, *International Law* (6th edn, India: Cambridge University Press, 2008) pp. 542-543.
[38] *Ibid.*
[39]The Space Millennium; The Vienna Declaration on Space and Human Development adopted by Third United Nations Conference on the exploration and Peaceful Uses of Outer Space(UNISPACE III), Vienna,19th to 30th of July, 1999. <https://www.google.com/url?q=http://www.unoosa.org/pdf/reports/unispace/viennadeclE .pdf&sa=U&ved=0ahUKEwj3_fCd3ePLAhXLQBQKHb2NB1EQFggNMAA&sig2=eC_FiMHlc7BAXH5YYWS8Yg&usg =AFQjCNEMfvkBK7sZ7lYy-nvw-Upl7f_Kog> accessed on 28/03/2023; UN General Assembly Resolution 1962(XVII), adopted in 1963 and entitled the declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space; The Declaration on International Co-Operation in the Exploration and use of Outer Space adopted in Resolution 51/126,1996. The legal regime for outer space was clarified by the signature, in 1967, of the Treaty on Principle Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and Other Celestial Bodies. See also B Cheng, 'Article VI of the 1967 Space Treaty Revisited:"International Responsibility", "National Activities", and "The Appropriate State" (1998) *Vol. 26, No. 1 Journal of Space Law,* 7-32; B Cheng, 'United Nations Resolution on Outer Space:"instant" Internationl Customary Law?' (1965) *5 Indian Journal of International Law*, 23-112.
[40]B Cheng, 'The Moon Treaty; Agreement Governing the Activities of States on the Moon and other Celestial Bodies within the Solar System other than the Earth, December 18, 1979' (1980) *33 Current Legal Problems,* 231-232; C Q Christol, 'The Moon Treaty Enters into Force' (1985) *79 American Journal of International Law*, 163.

Incorporeal Hereditament

An incorporeal hereditament is an intangible right in land[41] such as easements. An incorporeal hereditament is an inheritable right existing on land which is not the object of sensation; or can neither be seen nor handled but which are creations of the mind and exist only in contemplation.[42] Incorporeal hereditaments will include rights on land though not capable of physical existence or possession but actually exists and is capable of being enforced in law. Such rights like easements, profits or rents will qualify under this incorporeal right. John Austin distinguishing between corporeal and incorporeal hereditament remarked that while 'a corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right but the right itself'.[43] For clarity of thought and ease of understanding, we shall proceed to examine some of these incorporeal hereditaments under the next sub-heading.

3. Rights and Interests in Land

The law of real property regulates rights and interests in land in varying degrees usually denoted by the word 'title'. Though employed in various ways, title is generally used to denote or describe either the manner in which a right to real property is acquired or the quantum of interest or right which can be held in a property. It has been described as connoting the existence of facts from which the right of ownership and possession could be inferred, limitations being in terms of time[44]. As rightly and succinctly posited by Sir Fredrick Pollock; the law of real property is, in the first place, the systematic expression of degrees of control, use and enjoyment of property recognized and protected by law.[45] Title may be absolute or restricted. When it is absolute, it is synonymous with ownership but when it is restricted, the person is entitled to occupational or possessory rights but not ownership; it may also be a mere right to use.[46] Right to title may also be original or derivative and include such right as ownership, possession, easement, *profit a prendre*, etc.

Ownership

Ownership is of both legal and social significance; hence it has become the focus of governmental policy.[47] Ownership consists of an innumerable number of claims, liberties, power and immunities with regard to the thing owned.[48] Such rights are conceived as not separately existing but merged in one general right of ownership.[49] The most complete of relations that may exist in land is that expressed in the notion of ownership. It connotes a complete and total control which a person can exercise over land. It is that interest in land that is superior to every other interest existing in land and from which every other interest gets their validity. In the words of A. J. Smith, 'what is special about ownership is that it is the ultimate right to use (and abuse) the object or right in question'.[50] The Supreme Court in succinct pontification of the nature of ownership stated thus:

> It connotes a complete and total right over a property. The owner of the property is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property and he exercises his right of alienation or disposition without seeking the consent of another party because as a matter of law and fact, there is no other party's right over the property that is higher than that of his.... The owner of the property can use it for any purpose, material, immaterial, substantial, non-substantial, valuable, invaluable, beneficial or even for purposes detrimental to his personal or proprietory interest. In so far as the property is his and inheres in him, nobody can say anything. The property begins with him and ends with him. Unless, he transfers his ownership to another person he remain the allordial owner.[51]

In the light of the above exposition by the Supreme Court, it would be right to posit that ownership connotes the totality of rights and powers exercisable by a person over a property. These rights include, the right to income from it in money, in kind or in services and the power of management including that of alienation.[52] According

[41] B A Garner, *op cit,* p. 794.
[42] Blackstone: Commentaries, Vol 11 p.17 cited in I O Smith, *op cit,* p. 12.
[43] J Austin, *jurisprudence* (5th Edition) Vol. 1 p. 362, cited in I O Smith, *loc cit.*
[44] *Ogunleye v Oni* [1990] 2 NWLR (Pt. 135) 754
[45] F Pollock, *Jurisprudence and Legal Essay* (London: Macmillan, 1961) p. 93.
[46]This point is instructive as it would be our guiding principle when we shall discuss the nature of the right of occupancy introduced under the Act.
[47]R W M Dias, *Dias on jurisprudence* (5th edn, London: Butterworth, 1985) chapter 14, p. 292.
[48] *Ibid*; A N Saha, op cit, 532.
[49] Ibid; Halsbury Laws Of England, 13th edn, Vol. 29, p. 371.
[50] A J Smith, *Property Law* (4th edn, England: Pearson Education Ltd, 2003) p. 6.
[51] *Abraham v Olorunfunmi* [1991] INWLR (Pt. 165) 53.
[52]L M Qin, 'Reform of Land System in China' (1994) *Singapore Journal of Legal Studies* 495-520; C O Olawoye, *Title to land in Nigeria* (Lagos: Evans Brothers Ltd, 1974) p. 1; L K Agbosu. 'The Land Use Act and the State of Nigerian Land

to Garner, 'ownership is a legal relationship between a person capable of owning and an object capable of being owned'.[53] It is pertinent to emphasize however, that the owner of a property is not necessarily the person who, at any given time, has the whole power of use and disposal since in most cases, there may be no such person, it suffices if the person has the residue of all such powers.[54] Ownership therefore connotes the right to possession, mediate or immediate. An important and widely agreed feature of ownership is that there is some individual or collective whose decisions with respect to a thing others are bound to accept as final.[55] Ownership, therefore carves out a sphere of exclusive jurisdiction with respect to a thing in which one's choices are not subject to the choices of others.[56] This represents the concept of ownership of property in absolute terms; but it should be noted that this absolutistic view of property ownership is utopian and has been criticized.[57] The specific incidents of ownership have been highlighted by different scholars.[58] According to Honoré, [59] the incidents of ownership are the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the right of transmissibility, the right of absence of term, the duty to prevent harm, liability to execution and the incident of residuarity

It must be observed that the above postulations as to the true meaning and incidents is of ownership of land is true and important in its detail, only in theory.[60] This absolutistic view of ownership appears to have significantly declined in recent years in view of the 'instrumentalists' view that individual property rights should be allocated in whatever way that best promotes the societal goal.[61] In in practice, the State in the exercise of it protective and supervisory jurisdiction over all things within the State usually impose restriction on the exercise of the owner's right for the general well-being of the society. This is predominantly predicated on the fact that during the first half of the 20th century, the reformers enacted into law their conviction that private power was a chief enemy of society.[62] Property was thus subjected to reasonable limitations in the interest of the society. The regulatory agencies, federal and state alike, were strongly concerned with the furtherance of this reform. In sustaining this major inclination against private property, the old idea that property and liberty were one was rejected in the belief that there must be power to regulate and limit private rights.[63] Thus by the doctrine of tenure that operated in England, the radical title to, or allordial ownership of all land in England is vested in the Crown.[64] This inclination against private property rights seems also to have influenced the provision of Section 1 of the Land Use Act.

It must be emphasized, albeit briefly, that the holder of right of occupancy introduced under the Act does not enjoy all the incidents of ownership highlighted above. The absolutist conception of ownership as described above has its full significance in the Pre-Act land tenure especially when one views such ownership from the perspective of the family or community. Thus it has been judicially established that in its application to Nigeria, the fee simple title did not have any of the restrictive trapping of feudalism and conferred a full and allordial ownership to the holders.[65] It is important to highlight, at this point, that every legal system has its own meaning given to ownership. In England for instance, all land belongs to the crown as the absolute owner. Thus, the

Law' (1988) *Journal of African Law*, *Vol. 32, No.1*, 5. See generally, J Waldron, *The right to private property* (Oxford: Clarendon Press, 1988).

'[53] J F Garner, 'Ownership and the Common Law' (1976) *JPEL* p. 403

[54] F Pollock, *op cit,* p. 98.

[55]See generally, L Katz, "The Concept of Ownership and the Relativity of Title" (2011) *2(1) Jurisprudence* 191–203. also, available on <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1957119> accessed 2/04/2023. See also, L Katz, 'Ownership and Social Solidarity: A Kantian Alternative' *(2011) 17(2) Legal Theory,* 121; B Mcfarlane*, The Structure of Property Law* (London: Hart Publishing, 2008) pp 5-14.

[56] A Ripstein. *Force and Freedom: Kant's Legal and Political Philosophy* (London: Harvard University Press, 2009)244-245.

[57]C Ilegbune, 'Land Ownership Structure under the Land Use Act' (2003) *Vol. 23 JPPL*, 25. IO Smith, 'Power to Make Town Planning Laws in a Federation: The Nigerian Experience' (2004) *24 JPPL*, 23.

[58]Professor Paton proposed four of these incidents. See, GW Paton & DP Derham, *A Textbook of Jurisprudence* (4th edn, London: Oxford University Press, 1973,) p. 517; Professor John Salmond proposed five; See, J Salmond & P J Fitzgerald, *Jurisprudence* (12th edn, London: Sweet & Maxwell, 1966), p 246-249. Prof. Garner reduced these incidents to three which are the right to possess and enjoy, right to alienate and the right to destroy. See, J F Garner, 'Ownership and the Common Law' *loc cit*.

[59]A M Honoré, *Ownership; Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) p.161–192 cited in J Waldron, *The right to private property* (Oxford: Clarendon Press, 1988) p. 336. See also I A Umezulike, *op cit*, p. 19.

[60] C Ilegbunam, *art cit*, 25.

[61] A Bell & G Parchomovsky, 'A Theory of Property' (2005) C*ornell Law Review, Vol. 90,* 531.

[62] T Ajala, 'Private Property Right: A Vanishing Concept' (2003) *Vol. 22 JPPL*, 79.

[63] Ibid; Philbrick, *loc cit.*

[64]R Megarry & D J Hayton (eds), *Manual of the Law of Real Property* (6th edn, London: Stevens Publishing, 1982) pp 28-29.

[65]*Kabiawu v Lawal* (1965) 1 All NLR 329; B Nwabueze, *op cit,* p. 84; C O Olawoye, *Title to Land in Nigeria* (Lagos: Evans Brothers, 1974) pp. 17 – 18.

citizens who occupy land do so for a period granted by the crown. The right to use and occupy land is known as estate enjoyed on the land which may be finite or infinite. This doctrine of estate has transformed into ownership with all the incidents of that concept as regulated by the crown. The implication of this doctrine therefore is that although a subject in England cannot own the physical land, he does own an estate in it. His ownership of estate, however extensive, cannot be allordial, the allordial title being vested in the crown.[66]

Prior to the promulgation of the Land Use Act, there existed at least six sources of ownership of land thus: communal ownership, family ownership, individual ownership, State ownership, ownership by corporate bodies and ownership by the stool or Chieftaincy Office. Currently in Nigeria, by virtue of Section 1 of the Land Use Act[67] all land in the territory of each state is vested in the Governor of the state who grants right of occupancy to individuals and corporate bodies. The implication of the above provision therefore, is that the only right available to an individual in Nigeria, under the current land law regime, is the right of occupancy. Therefore, ownership of land in Nigeria today must be viewed in the light of a right of occupancy on the land with the attendant incidents.[68]

Possession

Possession generally means effective physical or actual control of a property; it connotes the direct physical relationship of a person to a thing.[69] According to the Blacks Law Dictionary, it means 'the fact of having or holding property in one's power; the exercise of dominion over property'.[70] In this context, it means physical possession quite apart from the right by virtue of which the property is had. Possession is the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world or against all the world except certain persons.[71] In relation to land, possession has been described as 'a word of wide and sometimes vague and ambitious import'.[72] Nnaemeka Agu JSC in *Buraimoh v Bamgbose*[73] also remarked thus:

> (Possession) may mean effective physical or manual control or occupation of land-*de facto* possession-as well as possession *animus possidendi* together with that amount of occupation or control of the land which is sufficient to exclude other persons from interfering-de-jure possession.[74]

The complex nature of possession is also succinctly stated by Pollock and Wright thus:

> As the name of possession is...one of the most important in our books, so it is one of the most ambiguous.... In common speech, a man is said to possess or to be in possession of anything of which he has the apparent control or from the use of which he has the apparent power of excluding others....[75]

As noted earlier, the right to possession is an incident of ownership. It may also arise, not as an incident of ownership, but also by virtue of grant from the owner. However, possession need not be based upon a right to possess as in the case of a person who takes possession of land without any right to do so; for instance, an adverse possessor.[76] In this instance, such possession without right may be wrongful against the person to whom the right of possession belongs, the possession being in that situation called an adverse possession. However it may not be wrongful against others without better title. From the *dictum* of Nnaemeka-Agu in *Buraimoh v Bamgbose*[77] above, possession may be classified into two categories viz: *de facto* possession and *de jure* possession. *De facto* possession means effective physical or manual control of land[78] such as physical presence, living on land, cultivation of land, etc. The sort and degree of control vary with the nature of the thing possessed. For instance, the control which a person has over a book or other chattel, which he holds in his bag, is perhaps the fullest extent of control that can be exercised over anything. Land on the other hand cannot

[66]R Megarry & D J Hayton (eds), *lo cit.*
[67] Cap L5 L.F.N. 2004.
[68] I O Smith, *op cit,* p. 46
[69] *Ibid,* p. 47.
[70] B A Garner, *op cit*, p. 1281.
[71] *The New Lexicon Webster Dictionary* (USA: Lexicon Publications Inc, 1987) Vol. 2 p.784.
[72] Per Nnaemeka Agu JSC (as he then was) in *Buraimoh v Bamgbose* [1989] 3 NWLR (Pt. 109) 352 at 355.
[73] *Supra.*
[74] *Supra* at 306.
[75]F Pollock & R S Wright, *An Essay on Possession in the Common Law* (London: Clarendon Press, 1988) pp. 1-2. See also G L Williams (ed), *jurisprudence by John Salmond* (10th edn. London: Sweet & Maxwell, 1947) p. 285.
[76]Adverse possession is the enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious. See B A Garner, *op cit,* p. 62.
[77]*Supra.*
[78] *Buraimoh v Bamgbose* (*Supra*).

however be reduced into such full control because of its immovable nature. Therefore with respect to land, all that seems to be required is some visible or external sign which can be regarded as indicating control over such land.[79] *De jure* possession, on the other hand, is singular and exclusive. It is the amount of control or right to occupy as would be sufficient to exclude other persons from interfering with the property. The control must be total and the right to occupy at will certain. It is pertinent to emphasize that two persons claiming adversely against each other cannot exercise legal possession.

The core significance of this exposition on possession is that it gives the right to keep away intruders even where the possessor does not himself have legal title. He can keep away all those interfering with his title except a person with a legal title or better title. Moreover a person in possession is presumed to have a better title to the property until the person with a better title is established and, in most cases, so declared by the court of competent jurisdiction. In this respect, it is pertinent to note the distinction between what is known as 'possessory right' or 'right of possession' as distinguished from 'right to possession'. While the former usually accrue to a person in *de facto* possession and means the right of a person who is in physical possession to continue in same until the determination of any dispute that may arise between him and another; the latter usually accrue to the owner of the land and means the right to occupy at will subject to any encumbrance on the land to which he, the owner has agreed to.

Easement

An easement is a right attached to land which allows the owner of the land (the dominant tenement) either to use the land of another person (the servient tenement) in a particular manner or to restrict its use, by that other person, to a particular extent for the advantage of the owner of the dominant tenement.[80] The extent of an easement depends entirely upon the construction of the terms of the agreement granting the easement.[81] Easement confers on its owner no proprietary right in the land affected. It merely imposes a definite and limited restriction upon the proprietary rights of the owner of the land.[82] Easement usually arises by definite grant by the owner of the servient tenement.[83] It can also arise by prescription and by necessity. The latter type of easement is the one which the, law in particular circumstances, creates and makes appendant to the dominant tenement by virtue of the doctrine of implied grant to meet the necessity of the particular dominant tenement. Even though easement is a non-possessory interest in the servient land, it may be perpetual (in fee), for life, or for a term of years. The duration will depend on the instrument of grant. According to Powell, easement can run the gamut of durability.[84] However easement given for a specific purpose is implicitly defeasible if the purpose ceases to exist or if it becomes accomplished, abandoned or ruled impossible of accomplishment. An easement may be positive or negative. It is positive when it consists of a right to use the land of another or a particular manner. It is negative when it consist of an imposition of a restriction on the use another person my make of his land. The right to easement is a privilege without profit.[85] It is a right in *rem* and thus, permanently binds the land other which it is exercisable and permanently avails the land for the benefit of which it exist. Thus it may be enforceable in equity against person who acquires the land with notice of its existence under the rule in *Tulk v Moxhay.*[86] Rights which have been held to constitute easements include; right of way,[87] Right of access to light,[88] right to support of building,[89] right to take water from or access a neighbour's land,[90] right to use a park for recreation,[91] etc.

For an incorporeal hereditament to qualify as an easement, the following conditions must be present:

i. There must be a dominant and a servient tenement.[92]
ii. The dominant and servient owner must be different persons.[93]

[79] *Offei v Danquah* (1961) ANLR 238. See also *Ayunde v Salawo* [1989] 3 NWLR (Pt. 159) 297 where the erection of a fence or survey pillars on vacant and unenclosed land has been held to be sufficient indication of possession. Further see *Okechukwu v Okafor* (1961) 1 ANLR 685

[80] *Manning v Wasdale* (1836), 5Ad. & E 758; *Okunzua v Amosu & Anor* [1992] 6 NWLR (Pt. 248) 417; *West Encyclopedia of American Law* (St Paul Minnesota: West Group, 1988) Vol. 4, p. 175. *The New Lexicon Webster Dictionary* (USA: Lexicon Publications Inc, 1987) Vol. 1, p. 553.

[81] *Ibid*

[82] G Cheshire, *Modern Law of Real Property* (7th edn, London: Butterworths, 1954) 467.

[83] I A Umezulike, 'Easements and the Problems of Startling Presumptions' (2004) 25 JPPL, 1-11 at 3.

[84] R R Powel & P J Rohan, *Powell on Real Property* (abridged edn, New York: Mathew Bender, 1968) p. 572.

[85] J Burke, *Jowitt's Dictionary of English Law* (2nd Edn, London: Sweet & Maxwell, 1977) Vol. 1. p. 675.

[86] (1948) 41 ER 1143.

[87] *Wheeldon v Bourrows* (1889) 12 Ch D; *Collins v Slade* (1874) 23 WR 199.

[88] *Colls v Home & Colonial Stores Ltd* (1904) AC 179.

[89] *Dalton v Angus & co* (1881) 6 AC 740.

[90] *Mocarthey v London merry & Lough Swelly Railway* (1904) AC 301.

[91] *Re Ellen borough park* (1956) Ch 131,

[92] *Rangelly v Midland Railway Co.* (1863) 3 Ch. App 306 at 311; J Burke, *op cit*, p. 675.

iii. The easement must accommodate the dominant tenement, ie it must be beneficial to the enjoyment of the dominant tenement[94] and must be appurtenant to the land.[95]
iv. The right must be the subject matter of a grant. This presupposes that the nature and extent of the right must be capable of exact description and its sphere of operation precise and certain.[96]

Profit a prendre

A *profit a prandre* is a right which may either be dependent or appurtenant to a corporeal hereditament or held in gross, to go into the land of another person and take some profit or material therefrom.[97] It literally means profit for a short time and it is strictly an interest in land of another. Like easement, the rights created under *profit a prendre* are protective from interference. The right created by *profit a prendre* could be made the subject matter of a separate title recognized by law.[98] The owner of the profit, unlike the grantee of an easement, need not own land to be entitled to such benefit.[99] Also, unlike easement, profit may be enjoyed in common with the servient owner.[100] The four main classes of profits are commons of pastures[101], commons of pislary,[102] commons of turbary[103] and commons of estovers.[104]

4. Conclusion

From the forgoing discussion, it is found that in Nigeria, land in its legal sense include the earth surface; subjacent things of a physical nature; everything attached to the earth's surface; the airspace above the soil as well as incorporeal rights. It was however found that the legal conception of land as including subjacent things of physical nature are qualified by statutes which usually provide for the ownership of such things by the government in the interest of the State. It was also found that the right to airspace above the soil now extends only to such height as is reasonably necessary for the ordinary use and enjoyment of the land and structures upon it and does not extend up to the sky. The rights and interest that may exist in land include the right of ownership, possession, and easement as well as *profit a prandre.* It was however found that these rights are subject to and have been modified by the right of occupancy introduced under the Land Use Act. This is especially so for the right of ownership. The implication is that in Nigeria, when one talks about ownership of land and the rights and interest thereon, it shall be limited by the provisions of the Land Use Act relating to right of occupancy.

[93] *Borman v Griffith* (1930) 1 Ch D. 493; *Beddington v Atlee* (1887) 35 Ch D 317.
[94] *Hill v Turper* (1866) 2H & C 121.
[95] *Lloyd v Smith* (1850) 10 C & B 164
[96] *A.G. v Antrobus* (1905) 2 Ch D. 188 198-199
[97] T O Elias, *Nigeria Land Law* (4th edn, London: Sweet & Maxwell, 1971) p. 253; B O Nwabueze, *Nigerian Land Law* (Enugu: Nwamife Publishers Ltd, 1974) p. 11.
[98] *Amakree v Kalio* (1923) 2 NLR 108; *Bassey v Ekanem* (1952) 14 WACA 364.
[99] *Lord Chesterfield v Harris* (1908) 2 Ch. 397 at 421; *Lovett v Fairclough* (1989) 61 P & CR 385 at 396
[100] IO Smith, *op cit*, p. 428.
[101] Right the right to graze cattle on another's land.
[102] Right of fish from another's private pond.
[103] Right to take turf or peat from another's land.
[104] Right to take materials for house building or household purposes from another's land.