

THE NATURE OF LAND OWNERSHIP AND THE PROTECTION OF THE PURCHASER

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ABSTRACT

This article examines the nature of ownership of land and derivative or subordinate real-rights under English law drawing some comparison with Romanic-Dutch ownership while arguing that the Anglo-American estate' or interest' in land is a mere semantic conundrum. It is the position of this writer that the concept of ownership in English law of real property, which dominantly influences our real property law in Nigeria and other common law jurisdictions such as the Bahamas and Jamaica, has not brought the desirable clarity to our real property jurisprudence/practice in Nigeria. The unfortunate problems faced by purchasers of real estate in some common law jurisdiction are also briefly examined in this article. The article seeks to advance a solution to these problems and in this context the writer strongly suggests that a land registration system of some model should be adopted in Nigeria and the Bahamas to protect purchasers of real estates and guarantee greater security of title and clarity in our conveyancing practice.

INTRODUCTION

Land is elemental. It is where life begins and it is where life ends. Land provides the physical substratum for human activity; it is the essential base of all social and commercial interaction. Land law is, accordingly, that part of the law which governs the allocation of rights and obligations in relation to 'real' or 'immovable' property. We spend scarcely a moment out of contact with terra firma and our very existence is constantly sustained and shaped by the natural and constructed world around us. The significance of land in human affairs is therefore incalculable, although it is only in an era of global environmental threat that we slowly begin to realize how fragile and irreplaceable the rich resource on which we so utterly depend is. In the case of real property, as was once observed, 'there is a defined and limited supply of the commodity.'¹ Land ownership bites both upon two concepts or forms of ownership i.e. the principal or dominant right and ownership of third party rights which are commonly known as subordinate real rights: X owns land for instance, but others may have rights in that land for land is an asset that lots of people can do lots of things with. We can live on it, build on it, work over it, catch fish in river or on it, play on it, and trade both on it and in it.²

Moreover, land is said to be static or stationary in the sense that it stays where it is, unlike say ships and other moveable items.³ At any given time a multitude of interests and rights can exist in one and the same land. More than anything else, the fact of the possibility of existence of multiplicity of interests and rights in land spins a serious conundrum in dealing with land ownership and prospective purchasers are usually faced with potential problems where issues are not

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¹ Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (1994) 1 AC 85 at 107D per Lord Brown-Wilkinson.

² See Qualified Lawyers Transfer Test 2007, Property Manual, BPP Professional Education 2007, London, England, p 1-5

³ These items are classified as personal property in contradistinction to land that is classified as real property.

handled with desirable expertise from a conveyancing perspective. Thus, the ownership of a land under English law is complex, and a potentially infinite number of people may have rights in it. That complexity militates against easy transactions in land. It may make it difficult to know at any given point in time who owns a piece of land or how many people have rights in it, or which third party rights have priority over other third party rights in a given land. When we view this from the context of legal terminology, the picture appears to be like a diptych for the reason that Western Legal systems have organized that intricacy in two different ways.

There are the common law systems, based on English law, and the civil law systems, descended from Roman law, and they take two quite distinct approaches to the ownership of land. For instance, in civil law systems, there is one owner of land, while others may have subordinate rights in it; in the common law on the other hand, ownership is not a unitary concept, and it may be impossible to say that any person is "the owner" of a piece of land. A veritable example is where land may be held upon trust, owned by one person for the benefit of someone else, and in this regard, we can rightly say that both the trustees and the beneficiary have ownership rights in the land, the one legal and the other equitable.⁴ In the common law, ownership is not a unitary concept, and it may be impossible to ascertain with pellucid clarity the owner of the entirety or totality of rights that inhere in a given property as right in the land may reside in multiple parties and thus the concept of absolute or full ownership becomes illusory in English law. In actuality under the English common law of real property there is always this dualistic approach to ownership of interest or estate in land, the one legal and the other equitable.⁵ Third party rights too inexorably follow the same principle in that they may be either legal or equitable and this sets up difficult questions or conundrum of priority and a purchaser is morbidly concerned about all these intricacies and complexities of English land law.⁶ In 1974, John Henry Merryman explained the difference between the two legal families like this:

The basic difference between Romanic ownership and the Anglo-American 'estate' or 'interest' in land can be illustrated by a simple metaphor. Romanic ownership can be thought of as a box, with the word 'ownership' written on it. Whoever has the box is the 'owner'. In the case of complete, unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits of income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership, even if the box is empty. The contrast with the Anglo-American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute has the largest possible

⁴ Note that the trust concept runs through the entire gamut of English law of property especially in the context of co-ownership. Whenever two or more persons have an interest in land a trust situation will arise. See J E Penner, *The Law of Trust*, 5th ed., oxford university press, 2006, pp 10-13.

⁵ The rigorous distinction drawn in the 1925 legislation between legal and equitable rights becomes more readily explicable when it is realized that the borderline between legal and equitable quality has provided, at least in historical terms, an important key to the resolution of the central question of land law. This central issue concerns whether subsidiary entitlements or derivative real rights of various kinds survive a disposition of the land to which they relate, thereby remaining valid and enforceable against a purchaser. This concern demands visceral scrutiny and appreciation by land law lawyers in the context of any given factual conveyancing matrix so as to accord greater circumspection to the protection of the interest of the purchaser.

⁶ See the case of *William and Glyn's Bank Ltd v Boland* (1981) A C 487.

bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of his bundle is gone.⁷

The construction of a coherent legal regime for land has not been a simple or instant process. Indeed, it is not easy to imagine, *tabula rasa*, how best to fashion a systematic body of rules governing rights in and over land.⁸ The conceptual point of crucial significance which lies at the back of the English law of land is the axiomatic construct that ownership of land does not exist and it still remains true that the law as it is today is still heavily impressed with the form of legal and intellectual constructs as mentioned above. English law has never contemplated with equanimity the idea of full ownership in the landowner. The world of the common lawyer has always been a curious blend of the physical and the abstract, a co-mixture or a collocation of the earthly pragmatic and the deeply conceptual.⁹ Having broken away from the Romanist legal tradition, the common lawyer devised a distinctive regime of property rules which – notwithstanding the extensive statutory consolidation of the early 20th century – is still piecemeal and full of internal ambivalence. The alternative to the dominium of civilian jurisprudence remains a collocation of organic adaptations, the common lawyer's crudely empirical outlook being encapsulated in a general reluctance to embrace any grand or over-arching model of the phenomenon of ownership.¹⁰ In consequence, the common lawyer's understanding of land still oscillates between a purely material conception of the physical stuff of land and a more cerebral image of land comprising a co-ordinate set of abstract rights. This tension between the empirical and the conceptual is indispensable to understanding the nature of land ownership under the English law.

At one level, the common lawyer's primary concern is with the observable phenomenon of de facto possessory control as exercised over physically identifiable terrain or premises. What actually happens on the ground – whether rightly or wrongly – has always constituted a powerful determination of entitlement in English land law. The normative tug of sheer physical fact should never be underestimated. Yet, at another level, the common law perception of property embodies an obsession with the rational manipulation of abstract concepts and with the careful outworking of axiomatic truths. Nowhere is this fascination with the naked force of reason more apparent than in the law of land, with its remorseless taxonomy of estates and interests,¹¹ its sub-classification of legal and equitable rights,¹² and with its multiple

⁷ JH Merryman, 'Ownership and Estate', (1974) 48 Tulane Law Review 916, at 927; cited in S Panesar, *General Principles of Property Law* (London, Longman, 2001) at 113. It should be noted further that under English law land was held in a pyramidal relationship of reciprocal obligation.

⁸ See Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 4th Ed., Oxford University Press, 2005, pp 1-4.

⁹ For a discussion of the tension between these various elements, see Gray and Gray, 'The idea of Property in Land', in S Bright and J K Dewar (Ed), *Land Law; Themes and Perspectives* (OUP 1998), pp 18-39.

¹⁰ See e.g. *Commissioner for Railways et al v Valuer-General* (1974) AC 328 at 351H-352A per Lord Wilberforce. Compare the dominium of Roman law, which treated as conceptually inseparable the owner's right to use, dispose of, and exclude others from his property with the English common law position. Dominium was an indivisible unity and the idea that it might be fragmented between a number of owners, each with a separate proprietary right to different aspects of dominium, was and still is unacceptable to civilian legal thought. See also Gray and Gray op cit at p 6.

¹¹ The doctrine of estate has its origin in the medieval theory of English land which was introduced after the Norman invasion of and conquest of 1066. By virtue of an act of conquest the King acquired an ultimate or 'radical' title to all land in England. The manifestation of the King's power in this regard lay in the political authority of the crown both to grant interests in the land to be held of the crown and also to prescribe the residue of unalienated land as the sovereign's beneficial interests. It

applications of propositional dogma.¹³ In the hands of the common lawyer, land law became a field of highly artificial concepts, each defined with meticulous – almost mathematical – precision.¹⁴ The idea of land and its relation to man has always been viewed in the form of being recognized only in the nature of being estates, interests and entitlements and this has led to the introduction of a theory of notional estates in land and not ownership of land in any sense of the word. English law recognizes only the ownership of abstract ‘estates’ rather than any ownership of land itself.¹⁵ Property in land is necessarily articulated through the medium of notional ‘estates’ in reality.¹⁶ It was, however, the characteristic interplay of empirical and conceptual concerns which has made modern law what it is, although the interaction has also served to infuse land law with a structural ambiguity which goes to the root of even the definition of such terms as ‘land’ itself.¹⁷ The common lawyer has no intellectual predisposition to propound large abstract declarations of ownership and has never done so in relation to ‘land’, but relies instead upon substantial reserves of common sense as applied, on a case-specific basis, to the raw facts of human behavior. It is in this regard that possession assumes a more preeminent dimension in the estimation of common law in dealing with the issue of ‘land’.¹⁸ The underlying tension between

follows that the King’s subjects – be they ever so great – occupied their lands on the terms of some grant derived ultimately from the largesse of the crown. It was in this regard that what the medieval tenant could say he ‘owned’ came to be referred to as estate. See Gray and Gray, *Elements of Land Law*, op cit pp 60-65.

¹² Within the field of proprietary rights in land, English law still draws a fundamental distinction between legal and equitable rights. Historically this distinction was grounded on the fact that legal rights were enforceable only in the common law courts of the King, whereas equitable rights fell within the exclusive and conscience-based jurisdiction, initially of the King’s Chancellor, and later of the Court of Chancery. See Pollock and Maitland, *The History of English Law*, (2nd edn, London 1968), Vol 1, pp 193-197.

¹³ In this way the austere propositional logic of unregistered land law demands that purchasers of land (and, indeed, all others) take unregistered estates subject to such pre-existing rights as legal easements, legal terms of years, legal mortgages and legal rights of entry. Note that the term ‘purchaser’ includes a mortgagee

¹⁴ See *Wright v Gibbons* (1949) 70 CLR 313 at 330 per Dixon J (confirming that central features of modern property law bear ‘many traces of the scholasticism of the times in which its principles were developed’).

¹⁵ The common law to a large extent has not found it necessary to construct any large or systematic theory of ownership. See Gray, ‘Property in Common Law Systems, in G E Van Maanen and A J Van der Walt (ed), *Property Law on the Threshold of the 21st Century* (MAKLU, Antwerp, 1996), pp 277-278. In contradistinction to the Romanic-Dutch legal system that emphasizes on dominion in relation to property right, it appears that the conceptual purity of a regime of individually ordered estates and interests in land under English law seemed to provide a perfectly functional substitute for more holistic ideas of dominium under the Romanic-Dutch system.

¹⁶ See *Reilly v Booth* (1890) 44 CH D 12 at 22-23 per Cotton L J, 26 per Lopes L J.

¹⁷ More than two centuries ago Blackstone declared ‘land’ to be a word of ‘a very extensive signification’. See *Bl Comm*, Vol 11, p 16. It has been further suggested in relation to land that something of its amplitude is captured in a number of statutory definitions which, although not uniform or consistent, point to ‘land’ as having a fairly complex meaning in English law. For instance, the law of property Act 1925, the primary statute contained within the corpus of English legislation 1925, describes ‘land’ as including land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land...See *Law of Property Act 1925*, s 205(1)(ix).

¹⁸ The common law theory of relativity of title therefore predicated that the best ‘title’ was that of the person whose claim to ‘possession’ was superior to that of anyone else. Since the best possible ‘title’ flows from ownership of the largest common law ‘estates’, unchallenged defacto ‘possession’ of land is equated with, and legally generates, ownership of an ‘estate’ in fee simple. Possession therefore is

the material and the conceptual has imparted a multi-dimensional complexity to the understanding of the term 'land' in English law.¹⁹ The first three dimension of land as a physical reality are perfectly consistent with the rough and ready empiricism which characterizes so much of English land law and our land law in Nigeria and the land law of other common law jurisdictions like the Bahamas and the Jamaica as well. The common law has also given a chronological significance to the raw and pragmatic notion of possession. The phenomenon of 'property' in land is simply a product of behavioral reality or socially constituted fact. It is indeed, at this point that it becomes mostly clearly apparent that effective possession comprises the basis of most claims of 'property' in land and, in the process, introduced the transformative concept of time-related 'estates' in the land.²⁰ The idea of land has taken a more cerebral dimension with the introduction of a theory of notional estates in land. In effect, English law invented an entire intellectual apparatus of artificial constructs in order to explain various forms of entitlement to land.

The idea of ownership can be seen to be effectively discountenanced by English law in that the devise of the 'estates' in land articulated the jural relationship between the land holder (i.e. the 'tenant') and his land who under the doctrine of subinfeudation is indeed a tenant to the original and primary land owner (i.e. the King/Queen) in whom all the ownership of land is vested. The inspired evolution of the 'estate' came eventually to provide a functional alternative to the holistic idea of dominium (or direct ownership of the land itself), which was part of the European heritage derived from Roman law.²¹ Indeed, perhaps, the single most striking feature of English law is the absence, within its conceptual scheme, of any over-arching notion of ownership.²² And it is in the distinctively English doctrines relating to estates and tenures that the roots of modern land law are to be located. Whereas the doctrine of tenures veritably served to describe the relationship existing between a tenant and his lord, it was the doctrine of estates, which mediated the relationship between the tenant and the land. The latter doctrine still plays a fundamental role in the classification or taxonomy of interests in land.

THE DOCTRINE OF ESTATES

The origins of the medieval theory of English land law lay in the Norman invasion of 1066. By virtue of an act of conquest the King acquired an ultimate or 'radical' title to all land in England.²³ This radical title was simply 'concomitant of

prima facie evidence of seisin in fee simple. *Peaceable de Uncle v Watson* (1811) 4 Taunt 16 at 17, 128 ER .232 per Mansfield CJ; See also *Re Atkinson and Horsell's Contract* (1972) 2 Ch 1 at 9 per Cozens-Hardy MR.

¹⁹ This veritably demonstrates the ultimate collocation/integration of the material and the conceptual in context

²⁰ See e.g. *National Carriers Ltd v Panalpina (Northern) Ltd* (1981) AC 675 at 708C, where Lord Rusesel of Killowen noted that a grant of an estate in fee simple passes the land 'as to its surface, and below its surface, and the airspace above, subject to exclusions. The three-dimensional nature of land is more eloquently than accurately expressed in the Latin maxim, *cuius est solum eius est usque ad coelum et ad inferos*; i.e. he who owns the land owns everything reaching up to the very heavens and down to the depths of the earth.

²¹ Following Roman law, the great codes of civilian law still define 'proprietary' in terms of the right to enjoy a thing and to dispose of it in the most absolute manner (see e.g. Code civil, art 544; Burgerliches Gesetzbuch, para 903; Swiss Civil Code, art 641).

²² See generally A W B Simpson, *A History of the Land Law* (2nd edn, London 1981).

²³ *Mabo v Queensland (No 2)* (1993) 175 CLR 1 at 48 per Brennan J, 80 per Deane and Gaudron JJ. (The Mabo case, involving the land rights of the Meriam people of the Murray Islands, provided an unusual – indeed almost unprecedented – forum for the critical examination in the High Court of

sovereignty' – a brute emanation of territorial power acquired and sustained through physical force.²⁴ It denoted the political authority of the crown both to grant interests in the land to be held of the crown and also to prescribe the residue of unalienated land as the sovereign's beneficial interest.²⁵ It followed that the king's subjects – be they ever so great – occupied their lands on the terms of some grant derived ultimately from the largesse of the crown. It was not initially clear what (if anything at all) the individual tenant could say he 'owned', but an answer was eventually found in the doctrine of estates.

The doctrine of estates carefully avoided the absolutist dogma that a person could have any direct relation of ownership with physical land. It is fundamental of English land law that nobody except the Crown owns any land.²⁶ At the heart of medieval theory lay the proposition that there could be no ownership of land, as such, outside the allodium – or prerogative title – of the crown. The object of each tenant's ownership was instead an artificial proprietary construct called an estate.²⁷ The notional entity of the estate was interposed between the tenant and the lands with the consequence that each tenant owned (and still owns) not land itself but an estate in land.²⁸ Each estate being graded with reference to its temporal duration. Estate in this context is merely viewed as slices of time. The duration of estates gave expression to the idea that each landholder owned not land but a slice of time in the land.

As was argued elegantly in *Washington's case*,²⁹

...the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time...By identifying a number of conceptual 'estates' as potential objects of ownership, the doctrine of estates effectively quantified the abstract entitlement which might be enjoyed by any particular tenant within the tenurial framework. The careful calibration of these estates injected a crucial dimension of time into the phenomenon of landholding, each estate comprising a time-related segment – a temporal slice of the rights and powers exercisable over land. As Pollock and Maitland so aptly put it, the doctrine of estate enabled proprietary rights in land to be 'projected upon the plain of time.'³⁰

Australia of the most fundamental concepts of English land law.) See also *Las Kiv' Alaams Band of Indians v Hudson's Bay Co* (1998) 158 DLR (4th) 526 at 535.

²⁴ 'Radical title links international and constitutional law notions with those which supports the private law of proprietary rights and interests in land' (*Wik Peoples v Queensland* (1996) 187 CLR 1 at 186 per Gummow J) For reference to the uncannily parallel notions of state sovereignty and private property, see Gray, (1991) CLJ 252 at 304; 'The Ambivalence of Property', in Prins (ed), *Threats without Enemies* (Earthscan Publications 1993), p 169.

²⁵ *Mabo v Queensland (No 2)* (1993) 175 CLR 1 at 48 per Brennan J.

²⁶ See *Lowe v J W Ashmore Ltd* (1971) Ch 545 at 554F per Megarry J.

²⁷ In English law no subject can own land allodially – he can own only an estate in land (*Minister of State for the Army v Dulziel* (1944) 68 CLR 261 at 277 per Lotham CJ). See also *Stokes v Costain Property Investments Ltd* (1963) 1 WLR 907 at 909E-F.

²⁸ See *Lowe v J W Ashmore Ltd* (1971) Ch 545 at 554F per Megarry J.

²⁹ (1573) 2 Plowd 547 at 555, 75 ER 805 at 816-817

³⁰ The substitution of an abstract estate in land (in place of land itself) as the object of proprietary right has had the most profound influence on English law. The ingenious compromise of the doctrine of estates resolved at a stroke the apparent contradiction between theory and reality in the ownership of land. At one level the 'estate' in the land merely demarcated the temporal extent of the grant to a tenant within the vertical power structure emanating from the crown. In practice the conceptualism of interlocking estates facilitated a functional scheme of landholding which obviated any holistic theory

THE THEORY OF TENURE AND THE MODERN IMPACT OF THE DOCTRINE OF ESTATES

The old common law estates were preserved, with modifications and additions, in the property legislations of 1925.³¹ It can even be argued that the scheme of landholding in Nigeria now contained in the Land Use Act 1978 is actually premised on the intellectual construct of the estate.³² Note the nature of the interest which the Act of 1978 confers on the proprietor or grantee. Modern English property legislation thus faithfully maintains the ancient theory that land ownership and use are mediated, not by the attribution to individuals of any direct ownership of the dominium over the land itself, but rather by the distribution of intangible jural entitlements which are interposed between persons and land.³³ In this respect at least, the perspective embraced by the statutory scheme is essentially, of property as an abstract right rather than as a physical resource, precisely on the footing that the only property in land which one can have is necessarily property in the form of a right. However, it should be acutely noted that ‘property’ in land is not an emanation of socially constituted fact, but rather comprises various assortments of artificially jural rights.³⁴ This vision of property as a right rests upon a complex calculus of carefully calibrated estates and interests in land, all underpinned by the political theory implicit in the doctrine of tenure.³⁵ In this sense, all property relationships with land are, accordingly, analysed through the intermediacy of artificial conceptual abstractions.³⁶ No citizen can claim that he or she owns the physical solum. One has ‘property’ in the form of an abstract right rather than ‘property’ in a physical thing. Each right is a

about the wider phenomenon of ownership. Indeed, it was the concentration on the rights and powers appertaining to different kinds of ‘estate’ which so sharply distinguished the common view of real property from the continental emphasis on full ownership in the sense of dominium. It was Otto Kahn-Freund who pointed out that owing to its habit of looking at the powers and right arising from ownership rather than at ownership in the abstract, English law has been able to introduce the time element into the property concept. The continental notion of property, like the dominium of Roman law, contains, as a matter of principle, element of eternity’ (‘Introduction’ to Karl Renner, *The Institutions of Private Law and Their Social Function* (London and Boston 1949), p 23). Consonantly with the feudal theory of ultimate sovereign title, some form of abstract estates constitutes the maximum interest which any subject -we should nowadays say any citizen - may ever hold in respect of land. As proprietary relationships with land thus fall to be analysed at a given instance – through the intermediacy of an estate – the tenant always having ownership of an intangible right (i.e. an estate) rather than ownership of a tangible thing (i.e. the land). At this point the law of real property becomes distanced from the physical reality of land and enters a world of considerable conceptual abstraction. But in the process the doctrine of estates effectively provides an invaluable means by which the three-dimensional phenomenon of realty can be carved up in a fourth dimension of time. See *Newlorn Housing Trust v Alsulaimen* (1999) 1 AC 313 at 317C-D per Lord Hoffmann; *Frazer v Canterbury Diocesan Board of Finance* (2001) Ch 889 at (42) per Mummery LJ.

³¹ The 1925 trilogy of legislations i.e. The law of property Act 1925, the Settled land Act 1925 and the Land Registration Act 1925 fundamentally or radically altered the entire landscape of English Real Property Jurisprudence.

³² The 1978 Land Use Act vests the ownership of all Lands in Nigeria/ various state of the federation in the Federal / state Government and in this regard it can as well be said that nobody owns land in Nigeria as all land in the State are vested in the state Government and the state governor is deemed to be the chief or principal trustee of all land in the state-See Section 1 of the land Use Act 1990 CAP L5 L.F.N 2004.

³³ Refer to the Nigerian Land Use Act 1978

³⁴ *Western Australia v. Ward* (2000) 170 ALR 159 at 165 per Beaumont and Doussa JJ

³⁵ See *Western Australia v. Ward* (2000) 170 ALR per North J. See p 145.

³⁶ In this sense, as Laskin J once said, “all legal interests are incorporeal” (*Saskatchewan Minerals v. Keyes* (1972) 23 D.L.R. (3^d) 573 at 586).

prepackaged bundle of tightly defined entitlement, the precise content of the bundle on the right involved.³⁷

It follows from the pre-eminence of the estate concept as the vehicle of modern land ownership that little now remains of the medieval theory of tenure. Tenure is already to some extent, a fiction in England.³⁸ Under tenural system of tiered or hierarchical landholding, all land in England (save unalienated crown land) was held, in pyramidal relationships of reciprocal obligations, either mediately or immediately of the crown. Whereas the concept of the estate systematized the relationship between tenant and the physical land, the concept of tenure characterized more closely the relationship between tenant and lord.³⁹ It being implicit in the relationship of tenure but both lord and tenant have an interest in the land.⁴⁰ Under the original feudal principle the lord seised his tenant of his tenement⁴¹. Unless the tenant failed in his service, the lord owed him enjoyment of his tenement as long as he lived.⁴² The different methods of landholding (differentiated according to the form of service required) were known as "tenure", each indicating the precise basis on which the land was held. Pollock and Maitland described the system of tenures in terms of series of "feudal ladders", noting that theoretically there is no limit to the possible numbers of rungs, and ... men have enjoyed a larger power, not merely of adding new rungs to the bottom of the ladder, but of inserting new rungs in the middle of it. In one of the authentic examples provided by Pollock and Maitland, it could be said that in Edwards 1st day, Roger of St German holds land at Paxton in Huntingdonshire of Robert of Bedford, who holds of Richard of Ilchester, who holds of Allan of Chartres, who holds of William le Boteler, who holds of Gilbert Nerville, who holds of Devorguil Balliol, who holds of the King of Scotland, who holds of the King of England.⁴³

The process of potentially infinite extension of the feudal ladder was known as subinfeudation. This is the process of parceling out land from the King as represented by the Crown as the owner of all the land in the country to his subjects as tenants in a hierarchical or pyramidal order from the top to the bottom who held the land in return for services etc. Subinfeudation has now been replaced by substitution to ensure more easy and free transfer of land in a modern society but the principle that the Crown owns all the land in England following the Norman conquest in 1066, and that the ownership of all land in England and Wales became vested in the Crown, in theory, has continued up to the present time.

The most any other person may own is a right of temporary possession or use of land. Other than the technical ownership of the Crown, the highest proprietary right anyone can hold is a right to possession of the land for a period of time, with or without attached conditions. Such a proprietary right to possess the land for a period of time is known as an 'estate' in land. Which particular estate you hold tells you for how long you hold the right to possession of the land. There are only two forms of land ownership capable

³⁷ Property in relation to land is a bundle of rights exercisable with respect to the land. (Minister of State for the Army v. Dulziel (1944) 68 CLR 261 at 285 per Rich J.) . See also *Western Australia v. Ward* (2000) 170 ALR 159 at (97) per Beaumont and von Doussa JJ. On this view the conceptual or cerebral aspect of 'property' in land takes over from the factual or pragmatic.

³⁸ See *Wik v. Peoples v. Queensland* (1996)187 CLR 1 at 244 per Kirby J.

³⁹ *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 767 at 771-772 per Earl of Selbourne LC.

⁴⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 46 per Breeman J.

⁴¹ On the concept of seism, see para 3.5, chapter 3 of Gray.

⁴² In this context, as Toby Milson op.cit, at p 40 has memorably pointed out, 'to seise is as much a transitive verb as to desseise'. Protection was the correlative of fealty.

⁴³ See Pollock and Maitland, *The History of English Law* (2nd edn, London 1968) Vol 1, p. 233.

of existing as legal estates; the freehold (known technically as the fee simple absolute in possession); and the leasehold (known technically as the term of years absolute). However subinfeudation carried the disadvantage that it tended to make the feudal ladder long and cumbersome, and in time the process of alienating land by substitution became more common. Under the latter device the alienee of land simply assumed the rung on the feudal ladder previously occupied by the alienor, and the creation of a new and inferior rung was no longer necessary. It later transpired that by the end of the 13th century a new concept of land as a freely alienable asset was beginning to displace the restrictive feudal order, and this evolution culminated in the enactment of Quia Emptores Act in 1290. This all-important statute constituted a pre-eminent expression of a new preference for freedom of alienation as a principle of public policy. The major innovation contained in the statute was the prohibition for the future of alienation by subinfeudation.⁴⁴ Following the enactment of 1290 Act only the Crown could grant new tenure and the existing network of tenures could only contract with the passage of time. Every conveyance of land thenceforth had the effect of substituting the grantee in the tenural position formerly occupied by his grantor; no new relationship of lord and tenant was created by the transfer; Note however that it is the Statute Quia Emptores which – quite unnoticed – still regulates fee simple transfer of land today.⁴⁵

In that regard it can be said that in some extremely notional sense, therefore, every parcel of land in England and Wales is held of some lord – almost invariably the crown. It is still technically the case that the crown holds the ultimate or radical title in all land; that no citizen can own land allodially; and that all occupiers of land are merely – *in the feudal sense* – ‘tenants’. Each transfer nowadays is merely a process of substitution of the transferee or grantee in the shoes of the transferor or grantor. The operation of the statute Quia Emptores during the last seven centuries has tended towards a gradual leveling of the feudal pyramid so that all tenants in fee simple are today presumed (in the absence of contrary evidence) to hold directly of the crown⁴⁶ Thus, against the background of the foregoing, then, the highest possible estate in land under English law is a freehold estate which to all intents and purpose nearly corresponds to ownership of land in the lay man’s parlance. This greatest of estates one can have under English land law is technically known as the fee simple absolute in possession. For the purpose of this article, this writer will simply refer to a fee simple absolute in possession as “free hold” and this is, in a given real estate transaction, what is usually transferred or conveyed to a purchaser who is acquiring the highest dominant estate in land albeit that the ownership of the subject land in the layman’s parlance is seemingly vested in the purchaser. The purchaser after the disposition is said to be ‘seised’ or ‘possessed’ of an estate in fee simple absolute in possession. The significance of the doctrine of seisin is not lost to the reader. The common law notion of title is founded essentially on the raw fact of unchallenged possession.⁴⁷ Although a central notion in English law, the term ‘possession’ has long

⁴⁴ Substitution replaced subinfeudation in this regard.

⁴⁵ It should be acutely noted that Quia Emptores remains effective in many parts of the common law world (see e.g. Imperial Acts Application Act 1969 (New South Wales), s 36; Property Law Act 1974 (Queensland, Australia), s 21). See also Bruce Ziff, *Principles of Property Law* (3rd edn, Carswell, Ontario 2000), pp 55-60..

⁴⁶ or in the context of Nigeria via our Land Use Act 1978, as the state “tenant in chief”.

⁴⁷ The Seisin – possession concept

lacked any concise explication.⁴⁸ The concept of ‘seisin’ is deeply embedded in the historical development of the English law.⁴⁹ The notion of seisin reflects the empirical orientation of the early common, which tended to analyse entitlement to land in terms of factual possession rather than in terms of some abstract or documentary title.

For all practical purposes, the owner of a freehold piece of land is equivalent to the owner of any other property in practice; it is usually perpetual, but if the current freeholder dies without next of kin and without a will, the land reverts to the crown. This is technically referred to as Escheat.

The owner of the freehold, since it is a form of property, is free to sell it or give it away. Alternatively, the owner may grant a lesser estate (one for a shorter period of possession) than his own to which that property will then be subject. Thus, when a freehold owner (or more appropriately called the owner of an estate in fee simple) grants a lesser estate which is of a certain duration, the estate granted is ‘leasehold’ or simply a ‘lease’. (i.e. a term of years). The residue of a freehold owner’s estate after the granting of a lease is known as the ‘freehold reversion’. At the termination of the lease, possession of the land will automatically revert back to the freeholder.

However, one will note that Merryman’s metaphor as previously mentioned of the black box of ownership conveys the idea that in a civil law (Romanic- Dutch) system in answer to the question “who owns the house?” It is supposed to be possible to point to one individual who is unambiguously the owner, while others may have rights of a different kind. He offers no metaphor for common law ownership, where there is no black box; one might compare something like a pack of cards, which has been dealt among a number of players. For that to work the pack has to contain an infinite number of cards; better perhaps would be a strudel or other flaky pastry construct, or a chocolate flake bar, where the texture is visibly complex, the substance splittable and sharable and the layers quite genuinely uncountable.⁵⁰

It can be argued that ownership under the Roman Dutch system is generally inimical to fragmentation which sharply contrasts with the position under the common law system which favors a multiplicity of interests in one and the same land at the same time and with its characteristic non-recognition of the concept of ownership and under which ownership is not a unitary concept and in this regard it may be impossible to say that any person is “the owner” of a piece of land.

Adewale Taiwo in his book “The Nigerian Land Law”⁵¹ observes that two practical difficulties present themselves on the concept of ownership. First, that the English law has never applied the concept of ownership to land.⁵² Secondly, that ownership “is a word of many meanings”.⁵³

⁴⁸ See *United v Dolfus Mieg et Cie SA and Bank of England* (1952) AC 582 at 605 per Earl Jorritt. (Possession is no simple concept). See *Mabo v Queensland No 2* (1992) 175 CLR 1 at 207 per Toohey J.

⁴⁹ See F W Maitland, “The Mystery of Seisin” (1886) 2 LQR 481; ‘The Beatitude of Seisin’ (1888) 4 LQR 249, 286.

⁵⁰ Merryman’s point is discussed further by Elizabeth Cooke in “The English Land Registration Act 2002 and The Nature of Ownership” Chap 5 of A Hudson (Ed.), *New Perspective in Property Law: Obligations and Restitution* (London, Cavendish, 2003), 117.

⁵¹ E.A Taiwo, *The Nigerian land law*, Ababa press, Ibadan (2011) p.10.

⁵² Under English law, all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to Seisin. As Burns puts it, “Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession. See Burns E H, *Cheshire’s Modern Law of Real Property* 12th ed, (Butterworths, London, 1976), 136.

⁵³ Burn op cit, 136-137

However, according to E. A Taiwo in the present context, ownership signifies “a title to a subject- matter whether moveable or immovable that is good against the whole world. In case of land law, ownership, according to the learned author signifies the maximum (absolute) right or interest that exists on land and this is what is referred to as fee simple absolute in possession or free hold estate under English law.⁵⁴ It should be noted that when a freehold owner grants a lesser estate which is of a certain or fixed or determinable duration, the estate granted is leasehold or simply a “lease”. The residue of the freehold owner’s estate after the granting of a lease is known as the leasehold reversion. Usually, at the termination of the lease, possession of the land will automatically revert back to the freeholder.

Indeed, the leaseholder may himself grant a lease (of a lesser duration) out of his own estate, whilst still retaining his own original lease (albeit now subject to the sub-lease “or under lease “). For the duration of the sub-lease, the original leaseholder holds a “lease hold reversion”, which is also a recognized interest, or more appropriately, estate in land and where a lessee transfers his leasehold interest to another it is commonly referred to as assignment.

The process may continue with sub-leases for shorter and shorter periods of possession being granted by the successive “sub -leases”. It should now be apparent that any piece of land may be subject to a hierarchy of rights of possession⁵⁵ with the holder of each right owning not the land itself, but rather the right to possession of the land, subject to the lesser rights he has been granted for his particular “slice of time”. Again, it can be seen from the foregoing that the ownership of land under English law is complex, and a potentially infinite number of people may have rights in it. That complexity and the resultant conundrum militate against easy transaction in land; it may make it difficult to know who owns a piece of land, or how many have rights in it, or which third party rights take priority over other third party rights. This also restates the position already adumbrated or canvassed in this article about the multiplicity of interests that may inhere in one land under English common law of real property as previously mentioned.

For example, A is the freeholder of a three – story office building in Lagos. A grants a lease of the whole building to B for a term of 99 years. B in turn grants three leases of one floor to each of X, Y and Z. The leases are each for a term of 10 years. The various interests in the building could be represented as follows: In this scenario, A is the freeholder, B is the leaseholder and X, Y, and Z are known as sub-tenants, or under-tenants. X, Y and Z are in actual occupation of the property, paying rent to B, and B in turn paying rent to A. Each owner, A, B, X, Y and Z has an interest in the property which they will be able to sell albeit not being “the owner” of the property. It is not the intention of this writer to examine leases in this article. For the purpose of this article, this writer’s focus is on freeholds.

Ownership of land under English common law of real property seems to be a mere semantic conundrum since a purchaser of land subject to the tenuous and fatuous non-recognition of the concept of ownership of land may for all practical purposes deal with “his land in the manner he deems fit”. But the concept is not overly whittled down as there are noted limitations besetting an owner of land under English law.

The concept of ownership (of land) has been aptly explained by noted Nigerian jurist, Prof. Nwabueze in the following terms:

⁵⁴ Free hold is contrasted with leasehold which is usually of a fixed or determinable duration as the only two legal estates in land under English law.

⁵⁵ The same piece of land may simultaneously support a free hold, a lease and sub-lease etc.

...Ownership is the most comprehensive and complete relation that can exist in respect of anything. It implies the fullest amplitude of rights of enjoyment, management and disposal over property. To put it the other way round, it implies that the owner's title to these rights is superior and paramount over any other rights that may exist in land in favour of other persons, in negative language his right to the enjoyment, management and disposal of the thing must not be dependent upon, or subordinate to that of any other person."⁵⁶ But it should be noted however, that in the context of English law of real property doubt is cast on the appropriateness or correctness of the use of the term "maximum" and "absolute" in describing the nature of right of an owner more appropriately called the "acquirer" or "purchaser" of a real property. Actually, a purchaser in the context of English law of real property does not really purchase land or acquire real property, he merely purchases or acquires an interest in land or an estate in land the highest of which in Land Law terminology is technically referred to as "*an estate in fee simple*".

Thus, against the background of Nwabueze's incisive and illuminating observation, it can be gleaned from his opinion that the most visible corollary of the abstract and conceptual notion of ownership of land under English law of real property is no doubt the right of alienation of such land. It should be noted that Nwabueze's observation is more applicable to Romanic ownership than to Anglo-American "estate" or "interest in land" which as previously mentioned can be illustrated by a simple metaphor. This position is aptly illustrated by the Roman doctrine of *dominium*, under which the *dominus* was entitled to the absolute and exclusive right of property in the land. Nothing less in the way of ownership was recognized. For example, A may have either absolute ownership or no ownership at all. Possession was regarded as fundamentally different, and though it was adequately protected, the remedies available were personal, not real.⁵⁷ In contrast, English law, in analyzing the relation of the tenant to the land has directed its attention not to ownership but to possession (Seisin).⁵⁸ In relation to the concept of seisin, it is noteworthy that under English law, all titles in land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to Seisin. As Burns puts it, "Seisin is a root of title, and it may be said without undue exaggeration that in so far as land is concerned there is in England no law of ownership, but only a law of possession."⁵⁹

⁵⁶ B O Nwabueze, Nigeria land law pg7-8.

⁵⁷ Note that for the purposes of determining which kind of entitlements survives a dealing and remains binding on a new estate owner or purchaser, English land law draws a conventional distinction between "personal" and "proprietary" right in respect of land. See Gray, Elements of Land Law, pp 124-130

⁵⁸ See Burns, op cit,29.

⁵⁹ Seisin comprised the actual or defacto possession of land quite irrespective of right. Since seisin was a matter of fact even the thief could enjoy seisin. The wrongful possessor came to be regarded as having a tortious fee simple which he could alienate and devise. At common law the term 'possession' connotes much more than the idea of a bare physical occupancy. See J A Pye (Oxford) Ltd v Graham (2003) 1 AC 419 at (70) per Lord Hope of Craighead.) The relevant emphasis is on the deliberate, strategic control of land. Possession is the self evident state of affairs which prevails where one person is in a position to 'control access to {land}' by others and in general, decides how it will be used.(Western Australia v Ward (2002) 191 ALR 1 at (52) per Glesson CJ, Gaudrn, Gummow and Hayne JJ.). Possession is thus an inherently physical capacity to deal with a thing as we like, to the

The writer has endeavored to concentrate on the nature of land ownership and the protection of the purchaser in this article. Before dealing with the protection of a purchaser in a practical conveyancing context, it is pertinent to add here that ownership in legal or juristic sense connotes the entirety or totality or the bundle of the rights of the owner over and above every other person on a thing. It connotes a complete and total right over a property.⁶⁰ It is the right to make physical use of a thing, the right to the income from it, in money, in kind or in services, and the power of management indicating that of alienation.⁶¹

The owner of a property is not subject to the right of another person. He has the full and final right of alienation or disposition of the property. He exercises this right of alienation or disposition without seeking the consent of another party because as a matter of law and fact, no other party's right over the property is higher than his.⁶² The owner's right does not have to be exclusive of rights of others, so long as these others are not superior to his own. Ownership has, therefore, an allodial character.⁶³ It should be noted that, unless the owner of property transfers his ownership over the property to a third party, he remains the allodial owner.⁶⁴ Similarly, it was the opinion of Main that ownership comprises "a bundle of various rights- in this vein the sum total of the principal component rights, that is, right of sale... right to lease, right to charge and right to create easement denotes ownership."⁶⁵ Suffice it to say that the right of the owner is, therefore, subject to or restricted by the superior right of another person.⁶⁶ Ownership vests in the owner the right to possession.

Dias posits that the right of ownership comprises both benefits and burden:⁶⁷ According to the learned author, the former consists of claims, liberties, powers and immunities, but the advantages they give are curtailed by duties, liabilities and disabilities.⁶⁸ He further opines that the concept of ownership is needed to give effect to the idea of mine", "not mine" or "thine"⁶⁹ E.A Taiwo, in his Nigerian Land Law⁷⁰ maintains that in customary law parlance, ownership is expressed by the concept of "absolute" ownership. He further asserts that under English law, as received and applied in Nigeria, that term "fee simple" indicates ownership.⁷¹ The above is somewhat correct; it is opined as an asseveration in that this is the highest possible interest one can hold in land under the English law which was received in Nigeria and which fundamentally continues to influence our real property jurisprudence . Although this is a qualified form of ownership against the background that the aforementioned English Law, as received and applied in Nigeria does not admit of the concept of ownership unlike the Romanic–Dutch (Civil) Land

exclusion of everyone else. Thus one may be in possession of land without ever having seen it or being aware of its full scope and one may even be in possession of things concealed under the land surface without having any reason to suspect their presence or know their location. See also *Elwes v Briggs Gas Company* (1886) 33 Ch D 562 at 568-569 (a case involving a prehistoric long boat)

⁶⁰ Tobi, Op Cit, 24-25.

⁶¹ Lawson, Law of Property, p.8 as cited in Nwabueze, Op cit, at p.7.

⁶² Tobi, Op Cit, at 25.

⁶³ Nwabueze op cit at 8.

⁶⁴ Tobi Op cit, at 25.

⁶⁵ See Main, Land law in East Africa (Oxford University Press, 1967) 204 – 205.

⁶⁶ Utuama, Op cit, 11.

⁶⁷ see RWM Dias, Jurisprudence, 5th ed, (1985) 297.

⁶⁸ 1bid.

⁶⁹ 1bid.

⁷⁰ See E A Taiwo, the Nigerian Land Law, Ababa Press, Ibadan, Nigeria 2011, p.13;

⁷¹ See also Utuama, A A, Nigerian Law of Real Property (Shaneson C I Ltd, Ibadan 1989) 2.

Law system⁷² It is the opinion of this writer that some of these terms are not quite correct in the context of Nigerian land law which is hinged on English law as received and applied. This writer is of the firm view that the qualified ownership is more appropriately reflected in our conveyancing practice whereby the phrase “beneficial” ownership rather than “absolute” ownership is used. It is this interest that the vendor/seller is said to convey upon the execution of a valid instrument of transfer/disposition as the beneficial owner of an estate in fee simple and the purchaser equally becomes, “not the owner of the land”, the subject-matter of the disposition/transfer, but the owner of “an estate in fee simple absolute in possession”, thus signifying the nature and or quality of interest he acquires thereby. Thus, Taiwo writes in his book, *The Nigerian Land Law*, that these terms are sometimes described as the “radical title” and “allodial ownership” and are used interchangeably. This writer adds “beneficial ownership” to the classification of the nature of ownership in the above mentioned.⁷³ James observed that the adjective “absolute” is usually avoided because of various limitations which exist over the landowner’s exercise of his dominating right.⁷⁴ It is submitted that this approach is correct and more apposite in dealing with the nature of land ownership in Nigeria as under the received and applicable English Law. The term beneficial ownership is consistent with James’ perspective on the subject, who, despite his earlier contention that the adjective “absolute” is usually avoided because of various limitations which exist over the land holder’s exercise of his dominating right – went further to prefer the expression “maximal” but concedes that the adjective “absolute” is permissible if it is remembered that it denotes the greatest interest in land admitted by customary land tenure.

THE PROTECTION OF THE PURCHASER

It is trite beyond any cavil or peradventure that the security of interest acquired by a purchaser is no doubt a corollary of ownership of real property just as possession is said to be an incident of ownership and that where ownership of land is in dispute, the law presumes the possessor as the owner till the contrary is proved.⁷⁵ The purchaser of an estate in fee simple (freehold estate) or a term of years (leasehold estate) is interested in acquiring a valid and indefeasible title or estate together with the relevant incorporeal hereditaments or derivative real rights appurtenant or pertaining to or benefiting the land. Adverse third party right however, undermines this aspiration especially in the context of the unfortunate problems faced in unregistered conveyancing. The purchaser and all others take unregistered estates subject to such preexisting rights – legal easement, legal lease, legal mortgages, legal rights of re-entry etc as these may rear its ugly heads in the form of equitable or legal interests which may affect the property as overriding interests. The difficulties posed by these interests have not been completely solved even in jurisdictions with registered conveyancing system.⁷⁶

⁷² See Merryman op cit

⁷³ See Taiwo citing Olawoye, op cit at 1 at p113

⁷⁴ James R. W., *Modern Land Law of Nigeria*, University of Ife Press (1973) 18.

⁷⁵ See E. A. Taiwo, *The Nigerian Land Law*, Ababa Press, Ibadan, Nigeria 2011, p.16; See also the case of *Aghheghen v Wighareghor* (1974) 1 S C 1; See also sec 146, Evidence Act, See also *Orhu v Gogo-Abite* (2010) 8 NWLR (pt1196) 307 at 324; *Da Costa v Ikomi* (1968) 1 All N L R 394.....

⁷⁶ See Elizabeth Coke, *The New Law of Land Registration*, Hart Publishing (2003) p.4.

As Land has become a tradable commodity with a concomitant demand for easy transferability of title,⁷⁷ the imperative for the protection of the purchaser becomes more paramount in contemporary real property law.⁷⁸ One of the central features of contemporary real property law is the way in which it operates to facilitate property transactions to protect property interests of third parties against purchasers and to protect purchasers.⁷⁹

The idea of land as a marketable commodity is so common place today that it may be easy to lose sight of the consequences of land alienation for the vendor as well as the purchasers. For purchasers of real property, especially in common law jurisdictions like the Bahamas, Nigeria; etc. buying property can be a nightmare in these jurisdictions that retains old common law unregistered (deeds) conveyancing system which poses some problems. Consistent with the preoccupation of a materialistic and increasingly affluent age, stability of title has become an ever more central focus of social (and therefore legal) concern. There are two practical problems here in the context of the foregoing. The first is that deeds may get lost. Without them, in the common law; one has to resort to possession as the ancient basis of title, which can be proved in a number of ways, none of them especially reliable.

The second problem is that deeds, even a full set of them, may not give a whole picture; a prospective purchaser may not be able to ascertain with any degree of certainty and clarity from them all the rights affecting land. Deeds registration guards against the first problem, but not the second, by setting up a record of deeds, so that there is a public record of private paper-work. The advantage of deeds registration (unregistered conveyancing system) is that it preserves the system that people are used to. Registration adds security and depending upon the precise details of the system publicity, which in turn generates a confident market. The main disadvantage however, is that it is cumbersome. Individual deeds must still be found in the records, there may be a great many to find. Title is not simplified by deeds registration; and the production of proof (called by conveyancers “deducing title”) is done by tracing ownership from the present day, through the various transactions recorded in different deeds, back to a legally acceptable starting point (called in a common law system a “root of title”). Thus, one of the important features of deeds registration system is its index which will make it more or less easy to find a particular document. A further disadvantage is that in land there may exist other interests apart from deeds; deed registration has no effect upon such rights and cannot make them any more secure or more easily discoverable.⁸⁰ The vital question

⁷⁷ G Ward and E Kingdom (eds), *Land, Custom and Practice in the South Pacific* (Cambridge, Cambridge University Press, 1995) 37. There has always been an instinctive bias in favour of transactional certainty in the land market. See *Royal Bank of Scotland PLC v Etridge (No 2)* (2002) AC 773 (at 2) per Lord Bingham of Cornhill; and this perceived imperative has now acquired a heightened emphasis with the enactment of Land Registration Acts in different parts of the progressive jurisdictions of the modern world

⁷⁸ By various means this innovative legislations relating to land registration infuse a new quality of rationality and pragmatism into dealings with land.

⁷⁹ Third party interests in land affect freehold and leasehold estate owners and purchasers alike and circumstances in which they can arise are legion. Note that freehold or leasehold estate owners may also choose to grant rights to others which do not confer possession, as a leasehold would, but rather some lesser form of use of the land. A neighbor might, for example, require a right of access over the land; a bank may require a charge on the land to be held as security for a loan. These rights are known as “interest in land” and depending on the nature and type of the right they may bind the land and be enforceable against subsequent owners (purchasers) of the land.

⁸⁰ It should be acutely noted that deeds registration may be merely protective, as in Nigeria and the commonwealth of the Bahamas, so that a deed can only have priority over subsequent transactions if

then for a prospective purchaser is not “to what burdens is the land subject at the moment” rather “to what burdens will it be subject if I buy it”.⁸¹ For time and statute may have sieving effect in dealing with land in the sense that whatever are or may be the burdens on the land at any point, only some will survive and affect a purchaser depending on the circumstances of a given transaction. Examples in this regard are legion. A given legislation may be curative and positive in relation to any prior defect or burdens affecting land. The operation of equitable principles like bona fide purchaser for value without notice may operate in favour of the purchaser who is regarded in this context as equity’s darling. And some defects may be wiped away or obliterated by effluxion of time. Besides, the general law may also favour the purchaser - so that the purchaser will not take the land subject to (or “be bound by”, as it is sometimes put) by such burdens.⁸²

Suffice it to say that the purchaser also knows from the general law, that he will not be subject to any trust interests, in the land that are overreached by the disposition to him. Overreaching is the process by which the beneficial or equitable interest of a trustee or co-owner is killed off and transferred into the proceeds of sale in the hands of the seller. The most common way to overreach the beneficial interest of such a co-owner is by appointment of a second trustee.⁸³ Thus, if for example one buys unregistered land now, and an estate contract was registered against a purchaser in 1930, the title deduced to the person will probably contain no evidence of that 1930 owner and the person will never actually find the registration. That does not matter because doubtless the contract is long defunct.⁸⁴ Registration under the English Land Charges Act 1972 and Law of Property Act 1925 constitute actual notice to the entire world, so that a purchaser is bound by all land charges, even if he would not otherwise have been bound because they are equitable and he had no notice of them.⁸⁵ Moreover, interest which can be registered as land charges must be so registered or be void against (broadly) most purchasers. The rule is strict; an unregistered land charge is void even if the purchaser knew about it, indeed even if the purpose of the conveyance was to defeat the interest.⁸⁶

It should be noted that in practical conveyancing, the prospective purchasers of land will want to know whether any third party rights exist over that land, and if

it is registered, or in some cases it may also be dispositive as in Scotland and other civil law jurisdictions (Scotland actually practices mixed system) so that it is of no effect at all unless registered. See the Sasine Deeds Act of 1611 (Scotland); Land Registration (Scotland) Act 1979

⁸¹ The distinction between proprietary and non-proprietary rights in land is quite apposite here. As previously adumbrated, for the purposes of determining which kinds of entitlement survive a dealing and remain binding on a new estate owner, English land law draws a conventional distinction between ‘personal’ and ‘proprietary’ rights in respect of land. Only those rights which are classified as proprietary have the potential to bind a purchaser of the land; personal right can never do so, although they may sometimes retain a limited enforceability (usually by way of a remedy in damages) against their grantor, the former owner of the estate now transferred.

⁸² See p.70 of Cooke.

⁸³ See the case of *City of London building society v Flegg* (1987) 3 All ER 435; *William and Glyn’s Bank Ltd v Boland* (1981) AC 487; *National Provincial Bank Ltd v Ainsworth* (1965) AC 1175 @ 1247G- 1248A. Overreaching is the process whereby equitable interests under a trust becomes detached from the land and transferred to the money paid by the buyer, thus enabling a buyer of a legal estate to take the land free from those interests. In other for the interest to be overreached, the purchase price must be paid to at least two trustees being not less than two in number (or to a trust corporation). If so, the interest of the beneficiary will not bind a buyer even one with notice.

⁸⁴ But note that a restrictive covenant might not be, and it is easy to see how a purchaser could be caught by pre-root encumbrances.

⁸⁵ See LPA 1925 section 198.

⁸⁶ See the case *Midland Bank Trust co. Ltd v Green* (1981) AC 513

they do, whether they will be enforceable against him/her as they are against the current owner. Likewise the holder of such a right over the estate needs to know whether or not that right will survive a sale of the estate to become enforceable against the new owner, as they are against the current owner. However, it is against the background that although the doctrine of privity of contract would suggest that rights can only bind the original parties, however because an “interest in land is a proprietary right, it is capable of being enforceable against successors in title to the party who originally created it. For example Caroline and Dorothy enter into a contract allowing Dorothy to have a right of way over Caroline’s land. In this scenario, there exists a privity of contract between Caroline and Dorothy. In this situation, there is said to be a privity of contract between Caroline and Dorothy. This means that both of them are entitled to sue upon the terms of the contract, for example, the buyer of Caroline’s land will depend upon the nature of the right and whether it has been registered. As a general rule, legal interests bind the whole world without the need for registration, but equitable interests, such as restrictive covenant, must be registered in order to be enforceable by or against successor in title. However, conveyancers must appreciate the need to timeously register interests that require such registration for their legal efficacy. In spite of the above, purchasers may still be affected by certain kinds of interest known as overriding interests. These are interests that bind a buyer/ purchaser even though they do not appear anywhere on the register. Overriding interest include legal lease granted for a term not exceeding 7years.⁸⁷ It is considered that any purchaser of the property will be aware of lease by virtue of the occupation of the property by the tenant.

Legal easements acquired by implied grant are also included in this category of rights that can override a registered disposition. In this respect, it should be acutely noted that easements, which are right over the land such as rights of way, do not need to be created by deed in some circumstances, and may be acquired by implication, for example as a result of use over time.⁸⁸ Any interest that is held by a person in occupation equally belongs to the category of rights under reference. However in the above context, such an interest will not be overriding if either:

1. It is not disclosed on reasonable inquiry, or
2. It belongs to a person whose occupation would not have been obvious on a reasonable inspection of the land.

⁸⁷ Such leases do not have their own registered leasehold title. there will only be a registered title in respect of freehold estate. nor do they appear anywhere on the freehold register. By virtue of schedule 3 paragraph 1 of LRA 2002 these leases override the register. They are an example of an ‘unregistered interest dispositions’. This means that any buyer of the freehold will be bound by the lessee’s less than seven year lease even though it is not registered.

⁸⁸ See s.62 law of property act 1925 with respect to implied grant. In relation to presumed grant (prescription), if there is no express or implied easement, then the third way (apart from express or implied grant) in which an easement may be created is by way of presumption after use for a sufficiently long period of time. Such easements are always legal as the presumption is made by the common law. They are frequently called easement by prescription. See the Prescription Act 1832. Note that in every case, the use must be of right neither by force, by stealth, nor by permission. Note further that an easement by presumed grant can only be claimed for the benefit of a freeholder against another freeholder who knows of the use and his able to resist it. Thus, tenant cannot claim an easement by prescription against their landlord (with the exception of a right to land), and one tenant cannot claim right against another tenant of the same landlord although they may on behalf of their landlord obtain a right by prescription against another freeholder.

Such an interest is binding to the extent that it relates to land that is actually occupied. The question then becomes opposite: how then are occupier's interests dealt with so that the buyer/purchaser takes free of them? It is also in practical conveyancing context possible to add a special condition (while drafting the contract) to the contract dealing with any occupiers at the property. In this regard it is common for the buyer to raise a pre- contract enquiry asking the seller to confirm whether there are any occupiers (apart from seller) and if there are, whether they may have a beneficial interest in the property and whether they will agree to vacate the property on or before completion of the transaction. This underscores the importance of the need to make actual inspection of the property where this is reasonably possible by the purchaser/buyer before concluding the transaction. If there are occupiers, the buyer should insist that the seller should provide for a special condition or clause to be inserted in the contract confirming that the occupier has no interest in the property, and that the occupier agrees to vacate on completion. The occupier must then sign the contract to give effect to this proviso, and should obtain independent legal advice prior to signing that they understand the nature and effect of the proviso.

CONCLUSION

Having examined the nature of land ownership, the need for the protection of the purchaser can hardly be over emphasized. As land becomes a tradable commodity with a concomitant demand for easy transferability of title, it is imperative that the means or the process by which lands are bought and sold be made less cumbersome, more safe and secure and less- time consuming. Our current old-common law deeds conveyances (unregistered) system has become anachronistic and should be jettisoned and replaced with the globalizing trend of title registration which facilitates conveyancing and affords guarantee to title being acquired by purchasers . There ought to be bold and pragmatic initiatives to introduce the Torrens system of land registration in the Bahamas and the federation of Nigeria and to establish a mechanism of ownership by way of Cadastral survey and registration of title to land. A statutory legislation is urgently needed in this regard in the two identified common law jurisdictions. Accordingly such legislation will seek to create and oversee an intensified system of almost universal recordation of property rights in Nigeria and the Commonwealth of the Bahamas in their respective Land Registers, thereby sharpening up the effects of dealings between strangers and reducing potential threats to any title taken by a transferee or mortgagee (purchaser). Accordingly such a system of land registration affords purchasers of real estate what in some jurisdiction is often referred to as indefeasible title.⁸⁹ The benefits inherent in a system of land registration are indeed legion.

Land registration reduces the transaction cost of property by providing publicity for interest in land, authoritative title information and clear priority rules to

⁸⁹ The more appropriate term 'guaranteed' title is preferred to 'indefeasible' title. Although an 'absolute title' to land is the most secure form of title recognized under most land registration legislations, it is nevertheless an inherent feature of most of the Acts e.g. the English Land Registration Act 2002 that no registered title is ultimately unalterable or indefeasible. Although it is critical to keep to a minimum the number of matters which may defeat the title of a registered proprietor, it remains the case that, regardless of the class of title to an applicant for first registration under the system, no register of title is ever bullet-proof. Even absolute titles are liable to be altered in certain kinds of circumstances. In this regard, one can say that the register is vulnerable to rectification in certain circumstances.

co-ordinate competing rights.⁹⁰ It is true that every purchaser of a real estate will want a title that is not vulnerable to effective advance challenge. Land registration provides purchaser such a title in the sense that in the rare unlikely circumstances where the purchaser's title is effectively challenged, the land register is vulnerable to rectification and the purchaser entitled to the land he purchased or at the very least to compensation commonly referred to as indemnity owing to the fact that in such a system of land registration, the acquisition of title enjoys state guarantee in the title so acquired by a purchaser.⁹¹ The plain fact here in the opinion of this writer is that such a system is much better than our current system of deeds recordation which is susceptible to fraud, transactional failure and a demonstrable lack of clarity in title albeit uncertainty in security of title being acquired by prospective purchasers. The system of registration checkmates fraud and transactional failures and protects purchasers against unknown adverse interest.

One of the aims of registration is to make title more secure and easily provable. It is supposed, ideally, to set up a mirror of ownership. The minor principle or, rather aspiration is hostile to interests that do not appear on the registered title. Such a system commends itself to jurisdictions that continue to practice common law deeds conveyancing system like Nigerian and the Bahamas. The system in Nigeria under which government administers land through grants of right of occupancy, issuance of certificate of occupancy and endorsement of consent on instruments of transfer of interests in land is a recipe for fraud, political patronage and fatuous bureaucratic chicanery on the part of the government against the governed which in addition to other drawbacks causes unnecessary difficulty, confusion and muddies the much sought after clarity of land ownership.⁹² Like many systems, registration has its own momentum; it tends towards tidiness and completeness and to the elimination, as far as possible of interests that a purchaser cannot discover from the register. Besides, registration seems to imply a unitary form of ownership, in much that the same way that registration of ownership of shares, cars, ships or dogs is supposed to enable one to point to the owners.⁹³ One of the fundamental difficulties with registration in a common law system is what are we to do with equitable interests? Are they to be eliminated or registered or enforceable despite being unregistered? It should be appreciated that most systems of land registration, whether the English or Australian system (the torrens system) are beset or faced with this perplexing problem in relation to overriding interests, the draconian effect of which was exemplified by the noted case of *William and Glyn Bank limited v Boland* which rocked the English conveyancing community to its very foundation. Against this background, there are certain rights and interests that

⁹⁰ The publicity principle as found in some jurisdictions like Scotland and other systems with Roman-Dutch heritage is similar to Anglo-American doctrine of notice found in common law jurisdictions like the Bahamas and Nigeria. See Law of Property Act 1925, section 198 on the doctrine of notice even in the context of unregistered conveyancing.

⁹¹ It is integral to the indemnity principle of title registration or what is sometimes referred to as the insurance principle underlying title registration that any person who innocently suffers loss by reason of the operation of the Land Register should receive compensation. Thus most land registration systems make provision for the payment of indemnity in certain qualified circumstances. See the recent English Land Registration Act 2002, section 103.

⁹² Our present conveyancing practice is redolent of anachronistic and archaic conceptions and practices

⁹³ The simplifying force of registration is thoroughly demonstrated in Alan Pottage's work. See *The Originality of Registration*, (1995) 15 *Oxford Journal of Legal Studies* 37, and 'Evidencing Ownership' in Bright and J Dewar (eds) *Land Law, Themes and Perspective* (Oxford), OUP, 1998/129.

surely demand protection albeit being incapable of registration e.g., the right of a spouse in occupation of a matrimonial home, the right of a person with a short term lease, right of every person in occupation of land, etc.⁹⁴ The ideal situation would have been for all these rights to be entered in the register so that the land register can surely be a mirror of interest in land. Overriding interests however, undermines this aspiration as a crack in the mirror.⁹⁵ It is suggested that prospective purchasers or their legal representatives should inspect the subject property and make necessary enquiries of any of such rights capable of overriding a given disposition. Perhaps, a further assurance or a warrandice as in Scots law may be obtained from the prospective seller undertaking that no such right to his knowledge is in existence or floating over the subject property.⁹⁶

It is highly desirable of (in) a modern society where individuals own and trade land as a capital asset that their ownership (be) not only easily proved and efficiently transferred but also safe, secure, indefeasible or guaranteed in the hands of purchasers.⁹⁷ This will inspire confidence in the real property sector / market and which will in turn boast investment in this vital sector of the economy. It is the opinion of this writer that a system of land registration is a means of achieving this end in Nigeria and in other common law jurisdictions like the Bahamas etc. that continue to operate the common law deeds (unregistered) conveyancing system.

⁹⁴ see *Celesteel Ltd v Alton House Holding Ltd* (1985) 1 WLR 204 and English LRA 1925, s70(1)

⁹⁵ The mirror principle means that the register reflects the state of the title and there is also the curtain principle which is to the effect that the register is the sole source of information for proposing purchasers, who need not and, indeed, must not concern themselves with trust and equities which lie behind the curtain. See “an English man looks at the Torrens system” (Sydney, Law Book Company, 1957), 8 ff.

⁹⁶ Note not all rights are registrable but the register is the complete record of those which are

⁹⁷ The term indefeasible as commonly used in the Australian jurisdiction is somewhat incorrect. The ideal term should be “guaranteed” as no title is in actuality indefeasible and the register may be vulnerable to rectification. Thus the term guaranteed is preferably to indefeasible.