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Why do we need *Grundstücke* (land units), and what are they?

On the difficulties of divining a European concept of 'thing' in property law*

1 Things

Mutual understanding of the law of 'property' or 'things' in Europe is an especially arduous undertaking. The problem starts with just isolating a suitable designation for the reference point for proprietary rights. Whilst it is not possible to develop the thesis here,[1] I would maintain that, as a first rough-and-ready categorisation for the purposes of pan-European stock-taking appraisal, one should distinguish between 'objects', 'objects of commerce', and 'things'. 'Objects' encompasses everything apart from 'persons' that is susceptible to the application of rules of private law, an 'object of commerce' is an 'object' that can be the subject matter of a sale or gift, and a 'thing' is anything that can be made the reference point for a right that enjoys protection against third parties and is thus 'absolute' (in the sense that it is not merely relative). The best approach is probably to distinguish between real and normative things. Real things exist independently of law; have an intrinsically formed and demarcated *corpus*; and, in consequence of this attribute, are capable of forming the subject matter of property rights. Normative things, in contrast, do not subsist as a matter of nature; they owe their existence and their capacity

* An earlier version of this article was published in Juridica International 2014 pp. 3–15; https://www.juridicainternational.eu/index.php?id=15451.

[1] Details and further supporting material in Christian von Bar, *Gemeineuropäisches Sachenrecht*, vol. 1 (Munich 2015) and vol. 2 (Munich 2019).

to be the reference point of property rights solely to an exercise of legal imagination – legal norms, in other words. This is the case, for example, not merely with regard to claims and other rights to a performance and for shares in companies and partnerships but also even in relation to parcels of land, or *Grundstücke*. *Grundstücke* belong to that set of normative things that in most legal systems are capable both of being owned and of being the subject matter of other property rights; claims and shares, on the other hand, are normative things that are susceptible only to (mere) property rights, not to ownership as such.

2 Terminology

Normative things may be subdivided into things with a physical substratum and purely normative things. Both have hitherto lacked a uniform European terminology. With regard to things in the first group, the word 'Grundstück' (literally meaning 'piece of land'), which is also invoked by Germany's Bürgerliches Gesetzbuch, or BGB (albeit with a technical signification of its own), seems to all intents and purposes an appropriate label within the domain of German-language legal scholarship. The German language simply lacks a better word. In the end, some word has to be used, and 'Grundstück' is at least not a bad choice. Of course, each legal language must find its own expression for the *Grundstück* concept. That the common law (which is not alone in this) lacks a genuine linguistic equivalent for *Grundstück*[2] and that even the legal systems that invoke the word as a *terminus technicus* associate it with variant meanings[3] is

[2] 'Estate' would be a suitable word, but it is no longer used to denote the subject matter of rights in land; rather, it refers to the rights themselves. 'Grundstück' may best be translated perhaps as 'tenement'. The latter word has the advantage that, in contrast to 'estate', it at least describes a thing (what is held, not how long it is held). Nowadays, however, the concept is often (especially in Scotland) confined to application for flats. Furthermore, the term extends further than the notion of *Grundstück* we are invoking, because 'tenement' also encompasses some rights in land (as does the word 'hereditaments' and also another use of 'Grundstücke', within the meaning of German law: see § 96 of Germany's Bürgerliches Gesetzbuch, or BGB).

[3] Article 46 § 1 of the Polish civil code defines *Grundstücke* as 'parts of the earth's surface that are the object of special ownership'. § 27(a) of the Czech Cadastre Law (344/1992) defines a *Grundstück* (albeit expressly only for the purposes of the same legislation) as the 'part of the earth's surface that is partitioned off from the neighbouring parts by the boundary of a regional authority or by the boundary of an area of land registration'. A distinction is drawn between *Grundstücke* and parcels of land (plots). Only parcels of

simply something that has to be taken on board. For legal scholarship in the English language, no ready candidate presents itself, for terms such as 'land' and 'parcel [or plot] of land' already carry very different signification. Their inappropriateness emerges all the more clearly as we probe the ramifications of the *Grundstück* concept. A tentative suggestion – inspired by the official English-language translation of the Swedish Land Code (the Jordabalk, or JB)[4] – might be 'land unit'.

land – areas or spaces that are described and recorded in the land register – may be transferred. A *Grundstück*, however, even if it only amounts to a portion of a plot, can also be leased and can be acquired by prescription (J. Spáčil, M. Spáčil. *Přehled judikatury ve věcech občanskoprávních vztahů k pozemkům*. Prague 2011, p. 85). Possession of part of a plot (a 'Grundstück' in the sense of this terminology) requires real and outwardly visible demarcation, but such demarcation is also sufficient (a *Grundstück* must merely make itself manifest, according to Supreme Court 23.1.2002, 22 Cdo 96/2000, Soubor civilních rozhodnutí Nejvyššího soudu C 987). The most neutral concept in Austrian law is that of 'land'. A tract of land becomes a *Grundstück* when it is registered with its own number as part of a cadastral municipality in the boundary cadastre or the land-tax cadastre (under § 7a of the Austrian Vermessungsgesetz, or VermG, and § 5(1) of the Austrian Allgemeines Grundbuchsanlegungsgesetz, AllgGAG). § 7a(1) of the VermG gives the following definition: 'A *Grundstück* is that part of a cadastral municipality that is designated as such with its own number in the boundary cadastre or the land-tax cadastre.' To some extent, the notion of a plot or parcel of land (*Parzelle* or *Grundparzelle*) is used as a synonym for the notion of a *Grundstück*. These cadastres are the foundation of the land register; their data on the location and boundaries of *Grundstücke*, along with the mode of use of each *Grundstück*, are carried over to the land register (§ 2(2) sent. 1 of the Austrian Grundbuchumstellungsgesetz). As for Spanish law, TS 10.12.1960, RAJ 1960, No. 4095, on pp. 2664, 2666, once described a *finca* as 'a portion of the earth's surface that is enclosed by a polygonal line and is the object of ownership'. Portuguese law, in contrast, refers only to the ground (*solo*) and not the earth's surface (*superficie*). Under Article 204(2) of the Portuguese Codigo Civil (CC), the idea of an agricultural *Grundstück* corresponds to a bounded part of the ground and what we might call an urban *Grundstück* is a building connected to the ground.

[4] The translation of Chapter 1, § 1 begins thus: 'Real property is land. This is divided into property units. A property unit is delimited either horizontally or both horizontally and vertically.' The term 'property unit', while avoiding the two-dimensionality flaw of terms such as 'parcel of land', has the weakness that 'property' as a word is overly inclusive. The official English translations of Sweden's land law and cadastral legislation are accessible via the Kungliga Tekniska högskolan (Swedish Royal Institute of Technology) Web site, at http://www.kth.se/abe/inst/fob/avd/fastighetsvetenskap/publikationer/slcl.

3 Entities of the landscape capable of being the subject matter of property rights

What, in substance, is at issue? The answer is that, in forming *Grundstücke* (or, more precisely, entities for which we use that nomenclature in the text that follows), legal systems create objects in the landscape that are capable of supporting property rights. A landscape or terrain, although readily perceptible to the senses and hence often (but rashly) labelled 'corporeal', is not in itself a thing. Things – that is to say, entities capable of being the reference point of property rights – come into being within a terrain only once it is parcelled out. It is only after subdivision into distinct plots of land in accordance with the rules of law created for that purpose[5] that subsisting or potential[6] entities capable of supporting property rights emerge – namely, *Grundstücke*.

[5] This is stated imprecisely by M.I. Spyridakis. *Epitomo Nomikó Lexikó*. Athens and Komotini, Greece 2008, p. 9 (as soon as the various parts of Earth's surface are demarcated and marked off from one another by natural or artificial markings, a *Grundstück* arises; however, that is the case only where a legal system does not actually require more than such action, and those times, if they ever existed, have long since passed). An interesting insight into earlier conditions might be furnished by Swedish legislation. It provides that the boundaries of a *Grundstück* (actually, *fastighet*), once they have been determined under the law (*lagligen bestämd*), follow the ground markings fixed in accordance with the law (*laga ordning*). If those markings can no longer be ascertained with certainty (*fastställa med säkerhet*), they are identified through the aid of cadastral plans (*förrättningskarta*), purchase documents, and possession and other criteria. If statutorily recognised ground markings are entirely absent, a *Grundstück* is determined with the aid of a plan (a *karta*) and documents (see Chapter 2, § 3 of the JB). If need be, one may also resort to border posts (*rå*) and mounds of stones (*rör*) and to other markings accepted in ancient times (Chapter 2, § 4 of the JB).

[6] A 'landscape', therefore, is not even an ownerless thing. Even ownerless things must at least be 'things' – i.e., potential subject matter of property rights. Consequently, besides real things, only *Grundstücke* (or, according to the national terminology, immovables) and not 'land' can be ownerless. § 928 of the German BGB, for example, permits abandonment of a *Grundstück*. In consequence, it becomes ownerless until the state exercises its right of appropriation, as it is entitled to do, and this is registered in the land register. However, under Article 1345 of the Portuguese CC (which is based on the almost identically worded Article 827 of the Italian Civil Code), 'immovable things [*coisas imóveis*] without a known owner are regarded as state property'. In Italy and Portugal, state ownership thus arises automatically, *ex lege*. Therefore, immovables are never ownerless; an act of appropriation is not required. The situation is the same in Spain. *Inmuebles* (or *bienes inmuebles*) likewise vest in the state if they have no other owner (under Art. 17 of the Law on the Property of the Public Administration, or 'Ley del Patrimonio de las Administra-

4 The purpose of forming *Grundstücke*

To understand what *Grundstücke* are, one must first address the preliminary question of why one actually needs the legal concept of *Grundstück*. The answer varies from one field of law to another. There are large areas of law that require the notion of 'movables', but not that of *Grundstücke*, in order to reach their goals; as a rule, criminal law belongs to that category.[7] Conversely, even though they are all concerned with *Grundstücke*, property law, on the one hand, and, for example, tax law, land-surveying law, planning law, and construction law on the other, need not read the concept in the same way and indeed do not do so.[8] Not even the law of

ciones Públicas', law 33/2003, of 3.11.2003; see also L. Díez-Picazo, A. Gullón. *Sistema de Derecho Civil*, Vol. III, Part 1: Derechos Reales en General, 8th edition. Madrid 2012, pp. 176–177).

[7] In the German Criminal Code, the word 'Grundstück' appears only in § 106b (on disturbing the activity of a legislative body in its building 'or the appurtenant *Grundstück*'). In some ancillary criminal legislation (e.g., in § 18(1), item 13 of the Waste Shipments Law, or 'Gesetz zur Ausführung der Verordnung', '(EG) No. 1013/2006 des Europäischen Parlaments und des Rates vom 14. Juni 2006 über die Verbringung von Abfällen und des Basler Übereinkommens vom 22. März 1989 über die Kontrolle der grenzüberschreitenden Verbringung gefährlicher Abfälle und ihrer Entsorgung'), a person may be punished for denying a representative of the relevant authorities 'entry to a *Grundstück* or living quarters, offices, or business premises'. § 287 of Germany's Strafgesetzbuch (StGB) criminalises unlicensed lotteries of 'immovable things'. All of these provisions obviously have nothing to do with protection of property rights; *Grundstücke* can be neither stolen (§ 242 of the German StGB) nor embezzled (§ 246 of the StGB). However, in Portugal and Spain, besides altering of boundary markers, the usurpation of property rights in immovables (the *usurpação de coisa imóvel* and the *usurpación de derecho real inmobiliario*, respectively) is a criminal offence (under Art. 215 of the Portuguese Código Penal (CP) and Article 245 of Spain's Código Penal). The notion of the immovable found in Article 215 of the Portuguese CP corresponds to that of an immovable in Article 204 of the Portuguese CC (J.M. Damião dar Cunha, in Jorge de Figueiredo Dias (ed.). *Comentário Conimbricense do Código Penal, Parte Especial: Artigos 202.° a 307°* (Vol. II). Coimbra, Portugal 1999, pp. 261–262, 270).

[8] An example from German building regulations is to be found in § 4(1) of the Lower Saxony Bauordnung (BauO): 'The building plot is the *Grundstück*, within the meaning of civil law, on which a building project is carried out or on which a structural work is located. The building plot may consist of several adjacent *Grundstücke* if and to the extent that a public-land charge ensures that all structural works on the *Grundstücke* would comply with the public building regulations if the *Grundstücke* were one *Grundstück*.' An example from German tax law can be seen in § 70 of the Bewertungsgesetz, specifically § 70(1): 'Every economic unit of patrimony in land constitutes a *Grundstück* within the meaning of this law. (3) A building that is constructed on another's ground

obligations and the law of property necessarily operate at all times to the same end with the notion of *Grundstücke*; therefore, they also endow it with distinctly different content.[9] It follows that one has to confine

[…] is a *Grundstück* within the meaning of this law even if it has become a component part of the ground.' In Portugal, there are at least four separate definitions of 'prédio' (referring to a *Grundstück*). Article 204(1)(a) of the Portuguese CC regards the rural and urban *Grundstücke* (*prédios rústicos e urbanos*) as immovable things (*coisas imóveis*). In translation, '[a] rural *Grundstück* is a delimited part of the soil and the existing constructions on it that are not economically independent, and an urban *Grundstück* is any building incorporated into the soil with the land that will serve as an amenity' (*ibid*., Art. 204(2)). Article 1(2) of the regulation on the land cadastre (Regulamento do Cadastro Predial, DL 172/95, of 18.7.1995) defines the word 'prédio' as referring to 'a limited portion of the earth's surface, one that is juridically independent, including water, plantations, buildings, and constructions of every kind that are present on it or are attached to it with an enduring quality, as well as independent units within the regime of condominium-ownership'. However, under this provision, the idea of *Grundstück* within the meaning of the law on cadastres does not encompass those waters, plantations, buildings, and constructions listed at the end of Article 2, item 1 of the Code on Council Tax (DL 442-C/88, of 30.11.1988, (i.e., the 'Código da Contribuição Autárquica'), since superseded by the Property Tax Code (CIMI), or 'Código do Imposto Municipal sobre Imóveis', DL 287/2003, of 12.11.2003). Article 2 of the Portuguese CIMI, for its part, reads: 'For the purposes of this code, 'prédio' means every fraction of the territory, including waters, plantations, buildings, and constructions of every kind, that is incorporated into the fraction with an enduring quality or is set upon it, provided that these are part of the patrimony or a natural or legal person and under normal circumstances have an economic value, along with the waters, plantations, buildings, and constructions […] on the terrain [*terreno*] that enjoy economic independence […], even if they are situated on a fraction of the territory that is a component part of another patrimony […].' The Land Register Code (or Código do Registo Predial), DL 224/84, of 6.7.1984, for its part, serves the purpose of publicising the legal relationships associated with the *Grundstücke* and providing for legal certainty in 'dealings' (*comércio jurídico imobiliário*) with them. Consequently, the notion of *Grundstück* in land-registration law does not draw on Article 204 of the Portuguese CC; it is based instead on the cadastre and tax law. *Grundstücke* and immovable are thus one and the same for the purposes of the law on land registration (Seabra Lopes. *Direito dos registos e do notariado*, 6th edition. Coimbra, Portugal 2011, pp. 322–324).

[9] In German law, for example, the notion of 'tenant relationships related to a *Grundstück*' (in § 578 of the German BGB) encompasses the letting of part of the surface of a camping site (OLG Frankfurt, 20.6.1985, NJW-RR 1986, p. 108) and the letting of the outside wall of a house for the attachment of a vending machine (see O. Palandt. Introduction to § 535, para. 97. – W. Weidenkaff (ed.). *Bürgerliches Gesetzbuch*, 71st edition. Munich 2012). The position is similar in Portugal. Portuguese law admittedly does not follow the German conceptual distinction between tenancies with fruits (*Pacht*) and tenancies without (*Miete*), but it does differentiate between renting (*contrato de locação*)

oneself to a property-law notion of *Grundstücke* and, as a first step, settle for the proposition that the formation of *Grundstücke* serves the purpose of setting up property rights for the usable parts of the planet. Without *Grundstücke*, that would be impossible: without them, there would be no entity susceptible to control; no-one would know which part of Earth is the subject matter of the relevant property right.

5 Products of imagination

Grundstücke for the purposes of property law are, accordingly, things in which, as in the landscape from which they are cut out in normative excision, a physical substratum inheres. The so-called law of immovables refers to this at numerous points. Indeed, a not inconsiderable number of the property rights that may be acquired in accordance with its rules would otherwise be quite inconceivable: rights of occupation and rights of way, to name but two, are cases in point. That does not mean, however, that *Grundstücke* owe their character as things to the materiality of the soil that forms part of them. The opposite is the case. Properly analysed, their element of earthy foundation does not even confer on them the quality of corporeality. Of course, one can stand in a field and get one's shoes dirty; in this sense, one may say there is a 'corporeal' thing when referring to the field. That, however, is not the sense of 'corporeality' that is determinative for the purposes of property law. The paramount task for this 'law of things' lies, rather, in constructing an 'entity' in the first place – that is, in constituting as a normative matter a spatial unit capable of supporting property rights.[10] Real things derive from their corporeality a

immovable things (*arrendamento*) and renting movables (*aluguer*). *Arrendamento* encompasses all immovable in the sense of Article 204(2) of the Portuguese CC and, thereby, for example, urban and agricultural *Grundstücke* (Pires de Lima und Antunes Varela, *Código Civil Anotado, Artigos 762-1250* (Vol. II), 4th edition. Coimbra, Portugal 2010, Note 2 to Article 1023, p. 344). The tenancy may be related to either the whole *Grundstück* or merely parts of it. In the case of urban *Grundstücke*, for example, outside walls and terraces may be leased for advertising purposes and windows may be leased to persons who wish to watch a festive procession (L. Menezes Leitão. *Direito das obrigações*, Vol. III: Contratos em especial, 4th edition. Coimbra, Portugal 2006, pp. 308–309).

[10] This is not the same as the phenomenon conceptualised in Austria by means of the notion of the 'corpus' of the *Grundstück* or land register. Under Austrian law, one or more *Grundstücke* may together be registered in the land register as a so-called *Grundbuchskörper* (land-register *corpus*), where they together constitute a *Grundbuchseinlage* (or land-register enclosure) (J.C.T. Rassi, *Grundbuchsrecht*, para. 5). It is even possible for

demarcation to other things; this determines their capacity to be the subject matter of property rights. The position is different for *Grundstücke*. They must firstly be fashioned by the legal system into a thing (into a *corpus*), and, moreover, this must be done from all sides – i.e., in the airspace, in the earth, and in the surface area. Their characteristics determined by the physics of nature are (as such) actually an obstacle to the quality of being a thing. This issue can be overcome only by the legal system. Consequently, *Grundstücke* owe their existence and their capacity to be the subject matter of property rights entirely to property law. *Grundstücke* are admittedly things with a physical substratum, but they are nonetheless normative things. They resemble the geometric figures that would arise if, by means of a computer program, three-dimensional gridlines were superimposed on the farthest-flung part of the earth. In the end, *Grundstücke* in the sense applied in property law are products of imagination. *Grundstücke* do not exist as a product of nature – that is to say, they are not separated from one another by corporeality. Their individualisation is a consequence of legal intervention. One could say that *Grundstücke* are needed everywhere, yet they are required only where people monopolise not merely the use of goods and rights but also the use of their living space on Earth by means of property law. Societies of hunter-gatherers do not have a concept of *Grundstücke*; planned economies need them only to a limited extent[11]; and for the use or exploitation of the oceans

Grundstücke that they are not spatially connected with one another to be registered as a single land-register *corpus* (see §§ 5 and 34 of the AllgGAG). The Austrian concept of the land-register *corpus* is derived from that of the *corpus tabulare* and therefore is designed only to express the proposition that not just the surface of the ground but also the strata of earth under it, the airspace above it, and the component parts of the *Grundstück* (most especially the buildings) forming parts of the legal entity constitute the land-register enclosure (see J.C.T. Rassi, loc. cit.). On this basis, Heinrich Demelius (*Österreichisches Grundbuchsrecht: Entwicklung und Eigenart*. Vienna 1948, p. 17) has commented that 'it is indeed not a surface but a *corpus*'. That is admittedly correct without qualification, but it does not latch on to the critical point; in reality, Demelius has put the cart before the horse. That is because spatiality does not invest *Grundstücke* with any corporeality in the sense of being marked off. Yet it is precisely on that point that they differentiate themselves from the so-called 'movable' things. In the case of *Grundstücke*, the corporeality has to be generated by a determination by the legal system.

[11] A striking example can be found in Article 142 of the Civil Code of Tajikistan. Under that provision, only buildings and installations fall under the label 'immovable'. That is because the ground and soil are in the exclusive ownership of the state and are outwith private legal commerce (R. Knieper *et al*. *Das Privatrecht im Kaukasus und in Zentralasien*. Berlin 2010, p. 339).

and sea beds, the notion of constructing *Grundstücke* is unworkable in its very approach. That is because the formation of *Grundstücke* for the law of property serves the purpose of monopolising resources in the hands of private individuals or corporations. Such monopolisation is ruled out in those regions that belong, or should belong, to everyone.

Because *Grundstücke* are legal constructs, they can only be partitioned[12] and merged in accordance with legal rules. The partitioning of *Grundstücke* is an everyday occurrence; merger, in contrast, is not. Nevertheless, it remains correct that the number and size of *Grundstücke* may be increased and decreased. What cannot be increased is only the land itself that a *Grundstück* normatively requires for its formation. That makes interests in land a particularly coveted asset. That asset's monopolisation necessitates stable relations, and stable relations demand a large measure of legal certainty. Where something is very much coveted, moreover, it is unsurprising to find from a comparative-law perspective a variation in the breadth of normative regulation which is often quite appreciable. The law on the formation of *Grundstücke* and the law on the use of *Grundstücke* confirm this. The law on the formation of *Grundstücke* is concerned with striking the difficult balance between party autonomy, with aspirations for polymorphism in legal transactions, and the imperative of protecting third parties against excessive complexity; the focus in the law on the use of *Grundstücke* is on ordering optimally tiered entitlements in relation to land among as many individuals and legal persons governed by private law as possible.

[12] Depending on the composition of the surface of the landscape, however, the partitioning of *Grundstücke* may be restricted for purposes of ensuring reasonable husbandry. Under Article 1376(1) of the Portuguese CC, for instance, the area cultivatable in agriculture (arable land or *terrenos aptos para a cultura*) may not be reduced to below the minimum area prescribed for regional cultural unity. Moreover, under Article 1376(2) of the Portuguese CC, partitioning of rural *Grundstücke* is not allowed if one result is that a parcel would become an enclave – irrespective of whether it would exceed the minimum area prescribed for regional cultural unity. The legislator's intention in setting forth this rule (and in Art. 1552 of the Portuguese CC) was to preclude the creation of new servitudes (rights of way, or *servidão de passagem*), which it regarded as one of the problematic consequences of *Grundstücke* divided into small parts (P. de Lima, A. Varela. *Código Civil Anotado: Artigos 1251-1575* (Vol. III), 2nd edition. Coimbra, 1987, comment 5 on Art. 1376, p. 259). Under Article 1377 of the Portuguese CC, however, areas of the ground (*terrenos*) that serve a purpose other than agriculture or constitute parts of urban *Grundstücke* may be divided almost at will. The merger of rural *Grundstücke* belonging to the same proprietor is the subject of the rules in Article 1382 of the Portuguese CC.

6 Corporeality, space, and normativity

6.1 A fixed connection with the land

It is repeatedly asserted in discussion of *Grundstücke* that they are made up of areas, 'portions of the surface of the earth'. This is correct in so far as an object of commerce can be characterised as a *Grundstück* only if it is firmly connected to the ground, the *fonds de terre* (French civil code, Art. 518).[13] It is incorrect, however, to regard a mere area of the ground as a *Grundstück*: nobody can step into a two-dimensional area, grow crops on it, or build on it; in terms of property law, one cannot do even the slightest thing with it.

Although its physical substratum – the ground – is, accordingly, insufficient in itself to form a *Grundstück*, it remains necessary as a requirement in the construction of *Grundstücke*. Without a fixed connection with the land, no object becomes a *Grundstück* capable of supporting property rights. The airspace above a house is not a fit object for separate ownership, even if (in cities) money is expended in vast amounts for permission to use it via encroachment with an overhanging high-rise building and the transactions may be labelled a 'sale'.[14] The converse position, which section 3(e) of the Irish Land and Conveyancing Law Reform Act 2009 assumes with the proposition that different layers of

[13] Irritatingly, however, it seems that in Europe there is not even consensus about this concept. Therefore, for example, in the Netherlands, *grond* (meaning 'ground') is defined in Article 3:3 of the Burgerlijk Wetboek (BW), which, in turn, invokes Article 5:20 of the BW (material describing in more detail what objects forming the subject matter of the right of ownership of the *grond* are encompassed). It includes the surface of the earth. The surface of the earth is, in its turn, understood as signifying the upper limit of ownership of immovables (see C. Asser [-F.H.J. Mijnssen *et al.* (eds). *Zakenrecht*, 15th edition. Deventer, The Netherlands 2008, p. 108, item 81) and is itself the subject matter of the right of ownership (T.M. *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek*. Parlementaire stukken, Book V: Zakelijke rechten. Deventer, The Netherlands 1981, p. 120). If an edifice is placed on the ground and joined to it such that ownership of the edifice follows ownership of the ground, this will be regarded as a change in the surface of the *Grundstück* in accordance with the attributes of the edifice (F.H.J. Mijnssen *et al.*, *loc. cit.*).

[14] The correct view is expressed in *Rolfe (Inspector of Taxes) v. Wimpey Waste Management Ltd* [1988] STC 329, 357 (Harman J, *obiter*: airspace separated from the ground below is not an 'item of property'). That, of course, does not preclude burdening a *Grundstück* with a property right for enjoyment of the airspace above the ground and registration of that right in the relevant register – e.g., as a servitude in the form of a special right of flyover (W. Sohst. *Das spanische Bürgerliche Gesetzbuch: Text und Kommentar*, 2nd edition. Berlin 2003, comment on Art. 350, p. 88, with references to Spanish case law).

air above a building may have different owners,[15] does not convince me. A layer of air remains just a layer of air, though encapsulated in measurements of length, breadth, and height; it still does not form a *corpus*. The open volume for playgrounds and car parks under a modern stilt or pillar construction forms part of the co-ownership of all the flat-owners in the same manner as a dependent part of the *Grundstück*. For it to become a *Grundstück* in its own right and thus an independent thing, the open space would have to be enclosed. Equally, someone who has established a dwelling on a houseboat[16] or the top deck of a double-decker bus cannot claim to have a *Grundstück* of their own. Neither boat nor bus has a fixed connection with the water over which the boat floats or the ground on which the bus stands.[17]

6.2 Space

A *Grundstück* captures a space.[18] That space arises from the notional demarcation from other spaces. Property law, as a notional starting point, draws its horizontal boundaries (offset vertically upward and downward)

[15] J.C.W. Wylie. *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary*. Dublin 2009, p. 39, para. 33, with notes 51 and 54.

[16] HR 15.1.2010, NJB 2010 No. 189 (a houseboat remains a movable thing even if it cannot move away under its own steam and can be towed away from its moorage by no more than only a few metres because a nearby bridge is too low to accommodate it; the boat does not even become an immovable if it is firmly connected to the local water and electricity supply).

[17] Quite what satisfies the requirement for a firm connection can, in turn, be problematic in any individual case. In general, however, one will tend to demand the criterion – as, for example, the Czech Constitutional Court has (6.5.2003, ÚS 483/01, Sbírka nálezů a usnesení 30 (2003) No. 60, p. 107) – that the object not be removable from the ground without becoming damaged and that its connection with the ground withstand the normal forces thrown at it by the elements. A similar position is taken with the formulation in Article 334(3) of the Spanish CC ('Immovable things are: […] everything that is firmly connected to an immovable thing such that it cannot be separated from it without destroying the material or damaging the object').

[18] In French academic writing, the point is rightly made that ownership of a *Grundstück* has as its subject matter a portion of the sovereign territory – namely, the ground – and the elements connected with it (J.-L. Bergel *et al*. Les biens. – J. Ghestin (ed.). *Traité de droit civil*, 2nd edition. Paris 2010, p. 188, para. 154). That ownership is not, however, confined to the ground. The delineation of the 'goods' need not occur merely in one plane. Rather, it presupposes a spatial representation of the three-dimensional volume that the *Grundstück* encapsulates. The parcel of the earth is only a horizontal cross-sec-

in parallel to the boundary lines that are projected by survey in two dimensions on the earth's surface. The latter often occurs by resort to a cadastre (if there is one) – i.e., an official description of the parcels of land. The vertical lines run upward and downward perpendicularly to the boundaries that delimit the land as a horizontal plane. Both lines – the horizontal and the vertical – serve to demarcate and define the *Grundstücke* – both in relation to other *Grundstücke* and as against spaces devoid of *Grundstücke*. Everything that the contours of the space delineate (not, we note, everything that is to be found within that space) is the *Grundstück*.

The image of the *Grundstück* as a cube (which would arise from a square ground plot) is, however, an illustrative simplification. That does not have anything to do with the curvature of the earth, which for the purposes of property law for the most part can in any case be disregarded, and nor has it anything to do with the fact that the formation of *Grundstücke* is not dependent on adherence to particular geometric figures; even in the two dimensions of the surface, *Grundstücke* need not possess straight boundary lines. Rather, the aspect of the distance of the upper and lower horizontal lines from the contours of the (notional) ground area is what cannot be expressed meaningfully for property-law purposes in numerical measurements. *Grundstücke* do not end anywhere within (for example) 200 metres above and 30 metres below the surface of the earth.[19] Such a rule would not make sense for property law, because it

tion of that space (*ibid*., p. 191, para. 156; similarly, R. Savatier. *La propriété de l'espace*. Dalloz 1965, I, p. 213: 'La surface ne peut servir qu'à porter et à soutenir un volume […]; l'immeuble ayant découpé la surface sur laquelle repose sa propriété doit nécessairement achever la représentation de celle-ci, en découpant, dans l'espace, le volume qu'il assoit sur cette surface').

[19] National rules on permitted heights for flying over a *Grundstück* do not alter this at all. They do not entail any universally valid statement as to the spatial volume of *Grundstücke*; rather, they address in this context merely an issue of detail. In Great Britain, for example, under the rules on air-traffic control (S.I. 1985/1714, reg. 5(1)(e)), an aircraft may not fly 'closer than 500 feet [approx. 153 metres] to any person, vessel, vehicle or structure'. Special rules provide for take-off and landing. See also *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] QB 479, 487G, per Griffiths J (one cannot have the absurdity of a trespass committed every time a satellite passes over a suburban garden). Common law has, in fact, always recognised immunities for the benefit of operators of aircraft. They derive from instances having to do with the operation of hot air balloons (*Pickering v. Rudd* (1815) 4 Camp. 219, 220f, 171 ER 70, 71) and in modern law have a statutory basis in Section 76(1) of the Civil Aviation Act 1982.

would be too inflexible. The monopolisation of powers over an individual's living space must be shaped effectively, of course, so that investment in *Grundstücke* is worthwhile, but it must not exceed the degree of exclusive control that is tolerable for the commonwealth. That forces each legal system to make difficult evaluations of competing interests. Quite how far the subject matter of an immovable property right should extend vertically can be determined (in contrast to the horizontal limitation) only in consideration of the nature of the ground, the permitted modes of use, the location, and the interest of the community in also using the relevant space. In consequence, *Grundstücke* 'taper off' in height and depth. They may vary in their height and depth for different purposes and in a manner depending on their location and features.[20]

6.3 Subject matter and right

This peculiarity of *Grundstücke* is put into words more easily and handled more practically if it is visualised not from the standpoint of the subject matter itself but from the perspective of the particular rights in *Grundstücken* that are allowed. Seen in that manner, the model works without exception. European legal systems continually change perspective so far as provisions determining *Grundstücke* are concerned. They substitute for the description of the subject matter *Grundstück* a restriction of the content of the property right permitted to subsist in respect of it. As a frame of reference they, for the most part, define the most extensive property right in a *Grundstück* – on the continent, civilian ownership. In doing so, they implicitly also give an affirmative answer to the question of whether the same concept of *Grundstück* is really fitting for all property rights; the efficacy of the so-called limited property rights too is specified according to its content and not according to the volume of the thing to which it refers. A mortgage has the same *Grundstück* for its subject matter as ownership or another property right does.[21] Were the law to proceed

[20] One example among thousands is furnished by *Grundstücke* located in the Athenian suburb of Ymittos. In order to prevent critically adverse impact on the circulation of air into the city of Athens, residents of the suburb may only build houses with no more than two storeys. A *Grundstück* in Ymittos hereby encompasses a lesser space than does a *Grundstück* in another part of the city.

[21] However, from the standpoint of some legal systems, the position is different if *Grundstücke* are 'merged'; in that case, an encumbrance burdening one of the original *Grundstücke* does not automatically extend to the new (larger) *Grundstück*. That legal outcome

otherwise and assign each property right and its specific configuration by the parties to its own *Grundstück*, the legal position would become dramatically complicated. Admittedly, possession assumes a special role. If to some extent the law on possession recognises possession of a part, it also recognises subject matter distinct from that over which ownership and other 'genuine' property rights subsist; consequently, acquisitive prescription of parts of another's *Grundstück* is made possible.[22] However, this merely confirms that everywhere possession does not form a part of the law of rights. Since in England it is not *Grundstücke* that are registered but estates, some questions are posed there rather differently. Some property rights, such as rights of way and hunting rights, define their spa-

implies, however, that 'merger' of *Grundstücke* in such cases is a contradiction in terms. Conversely, if a *Grundstück* is partitioned, whether a burden remains for the new *Grundstücke* will depend on the nature of the encumbrance. § 1026 of the German BGB, for example, provides: 'If the burdened *Grundstück* is partitioned, then, where the exercise of the real servitude is confined to a defined part of the burdened *Grundstück*, those parts that lie outside the area of exercise are freed from the servitude.'

[22] See for the common law *Zarb v. Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240 and from the extensive body of Italian case law, for example, Cass. 27.2.2008, No. 5134, Riv. notariato 2008, p. 1069; Cass. 13.12.2005, No. 27413, Juris data DVD; Trib. Napoli 19.10.2005, Giur. Merito 2006, p. 1696; Cass. 24.5.2004, No. 9913, Juris data DVD; Cass. 11.6.1998, No. 5809, Mass. Giust. civ. 1998, p. 1287; Cass. 1.3.1995, No. 2332, Mass. Giust. civ. 1995, p. 480. The defence of *usucapio* (*eccezione di usucapione*) is typically raised in Italy in an action for adjustment of the boundary (*actio finium regundorum*); it requires complete and exclusive possession of part of the area (Cass. 24.5.2004, *loc. cit.*; Cass. 3.5.1993, No. 5115, Mass. Giust. civ. 1993, p. 800). German law recognises the possibility of partial possession of things in § 865 BGB. Any spatially delineated part of a thing can be the subject matter of partial possession, including, for example, a garden area or a parking space on another's *Grundstück* (MünchKomm [-Joost], *Bürgerliches Gesetzbuch*, Vol. VI, 5th edition. Munich 2009, § 865, para. 3). Whether by means of partial possession it is possible to acquire an integral part of another's thing prescriptively (as advocated by Soergel [-Marly], *Bürgerliches Gesetzbuch*, Vol. I, 13th edition. Stuttgart, Germany 2000, § 93, para. 25) is, however, disputed (J. von Staudinger [J. Jickeli, M. Stieper. *Bürgerliches Gesetzbuch*. Berlin 2004, § 93, para. 32). Under Article 1045 of the Greek Civil Code, in contrast, it is unproblematic for a neighbour to acquire ownership of part of an adjacent *Grundstück* by means of extraordinary *usucapio*. This presupposes 20 years of proprietary possession without interruption (Areopag. 980/2007, Isokrates database). The part of the *Grundstück* in dispute must be fenced off (e.g., Appeal Court of Larissa 894/2006, Isokrates database; Areopag. 623/1999, Isokrates database) or determined with sufficient precision in some other manner. Where the nature of the ground rules out other possibilities, even continual exploration and monitoring of the land may suffice (Areopag. 1430/1992, Isokrates database; see also Areopag. 757/2008, NoB 56 [2008], p. 2450).

tial reference points themselves, so to speak. Their outer boundaries are determined by the same rules that fix the outer boundaries of an estate. In other words, they are not tied to one or more *Grundstücke*; instead, they constitute independent units themselves.

The change in descriptive level from entity to ownership thereof is, admittedly, merely a dictate of practicability, but in theory it is not dishonest just because the existence of a thing is inseparably bound up with its capacity to be or become the subject matter of a property right; the notion of a thing is co-determined by the content of the property right. Hence, one may say that a *Grundstück* ends where the owner's entitlement to use ends – and that is the point from which the owner has no more interest in user that is worthy of protection.

Because *Grundstücke* are conceived of as (normatively) demarcated spaces, minerals and other resources in the soil do not themselves constitute *Grundstücke* – even when, as seams of coal are, they are visibly set apart from other layers of earth. At best, they are immovables.

6.4 The formation of *Grundstücke* above and below the ground surface

Linguistically, the German word 'Grundstück' denotes *ein Stück des Grundes* – literally, 'a piece of ground'. A *Grundstück* is, accordingly, in the literal sense a surface, whereas a *Grundstück* in the legal sense is a space. To regard a *Grundstück* for the purposes of property law as a 'piece of ground' is to nurture a false conception of the 'corporeality' of *Grundstücke*. That point, together with the fact that nowhere today must 'ground' and 'building' necessarily be united in the same hands, makes it possible for space above and below the surface of the earth also to be regarded as *Grundstücke* for the purposes of property law, if the latter ascribes to them an independent capacity to be the subject matter of property rights. What is indispensable is merely the proposition that things designated as *Grundstück* must be firmly connected to the surface of the ground. All other aspects, in contrast, are merely a question of the effectiveness of juridical concepts. A spatial understanding of the concept of *Grundstück*, applied consistently, could appreciably lighten the load in the conceptual toolbox of property law.

Since all legal systems of Europe migrated (once more) towards the idea that at least certain parts of buildings – sometimes even entire buildings and other edifices constructed by humans – are to be regarded as

distinct entities in property law, they have in essence effected a separate formation of *Grundstücke* in the space lying above and below the surface of the ground. In this manner, flats and other artificial spaces have normatively been rendered independent things. An obvious step is to regard them as *Grundstücke* on the basis that, in accordance with the provisions of the relevant legislation (e.g., on opening of a separate land registry file), they are separated from the other flats in the same building. The same applies to whole houses, individual storeys, cellars, and even naturally occurring subterranean spaces. Wherever ownership of *Grundstücke* is divisible horizontally as well as vertically, one must also tackle the question of which entities arise on account of the horizontal division. In terms of property law, they can only be *Grundstücke* in their own right.

6.5 Formation of *Grundstücke* by partition of land

A *Grundstück* has to be individualised if it is to be able to discharge its function as a thing. The individualisation is effected by partition of the land in accordance with the rules of the law. In all systems, those rules invoke the geometric figure of the two-dimensional area. Information about its size in square metres is not in itself sufficient to identify that area.[23] What is needed instead is its contours and its fixation by points of reference[24]; the fewer the demands a legal system makes regarding

[23] Tellingly, according to TS 12.5.2010, RAJ 2010 No. 3692, p. 10570, an action for vindication under Article 348 of the Spanish CC may only be raised once the thing in question is individualised – with the aid of, among other things, precise specification of the surface area by means of the four cardinal points, such that the lay of the thing is fixed. Accordingly, a site plan is required. It is not sufficient for the purposes of Article 348 CC to invoke a right of ownership of a ground area with a specified size in square metres. See also the Czech Supreme Court 23.1.2002, 22, Cdo 96/2000, Soubor civilních rozhodnutí Nejvyššího soudu C 987 (even for the purposes of acquisitive prescription, a *Grundstück* must at least 'show' itself) and OLG Frankfurt/Main 28.1.1985, MittRhNotK 1985, pp. 43, 44 (one cannot 'conceive of ownership of a *Grundstück* differently from ownership of a defined area of the ground').

[24] For example, Areopag. 1170/2011, Isokrates database (contracts pertaining to *Grundstücke* must state the exact measurements of the *Grundstück*, the boundaries of the *Grundstück*, and the names of the neighbouring owners, and they must be notarised; furthermore, a topographical plan of the *Grundstück* is required, which depicts the *Grundstück* in the context of its neighbouring *Grundstücke* and the road layout and shows not merely the form of the *Grundstück* but also its exact location, direction, and area, and this plan must be notarised (a cadastre exists only for the Ionian Islands and the Dodecanese – that is to say, for the areas that were conquered by Napoleon and intermittently had their own

the form of a *Grundstück* and the more irregular its contours may be, the more such points of reference are needed. The area projected onto the planet by the contours and points of reference remains for its part a merely notional construct. That is hardly reflected in everyday speech, of course: in rural settings, people often speak of their 'area' when they mean their *Grundstück(e)*. In that case, spatial connotations reverberate in the word 'area'. It also enjoys an echo in the law, because if one knows the contours and the position of a *Grundstück*, one can set about defining the space that said *Grundstück* fills. The circumstances in which *Grundstücke* arose in Europe do not appear to have been grasped in all their details; it remains a task of comparative legal historical research to shed light on the subject.[25] Two basic models come into question. It is conceivable that at the start there was an occupation of parcels of land by earlier inhabitants and immigrants – made manifest to all and sundry by some means or other and, at any rate, accepted later by the legal system. However, it seems more realistic to suppose that at the beginning of the aeon that has moulded our present-day law, land was allocated to its users under a hierarchical feudal system of grants with the nature of a franchise: a legal transaction as a matter of form but an act of sovereignty as a matter of substance. In England, the consequences of this model are still palpable to this day.[26] In the allocation of landed estates for the grantee's own

civil codes; there, the parties can make do with a reference to the entry in the cadastre)) and J.L. Bergel *et al.* (see Note 18), p. 193, para. 157 (the separation of ownership of an immovable begins with the demarcation of the ground area by charting of the parting line with the adjacent *Grundstücke*). The English system works with a so-called title plan – that is, a contour based on the Ordinance Survey maps. Such a plan is required for the registration (Land Registration Rules 2003, SI 1417, r. 5(a)). An official illustration can be found at http://eservices.landregistry.gov.uk/www/wps/QDMPS-Portlet/resources/example_title_plan.pdf; for details, see the Land Registry's Practice Guide 40 (22 June 2012) and its supplements (http://www.landregistry.gov.uk/professional/guides/practice-guide-40), particularly Supplement 5 (on title plans).

[25] Broadly to the same effect, P. Grossi. *La proprietà e le proprietà nell'officina dello storico*, Quaderni fiorentini XVII (1988), pp. 359, 394 *ff.* See also C. Castronovo, S. Mazzamuto. *Manuale di diritto privato europeo*, Vol. II: Proprietà obbligazioni contratti. Milan 2007, pp. 28–31.

[26] Traces of this can, of course, be identified in other legal systems. The Greek state, for example, has remained a sort of superior owner of the so-called Vakúfia. These are areas that were not in private ownership within the Ottoman Empire and that served religious purposes instead or belonged to the general public or community. Under the terms of the London Protocol of 3.2/22.1.1830, the newly created Greece accepted the usufructuary and administrative rights of the Muslim population in respect of these areas; the

use, the first step was completed towards the formation of *Grundstücke*. The smaller the sub-units became, the more precisely the course of the border had to be marked out. A *Grundstück* was identified in that allocated parcel of land as soon as the legal system furnished the private rights referable to it with *erga omnes* effects and permitted their transfer. Formation of *Grundstücke* and recognition of ownership of land went hand in hand: in allowing ownership of land, one created *Grundstücke*; in creating *Grundstücke*, one made ownership of land possible. In contrast, the formation of *Grundstücke* and the substance of ownership are not interwoven: the emergence of *Grundstücke* does not presuppose a notion of ownership that has a civilian character – that is, a concept in which the right of ownership is perpetual and indivisible. There is nothing in the internal logic of property law that compels one to deploy an identical right of ownership across all types of things; it is only necessary that each of those rights of ownership specify the subject matter of the right.

6.6 Changes in the *Grundstück's* make-up

Save for special restrictions on dealings, the formation of a *Grundstück* is bound up with the possibility of transfer and acquisition of ownership of it. *Grundstücke* are not, however, entities that are fixed for all eternity. Their aggregate number can be increased by partition and sometimes may even be reduced by merger. With *Grundstücke*, such processes are, of course, clearly more complicated than with real things. To achieve the same effect with real things, one need only break them up, take them apart, or assemble them in such a way that a new commodity comes into being. In each case, a merely physical occurrence suffices to bring about a new object capable of being owned. *Grundstücke*, in contrast, are normative things, and, therefore, their partition and merger too are normative processes. The mere planting of a hedge, digging of a ditch, or building of a wall do not make two *Grundstücke* out of one; nor does the removal of the hedge or wall or the filling in of the ditch make one *Grundstück* out of two – not even when they have the same owner.[27]

state became their superior owner (among other items from the case law addressing this, see Areopag. 454/2011, NoB 59 (2011), p. 2177; Appeal Court of Larissa 384/2011, Isokrates database).

[27] Occasionally, of course, there is dispute as to whether, where two adjacent areas belong to the same owner, there is not already a single immovable. The Polish Supreme Court 30.10.2003, IV CK 114/2002, OSNC 2004/12/201, Biul.SN 2004/12/6 answered this

The merger of *Grundstücke* is a comparatively rare occurrence. Typically, the underlying reason lies outside property law and also, accordingly, the mechanisms are often just as extraneous. The most frequently cited example is the merger of *Grundstücke* in the course of intervention by public authorities acting under statutory powers so as to effect a consolidation or re-parcelling of land. A more difficult question to answer is whether *Grundstücke* can also be merged through the exercise of a right of ownership subsisting in relation to them. That is because a 'merger' of *Grundstücke* effected at the initiative of their owners is unproblematic from a property-law point of view only if it is related to two hitherto completely unencumbered *Grundstücke* – in which case, from the isolated standpoint of the right of ownership, the merger is also meaningless. It is undertaken merely to simplify what has become a complicated set of entries in the land register or in order to satisfy the demands of planning law, which requires a specified minimum area of ground for the construction of a building. One may maintain, therefore, that the consolidation of two *Grundstücke* is always a process that is prompted by 'externalities'; it always follows the internal logic of re-parcelling of land and never the logic of property law. Such a process can certainly cause appreciable difficulties for property law if, for the purposes of obtaining planning permission, *Grundstücke* have to be consolidated that are already burdened with rights of third parties. If a union of two *Grundstücke* is not precluded precisely because of that complication or at least made dependent on the agreement of the creditors about the priority of their rights in respect of the new *Grundstück* that is to emerge,[28] the law must

question in the negative. Neighbouring *Grundstücke* that are owned by the same person but have different registrations in the land registry remain different immovables for as long as they are not joined in a single land registration. The Polish Supreme Court 27.12.1994, III CZP 158/94, OSNC 1995/4/59 took the contrasting view that an immovable is an area that is owned by a holder of rights and that is enclosed externally by *Grundstücken* belonging to other holders of rights; the position with regard to the land registration is immaterial.

[28] Under Article 22(2) of the Polish Land Registration and Mortgages Act, land that is burdened with limited property rights can only be merged if the persons entitled to do so agree on the priority of these rights over the land that arises out of the merger. In the Czech Republic, almost every merger (and every partition) of *Grundstücke* requires the permission of the local planning authority. Permission must be applied for by all owners of the *Grundstücke* involved, under § 77 in conjunction with § 82(2) of the Planning Law, 183/2006, as quoted in the *Czech Law Gazette* – the result is a 'planning decision' (*územní rozhodnutí*). Only *Grundstücke* of the same kind can be merged; one cannot

itself decide what is to happen with the encumbrances burdening the original *Grundstücke*.

It is comparatively easy to interpret the partition of *Grundstücke* coherently in property-law terms. A partition of *Grundstücke* – if it is not the consequence of action by a public authority under public law (such as a compulsory acquisition) – results either from the fulfilment of a requirement in a norm of property law that provides for the acquisition by operation of law of parts of a *Grundstück* or from an exercise of the right of ownership of the *Grundstück* being partitioned that is dependent on the participation of others. The law on acquiring ownership by operation of law has the effect of creating new *Grundstücke* primarily by virtue of its rules on prescription. Moreover, many legal systems count their law on good-faith acquisition as within this domain. In some places at any rate, on the assumption that there is an appropriate system of land registration in place, those land-registration rules may also effect the creation of new *Grundstücke*.[29] Under German law, for example, public faith in the land

unite a garden with a field. Above all, § 4(7) of the Cadastre Regulation (26/2007 in the *Czech Law Gazette*) must be heeded: 'It is not allowed to merge parcels or parts of parcels for which there are diverse statements of rights or diverse statements related to rights. Parcels and parts of parcels for which a real burden is registered, the extent of which is recorded in a geometric plan, constitute an exception.'

[29] In France, for example, the publicity of the register in cases associated with *Grundstücken* (*publicité foncière*) makes it possible to identify a *Grundstück*. That is because the register of immovables (*fichier immobilier*) established in 1955 facilitates the search for an existing *Grundstück* by means of various registers – namely, a personal register for every holder of a property right in an immovable, a register for every immovable, and a register of parcels (which encompasses multiple pools of owned parcels on the basis of the cadastre). In France, the publicity in cases related to *Grundstücke* has only a declaratory effect. It has no significance for the relationship between vendor and purchaser or for the question of transfer of ownership between them. The statements in the register serve merely to protect a third party who has acquired competing rights from the same transferor (L. Aynès, P. Crocq. *Les sûretés: La publicité foncière*, 5th edition. Paris 2011, p. 287, para. 634). This follows from Article 30(1) of Decree 55-22, of 4.1.1955, on the reform of publicity in matters related to *Grundstücke* ('Décret n° 55-22 portant réforme de la publicité foncière'). *Inter vivos* dispositions of *Grundstücke* that are not registered are effective only against those third parties who acquire competing rights to the same *Grundstück* from the same transferor on the basis of transactions that require registration. Publicity has the function, moreover, of furnishing the administration with information about the relevant *Grundstück*. The legal position in Belgium conforms to the same model in all essential respects. Registration is not a requirement for the effectiveness of the transaction with regard to the relationship between the parties *inter se*. Registration in the register (*transcription*) is necessary only in order to confer effectiveness on the transaction

register (see § 892 of the German BGB) is related to not merely the property rights it records but also even the very existence of the *Grundstück* that is registered.[30]

Continuity of pre-existing encumbrances poses a far less acute problem in relation to partition, as opposed to merger, of *Grundstücke*. That is because the universal principle is for encumbrances of the original *Grundstück* to continue in relation to the newly constituted *Grundstück(e)*.

7 The formation of *Grundstücke* and the character of the ground

The character of the surface of the earth that belongs to the *Grundstück* is, as a rule, irrelevant for the actual formation of the *Grundstück*. The subject matter may be either an urban space or a rural one; equally a *Grundstück* can consist of a building plot, arable land, meadowland, woodland, or waste land, and it may lie in the hills or on the plains. The surface of the ground is inconsistent with the capacity of its parts to be the subject matter of property rights only if the physical character is such as to cause the legislator to reserve land of the relevant type for state ownership or in some other way render it *extra commercium*. Statutory provisions that prohibit the partition of agricultural or forestry land into units below a

with regard to third parties (Art. 1 of the Law of 16 December 1851 on the Revision of the System of Hypothecs, or the *Loi sur la révision du régime hypothécaire*; for details, see M. Grégoire. *Publicité foncière, sûretés réelles et privilèges*. Brussels 2006, p. 40, para. 125). Matters are exactly the same under Article 2644 of the Italian CC: 'The legal transactions listed in the previous article are not effective against third parties who, on whatever legal basis, have acquired rights in respect of the immovable on the basis of a registration effected before the registration of those legal transactions. After registration [of those transactions], a [later] registration of rights acquired from the predecessor in title [of the party first registering] can have no effect as against the party first registering, even if the acquisition [by the party registering later] is referable to an earlier date'.

[30] BayObLG 6.2.1981, MittBayNot 1981 pp. 125, 126; BayObLG 11.5.1995, MittBayNot 1995, pp. 291, 293 ('The public faith in the register also extends to the fact that the registered *Grundstück* legally exists as such') and also OLG Frankfurt 28.1.1985, MittRhNotK 1985, pp. 43–44 ('Since one cannot conceive of ownership of a *Grundstück* other than in relation to a defined area of the ground, the registration of the area of the *Grundstück* belongs to the part of the content of the register that maps to the public faith in the register'). For further details, see J. von Staudinger (-Gursky), *Bürgerliches Gesetzbuch*. 2008, § 892, para. 33.

set minimum size ultimately have the same effect. That is because such rules boil down to the rule that agricultural land and forestry land must be of at least the given minimum size if they are to qualify as the subject matter of property rights. In all other cases, however, the classification of *Grundstücke* according to the character of the surface of the ground is material only with respect to the type of property rights possible for use of that land.[31] Where, additionally, special modes of acquisition fall

[31] Article 204(1) of the Portuguese CC expressly includes as immovables, among other things, 'the agricultural and the urban' *Grundstücke* and, moreover, the 'waters' (and Art. 204(2) of the Portuguese CC elaborates on what is meant by an 'agricultural' or 'urban' *Grundstück*), but this terminology taken from Article 374 of the Portuguese CC of 1867 has been retained only for tenancy-law and tax-law purposes (Pires de Lima. Das coisas. – *BMJ* 91 (1959), pp. 207, 211; Pires de Lima, Antunes Varela. *Código Civil Anotado: Artigos 1.º-761.º* (Vol. 1), 4th edition. Coimbra, Portugal 1987, comment 3 on Art. 204, p. 196; on tax law, see also A. Menezes Cordeiro. *Tratado de direito civil português*, Vol. I: Parte geral. Part 2: Coisas, 2nd edition. Coimbra, Portugal 2002, p. 127). To escape the difficulties in distinguishing between a *prédio rústico* and a *prédio urbano*, tax law has recently adopted the notion of the mixed *Grundstück* (*prédio misto*). In the private-law context, however, that too is of no importance (J.A.C. Vieira. *Direitos reais*. Coimbra, Portugal 2008, p. 160). In Italy, the position is no different, although there legislation distinguishes between agricultural (Art. 846 *ff* of the Italian CC) and urban (Art. 869 *ff* of the Italian CC) immovables. The reason for this distinction is entirely a public-law one. Whilst the Spanish Civil Code does not draw a distinction between *fincas rústicas* and *fincas urbanas*, the matter is addressed in case law and scholarly writing. It hinges on the locality where the *Grundstück* is situated and, moreover, on, among other things, the area's population density, the existence of surrounding development, and the current use (W. Sohst (see Note 14), comment on Art. 1523, pp. 263–264). Not all of the *Grundstücke* in the countryside are *fincas rústicas*, and not all *Grundstücke* in urban areas are *fincas urbanas* (R.M. Roca-Sastre *et al*. *Derecho hipotecario*, 9th edition, Vol. III. Barcelona 2008, pp. 203–210). The owners of neighbouring *Grundstücke* enjoy under Article 1523(1) of the Spanish CC a right of pre-emption in respect of a *finca rústica* that is no larger than a hectare and is actually used for agriculture (details can be found in the Law on the Modernisation of Agricultural Development (Law 19/1995, of 4.7.1995, 'Ley de Modernización de las Explotaciones Agrícolas'); see M. Eberl, B. Selbherr. *Immobilienrecht in Europa: Spanien*. – S. Frank, T. Wachter. *Handbuch Immobilienrecht in Europa*. Heidelberg, Germany 2004, pp. 1391, 1407). Finally, the Roman-law distinction between agricultural land (*praedia rustica*) and town land (*praedia urbana*) survives also in some of the provisions of the Greek Civil Code (e.g., in its articles 619, 620, 1024, 1029, 1162, and 1163). Town land is land that by custom or law is destined to be built or rebuilt upon, irrespective of whether or not it has already been built on (Areopag. 498/1953, NoB (A) 1953, p. 855; Areopag. 632/1967, NoB 16 [1968], p. 239; Areopag. 1793/2006, ArchN 2007, p. 582) and regardless also of the public-law planning on land use. Agricultural land serves the cultivation of fruits (Areopag. 534/1956, NoB 5 [1957],

to be considered, that is typically not a matter of property law but rather of public-law requirements to obtain consent. A more precise analysis is called for only for those spaces whose visible surface is partly or completely filled with water. In those cases, a distinction has to be drawn along several lines – in particular, according to whether the water is flowing or static and, furthermore (in either case), whether the water falls under a regime of public law or of private law. However, consideration of that aspect of matters cannot be developed further within the confines of this contribution.

8 *Grundstücke*, not immovables

There remains the question of the relationship between '*Grundstücke*' and 'immovables' ('immovable things'). Of course, one might take the view that all is entirely the same whichever word one uses to denote the parts of the planet Earth that are capable of being the subject matter of property rights – be they *Grundstücke*; immovables (or immovable things); or, to borrow from the title of Alfred Ross's immortal article on legal realism, simply 'tû-tû'.[32] A fair number of jurists thus regard 'Grundstücke' (or, more precisely, the relevant national language's word for a parcel of land) and 'immovable' to be one and the same.[33] That is true even for many in Germany, where the BGB takes pains to avoid the notion of an 'immovable thing' and refers only to 'Grundstücke'. In recognising 'movable things', the BGB also implies its counterpart – the 'immovable

p. 184; Areopag. 632/1967, *loc. cit.*; Areopag. 506/1965, NoB 14 [1966], p. 425). However, the distinction enjoys only limited significance in a purely property-law context – e.g., where the question is who the direct possessor of the *Grundstück* is. That is because the question of whether a person exercises normal control over the *Grundstück* depends on whether that person undertakes the actions corresponding with the nature of the land (C.L. Kousoulas. *Empragmato Dikaio*. Athens and Thessaloniki 2004, p. 138).

[32] The article, originally written in Danish, has been published at least three times: in the *Festschrift for Henry Ussing* (Copenhagen, Denmark 1951), pp. 468–484; in *Scandinavian Studies in Law* 1957, pp. 138–153; and in *Harvard Law Review* 1956–57, pp. 812–825.

[33] This is the position under Article 18(1) of the Slovenian Property Code (*SPZ*) (on which see M. Tratnik. Das neue slowenische Sachenrecht. – *WGO Monatshefte für Osteuropäisches Recht* 45 (2003), pp. 94, 99); under § 119(2) of the old Czech Civil Code (of 1964) and § 498(1) of the new one (of 2014); and in numerous other countries, such as Sweden, where *fastighet* and *jord* are only rarely sharply distinguished (in *Svenska Akademins Ordbok*, at http://g3.spraakdata.gu.se/saob/, however, 'jord' appears as a term denoting the object of ownership of land).

thing' – even though it uses the term 'Grundstücke'.[34] While that might be so, it does not resolve our difficulty. That difficulty, moreover, is not a mere consequence of the fact that other legal systems regard the *fonds de terre*, *tierras*, or whatever they may be called as only a subset of immovables (such that every plot of ground is an immovable but not every immovable is ground) while the common law manages to avoid both concepts and makes do with 'land'. In their essence, they all display the same weakness. They classify entities according to a criterion that is of relevance to property in, at best, secondary contexts; in other words, they tackle the secondary question before the main one. The first question, which alone is the focus of this contribution, is this: what exactly is the specific subject matter of an exclusive right of use of the ground? That question is not answered by the term 'land' or 'immovable' (referring to *immeuble* or *unbewegliche Sache*); someone who actually equates immovables and *Grundstücke* merely swaps words without advancing the substance of the matter one jot. This is because one might perhaps say that the surface of the ground, a house, a body of water, a farm animal[35], or a right over another's *Grundstück* is 'land' or an 'immovable' but not that they are *Grundstücke* in the sense that, in our view, matters.

The notion of an immovable thus extends appreciably further than does the notion of a *Grundstück*. There is an almost endless number of objects that, though not *Grundstücke*, are classified by national legal systems as immovables.[36] In using the term '*unbewegliche Sache*', '*immeuble*', or '*land*', the relevant national terminology does not encapsulate the proposition that these items are the potential subject matter of property rights effective against third parties. Astonishingly, there does not appear to have been a word created, to this day, for that attribute that is cut out for Europe. We believe that 'Grundstück' can fill that gap, as it conceptually grasps the object individualised by the legal systems in respect of which a person asserts a right when he or she claims to be the land-owner.

[34] For example, Staudinger (-Jickeli/Stieper), *Bürgerliches Gesetzbuch* (2004), preliminary comment on §§ 90–103, para. 37 ('Immovable things are *Grundstücke*, including their integral component parts').

[35] E.g., Article 524 of the French, Belgian, and Luxembourg civil codes. See also Article 334(6) of the Spanish CC (wherein facilities for breeding animals and beehives count as immovables if connected to a *finca*, though the animals themselves do not).

[36] A further example is furnished by Article 334(7) of the Spanish CC, where even the 'fertiliser that is destined to supply a landed estate' is immovable, provided that it is 'on the premises where it is to be applied'.

'Immovables' ('immovable things') is a general category no different from categories such as 'generic goods', 'fungibles', and 'consumable goods'. A legal system or a juridical dogmatic framework deploys them for purposes different from those for which we propose using the term 'Grundstück'. The notion of immovables as currently embodied in most of the legal systems that invoke it is concerned with certain issues consequent from the formation of *Grundstücke*, such as the modes of acquisition and the transfer of rights that must be registered, or with articulating the proposition that a person who has a right of use of another's *Grundstück* or a power of sale over it may also have resort to possessions of the debtor that serve husbandry of the land. Naturally, such rules have to be developed separately, not merely as between distinct types of property rights and, in a European context, moreover, from one legal system to another.[37] Furthermore, there may be a need to distinguish not between movables and immovables but, rather, between registered things and things not required to be registered (as Art. 3:10 of the Dutch Bugerlijk Wetboek does). More important, however, is that such rules always presuppose another – namely, that the relevant legal system permits and facilitates the excision of entities from the land that are capable of forming the subject matter of property rights. The 'movable'/'immovable' dichotomy therefore fails to hit the essential target.[38] A 'movable' is capable of being

[37] There is not merely no guarantee that the distinction between movable and immovable follows the same rules everywhere. It is also not guaranteed that they achieve the same purposes. The Spanish CC, for example, in its systematic structures attributes to the differentiation between movable and immovable things far less significance than the German and the Italian codes do (L. Díez-Picazo. *Fundamentos del derecho civil patrimonial*, 5th edition, Vol. III: Las relaciones jurídico-reales, el registro de la propiedad, la posesión. Madrid 2008, pp. 203, 206). Moreover, unconsidered invocation of the definition of a *Grundstück* as an immovable may lead to irritations even within a single legal system. Díez-Picazo dryly observes (*ibid*., p. 212) that it is not imperative that there be a requirement of judicial approval when a minor wishes to sell a dovecot and that a disposition of a dovecot by an adult be able to be effected only by means of notarised writing (*escritura pública*) merely because Article 334, item 6 of the Spanish CC treats a dovecot placed on a *Grundstück* as an immovable.

[38] That is evident in how one and the same thing can be at the same time both movable and immovable in some legal systems. That is the case not only in France but also, for instance, in Spain. TS 21.12.1990, RAJ 1990, No. 10359, p. 13270, for example, had to do with a dispute about the realisation in money of irrigation systems that had been sold but were on a *Grundstück* burdened with a hypothec. The court accepted that, by force of the agreement, the hypothec extended to the irrigation systems. On the one hand, they were movable goods under Article 111 of the Mortgage Act (Ley Hipotecaria, LH), but

owned not because the object is movable (running water and dockside rail-mounted gantry cranes[39] are movable) but, rather, because it is spatially separated from other objects and, therefore, as a real thing, capable of being exclusively assigned to a party. An 'immovable', in contrast, is not by nature a thing; it only becomes a thing when it assumes the form of a *Grundstück*. Categorising things as 'movables' rests on a fuzzy concept, though, for the most part, the repercussions are not especially disruptive. If, however, one contrasts 'movables' against 'immovables' and moulds the latter into its own legal category, the fuzziness snowballs into a serious conceptual problem.

at the same time also (as accessories) *inmuebles por destinación* or *pertenencias*. Given this background of a dual characterisation of such things, scholarly writing has been forced to distinguish between 'genuine' and 'improper' immovables and has noted that the Spanish CC, in contrast to the French civil code, does not state that all things are either movables or immovables; it only states that they are to be regarded as either movables or immovables (L. Díez-Picazo, *op cit*., p. 210). However, this does not necessarily make matters appreciably clearer.

[39] According to Dutch and Belgian case law, however, these are also 'immovable' things (HR 24.12.2010, NJB 2011 No. 199; Cass. 14.2.2008, Pas. belge 2008 No. 110, p. 440).