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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 at present 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, 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 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 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 debts 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.

1 Details and supporting material will appear in the first volume of my forthcoming work Gemeineuropäisches Sachenrecht. Publication is envisaged for 2015.
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 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’. The Estonian language, I am informed, has no difficulty here and can operate with the word ‘maatükk’.

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

\(^2\) ‘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 because we are invoking, because ‘tenement’ also encompasses some rights in land (as does the word ‘hereditaments’ and also another use of ‘Grundstück’), 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’; §27a (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 land—areas or spaces that are described and recorded in the land register—may be transferred. A Grundstück, 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 odebírskoprávních zatočích 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, and also Supreme Court 30.4.2006, 22 Cdo 806/2006; see http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/A6791F824D7PoDBBC12579830059A423?openDocument&Highlight=0). 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 or the land-tax cadastrale (under §7a of the Austrian Vermessungsgesetz, or VermG, and §5 (1) of the Austrian Allgemeines Grundbuchsanlegungsgesetz, AllgGAG). Subsection 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 cadastrale (under §7a of the Austrian Vermessungsgesetz, or VermG, and §5 (1) of the Austrian Allgemeines Grundbuchsanlegungsgesetz, AllgGAG). Subsection 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 cadastrale. To some extent, the notion of a plot or parcel of land (Parselle 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), sentence 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’.

\(^4\) 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/scl.
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 that subsisting or potential entities capable of supporting property rights emerge—namely, Grundstücke.

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 Grundstücke. 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. 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. Not

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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 (rő) and mounds of stones (röver) 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. Section 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. Immuebles (or bienes inmuebles) likewise vest in the state if they have no other owner (under Article 17 of the Law on the Property of the Public Administration, or ‘Ley del Patrimonio de las Administraciones 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 ed. 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) 13) of the Waste Shipments Law, or ‘Gesetz zur Ausführung der Verordnung’; (EG) No. 1013/2006 of the 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’. Section 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 usurpacao de coisa imóvel and the usurpación de derecho real inmobiliario, respectively) is a criminal offence (under Article 215 of the Portuguese Código Penal (CP) and Article 245 of Spain’s Código Penal, Parte Especial: Artigos 202.ª a 307ª (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 (BanO): ‘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 [...] 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., Article 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,
even the law of 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. It follows that one has to confine 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. Real things derive from their corporeality a demarcation to other things; this determines their capacity to be the subject matter of property rights. The position is different for Grundstücke. They

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 (97). – W. Weidenkaff (ed.). Bürgerliches Gesetzbuch, 71st ed. 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) 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 ed. 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 ed. Coimbra, Portugal 2006, p. 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 Grundbuchkörper (land-register corpus), where they together constitute a Grundbuchseinlage (or land-register enclosure) (J.C.T. Rassi, Grundbuchrecht, paragraph 5). It is even possible for Grundstücke that are not spatially connected with one another to be registered as a single land-register corpus (see §§ 5 and 54 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 EigenArtikel 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.
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; and for the use or exploitation of the oceans 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 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.

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, Article 518). 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’.\textsuperscript{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 air above a building may have different owners,\textsuperscript{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 stilts 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\textsuperscript{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.\textsuperscript{17}

6.2. Space

A Grundstück captures a space.\textsuperscript{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) 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.

as signifying the upper limit of ownership of immovables (see C. Asser [-F.H.J. Mijnssen et al. (eds). Zakenrecht, 15th ed. 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.).

\textsuperscript{14} The correct view is expressed in Rolfe (Inspector of Taxes) v. Winpey Waste Management Ltd [1988] STC 329, 357 (Harman J, obiter: airspace separated from the ground below it 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 fly-over (W. Sohst. Das Spanische Bürgerliche Gesetzbuch: Text und Kommentar, 2nd ed. Berlin 2003, comment on Article 350, p. 88, with references to Spanish case law).


\textsuperscript{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).

\textsuperscript{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, Sbirka 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’).

\textsuperscript{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 ed. Paris 2010, p. 188, paragraph 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-section of that space (ibid., p. 191, paragraph 156; similarly, R. Savatier. La propriété de l'espace. Dalloz 1995, 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 découplant, dans l'espace, le volume qu'il assoit sur cette surface’).
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. Such a rule would not make sense for property law, because it 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.¹²⁰

### 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 Grundstücke 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 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

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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.

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 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 Grundstück will depend on the nature of the encumbrance. § 1026 of the 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.’

everywhere possession oscillates between being a state of affairs and being a right. 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 spatial 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 mere 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 immovable.

### 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.

Why do We Need Grundstücke (Land Units), and What are They?

Christian von Bar

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 ally systems, those rules invoke the geometric configuration is effected by partition of the land in accordance with the rules of the law. In ally systems, those rules of this model are still palpable to this day.*26 In the allocation of landed estates for the grantee’s own use, action as a matter of form but an act of sovereignty as a matter of substance. In England, the consequences 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 trans-action 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 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.

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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 687 (even for the purposes of acquisitive prescription, a Grundstück must at least ‘show’ itself) and OLG Frankfurt/Main 28.1.2005, MitthRNortK 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, 1770/2011, Isokrates database (contract 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 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, paragraph 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 1477, r. 7 (a)). An official illustration can be found at http://eservices.landregistry.gov.uk/www/wps/QDMPS-Porlet/resources/example_title_plan.pdf; for details, see the Land Registry’s Practice Guide 40 (20 December 2012) and its supplements (http://www.landregistry.gov.uk/professional/guides/practice-guide-40), particularly Supplement 5 (on title plans).


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 Vakíufa. 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 3/22.1.1830, the newly created Greece accepted the usufructuary and administrative rights of the Muslim population in respect of these areas; the state became their superior owner (respect of 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).
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

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 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

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 question in the negative. Neighbouring Grundstücke that are owned by the same person but have different registrations in the land registry remain different immovable 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 Grundstücke 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 unite a garden with a field. Above all, §4 (7) of the Katasterverordnung (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 Grundstücke (publicité foncière) makes it possible to identify a Grundstück. That is because the register of immovable (fichier immobilier) established in 1955 facilitates the
German law, for example, public faith in the land 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.\textsuperscript{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 set minimum size usually 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.\textsuperscript{31}
Where, additionally, special modes of acquisition fall 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 ‘tü-tü’.

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. 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 thing’—even though it uses the term ‘Grundstücke’.

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, 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.


This is the position under Article 18 (1) of the Slovenian Property Code (SPZ) (on which see M. Trtnik. Das neue slowenische Sachenrecht. – WGO Monatshefte für Osteuropäisches Recht 45 (2003), pp. 94, 99; under §109 (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 Akademiens Ordbok, at http://g3.spraakdata.gu.se/saob/, however, ’jord’ appears as a term denoting the object of ownership of land).

For example, Staudinger (Jickell/Stieper), BGB (2004), preliminary comment on §§ 90–103, paragraph 37 (‘Immovable things are Grundstücke, including their integral component parts’).

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).
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. 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 claims to be the land-owner. ‘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. 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 Article 3:10 of the Dutch Burgerlijk 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. A ‘movable’ is capable of being owned not because the object is movable (running water and dockside rail-mounted gantry cranes 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.

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’.

37 There is not merely any 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. 10339, 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 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).