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Nieruchomość jako rzecz w świetle Kodeksu cywilnego[2]

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Streszczenie:

Celem artykułu jest prezentacja zasadniczych cech charakterystycznych rzeczy w polskim prawie cywilnym, ze szczególnym uwzględnieniem nieruchomości. Zgodnie z Kodeksem cywilnym te ostatnie stanowią grunty, a także budynki lub części budynków. Rzecz, w tym nieruchomość, jest pojęciem normatywnym, w prawie polskim ograniczonym do samoistnych, wyodrębnionych z otoczenia przedmiotów materialnych. Wątpliwości może budzić materialny charakter gruntu z uwagi na fakt, że stanowi go „część powierzchni ziemi" (art. 46 § 1 kc.). Tak rozumiany grunt niejako „materializują" dopiero przedmioty znajdujące się na powierzchni lub pod nią. Jednak zakres aktów w ramach wykonywania własności determinują ramy dopuszczalnego korzystania z przestrzeni, tj. społeczno-gospodarcze przeznaczenie gruntu (art. 143 kc.). Z kolei budynek lub jego część mogą stanowić odrębną od gruntu nieruchomość w przypadkach wskazanych w przepisach szczególnych. Te zaś nakazują wyróżnić nie tylko budynki i lokale, lecz również części budynków będące tzw. niewyodrębnionymi lokalami albo związaną ze współużytkowaniem wieczystym gruntu nieruchomość wspólną w budynku, w którym zostały wyodrębnione lokale mieszkalne.

Słowa kluczowe: prawo cywilne, rzecz, nieruchomość, grunt, budynek, lokal

Real Property as a Thing Under the Polish Civil Code

Abstract:

The aim of the article is to present the main characteristics of things in the Polish civil law, with a particular emphasis on real property. According to the Polish Civil Code, real property includes land, buildings or parts of buildings. A thing, including a real property, is a normative concept, limited under the Polish law to self-contained material objects. The material nature of the land may raise doubts due to the fact that it is a "part of the earth's surface" (Article 46 § 1 of the Civil Code). The land thus understood is only "materialized" by objects located on or below the surface. However, the scope of acts related to the exercise of the ownership title is determined by the framework of the permissible use of space, i.e., the socio-economic purpose of land (Article 143 of the Civil Code). Then again, a building or its part may constitute a real property separate from the land in the cases specified in special regulations. These regulations distinguish not only between buildings and premises, but also between parts of buildings that are non-separated premises or a common property related to the perpetual usufruct of land in a building in which residential apartments have been singled out as distinct separate properties.

Keywords: civil law, property, real property, land, building, premises

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[2] The Act of 23rd of April 1964, the Civil Code (consolidated text: Journal of Laws of 2022, item 1360 - hereinafter referred to as: the Civil Code).

1. Introductory remarks, thing in a legal sense

The legal essence of real property within the meaning of Art. 46 of the Civil Code is complex. This concept has long been a subject of the doctrine's interest. However, it has not been elaborated exhaustively. These considerations do not aspire to a comprehensive presentation of the legal issues relating to this category of goods. A detailed analysis of the problem of the concept of "real property" requires separate monographic work. However, they are an attempt to organize key issues. The analysis of the scope of this concept should be recalled from the basic statutory assumptions.

“Thing" in Polish civil law has been narrowly defined [3]. Firstly, a thing, within the meaning of the Civil Code, can only be a material object (Art. 45 of the Civil Code). The legislator consciously did not accept the broad scope of this category, following the legislation of the turn of the 19th and 20th centuries, including in particular German and Swiss[4].

A thing in Polish law is only a part of the “non-rational" matter[5], a sensual, material object ("corporeal", *corpus, res quae tangi cernique potest*)[6]. *De lege lata,* neither rights nor property rights or animals are things in the legal sense. For the latter, however, the provisions on things (movables) should be applied accordingly[7].

Secondly, not every tangible object is a thing within the meaning of civil law. This is because only tangible goods that meet certain criteria (premises) under Art. 45 of the Civil Code can be understood as such.

The commonly accepted definition of a thing indicating these premises was formulated under Polish law by Jan Wasilkowski. According to it, things are "material parts of nature in their original or processed state, separated (naturally or artificially) to such a degree that they may be treated as intrinsic goods in socio-economic relations"[8].

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[3] T. Dybowski, *Ochrona własności w polskim prawie cywilnym (rei vindicatio - actio negatoria),* Warszawa 1969, p. 38.

[4] J. Wasilkowski, *Prawo własności w PRL. Zarys wykładu, opracowane przy współudziale M. Madeya,* Warszawa 1969, p. 19-21.

[5] B. Windscheid, *Lehrbuch des Pandektenrechts. Zweiter Band,* Frankfurt a. M. 1906, p. 273: German: *das einzelne Stuck der vernunftlosen Natur.*

[6] This is also the case, for example, with § 90 of the Civil Code.

[7] See art. 1 clause 1 of the Act of August 21, 1997 on the protection of animals (consolidated text: Journal of Laws of 2022, item 572, as amended); see also e.g. art. 641a of the Swiss Civil Code; § 285a of the Austrian Civil Code, § 90a of the German Civil Code; see e.g.. E. *Łętowska, Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja,* [in:] *Studia z prawa prywatnego. Księga Pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej,* Łódź 1997, pp. 71-92.

[8] J. Wasilkowski, *Zarys prawa rzeczowego,* Warszawa 1963, p. 58; see also e.g.: A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej,* Warszawa 2020, p. 45, 286; J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe,* Warszawa 2022, p. 19; E. Gniewek, *Prawo rzeczowe,* Warszawa 2020, pp. 25-26; M. Bednarek, *Mienie. Komentarz do art. 44-55[3] Kodeksu cywilnego,* Kraków 1997, p. 47, which indicates that things are, inter alia, "Objects derived from other celestial bodies as soon as they are brought to earth or taken over by man with the use of available technical means" (see also the literature quoted therein). according to which they are "limited particles of nature (...) in either a natural (...) or processed state (...), insofar as they represent a property value and are considered in trade as units (...) and these are self-contained units, not constituent parts of something else, and in the state in which they are, they are already subject to or may be subject to human authority.", see also: F. Zoll, *Prawo cywilne w zarysie. Prawo rzeczowe,* v. 2 b. 1, Kraków 1947, p. 6; T. Dybowski, *op. cit.,* p. 39; E. Gniewek [in:] *Kodeks cywilny. Komentarz,* ed. E. Gniewek, P. Machnikowski, Warszawa 2021, p. 124

In the legal sense, a thing is therefore characterized by its physical character (materiality), impersonality and physical limitation (self-existence).

A thing can only be an object that can be subjected as a whole to the actual control of man. For this reason, flowing water is not considered a thing *(aqua profluens)*[9], nor are energies or gases floating freely in the atmosphere. For the analyzed classification, however, the property value of the object, its condition (new, used), the way it was created, usefulness or suitability for a specific purpose do not matter.

In order to meet the criterion of self-existence, a thing must have a physical frame (boundaries) defined in the space. These limits, depending on the type of thing, are determined by its physical structure or normative criteria.

A movable thing is always individualized by its physical coherence, consisting in its spatial distinctiveness[10]. In turn, the boundaries of real property are determined both by physical separation by its material components (the earth layer shaping the surface, walls of the building, plants, etc.), and by the boundary lines drawn up in the relevant proceedings (see Art.153 of the Civil Code and Art. 29 and the following of the Act of May 17, 1989 - Geodetic and Cartographic Law[11])[12]. Marking the boundaries of land on the surface is strictly legal, basically detached from the physical properties of the land or its individual parts[13]. The frames determined in this way define the horizontal spatial boundaries of land. There are more doubts as to what, in particular in the light of Art. 143 of the Civil Code, is the vertical range of the boundaries of the land property (which will be discussed later in the article).

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[9] See e.g.: T. Dybowski, *op. cit.,* p. 41; it is emphasized that flowing water is not limited on all sides by borders, F. Zoll, *Przedmiot praw rzeczowych,* „Kwartalnik Prawa Prywatnego" 1938, b. 3, p. 216. The stream of water (*fluor aquae*) as such cannot be subjected to human sovereignty, see: A. Randa, *Das Eigenthumsrecht mit besonderer Rucksicht auf die Werthpapiere des Handelsrechtes nach* osterreichischem *Rechte,* Band 1, Leipzig 1893, p. 61.

[10] See H. Dernburg, Pandekten. Band I, Berlin 1884, p. 167.

[11] Consolidated text: Journal of Laws of 2021, item 1990.

[12] Cfr.also S. Grzybowski [in:] *System Prawa Cywilnego,* v. I *Część ogólna,* ed. S. Grzybowski, Wrocław-Warszawa--Kraków-Gdańsk-Łódź 1985, p. 413.

[13] See also E. Drozd, *Przeniesienie własności nieruchomości,* Warszawa-Kraków 1974, p. 139.

Thirdly, in Art. 45 of the Civil Code it was indicated that only tangible items are things "within the meaning of" the Civil Code. The restriction indicated in this provision ("Things within the meaning of this Code are...") does not exclude the subject extension of the category of things in other normative acts to items of an intangible nature[14].

Fourthly, the concept of a thing is not used in the Civil Code in the sense in which it is understood in everyday language. A thing is a good which is defined as such by a legal norm. For this reason, the term "thing in the legal sense" (or in the technical legal sense) is sometimes used)[15], to distinguish the normative conceptual category of "things" from the colloquial meaning and non-normative scope of the designations of this term. Thus, not every object usually referred to as "things" is a thing in the legal sense (as a normative category).

The Civil Code does not define movable property. This group includes all objects that meet the criteria of being recognized as a thing in the legal sense that do not belong to the category of real property. On the basis of Polish civil law, one can therefore speak of the so-called negative definition of movable things[16]. Traditionally, it is assumed that movables are things that can be moved from place to place without damage or destruction [17] (Art. 528 of the French Civil Code - French *les biens qui peuvent se transporter d'un lieu a un autre,* § 293 of the Austrian Civil Code – German: *Sachen, welche ohne Ver- letzung ihrer Substanz von einer Stelle zur andern versetzt werden konnen).*

The above distinction is based on the assumption that the division into real property and movable property is considered complete and separable. A thing, then, can only be immovable or movable. Polish law is alien to the concept of the French codes of 1804 and the Austrian codes of 1811, which consist in the fact that real property or movable property also includes certain property rights.

A thing can be uniform (simple) or complex, depending on whether it is made of a single-species material *(res unitae),* or is composed of different elements which have a

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[14] Electricity Act of March 21, 1922 (Journal of Laws of 1935, No. 17, item 98) in Art. 20 stated that electricity is considered a movable property within the meaning of the law.

[15] E. Gniewek [in:] *Kodeks cywilny. Komentarz...,* p. 124 and the literature cited therein.

[16] The fact that it is a legal concept is indicated, for example, by T. Dybowski, *op. cit.,* p. 37, 39; see e.g.: S. Grzybowski [in:] *System Prawa Cywilnego,* v. 1..., p. 413; M. Bednarek, *op. cit.,* p. 48; A. Wolter, J. Ignatowicz, K. Stefaniuk, *op.cit.,* p. 289; see also e.g. E. Gniewek [in:] *Kodeks cywilny. Komentarz...,* p. 126; C. Crome, *System des deutschen burger- lichen Rechts. Band I. Einleitung und Allgemeiner Teil,* Tubingen 1900, p. 276. The situation is different in Austrian law, where there is a negative definition of real property. Pursuant to § 293 of the Austrian Civil Code, things that can be transferred from one place to another without damaging their substance are movable things, while all others are real property („im *entgegengesetzen Falle sind sie unbeweglich").*

[17] See e.g. J. Zielonacki, *Pandekta, czyli wykład prawa prywatnego rzymskiego. Część pierwsza,* Kraków 1870, p. 33;
E. Till, *O rzeczach jako przedmiotach praw prywatnych,* „Przegląd Sądowy i Administracyjny" 1884, no. 20, p. 155;
F. Zoll, *Prawo prywatne w zarysie przedstawione na podstawie ustaw austryackich,* Kraków 1910, p. 48; H. Konic, *Prawo rzeczowe,* Warszawa 1927, p. 24, 74.

different physical structure, in particular, they are made of different materials *(res connexae)*[18]*.* This applies to both things that are natural and artificial, and therefore created or processed by man. This division was not distinguished in the Civil Code, however, the purposefulness of its distinction is not in doubt. It affects, in particular, the recognition of a complex item as a good consisting of various elements, i.e. components that are not independent objects (things). No part can be treated as an object separated from the thing, which is only an "addition" to the others as things. They all contribute to the thing, somehow co-creating it. This conclusion results directly from the definition of a component part of a thing contained in Art. 47 § 2 of the Civil Code. According to this provision, a constituent part of a thing is anything that cannot be disconnected from it without damaging or substantially changing the whole, or without damaging or substantially changing the disconnected object. Therefore, it does not constitute a component part of the thing, an element that could be disconnected from the others without the result of damage or a significant change to a part or the whole constituting a thing in legal sense. In German law, such components that should be permanently physically connected (linked) to each other are defined as "essential" (German *wesentliche Bestandteile,* see §§ 93 and 96 of the German Civil Code).

As a rule, since a component part can only be considered in the case of physically related goods, then each of the component parts of a thing must also be a material object (see, however, Art. 50 of the Civil Code). Every immovable property is a composite thing[19]. In particular, land components are, as a rule, plants growing on it (from the moment of planting or sowing, including their natural benefits), as well as buildings and other devices permanently connected with the land (in accordance with the principle of *superficies solo cedit,* Art. 48 of the Civil Code)[20].

Exceptionally, the Civil Code in Art. 50 recognizes subjective rights related to the ownership of immovable property as constituent parts. These are the so-called fictitious or intangible components of things[21]. *De lege lata* in Polish law they are constituted by land easements (formerly also e.g. real burdens). Moreover, Art. 3 sec. 1 sentence 1 of the act on ownership of premises qualifies the share in common real property as a component part within the meaning of Art. 50 of the Civil Code in connection with Art. 46 § 1 of the Civil Code.[22]

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[18]See e.g. S. Grzybowski [in:] *System Prawa Cywilnego,* v. 1..., p. 417.

[19] S. Grzybowski [in:] *System Prawa Cywilnego,* v. 1..., p. 414.

[20] See e.g. K. Zaradkiewicz, *„Warstwowość"...,* p. 41.

[21] See e.g. *ibidem,* p. 38; see also e.g. E. Gniewek [in:] *Kodeks cywilny. Komentarz.,* p. 135.

[22] Judgment of the Supreme Court of March 16, 2016, IV CSK 259/15, LEX no. 2021227.

Nowadays, Polish law is alien to legal fiction which equates some property rights with the concept of a thing in the legal sense. However, such a solution is known to some foreign legal systems.

2. Real property in the light of Art. 46 of the Civil Code.

Pursuant to Art. 46 § 1 of the Civil Code, real properties are parts of the land that constitute a separate subject of ownership (lands), as well as buildings permanently attached to the land or parts of such buildings, if under special provisions they constitute an object of ownership separate from the land. In the light of this definition, real property can be not only land, but also goods having certain features distinguished in the statutory definition, regardless of their permanent connection with the surface of the land. Real property is distinguished by the fact that it does not have the feature of transferability understood as not causing a significant change or damage to the whole change of the physical system as a result of external influence on the thing (regardless of its source)[23]. Non-transferability relating to a thing, not to a subjective right, and therefore in the sense of the impossibility of changing the position of the object of law, results from being permanently bound to the land's surface.

It is correct to observe that the division of the land area into real properties is artificial and results "not from the physical properties of the land's surface, but from the system of ownership relations"[24]. As already mentioned, land boundaries are not determined horizontally by their natural properties[25]. Consequently, this applies to any object on or below the ground, which is its component part [26]. The separation of the category of land real properties as things is of conventional (legal) character[27]. Boundaries separating neighboring lands (horizontal boundaries), as already indicated, usually do not result from their physical properties.

In certain cases strictly regulated by law, real property may also include buildings (Art. 235 §1, Art. 272, Art. 279 of the Civil Code) and parts of buildings (mainly premises)[28]. However, *de lege lata*, the floor of the building cannot be a real property. It is disputable whether a property, in the legal sense, may be plants and equipment permanently attached to the land, if under special provisions they constitute an object of

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[23] See H. Dernburg, *Pandekten. Band I*..., p. 166.

[24] T. Dybowski, *op. cit.,* p. 48.

[25] See E. Drozd, *Przeniesienie własności nieruchomości,* pp. 139-140.

[26] See W. Górecki, *Sytuacja prawna budynku wniesionego częściowo na sąsiednim gruncie,* „Monitor Prawniczy" 2010, no. 5, pp. 276, 277; K. Zaradkiewicz, *„Warstwowość"...,* pp. 49-51.

[27] See also e.g. M. Bednarek, *op. cit.,* p. 89; E. Gniewek, *Kodeks cywilny. Komentarz.,* p. 126.

[28] One cannot agree with the view that seagoing vessels or ships are real property; movable property are also - according to the definition of Art. 16 sec. 1 of the Act of July 3, 2002, Aviation Law (consolidated text: Journal of Laws of 2022, item 1235),

property separate from the land (see in particular Art. 49, Art. 235 § 1, 272, 274 and 279 § 1 of the Civil Code). Not much space is devoted to this issue in the literature, which presents the view that the so-called "other devices" in the indicated cases should be treated as movable property[29].

On one hand, *a contrario* to Art. 46 of the Civil Code, it can be assumed that since these objects are not buildings or their parts, they cannot be regarded as such, not falling into the three-division form of real property. Since this provision distinguishes only three types of real properties, there are no grounds for distinguishing any other. On the other hand, however, the physical property of plants and devices constituting a separate object of property, i.e. the inability to move in space without a significant change in whole or in part, may prove that these objects meet the essential feature that distinguishes each property. Particularly in the case of plants that are separate things, one could theoretically argue that their physical bond with the land's surface allows them to be regarded *sui generis* as land in legal context. Ultimately, however, it must be acknowledged that it is not the physical features ("non-transferable" in the above sense), but the lack of a normative distinction as separate types of real property within this general category, that leads to the conclusion that while constituting an object of property separate from the land, other than buildings, devices and plants are *sui generis* movable objects.

In the legal sense, the legislator closely associates the attribute of a thing with the fact that such a good may constitute a separate object of property. This law is complete in the sense that it exists for things as a whole, and also for particularities, for its scope can only include one thing. On the one hand, there cannot be "joint" ownership of several things, on the other hand, a component part of a thing cannot be a separate object of property (Art. 47 § 1 of the Civil Code)[30]. In the case of real property, they are therefore only goods that can be owned as such. This was explicitly provided for in Art. 46 § 1 of the Civil Code in relation to land. This means that it is not the physical features of an object that determine its nature as a thing, but the statutory possibility of the

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aircrafts and ships, both sea and inland (also: A. Wąsiewicz [in:] *System Prawa Cywilnego,* v. 2 *Prawo własności i inne prawa rzeczowe,* ed. J. Ignatowicz, Wrocław-Warszawa-Kraków-Gdańsk 1977, pp. 602-603, the author rightly points out that a seagoing vessel has special features compared to other movables). However, as for the loads on the ship, it is sometimes perceived - not quite rightly - as "quasi-immovable property", hence S. Matysik, *Prawo morskie. Zarys systemu,* v. 1, Wrocław-Warszawa-Kraków-Gdańsk 1971, p. 134, the author notes that "the analogy with real property consists primarily in the fact that the ship is subject to entry in a register similar in its purposes and tasks to land and mortgage registers, kept, as is known, only for real property". The category of real property includes, inter alia, sea and inland ships, aircraft, as well as spacecraft subject to registration in Russian law, Art. 130 sec. 1 of the Russian Civil Code, similarly, enterprise as a property complex is considered a real property, Art. 132 sec. 1 of the Russian Civil Code.

[30] E. Gniewek, *Kodeks cywilny. Komentarz...,* p. 126; see however *idem, Księgi wieczyste. Komentarz,* Warszawa 2018, p. 23.

[30] Otherwise, on the basis of the decree of October 11, 1946 - Property Law (Journal of Laws No. 57, item 319, as amended), which in Art. 9 stipulated that "a component part of an item may not be the subject of separate property rights, except for the cases provided for in the Act".

existence of a property right on such an object (and consequently also - depending on its nature - other property rights)[31].

In the light of Art. 46 § 1 of the Civil Code, real property cannot constitute anyone's property (*res nullius*). The existence of the property right is a constitutive factor for the separation of land within the meaning of Art. 46 of the Civil Code.[32]

3. Land in the legal sense

In the legal sense, land can only be separated parts of the ground, which in fact are properly marked in relation to other points on the ground (using the land register or cadastre)[33]. A special type of land that is subject to separate regulation is forest [34]. Due to their nature and purpose, a special type of land are road lanes constituting public goods *ex definitione*, the parts of which are roads understood primarily as structures intended for road traffic[35]. In accordance with the Act of March 21, 1985 on public roads[36], the road lane is the land separated by border lines along with the space above and below its surface, in which the road and construction facilities and technical devices related to the guidance, security and traffic management, as well as devices related to the needs of road management are located.

A typical feature of land real property is, in principle, i.e. in the absence of a statutory order, the potentially infinitely unlimited possibility of their physical transformation, including division or combination[37]. In fact, changes in the spatial boundaries of land do not affect their character. They may, however, affect the scope and legal nature of their constituent parts (in particular buildings or other devices). The combination or division of land, regardless of the size of the areas to be transformed, always results in a change in the legal status shaping the substantive status of at least

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[31] See Z. Radwański, *Funkcja społeczna, treść i charakter prawny odrębnej własności lokali,* „Studia Cywilistyczne" 1968, v. 11, p. 65.

[32] See e.g. B. Swaczyna, *Umowne zniesienie współwłasności nieruchomości,* Warszawa 2004, p. 16; *idem, Prawne wyodrębnienie gruntu na powierzchni ziemi,* „Rejent" 2002, no. 9, pp. 89-91; E. Gniewek, *Kodeks cywilny. Komentarz...,* p. 126; see also on this topic: J. Wasilkowski, *Prawo własności w PRL...,* p. 129; E. Drozd, *Przeniesienie własności nieruchomości,* Warszawa-Kraków 1974, pp. 39-40; J.St. Piątowski [in:] *System Prawa Cywilnego,* v. 2..., p. 109; M. Bednarek, *op. cit.,* s. 89; B. Swaczyna, *Hipoteka umowna.* Warszawa 2007,p. 128 and the following.

[33] A. Kraus, *Prawo ksiąg gruntowych,* Warszawa 1921, p. 5.

[34] Pursuant to Art. 3 of the Act of 28th of September 1991 on forests (consolidated text: Journal of Laws of 2022, item 672), a forest within the meaning of the Act is a land with a compact area of at least 0.10 ha, covered with forest vegetation (forest crops) - trees and shrubs and undergrowth - or temporarily deprived of it, intended for forest production or constituting a nature reserve or part of a national park or entered in the register of monuments; forest is also land associated with forest management, used for forest management: buildings and structures, water drainage facilities, forest spatial division lines, forest roads, areas under power lines, forest nurseries, wood storage places, and also used for forestry parking lots and tourist facilities.

[35] See more on this topic: A. Wasilewski, *Droga publiczna (zagadnienia prawne),* Krakowskie Studia Prawnicze 1971, v. 4, p. 33-44; see also the same, *Administracja wobec prawa własności nieruchomości gruntowych: rozważania z zakresu nauki prawa administracyjnego,* Warszawa 1972, in particular p. 68.

[36] Journal of Laws of 2007, No. 19, item 115 as amended.

[37] See: A. Kraus, *Prawo ksiąg gruntowych.* , p. 5.

two things. Theoretically, it can be considered that the annexed part is a component of the "economically main" land"[38], however, as a rule, such a distinction has no significant legal significance.

In the legal sense, part of the land becomes real property when certain legal events occur. There are two meanings of the land property - land and mortgage register and the meaning separated from it, adopted in Art. 46 of the Civil Code.

According to the first, real property is a legal good with a land and mortgage register. As a consequence, one real property consists of plots of land which, adjacent to each other and belonging to the same owner, have one land and mortgage register[39].

In the absence of a land and mortgage register, the principle of Art. 46 of the Civil Code, which allows to establish general premises for treating a part of the land's surface as land in the legal sense shall be assigned the basic meaning. This approach refers to the concept of the so-called "historical" real property or "in the meaning of material law", as opposed to the previously indicated meaning of the real property for which the land and mortgage register has been arranged (so-called "register" real property or "in the land and mortgage register sense)."[40,41].

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[38] *Ibidem,* p. 6.

[39] Judgment of the Supreme Court of February 26, 2003, II CKN 1306/00.

[40] The Ordinance of the Minister of Justice of November 26, 1946 on the organization and keeping of land and mortgage registers (Journal of Laws No. 66, item 366) stated in § 3 that real property of the same owner, for which one land and mortgage register is arranged, shall constitute one real property . Parts of this real property could not be the subject of separate property rights (Art. 15 of the above Ordinance); see the decision of the Supreme Court of February 19, 2003, V CK 278/02, LEX no. 77085.

[41] W. Prądzyński, *Uwagi do projektu prawa rzeczowego,* „Przegląd Notarialny" 1950, v. 1, p. 1, pp. 35-36; the position of the Supreme Court is inconsistent, as it once adopts the concept of real property in the historical sense (resolution of 27th of December 1994, III CZP 158/94, OSNC 1995, zb 4 item 59), another time (rightly) in the land and mortgage register (judgment of the Supreme Court of 26th of February 2003, II CKN 1306/00, BSN 2003, b. 8, p. 8; decision of October 30, 2003, IV CK 114/02, OSNC 2004, b.12, item 201; resolution of April 7, 2006, III CZP 24/06, OSNC 2007, b. 2, item 24; resolution of April 26, 2007, III CZP 27/07, OSNC 2008, b. 6, item 62); this distinction results from the specific definition of Art. 46 of the Civil Code, it was fully explained by the Supreme Court in its decision of October 30, 2003, IV CK 114/02 (OSNC 2004, b. 12, item 201; see also the judgment of the Supreme Court of November 8, 2007, III CSK 183/07 (unpublished).

It is assumed that a land property does not have to have marked external boundaries[42]. This, however, cannot be equated with the lack of them, because then it would be difficult to talk about the existence of a thing in the legal sense at all. The very creation of ownership occurs with the delineation of the extent of the part of the land's surface which is its subject. On the other hand, real property in the sense of "land and mortgage register" becomes one for which the land and mortgage register has been arranged, then the land that is the subject of trade is also separated in accordance with Article 46 § 1 of the Civil Code (in this sense, this definition covers both distinguished categories)[43].

Already in the light of the general remarks formulated at the beginning, it is obvious that the land as a thing should meet the distinguishing features of this good in general, and therefore, first of all, should be a material object. This means that it must be three-dimensional.

In the literature and jurisprudence, it is sometimes assumed that land as a solid (spatial category) is defined by Art. 143 sentence 1 of the Civil Code, according to which, within the boundaries determined by the socio-economic use of land, the ownership of the land extends to the space above and below its surface. Therefore, the land is treated as an object encompassing a certain range of domination in terms of property rights, delimited by horizontal boundaries and reaching, within certain limits, also deep into the ground and above it.

For example, in its decision of November 26, 2019, IV CSK 418/18, the Supreme Court decided that the land is a solid which scope covers the space above and below its surface, which, however, does not impose a statement that all tangible objects permanently located in this space, constitute a constituent part of the land and belong to its owner[44]. In turn, the doctrine sometimes presents the view that real property "as a certain solid, reaches deep into the ground and how high it rises into the space above the ground"[45].

The extension of land ownership to the space above and below the ground's surface does not, however, make this space a separate object of ownership, much less its constituent parts. Including a space under the control of land does not make this space a separate, independent subject of property rights[46]. This also applies to

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[42] See B. Swaczyna, *Umowne zniesienie.,* p. 16.

[43] See S. Rudnicki, *Pojęcie nieruchomości gruntowej,* „Rejent" 1994, no. 1, p. 30; B. Swaczyna, *Prawne wyodrębnienie gruntu*..., p. 92 and the following.; B. Swaczyna, *Hipoteka umowna.,* p. 129 and the literature cited therein.

[44] Unpublished; see also the earlier cited therein: judgments of the Supreme Court of November 14, 2003, V CK 419/02, OSP 2005, b. 4, item 56 and of July 16, 2004, I CK 26/04, OSP 2005, b. 3, item 40.

[45] A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.,* p. 289.

[46] K. Zaradkiewicz, *„Warstwowość"...,* pp. 55-56.

everything in this area. Extending the property right of the landowner to this area means that in the light of Art. 143 of the Civil Code, the entitled person may exercise in this space their right over the land itself[47].

Each time, the owner may use this space only within the limits determined by the socio-economic purpose of the land. This solution enables the full possibility of exploiting the land, including its constituent parts, somehow "from the outside", i.e. through actions taken in a sphere not constituting the object of property as such (due to the lack of material character of the land)[48]. However, Art. 143 of the Civil Code does not designate or prejudge the shape or boundary of the ground as a thing in the legal sense. Already under the unified law of 1946, W. Prądzyński aptly drew attention to the fact that "the surface (...) is not a thing, but an abstract notion like a border"[49] separating the sphere below from the sphere above it: "real property would therefore be an abstract concept at all and would dissolve into nothingness." This position should be considered valid also under Article 46 of the Civil Code and in this scope it is an abstract concept.

In the light of the above findings, it should be concluded that, contrary to the prevailing belief, the land, since it is "part of the surface" in accordance with the Act, does not constitute a solid [50](„ a "three-dimensional" creation)[51].

This does not mean, however, that land property should not be treated as a tangible object. On the contrary, such character is ensured by its existence with part of the land's surface co-creating all the components on the ground and below it (trees and other plants, sand, rocks, gravel, minerals, etc.). It would be difficult to imagine the land as an object of civil law transactions in isolation (without existence) from its material components, in particular those that are located underground[52]. Thus, it can be

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[47] See *Ibidem,* p. 55

[48] See more broadly *Ibidem,* p. 51 and the following.

[49] W. Prądzyński, *op. cit.,* p. 34.

[50] W. Pańko, *Własność gruntowa w planowej gospodarce przestrzennej. Studium prawne,* Katowice 1978, p. 48, see also pp. 56-57, on pp. 57-58 the author points out: "the construction of the land ownership right undoubtedly assumes that the allowed behavior of the owner will be implemented in three-dimensional space, but the boundaries in the geometric sense of this action can only be determined in two-dimensional space, i.e. on the surface of the earth"; see also W. Pańko, *Uwagi o przedmiocie prawa własności nieruchomości gruntowej,* „Problemy Prawne Górnictwa" 1978, v. 2, p. 100, 101 and the following.

[51] See K. Zaradkiewicz, *„Warstwowość"*., p. 59. The three-dimensionality is uniformly recognized by the jurisprudence (see e.g. the judgment of the Supreme Court of November 14, 2003, V CK 419/02, OSP 2005, b. 4, item 56; the judgment of the Supreme Court of July 16, 2004, I CK 26/04, OSP 2005, b. 3, item 40) and most of the doctrine: see e.g.: T. Dybowski, *op. cit.,* p. 48; J.S. Piątowski, *System Prawa Cywilnego,* v. 2..., p. 109; A. Klein, *Ewolucja pojęcia nieruchomości w polskim prawie cywilnym,* [in:] *Prace z prawa cywilnego. Księga pamiątkowa ku czci prof. J. St. Piątowskiego,* ed. B. Kordasiewicz, E. Łętowska, Ossolineum 1985, p. 93; T. Kurowska, *Upowszechnienie prawa własności nieruchomości,* Katowice 1994, pp. 58-59; E. Gniewek, *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz,* Kraków 2001, pp. 82-84; A. Lipiński, R. Mikosz, *Ustawa - Prawo geologiczne i górnicze. Komentarz,* ed. 2 am., Warszawa 2003, pp. 56-57; B. Swaczyna, *Umowne zniesienie współwłasności nieruchomości,* p. 18.

[52] However, they are not an integral part of the concept of land, see W. Pańko, *Własność gruntowa w planowej gospodarce przestrzennej,* p. 60.

figuratively stated that it is the components of the land that "materialize" it by assigning them to a specific part of the earth's surface. In this sense, land as a physical object has a specific spatial shape and physical boundaries[53]. This is probably how one should understand the statement of Witold Prądzyński, who, still under the unified law of 1946, wrote that "real property is a creation of nature", and "everything that nature has placed on the surface of a part of the earth and in the interior of the earth beneath this surface, except for animals, is one whole (...,) [consisting of, for example, earth, sand, water, rocks, stones, caverns etc."[54]

Unlike many other jurisdictions and the property law of 1946, under which it was assumed that the ownership of real property below the surface of earth *(ad infernum)* and in the air *(ad cœlum)* is unlimited (a kind of "cone" from the earth's core to space, *cuius est solum, eius debet esse usque ad cœlum usque ad infernos)*[55]*,* and only its performance is limited, it is considered that due to the content of Art. 143 of the Civil Code, it defines the existence of spatial boundaries of land ownership "vertically" - to the extent that it covers the space above or below the ground.

This solution, seemingly correct, in fact leads to a blurring of the concept of property and its boundaries, as it turns out that when adopting such an opinion, they are very difficult, if not impossible to establish[56].

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[53] K. Zaradkiewicz, *„Warstwowość"...*,p. 41.

[54] W. Prądzyński, *op. cit.*,p. 35.

[55] See in detail on this issue: K. Zaradkiewicz, *„Warstwowość"..,* p. 51 and the following.

[56] See on this topic, e.g.. E. Till, *O prawie właściciela gruntu do tzw. słupa powietrznego,* Warszawa 1913; J.S. Piątowski [in:] *System Prawa Cywilnego,* v. 2..., p. 109; J. Ignatowicz, *Przemiany prawa własności w świetle przepisów kodeksu cywilnego,* „Studia Cywilistyczne" 1969, v. 13-14, Kraków 1969, p. 75; R. Mikosz, *„Ograniczenia" własności (na przykładzie prawa rzeczowego),* „Przegląd Prawa Górniczego" 1982, no. 5, p. 31; J. Ignatowicz [in:] *Kodeks cywilny. Komentarz,* v. 1, Warszawa 1972, p. 375; A. Lipiński, R. Mikosz, *Ustawa - Prawo geologiczne i górnicze. Komentarz,* Warszawa 2003, pp. 56-57; B. Swaczyna, *Umowne zniesienie współwłasności nieruchomości,* pp. 18-19; A. Lipiński, *O potrzebie reformy mechanizmów powstawania uprawnień górniczych,* [in:], *Rozprawy prawnicze. Księga pamiątkowa profesora Maksymiliana Pazdana,* ed. L. Ogiegło, W. Popiołek, M. Szpunar, Kraków 2005, p. 1105 and the following.

Rejecting the aforementioned interpretation of Art. 143 of the Civil Code as identifying the size and boundaries of the land itself *de lege lata*, it should be considered that the latter includes everything that constitutes material goods, belongs to the surface of the land delimited by the boundaries of the ground and constitutes, together with this surface, a closed, self-contained whole. The spatial boundaries of things under the earth's surface are also determined by goods not belonging to the owner of a separate part of the earth's surface, which are subject to the exclusive control of the State Treasury under special provisions, in particular the water, geological and mining law.

One cannot identify the space covered by the property of land (Art.143 of the Civil Code) with the real property itself. The latter is determined by the physical relationship between the surface of the ground and all objects on or below it that remain permanently attached to the surface. It is important, however, that the scope of ownership in the space under the ground determines the permissible framework for exercising this right in relation to the land itself [57]. Excluding the space under the ground from the ownership of the property owner pursuant to Art. 143 of the Civil Code makes it necessary to recognize that its ownership cannot be exercised in relation to the soil components located in this space. The boundaries of the space under the control of the land owner define the framework of the permissible behavior of the owner towards the real property in this space.

4. Building

A building may constitute a separate real property, if under special regulations it may be a thing, and not being a component of the land. According to the general rule, buildings permanently attached to the land, and every part of it, are its component parts (Art. 48 of the Civil Code). Then they, together with the rest of the parts, are in fact land.

The basis for changing the legal status of a building from a component part of land to a property separate from the land may be a statutory legal norm[58]. Thus, only a building or a part of it may be a real property, provided that the requirements set out in specific regulations are met (Art.46 § 1 of the Civil Code). For example, according to Art. 235 § 1 of the Civil Code, the building is a property separate from the land on which it is situated, if the land has been put into perpetual usufruct[59] (see also Art. 272 and Art. 279 § 2 of the Civil Code).

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[57] See K. Zaradkiewicz, *„Warstwowość"*. ,p. 57 and the following, *imprimis* pp. 61-62.
[58] Resolution of the Supreme Court of 30th of November 2016, III CZP 70/16, OSNC 2017, b. 7-8, item 81.
[59] In the current legal state, the absolute nature of Art. 31 of the Act of August 21, 1997 on real property management (consolidated text: Journal of Laws of 2021, item 1899, as amended; hereinafter: u.g.n.) and Art. 235 § 1 of the Civil Code and the strict connection of the ownership of buildings with the right of perpetual usufruct results in deeming it unacceptable to

The concept of "building" has not been defined in the Civil Code, despite the fact that it uses it many times. For this reason, the definition contained in Article 3 point 2 of the Act of July 7, 1994 - Construction Law is sometimes used[60], according to which the building is a structure permanently connected with the ground, separated from the space by means of building partitions, and has foundations and a roof. It is supposed to be a universal definition, applicable also under civil law[61]. However, this position is not uniformly adopted in the jurisprudence of the Supreme Court. It is also indicated that the definitions contained in the Construction Law are adopted for the purposes of administrative law and cannot be directly applied in civil law as such[62].

In practice, the scope of the terms "building" and "structure" sometimes raises doubts[63] (which was the term used by the decree of October 11, 1946 - Property Law), as well as whether the building can only be an object that is completed (it has been erected or is not significantly damaged, e.g. as a result of hostilities). The last view is the recognition that the building should be a construction object with a clearly closed shape (which distinguishes it from similar objects, such as sheds, gazebos, linear devices, etc.)[64].

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establish perpetual usufruct on developed land without acquiring ownership of the building situated on this land (resolutions of the Supreme Court of January 19, 1971, III CZP 86/70, OSNCP 1971, b. 9, item 147; of July 1, 1983, III CZP 27/83, OSNCP 1984, b. 2-3, item 24; of November 24, 1992, III CZP 124/92, OSNCP 1993, b. 7-8, item 154; of June 26, 1996, III CZP 63/96, OSNC 1996, b.11, item 144; of January 21, 2003, III CZP 9/05, OSNC 2006, b. 3, item 44; of January 23, 2007, III CZP 136/06, OSNC 2007, b.11, item 163; of November 25, 2011, III CZP 60/11, OSNC 2012, b. 6, item 66; of November 30, 2016, III CZP 70/16). In the resolution of the Supreme Court of November 25, 2011, III CZP 60/11, an interpretation was adopted extending Art. 31 of u.g.n. and Art. 235 § 1, first sentence of the Civil Code, which argues that all cases of erecting a building on land given for perpetual usufruct should be assessed as if the erection was made by the perpetual usufructuary himself, therefore the building erected by the lessee on land given for perpetual usufruct is the property of perpetual usufructuary.

[60] Consolidated text: Journal of Laws of 2021, item 2351.

[61] In jurisprudence, it is sometimes assumed that the concept of a building under the Civil Code and the Construction Law is the same, see e.g. the decision of the Supreme Court of January 26, 2006, II CK 365/05, LEX No. 490515; the judgment of the Supreme Court of April 29, 2011, I CSK 484/10, LEX no. 936482.

[62] The judgment of the Supreme Court of January 25, 2006, I CK 247/05, unpublished; see also the judgments of the Supreme Court: of January 7, 2017, V CSK 161/16, LEX No. 2269113; of October 8, 2014, II CSK 505/13, OSNC 2015, b. 9, item 107; of January 15, 2021, I CSKP 6/21, LEX No. 3107891.

[63] For example, the issue of assessing a silo as a building or structure was analyzed by the Supreme Administrative Court, see judgments of the Supreme Administrative Court: of October 18, 2016, II FSK 1741/16, LEX No. 2164395; dated May 5, 2017, II FSK 2767/16, LEX No. 2347188; dated May 8, 2018, II FSK 1162/16, LEX No. 2544074, II FSK 1281/16, II FSK 1296/16, II FSK 1297/16, II FSK 331/17; publ. CBOSA).

[64] The judgment of the Supreme Court of January 18, 2018, V CSK 242/18, LEX no. 2558241.

There is no doubt, however, that a thing is not a legally non-existent object, i.e. one that does not meet the essential physical characteristics of a specific type of thing (if it has been distinguished in such a way in specific provisions). This applies in particular to real property which is built or constituting part of buildings. This is due to the general rule, according to which a property right cannot exist without its subject. For example, in the justification of the resolution of May 16, 2019, III CZP 1/19, the Supreme Court stated that there are no property rights in the Polish system, which would not cease, and the natural consequence of the lack of an object of law is its cessation[65]. Destruction (including destruction) of things may be the result of an event independent of the human will (e.g. fire, flood, earthquake, tornado, hurricane), a prohibited act (bomb attack, arson, terrorist act or other unlawful act) or an act compliant with the law (e.g. demolition of a building)[66]. Therefore, the ruins left by such events do not constitute a building.

It does not matter what materials the object was built from. However, it is important that there is a permanent bond with the land (also when the building is treated *de iure* as a component of this land). The permanence of the connection with the land makes it possible to treat such an object as a separate real property under a special provision (which is directly confirmed by Art. 46 § 1 of the Civil Code). Therefore, in order for a specific structure to be considered a building within the meaning of the Civil Code, there must be a permanent relationship between it and the land, which, as a rule, presupposes a physical connection between them. This combination must be sufficiently strong and strict, which in the case of buildings is often understood - with reference to the definition of a building specified in Art. 3 point 2 of the Construction Law - in such a way that it has foundations, although - as noted by the Supreme Court - this is not an absolute rule[67]. The Supreme Administrative Court recognizes that the concept of "permanent bond to land" means both the building's possession of foundations that are located below the ground level (buried in the ground) and a permanent (rigid, stable, continuous, unchanging) connection of the object with these foundations. The foundation must constitute a component part of the building within the meaning of Art.47 § 2 of the Civil Code[68] (in fact, it can only be such if the building constitutes a separate real property). The Supreme Administrative Court also assumes

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[65] OSNC 2020, b. 3, item 25; see also e.g. the decision of the Supreme Court of May 7, 2008, II CSK 664/07, OSNC-ZD 2009, No. B, item 48; justification of the resolution of the Supreme Court of December 8, 2017, III CZP 77/17, OSNC 2018, No. 12, item 113, as well as the resolutions of the Supreme Court of May 16, 2019, III CZP 1/19, OSNC 2020, b.3, item 25; of March 13, 2020, III CZP 65/19, OSNC 2020, b.12, item 101.

[66] Resolution of the Supreme Court of March 13, 2020, III CZP 65/19.

[67] Decision of the Supreme Court of November 26, 2019, IV CSK 418/18, LEX No. 2784013.

[68] Resolution of the Supreme Administrative Court of September 29, 2021, III FPS 1/21, ONSAiWSA 2021, issue 6, item 89; judgment of the Supreme Administrative Court of February 8, 2022, III FSK 2744/21, LEX No. 3322816.

that "the possibility of detaching a building from the footing, without its complete destruction, deprives it of the building's qualities, and this is due to the failure to meet the condition of being permanently bound to the ground in the sense presented above"[69].

Finally, it is pointed out that a building connected to the ground but only for temporary use is not a component [70]. It should be mentioned that in the light of Art. 46 § 1 of the Civil Code a building may also be an object that is not permanently connected to the ground. As such, it cannot only not be part of the land, but also a separate real property.

5. Part of the building as real property

Part of the building may also be a separate real property in the legal sense. This is the case when, as in the case of a building, certain conditions for recognition as a self-contained thing are met under special regulations. It is unacceptable to establish the so-called ownership of the floors (Article 664 of the French Civil Code). The dominant view in the doctrine is that the concept of a part of a building as a separate real property under Art. 46 § 1 of the Civil Code in fact, remains the same as housing real property premises)[71].

1) premises

In the legal sense, real property may be primarily premises that meet the criterion of independence in the light of the provisions of the Act on the ownership of premises (the so-called independent residential premises or premises for other purposes, see Article 2(1) of the Act of June 24, 1994 on ownership of premises[72], hereinafter referred to as: u.w.l.).

According to Art. 2 clause 2 of this Act, residential premises constituting separate real property (the so called housing real property) is "a room or a group of rooms separated by permanent walls within the building, intended for permanent residence of people, which, together with auxiliary rooms, serve to satisfy their housing needs". This definition refers to the features that distinguish also other categories of independent premises, thus constituting the so-called housing real property. Fulfillment of the

[69]SAC judgment of February 8, 2022, III FSK 2744/21.

[70] See on this subject, e.g. the decision of the Supreme Administrative Court of July 13, 2021., III FSK 1611/21, LEX no. 3206901.

[71] E. Gniewek [in:] *Kodeks cywilny. Komentarz.*, p. 127; *idem, Księgi wieczyste. Komentarz,* Warszawa 2018, p. 22.

[72] Journal of Laws of of 2020, item 1910.

relevant requirements by the premises is confirmed by the starost in the form of a certificate.

The premises may have component parts that are not necessarily directly adjacent to it or were located within the boundaries of the land property, outside the building of which the premises is a part. Such parts of the premises may be, for example, a basement, attic, cellar or garage[73]. They may also be part of a shared property.

Auxiliary rooms can be distinguished from the adjoining rooms, which can also be used only to meet the living needs of people living in the premises (e.g. a balcony[74]). In the jurisprudence of the Supreme Court it was indicated that the auxiliary room serves directly to meet housing needs (it is functionally related to the premises). This is to distinguish the auxiliary rooms from adjoining rooms, which in the functional sense do not constitute a space intended for the direct satisfaction of people's housing needs. The latter, on the other hand, serve to satisfy other needs of people using the premises[75]. „The room "in both indicated meanings is a part physically separated in terms of architecture from the other parts of the building[76].

De lege lata, the purpose of a part of the building is irrelevant in order to recognize the admissibility of a housing real property. A separate dwelling is not part of a building that could be jointly owned by the owners of the premises[77]. As a separate real property, the premises may only be treated as long as they exist physically. In the justification of the resolution of November 25, 2011, III CZP 65/11[78] The Supreme Court indicated that although the right to separate ownership of the premises is created through an entry in the land and mortgage register, this does not mean that separate ownership of the premises exists as long as an entry is made in the land and mortgage register kept for the property.

2) part of the building including the so-called unseparated premises

Parts of the building resulting from the separation of certain premises as separate properties, leaving them to the current owner of the whole, may be separate real

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[73] The judgment of the Supreme Court of June 8, 2006, II CSK 37/06; in the decision of the Supreme Court of May 19, 2004, I CK 696/03, OSP 2005, b. 5, item 61, it was found that a garage space in a multi-space garage does not constitute an adjoining room.

[74] Resolution of the Supreme Court of March 7, 2008, III CZP 10/08, OSNC 2009, b. 4, item 51; in the judgment of the Supreme Court of October 3, 2002, III RN 153/01, OSNP 2003, b. 18, item 423, it was indicated that the balcony adjacent to the premises is its component part.

[75] The judgment of the Supreme Court of March 7, 2003, III RN 29/02, "Monitor Podatkowy" 2003, No. 5, pp. 29-31, also the resolution of the Supreme Court of March 7, 2008, III CZP 10/08.

[76] See decision of the Supreme Court of May 19, 2004. I CK 696/03, OSP 2005, b. 5, item 61, resolution of the Supreme Court of March 7, 2008, III CZP 10/08; the term "adjoining rooms" should be considered not very fortunate.

[77] The judgment of the Supreme Court of February 21, 2002, IV CKN 751/00, OSNC 2003, b. 2, item 21.

[78] OSNC 2012, b. 6, item 68.

properties[79]. This issue mainly concerns the so-called successive separation of premises, i.e. a situation where the ownership of all premises in the building is not established at the same time, and only some of them do not obtain the status of separate real property (residential).

In this case, the question arises as to the legal nature of the parts of the building not converted into housing real property. This issue was not directly resolved in the act on ownership of premises. There are views in the literature that in fact unseparated premises constitute a special part of a shared property[80], and that they are part of the land without being jointly owned by the owners of the premises[81]. It is also indicated that unseparated premises constitute one whole as a housing real property [82] (or complex housing real property)[83].

[79] The so-called complex housing property, art. 4 sec. 1 u.w.l., see. more broadly, e.g.: M. Bednarek, *op. cit.,* pp. 117-118; M. Nazar, *Odrębna własność lokali (wybrane zagadnienia),* „Państwo i Prawo" 1995, b. 10-11, pp. 28-31; *idem, Sposoby ustanowienia odrębnej własności lokali na podstawie ustawy z 24.06.1994 r,* [in:] *Obrót nieruchomościami w praktyce notarialnej,* Kraków 1997, pp. 140-141; B. Swaczyna, *Umowne zniesienie współwłasności nieruchomości,* p. 27; R. Strzelczyk [in:] *idem,* A. Turlej, *Własność lokali. Komentarz,* Warszawa 2007, pp. 118-123; B. Swaczyna, *Hipoteka umowna.,* pp. 142-143, as for the basic concepts, see apart from the work of M. Nazar also E. Drozd, *Lokal jako przedmiot regulacji ustawy o własności lokali,* „Rejent" 1994, no. 11, p. 63; E. Gniewek, *Nieruchomość wspólna według ustawy o własności lokali,* „Kwartalnik Prawa Prywatnego" 1995, b. 2, pp. 174-175; J. Ignatowicz, *Komentarz do ustawy o własności lokali,* Warszawa 1995, pp. 36-38; J. Pisuliński, M. Berek [in:] *System Prawa Prywatnego,* v. 3 *Prawo rzeczowe,* ed. E. Gniewek, Warszawa 2020, pp. 505-507; see the resolution of the Supreme Court of December 9, 1999., III CZP 32/99, OSNC 2000, b. 6, item 104; the judgments of the Supreme Court: of December 2, 1998, I CKN 903/97, OSNC 1999, b. 6, item 113; of February 21, 2002, IV CKN 751/00, OSNC 2003, b. 2, item 21; of October 21, 2003, I CK 156/02, OSNC 2004, b. 11, item 185.

[80] J. Ignatowicz, *Komentarz do ustawy o własności lokali.,* pp. 37-38; *idem, Podstawowe założenia ustawy o własności lokali,* „Przegląd Sądowy" 1994, no. 11-12, p. 7; see also E. Gniewek, *Własność osobista lokali w prawie polskim,* Wrocław 1986, p. 72.

[81] E. Drozd, *Zarząd nieruchomością wspólną według ustawy o własności lokali,* „Rejent" 1995, no. 4, p. 11; E. Drozd, *Lokal jako przedmiot.,* pp. 62-64.

[82] M. Nazar, *Odrębna własność lokali.,* s. 30; *idem, Sposoby ustanowienia odrębnej własności lokali.,* p. 141; see also e.g. M. Bednarek, *op. cit.,* p. 118; E. Gniewek, *Nieruchomość wspólna.,* p. 174.

[83] M. Nazar, *Odrębna własność lokali.,* p. 30; *idem, Sposoby ustanowienia odrębnej własności lokali.,* p. 141; J. Pisuliński, M. Berek [in:] *System Prawa Prywatnego,* v. 3 *Prawo rzeczowe,* ed. E. Gniewek, p. 507.

Pursuant to Art. 4 sec. 1 of the u.w.l., the existing owner is entitled to the same authority to unseparated premises and to the common property as to the owners of separated premises, which also applies to his obligations. The position of the Supreme Court is somewhat enigmatic in this provision, which indicated that "by using the term "authority" and not the term "rights", the legislator (...) expressed the thought that the legal situation of the current owner is analogous to the situation of the owners of the premises, but it is not the same. Their owners have the ownership right to the premises, while the current *sui generis* owner is entitled to joint ownership"[84]. Such an opinion seems to adhere to the thesis that the so-called unseparated premises do not belong to the owner of the part that he did not dispose of as part of establishing separate ownership of the premises, but became the subject of joint ownership. At the same time, however, the Supreme Court in its jurisprudence rightly recognizes that unseparated, independent premises within the meaning of Art. 2 clause 2 of u.w.l. are not part of the joint property and do not constitute the subject of joint ownership of the owners of the premises and the current owner of the property, but are the sole property of the current owner of the property[85]. In the opinion of the Supreme Court, unseparated independent premises cannot be considered parts of the building that are not used exclusively by the owners of the premises [86].

Unseparated premises are not part of the common property, but are owned by the current owner of the entire property subject to division[87]. Neither of them can be regarded, precisely because of their lack of separateness, as a separate thing in the legal sense. All of them together, even if they are not adjacent to each other within the building, constitute one real property. As such, it constitutes a whole with the exception of premises that are separate real property and not including common real property. Within the real property understood in this way, which is part of a building with unseparated premises, it is not possible to establish the ownership of the floor, as it excludes the necessity to separate the joint property. They constitute an independent category (type) of real property within the meaning of Art. 46 § 1 of the Civil Code as "part of the building".

3) joint real property

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[84] Judgment of the Supreme Court of June 16, 2009, V CSK 442/08, LEX no. 602338.

[85] Judgments of the Supreme Court: of December 2, 1998, I CKN 903/97; of February 21, 2002, IV CKN 751/00; of October 21, 2003, I CK 156/02; of March 31, 2016, IV CNP 33/15, IV CNP 33/15, LEX No. 2037902.

[86] Decision of the Supreme Court of September 16, 2016, IV CSK 786/15, LEX No. 2165588.

[87] Decision of the Supreme Court of March 12, 2020, IV CSK 585/18, LEX No. 2683728; see also the resolutions of the Supreme Court of July 14, 2005, III CZP 43/05, OSNC 2006, No. 6, item 98 and of December 9, 1999, III CZP 32/99, OSNC 2000, No. 6, item 104.

A separate real property may also be the so-called joint real property (Article 3 (2) of the Civil Code).

Basically, the so-called joint real property is the land with parts of the building and equipment that are not used solely for the common use of the owners of the premises (see Article 3 (1) and (3) of u.w.l. However, in the case of land handed over for perpetual usufruct, this cannot constitute a joint real property, because the owners of premises (separated or not separated) are not entitled to the ownership of the land. Therefore, the joint property covers only the part of the building intended for common use, the co-ownership of which is the right related to the joint perpetual usufruct (see Art. 4 (3) of u.w.l.). In this case, as is the case under the regulation of the so-called unseparated premises, we are dealing with an independent category (type) of real property within the meaning of Art. 46 § 1 of the Civil Code as "part of the building".

A joint real property is one in which the share of joint ownership is the right related to the ownership of the premises and as such is compulsory. This is the case irrespective of whether the joint real property constitutes land together with the building elements that are part of that land, or whether it is only rooms in the building itself. This real property exists as long as the separate ownership of at least one premises lasts. The fractional part of this property being the subject of a joint ownership share, together with this share, constitutes a component part of the housing real property (Art. 50 of the Civil Code)[88]. The independence of this legal structure is described in more detail in the resolution of seven judges of the Supreme Court of August 25, 2017, III CZP 11/17[89].

6. conclusions

In Polish law, the concept of a thing in the legal sense, contrary to the literal wording of the act, is not limited only to self-existent categories in the sense of the physical distinctiveness of tangible objects in the strict sense (see Art. 45 of the Civil Code). This feature, in principle, unquestionably applies only to movable property. In the case of real property, their components may also include abstract categories (part of the land's surface, rights related to ownership).

In fact, what determines the classification of things is only the fact that a specific object may be the subject of property, and this is always determined by the provision of the act. Therefore, whenever a specific property may constitute an object of property in the light of the applicable regulations, it should be considered a thing in the legal sense (see Art. 45 of the Civil Code). *De lege lata*, the distinguishing feature of objects

[88] See e.g. the decision of the Supreme Court of November 24, 2010, II CSK 267/10, LEX No. 738095.
[89] OSNC 2017, b. 12, item 132.

regarded as things is the "three-dimensionality" of the range of sovereignty over them, i.e. the possibility of exercising it within a certain spatial framework.

The Polish legislator did not accept the construction of Romanesque property, not allowing the existence of ownership of non-sensual (intangible) goods. The concept, derived from German and Swiss legislation at the turn of the 19th and 20th centuries, seems to fail to work and has long been the subject of criticism. Anyway, these laws are inconsistent with regard to the concept of immovable property. For example, in German law, the development law (German: Erbbaurecht), which is a limited property right, is treated as "identical with real property" (not with its ownership, therefore the right is "treated as land", German: *grundstucksgleiches Recht)*[90]. In Swiss law, a special property right, which is the right to the source (German: *Quellenrecht,* French: *droit a une source sur fonds d'autrui)* may be disclosed in the land register as real property (Art.780 of the Swiss Civil Code). The Polish lawmaker is also inconsistent, if only because of the content of Art. 50 of the Civil Code. These examples testify to the shortcomings of the regulation treating only some tangible goods as things in the legal sense and make us reflect on the adequacy of the solution adopted in Art. 45 and 46 of the Civil Code.

Disadvantages of a narrow view of things which come down solely to the category of material objects. The shortcomings of such a solution have long been indicated in the doctrine[91]. These disadvantages are now visible, especially in connection with technological development, which is related to the question of the legitimacy of extending the scope of exclusive ownership not only to various forms of energy (including electricity), but also to the so-called digital goods.

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[90] See e.g. in Polish literature R. Paczkowski, *Prawo zabudowy jako „grunt",* Poznań 1932; K. Zaradkiewicz, *Prawo zabudowy w pracach Komisji Kodyfikacyjnej Prawa Cywilnego,* [w:] *Współczesne problemy prawa zobowiązań,* Warszawa 2015, p. 774.

[91] See e.g. Z. Żabiński, *Wpływ pojęcia rzeczy na kształtowanie się systemu prawa cywilnego,* „Zeszyty Naukowe Uniwersytetu Jagiellońskiego" CCCXLVI, Prace z Wynalazczości i Ochrony Własności Intelektualnej 1974, b. 1, pp. 259-260; K. Zaradkiewicz, *Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym,* Warszawa 2013, p. 396.

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