

Establishing Title in Property Cases?

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The article explores the fundamental principles of Icelandic property law, particularly focusing on establishing title in property disputes. It outlines the civil procedure rules and evidentiary standards that govern these cases, emphasizing the importance of evidence submission by claimants to substantiate their property rights. Three core principles are highlighted: the numerus clausus principle, which limits the types of property rights recognized; the claimant's duty to substantiate title; and the nemo dat principle, which asserts that one cannot transfer more rights than one possesses. The paper illustrates these principles through various judgments from the Icelandic Supreme Court, demonstrating their application in real-life property disputes. The author argues that a deeper understanding of these principles can lead to more systematic and effective resolutions in property cases. The article ultimately underscores the significance of these legal foundations in ensuring fair adjudication of property rights in Iceland.

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1. Introduction

Property disputes are often brought before the Icelandic courts and such disputes can revolve around various kinds of possessions, both immovables and movables. Disputes concerning immovable property are, however, quite common, including boundary disputes and disputes concerning the determination of private and public land. In short, the substantiation of a property right in court — i.e. to establish title — entails, first, that a claimant must submit evidence to support his entitlement. Second, an owner may not to any extent increase his property right beyond what he himself was rightfully in possession of. Third, the courts must adhere to the justices' free assessment of evidence taking into account the individual property sources — submitted in court — together with the factual circumstances at hand. At first glance, this process may not seem overly complicated, but when a multitude of property sources has been submitted in court and the parties to a case do not agree on the facts, it can be difficult to take a position in terms of who is in rightfully in possession of the title.

This paper aims to introduce the fundamental principles of Icelandic property law that apply to the process of establishing title in a property dispute. In this paper, I *inter alia* rely on the research conducted during my doctoral studies on property in land according to the Icelandic

Supreme Court's case law according to Act No. 58/1998 on wasteland.¹ From this research it was possible to draw some more general conclusions about the fundamental principles of Icelandic property law, that are *mutatis mutandis* applicable to alternative property disputes. The Icelandic courts have effectively applied these fundamental principles, explicitly and inexpressly, without the rules having been featured in Icelandic legal scholarship. There is, thus, a lack of scholarship defining the fundamental principles, and court decisions generally do not expressly acknowledge or refer to them. As a result, legal acts concerning property rights can lack the correct legal foundation, and property disputes can be resolved on the basis of the incorrect legal foundation. In its century long period of operations, the Icelandic Supreme Court has played a significant role in shaping and applying these fundamental principles. By defining the property principles it may very well be possible to systematize the process of establishing title, and thus enabling a deeper understanding of the topic, whilst simultaneously contributing to more advanced arguments in property disputes, and, even, clearer decisions at all three court levels.

In addition to property scholarship, this paper relies on a research of various property decision rendered by the Supreme Court.² The research is not an exhaustive examination, but rather an examination of court decisions that vividly illustrate the application of the relevant fundamental principles of property law. The case study examines case law on property disputes as of 1 September 1999, when the Supreme Court began to publish its case law on its website. The case study encompasses property disputes concerning movables and immovables, including boundary disputes. The case study also relies on the findings of a case study conducted on 58 judgments rendered by the Supreme Court in accordance with Act No. 58/1998 as of its entry into force on 21 October 2004 until 28 September 2017, that was conducted for the purposes of my doctoral studies as previously noted.³ The societal significance of immovables, and the inherent value generally attached to real estate, explain why most of the featured court decisions revolve around immovables. It should also be noted that the Supreme Court's case law according to Act No. 58/1998 includes several vivid examples of the application of the fundamental principles of property law.

Section 2 explores the rules of civil procedure that are tested when establishing title before the Icelandic courts, primarily the principle on the justices' free assessment of evidence, but also the the general principles of party control and alternative points concerning the statement of claims and evidence. *Section 3* features a discussion of three fundamental principles applicable to the substantiation of property rights under Icelandic law. These are, first, the principle of *numerus clausus*, which places restrictions on the field of property law in relation to other fields of law. Second, the principle requiring a claimant of a property right to submit evidence to support his entitlement is explained. Third, there is the principle of *nemo dat*, providing that one cannot transfer more than he himself was in possession of. *Section 4*

¹ Valgerður Sólmes: *Clarifying land title: Land reform to eliminate terra nullius in Iceland*. Ph.D. thesis at the Faculties of Law at the University of Copenhagen and University of Iceland, 2018.

² The author examined all judgements rendered by the Icelandic Supreme Court that were available on the Court's website as of 1 January 1999 until 15 March 2020 and referenced with the keyword "property right" (i. *eignarréttur*).

³ As of 1 September 2025, the Icelandic Court of Appeals Landsréttur has rendered 14 more judgments in cases according to Act No. 58/1998, and one judgment thereof was granted a leave to appeal to the Icelandic Supreme Court, who rendered a judgments in the respective case, cf. *H 41/2020*. These decisions were rendered after the completion of this study and are thus excluded from the paper.

attempts to draw conclusions from the previous discussion in *Sections 1* through *3*, in order to highlight the practical value of the principles, and demonstrate how they are applied in practice by exhibiting how they have been relied on in the case law of the Supreme Court. Lastly, a summary of the paper is available in *Section 5*.

2. Fundamentals from Icelandic civil procedure

2.1 General

It should be noted that rules of evidence can be considered either formal rules or substantive rules. The Icelandic Act No. 91/1991 on civil procedure includes various rules on what must be proven in a civil case, on whom the burden of proof rests, who is responsible for obtaining evidence, what types of evidence may be presented in a court case, as well as the courts' assessment of whether proof of facts or points of law has been established. The principle of legally protected interests under Icelandic civil law is *inter alia* determined by the provisions of Act No. 91/1991, particularly Articles 24 and 25(1).⁴ This is why rules of evidence have generally been considered to be a component of procedural law.⁵ Alternatively, it has been argued that the subject of establishing title — featured in this paper — is so closely related to substantive law that examining if title has been successfully established is at the periphery of procedural law.⁶ As for the burden of proof in civil cases, there are hardly any general procedural rules in Icelandic law to be relied on, although such rules have developed in specific fields of law.⁷ In the light of the extent to which the determination of property rights rely on rules of evidence that form a part of the substantive law of Icelandic property law, rules of evidence will be considered and discussed herein as a component of substantive law.

2.2 Historical rules of evidence

We now turn to the fundamental rules that apply to the evidence and establishing title. Several evidentiary rules were provided for in the previous laws on civil procedure and they could be obligatory in terms of proof and the assessment of evidence.⁸ Such rules have also taken shape in the case law of the Icelandic courts.⁹ One example, is how the courts imposed the burden of proof upon the person who wished to dispute the registered title of another person, and that the latter person was considered the rightful owner of the thing in question until otherwise proven.¹⁰ A parallel example is how the courts imposed the burden of proof upon

⁴ See Markús Sigurbjörnsson: *Einkamálaréttarfar* (2nd ed.). Reykjavík 2003, at 117.

⁵ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 238. See e.g. Timothy M. Mulvaney and Joseph William Singer: "Move Along to Where? Property in Service of Democracy (A Tribute to André van der Walt)". *Texas A&M University School of Law Legal Studies Research Paper Series No. 17-39*, 2017, at 22 (demonstrating examples from U.S. law where rules on evidence are regarded as formal rules and not substantive rules).

⁶ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 238. See e.g. Timothy M. Mulvaney et al: "Move Along to Where?", at 22. See also Páll Sigurðsson: "Um sönnun og sönnunarbyrði", at 2.

⁷ See Eiríkur Tómasson: "Um sönnun og sönnunarbyrði: Síðari hluti", at 249.

⁸ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 16.

⁹ See e.g. Ólafur Lárusson: *Eignaréttur I*, Reykjavík 1950, at 149–55.

¹⁰ Ólafur Lárusson: *Eignaréttur I*, at 150.

he whom disputed a registered boundary description, and that the registered boundary line was considered correct until otherwise proven.¹¹ Both examples demonstrate the importance of public registration of property rights, especially rights related to immovables, in determining possession. Prior to the availability of public registration, the custody of an object was of greater significance.¹² This is evidenced by e.g. procedural rules in the lawbooks of King Christian V of Denmark as further explained below.

A second example is how the courts imposed the burden of proof upon he whom disputed property rights of the church according to church records. This rule relied on Article 16 of a 1 July 1746 letter of appointment to bishops, where the priority of further specified pre-reformation church records (i. *máldagi*) is provided for.¹³ A similar provision is still in force and provided for in Article 2 of Act No. 41/1946 on the division of land (i. *landskiptalög*), where the priority of the various kinds of land registry records (i. *jarðamat*), in the event of the division of land, is provided for .

A third example, is how many other property sources — even unregistered documentation — could have probative value in court, to the effect of bearing witness to the property rights of he whom was in possession of the respective document, unless otherwise proven. Such documentation was however waived if a more significant source was submitted in court, or else if the documentation in question was proved null and void.¹⁴

A fourth example, is how the courts are known to have relied on information of land use in their case-by-case assessment when determining land ownership, in instances where there was lack of documentary evidence.¹⁵ To this effect, the courts have found in favor of a person, who claimed land title, on the basis of information that this person and his predecessors had been the exclusive users of the disputed land, or else believed it was their possession for as long as people could remember.¹⁶ Also, a senior right takes priority over a newer right, in instances where the disputed land had first been used by one estate, and later by another or both.¹⁷ In this respect it should be noted, that after the entry into force of the Act No. 46/1905 on adverse possession in 1906, this type of individual court assessment informed by knowledge of prolonged land use is no longer applicable in this previously described manner. According the statute, it is the land use just preceeding the instigation of a lawsuit that determines the ownership of the land in question on account of adverse possession.¹⁸

The procedural rules prescribed in the lawbooks of King Christian V of Denmark, i.e. the 1683 Danish laws (DL) and the 1687 Norwegian laws (NL),¹⁹ replaced the previously

¹¹ Ólafur Lárusson: *Eignaréttur I*, at 151.

¹² Ólafur Lárusson: *Eignaréttur I*, at 150.

¹³ Ólafur Lárusson: *Eignaréttur I*, at 152. See also a 1746 letter of appointment to bishops, “Instruction for Superintendenterne i Island” (i. *erindisbréf handa biskupum*), at 648–668.

¹⁴ Ólafur Lárusson: *Eignaréttur I*, at 152.

¹⁵ Ólafur Lárusson: *Eignaréttur I*, at 153.

¹⁶ Ólafur Lárusson: *Eignaréttur I*, at 153.

¹⁷ Ólafur Lárusson: *Eignaréttur I*, at 153.

¹⁸ Ólafur Lárusson: *Eignaréttur I*, at 153–54.

¹⁹ DL of 15 April 1683; NL of 15 April 1687.

applicable procedural rules.²⁰ The lawbooks entailed an evidentiary rule on property rights.²¹ This rule prescribed that if a third party claimed to be in possession of a thing held in the custody of another person — for a longer or a shorter duration of time — that person was not obligated to return the thing to the claimant, unless the claimant brought credentials establishing his title.²² This rule thus imposed the burden of proof upon the claimant, who was required to establish his title and not only that his counterparty — the person in custody of the disputed thing — was not the rightful owner of the thing in question.²³ Icelandic procedural laws — primarily Act No. 85/1936 on civil procedure at first instance and subsequently Act No. 91/1991 on civil procedure — finally replaced the procedural rules of DL and NL.²⁴ The lawbooks' old evidentiary rule on property rights is thus no longer applicable.²⁵

2.3 Rules of evidence according to Icelandic civil procedure

Rules of evidence in the field of civil procedure, including those that apply to property rights, have advanced from specific rules of evidence to the current principles of civil procedural law on the justices' free assessment of evidence,²⁶ that was first enacted via Articles 121 and 122 of Act No. 85/1936 on civil procedure at first instance.²⁷ The statutory provisions entailed that a justice was free to decide upon who to impose the burden of proof regarding disputed facts, and whether a statement had been sufficiently substantiated in court.

The aforementioned provisions of Act No. 85/1936 were replaced by a provision Article 44(1) of Act No. 91/1991 in civil procedure, that remains in force. This provision prescribes that a justice is to render a ruling on each occasion of whether a statement about a disputed fact is found to be proven, following an assessment of the evidence that has been submitted in the case, provided that statutory provisions do not specifically restrict the justice in his assessment thereof. As Markús Sigurbjörnsson states in his textbook on civil procedure, this short rule says everything that needs to be said in statutory law about what needs to be proven in each civil case. The essence of the rule is simply that evidence must be relied on to convince the judge that a claim about a disputed event is correct. To clarify further, each party's submittal of evidence must be directed at demonstrating that their assertion about an event or fact is correct. Their evidentiary efforts must, thereafter, be directed at the assertion of one party regarding an event or fact that the other party has contested and is therefore disputed.²⁸ This general principle of evidence in Icelandic civil procedure, which implies that a person

²⁰ Einar Arnórsson: *Dómsstólar og réttarfar á Íslandi*, at 41; Ólafur Lárusson: *Lög og saga*, at 212 (the previous procedural rules were provided for in the 1281 lawbook *Jónsbók*).

²¹ DL, 5-5-3; NL, 5-5-5. See also Ólafur Lárusson: *Eignaréttur I*, at 154.

²² DL, 5-5-3; NL, 5-5-5. See also Ólafur Lárusson: *Eignaréttur I*, at 154.

²³ Ólafur Lárusson: *Eignaréttur I*, at 154.

²⁴ *Lög um meðferð einkamála í héraði og safn greinargerða*, at 74–75; *Alþingistíðindi* 1991, A-deild, at 1126. See generally, NL, § 6.

²⁵ Ólafur Lárusson: *Eignaréttur I*, at 155.

²⁶ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 16.

²⁷ *Lög um meðferð einkamála í héraði og safn greinargerða*, at 105–06.

²⁸ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 220.

who makes a statement about disputed events must provide evidence thereof, is reflected in the rules of evidence in property law, as will be further explained in the below.

This rule stipulated for in Article 44(1) of Act No. 91/1991 entails that a justice will not only consider witness statements and documentary narratives, but also whether the evidence is credible in the light of experience and other information.²⁹ At the core of the principle on the justices' free assessment of evidence, is how a justice is principally not bound by statutory provisions on how statements can be proven, or at which point in time he is bound by a duty to agree that something has been sufficiently proven.³⁰ The principle is, however, naturally subject to statutory restrictions that contain special evidentiary rules.³¹ Such exceptions are minor at present and thus not disruptive of the general applicability of the principle.³² As a result of this principle, the courts are — when resolving property disputes — free to assess to whom a possession belongs in the light of the informed factual circumstances at hand.³³ Aside from documentary evidence submitted in court, the information on the custody of a disputed thing or the use thereof — both historical and present day information — can impact the assessment.³⁴ This can, however, vary depending on the type of possession, e.g. immovables or movables, as further explained in the below.

The principle of justices' free assessment of evidence is thus relied on when courts resolve disputes regarding land ownership. It entails an individual case-by-case assessment of the available documentary evidence and the factual circumstances at hand.³⁵

2.4 What happens when no evidence is available?

This begs the question of what the courts can rely on when there is no available documentary evidence regarding the disputed land zone, in instances where the disputing parties have used it for a long time.³⁶

Ólafur Lárusson pointed out multiple avenues to solve a situation such as this, including determining that the disputed land zone should be subjected to the parties' joint ownership or else evenly divided among them.³⁷

²⁹ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 16.

³⁰ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 16–17.

³¹ Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 17. See e.g. Article 44(2), 44(3), 50, 71 and 72 of Act No. 91/1991 (concerning the burden of proof when substantiating the existence and content of a foreign legal rule, when assessing a fact that a party has admitted in court and is not in his favour or if he does not adequately answer a question from which he is not entitled to evade and thus shows negligence, gives vague answers or remains silent, as well as rules of probability on the evidentiary value of public and private documents).

³² Markús Sigurbjörnsson: *Einkamálaréttarfar*, at 17.

³³ See Ólafur Lárusson: *Eignaréttur I*, at 155 (the author's discussion regarded the rule of the free assessment of judges according to Act No. 85/1936, in force at the time).

³⁴ Ólafur Lárusson: *Eignaréttur I*, at 155.

³⁵ See Ólafur Lárusson: *Eignaréttur I*, at 155.

³⁶ Ólafur Lárusson: *Eignaréttur I*, at 155.

³⁷ Ólafur Lárusson: *Eignaréttur I*, at 155.

The Icelandic courts opted for a different solution, i.e. to determine the boundaries of the disputed land themselves in the light of what they deemed most natural according to topography.³⁸ One can assume, from the Icelandic Supreme Court's case law it, that when the parties to a dispute are unable to locate a disputed point of a boundary line in the context of the sources available, the Court aims for establishing which of the points in the landscape — claimed by the parties to be the correct location — might best correspond to the remainder of the boundary line.³⁹ The case law also indicates that if one of the parties' claims in terms of location is supported by topography or other available information, the burden of proof might be shifted to the opposing party, cf. e.g. *H 47/2005* and *H 338/2009*.⁴⁰ The courts still adhere to this approach,⁴¹ as is evident from e.g. cases concerning wasteland, cf. e.g. *H 59/2016*, and boundary disputes.

The rationale for this approach has been explained by reference to the courts' duty to resolve any and all disputes brought before them in a final and binding manner.⁴² Karl Axelsson has even alleged that when all else fails, Court's either ignore or omit the disputed points of a boundary line and draw the line differently, cf. e.g. *H 219/1998* and *H 411/2012*.⁴³

The courts do, however, remain within the boundaries imposed by the parties' claims and arguments as the courts are bound by the general principles of party control in Icelandic civil procedure.⁴⁴ See e.g. *H 59/2016* where the description of boundaries in a boundary deed was interpreted to the effect that the line was determined by a riverbed excluding a further specified part of the line where the administrative organ (*Óbyggðanefnd*) and the courts were bound by the parties' claims on account of the general principle of party control in Icelandic civil procedure.⁴⁵

³⁸ Ólafur Lárusson: *Eignaréttur I*, at 155; Tryggvi Gunnarsson: "Landamerki fasteigna", at 542 (referencing *H 1967/916* as an example of this court doctrine).

³⁹ Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti: forgengileg og forvitnileg viðmið í landamerkjamálum". *Afmælisrit: Tryggvi Gunnarsson sextugur*. Eds. Berglind Bára Sigurjónsdóttir et al. Reykjavík 2015, at 453–493, at 488.

⁴⁰ Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti", at 488.

⁴¹ Tryggvi Gunnarsson: "Landamerki fasteigna". *Afmælisrit: Gaukur Jörundsson sextugur*. Eds. Katrín Jónasdóttir et al. Reykjavík 1994, at 503–543, at 542; Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti", at 487–488. See also Thor Falkanger: *Fast eiendoms rettsforhold* (4th ed.). Oslo 2011, at 42–45 (on parallels in Norwegian law regarding the court assessment of who is in possession of absolute possession (n. *grunneiendomsretten*) see *inter alia* in Norwegian: "For det første, domspraksis er klar 'justiniansk'. Det er én som utpekes som eier, mens de øvrige som har interesser i eiendommen, betegnes som rettighetshavere med positivt avgrenset rådighet. [...] For det annet, når det skal avgjøres hvem som har grunneiendomsretten, er det tale om en bred konkret vurdering, hvor et omfattende og variert materiale vedrørende faktum og rettslige oppfatninger kan være relevant. [...] Men dette er ikke mer enn et 'hovedsynspunkt'; de konkrete omstendigheter kan føre til et annet resultat." See i.d., at 44–45).

⁴² Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti", at 488.

⁴³ Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti", at 488.

⁴⁴ Karl Axelsson: "Flatskalli, fuglsbringa og maður á hesti", at 488–89.

⁴⁵ See e.g. *H 59/2016* (ch. IV, §§ 1 and 5).

3. Three fundamental principles on how to establish title in property cases

3.1 The *numerus clausus* principle

Among the fundamental principle of property law that have been maintained in various jurisdictions, is the principle of *numerus clausus*,⁴⁶ although it is variously applied depending on the jurisdiction.⁴⁷ Common law jurisdictions merely implicitly behave according to the principle in practice whilst it is expressly recognized in civil law jurisdictions, in the light of how they abide by codes.⁴⁸ The principle entails two components:

First the principle is associated with the contents of property rights. Each legal system somewhat delimits the number of property rights and their content. The *numerus clausus* limits party autonomy in terms of the number of property rights available (German *Typenzwang*). If one wants to create property rights they must due to the principle of *numerus clausus* choose from the types of property rights recognized in the respective jurisdiction.⁴⁹ Under Icelandic law the recognized property rights are absolute ownership (i. *beinn eignarréttur*) and several types of restricted property rights, i.e. lesser rights (i. *óbeinn eignarréttur*).⁵⁰ The principle also functions to the effect of limiting party autonomy in terms of the contents of each property right (German *Typenfixierung*).⁵¹ Under Icelandic law the contents of absolute ownership generally includes the authorization to control and use one's

⁴⁶ Thomas W. Merrill and Henry E. Smith: "Optimal Standardization in the Law of Property: The Numerus Clausus Principle". *Yale Law Journal*, 2000, at 1–70, at 9–11. See also Bram Akkermans: *The Principle of Numerus Clausus in European Property Law*, In *Ius Commune Europaeum*. Ed. Jan M. Smits et al. Cambridge 2008, at 7.

⁴⁷ *Cases, Materials and Text on Property Law*, Eds. Sjef van Erp and Bram Akkermans. In *Ius Commune Casebooks for the Common Law of Europe*. Ed. Walter von Gerven. Oxford 2012, at 65, 73 (where it is explained how in French and Dutch law the rule is stipulated for in the civil code, whereas the rule is derived from statutory law in German law. Also, how the recognition of the rule is more complex).

⁴⁸ Thomas W. Merrill et al: "Optimal Standardization in the Law of Property", at 9–11. See also Bram Akkermans: *The Principle of Numerus Clausus in European Property Law*, at 7 (where it *inter alia* states: "Depending on the legal system there are different ways of describing the numerus clausus. When the principle of numerus clausus has found expression in the form of legislation, in particular as a part of the Civil Code, from which parties may not deviate, we could speak of a rule of numerus clausus. However, there are also legal systems in which the principle has not found expression as a formal rule. In some legal systems, for example, there is no Civil Code, and another source of law has a more important position than general legislation." See i.d.).

⁴⁹ *Cases, Materials and Text on Property Law*, at 67 and 69. See also Hafsteinn Dan Kristjánsson: "Grundvöllur og einkenni eignarréttinda í íslenskum rétti", *Afmælisrit: Tryggvi Gunnarsson sextugur*. Eds. Berglind Bára Sigurjónsdóttir et al. Reykjavík 2015, at 189–235, at 228.

⁵⁰ See also for reference e.g. Hafsteinn Dan Kristjánsson: "Grundvöllur og einkenni eignarréttinda í íslenskum rétti", at 228 (where the author discusses how forms of ownership are limited in Icelandic law, referencing private property, collective property, hereditary land rights, non-profit organizations, absolute ownership and restricted property rights in that context. The further alleged that property rights were required to fall under one of those forms of ownership, noting however that the forms of ownership could vary from time to time); Þorgeir Örlygsson, Karl Axelsson and Víðir Smári Petersen: *Eignaréttur I: Almennur hluti*. Reykjavík 2020, at 145–147, 167 and 283–285 (where there is a discussion of absolute ownership, restricted property rights and forms of ownership. This textbook distinguishes between types of property rights (absolute ownership and the various kinds of restricted property rights) and forms of ownership (private property, collective property, ownership within condominiums, hereditary land rights, non-profit organizations, right of residence, ownership in the social housing system etc.)).

⁵¹ *Cases, Materials and Text on Property Law*, at 65, 67 and 72.

possession, the authorization to dispose of one's possession via a legal act such as transfer and mortgage, the authorization to mortgage one's possession, the authorization to pass on one's possession upon death, and to seek assistance from courts and other authorities for the protection of one's possession.⁵² According to the principle only these recognized rights and no others can be considered the contents of property rights.

Second the principle of *numerus clausus* is associated with how property rights can be created, transferred and destroyed, as each jurisdiction recognizes a limited number of ways in which to facilitate those functions.⁵³ Under Icelandic law the original acquisition can only occur via settlement of immovables (i. *nám*, *landnám*) or movables (i. *taka*), and subsequent acquisition can only occur on account of a limited number of ways such as adverse possession and transfer.⁵⁴ If a right has not been created in a recognized manner under the respective jurisdiction, it will not be considered a property right.

The principle of *numerus clausus* thus entails that property rights can only exist in a standardized form.⁵⁵ Consequently, only those rights that fall within the ambit of the standards recognized in a given jurisdiction can be considered property rights. In contrast the law of contracts allows for the creation of infinite types of legally binding contracts.⁵⁶ As a result of the aforementioned, the principle of *numerus clausus* also functions as a mechanism to decide whether further specified legal relations fall within property law — and are as such subject to its substantive rules — or otherwise governed by the other fields of commercial law, i.e. the law of obligations, rules of contracts or torts.⁵⁷ The resolution of this issue is then essentially determined by the codified and uncoded rules of property law. To this effect, the principle of *numerus clausus* operates in a similar manner as e.g. the property provision (Article 72(1)) of the Icelandic Constitution that requires full compensation, as the provision's more detailed content is determined by the substantive rules of property law and torts.

In this context it is imperative to distinguish between property rights within the meaning of property law as a field of law, and property rights within the meaning of the Icelandic constitution's property provision, cf. Article 72(1), since the latter concept is broader than the former, cf. e.g. *H 195/1999*, *H 340/2011* and *H 501/2016*,⁵⁸ and as such not associated with the principle of *numerus clausus*.⁵⁹

Another difference between property rights and rights subject to the other fields of commercial law, is how property rights are binding on third parties due to their *erga omnes* effect, while claims associated with a right under the other fields of commercial law are only binding upon the contracting parties. Those legal acts or rights that are not considered

⁵² See e.g. Valgerður Sólmes: *Clarifying land title*, at 53–54 and 57; Þorgeir Örlygsson et al: *Eignaréttur I*, at 146. See for reference A.M. Honoré: “Ownership”. *The Nature and Process of Law: An Introduction to Legal Philosophy*. Ed. Patricia Smith. New York 1993, at 370–433, at 370–375 (a seminal paper explaining how property rights generally encompass a further explained bundle of rights).

⁵³ See *Cases, Materials and Text on Property Law*, at 65.

⁵⁴ See e.g. Valgerður Sólmes: *Clarifying land title*, at 83–93; Þorgeir Örlygsson et al: *Eignaréttur I*, at 351–353.

⁵⁵ See Thomas W. Merrill et al: “Optimal Standardization in the Law of Property”, at 4.

⁵⁶ Thomas W. Merrill et al: “Optimal Standardization in the Law of Property”, at 3.

⁵⁷ *Cases, Materials and Text on Property Law*, at 65 and 67.

⁵⁸ *H 195/1999* (ch. II, § 1); *H 340/2011* (ch. IV, § 6); *H 501/2016* (ch. III, § 1).

⁵⁹ See e.g. Valgerður Sólmes: “Skattlagningarvald gagnvart friðhelgi eignaréttar”. *Hæstiréttur í hundrað ár: Ritgerðir*. Eds. Þorgeir Örlygsson et al. Reykjavík 2020, at 475–512, at 501–502.

property rights in the aforementioned sense, are therefore considered to be other types of commercial or economic rights and the principle of *numerus clausus* is applied in order to resolve under which category the legal act or rights in question fall under.⁶⁰ This distinction is important because the rules of property law are binding and those in possession of a property right have no choice whether to adhere to the rules of property law. Property rights are thus different from other commercial rights where the starting point is the freedom of contract.⁶¹

There is hardly any discussion of the principle of *numerus clausus* in Nordic law, including Icelandic law, save for implicit discussion of the way in which property rights are exhaustively described by listing up the types of property rights available, and the authorities they can contain, together with the ways in which to create, transfer and destroy property rights.⁶² It has, however, been pointed out that if a society was to rely on property rights without further specification of what the property rights entailed — to the extent of which is assumed by the principle of *numerus clausus* — it would be difficult to claim that such a society did in fact acknowledge private property rights.⁶³ The exhaustive sources of property rights and their creation rely on the codified and uncoded rules of property law. Under Icelandic law — and in other jurisdictions that rely on civil law — it is only in the power of the legislator to introduce new sources of property rights together with new ways in which to create such rights.⁶⁴

The practical value of the principle of *numerus clausus* is *inter alia* manifested in the distinction between property rights and rights of claim under certain circumstances; property rights supersede alternative rights and/or claims in the ranking of debts under bankruptcy proceedings, cf. e.g. Article 109 of the Icelandic Act No. 21/1991 on bankruptcy etc., and claims are interest-bearing whereas property rights are not, cf. e.g. Article 1(1) of the Icelandic Act No. 38/2001 on interests and indexation. Both points were at issue in *H* 72/2014, where a dispute arose regarding the priority of claims based on six payments — that had been initiated and were meant to be transferred from one financial institution to another that had been subjected to winding-up proceedings. The transfer of the payments was not finalized and the issue pertained to whether the claims should be decided upon as property rights as per Article 109(1) of Act No. 21/1991 on bankruptcy proceedings etc., or general claims according to Article 113 thereof. The former claims supersede any other claims during bankruptcy and/or winding-up proceedings, whereas the latter do not enjoy priority status of any kind. The Icelandic Supreme Court found that two payments were in fact based on

⁶⁰ *Cases, Materials and Text on Property Law*, at 65.

⁶¹ *Cases, Materials and Text on Property Law*, at 67.

⁶² See e.g. Þorgeir Örlygsson et al: *Eignaréttur I*, at 145–147, 167, 283–285, 351–353 (on Icelandic law). See also e.g. Ólafur Lárússon: *Eignaréttur I*, at 11–12; Gaukur Jörundsson: *Um eignarnám*, Reykjavík 1969, at 58; Sigurður Lindal: “Hugtakið þjóðareign”, *Úlfjótur* 2012, at 101–125, at 105 (on Icelandic law to this effect). See for reference Thor Falkanger: *Fast eiendoms rettsforhold*, at 32–34, 38–41; Erlend Baldersheim: *Reglar om fast eigedom*, Oslo 2010, at 75–81 (on Norwegian law to this effect).

⁶³ Then any and all possession would in effect become objects of sale that the “owner” would be forced to by and sell like any other claims, and the only value that could be acquired in such a society would be money. See Erlend Baldersheim: *Reglar om fast eigedom*, at 63. Such circumstances do not align with the interests inherent in e.g. ownership of immovables for residential or agricultural use.

⁶⁴ *Cases, Materials and Text on Property Law*, at 67. See also e.g. Bram Akkermans: *The Principle of Numerus Clausus in European Property Law*, at 467–469 (where Sjef van Erp alleges that if the principle *numerus clausus* is applied with too little flexibility, it might hinder innovation).

property rights whereas the four remaining claims were deemed as general claims.⁶⁵ Additionally, the Court rejected the notion that the claims based on property rights according to Article 109(1) of Act No. 21/1991 could be interest bearing. Another example is *H 18/2019*, where it was disputed whether a property right in the form of land rights that were subject to an obligation containing a right to contract could be considered a right *in rem* and as such governed by the substantive rules of property law. The Court concluded that this was not the case and that the right, alternatively, contained a right of claim in a mutual debtor-creditor relationship.⁶⁶ This meant that the right in question was governed by law of obligations and not property law. Also, property rights are not subject to a statute of limitations, cf. Article 1(1) of Act No. 150/2007 on the statute of limitations concerning rights of claim and e.g. *H 23/2017*.⁶⁷

In line with the aforementioned exhaustive description of property rights the field of property law is sometimes referred to as a closed system,⁶⁸ with the exception that it is generally assumed that new types of property rights can emerge,⁶⁹ as exemplified by e.g. how new natural resources have emerged *inter alia* by way of the advancement of technology etc. As previously discussed, the power to create new property rights is confined to the legislator in civil law jurisdictions.⁷⁰

An examination of rights or legal acts in the light of the principle of *numerus clausus* consists of comparing the respective rights or legal acts to the recognized types of property rights, their content and the way in which they can be created.⁷¹ Once the rights or legal acts have been examined and that examination leads to the conclusion that they are in fact property rights, the rights or legal acts are thus subject to the substantive rules of property law.⁷² The substantiation of property rights under Icelandic law is, among other things, determined by the substantive rules of property law.

3.2 A claimant's duty to substantiate title

As previously explained in the above, it is a fundamental principle under Icelandic property law that the claimant of a property right has a duty to substantiate his possession — i.e.

⁶⁵ See also e.g. *H 441/2011*.

⁶⁶ *H 18/2019* (ch. III.1, § 4).

⁶⁷ *H 23/2017* (ch. II, § 2).

⁶⁸ See *Cases, Materials and Text on Property Law*, at 66.

⁶⁹ See *Cases, Materials and Text on Property Law*, at 67 and 73; Sjöf van Erp: *Comparative Property Law*, Oxford 2006, at 1053.

⁷⁰ *Cases, Materials and Text on Property Law*, at 67. See generally *id.*, at 74–75 (where an example is given on how the *numerus clausus* principle has played out before the French and English courts in terms of the recognition of newly created rights).

⁷¹ *Cases, Materials and Text on Property Law*, at 67.

⁷² *Cases, Materials and Text on Property Law*, at 65 and 67.

establish his title — by submitting evidence thereof,⁷³ cf. e.g. *H 48/2004*.⁷⁴ The Icelandic Supreme Court has repeatedly reiterated this principle in its case law, cf. e.g. *H 497/2005*, *H 67/2006* and *H 69/2009*.⁷⁵ The principle *inter alia* relies on the aforementioned general rule of Icelandic civil procedure provided for in Article 44(1) of Act No. 91/1991 on civil procedure. According to the principle a third party who claims property title of a thing in the possession of another person is required to substantiate his property claim,⁷⁶ cf. e.g. *H 716/2016*, *H 439/2015*, *H 524/2014*, *H 412/2009* and *H 349/2005*,⁷⁷ cf. conversely *H 570/2012*, where the person who claimed entitlement to the object appears to have successfully established possession, or alternatively that the burden of proof was shifted over to the custodian of the object, and *H 183/2005*, where the Court acknowledged the possibility that the disputed horses could be in the custody of other than their owners for a longer or shorter period of time and therefore the custody in and of itself could not provide an indication of possession.⁷⁸ This last judgment is indicative of how the custody of an object can be of varying significance depending on the nature of the object in question. The judgment also supports how it is in fact the evidence submitted in each case that determines the outcome of property cases, both in terms of what kind of property rights are at issue, their content and scope, together with who is their rightful owner.⁷⁹

From a procedural perspective, the owner would benefit from a judgment that would not only opine that the evidentiary efforts of the third party claimant had failed,⁸⁰ as such a judgment would not prevent the third party claimant from initiating a second lawsuit with new pleadings and arguments.⁸¹ As a result, the owner would be expected to defend his right by striving to establish his title of the disputed thing in order to obtain a judgment that can resolve the dispute. In the case law of the Supreme Court there are examples of attempts to circumvent the binding legal effect (*res judicata* effect) of court decisions by raising parallel claims based on the same reasoning, but a court's previous decision on such claims is binding

⁷³ Þorgeir Örlygsson: "Om ejendomsret til landområder og naturressourcer", at 576; Þorgeir Örlygsson: *Kaflar úr eignarétti I*, Reykjavík 1998, at 107–108. See also Knud Illum and Vagn Carstensen: *Dansk tingsret* (3rd ed). Copenhagen 1976, at 31 (on the same principle in Danish property law where it *inter alia* states: "Skal ejendommen vindes fra besidderen, må vindikanten føre bevis for sin adkomst [...] [If the property is to be recovered from the occupier, the claimant must provide evidence of his title.] Knud Illum et al: *Dansk tingsret*, at 31).

⁷⁴ *H 48/2004* (ch. VII, § 1).

⁷⁵ *H 497/2005* (ch. II, § 2); *H 67/2006* (ch. II, § 2); *H 69/2009* (ch. V, § 3) (where the Supreme Court confirmed the conclusion of the first instance court to this effect, *H 69/2009* (see the first instance court's judgment, § 92)).

⁷⁶ Knud Illum et al: *Dansk tingsret*, at 31.

⁷⁷ *H 716/2016* (§ 5); *H 439/2015* (§ 5); *H 524/2014* (ch. II, § 2), *H 412/2009* (§ 4 and ch. IV, § 3 in the judgment of the first instance court); *H 349/2005* (§ 4 and ch. V, § 1 in the judgment of the first instance court).

⁷⁸ *H 183/2005* (§ 4).

⁷⁹ Þorgeir Örlygsson: "Om ejendomsret til landområder og naturressourcer", at 576.

⁸⁰ Knud Illum et al: *Dansk tingsret*, at 31.

⁸¹ Knud Illum et al: *Dansk tingsret*, at 31. Compare *H 334/2014* (ch. IV, §§ 1–2), with *H 693/2008* (where the Supreme Court resolved a few claims of the parties to *H 334/2014* re. the boundaries between their estates. *H 334/2014* (ch. IV, §§ 1–2). The same claims had not been made in the previous case, *H 693/2008*. In the latter case the Court rejected the claims of the landowner who had initiated the lawsuit, whereas his opponent had not filed a counterclaim and made the necessary claims for his part re. the respective boundary line. *H 693/2008* (ch. II, §§ 1–3)).

upon the parties and the courts.⁸² The two following judgments, *H 334/2014* and *H 579/2014*, are testament to these circumstances:

In H 334/2014, the Supreme Court dismissed a boundary case from the first instance (district) court partially due to the fact that the main claim of the owner of the estate H — who was a party to the case — had been raised in a previous court case concerning the same boundary line, cf. H 693/2008, and the claim had even been based on the same reasoning in both cases. In the previous case, H 693/2008, the owner of the land R had been acquitted of the claim made by the landowner of H, regarding a boundary line between the two estates, H and R, and the boundaries disputed by the landowners could thus not be resolved. In the second case, H 334/2014, the Supreme Court, however, found that it was possible to resolve the claim made by the landowner of H in the alternative, together with the claim made by the landowner of R at first instance, as neither claim had previously been brought before the courts.

In H 579/2014, the Supreme Court partially dismissed a boundary dispute from the first instance (district) court, i.e. the claims regarding the boundary line between the estate S and three other estates, as a judgment thereon had been rendered in a previous court case, H 297/2008. The Court did, however, conclude upon the claims brought before it regarding a boundary line between the estates S and B, as the Court had in the previous case found that the provisions of the available boundary description pertaining to the boundaries between those two estates was invalid. In the latter case, H 579/2014, the landowner of the estate S made a claim that the boundary line between the estates S and B was to be located differently than indicated by the aforementioned boundary description, to the benefit of the estate S. This claim, by the landowner of the estate S, in the form of a claim of recognition of the alleged boundary line between the two estates, was deemed admissible as it had not been tested before the courts in the previous case, H 297/2008. That previous case had only dealt with a claim by the landowner of the estate B for the invalidation of the respective provision in the boundary description.⁸³

For the above reasons, the custodian (owner) of the object would be expected to take action by seeking to prove his ownership of the object, and thus strive for a judgment that can resolve the dispute in a final and binding manner,⁸⁴ cf. e.g. *H 78/2017*.⁸⁵ This is, however, not always the case, cf. e.g. *H 693/2008* where the defendant before the first instance (district) court, for his part, did not state any claims to prove his property title.⁸⁶

Another element to consider is how the evidence of title, that a third party claimant is required to submit, is not necessarily sufficient proof of his title, as the evidence merely demonstrates the claimant's justified claim at the material time (i.e. the date of issuance) and not necessarily his title at present (i.e. when the instigation of a lawsuit).⁸⁷ In that case, there is no reason why the respondent — the alleged owner — should not submit evidence that bears witness to subsequent events that may have altered the legal position.⁸⁸ In a sense, it is thus impossible to render a final and binding decision on property title via contract or

⁸² See *H 334/2014* (ch. III, § 5) (where the Supreme Court dismissed a claim brought forth by a party to a boundary dispute, which had already been made in a previous court case between the representatives of the same estates, since the arguments for the claim were identical to the arguments in the previous case).

⁸³ *H 66/2013* (ch. II, § 1); *H 579/2014* (ch. IV, § 3).

⁸⁴ Knud Illum et al: *Dansk tingsret*, at 31.

⁸⁵ *H 78/2017* (see the first instance judgment, § 12) (where the appellant had responded to the lawsuit by bringing a counterclaim at the first instance, in order to substantiate the location of a boundary line for his land towards the defendant's adjacent estate, in order to obtain a final judgment on the boundary line between the two estates).

⁸⁶ See e.g. *H 693/2008* (§§ 2–3) (where the defendant did not bring a counterclaim at the first instance in order to substantiate his ownership of the disputed land zone. See *H 334/2014* (ch. II, § 2)).

⁸⁷ See Knud Illum et al: *Dansk tingsret*, at 31.

⁸⁸ See Knud Illum et al: *Dansk tingsret*, at 31.

judgment based on documentary evidence, that will be binding forever and ever, as subsequent events can effect or change the *status quo*.⁸⁹

3.3 The *nemo dat* principle

In the property law of European states, four substantive principles have been referred to as fundamental principles when dealing with establishing title in property cases.⁹⁰ These are the principles of priority, first, that older rights take priority over more recent rights (*prior tempore*), and, second, that limited property rights take priority over absolute possession. Third, there are protective principles such as the right of estoppel. Fourth, there is the principle of *nemo dat*.⁹¹ Discussion on the first three principles is available in other sources.⁹² This paper will, however, examine the last principle. The fundamental principle of *nemo dat* entails that nobody can transfer that which he does not own.⁹³ Its name stands for *nemo dat quod non habet* (or one cannot give what one does not have).⁹⁴ According to the principle it is necessary for the transferor of a property right to have the power to dispose of it.⁹⁵

The *nemo dat* is, however, offset by rules on third party protection, whereas a third party in good faith who paid for a property right is often protected against an original owner claiming his right of ownership thereof.⁹⁶ Rules on third party protection result in the rightful owner, the one who could otherwise have challenged the deed of assignment, losing that right and what would otherwise have been lacking in the deed does not affect the validity of subsequent dispositions of the object, including a deed of assignment in favor of a third party.⁹⁷ The *nemo dat* principle is thus restricted in favor of the legal protection of third parties, because a third party who pays in good faith and thus acquires a property right often enjoys protection against the rightful owner who makes a claim for the property right in question.⁹⁸ In such instances, the *nemo dat* principle “[...] is overridden in favor of subsequent good faith purchasers for value.”⁹⁹ Among the most significant rules of trust in Icelandic law are the statutory rules provided for in the Act No. 39/1978 on public registration. Publicly registered property sources can contribute to a subsequent transferee (third party) acquiring property rights associated with an object he would otherwise have lost on the basis of the *nemo dat* principle.¹⁰⁰ The *nemo dat* principle thus applies even where no

⁸⁹ See Knud Illum et al: *Dansk tingsret*, at 31.

⁹⁰ *Cases, Materials and Text on Property Law*, at 93.

⁹¹ *Cases, Materials and Text on Property Law*, at 93.

⁹² See e.g. Valgerður Sólmes: *Clarifying land title*, at 73–75 (where the rules are discussed *inter alia* in the context of examples from Icelandic law); *Cases, Materials and Text on Property Law*, at 93–94 (where the rules are referred to as fundamental principles of property law). See also e.g. Þorgeir Örlygsson et al: *Eignaréttur I*, at 377–378 (where there is discussion of the right of estoppel).

⁹³ Thomas W. Merrill and Henry E. Smith: *The Oxford Introductions to U.S. Law: Property*, Oxford and New York 2010, at 24.

⁹⁴ Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 168.

⁹⁵ See *Cases, Materials and Text on Property Law*, at 93.

⁹⁶ *Cases, Materials and Text on Property Law*, at 93; Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 169.

⁹⁷ Þorgeir Örlygsson et al: *Eignaréttur I*, at 378. See also e.g. Ólafur Lárusson: *Eignaréttur I*, at 230–232.

⁹⁸ *Cases, Materials and Text on Property Law*, at 93.

⁹⁹ Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 169.

¹⁰⁰ Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 168.

title record exists.¹⁰¹ The rationale for deviating from the *nemo dat* — e.g. by way of recording acts — is the need to promote business and markets.¹⁰² Both ordinary commercial dealings and third parties in good faith would be adversely affected, if the original owner would always be able to reclaim his possession.¹⁰³ *Nemo dat* exceptions thus provide customers in good faith with insurance that their business dealings will prevail,¹⁰⁴ cf. e.g. *H 333/2008* and *H 400/2002*,¹⁰⁵ but do not apply when a third party is in bad faith, cf. e.g. *H 237/2009*, *H 87/2010* and *H 193/2004*.¹⁰⁶

The *nemo dat* principle is apparently present in most jurisdictions,¹⁰⁷ including Nordic law.¹⁰⁸ In Icelandic law the principle has *inter alia* been a recurrent theme in boundary disputes.¹⁰⁹ It has been variously applied in Icelandic case law in general. The Icelandic Supreme Court seminally opined in *H 222/2014*, via reference to *H 1967:916*, that from the inception of the present system of title registration a principle had been in force and applied prescribing that a landowner could not unilaterally expand his right beyond its previous condition via the registration of boundary records.¹¹⁰ The principle has also featured heavily in the Court's wasteland case law, cf. e.g. *H 48/2004*, *H 24/2007* and *H 617/2012*.¹¹¹

The *nemo dat* principle therefore plays a significant role in resolving the evidentiary value of the available evidence (property sources), and according to case law this is particularly the case when it comes to the evidentiary value of boundary deeds, but also deeds of assignment and other types of agreements.¹¹² It should be noted that in practice a dispute may, for example, revolve around whether making a specific legal act the person who made it has disposed of a right in excess of what he himself was in possession of. The dispute thereon may, however, be dependent either on the application of the principle to the facts of the case,

¹⁰¹ Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 168.

¹⁰² Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 170; *Cases, Materials and Text on Property Law*, at 93.

¹⁰³ *Cases, Materials and Text on Property Law*, at 93.

¹⁰⁴ Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 170.

¹⁰⁵ *H 333/2008* (§ 4); *H 400/2002* (§ 7).

¹⁰⁶ *H 237/2009* (ch. IV, § 3), *H 87/2010* (ch. VI, § 4); *H 193/2004* (ch. II, § 2).

¹⁰⁷ *Cases, Materials and Text on Property Law*, at 93 (where the rule is referred to as one of the fundamental rules of property law in Europe); Thomas W. Merrill et al: *The Oxford Introductions to U.S. Law: Property*, at 24 (where the application of the principle of *nemo dat* in U.S. case law is discussed). See generally *Cases, Materials and Text on Property Law*, at 52–53 (where reference is made to the fact that once a decision has been made by a competent party that rights are in fact property rights, certain fundamental principles apply to the rights, including the principle of *nemo dat*, which states that people cannot transfer more rights than they themselves own. See id.).

¹⁰⁸ von Eyben, W.E.: *Formuerettigheder: Indhold, beskyttelse, overdragelse* (7th ed.), Copenhagen 1983, at 18 (re. the principle of *nemo dat* in Danish law); Thor Falkanger: *Fast eiendoms rettsforhold*, at 102 (re. the principle of *nemo dat* in Norwegian law).

¹⁰⁹ See e.g. Karl Axelsson: “Flatskali, fuglsbringa og maður á hesti”, at 461–62 (re. one of the manifestations of the principle of *nemo dat*, i.e. in boundary disputes). See Thor Falkanger: *Fast eiendoms rettsforhold*, at 102 (re. the parallel rule in Norwegian law).

¹¹⁰ *H 222/2014* (ch. IV, § 2) (where the Supreme Court referenced *H 1967:916*, cf. at 919).

¹¹¹ See e.g. *H 48/2004* (ch. VII, § 6); *H 24/2007* (ch. V, § 1) (where the *nemo dat* principle was invoked in such a way that a landowner could not, by creating a boundary deed or an agreement, unilaterally extend his land or land rights beyond what had been); *H 617/2012* (ch. VI, § 3) (where the *nemo dat* principle was referenced in a parallel manner in the context of the creation of a boundary deed).

¹¹² Valgerður Sólmes: *Clarifying land title*, at 76–77.

or merely on the *interpretation* of the legal act, e.g. the interpretation of a deed of assignment or an alternative type of agreement.¹¹³

Where boundary deeds are concerned, the *nemo dat* principle is apparent in all of the conclusions that the Supreme Court was able to draw from the available sources in the following cases. The Court has held that a boundary deed had not gone beyond the previous condition in its land demarcation, cf. *H 498/2005*.¹¹⁴ The Court has rejected the notion that claimants could expect to have won over land via the creation of a boundary deed that was previously not subject to the respective estate, cf. *H 498/2005*.¹¹⁵ The Court has also opined that older sources were neither in support of the disputed land zone being subject to absolute ownership, nor could such a right have been created via the creation of a boundary deed, cf. *H 294/2010*,¹¹⁶ that the description of a boundary deed extended beyond older sources with regard to the boundaries of the land zone in question, cf. *H 656/2012*,¹¹⁷ and that older sources were contrary to a specific boundary line later described in a boundary deed, cf. *H 617/2012*,¹¹⁸ or in any case that older sources did not provide sufficient support for statements of a boundary deed proclaiming that a disputed land zone was subject to an estate, cf. *H 94/2017*.¹¹⁹ When conflict occurs between two boundary deeds, the Court has opined that the boundaries of an estate could not be expanded via a new boundary deed from the previous condition according to the previous deed for the same estate, cf. *H 69/2009*,¹²⁰ and that older sources were in support of an older boundary deed for an estate whereas a more recent deed was not supported to the effect it extended beyond the older deed, cf. *H 69/2009*.¹²¹ The Court has rejected the notion that claimants could expect to have won over land via the creation of a boundary deed that was previously not subject to the respective estate, cf. *H 498/2005* and *H 350/2011*,¹²² and that the official registration of a boundary deed could operate in support of such expectations, when it was already clear that the disputed land zone had not been subject to the respective estate prior to the making of the deed, cf. *H 350/2011*.¹²³

As for conveyance deeds and other contracts, the Court concluded in *H 294/2010*, *H 411/2012* and *H 323/2016* that conveyance deed for the sale of land could not create expectations of absolute land ownership with the purchaser, when it was clear that the seller's property had been restricted to lesser rights therein.¹²⁴ The Court has asserted — many times over — that a beneficiary of lesser rights within a disputed land zone is not capable of

¹¹³ See e.g. *H 114/2005*, *H 372/2005*, *H 89/2008*, *H 120/2009*, *H 122/2009*, *H 467/2009*, *H 560/2009*, *H 554/2011*, *H 643/2015*, *H 505/2016*, *H 716/2016* and *H 26/2019*.

¹¹⁴ *H 498/2005* (ch. V, § 6) (re. a boundary deed for the disputed land zone south and west of Jökulsá river).

¹¹⁵ *H 498/2005* (ch. VII, § 3) (re. a boundary deed for the disputed land zone north and east of Jökulsá river).

¹¹⁶ *H 294/2010* (ch. V, § 3).

¹¹⁷ *H 656/2012* (ch. IV, § 3).

¹¹⁸ *H 617/2012* (ch. VI, § 3).

¹¹⁹ *H 94/2017* (ch. IV, § 3).

¹²⁰ *H 69/2009* (ch. V, § 3).

¹²¹ *H 69/2009* (ch. V, § 3).

¹²² *H 498/2005* (ch. VII, § 4); *H 350/2011* (ch. IV, § 8).

¹²³ *H 350/2011* (ch. IV, § 8).

¹²⁴ *H 294/2010* (ch. V, § 4); *H 411/2012* (ch. XI, § 5) (re. the disputed land zone Bleiksmýrardalur eystri); *H 323/2016* (ch. IV, § 5).

transferring any rights beyond that, cf. *H 67/2006*, *H 350/2011*, *H 294/2010*, *H 411/2012*, *H 323/2016*, *H 94/2017*, and *H 862/2016*.¹²⁵

4. The fundamental principles in practice

Having completed a theoretical review of the fundamental principles of property law (the principle of *numerus clausus*, a claimant's duty to substantiate title, and the *nemo dat* principle), it is only appropriate to explain how the principles can be applied in practice as exhibited by real life disputes over property rights. To this end, a few judgments rendered by the Icelandic Supreme Court — regarding immovable and movable property — will be relied on for illustrative purposes.

First, there is a judgment rendered by the Supreme Court in a wasteland case, *H 48/2004*, where *inter alia* the principles of *numerus clausus* and *nemo dat* were tested.

H 48/2004. The case revolved around a dispute over the boundaries of public land within a further specified land zone towards the adjacent land of the uppermost estates in Biskupstungur, on the one hand, and whether the land zone of Framafréttur and Hagafellsland were to be determined as private or public land, on the other hand.¹²⁶

Regarding the first issue, the Supreme Court found that it was unable to exclude that absolute ownership of the land of the respective estates had been established at the outset by way of settlement,¹²⁷ which is a recognized way in which to originally acquire land according to the principle of *numerus clausus* under Icelandic law. Having reached this finding, the Court's outcome was primarily determined by the evidentiary value of boundary deeds for three estates, where the Court found that two of the deeds were each supported by older sources.¹²⁸ There, the Court was in effect referring to the fact that the requirement of the *nemo dat* principle was fulfilled regarding the boundary deeds, to the effect that the disputed land could not be considered to have been expanded via the creation of the deeds beyond what had previously been.¹²⁹ The disputed land of the estates was thus determined as private land.¹³⁰

As for the second issue, the Court found it unproven that absolute ownership had been established over the two disputed land zones, Framafréttur and Helgafellsland, in any recognized manner. Therefore, the Court found it unproven that the land zones had become subject to absolute ownership by way of settlement, legal acts or in any alternative manner.¹³¹ The conclusion was thus in fact determined by the principle of *numerus clausus*, which restricts the ways in which to create property rights. As a result the disputed land zones were determined as public land, although the Court also recognized restricted private property rights within the public land in question.¹³²

¹²⁵ *H 67/2006* (ch. V, § 2); *H 350/2011* (ch. IV, § 6 and 8); *H 294/2010* (ch. V, § 4); *H 411/2012* (ch. XI, § 5) (re. the disputed land zone Bleiksmýrardalur eystri); *H 323/2016* (ch. IV, § 5); *H 94/2017* (ch. IV, § 4); *H 862/2016* (ch. III, § 2).

¹²⁶ *H 48/2004* (ch. III).

¹²⁷ *H 48/2004* (ch. VII, § 2).

¹²⁸ *H 48/2004* (ch. VII, §§ 6–11).

¹²⁹ See *H 48/2004* (ch. VII, § 6).

¹³⁰ *H 48/2004* (ch. VII, § 13).

¹³¹ *H 48/2004* (ch. VIII, § 3).

¹³² *H 48/2004* (ch. VIII, §§ 4–5).

In both instances, those who made claims for the entitlement of the disputed land zones — i.e. the estates in Biskupstungur, and land zones in Framafréttur and Hagafellsland — were required to submit evidence to support their property entitlement.¹³³

Second, there are two judgments rendered by the Supreme Court in boundary disputes, i.e. *H* 222/2014 where *inter alia* the principle of *nemo dat* was tested, and *H* 480/2010 where that principle was also tested together with the principle of *numerus clausus*:

In *H* 222/2014 the owners of the estates Miðhús and Barmar in Reykhólahreppur disputed the boundaries between the two estates. More specifically, the dispute regarding whether the boundaries should be determined by the boundary deeds of Miðhús or Reykhólar, respectively.¹³⁴ According to the Supreme Court judgment a boundary deed was created for the estate Miðhús and publicly registered in May 1884, and in that deed there was a description of the boundaries between that estate and the estates Reykhólar and Barmar, respectively. Alternatively, the boundaries between Barmar and Miðhús had been described in the boundary deed for Reykhólar, that was created in February 1884 and publicly registered two years later. The reason for this is that the same person was the owner and representative of both estates, i.e. Reykhólar and Barmar, when the latter deed was created.¹³⁵

The Supreme Court effectively resolved the dispute on the basis of the *nemo dat* principle. The Court relied on the fact that the owners of the estates Miðhús and Barmar had initially agreed on the boundaries between the estates via the creation of the deed for Reykhólar, and later via the deed for Miðhús. As a result, the Court concluded that the latter agreement should stand and form the basis for determining the boundaries between the estates. Since the landowners had reached an agreement to this effect, the Court was unable to contend that the deed for Miðhús had increased the land rights associated with that estate beyond what had been.¹³⁶

In *H* 480/2010 two landowners, S and M, disputed the boundaries of their respective estates. More specifically, the dispute revolved around a specific parcel of land and whether it belonged to the estate of S or the estate of M. The land of the estate M had been sold out of the land of the estate of S and during that transaction it had been stipulated that a specific road was to determine the boundaries of the estates. This road was later moved onto the land of S and the dispute centered on the parcel of land between the two roads (the old road and the new road). M claimed that the previous owner of the estate of S had verbally given him the right of way.¹³⁷

The Supreme Court found that it had neither been established in the case that the previous owner of the estate of S had already renounced the disputed parcel of land when he sold it, nor that the transfer deed in the possession of S indicated anything other than that the boundaries between the two estates should be determined by the old road.¹³⁸ Both the principles of *numerus clausus* and *nemo dat* were relied on in the determination of the outcome of the case, because it was not considered proven that a transfer deed (gift) had created the ownership of S over the disputed parcel of land, cf. the former principle. Also that S could not have acquired the ownership over something other and more than the right of his predecessor, thus excluding the ownership of the disputed parcel of land as per to the latter principle.

Third, there is a Supreme Court judgment regarding immovables in a different context, *H* 194/2015, where *inter alia* the principle of *nemo dat* was tested.

In *H* 194/2015 there was a dispute on what should determine the delimitation of ownership shares for two owners of apartments in a condominium. Owner S relied on the delimitation according to a plan attached to a

¹³³ *H* 48/2004 (ch. VII, § 1).

¹³⁴ *H* 222/2014 (ch. IV, § 1).

¹³⁵ *H* 222/2014 (ch. I, § 1).

¹³⁶ *H* 222/2014 (ch. IV, § 2).

¹³⁷ *H* 480/2010 (ch. I).

¹³⁸ *H* 480/2010 (ch. III, § 1).

declaration of a division of property (i. eignaskiptayfirlýsing). Owner H argued that the location of a wall between the two parts of the condominium should be determined by its actual location,¹³⁹ which was offset by 40 sq. m. in H's favor.¹⁴⁰ In the court case it was clear that the 2005 declaration of ownership had been created when both shares were in the possession of the same person. It was also clear that when that owner sold the share of the condominium, later acquired by H, the seller had undertaken a duty to amend the declaration in accordance with the amended design of the aforementioned wall. The seller never followed through with the amendment and the respective shares of the condominium were transferred and eventually came into the hands of S and H.¹⁴¹

The Court's finding is determined by the *nemo dat* principle, because S was not considered to have acquired rights over a larger share of the condominium in question than what his transferor had at his disposal, and his authorization was determined in the context of the actual location of the wall between his part of the condominium and the share of H therein.¹⁴² See also e.g. H 252/2015 regarding a parallel case, where the property right to an interspace in a condominium was determined by *nemo dat*, as the property entitlement did not align with the available declaration of the division of property and transfer deed.

Lastly, there are two Supreme Court judgments regarding movables, i.e. H 128/2015 and H 684/2009, where both the principle of *numerus clausus* and the principle of *nemo dat* were tested:

In H 128/2015 there was a dispute regarding whether E, by virtue of its alleged possession of a drawing, could prohibit the company H hf. from any and all use of the drawing which was used in the company's trademarks.¹⁴³ The Supreme Court concluded that the drawing had such special characteristics that it was protected as a work of art under the Copyright Act No. 73/1972, and that E, as its author, was in possession of it.¹⁴⁴ As a result, ownership rights over the drawing had been established in a recognized manner within the meaning of the principle of *numerus clausus*.

E had entered into an agreement with BÍ hf. for the temporary and conditional use of the drawing, and the agreement was relied on in the resolution of the case. Alternatively, H hf. derived its right to use of the drawing in its retail operations to the transferor of BÍ hf., who had acquired the operations of the respective stores and then received the right to use the artwork of E, together with the trademarks associated with the operations.¹⁴⁵ Since the transferor was unaware of the aforementioned agreement, the Court held that the right that E had reserved against BÍ hf. (who later transferred that right) could not prevail over the right that the person from whom H received his right had acquired upon taking over the stores.¹⁴⁶ Here, the rules of trust prevented E from being able to maintain — on the basis of the *nemo dat* principle — the copyright that it had reserved against H hf.'s predecessor.

In H 684/2009 a contractor had on behalf of the municipality K removed 559 trees — in connection with water supply construction — that had been planted on behalf of S in Þjóðhátíðarlundur in Heiðmörk. The land on which the trees stood was owned by the municipality R, but S had, according to an agreement with R, supervised forestry and carried out construction for that purpose.¹⁴⁷ In this case, S made a claim for damages against the municipality K resulting from the removal of the trees. K, on the other hand, argued that R had been the rightful owner of the trees, not S. The Supreme Court rejected the notion that the Court had previously, H 210/2009, concluded that S had only been in possession of property rights amounting to the authorization of economically

¹³⁹ H 194/2015 (ch. I, § 2).

¹⁴⁰ H 194/2015 (ch. I, § 1).

¹⁴¹ H 194/2015 (ch. II, § 1).

¹⁴² See H 194/2015 (ch. II, § 2).

¹⁴³ H 128/2015 (ch. IV, § 1).

¹⁴⁴ H 128/2015 (ch. V, § 1).

¹⁴⁵ H 128/2015 (ch. IV, § 1; ch. V, § 2).

¹⁴⁶ H 128/2015 (ch. V, § 5).

¹⁴⁷ H 684/2009 (§ 4).

exploiting the disputed trees.¹⁴⁸ Inherent in the Court's judgment is how the Court essentially found that S's claim for the trees was legitimate within the meaning of the principle of *numerus clausus*. Also, how the principle of *nemo dat* was of significance, since S could naturally not act with regard to the destroyed trees beyond the rights that S had acquired via its agreement with the landowners, R.

5. Summary

There are a handful of fundamental principles that are applicable to the establishing of title in property cases. The principle of *numerus clausus* entails that property rights can only exist in a standardized form, as the principle functions to the effect that each legal system only recognizes a limited number of property rights and their content, together with a limited number of ways in which to create, transfer and destroy property rights. The principle is particularly useful for resolving whether a legal act or a right is subject to the field of property law and its substantive rules, because otherwise the legal act or right in question is subject to the scope of the other fields of commercial law. The principle requiring a claimant to submit evidence to establish title entails that the claimant of an object in the custody of another person must substantiate his claim. The principle of *nemo dat* provides that one cannot transfer more than he himself was in possession of and as a result he who transfers a property right must have the authority to dispose of the right. The Icelandic Supreme Court has played a significant role in shaping and applying these principles under Icelandic law.

The Supreme Court judgments referred to as examples in Section 4 above demonstrate how the fundamental principles of property law (the principles of *numerus clausus* and *nemo dat*, but also the principle requiring a claimant to submit evidence to establish title) can typically be tested in property disputes. The case law indicates that the courts do not explicitly address the principle of *numerus clausus*, whilst they do in fact resolve property disputes on the premise that they involve property rights, and thus that the rules of property law are applicable to the resolution of the case, but this point is hardly ever at issue between the parties. This does not, however, mean that this fundamental principle is of limited significance. Conversely, the determination of whether a legal act or a respective right is subject to the rules of property law, must be considered a point of departure in both legal transactions and the resolution of alleged property rights. The assessment of the probative value of the evidence (property sources) submitted in support of a property entitlement is clearly an important aspect of resolving a property dispute. The case law also clearly indicates how diversely the principle of *nemo dat* can be tested in practice, and its greater significance in regulating the way in which property rights over objects are managed. When the fundamental principles have been identified and applied to the facts of a case, one could say that the resolution of the respective property dispute has been put on track in an organized manner.

Provided that a property dispute revolves around a legal act or right that falls within the ambit of property law it should, however, be noted that it is subsequently always necessary to examine in more detail the documentary evidence available in individual cases, in order to

¹⁴⁸ H 684/2009 (§ 5).

assess their evidentiary value in the context of the weight the different types of documentary evidence (property sources) have been given in practice according to case law.

In the above an attempt has been made to draw the attention to and explain the aforementioned fundamental principles applicable to the substantiation of property rights in property cases, as well as demonstrating how they function in practice. The principles are tested in nearly every property dispute, where a property entitlement — concerning an alleged absolute ownership or a restricted property right associated with immovables and movables — is tested. As for the concluding remarks, the resolution of property disputes may very well prove more systematic and purposeful if attention is explicitly focused on the aforementioned fundamental principles of property law, e.g. when dealing with the drafting of arguments for property disputes or negotiating a resolution regarding ownership.