DESTINATION

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How do we know when a right of way or some restriction on a land use really serves a piece of land? When an elevator or a furnace gets incorporated in an integral manner into a building or a house, thus going to the "utility of the immoveable" so that it can no longer be removed by the person who installed it? When a condo owner uses their unit for some purpose that may not be allowed, such as renting it out weekly? These questions might have important practical and economic consequences. A right of way might be necessary to get to one's own property, while a restriction on use, say a restriction enjoining a person from using their land as a grocery store, might be of great economic value to the person and property—no doubt a grocery store owner—that gets the benefit of that restriction. If the elevator or furnace is installed, and gets classified as part of the building, the person that installed either appliance may lose an important right to remove them if they do not get paid. And a condo owner may find that the weekly renting of a furnished condo, in this age when it can easily be done online, is an excellent source of revenue.

The resolution of such cases will be determined by the "destination" of the land or building, with some weighty degree of objectivity attached to the meaning of the term. Yet, it is human beings, or perhaps other living creatures, that "enjoy" property or derive utility from it, and it is human beings who determine how resources are used or modified. So why are some uses deemed personal, while others are deemed attached to an immoveable in some permanent way, such that the rights and obligations, as our common law friends say, "run with the land"? When does some right "benefit the immoveable," or again as a common lawyer might ask, "touch and concern" the land? If an immoveable "serving" another immoveable is thus a fiction—the land and the use is only serving some *human* purpose after all—why is the fiction sometimes accepted, forcing legal consequences, and other times not? And how is it applied?

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Generally stated, destination is the idea that a resource or "object of social wealth" has or has been given a specific purpose, goal, or duty, or is otherwise meant to be used in a certain way or as part of another resource. In its formal manifestations, destination helps determine legal classifications and legal outcomes in certain instances: moveable or immoveable, for example. However, it is also a larger organizing concept that channels the way objects of social wealth are used, and in particular, circumscribes the range of given uses for certain resources and occasionally even requires specific uses. Destination performs this role both explicitly, through codal provisions and statutes, for instance; and implicitly, through tacitly accepted social norms surrounding the nature of an object of property.

As an overarching concept, destination helps us understand the nature of private property and ownership in general in civil law property. Despite this role as a key concept in property law, destination is not a concept that is well understood, even when used explicitly. There are three well-known traditional examples of the formal use of destination in both the *Civil Code of Quebec* (CCQ) and the *Civil Code of Lower Canada* (CCLC): destination as a factor in the process of immobilization, destination as a factor in co-ownership schemes, and destination in the process of creating a real servitude. The CCLC articulated all three notions, while the CCQ has apparently retained only the latter two. These are not the only examples of the formal use of the concept of destination, but they suffice for my purposes to understand the general understanding and application of the term in the civil law.

There is little doctrinal analysis beyond these codal articles. Destination is rarely, if ever, defined, and it seems to be assumed that it is simply a concept understood by all. Judges and scholars have therefore been left with a great deal of discretion as to its application, leading, at first blush, to what appear to be subjective understandings of the concept. That its content may be determined by agreement—in a condominium declaration, or a servitude created by a single owner of two immoveables—enforces this sense of subjectivity.

It is my first contention that while destination is never clearly defined or understood, it is applied *as if* it were well understood. As such, it remains a concept that is equally intriguing and nebulous in that there appears to be much common ground in its application (judging by the lack of a hue and cry against prominent judicial interpretations), while at the same time appearing in its formal instantiations to be subjective.

This apparent common ground regarding the practical use of destination leads to my second contention: destination is far less subjective than it first appears, and in some profound manner is implicitly understood in more objective terms. So in focusing on the subjective or idiosyncratic ap-

plications of the concept of destination, one finds that, while apparently subjective in each case, the use of the concept of destination actually yields a less-than-subjective picture of the role of destination, and perhaps even a relatively *objective* picture of the contents of the concept for certain resources. This underlying objectivity means that the destination of the resource is both settled and somehow well-understood.

Moreover, some idea of objective destination does a great deal of work implicitly in solving disputes. That is, judges implicitly use the idea of destination to make their decisions, even when it is not one of the formal areas "governed" by the idea of destination, and often without even knowing that they are turning to it. The same is true for doctrinal writers. The idea of destination is implicitly used to inform discussions and judicial decisions concerning immoveables by nature, real servitudes, neighbourliness, rules concerning disbursements made on the immoveables of others, and the content of physical ownership.

In the civil law of Quebec, we see this inchoate, implicit view of destination quite clearly. Manifested in the way objects of property are classified, valued, and weighed, the well-understood—if unarticulated—meanings of the concept of destination determine what label is attached to an object (with numerous important legal ramifications flowing from that labeling). The ubiquity and functionality of destination means that it creeps into judicial decisions, doctrinal writings, and even, to a certain extent, codal provisions (although under different and seemingly unrelated rubrics). Disguised in concepts like "utility," "necessity," "benefit to an immovable," "completion of the immovable," "systemic integrity," or "amenity," and in adjectives such as "useful," "necessary," and "reasonable use," destination weaves its way through a variety of civil law doctrines and rules applying to objects of property and with great impact on legal outcomes. All of these labels are attached with little discussion, and seem to emanate from what appear to be widely shared or tacitly understood viewpoints. If true, then the underlying notion of destination present in all of these labels does a great deal of covert work by telling us what "touches and concerns" land and what does not.

An appeal to the idea of destination is often used to help dictate how resources should be used, or to determine the scope of limitations of certain uses of specific tangible resources, even when it is not necessarily formally associated with different property concepts. That is, destination seems to implicitly inform discussions of immobilization by nature, servitude, neighbourliness, disbursements, and the physical parameters of ownership. Here, destination is objective, not in the sense that it has one meaning; but rather, it is *relatively* objective in that informally understood meanings are similar across a large number of actors or even a whole society.

This, then, is what one might call the paradox of destination: where formally used it is poorly understood and its content tends to be subjective; where informally used its substance is much more objective, and possibly much better understood, though it is understood only inchoately and certainly never articulated as the reason or notion animating the decision.

With respect to immobilization, it appears that we have some notion of what constitutes a "building." Regarding the real servitude, we know that certain types of uses of land (e.g., a right to pass over) are essential to or even constitute the very utility of the resource. Regarding neighbourliness provisions, we understand that (clean) water has a number of important uses that ought to be protected and shared among landowners. Regarding disbursements, the considerations are similar to those seen in the case of immobilization: some notion of what is objectively necessary will be reimbursed.

What is striking in all of these cases, and in stark distinction to the formal use of destination in the CCQ, is the objective nature of the discourse that determines, classifies, defines, or limits the uses of certain resources. There is definitely less and perhaps even little room for a proprietor to determine the use of resources on their own, or for parties to establish some convention between them. What is equally clear is that these implicit standards are widely shared and understood; lawyers, judges, and scholars need not define the standards in most cases in order to make legal sense of the distinctions based on them. It is really only in the hard cases—situations where some substantive view of destination is perhaps not shared or the case itself is on the borderline of an otherwise clear distinction—that we are forced to look behind the rules. The restraint of trade clause as real servitude is one such case.

Where do these strong, shared opinions on the proper destination of objects of property come from? There are a number of obvious candidates. There may be a natural set of rules governing (or a naturalism present in) certain resources. These may be in some way self-evident in the way that human beings relate to resources, or developed over centuries of human societal evolution. Arable land is meant to be planted, water needs to be drunk, land needs to be accessible, and, all things being equal, a structurally well-maintained house is better than an amenity such as a swimming pool. In all of these cases, one might argue for natural destinations to certain objects, or for some relation between the use of objects (often grounded in naturalism, no doubt) and lived human experience. Indeed, the historical relation of human beings to resources is the most profound source of our notions of destination.

Thus, the idea that purports to explain why a real servitude does not include a restraint of trade clause is customary in origin, more complex,

and ultimately more fruitful as an explanation. That is, it is more useful to argue that real servitudes have typically meant a certain set of rights since Roman times, and thus this category of rights has a sort of experiential momentum. Such customary relations can change over time (the speed of the changes depending on the resource in question); they have not yet reached restraint of trade clauses not tied to any particular physical attributes of the land.

Changes in destination may also occur more formally. Zoning regulations, for instance, furnish more concrete examples of destination based on formal grounds. In each case, some direct social consensus on how resources could be used (or some notion of allowed resource use based on human agreement) produces a strong consensus which might be reflected in formal zoning rules that are a result of the democratic process. In either of these two instances—custom or human agreement—one might argue that there is some sort of tacit or explicit social contract governing the use of certain resources.

Thus we might, with temerity, define destination as follows: the specific end understood to be embedded in a specific resource in a specific context. Context includes a variety of factors identified above.

If this is right, then there is a larger role for destination that we are only beginning to comprehend. The content of destination (*i.e.,* the content of specific rights, powers, and responsibilities flowing from specific resources) will in my view be determined by some shared and deeply-held view of how resources ought to be used. In other words, in any given society it will be accepted and understood that certain objects of property can only be used in a particular manner; the bundle of rights that is private property will vary with respect to certain resources. That is to say that we cannot understand property relations without understanding the nature of the resource in question, and without accepting that certain resources will carry with them specific obligations, or require or prohibit specific uses. This will be equally true for both tangible and intangible resources, though the sources through which destination might be determined will differ. With this understanding paradoxes disappear, and we understand that a right of way is different from a restraint of trade clause.