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## THE EVOLUTION OF THE FIDEICOMISO (TRUST) CONCEPT UNDER MEXICAN LAW

RODOLFO BATIZA

Maitland, in his Third Lecture, stated that to an Englishman the trust seems to be one of the essentials of civilization. However, Maitland was surprised to find that foreign legal systems succeeded in existing without it. Take, for example, the Civil Code of Germany; where is the trust, Maitland would ask. It is just not there. This, in the eyes of an Englishman, represents an enormous gap which, to a foreigner, is not even noticeable. This is to be explained, Maitland suggests, by the fact that the trust does not fit into other legal systems.<sup>1</sup>

This situation has changed considerably since the time Maitland referred to it, almost half a century ago. The problem of the adaptation of the trust into the civil law, i.e., those legal systems which trace their origins back to the Roman law, has, nevertheless, given rise to two antagonistic positions. Over a quarter of a century has elapsed since Esquivel Obregón asserted that Mexico neither had, nor could have for a long time, anything that would resemble the trust; and this because no legislative enactment could create from one day to another the set of conditions, individual or social, which had made the trust possible and highly beneficial in the English speaking countries.<sup>2</sup> The Panamanian writer Alfaro, on the contrary, contends that although the adaptation of the principles of the English trust to the civil law has always seemed to some people to be something impracticable, or at least, surrounded by insurmountable difficulties, there is no reason to believe one thing or the other for such adaptation has proved to be simpler than might seem possible.<sup>3</sup>

It is to be noted that Alfaro limits the problem to the *legal* adaptation of the trust whereas Esquivel Obregón considered individual and social factors to be of greater importance. Irrespective of whether or not a "correct" legal adaptation of the trust was made, or the extent to which individual and social conditions warranted such adaptation, the trust began moving into the civil law system<sup>4</sup> shortly after the First World War.

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1. MAITLAND: EQUITY, A COURSE OF LECTURES, p. 23 (1949).

2. Toribio Esquivel Obregón: "Carácter de lo que la Ley Bancaria llama Fideicomiso." Vol. 1, REVISTA GENERAL DE DERECHO Y JURISPRUDENCIA, México 1930.

3. RICARDO J. ALFAROS "Adaptación del trust del derecho anglosajón al derecho civil." ACADEMIA INTERAMERICANA DE DERECHO COMPARADO E INTERNACIONAL, VOL. 1. CURSOS MONOGRAFICOS. Havana, 1948. Professor F. F. Stone has stated: "The assimilation of the alien concept has been attended by less difficulty than many had feared, and much itself as to the nature of the adopted institution." "Trusts in Louisiana." INT'L & COMP. L. Q. July, 1952.

4. Japan, in 1922, and Liechtenstein, in 1926, enacted laws on the subject.

The trust found fertile ground in Latin America. Beginning with Columbia in 1923, the civilian version of the trust, under the various names of *fideicomiso*, *comisiones* or *operaciones de confianza* (trust-commissions or operations, and *mandato* (agency) has been introduced in the legal systems of the following countries: Panama (January, 1925),<sup>5</sup> Chile (September, 1925),<sup>6</sup> Mexico (June, 1926),<sup>7</sup> Bolivia (July, 1928, but in abeyance until 1955),<sup>8</sup> Peru (May, 1931),<sup>9</sup> Costa Rica (November, 1936),<sup>10</sup> Venezuela (January, 1940),<sup>11</sup> Nicaragua (October, 1940),<sup>12</sup> Guatemala (December, 1946),<sup>13</sup> Ecuador (August, 1948),<sup>14</sup> and Honduras (February, 1950).<sup>15</sup>

The discussion herein will be limited to the legal adaptation of the trust in Mexico, the various applications of the institution in banking practice having been discussed in a previous article.<sup>16</sup>

The term *fideicomiso* made its initial appearance in its new<sup>17</sup> meaning as equivalent to the trust in the General Law of Credit Institutions and

5. Law No. 9 of January 6, 1925, as amended by Law No. 17 of February 20, 1941 (*fideicomiso*).

6. Decree-Law No. 559 of September 26, 1925, as amended by Law No. 4827 of February 11, 1930 (*comisiones de confianza*).

7. General Law of Credit Institutions and Banking Establishments of December 24, —Law of Trust Banks of June 30, 1926, General Law of Credit Institutions and Banking Establishments of August 31, 1926, General Law of Credit Institutions of June 28, 1932. These statutes were successively superseded. The laws presently in force are: General Law of Instruments and Transactions of Credit of August 26, 1932, as amended by a Decree published in the *Diario Oficial* of August 31, 1933, and by Decree of April 11, 1945; General Law of Credit Institutions and Auxiliary Organizations of May 3, 1941, as amended by Decrees of February 11, 1946, August 21, 1942 and December 29, 1956 (D.O. of December 31) (*fideicomiso*).

8. General Law of Banks No. 608 of July 11, 1928, as amended by Supreme Decree of August 20, 1928, Law of January 26, 1929, Regulatory Decree of October 24, 1929, Supreme Decree of June 30, 1942, Law of December 9, 1941, Law of July 18, 1944. Decree-Law of July 19, 1944, Supreme Decree No. 255 of January 30, 1945, and Decree of May 10, 1955 (*fideicomiso*).

9. Law of Banks, being Decree-Law No. 7159 of May 23, 1931, as amended by Laws No. 7484 of February 11, 1932, No. 8050 of March 23, 1935, No. 8778 of October 27, 1938, No. 8973 of September 28, 1939 and by Supreme Decrees of November 15, 1940, and December 31, 1941 (these last two having been enacted by virtue of Law No. 9187 of October 7, 1940) (*comisiones de confianza*).

10. General Law of Banks No. 15 of November 5, 1936, as amended by Laws, No. 38 of April 4, 1939, No. 24 of May 30, 1941 and No. 13 of October 2, 1943 (*comisiones de confianza*).

11. Law of Banks of January 24, 1940, as amended by Law of July 22, 1941, and Law of August 25, 1943. These laws have been superseded by Law of *Fideicomisos* of July 23, 1956 (*fideicomiso*). See comment in 5 AM. J. COMP. L.628 (1956).

12. General Law of Banking Institutions of October 26, 1940, as amended by Law No. 158 of August 4, 1941 (*comisiones de confianza* or *fideicomiso*).

13. Law of Banks No. 315 of December 5, 1946 (*operaciones de confianza*).

14. Codification of the General Law of Banks of March 17, 1948 (*mandato*).

15. Law for Banking Establishments, being Decree No. 63 of February 10, 1950 (no specific designation).

16. See the writer's article: "*Realidades del Fideicomiso en México*." Vol. III, No. 4. REVISTA BANCARIA. México. July-August. 1955.

17. The old and traditional meaning of the term *fideicomiso*, going back to the Roman law, referred to dispositions *mortis causa*, including in this last term both testamentary (*stricto sensu*) and non-testamentary dispositions, whereby the deceased transferred his estate or part thereof to his heir with instructions to transfer it to another person.

Banking Establishments of December 24, 1924. The so-called "trust banks" (*bancos de fideicomiso*) were among the various banking institutions regulated by this law which, however, lacked a concept of *fideicomiso*. The regulation of trust banks was dealt with by a subsequent special law, the Trust Banks Law of June 30, 1926.

Article 6 of the Trust Banks Law defined *fideicomiso* in the following terms: "*Fideicomiso*, properly called, is an irrevocable agency by virtue of which specific property is delivered to the Bank in its capacity as 'fiduciary' (*fiduciario*) in order that it may dispose thereof or of the income of the same according to the will of the person who delivers the property, called the 'settlor' (*fideicomitente*) for the benefit of a third party called the 'beneficiary' (*fideicomisario* or *beneficiario*)."

The Trust Banks Law was in force for only about four months. It was superseded by the General Law of Credit Institutions and Banking Establishments of August 31, 1926, which consolidated the text of the former, retaining unchanged the foregoing definition of *fideicomiso*.

The influence of the Alfaro Draft on *Fideicomiso* of 1920 upon the aforementioned definition is evident.<sup>18</sup> A closer examination, however, reveals that the definition departed from its model in two important points: first, it suppressed the element consisting of the transfer of ownership from the settlor to the fiduciary, substituting therefore a mere "delivery"; and second, it restricted the capacity to act as a fiduciary in favor of banks alone.

The General Law of Credit Institutions and Banking Establishments of 1926 was in turn superseded by the General Law of Credit Institutions of June 29, 1932. The Explanation of Purposes of the latter contained the following statements: "The Law of 1926 introduced in Mexico, breaking with tradition, the juridical institution of *fideicomiso* . . . Unfortunately, however, the Law of 1926 failed to determine the substantive nature of the institution and left, consequently, great vagueness in the concepts relating thereto. In order that the institution may live and prosper in our environment a clear definition is required of its contents and of its effects, this definition coming under the General Law of Instruments and Transactions of Credit, and an adequate regulation is also required of the institutions acting as fiduciaries. The *fideicomiso* will be conceived as an estate (*patrimonio*) destined to a purpose the achievement of which is entrusted to the activity of a fiduciary, thus defining clearly the nature and effects of this institution which the law now in force obscurely conceives as an irrevocable agency."

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18. Article 1 of said Draft reads as follows: "The *fideicomiso* is an irrevocable agency by virtue of which specific property is transferred to a person called trustee (*fiduciario*) to deal therewith in accordance with the instructions of the person who transfers it, called settlor (*fideicomitente*), for the benefit of a third party called beneficiary (*fideicomisaria*)."

The present General Law of Instruments and Transactions of Credit, of August 26, 1932, while changing somewhat the wording of the explanation of purposes of the prior law, but not altering its basic idea, provided in article 346: "By virtue of the *fideicomiso* the settlor destines certain property to a specific lawful purpose, entrusting the achievement of this purpose to a fiduciary institution."

The influence of the interpretation given by the French writer Lepaulle on the juridical nature of the trust is apparent both in the Explanation of Purposes and in Article 346, except as regards the restriction in favor of banks to act as fiduciaries, which has been a feature of Mexican law since the year 1924.<sup>19</sup>

The legal concept of the Mexican trust, both in the laws of 1926 and in the law presently in force, is technically defective. It lacks the essential element of the transfer of ownership of subject matter of the *fideicomiso* to the fiduciary. In the case of the laws of 1926 it is clear that the Panamanian model was deliberately not followed; in the case of the law now in force the unwillingness to recognize that the fiduciary acquires title is demonstrated by the rejection of Lepaulle's opinion as to the elements of trust.<sup>20</sup>

The position taken by the Mexican legislation on this point is obviously mistaken. The draftsmen were acquainted with the mechanism of the Panamanian *fideicomiso* which was designed after the English trust. Alfaro described this mechanism in the following words: "The commission entrusted to the fiduciary produces another effect without which it could not be discharged: that of transferring to the fiduciary the property subject matter of the *fideicomiso* . . . . It is, therefore, of the essence of the *fideicomiso* and indispensable to its purposes that the settlor relinquish own-

19. "The trust is a destination (*afectación*) of property guaranteed by the intervention of a person who is under the duty to do everything reasonably necessary to fulfill said destination, and who has title to all the rights which are useful to perform said duty." Pierre Lepaulle. "La Naturaleza del Trust." Vol. III, REVISTA GENERAL DE DERECHO V. JURISPRUDENCIA. México, 1932, translated from the French by Pablo Macedo.

20. Said author, in effect, stated: "A proprietor, the settlor, transfers, either wholly or in part, specific property to a third party called trustee." *Op. cit.* He also added, however: "The thing placed in trust may be in the estate of no one." *Op. cit.* It is interesting to note that the Mexican law embodied an idea which characterizes Lepaulle's later development in his legal thinking. In his *Traité, infra*, he holds: "These rights (those belonging to the settlor) are no longer in the estate of anyone. In effect, they must not remain in the settlor's estate; if they do it would be a mere agency coupled with a bailment. They must not be in the trustee's estate, otherwise, there would be a donation of a conditional gift or a contract for the benefit of a third party, but there would not be a trust. In effect, in a trust the property is never in the trustee's estate, it does not go to his heirs, and does not constitute a pledge for his creditors. Lastly, the res is not in the beneficiary's estate (otherwise the so-called trustee would be an agent, a testamentary executor, a guardian, a subagent, etc. . . . but not a trustee). Each *cestui* has in his estate only the beneficiary interest." *TRAITE THEORIQUE ET PRACTIQUE DES TRUSTS EN DROIT INTERNE, EN DROIT FISCAL ET EN DROIT INTERNATIONAL*, p. 26, Paris 1932.

ership of the property to which the *fideicomiso* refers, and that he transfer the same to the person in whom he deposits his confidence."<sup>21</sup>

There is no doubt that a legal institution patterned along the lines of the later concept propounded by Lepaulle cannot possibly work in practice without recognizing that the fiduciary has some powers to dispose of the property, if only for the purpose of enabling him to perform his duties.

The amputation suffered by the trust, as conceived in the Mexican legislation, has given rise to much misunderstanding in the courts and in legal literature. Fortunately the Supreme Court, overruling its former position,<sup>22</sup> has maintained in five decisions<sup>23</sup> over the last eight years a viewpoint which supplements and corrects the vagueness and lack of precision of the legislative concept of the *fideicomiso*.

In the *amparo Mexicana de Fideicomisos*,<sup>24</sup> the Third Chamber of the Supreme Court stated: "Consequently, the complainant having acquired the right to be the fiduciary owner of the property, and having possession thereof before the date on which the foreclosure proceedings were commenced, summons had to be served on it notwithstanding the circumstance invoked by the District Judge consisting in that the mortgage was constituted before the *fideicomiso*. This only means that the mortgage has preference as to payment, but it has nothing to do with the procedural right to have a prior hearing and to be served with summons in the suit. This is the right which the complainant basically claims so that it may not be deprived of its vested rights in the property without first having its day in court . . . . In the case at bar, since the change with respect to ownership and possession occurred before suit was commenced it must be said with even greater reason that, in order not to impair the right provided for in Article 14 of the Constitution,<sup>25</sup> it was necessary that the complain-

21. "El Fideicomiso. Estudio sobre la necesidad y conveniencia de introducir en la legislación de los pueblos latinos una institución nueva, semejante al *trust* del derecho inglés." IMPRENTA NACIONAL, pp. 48, 49, Panama, 1920.

22. Where the Court stated that the property the subject matter of the *fideicomiso* is not transferred from the settlor to the fiduciary, and that the fiduciary has only the functions of a mere manager. *Amparo* No. 210/1937, *Cía. Limitada del Ferrocarril Mexicano*, LII *Semanario Judicial de la Federación* (hereinafter S.J.F.) 2317, 2325. (June 23, 1937).

23. In *amparo* jurisdiction, see *infra* note 24, five decisions make *jurisprudencia*, binding law like a case under *stare decisis*. See also *infra* note 31.

24. The "*amparo*" is an institution peculiar to Mexican law dating back a century. The *amparo* may be filed either as a suit starting with a complaint, or as an appeal. It is used both as a defense against arbitrary actions or decisions of government officials or agencies or against laws. The Federal Supreme Court is divided into four separate Chambers following the main branches of the law: criminal, administrative, civil, and labor. The Supreme Court may take cognizance of *amparos* either by original or appellate jurisdiction. The decisions handed down in *amparo* proceedings protect the individual against the violation of constitutional rights in the specific situation complained against, without making a general declaration concerning unconstitutional acts, especially in the case of unconstitutional laws. The legal bases of the *amparo* are found in Articles 103 and 107 of the Federal Constitution, and the regulations thereof are contained in the Organic Law, as amended, of December 30, 1935.

25. No. 4298/1949, S.J.F., Vol. CIII, 1768, 1773, (1950).

ant should have been summoned in the suit, inasmuch as to its status as fiduciary owner of the realty, it also acquired possession thereof."

In *Financiera de Construcciones, S. A.*<sup>26</sup> the Court said: "The District Judge failed to examine the fundamental question at issue and consequently failed to decide with respect to the juridical nature of the contract of *fideicomiso*. The complainant maintains that the contract transfers ownership and bars further encumbrances. Since the other rights invoked in the *amparo* petition are dependent upon the result of this study, such question is herein examined . . . and from the text of the aforementioned provisions (Articles 346, 349, 351, 352, 353, 356, and 358, General Law of Instruments and Transactions of Credit) it is clear, and such is the doctrine<sup>27</sup> on the point, that the *fideicomiso* transfers ownership since by virtue of the contract the settlor is deprived of all actions or rights of disposition with respect to the property which is its subject matter. Actions and rights are transferred to the fiduciary institution for the strict and faithful accomplishment of the lawful purpose entrusted to it; that is, the fiduciary is subrogated to exercise the full power of management and disposition which, before the contract, belonged to the owner of the property now under fiducia. These powers are limited only by rights acquired before the creation of the *fideicomiso*. In these circumstances, once the *fideicomiso* was created without any reservation and recorded in the Registry of Property, the contract produced its effects. Consequently the settlor, unless the essence of the *fideicomiso* is destroyed and the covenant breached, is no longer able to exercise powers of management or rights of free disposition over the property segregated, nor consequently, to create new encumbrances in favor of third parties. The disregard of the rights acquired by the fiduciary institution and of those which correspond to it through the recording in the Registry of Property constitutes an infringement of constitutional rights."

The Fourth Chamber of the Supreme Court, in the *amparo Sosa Garcia Efrain*,<sup>28</sup> held that: ". . . from the moment in which this [the *fideicomiso*] is created, an autonomous and *sui generis* estate is formed, designed for specific purposes and the restricted ownership thereof is acquired by the fiduciary. The property goes out of the settlor's estate to form this *sui generis* estate. The property may or may not revert to the former owner, as provided in articles 357 and 358 of the General Law of Instruments and Transactions of Credit; this only implies the reacquisition of the proprietary rights relinquished by the settlor upon the creation of the *fideicomiso*

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26. No. 4572/1948, S.J.F., Vol. CV, 2047, 2057, (1950).

27. The term *doctrine* means the systematic treatment of legal subjects developed by scholars. The importance of doctrine in the *civil law* countries is demonstrated by the fact that it is considered to be a secondary source of the law. Courts often resort to doctrine when codes or statutes are silent or unclear on a given point.

28. No. 3308/1950, S.J.F., Vol. CVIII, 1328, 1339, (1951).

... When the attachment was levied by the Conciliation and Arbitration Board, the *fideicomiso* already existed and had been recorded in the respective public registry, then there is no doubt that property not belonging to the defendant was attached, but property constituting the *sui generis* estate mentioned above, the agent for the administration [the purposes of the *fideicomiso*] of such property being the Banco Mexicano Espanol. This institution was the only one entitled to exercise the pertinent rights for the defense and care of the estate under its responsibility."

Several years later, in another opinion<sup>29</sup> the Supreme Court, speaking again of the *fideicomiso* stated: "... as in the case of the agent who acts in the interest and for the account of his principal, the fiduciary acts in the interest of the beneficiary and for the account of the settlor. The fiduciary also acts in the exercise of the powers which have been granted to it, almost always in accordance with articles 352, 355, and 356 of the General Law of Instruments and Transactions of Credit. It is because of that transfer of specific rights in the property given in *fideicomiso* that the settlor cannot modify or disregard what has been done by the fiduciary within the scope of the powers transferred for the accomplishment of the purpose sought. The adoption of the complainant's reasoning would lead to the perversion of the very essence of the *fideicomiso* as it is established in the law and set up in the *fideicomiso* deed because it would affect the fiduciary's freedom of action and hinder or prevent the accomplishment of the essential purpose of the *fideicomiso*. This purpose consisted in the sale of lots [of land] in order to pay the loan by the beneficiary and also subordinating that freedom, not to the general instructions set forth in the *fideicomiso* but to those instructions that [the fiduciary] should request from the settlor in each specific transaction. [The settlor] might give or refuse to give the instruction, thus impeding the fiduciary institution in the performance of the obligations assumed by it and the accomplishment of what is deemed indispensable in order to insure the amortization of the loan by the beneficiary in whose benefit and guarantee the *fideicomiso* was created. As between the settlor and the fiduciary there is a relationship such as that which exists between a person who conveys title to property and the person acquiring it, inasmuch as the former transmits to the latter the title to the property given in *fideicomiso*. Once the *fideicomiso* is terminated the title to the same property is returned from the fiduciary to the settlor. This is the reason why the institution of agency is not sufficient to explain the fiduciary's legal capacity in the performance of the legal acts which have been entrusted by the *fideicomiso*. In the discharge of the *fideicomiso* the fiduciary does not act in the name of another, but exercises a right of its own, inasmuch as the fiduciary has title to the property subject to the

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29. Amparo "Acosta Sierra Francisco," No. 2064/1952, S.J.F., Vol. CXVIII, 1802, 1101, (1953).

*fideicomiso*, without prejudice to its duty to account to the settlor and to return the property which may remain upon termination of the *fideicomiso* . . . . Inasmuch as the *fideicomiso* transfers title, the fiduciary's power of disposition over the property given in *fideicomiso* may be limited only by the respective instructions which may appear in the Public Registry of Property."

In a case<sup>30</sup> involving a yarn mill where the property included machinery, tools and a lease of the premises, the same Court said: "For the purposes of the *fideicomiso*, title to the aforementioned property was transferred to the fiduciary. The fiduciary institution could take possession of the factory as soon as it deemed convenient . . . . According to the first and second clauses of the instrument setting up [the *fideicomiso*], the fiduciary bank acquired title to the factory, with everything pertaining thereto considered as an industrial unit. As regards third parties the bank must be considered as the sole owner, although in its relations with the settlor the bank is bound by the purposes for which the *fideicomiso* was created. It is difficult to understand, otherwise, how [the fiduciary] could accomplish said purposes when the beneficiary should make a demand upon it; that is, only in its capacity as owner could it sell the property involved and make payment to the creditor without having to bring an action in order to enforce the guarantee."

These opinions of the Supreme Court, although open to some objection in matters of detail, represent a sound effort toward creating better understanding of the juridical nature of the *fideicomiso* and of the effects it produces. Moreover, the Mexican variety of the *stare decisis* doctrine<sup>31</sup> gives a significant weight to the position taken by the Supreme Court. In view of the foregoing opinions it is no longer possible to confuse *fideicomiso* and agency.

For a number of years the need for a new legal regulation of the *fideicomiso* has been felt in Mexico. The statute now in force might have been satisfactory on a provisional basis twenty-five years ago when enacted. It no longer responds to the needs created by the substantial development of the *fideicomiso*.<sup>32</sup> In response to this felt need the Bankers Association of Mexico prepared a draft of amendments to Chapter V, Title II, of the Gen-

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30. Amparo "Fabrica de la Constancia" No. 6160/1954 (not yet published in the S.J.F.).

31. According to Art. 193 of the Organic Law of Articles 103 and 107 of the Federal Constitution, known as the Law of *Amparo*, five consecutive decisions handed down by any Chamber of the Supreme Court constitute "jurisprudence." Jurisprudence interpreting the Constitution, federal laws, or international treaties, is law for the Chambers themselves, for the circuit courts, district courts, courts of the different states, and the labor boards.

32. In the year 1939 *fideicomisos* in Mexico represented \$25,943,000 (Mex. Cy.); in the year 1944, the amount was \$109,295,000; in the year 1949, it increased to \$368,744,000; in the year 1954, the sum of \$658,485,000. See the writer's article mentioned in note 15, *supra*.

eral Law of Instruments and Transactions of Credit which establishes the *fideicomiso*.<sup>33</sup> Article 346, as proposed to be amended in this draft, contains a new definition which reads as follows: "In the *fideicomiso* the fiduciary institution acquires title to a right transferred by the settlor, and it is under the duty to exercise this right for the carrying out of a purpose or in the interest of the beneficiary." With only slight modification of language article 808 of the draft of a new Code of Commerce, being prepared by a governmental commission, has accepted the foregoing definition.

This new definition of *fideicomiso* is a substantial improvement on the legal concept of the institution as presently in force. It is not, however, completely free from criticism.<sup>34</sup> This is not the occasion to attempt such criticism, since the present article is limited to the discussion of Mexican law, past and present.

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33. It must be borne in mind that fiduciary operations are regulated also in the General Law of Credit Institutions and Auxiliary Organizations.

34. Briefly, the definition uses the term *titularidad* which in the opinion of some writers means "ownership" whereas in the opinion of others it has a broader meaning so as to include rights other than proprietary rights.