THE MEANING OF THE TERM "LAW" UNDER THE LEGAL SYSTEM OF CALIFORNIA

J.J. SANTA PINTER*

Summary:

---

1. *Definition*

Section 22 of the Civil Code of California (CC) provides as follows "Law is a solemn expression of the will of the supreme power of the State".

To evaluate this provision we must keep in mind the significance of "will", "supreme power" and "state". "Supreme power" (sovereignty) and "state" offer no *conceptual* problems.[1] "Will" can be more complex since CC, Sec. 22.1 only provides how this will is expressed, that is (a) by the Constitution and (b) by statutes, leaving open the fundamental question of what this will *is*. In other words: sec. 22.1 does help us *formally* concerning origin but it does not help *materially*, i.e., referring to the meaning of the concept.

The fact that the will of the supreme power of the State expressed by the Constitution and by statutes is *law* in California does not mean — because it cannot mean — that it is all "the" law in California for the simple reason that there are manifestations other than made by the Constitution and by statutes which also are *law* in the state, such as, for instance, municipal ordinances or judicial

* LL.D., Dipl. C.L., LL.B., Professor of Law, University of San Diego.

[1] *Stricto sensu* speaking, this statement has a relative value only since the member-states of the United States of America lack juridical personality from the *international* law's point of view.

decisions. The argument for this statement consists simply of invoking judicial decisions stating that ordinances are also law in California[2] or stating that unwritten *law* includes judicial constructions of the common law.[3]

2. *What Kind of Law?*

Law[4] is both common law and statutory law. It is in both popular and common acceptance that it includes "the full body or system of rules of conduct including the decisions of courts as well as legislative acts",[5] however, it is a general rule of statutory construction that where an act of the legislature refers to "laws", the expression will be held to refer to statute law, rather than to common law, unless the context requires a different construction.[6]

It must be emphazised that it is not every act, legislative in form, that is "law", since law is something more than the mere will exerted as an act of power. It must not be a special rule for a particular case, but the general law.[7] Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law[8] in the same sense, a resolution by the assembly of California, even if concurred in by the Senate, passed to answer a request or recommendation of the governor, is not a "law", since sec. 15 of Art. IV of the Constitution provides that no "law" shall be passed except *by bill.*[9]

This idea — important enough from the point of view of constitutional or administrative law — receives a basic jurisprudential reaffirmation in *Plum v. State Board of Control,* 51 C.A. 2d 382,

---

[2] An ordinance is deemed to be a "law" in California (*In re Johnson,* 1920, 47 C.A. 465, 190 P. 852) since the words "law" and "ordinance" are synonymous when applied to the acts of municipal corporations (*Zottman v. San Francisco,* 1862, 20 C. 96; *Pimentel v. San Francisco,* 1863, 21 C. 351; also *Weisman v. Building & Safety Comrs.,* 1927, 85 C.A. 493, 259 P. 768 with reference to Code of Civil Procedure, sec. 1085).

[3] *Victory Oil Co. v. Hancock Oil Co.,* 125 C.A. 2d 222, 270 P. 2d 604 (1954).

[4] As used in the Uniform Reciprocal Enforcement of Support Law, CCP, sec. 1653 (5).

[5] The term has been employed in the Constitution, in a majority of instances, in the sense of a statute, bill or legislative enactment, regardless of the constitutionality or validity of the act (*Miller v. Dunn,* 1887, 72 C. 462, 14 P. 27).

[6] *Gilliam v. California Emp. Stab. Com.,* 130 C.A. 2d 102, 278 P. 2d 528 (1955). So also *Hinds v. Marmolejo,* 60 C. 229 (1882) stating that the expression "laws of the state" as used in the national banking act (12 U.S.C., sec. 85) means statute laws.

[7] It seems to me that the wording could be more correct, since a special law, enacted by the legislature in due form and signed by the governor, can be for a "particular case" without being a "general law". So provides also CCP, sec. 1898; "Statutes are public or private. A private statute is one which concerns only certain designated individuals, and effects only their private rights", etc.

[8] This is a very important subject matter of discussion among philosophers of law and legal politicians (the unjust law), however its discussion is beyond the writer's intention *hic et nunc.*

[9] *Mullan v. State,* 114 C. 578, 46 670 (1896).

124 P. 2d 891 (1942) insofar as it states that when a bill has been passed by the legislature, and signed by the governor, it becomes "law", and no evidence, nor the judgment of any court can be allowed to modify or change its terms or effect, or prevent or impair its complete operating force.[10]

Concerning the Constitution-statute-relationship, the Supreme Court of California held in *Pasadena v. Superior Court,* 157 C. 781, 109 P. 620 (1910) that while the codes declare the law of the states, they do not declare all of it. The constitutional provisions also constitute the law of the state.

Now, it seems to me that the wording of this sentence is not exactly correct from the axiological point of view, since it is hurting the hierarchical order established — logically — in CC, sec. 22.1, i.e., the Constitution is located — naturally — in the first place and only in second place the statute. This is true also in light of *Los Angeles Gas Elect. Co. v. Los Angeles County,* 21 C.A. 517, 132 P. 282 (1913) since it states correctly that provisions of a state Constitution in the nature of direct legislation may be included within and form a part of the "law" of the state as distinguished from the other provisions of the Constitution dealing with the frame of and declaring the general principles of the republican form of government. This is so because hierarchically it occupies a place of privilege within the whole legal system of the state.

Law, which in its broad sense includes also equity,[11] in a legal sense is synonymous with "rule"[12] and as such a "rule of conduct" is enacted by the state, for the conduct and control of its people[13] to the extent that this rule "of civil conduct" results in the fact that "in every activity of life we are constantly coming into the shadow of some law that limits the freedom of our movements".[14]

Laws, which can be either organic or ordinary,[15] are either written or unwritten [Code of Civil Procedure (CCP), sec. 1895], a written law being that which is promulgated in writing, and of which a record is in existence (CCP, sec. 1896). On the other hand, unwritten law is the law not promulgated and recorded, but which is, nevertheless, observed and administered in the courts. It has no

---

[10] See rules of construction *infra.*

[11] *Coleman v. Los Angeles County,* 180 C. 714, 182 P. 440 (1919).

[12] *Los Angeles v. Gager,* 10 C.A. 378, 102 P. 17 (1909).

[13] *Berton v. All Persons,* 176 C. 610, 170 P. 151 (1917).

[14] *Leymel v. Johnson,* 105 C.A. 694, 288 P. 858 (1930). Cf. William Blackstone's concept (Commentaries on the Laws of England, I, 44-46, 1758) or John Austin's "every law or rule is a command" position (Jurisprudence, 3d. ed., 1869, I. 90).

[15] "The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefor contained in its constitution and statutes, and in the constitution and statutes of the United States" (CCP, sec. 1897).

certain repository, but is collected from the reports of the decisions of the courts, and the treatises of learned men (CCP, sec. 1899).[16] In other words, unwritten law includes judicial interpretations.[17]

3. *The Common Law of England*

CC, sec. 22.2 provides as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or Laws of this State, is the rule of decision in all the courts of this State".

The expression "common law of England" designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law.[18] On the other hand, it is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by parliament.[19] However, as it is indicated, English decisions are not conclusive as to the common law, since judicial decisions do not themselves constitute the common law, but are merely evidence of the common law; and in determining what the common law is, the Supreme Court of California stated in *Callet v. Alioto*, 210 C. 65, 290 P. 438 (1930) that it is not limited to a consideration of the English decisions, but can and should consider and weigh the reasoning of the courts of sister states, and the decisions of sister state constitute evidence of what common law is, even if contra to the English decisions.

Finally, common law is presumed to be in force in other states, unless the contrary be shown,[20] however, it is presumed, in absence of proof to the contrary, to exist only in those states of the Union which wer originally colonies of England, or were curved out of such colonies.[21]

(a) When It Governs?

The main principle is that it is only the rule of decision where there is no positive law controling, when the code or other statutes

---

[16] *White v. Merril*, 1889, 82 C. 14, 22 P. 1129 (concurring opinion). It should be mentioned *passim* that CCP, sec. 1888 defines public writings, whilst CCP, sec. 1894 establishes four classes for these public writings: laws, judicial records, other official documents and public records kept in this state, of private writing, a public record being one made by public officer in pursuance of duty (*People v. Olson*, 1965, 232 C.A. 2d 480, 42 Cal. Rptr. 760).

[17] *Victory Oil Co. v. Hancock Oil Co.*, 125 C.A. 2d 222, 270 P. 2d 604 (1954).

[18] *Lux v. Haggin*, 69 C. 255, 4 P. 919 (1886). This case also states that the Roman "law of nature" as discussed by certain civil-law commentators, must be distinguished from the "common law" of England, and only the latter was adopted as the rule of decision in all of the courts of this state by statute of April 13, 1850 (now CC, sec. 2.2).

[19] *Moore v. Purse Seine Net*, 18 C. 2d 835, 118 P. 2d 1 (1941).

[20] *Thompson v. Monrov*, 2 C. 99, 56 Am. Dec. 318 (1852).

[21] *Norris v. Harris*, 15 C. 226 (1860).

are silent.[22] On the other hand, the law of California must be presumed to be in accord with the common law of England only in the absence of California decisions or statutes to the contrary.[23] Now, this principle, in the writer's opinion, is valid also conversely: while the rules of common law are the basis of our jurisprudence where our laws are silent, this means and it can only mean that those rules will be recognized and adopted where they meet the conditions existing in this state, and will not be allowed to control where the conditions were those never contemplated by the common law.[24] In other words, such parts of the common law of England as are not adapted to our conditions, form no part of the law of this state.[25]

From the foregoing principle it follows also that in cases of a square conflict between modern English and modern American interpretation of the common law we should follow the American expositions.[26]

(b) Common Law Modified by Statute

Common law of England governs only in those cases where it is not repugnant to or inconsistent with the constitutions and statutes mentioned in CC, sec. 22.2.[27] According to this provision, the common law is the basis of our jurisprudence[28] since it was made the "rule of decision" at the time of the formation of the state government in all situations where not abrogated or modified by statute.[29] Conversely it sounds like this: common law becomes inapplicable in California where, among other things, it has been modified by statutes.[30]

It has been established that common law is only one of forms of law and is not more sacred than any other, and, as a rule of conduct, it may be changed at the will of the legislature, unless prevented by constitutional limitations.[31] This means, in other terms, that all

---

[22] *Siminoff v. Goodman (James H.) & C. Bank*, 18 C.A. 5, 121 P. 939 (1912); *Burlingame v. Traeger*, 101 C.A. 365, 281 P. 1051 (1929); *Cole v. Rush*, 45 C. 2d 345, 289 P. 2d 450 (1955).

[23] *Horne v. Title Ins. & Trust Co.*, 79 F. Supp. 91 (1948).

[24] *Jones v. California Dev. Co.*, 173 C. 565, 160 P. 823 (1916); *Galeppi Bros., Inc. v. Bartlett*, 120 F. 2d 208 (1941).

[25] *Katz v. Walkinshaw*, 141 C. 116, 70 P. 663 (1903).

[26] *Fletcher v. Los Angeles Trust and Savings Bank*, 182 C. 117, 187 P. 425 (1920).

[27] *In re Fair*, 132 C. 523, 60 P. 442 (1901); *People v. Marah*, 30 C.A. 424, 159 P. 191 (1916); *Jewett v. City Transfer & Storage C.*, 128 C.A. 556, 18 P. 2d 351 (1933); *Reed v. Eldredge*, 27 C. 346 (865); *Bryan v. Banks*, 98 C.A. 748, 277 P. 1075 (1929).

[28] *Sesler v. Montgomery*, 78 C. 486, 21 P. 185 (1889).

[29] *Van Maren v. Johnson*, 15 C. 308 (1860); *Renton Estate*, 3 Cof. 519 (1892).

[30] *Monterey Club v. Superior Court*, 48 C.A. 2d 131, 119 P. 2d 349 (1941).

[31] *People v. Hickman*, 204 C. 470, 268 P. 909 (1928).

the rules of common law are subject to the changes introduced by the statutes.[32]

4. *Construction of Laws*

(a) General Rule

The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to the Civil Code[33] since the Code establishes the law of California respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice (CC, sec. 4). So, California is said to have departed from the ranks of the common-law states and following the example particularly of New York become a code state.[34] This statement is correct only to a certain extent since as of today the general tendency within common-law countries is toward a partial "codification", which doesn't mean abandonment of the common-law platform.[35]

Statutes are to be construed according to fair import of their terms and with a view to effect the object of the statute as well as promote justice.[36] In other words, where the language of a statute is plain, and nothing therein requires construction, the law must be declared as it is found,[37] it means that "when the legislature has spoken in plain and unmistakable language it is our duty to follow the statute as written.[38]

(b) Legislator's Intention

The guiding star of statutory construction is the Legislature's intention, and to the end that it be correctly ascertained the statute is to be read in light of its historical background and evident objective.[39] This means going back to the "mind of the legislator", as it is called in the civil-law countries. This intention of the legislator is controling whenever it can be reasonably ascertained from the language used[40] but when the language is not entirely clear, the court may, to effect the object of a code provision, to determine the meaning, and in aid of interpretation, consider the spirit, intention, and purpose of a law, and to ascertain such purpose may look into contemporaneous legislation on the same object and the external and

---

[32] *Tennant v. Tennant (John) Memorial Home*, 167 C. 570, 140 P. 242 (1914); *Renton Estate*, 3 Cof. 519 (1892).

[33] Cf. Penal Code, sec. 4; Evidence Code, sec. 2.

[34] *People v. Troche*, 206 C. 35, 273 P. 767 (1928); *People v. Tanner*, 3 C. 2d 279, 44 P. 2d 324 (1935).

[35] A similar trend is to be discovered also in the civil-law countries but, of course, *contrario sensu*, using more and more "case law".

[36] *People v. White*, 124 C.A. 548, 12 P. 2d 1078 (1932).

[37] *Ashley v. Olmstead*, 54 C. 616 (1880).

[38] *Dynan v. Gallinatti*, 87 C.A. 2d 553, 197 P. 2d 391 (1948).

[39] *People v. One 1952 Mercury 2-Door Sedan*, 176 A.C.A. 235, 1 Cal. Rptr. 245 (1959).

historical facts and conditions which led to its enactment.[41] This position is closely related to that of the historical school as well as the sociological school in jurisprudence.[42]

The principle of the so called "authentic interpretation" is reflected in *California Emp. Stab. Com. v. Payne*, 31 C. 2d 210, 187 P. 2d 702 (1947) insofar as it states that when a statute is ambiguous, a subsequent expression of the legislature as to the intent of the prior statute may properly be used in determining the effect of the prior statute. However, the court states that such a declaration of the legislative power is not binding on the court. It seems to be incorrect for the court to state this because the subsequent declaration of the legislative intent is another solemn expression of the will of the supreme power in the state (CC, sec. 22), yet it is perhaps more than "a" solemn expression since the legislature returns once more to the same subject declaring again its solemn will concerning that point. In this way, there exist practically "two" solemn expressions on the same subject, and as such, the will of the supreme power should be binding "twice" on the court, if this expression can be allowed.

This problem is connected to the operational value of construction since the principle has been established that statutes should be made operative rather than without effect by their construction.[43]

(c) Liberal Construction

This main principle of CC, sec. 4 means, in the writer's opinion, two things:

(1) That all sections of the code are to be liberally construed, with a view to effect its objects and promote justice[44] when applied to acts occuring since its passage, for no part of the Code is retroactive, unless expressly so declared (CC, sec. 3).

(2) The second significance of Sec. 4 is that statutes in derogation of common law are not be strictly construed.[45] Again, it doesn't mean derogation of common law which still remains in force, efflcept insofar as it is inapplicable to our conditions, or — as in this case — has been modified by statute.[46]

It has been established that common law is not repealed by statute by implication or otherwise if there is no repugnancy be-

[40] *Alameda County v. Kuchel*, 32 C. 2d 193, 195 P. 2d 17 (1948).
[41] *Grannis v. Superior Court*, 146 C. 245, 79 P. 891 (1905).
[42] Cf. the influence of Savigny, the Neo-Hegelians as well as the positions of Pound, Holmes and Cardozo.
[43] *Van Dorn v. Couch*, 21 C.A. 2d Supp. 749, 64 P. 2d 1197 (1937).
[44] *Blythe Estate*, 4 Cof. 67 (1890).
[45] *Tennant v. Tennant (John) Memorial Home*, 167 C. 570, 140 P. 242 (1914).
[46] *Elizalde Estate*, 182 C. 427, 188 P. 560 (1920).

tween it and statute and if it does not appear that the Legislature intended to cover whole subject.[47]

(d) The Continuity Principle

This principle is closely related to the prior point insofar as CC, sec. 5 provides that the provisions of the code, so far as they are substantially the same as existing[48] statutes, or the common law, must be construed as continuation thereof, and not as new enactment.[49]

This means, among other things, the following:

(1) Where the statute is an affirmance of common law, the statute is to be construed as was ruled by common law;[50]

(2) The Civil Code establishes the law of California insofar as it departs from common law;

(3) Although the traditions of English law and history were inherited by the framers of the United States Constitution, other ideas and processes of the civil legal system are also not unknown in California, where other system of jurisprudence than the common law prevail,[51] such as, for instance the whole community property law. However, this community property law of Spanish origin frequently has been construed in common-law spirit.[52]

5. *Foreign Judgments in California*

In connection with the acceptance of foreign judgments, the Code of Civil Procedure (CCP) deals with two kinds of Judgments: (1) judgments rendered in a sister state, and (2) judgments rendered in a foreign country, provided that they have the same effect in California as they have in the foreign jurisdiction.

(a) Sister states' judgments

CCP, sec. 1913 provides that "the effect of a judicial record of a sister state is the same in this State as in the state where it was made, except that it can only be enforced here by an action or special proceeding".[53]

By virtue of its establishment in California as a foreign judgment, in full force and effect, a judgment of a sister state becomes

---

[47] *Gray v. Southerland*, 124 A. 2d 280, 268 P. 2d 754 (1954).

[48] The word "existing" refers to and limits the common law, as well as the statutes (*The Louis Olsen*, 1893, 57 F. 845, 6 C.C.A. 608).

[49] Cf. Penal Code, sec. 5.

[51] *Baker v. Baker*, 13 C. 87 (1859).

[51] *Monterey Club v. Superior Court*, 48 C.A. 2d 131, 119 P. 2d 349 (1941).

[52] *George v. Ransom*, 15 C. 322 (1860), cf. William Quinby De Funiak, Principles of Community Property, Callaghan, Chicago, 1943, I, sec. 51 and

[53] Sec. 1913 continues as follows: "And except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority". Cf. *Hood v. Hood*, 211 C.A. 2d 332, 27 Cal. Rptr. 47 (1962).

California judgment for the purpose of enforcement in this State.[54] On the other hand, the method of enforcement of foreign judgments is governed by the law of the forum and enforcement procedures of each state are peculiar to it.[55]

This principle of section 1913 is valid only if presumptions of regularity and jurisdiction are not overcome,[56] since the jurisdiction of a court of a foreign state to render judgment is always open to collateral attack in proceeding in another state.[57]

The recognition in California of foreign judgments is based on the rule of comity existing at common law[58] as well as on the full faith and credit clause of the federal Constitution (Art. IV, sec. 1). By virtue of this clause valid judgments of a sister state must be enforced by the courts of every other state.[59] However, the full faith and credit clause and statutes enacted thereunder do not apply to judgments rendered by a court without jurisdiction.[60]

(b) Foreign Countries' Judgments

As to the judgments rendered by a foreign country's court, CCP, sec. 1915 provides that "a final judgment of any other[61] tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this State. The judicial interpretation quoted as to CCP, sec. 1913 remains valid also as to sec. 1915. However, the judgment of a court of a foreign country can never have any greater force than that given it by the law of the country where it was pronounced, from which it derives its full force.[62]

6. *Conclusion*

Naturally, Law in California — conceptually speaking — *cannot* be *different* from law in any other country or any other state of the United States; however, Law in California *is* and *naturally must be different* from law in other jurisdictions.

The writer's intention was to present briefly the two distinct qualitative judgments contained in the foregoing sentence: (1) a iusphilosophical and (2) a jurisprudential approach. In the fore-

---

[54] *Leverett v. Superior Court*, 222 C.A. 2d 126, 34 Cal. Rptr. 784 (1963).
[55] *Weir v. Corbett*, 229 C.A. 2d 290, 40 Cal. Rptr. 161 (1964).
[56] *Blain v. Burge*, 75 C.A. 418, 242 P. 804 (1925).
[57] *Steinbroner v. Steinbroner*, 30 C.A. 673, 159 P. 235 (1916); *Gordon v. Hillman*, 47 C.A. 571, 191 P. 62 (1920).
[58] *Richards v. Blaisdell*, 12 C.A. 101, 106 P. 732 (1909).
[59] *Paul v. Hiller*, 61 C.A. 2d 73, 142 P. 2d 96 (1943).
[60] *Britton v. Bryson*, 216 C. 362, 14 P. 2d 502 (1932).
[61] By virtue of CCP, sec. 1914 the effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.
[62] *Cleland Estate*, 119 C.A. 2d 18, 258 P. 2d 1097 (1953).

going presentation the iusphilosophical approach is based upon the positive written authority of the legislative and judicial branches of the State of California.