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COMMENTS

CONSTITUTIONAL VERSUS LEGISLATIVE COURTS

EDWARD CASSIN*

I venture to prophesy that if a poll were taken of the Bench and Bar of the State of New York, a substantial majority would state that a constitutional court was created in a constitution and a legislative court was created by a legislative enactment. It is to the examination of the validity of this distinction that this article is addressed.

Whether or not it is because the necessity for such distinction is rarely occasioned, it is worthy of note that the writer, after a somewhat diligent search has found but two courts of last resort—the United States Supreme Court¹ and the Court of Appeals in New York²—which have attempted to define the two types of courts. Briefly stated, the federal court holds that a constitutional court is one created in the Constitution or by Congress in the exercise of the power delegated to it in the judiciary article of the Constitution.³ A legislative court, on the other hand, is one created by Congress in the exercise of its inherent power when called upon to perform a legislative duty imposed upon that body by Article II of the Constitution. The New York Court of Appeals holds that the constitutional courts are those created in the constitution and that all other courts are legislative courts. It can readily be discerned that these definitions are irreconcilable.

In *The American Insurance Company, et al. v. Canter*,⁴ Chief Justice Marshall states:

“The Judges of the Superior Courts of Florida hold their offices for four years. These Courts then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States.”⁵

† Justice of the Municipal Court of the City of New York.

1. *American Insurance Company et al. v. Canter*, 1 Pet. 511 (U. S. 1828).

2. *Haggerty v. City of New York*, 267 N. Y. 252, 196 N. E. 45 (1935). The Supreme Court of Rhode Island also passed upon the question, *Gorham v. Robinson*, 57 R. I. 1, 186 Atl. 332 (1936) and accepted and approved the reasoning of the United States Supreme Court and is therefore referred to incidentally in this article.

3. U. S. CONST., Art. III.

4. 1 Pet. 511, 546 (U. S. 1828).

5. Florida was a territory in 1828.

In *Haggerty v. City of New York* the following definition is set forth:

"The Constitution of the State of New York recognizes two classes of courts—constitutional courts, and inferior local courts of civil or criminal jurisdiction. The constitutional courts are those which are created or continued by the Constitution and, as to these, the Constitution gives certain power and jurisdiction as well as defining the nature and extent of the office. The inferior local courts are left to the creation, control and regulation of and by the Legislature."⁶

And to make it clear what it means by inferior local courts, the Court of Appeals states further on:

"The line of cleavage between the constitutional and legislative courts is clearly drawn by the Constitution of 1925, and it should not become blurred or obliterated by judicial interpretation."⁷

Thus did the Court of Appeals put its *imprimatur* on what the writer believes is the generally accepted division of courts in this state.⁸

For more than a century this differentiation set forth by the Supreme Court in the *American Insurance* case between the two types of courts remained quiescent, or, at least unnoticed in future opinions relative to this subject.⁹ Then, in the nineteen thirties, a series of decisions dealing with the tenure of office or the protection from diminution of compensation of certain judicial officers in the federal government and the States of New York and Rhode Island were handed down. In 1933, Judge O'Donoghue of the Supreme Court of the District of Columbia,¹⁰ Judge Hitz of the Court of Appeals of the District of Columbia¹¹ and Judge Williams of the United States Court of Claims¹² appeared as plaintiffs in cases which reached the Supreme Court of the United States. In two lengthy and exhaustive opinions that body held that the District of Columbia Supreme Court and the Court of Appeals of

6. 267 N. Y. 252, 254, 196 N. E. 45, 46 (1935).

7. *Id.* at 258, 196 N. E. at 48.

8. So also did another responsible body. In the FOURTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1938) 151, 166, the term "constitutional court" is constantly used to denote a court created in the constitution.

9. Not only unnoticed but in *Williams v. United States*, 289 U. S. 554, 568 (1933) the Supreme Court admitted that it had repeatedly failed to follow the *American Insurance* case stating: "It must be conceded at the threshold that this court has expressed, more or less irrelevantly its opinion in the affirmative." The irrelevant expression was in stating that the Court of Claims was a constitutional court. Cited by the Court as cases in which such *dicta* appear are *United States v. Klein*, 13 Wall. 128, 145 (U. S. 1871); *United States v. Union Pacific R. R. Co.*, 98 U. S. 569, 573 (1878); *Minnesota v. Hitchcock*, 185 U. S. 373, 386 (1901). But the decision which the court failed to cite as one of its lapses and which Judge Williams relied upon in his appeal was *Miles v. Graham*, 268 U. S. 501, 570 (1925).

10. *O'Donoghue v. United States*, 289 U. S. 516 (1933).

11. *Ibid.* The *Hitz* case was disposed of in the same opinion as the *O'Donoghue* case.

12. *Williams v. United States*, 289 U. S. 554 (1933).

that District were constitutional courts and that the Court of Claims was a legislative court. In 1935, the administratrix of the late Justice Haggerty of the Municipal Court of the City of New York appeared before the Court of Appeals which held that the Municipal Court was a legislative court. And in 1936, in an action involving the tenure of office of Judge Gorham of a District Court of Rhode Island, the Supreme Court of that State reiterated and adopted as sound constitutional law the definition of the *American Insurance* case and held that Judge Gorham was an officer of a constitutional court.¹³ It would serve no useful purpose to expatiate upon a detailed analysis of these cases since we are not interested in the results; rather we shall confine our discussion to the underlying principles that guided the respective tribunals in determining the basic difference between constitutional and legislative courts.

Considering the Court of Claims, the Supreme Court held that it was not a court created pursuant to the power delegated to Congress in Article III; that Congress had the inherent power to create courts in the exercise of its legislative power and that since the power to consider claims against the government was a legislative power, Congress in its exercise could create a court to assist it even though the power so to create is not explicitly set forth in the legislative article of the Constitution, the Court stating:

"That judicial power apart from that article [Art. III of the Constitution] may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Company, et al. v. Canter*, 1 Pet. 511, 540, dealing with the territorial courts. 'The jurisdiction', he said, 'with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States.' That is to say (1) that the courts of the territories (and, of course, other legislative courts) are invested with judicial power, but (2) that this power is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument."¹⁴

In the case involving the Supreme Court of the District of Columbia, the Court stated:

"In *American Insurance Company v. Canter*, supra, the Chief Justice gave as a conclusive reason why the territorial courts were not constitutional courts vested with the judicial power designated in Art. III of the Constitution that 'They are incapable of receiving it.' It is not hard to justify this observation in respect of courts created for a purely provisional government to serve between events; but the District Supreme Court and the Court of Appeals are permanent establishments—federal courts of the United States and part of the federal judicial system."¹⁵

13. *Gorham v. Robinson*, 57 R. I. 1, 186 Atl. 832 (1936).

14. *Williams v. United States*, 289 U. S. 554, 565 (1933).

15. *O'Donoghue v. United States*, 289 U. S. 516, 544 (1933).

Thus it can be seen that, in 1933, the Supreme Court returned to the safe moorings of the philosophy and logic of the *American Insurance* case. It may be assumed that it will not again stray from this authority. Two years later, "the line of cleavage" as set forth above in the *Haggerty* case was handed down in New York. Whether it removes the blur on the line is a moot question.

One need not be informed that the definition in the *Haggerty* case cannot be reconciled with that of Chief Justice Marshall. It is apparent that the acid test in the Federal exposition is the source of the court's judicial power. If it flows from the judiciary article it is a constitutional court. It matters not whether it was created in the Constitution or by Congress in the exercise of the power delegated by the Third article to create other courts. If its source is the second or legislative article, it is a legislative court.

It is not as simple a task to analyze the definition in the *Haggerty* case. First, it must be understood that the judicial power is not vested in the New York courts in the manner the grant is made to the federal courts.¹⁶ The Federal Constitution states:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish."¹⁷

In the New York Constitution the judicial power is not vested in the courts. Rather a moiety, greater or less, is vested in seven courts, continued and created in the Constitution,¹⁸ which then states:

"Inferior local courts of civil and criminal jurisdiction may be established by the Legislature. . . ."¹⁹

16. New York is one of the few states wherein the "judicial power" is not vested in the courts. See *Problems Relating to Judicial Organization*, 9 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE (1938) 401, wherein the reasons for this failure are discussed.

17. U. S. CONST., Art. III, § 1.

18. The seven courts are: Court of Appeals, Supreme Court, Appellate Division of the Supreme Court, County Court, Surrogate Court, Court of General Sessions and the City Court of City of New York. N. Y. CONST., Art. VI, §§ 1-16 incl.

19. N. Y. CONST., Art. VI, § 18. There has always been an inaccurate use of the word "inferior". Inferior to what? All New York courts are inferior, since in none of them is vested the entire judicial power as it is in the United States Supreme Court. Even the New York Supreme Court is inferior since it is ". . . continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may prescribed by law not inconsistent with this article." N. Y. CONST., Art. VI, § 1. At most it is a superior court. And if one desired to be dramatic, it could, in truth, be asserted that a Judge of the Court of Appeals does not possess the judicial power of a Justice of the Peace. Chief Justice Marshall in *Kempe v. Kennedy*, 9 U. S. 173 (1809) states: "All courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgment may be carried; but they are not, therefore, inferior courts, in the technical sense of the word."

One can agree with the denomination of the seven courts as constitutional but, when we are warned not to blur the line of cleavage between them and all the other courts now existing in this state, we are compelled to group every court created under the power delegated to the Legislature in the judiciary article as a legislative court. With such courts, for want of another classification, must be placed the State Court of Claims. But we are left to conjecture whether the latter is created as an inferior local court pursuant to this section. And there is the rub. The Constitution in delegating the power to create inferior courts states²⁰ they must (1) be local, (2) not be courts of record, and (3) have jurisdiction no greater than the County Court (§3000). The present Court of Claims was created subsequent to the adoption of that provision yet we find the statute (1897) creating it violates these provisions.²¹

The history of the Court of Claims demonstrates that, when it was created, the Legislature knew it had the inherent power to create that type of court *dehors* the power to create inferior local courts granted in the judiciary article. And the Court of Appeals recognized that inherent power when it stated that neither the Board of Claims created by Chapter 205 of the Laws of 1883, nor the Court of Claims created by Chapter 36 of the Laws of 1897, was a court or judicial body within the terms of the meaning of the judiciary article of the State Constitution.²²

This being so, how shall the State Court of Claims be typed? The answer, I repeat, is insoluble. Perhaps like a judicial Ishmael, it must wander in outer darkness until a classification is devised to give it a legalistic standing.²³ That it is the only legislative court in the judicial system

20. N. Y. CONST., Art. VI, § 18.

21. N. Y. LAWS 1897, c. 36.

22. *People ex rel. Swift v. Luce*, 204 N. Y. 478, 97 N. E. 850 (1912).

23. This is not a mere figure of speech. If it cannot be classified under the courts created under § 18 of Article IV of the New York Constitution, a new classification must be devised if the division of courts laid down in the *Haggerty* case are followed. Perhaps the best example of the failure to understand the basic difference between the two types of courts appears in the *Haggerty* opinion at page 259, where it states: "Reference should be made to the rulings of the United States Supreme Court regarding this matter of inferior local courts under the Federal Constitution. In *Williams v. United States* (289 U. S. 553) it was held that the judicial power of the Court of Claims is not vested in virtue of Article III of the Constitution, so as to bring the judges within the protection of that article as to tenure of office and compensation." Note the word "local". The Federal Court of Claims is not a local court. Its geographical jurisdiction is co-terminus with that of the Supreme Court. Further you would be led to believe that because it is an "inferior local" court its judicial power is not vested in virtue of Article III when the fact is, as we have previously seen, its judicial power is not vested in virtue of Article III, but in virtue of Article II, which the *Haggerty* case overlooks. Had the court read the *O'Donoghue* case which is reported immediately before the *Williams* case in 289 U. S. at 516 (1933), it would have found that the Supreme Court of the District of Columbia, admittedly an inferior local court is vested with its judicial power in virtue of Article III and its judges are brought within the protection of

of New York, if the reasoning of the *American Insurance* case is applied, is apparent.

The failure to comprehend or indicate the true nature of a Court of Claims was not confined to judicial interpretation as set forth in the *Haggerty* case. Section 23, Article VI of the New York Constitution of 1925, states:

"Nothing in this article contained shall abridge the authority of the legislature to create or abolish any board or court with jurisdiction to hear and audit or determine claims against the state, and any such tribunal existing when this article shall take effect shall be continued with the powers then vested in it until otherwise provided by law."²⁴

Now it is submitted that this affirmation of the right of the Legislature is an act of supererogation in that the right had theretofore been exercised by that body and had never been challenged but had been upheld in *People ex rel. Swift v. Luce*.²⁵ This is not a criticism of deep import but the genesis of the section and its inclusion in the judiciary article is something else. The Legislature had created a Judiciary Constitutional Convention²⁶ in 1921 to submit proposed amendments to the judiciary article, yet we find that body submitting an amendment which, if it has any place in the Constitution, should have been included in the legislative article for, as has been noted above, it is the affirmation of the right of the Legislature to create a legislative court.²⁷

There is something else that should be discussed at this point. I refer to the inexact use of the word "statutory" as being synonymous with "legislative."²⁸ It is correct to say that all legislative courts are statutory courts but all statutory courts are not legislative courts. Nowhere has this been clearer put than in the minority opinion in the Rhode Island case:

"It is true that they are brought into existence by legislative enactment, Article III because it was established in virtue of that article. Thus the test is not whether a court is inferior or local, but under which article it was created.

24. For the reasons why this section was proposed and adopted, see *Supplemental Report of the Executive Committee, JUDICIARY CONSTITUTIONAL CONVENTION OF 1921, LEGISLATIVE DOCUMENT (1922) No. 67, at 11.*

25. 204 N. Y. 478, 97 N. E. 850 (1912).

26. At the risk of appearing didactic but merely to emphasize the recurrent misuse of words the Constitutional Convention should have been named a commission. Conventions are called pursuant to N. Y. Const., Art. XIV, § 2.

27. As an amendment to Art. 3, § 19, which the Convention, be it noted, was not empowered to propose.

28. It appears in *Williams v. United States*, 289 U. S. 554, 570 (1933), where the court states: ". . . nor does it [*Miles v. Graham* (1925)] show that the Court's attention was drawn to the question of whether that court [Court of Claims] is a statutory court or a constitutional court." Justice Sutherland in writing this failed to note that a court can be both statutory and constitutional. Yet in the *O'Donoghue* opinion handed down the same day, the same Justice emphasized the fact that the Supreme Court of the District of Columbia was both a statutory and a constitutional court. It makes for confusion worse confounded.

and that, because of this fact, they may be loosely termed statutory courts, but when they are so instituted the judicial power of the state is vested in them by the Constitution, which makes them constitutional courts in the strict sense of the term."²⁹

At the risk of being charged with *lèse majesté*, I believe that Chief Justice Marshall's denomination of courts established under the judiciary article as constitutional courts is not sufficiently descriptive. A truer appellation would be to call them judiciary courts. Then, when referred to, the title would indicate the constitutional article by virtue of which they were established. We might then call both judiciary and legislative courts constitutional courts for the power to create both types of courts, explicitly granted in the judiciary article and implicitly possessed in the legislative article flows from the same source, the Constitution itself.

Nor can I agree with Chief Justice Marshall when he states that a legislative court ". . . is incapable of receiving . . ." the judicial power.³⁰ A court, no matter whence the source of its creation, can receive but one power—the judicial power; certainly not the executive or legislative power. What the Chief Justice had in mind, I believe, when he stated that only the courts created under the judiciary article were capable of receiving the judicial power was that these were the courts vested with the power to administer the common and chancery law as it was received by us from England and subsequently modified by statute. This, one can readily perceive, is a blanket grant whereas the grant to legislative courts is severely restricted to aid in the execution of a legislative duty.³¹

29. *Gorham v. Robinson*, 57 R. I. 1, 19, 186 Atl. 832, 869 (1936) dissenting opinion. The exposition on the two types of courts in the Rhode Island case is exhaustive and illuminating. Although there was a disagreement it was not on the basic distinction but on the interpretation of constitutional provisions of the constitution of Rhode Island. So also the dissent in the *O'Donoghue* case was not on the definitive characteristics of courts. The prevailing opinion in the Rhode Island case made another novel division. It held that the only true legislative court is the territorial court and that the others (Court of Claims, Court of Customs Appeals) are ". . . tribunals created by Congress under its general legislative power, to perform administrative or quasi-judicial functions." *Id.* at 9, 186 Atl. at 849. The federal court does not make this distinction.

30. Justice Sutherland in the *Williams* case, as noted previously, states it correctly when he says: "The courts of the territories . . . are invested with judicial power but that this power is not conferred by the third article. . ." *Williams v. United States*, 289 U. S. 554, 565 (1933).

31. In the *American Insurance* case, we find Chief Justice Marshall making this observation: "If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The constitution declares that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under this authority.'" *American Insurance Co. et al. v. Canter*, 1 Pet. 511, 544 (U. S. 1828). The fact is this "pure fountain" supplies the judicial power in a strictly limited amount to the legislative courts, once

When the *American Insurance* case came before him, Chief Justice Marshall recognized that Congress must have the power to create courts in territories if it were to execute effectively the ". . . power to dispose and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." ³² but that the power vested in such courts was not the judicial power referred to in Article III. He recognized that the framers of the Constitution had failed to envision the necessity for such a court and he found the power when the need was apparent, as was his wont. ³³ It is also to be noted that the federal government has a special and important interest in legislative courts. In the Courts of Customs Appeals and the Court of Claims the government is the defendant. No citizen can sue another in these courts. He is relegated to the courts created under the judiciary article. It is true that a citizen can sue another citizen in a territorial court but it is a court of limited tenure to be abolished when the territory is admitted to the Union as a state.

It might be interesting, if not profitable, to speculate on the underlying reasons which have given the sanction of judicial approval to the manifestly artificial and illogical division of the two types in New York. To the writer there appear to be current two underlying assumptions that have contributed to the bringing about of this untenable position. The first is that the power, the right, to render judgments by courts created in the Constitution is something different than that which gives life to the courts created by the legislature under the judiciary article; that they and their judgments partake of a sacerdotal character; or, in other words, it is the failure to recognize that the judicial power vested in the one is the same as that vested in the other. The second is the tyranny, or should I less severely say, the cult ³⁴ of words and a failure to understand their true content. A court is created by a legislature; *ergo*, it is a legislative court. A court is created by statute; *ergo*, it is a statutory court and can't possibly be constitutional. A court is inferior; *ergo*, its judgments are of an inferior quality. It finally results in the veneration of the shadow of words without a thought to the substance of their content.

In conclusion this may be observed. If consistency is a jewel, it might be well if those charged with interpreting the judicial procedures had that precept in mind. We have heretofore noted that the yardstick in determining

the right to create them is granted, as surely as it supplies the constitutional courts in an unlimited amount.

32. U. S. CONST., Art. IV, § 3.

33. There is growing, particularly in Washington, a belief that a new type to be called the Executive Court is coming into existence. It functions now under the guise of a bureau in the opinion of many students of the subject. The Tax Court is a true executive Court.

34. I commend the reader to a reading of Judge Frank's essay on THE CULT OF THE ROBE, SAT. REVIEW OF LITERATURE, Oct. 13, 1945, p. 12; N. Y. L. J., March 2, 4, 1946, pp. 838, 856, col. 1, wherein he maintains that a gown neither increases the power, augments the intelligence nor enhances the dignity of the wearer.

the constitutionality of a court is the place of its inception, not the source of its power, at least so far as New York is concerned. Whether we agree with this postulate is of no avail. It is the adjective law of this state. Yet we find the same tribunal that set forth this standard of demarcation using a different test in determining the constitutionality of a legislative body. In *People ex rel. Deitz v. Hogan*³⁵ it was held that the Board of Aldermen of the City of New York was a constitutional body not because it was created in the Constitution, which it assuredly was not, but because it was vested with the legislative power to create Assembly districts out of Senatorial districts.³⁶ Thus the test of the constitutionality of a body was shifted from the source of its inception to the source of a particular power. I leave it to others to harmonize these two conflicting approaches to the answer to the same question.

This, at least, can be maintained. If the reasoning employed in the *Deitz* case was the rationale of the *Haggerty* case it is obvious that the Municipal Court of the City of New York would be held to be a constitutional court for, as the writer sees it, such is the philosophic background of the *American Insurance* case.

THE STATUTE OF FRAUDS IN NEW YORK AS AFFECTING CONTRACTS FOR THE PAYMENT OF COMMISSIONS

A number of recent New York decisions have created some doubts as to the effect of the Statute of Frauds on certain types of employer-employee contracts, particularly those relating to the payment of commissions. A review of the cases in the light of their historical background will not entirely resolve the doubts, but it may serve at least to outline an area in which inconsistencies appear.

The section of the New York Statute with which we are concerned¹ is as follows:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

"1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime . . ."

The Historical Background

This section stems directly from the corresponding portion of the original Statute of Frauds² except for the last sixteen words quoted, which bring life-

35. 214 N. Y. 216, 222, 103 N. E. 459, 463 (1915).

36. N. Y. CONST., Art. III, § 5.

1. N. Y. PERS. PROP. LAW § 31(1).