PUBLIC HEARING

On

SENATE CONCURRENT RESOLUTION #10

Before

New Jersey Legislature, SENATE, JUDICIARY COMMITTEE

Harold W. Hannold, Chairman
John M. Summerill
Frank S. Farley
Samuel L. Bodine
James M. Davis
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Senate Chamber
State House

Hearing Division
New Jersey Civil Service Commission
State House, Trenton, N. J.

I N D E X

SENATOR [illegible] . MARTINI, (CHAIRMAN): Gentlemen, I think it is just a little after 2:30 and we will proceed with the Judiciary Committee hearing on Senate Concurrent Resolution Number 10. Before we go any further, are there any individuals here who have prepared statements and haven't turned them over to the secretary? If you have any that have not been turned over, will you do it now please? Are there any folks here who desire to speak and have not registered?

All right, we will proceed to hear the proponents of the resolution first and I will call on Mr. Milton B. Conford.

MR. MILTON B. CONFORD: I believe you have my name. It is Milton B. Conford. I am from Millside, New Jersey, speaking for myself only.

I strongly support the resolution for the proposed amendment. I recommend, moreover, that action ought also to be taken to amend Article VI, Section 5, Paragraph 4, dealing with review by the Superior Court in lieu of prerogative writs, so as to make the rule-making power of the Supreme Court in matters pertaining to prerogative writs also subject to such legislation as may be enacted. My reasons for urging the amendment as to prerogative writs will be stated hereinafter. At the moment, I address myself to the resolution for the amendment of Paragraph 3 of Section 2.

Very simply stated, my support of the resolution is based upon my belief that the amendment will effectuate, in terms beyond construction, the actual intent of the delegates at the Constitutional

Convention in promulgating Article VI, Section 2, Paragraph 3, as adopted.

The much-quoted report of the Judiciary Committee of the Constitutional Convention leaves no doubt whatsoever that those who drafted paragraph 3 intended that the people, acting through their representatives in the legislature, should reserve the right to alter or repeal rules of practice and procedure, or initiate their own proposals on such subjects whenever it was deemed necessary as a matter of public policy. There is no evidence that any delegate to the Constitutional Convention or the people in voting for the Constitution thought otherwise. Nothing has transpired between the time of the adoption of the Constitution in 1947 and the present day to warrant the conclusion that what the delegates to the Constitutional Convention intended and voted for is not as appropriate and desirable today as a matter of public policy, as it was deemed to be when the Constitution was formulated.

It is eminently sound and appropriate that the initial exercise of the rule-making power should be vested in the Supreme Court, as was provided for by the Constitution. The performance by the Supreme Court of its rule-making function has been so magnificent as to have fully justified the faith which the constitutional delegates placed in the court in delegating this duty to it; but the excellence with which the court has performed its constitutional function should not be permitted to minimize the importance which

the constitutional delegates rightfully ascribed to the reserved power of the legislature to act as a check and balance of rule making. The great rule makers on the Supreme Court will pass on their mortal way, but constitutional doctrine becomes more firmly imbedded with the passage of time.

Matters of practice and procedure frequently involve public policy in aspects far removed from the mere mechanics of judicial administration. It is fundamentally undemocratic to deprive the legislature of any jurisdiction in the formulation of public policy, whether such policy is related to practice and procedure in the courts, or in respect to any other subject matter of legislation. Consider as an example the very important labor relations and industrial disputes policy considerations involved in the so-called anti-injunction statutes adopted by the New Jersey legislature some time ago. These acts required the conduct of a hearing before the granting of a preliminary restraint in labor cases, enlarged the period of notice in applications for preliminary restraint, and restricted the period of restraint in such cases to fixed periods of time. All of these regulations were clearly in the field of practice and procedure. Any of them could appropriately be changed by the Supreme Court today as a regulation of practice and procedure. Yet, does it not seem unthinkable that if the court chose to change the provisions of this anti-injunction statute by a rule of court the legislature should be powerless to intervene in the event that the legislative conception of appropriate public policy

differed from that of the Supreme Court? As another example take Rule 2:4-4 which calls for a record to be made of the vote of every grand juror on every matter presented to a grand jury which record can be made public only by order of the Assignment Judge of that county. Suppose the legislature feels this rule should be changed in any respect. Is it right that it should be constitutionally held to be beyond its power? These examples can be repeated in unlimited instances in other fields of public policy inherent, necessarily inherent, in regulations of practice and procedure. The exclusion of the legislature from the right of final determination of matters of practice and procedure, in my opinion, strikes at the fundamentals of the republican form of government in a democracy. It transfers from the elected representatives of the people in the legislature, acting with the check of a gubernatorial veto, to an appointed court, the exclusive say in a vitally important and broad segment of the general field of public policy. This unprecedented situation is now the law of NewJersey as the result of the recent Winberry case. This result, not having been intended by the delegates to the Constitutional Convention, the Constitution should be amended so that the unwarranted reformation of the judicial article accomplished by the Winberry case may be eliminated and the judicial article restored to its original intent.

I have mentioned at the beginning of my remarks the desirability for also amending Article VI, Section 5, Paragraph 4, dealing with procedure in lieu of prerogative writs. In Fischer v. Bedminster

Township, reported in 5 N.J. 534, the Supreme Court of New Jersey held that the legislature was without constitutional right to pass any legislation on the subject of procedure in the field of remedies in lieu of the former prerogative writs. I consider this result as being just as much in derogation of our fundamental democratic processes as the result of the Winberry case. In my opinion, there is no legitimate basis for so distinguishing between procedure in lieu of prerogative writs and procedure generally as to warrant making rules of procedure subject to legislative revision in one case and not in the other. In the Pedminster case it was held that a legislative statute of limitations on actions in lieu of prerogative writs was unconstitutional. This indicates the extremes to which judicial construction may be expected to go in eliminating the legislature from its appropriate exercise of policy making. I have never heretofore heard it contended that the fixing of a statute of limitations was not peculiarly the appropriate subject matter for legislative, rather than judicial determination. The field of procedure in lieu of prerogative writs covers the important area of disputes between the citizen and governmental agencies, and disputes between governmental agencies, as well as review of actions of quasi-judicial agencies. There is no more important field of litigation before our courts. Everything to which I have pointed to previously, bearing upon the desirability of restoring the last voice in rule-making to the legislature should be given added emphasis when considered in

connection with the field of procedure in lieu of prerogative writs.

I therefore recommend that, in addition to adoption of the resolution now before the committee, Article VI, Section 5, paragraph 4, also be amended by insertion of the same qualifying language as has been inserted by the proponent in Article VI, Section 2, Paragraph 3.

I should like to emphasize, because this is the only substantial argument that I have heard debated about in opposition to this resolution, that in my view the issue presented here is not as to whether the legislature is more technically competent than the Supreme Court to adopt and promulgate rules of practice and procedure nor whether the legislature should grab away from the Supreme Court rule making. Everyone knows that nothing is further or was further from the mind of its proponent than the idea of grabbing away or usurping the rightful function of the Supreme Court as having the initial responsibility of rule making. The issue is far deeper. It involves the fundamental question as to where lies the ultimate voice in the formulation of public policy in a democracy. As to this I do not think there can be any debatable issue.

But even if it were regarded as pertinent to this question to inquire whether the Court or the Legislature is more competent in this regard, the answer would be that the Legislature has access to the same sources of scholarship and research for regulatory

draftsmanship as has the Court. The Rules of the Supreme Court could not have been adopted, could not have been promulgated, without the great aid and labor of many minds not on the Court. Many of those same minds not on the court, of which I am proud to have been one, are now at work in preparing a monumental Revision of Titles 2 and 3 of the Revised Statutes which it is expected the Legislature will adopt. This work will be as thorough and as scholarly as the Rules of Court. The Legislature will have demonstrated its willingnes to be progressive in the field of procedural legislation, just as it always did, prior to 1947, pioneer in the field of reform of procedur while the Courts of New Jersey lagged far behind in rule making.

I cite you the adoption of the Practice Act of 1912, which was revolutionary in its day. I cite you Section 23 of the act which provided that no civil action or proceeding should be dismissed or fail because the plaintiff had mistaken his remedy or procedure if the court had jurisdiction to grant relief by any procedure. This remedial and pioneering piece of legislation was thoroughly scuttled by decisions of our courts which ignored it and frequently denied relief in prerogative writscases because the wrong writ was applied for or granted.

I also cite you the Declaratory Judgment Act which the New Jersey Legislature adopted many years ago and which our Courts subsequently made practically useless by narrow and restrictive constructions.

The New Jersey Legislature has, in the past, I submit, shown a fairly reasonable degree of responsiveness to movements for reform in practice and procedure. That has not been true of the New Jersey Courts, on the whole, prior to 1947, except for the reforms which former Chancellor Cliphant was beginning to institute prior to the Constitutional Convention of 1947.

There is absolutely no reason to fear, as some of the opponents of this amendment have asserted, that if it is adopted, the Legislature will scuttle the fine job of rule making done by the Supreme Court. Public opinion would not allow it. There is always the check of a gubernatorial veto. And, finally, nothing has hither to transpired since 1947 to indicate that a majority of both legislative houses would impair the great body of procedural regulations promulgated by the Court.

I have also heard this amendment opposed on the ground that legislators are incompetent and motivated by considerations of politics and expediency. I regret to say that some of the outstanding newspapers of this State have seen fit to give comfort to that idea within the last two or three days. In response to this I can only say that if and when we reach the pass in which it can be fairly asserted that our Legislature should be officially and constitutionally branded as unfit to have the last word in matters of public policy, we have, by the same token, pleaded guilty to the charge of failure of the democratic process. I, for one, repel this charge, or even the inference, with all the

earnestness at my command.

In conclusion, I say - the elected legislature and governor acting together under the Constitution, are the only, and I underscore that only, appropriate policy making agencies under our form of representative government. The Winberry decision has made the Supreme Court the exclusive determinator of public policy in any matter involving court procedure or practice. Court procedure and practice, as I have pointed out above, involve an infinite number of matters of important social, economic and political considerations. All of these are made exempt from legislative participation by the Winberry case. Both the amendment before you and the one I have advocated should be adopted if the legislature and Governor are to continue in the future to perform, in their full scope, their proper functions in our form of government.

SENATOR O'MARA: May I ask Mr. Conford a question? I was interested in your discussion of the decision of the Bedminster case. That is not before us at the present time but you have opened it and you have told us the result which the court reached, but can you tell us the basis of the reasoning?

MR. CONFORD: The basis of the reasoning was two-fold. The court held in the first place that provision of the judicial article which refers to relief in matters of prerogative writs did not contain the qualifying language "subject to law" and that therefore there was evinced the intent to exclude the legislature from any participation whatsoever. I believe there was also the ground

that the phrase having been construed in the Winberry case to mean subject to law, the result would be the same and the legislature would be powerless.

SENATOR O'MARA: Was there any discussion of any historical reason for the court's decision?

MR. COMFORD: Yes, there was.

SENATOR O'MARA: Was it perhaps based on the fact that the jurisdiction in the matter of prerogative writs was inherited from the King's Bench?

MR. COMFORD: The court pointed out that prior to the adoption of the 1947 Constitution the former Supreme Court had the exclusive and unshareable jurisdiction over the granting of relief in prerogative writ cases, which it had previously held to be constitutional, beyond the right of interference to any substantial extent by the legislature. The people who appeared before the Constitutional Convention of 1947 and spoke in reference to the prerogative writ provision, and I know about that because I was a member of the joint committee of the Essex County Bar Association and State Bar Association whose representative appeared before the Judiciary Committee in reference to this subject, if there was one thing they were interested in accomplishing more than anything else it was to take the shackles off the legislature in dealing with prerogative writs. It was to make these remedies subject to whatever policy considerations the legislature in the future might ever deem applicable and appropriate to make the relief grantable as a matter

of right. When they inserted the provision that the relief hearings, etc., should be as provided by rules of the Supreme Court, in my opinion they only intended that the court should set up the machinery for relief by the rules but that it was not intended that such rules should be beyond the influence or participation or veto of the legislature. In other words, the provision in the section now before this committee which says the courts generally may adopt rules of practice and procedure subject to law, in my opinion was intended to cover practice in lieu of prerogative writs as well as other practice.

SENATOR O'HARA: If I get your point, and you correct me if I am not right, you said that under the old Constitution the legislature was powerless to interfere with the old Supreme Court in the field of the prerogative writs.

MR. CONFORD: It wasn't quite that, Senator, it was this, as I recall,-the legislature could not adopt any legislation which would substantially impair the jurisdiction, for example, they could adopt the period of limitations on an application for certiorari but the period had to be reasonable. I point out, parenthetically, that under the Bedminster case we are even worse off than we were under the old Constitution for under the Bedminster case the legislature may not adopt any statute of limitations, in reference to regular writs, whereas under the old statute the legislature could adopt periods of limitation if it was reasonable.

SENATOR O'MARA: Under the old Constitution, the old Supreme Court was a rule unto itself in the field of prerogative writs?

MR. COSFORD: That is right.

SENATOR O'MARA: That was well established in the law as it existed prior to the adoption of the new Constitution?

MR. COSFORD: That is so.

SENATOR O'MARA: Your theory is that the provisions of the judiciary article of the new Constitution were meant to apply, giving it the broad scope that you contend that the delegates thought they were giving to it to the field of prerogative writs as well as other writs?

MR. COSFORD: Yes.

THE CHAIRMAN: Any other questions by any other member of the Committee? If not, I will call on Mr. Richard L. Amster.

MR. WILLIAM L. MARSH: I speak merely as a citizen of the State of New Jersey and a member of the Bar. I would like to preface my remarks with a statement that nothing I say is to infer criticism of our courts. I am too young a member of the Bar and not that presumptuous as to set myself up as a judge of their actions However, I am addressing myself to the broad principle which I feel is at stake and I speak, of course, as a proponent of Senate Concurrent Resolution Number 10, so I say that I think that the Wimberry Case as it stands on the books today constitutes a step in the wrong direction as far as our constitutional government is concerned. I am not that long out of law school to forget my old law professor, Noel T. Dowling of Columbia, who was the confidant of the late Chief Justice Stone and a very, very brilliant constitutional lawyer, and his statement that the Chief Justice felt that one of the most important functions of the members of the Judiciary was to maintain an abiding reference for the written word of the constitution. We are fortunate in New Jersey that at this time the framers of our present constitution are still alive and around us. Chief Justice Marshall was similarly fortunate and he turned to those framers when questions as to the meaning of certain written words in the constitution came up and asked, "What did you mean by this?" I submit that in this case, if our present Supreme Court had turned to any one of the members of the Judicial Section of the Constitutional Convention, they would have found that the phrase "subject to law" meant exactly the opposite of what they interpreted it

to mean, and I say that that is a breach of a very fundamental contract that we have with the people. I might say that I think the words were so plain that the court might be accused of being guilty of intellectual sophistry, because you and I, and any one of us who has read the minutes of the Convention, cannot question that "subject to law" meant subject to the law of the Legislature and the reference made to the Federal rules makes it so clear that I think it requires very little discussion on that point. We all know what they meant; we know that the result is the opposite. I don't think anyone speaking for or against would be so bold as to say "the end justifies the means." That isn't the American way. The American way is to have that abiding reverence for the separation of powers which we found so necessary in the early 1690's and the system of checks and balances, which requires that you, the elected representatives of the people, be responsible to your electorate in matters of this sort. You and you alone can be called on the carpet if the people object to some of these procedural steps. There is not a single thing we can do to the Supreme Court of the State of New Jersey. There is no method of recall, no way to protect ourselves if they promulgate a rule which is shocking. We don't know that they will. Of course, past history indicates that they haven't. We have only had the new constitution since 1947, and I think that the Winberry Case is shocking. However, that is a matter of debate.

Now I say that these two principles are at stake here:

separation of powers and the system of checks and balances. We have no corresponding check on the present Supreme Court. The rules that they have enunciated are the ultimate unless there is a Federal question involved. Then and only then can a man get judicial review. If a constitutional question involving the United States Constitution is involved, the case can go up for review. In any other case there is no way that we can get review. There is no way that the people can get review. If you have the power, at least in an election year some review can be had, and I say that this present decision constitutes a dangerous step in the wrong direction. It abrogates certain vital concepts, philosophical, sociological and political, which every one of us takes for granted. In this case, unwarranted assumption of power by the Supreme Court is in contradition to the minutes of the Constitutional Convention. Every one of those men, except two, is still alive. I think anybody speaking against this resolution would not be so bold as to say, "These words 'subject to law' mean something else." They mean what they say - subject to the law of the Legislature.

Now in closing I should like to point out that under the Federal setup, in the absence of legislation, the Supreme Court may promulgate rules. However, the Congress of the United States reserves onto itself the power to check the Supreme Court's right to promulgate rules. That is done by the Congress itself, enacting rules of procedure, and in case there is a conflict between the

rule of the Supreme Court and a rule of the Congress of the United States, the rule of the Congress shall take precedence and be followed. I submit that that is the same method that should be used in the State of New Jersey. It is the method that was meant to be used. I respectfully request that the Senate adopt Concurrent Resolution Number 10. Thank you, sir.

THE CHAIRMAN: I will now call on Merritt Lane, Jr.

MR. MERRITT LANE, JR: I am from Newark, New Jersey, and am speaking individually. I represent nobody other than myself. I am not going to address any remarks to the merits as to whether or not the rule-making powers should reside finally in the Supreme Court, nor am I going to address any remarks to the political considerations — the philosophical considerations perhaps.

I favor this concurrent resolution because I have a strong feeling that in 1947 when a great many people went up and down the State explaining the constitution to the people, they explained the term "subject to law" to mean, subject to legislative enactment. With that meaning in mind, the people voted on the constitution and they passed it, and now they find that is not the meaning of the phrase. I believe that the people should have an opportunity to say whether or not they want the rule-making power to reside finally in the Supreme Court or whether they want to have it subject to legislative enactment.

THE CHAIRMAN: Senator Robert B. Meyner —

SENATOR ROBERT B. MEYNER: Members of the Judiciary Committee: My name is Robert B. Meyner. I represent, I believe, the people of Warren County. I think the first point that should be made is that the people never voted upon the question of whether the rule-making power should reside in the Supreme Court. I think early in the convention proceedings when the Judiciary Article was under consideration, on page 181 we have Nathan L. Jacobs, who was then Vice-Chairman of the Judiciary Committee, saying with respect to the proposal: "You will note that the Supreme Court is given comprehensive power to adopt rules of practice and procedure for all courts in the State, a power analogous to that possessed by the United States Supreme Court. However, the Legislature would have the power under the committee proposal to alter those rules of practice analogous to the power now possessed by the Congress of the United States." I have thumbed through the minutes of the Convention. I have thumbed through the Judiciary Report. I see nothing which would contradict that statement. As a matter of fact, I see other references which indicate that the constitutional framers in the Convention understood that this rule-making power was supposed to be subject to an act of the Legislature. I think that that went to the people.

As a matter of fact, I have here, and I got it out of the Secretary of State's Office - and any one of the proponents or opponents who would like to have one can have one as I have some available - a pamphlet gotten out by the Secretary of State, entitled "What

the Proposed New State Constitution Means to You." This is what the people, if they were anxious to know what they were voting on, had a chance to read. There is nothing in there which specifically says that the Supreme Court has the absolute power with respect to making rules. As a matter of fact, they speak of the county courts and they say that the county courts are -- "replaced by one county court. The Legislature may alter the jurisdiction, powers, and functions of these courts as the public good may require, but it cannot abolish these courts--the courts closest to the people." They may alter the jurisdiction, powers and functions of these courts, speaking of the county courts. Nothing is said with respect to administration, which no one denies that the Supreme Court has complete power over. They say: "Under the old constitution no one has administrative powers over New Jersey's court system. Giving the Chief Justice such powers will increase the efficiency of our system, expedite justice and minimize court delays." Those to my knowledge are the only pertinent references made in this statement which was circulated by the thousands amongst the people. It indicated that the people understood that they were giving to the new Supreme Court under the constitution this absolute power with respect to practice and procedure. As a matter of fact, you have the Judiciary Report which substantiates the statement Justice Jacobs made to the Convention. You have this pamphlet. As the previous speakers have indicated, no one has been able to offer evidence of the understanding that when the people were voting

on this question they were giving the Supreme Court absolute power.

Now I know the people in my county want a chance to vote on this proposition and I know it because I sent out a questionnaire to ten thousand telephone subscribers and I got back some two thousand replies and I have calculated the answers on 1249. Now I didn't load the question. I have the question here. The question says: "The Supreme Court has decided that the Legislature cannot change rules of practice and procedure which the Supreme Court adopts. Do you favor a constitutional amendment which would permit the Legislature to change such rules when in its judgment there is a public need for change?" The answers were: 877 "yes" and 266 "no." So when I say I believe firmly that the people of the County of Warren want to pass upon this amendment, I have some substantial information asking that their will be transferred into action by a passage of constitutional amendment.

A second point should be made. I do not think, with all deference to the men who comprised the Supreme Court, that the decision in the Winberry Case is intellectually honest. You have the Chief Justice, who at the time of the Constitutional Convention was the political leader of Essex County, the leader of some 800,000 people. Now what he thought "subject to law" meant at that time as a political leader of the most populous county has some effect. What he thought as a man leading his county about "subject to law" would have some influence, it seems to me. I say he expressed his

thoughts in no uncertain terms. He said in a letter to the Judiciary Committee dated July 29, 1947, from Maine, as follows, and he had before him a draft of the Judicial Article: "The rule-making power by Section II, Paragraph 3, is made subject to legislative control by the words 'subject to law.' The trend throughout the United States has been to confide the rule-making power to the highest court and to hold that court responsible for rules. I therefore suggest the deletion of the phrase 'subject to law.'" Very obviously it didn't take any long opinion for him at that time to conclude "subject to law" meant subject to legislative act. The Governor in the 1948 session knew what it meant because when the Legislature at that time passed an act, in which we stated that these rules would not take effect until we did something about it - we as legislators, what happened? At that time the Governor vetoed the bill and he said in his message: "The right of the Legislature on this subject is conceded." The Governor thought so in 1948. The Chief Justice in March of 1948 — he was no longer the political leader of Essex County; he was then Chief Justice — spoke to the lawyers down in Newark and this is what he said then. He was discussing the 1912 Practice Act and he talked about the rule-making power there. And he came down to speak about the old court. He said: "The old court never abrogated their rules and for the most part they still stand. That they had sound ground for their fears, however, is demonstrated by the fact that the provisions of the rule relating to the very matter that we are going to learn about this afternoon, the settlement of issues

before trial, were frustrated by the simple failure of the Supreme Court of that day to designate a commissioner in each county to carry out the provisions of the rules with respect to preliminary references. A burnt child dreads the fire, even when he has reached the age of three score and ten, and perhaps that is why the grant of rule-making power in the new constitution as to practice and procedure is subject to the law. Be that as it may; if I have any understanding of the intentions of seven men, I can say with confidence that that particular phrase of the Judicial Article will never need to be invoked." You have the pronouncement from Maine. You have the Governor's words at the time he vetoed this bill which we had hoped to pass, and then you have this pronouncement in March of 1948. Compare that with the decision. The decision says: "The phrase 'subject to law' is not only ambiguous but eliptical." No word in the law has more varied meanings than the term law, itself. There are 57 references in the constitution to the word "law" - not "subject to law" but "law" — "as provided by law," "as required by law." No one has definitely come out and said it doesn't mean an act of the Legislature. But the court here, when the Chief Justice was so sure what it meant on two previous occasions, says it is ambiguous and therefore he reaches the conclusion that it is substantive law and not adjective law. I say that that is not consistent with the previous pronouncements. I say when you find that type of reasoning, I think it is important for all of us, whether

newspapers are for or against the proposition - whether it is a good thing or a bad thing that the Supreme Court have the rules or not have the rules, that we bring something like that to the attention of the people. I think the important issue here today is not so much whether the Supreme Court shall have the rule-making power, but whether the constitutional framers originally intended that this power be granted to the Judiciary or to the Legislature. I don't think there is any doubt that they intended to give it to the Legislature. I don't think there is any doubt that the political leader of Essex County at the time he was in Maine and wrote to the Convention believed that that is what the words meant. And I say, any decision contrary to that now is an effort to seek power for a court where the court feels that it is doing a good job. I feel that the people haven't had a chance to vote on this issue and they should have a chance. I feel further that the decision rendered doesn't measure up intellectually to these previous pronouncements.

I have some other things that I would like to talk about. I might say that I wrote a letter to Dean Sommer asking him to appear here, hoping that he would further substantiate what is replete in the letter - what the Judiciary Committee meant - what the framers of the constitution meant. I wanted him to take the stand so that he could further substantiate it but I don't see him here right now, but I hope before the afternoon is over that he might get here.

I want to say also that I would like the opportunity to have a short rebuttal after some of the other people have had an opportunity to present their side of the case.

THE CHAIRMAN: Are there any other speakers who desire to be heard on behalf of the resolution? (Man indicated desire to speak.) What is your name?

MR. FRANCIS MC CARTER: My name is Francis McCarter of Newark. I will speak very briefly and at the peril of possibly repeating what has been said by some others as I did not get here at the beginning.

I feel very strongly that the greatest danger inherent in the present situation is the fact that by and large the laymen are not interested in this question and do not understand the various conflicts involved and that lawyers, we have found only too many times, when they understand it are afraid to speak. It is therefore the sort of situation under which those who think they understand it, and are not afraid to speak, must speak.

We are faced here with a situation where one of our three branches of government has adopted onto itself a phase of government which heretofore had been thought entirely separate. For who can deny that now the Supreme Court has taken onto itself the power to initiate legislation? That is what it has done. It is now apparent that under the guise of making rules for purely procedural

matters governing the procedure before the court, that our Supreme Court instead of merely reviewing the acts of the Legislature has now withdrawn from the Legislature a certain field of legislation, and taken it onto itself with no branch of government to review its acts. To me that is the most contradictory thing in our present constitutional framework, to conceive of a situation where one of the three separate branches of government has no branch to review its initiation of acts. To me, that is dangerous.

I do not think that we can always safely count on having a Supreme Court made up of Justices who like Cincinnatus will give up the sword of absolute power and return to the plow of purely judicial procedure. I can quote what has been said before at the Mid-Winter Meeting of the New Jersey State Bar Association when this whole subject was aired by those much more competent than myself, that absolute power corrupts absolutely. We have not that danger now but again, who can say when we shall. It is the right of the people of this State to make the determinations as to whether the interpretation of our constitution as laid down in the Winberry Case is that which they wish for their government. It is the obligation, I feel, of our Legislature to give that opportunity to the people. Thank you.

SENATOR FARLEY: Mr. Chairman, I would like to ask a question.

THE CHAIRMAN: Senator Farley —

SENATOR FARLEY: Mr. McCarter, are you the son of the late George W. C. McCarter?

MR. MC CARTER: I am.

SENATOR FARLEY: For the purpose of the record, did your father serve on the committee of the Legislature, appointed to prepare legislation relative to the problem created by the difference of opinion between the legislative body and the upper courts?

MR. MC CARTER: I couldn't say of my own personal knowledge. I believe he may have.

SENATOR FARLEY: For the purpose of the record, the Honorable George McCarter, a fine gentleman and wonderful lawyer, served on such a committee. Thank you, Mr. McCarter.

THE CHAIRMAN: Are there any others who desire to be heard in behalf of this resolution? If not, we will proceed to hear those opposed to its passage.

The first name I have is John W. Vanch, Jr., President of the State Bar Association.

MR. JOHN W. VANCH, JR.: Members of the Committee: May I as the President of the State Bar Association bring to your attention the result of the vote of our membership on this question at the Mid-Year Meeting last December.

At the meeting of the General Council of our New Jersey State Bar Association held at Trenton on October 20, 1950, the delegates representing the County Bar Associations throughout the State

adopted the following resolution:

"Be it Resolved by the General Council of the New Jersey Bar Association that it is the sense of this meeting that the rule making power now exercised by the Supreme Court of New Jersey should continue to reside in the Supreme Court and that the General Council recommend that this Association oppose any action which tends to extend that power either in whole or in part to the Legislature of New Jersey."

Pursuant to the resolution that I have just read of the General Council -- and incidentally, the General Council of the New Jersey State Bar Association is appointed by the various county Bar Associations. Each County Bar Association has delegates equal in number to the number of the members of the Legislature from each county. Pursuant to the resolution of the General Council, the Board of Trustees of our Association referred the matter to our next membership meeting.

On Saturday, December 9, 1950, at our Mid-Year Meeting of the New Jersey State Bar Association, the above resolution was approved by the membership by a vote of 123 in favor and 78 opposed. Prior to the vote, extensive argument pro and con was engaged in by the members present.

That concludes my statement officially as the President of the New Jersey State Bar Association. I would like to briefly make some comments personally as to my views in connection with this situation.

I practice law in Newark. I believe that it would be a mistake to adopt this resolution. Now, of course, I somewhat resent the inference that only those that talked in favor of this resolution have courage. I look at this dispassionately on the merits. As I see it, the question is now whether, as a result of the Winberry Decision, the present situation with reference to this question is sound on the merits. I think it is very unusual to go back and see what was in the minds of men, by interpreting letters from Maine, or wherever it was from. I think the question today is whether under the circumstances it is advisable, considering the fact that this system that has been in effect for a short two years, and that is not very long when we deal with a fundamental document like the constitution, to appeal or review the Supreme Court Decision in the Winberry Case.

Now, of course, as a lawyer, I strongly favor the continuation of the separation of powers among the executive, legislative and judicial. Such fundamental policy to be effective must, however, necessarily permit each branch to adopt its own procedural rules. Otherwise, if another branch may do that, the power of the legislative branch to control the judicial branch may be accomplished through procedural rules.

I appreciate the difficulty sometimes of drawing the line between procedural and substantive matters. However, if the court distorts its power to deal with procedural rules by in fact dealing

with substantive matters and in effect legislating, then we can rely on an aroused public and members of the Legislature themselves rising up in protest.

I have not heard of any aroused public complaining about this issue. Personally I have not heard of any aroused public rising up in protest, excepting as Senator Heyner has made reference to among the good people of Warren County. However, I don't know whether the subject was presented in such a way that the people of that county had a full appreciation of the arguments pro and con on that question. The bold question was submitted asking for affirmation, and we know oft'times when just a question of that kind is presented, sometimes the public with not a full appreciation of the merits, doesn't deal with the question properly. I believe it is preferable that the court have the right to adopt and control its own procedural rules, because in some cases the proper administration of justice requires relaxation of rules. If rules were subject to legislation, it would make them inflexible in application to cases until legislative amendment took place.

Meaning no reflection on the members of the Legislature, I sincerely believe that the preparation of procedural rules, and I emphasize that word "procedural" -- I speak just as strongly in favor of this body of our Legislature retaining the power in connection with legislation with substantive matters -- but in connection with procedural rules, I believe our court is better constituted under the present circumstances in the present state of

affairs with our Judicial Conferences where all the lawyers of this State have an opportunity to participate, to develop our rules.

The issue appears to have been raised that the court may abuse its power with reference to procedural rules and possibly assume power over substantive matters. No one has suggested that the power has thus far been abused. I do not think it ever will be abused. Formulation of the rules was the result of the cooperation of the Bench and Bar. The Judicial Conference provides a means for the Bar to influence amendments of the rules, if necessary. Any further agency to deal with procedural rules is unnecessary and improper in my mind.

Under our new court system, the court has assumed responsibility and lived up to it to greatly improve the administration of justice. We are the envy of all the other judicial systems in the United States. The improvement in the administration of justice is vital at this time and it would be unfortunate if any attempt was made to hamstring the court by the Legislature attempting to have power over the court's procedural rules.

We have the right to hold the court responsible for the proper administration of justice. It is the exclusive responsibility of the court. Where the responsibility rests, the power to adopt rules should also rest.

I submit that the objection from those that sponsored an amendment to the constitution to give the Legislature veto powers over procedural rules of court in order to prevent the court from

being dictatorial, overlook that the court is the last word on determining the constitutionality of statutes. I think that the issue that is raised is whether the court should retain the right to adopt procedural rules, and I submit that in the circumstances, it is preferable that the court have that exclusive right.

These remarks that I have made, other than submitting the record of the vote at the State Bar Association meeting, are my personal comments. Personally, I believe that it would be a mistake to adopt this resolution.

SENATOR FARLEY: Mr. Chairman!

THE CHAIRMAN: Senator Farley.

SENATOR FARLEY: Mr. Yauch, in your opinion how could you hold the members of the court responsible for the administration of justice if they have tenure of office?

MR. YAUCH: I think just as it is being done now, Senator; if there is an apparent distortion by the court of its power, the public, as has been done over the centuries, can deal with the question at that time.

SENATOR FARLEY: Isn't it true that the only recourse would be impeachment by the Assembly and trial by the Senate?

MR. YAUCH: At that time a constitutional amendment could be submitted to the public.

SENATOR FARLEY: Well, if it would be fair and sensible at that time, why would this resolution be unsound at this time?

MR. YAUCH: Because I don't think there is any necessity for it, Senator. I point out to you that constitutions are documents that we should live with for many years until circumstances make necessary a reconsideration of that fundamental document. Now here we have had a situation there we have gone to the people of New Jersey only as far back as 1947. We haven't learned to live with this constitution yet, and I don't think it is proper at this time under the circumstances to resubmit this question to the public. Besides, I don't see that there has been any abuse of this power. Therefore, there is no need, as I see it, for the public to assert itself by way of an amendment to the constitution at this time.

SENATOR FARLEY: I don't think that point is involved. It is not a question whether they ever abused it. I don't think anyone contends that they have. They are interested in the primary and fundamental basis whether they could ever abuse it. You related a vote by the State Bar Association; is that right?

MR. YAUCH: That is right.

SENATOR FARLEY: Was that an open vote?

MR. YAUCH: Yes, it was.

SENATOR FARLEY: And who was present?

MR. YAUCH: I might say this, Senator: At that time there was a motion made that a closed ballot be taken. At that time there were many men who spoke against the adoption of that resolution and spoke very, very sincerely from their viewpoint. The gentleman,

to whom you referred with such respect, and I agree with you heartily, George McCarter, stated his ideas at that time. It was open and free argument on the question. And I resent the implication that the lawyers of this State haven't courage enough to stand up and express their views and that they are influenced because of the power of the court.

SENATOR FARLEY: No one has given that implication. I am trying to get for the purpose of the record who was present when this vote was taken. Was the top court there at that time?

MR. YAUCH: Yes, I believe it was. It was a meeting and they are all members of our Association, and it was a meeting of our general membership.

SENATOR FARLEY: Mr. Yauch, would I embarrass you if I asked you to define the words "subject to law" before this Committee, as a lawyer?

SENATOR DAVIS: You mean since the Winberry Decision.

MR. YAUCH: As a lawyer who believes in precedence, when the Supreme Court deals with a question, I necessarily answer that that language means what the Supreme Court says it means.

SENATOR FARLEY: What do you think it means, Mr. Yauch?

MR. YAUCH: Well, I don't feel like speculating. I have a great respect for the law as it is established by our constituted authorities and I feel that under the circumstances that answers the problem as far as I am concerned.

SENATOR O'MARA: You are not saying, Mr. Yauch, whether you would have voted with the majority or minority opinion if you had been a member of the court when the case was decided.

MR. YAUCH: I wouldn't be that presumptuous.

SENATOR FARLEY: Are you familiar with the fact that the delegates who convened in 1947, that very hot summer in New Brunswick, were under the impression that "subject to law" meant what it had meant prior to the Winberry Case?

MR. YAUCH: I have heard what Senator Weyner had to say in his quotation from Justice Jacobs. I have heard all that. I haven't had an opportunity of interviewing all of the members of the Constitutional Convention.

SENATOR FARLEY: Would it surprise you to know that inquiry was made by other sections of the Constitutional Convention, such as Executive, to the Judicial Section for the purpose of determining what the phrase "subject to law" was prior to its adoption; would that surprise you?

MR. YAUCH: It would not. I do not believe we are dealing with the question of what took place in New Brunswick and what didn't take place, but with the situation as we find it. I think that is the basis on which we should consider this resolution.

SENATOR FARLEY: Thank you, Mr. Yauch.

THE CHAIRMAN: Any other questions by any members of the Committee? Senator Davis —

SENATOR DAVIS: If you were convinced that the Winberry decision was at variance with what a majority of the delegates to the Constitutional Convention had intended with respect to this particular clause, would your position on this resolution be the same?

MR. YAUCH: Yes, it would be.

SENATOR DAVIS: In other words, you feel that no matter what was intended by the delegates, as a matter of expediency the people should not be permitted to vote on the question now?

MR. YAUCH: I think as a matter of good government at this time, considering the fact that only a period of two years has elapsed - we have lived under the new constitution for that short time - I think that more time should elapse before we attempt to revise the constitution.

SENATOR DAVIS: Thank you.

THE CHAIRMAN: Any other questions by any member of the Committee? If not, I will call on Wayne D. McMurray.

WAYNE D. McMURRAY, Asbury Park, New Jersey, Member of the Committee on the Judiciary and Chairman of the Committee on Arrangement and Form, New Jersey Constitutional Convention, 1947:

I address my remarks to Senate Concurrent Resolution No. 10 which proposes an amendment to the Constitution of the State of New Jersey affecting the rule-making power of the Supreme Court.

I speak as an individual who was one of the lay delegates to the Constitutional Convention of 1947 which framed our existing basic law and as one who served on the Committee on the Judiciary which wrote that section of our Constitution establishing our Courts. I also speak in behalf of four other persons, laymen, who were also members of the Committee on the Judiciary: They are:

The Honorable Amos P. Dixon, Vice-president of the Convention
Mrs. Gene M. Miller, active in the League of Women Voters and Secretary to the Committee on the Judiciary
The Honorable Henry H. Peterson, Secretary of the South Jersey Port Authority
The Honorable George P. Smith, Vice-president of the New Jersey Turnpike Authority

I have consulted with these convention delegates and am authorized to state that they concur in the thoughts which I will express.

The author of Senate Concurrent Resolution No. 10, bases his demand for a constitutional amendment upon a statement made before the Convention on August 5, 1947 in which the speaker stated that it was proposed to give the Supreme Court power to make rules of practice and procedure for all the courts of the state, and that

the legislature would have power under the committee proposal to alter those rules—a power similar to that now possessed by Congress under the federal rules. To assume that this statement, as interpreted by the author of Senate Resolution No. 1, represented a desire on the part of the Constitutional Delegates to give power to the legislature to make the rules for the Supreme Court is contrary to fact. If there is one thing more than another that ran through the whole Constitutional Convention philosophy, it was that the delegates desired to give New Jersey a unified court system, supervised by a central authority, and divorced completely from politics.

During the arguments on the floor regarding the section of the Constitution relating to the Court structure, those speaking for the committee proposal, iterated and reiterated their desire for a single, powerful, Supreme Court that could supervise the entire judicial structure. I quote from a speech made by me on the floor of the Convention, reported in Volume 1 of the Convention proceedings on Page 498—502. The following excerpt, is I think, pertinent to our present discussion:

"The public in New Jersey has lost confidence in its state courts. It has not lost confidence in those courts because of the personnel of the courts, but it has lost confidence in them because of the cumbersome system under which those courts are organized. Litigation has become so complicated that the average citizen fears to go to court, instead of welcoming the chance to

go to court and having a legal determination of his legal problem.

"First of all, the public, if you will talk with the average citizen, wants a unified court system. The public thinks in terms of business organizations and military organizations, where unification is carried to a very high degree. No business could prosper without without unification and centralized control. No business could prosper if the president and general manager and all the vice-presidents had equal power. It is a cardinal principle in every successful business that there is one top executive who is responsible for all the activities of the business and who can overrule disagreements among the lesser executives. How could an army function if all the top officers had equal authority? We just merged the War and Navy Department, and we have merged them for the sole purpose of unification and centralized authority. There must be a single final authority somewhere. Business recognizes it. Military men recognize it. And we are coming, throughout the country, to recognize it in our courts."

That was the way I felt about our court structure in 1947, and that is the way I feel about it today. I do not think by any stretch of the imagination one can read into that expression anything but a determination that the Supreme Court should be independent of everything except the will of the people themselves.

From the same volume of convention proceedings I now quote from a speech by the Honorable Anna P. Dixon, Convention Vice-president, as follows:

"As I look at the courts through the eyes of a layman whose only wish is to see justice dispensed in a simple manner, I see them wrapped and tied with tradition and precedent, held as sacred, not to be broken or tampered with, and that adverse opinion is held by others more qualified to speak than I."

"Realizing the necessity for a change, my natural inclination has been to pattern the court structure on the pattern of successful, flexible and efficient business administration.

"The court system of NewJersey is big business. It is big business operated by the people of the State, and it should be simple understandable, flexible and efficient. It can be made so by following the pattern of successful business, with a single line of responsibility stemming from a single responsible head down through co-operating departments responsible to their heads. To my mind, the only way to attain that simple, understandable, flexible, efficient court system is to set up that definite responsibility. That, Mr. President and ladies and gentlemen of the Convention, is the pattern of the Judiciary Committee Proposal."

I do not find anything in Mr. Dimon's speech on the floor of the convention, which indicates that he envisaged anything but a strong Supreme Court, unhampered by political action.

I should like also to quote from a speech by the Honorable George F. Smith, delivered on the floor of the Convention and found in the volume of the convention proceedings referred to before. I quote Mr. Smith's own words referring to the hearings before the

Committee on the Judiciary.

"There was a persistent demand by all, particularly from the laymen, from most of the lawyers and many of the judges for a simplified court structure, a flexible court structure , one that could be made to dispense justice without the extravagant waste of time and money that is so typical of the court structure we have today."

"Many laymen and all of your lawyers and judges know from your own experience that there can be no compromise on this basic issue of unification. There is a manifest need for clear-cut authority, fixed responsibility, and able administration of the court system, and, not by any means least, the spotlight of responsibility on one man, so that if we, the people, and you the lawyers and you judges do not like what is going on, at least you will be able to look with unerring eye upon the man who is failing to do his job."

Certainly Mr. Smith contemplated a single, powerful and independent head for our court system.

Henry W. Peterson also spoke in behalf of a single, powerful, top court. Referring to the exhaustive study made by the Committee on the Judiciary he said on the floor of the Convention:

"The preponderance of evidence and testimony in that huge volume was toward a complete, integrated court system. *** The proposals that came to us from the most eminent authorities for a nearly perfect judicial system provided for one top court."

Serving with distinction on the Committee on the Judiciary and as its secretary was one woman, Mrs. Gene W. Miller. She, too,

worked for a powerful, supervisory court. In the volume of the Convention proceedings before referred to you will find Mrs. Miller spoke on this subject on the Convention floor.

Speaking of the philosophy which had guided the committee deliberations she said: "In our consideration of a court system the goal we sought was an independent judiciary—to put our courts as far as possible from political influence."

These are the words of the lay people who served on the Committee on the Judiciary and helped write the Judicial Article. These words set forth the kind of court structure they desired—a single powerful, independent top court. And nowhere in the whole convention proceedings do they indicate ever so slightly that they desired the legislature to have the rule-making power.

I think these quotations from the lay members of the Committee on the Judiciary, demonstrate with absolute clarity the thinking of the convention with regard to the sort of court it wished to create. For those who will take the time to read the proceedings of the Convention of 1947, it will become increasingly apparent that it was the will of the entire Convention to establish a strong judiciary, supervised by an independent high court—to again quote Mr. Dixon, "A supreme court that is really supreme."

There is one other aspect of this question which I do not think any fair-minded person can overlook. I refer to the forces seeking to change our Constitution by transferring the rule-making power from the Supreme Court to the legislature.

The Constitution is the basic law of the State. Constitutional changes should not lightly be made. This is not simply an opinion of mine, but is the fact historically. History reveals that ever since constitutional government came into being, there has been a reluctance to change the constitutional instrument except for good and sufficient cause, plus widespread public demand for such a change. The Constitution is the written will of the people. Obviously, it should only be changed when the will of the people demands it.

It would be a grievous mistake to change the Constitution merely because someone proposed a change, and in the ensuing referendum it slipped through because the voters were apathetic and did not vote in large enough numbers to insure that the vote represented the real will of the people. When there is a great welling up of popular demand for a constitutional change, the entire electorate becomes aware of the situation and the proposed change is thoroughly studied and debated and discussed, with the result that when it finally comes to the polls the decision of the electorate as nearly represents the will of the people as it is possible to obtain it.

There is no such popular demand for this change in our Constitution. The public, and I pretend to speak only for the lay public, is more satisfied with today's court system than it has ever been. So prompt has been the judicial process in the last year or two, that no longer do we hear jokes at the expense of our

courts as we did two or three years ago. The crop of jokes which made judges and lawyers the butt of their humor is dying out, for the reason that under the new court system the lawyer and judge enjoy positions of respect that they had often lost in the years prior to the institution of our new judicial system.

There is no demand for the change recommended in Senate Concurrent Resolution No. 10. The public likes its court system as it is today. This is not to say that it will not want changes, in keeping with the times, in the future. But certainly there is no welling up of popular demand for constitutional change at this time. And without such a welling up of popular demand, I submit that there is no possible justification for constitutional change. Just as it would be unwise to refuse to change the Constitution when widespread public demand calls for a change, so is it equally unwise to encourage change in our Constitution when there is no widespread public demand for such a change.

Another argument against this concurrent resolution and I am through. The great weakness, universally recognized, of our old court structure, was its susceptibility to politics. It was probably this susceptibility to politics and the cumbersome court procedures that were evolved as a result of legislative enactments affecting the courts, that, more than anything else, intensified the demand for a new constitution. Today, under that Constitution, we have a judicial system heralded throughout the world as the finest judicial system in existence. The cornerstone of its success lies

in the independence of our Supreme Court and its power to make rules of practice and procedure without legislative or executive interference. Anything that diminishes that independence of our Supreme Court strikes directly at the root of our whole judicial system.

Rules of practice and procedure are made today by the Supreme Court. Judicial conferences are held annually, and lawyers and bar associations are encouraged to make recommendations in regard to the rules. At the meetings of the judicial conference, of which I have the honor to be a member, even the layman's attitude toward the court rules is sought. Were this rule-making power transferred to the legislature it would mean that every lawyer and every judge would have to become a lobbyist in order to secure the promulgation of rules which be deemed necessary to the better operation of the courts.

May I remind you again that I speak as a layman in behalf of laymen. I have not attempted to go into the legal aspects of this question, not into the traditional right of the courts to make their own rules. I have sought to set forth in a layman's words the fact that the dominating philosophy of the delegates at New Brunswick was to have a strong, independent Supreme Court and I have tried to make clear that, in my opinion, changes should not be made in the Constitution unless they are the result of overwhelming public demand.

Finally, may I again call your attention to the fact that if we transfer the rule-making power from the court to the legis-

lature we will compel our lawyers and judges to actively enter the political arena in judicial matters, something that for years we have sought to eliminate.

SENATOR DAVIS: I understood you to say you were a delegate at the Constitutional Convention?

MR. McMURRAY: Yes sir, I was amember of the Judiciary Committee.

SENATOR DAVIS: When you voted to adopt, as I assume you did, the Constitution, what did you think the phrase "subject to law" meant in paragraph 3, section 2, Article VI.

MR. McMURRAY: As I mentioned at the outset of my remarks, or should have, I am a layman. I can't attempt to go into the legal meaning of the words. I can only say that when you interpret, as we did, what any phrase in the Constitution meant, you have got to take it in the light of not only one thing that was said but of everything that was said. And throughout the entire constitutional debate while references were made to the fact that "subject to law" meant subject to the law of the legislature, it might have meant subject to law in the sense, I suppose, that you refer to a law-abiding citizen, a person that regards law and custom and practice and all those things. There also was running through that convention the one very determined thing which was there was to be an absolutely independent Supreme Court and certainly that overweighed whatever technical interpretation might be placed upon it. In other words, I think that what the delegates meant is best found by reading the proceedings of the convention and taking one thing in the light of

another. It is a very long and involved answer, but it is the best I could do.

SENATOR DAVIS: Were you aware of the letter written by the present Chief Justice, reference to which is made in the statement attached to the resolution?

MR. McMURRAY: I must have been aware of it, I can't say that I was. It came up in the very first few meetings of the judicial conference at which I was not present because I was serving on another committee. There is no question, however, that at the time I did know about it because the printed reports were given to us.

SENATOR DAVIS: Did you participate in any effort to delete the clause that is now under consideration, the words "Subject to law"?

MR. McMURRAY: I did not.

CHAIRMAN: Are there any other questions? If not, I will call on Henry W. Peterson of Woodbury.

MR. HENRY C. PETERSON: Senator Wenncld and members of the Committee: I was a lay member of the Judiciary Committee of the Constitutional Convention. I attended every session and every minute of every session. I regret one thing - that what was said in Executive Session wasn't made a matter of record, because it was in Executive Sessions where there was more free discussion of what finally determined the Judicial Article than there was in the open sessions. That is, of course, as it should be. But, nevertheless, it would have been of great value in the future if those Executive Sessions had been recorded, even though they were not published at the time.

Why was it necessary to propose a new constitution? It was necessary to propose a new constitution because there was a public demand for a new constitution. That came about because, without reflection on the past Legislatures, nevertheless the Legislatures are burdened, as you are today, with a multiplicity of bills and provisions, etc., that affect sometimes very few of the people but still take your time. I think the present Legislature has before it one thousand and eighty bills. They won't all pass, of course, but for any one person as a Senator or an Assemblyman to sit down and study all of the provisions of one thousand and eighty bills in one legislative session is asking just too much. You have to depend on what somebody tells you as to the merits of the bills. In your present legislative index, I think there are over a

hundred bills before you that have to do with courts and crime.

As to the phrase "subject to law" as it is in the constitution, I was there when Judge Vanderbilt's letter from Maine was read and was talked about. May I make this observation as a layman, that all law isn't enacted by the Legislature. You have a great many administrative bodies that write rules and regulations that have the full effect of law. Of course, the Legislature can override them, but you still have them.

I lay claim, I think, to being one of the few people in the State of New Jersey who ever read all of the reports of the old Judicial Council of New Jersey from 1930 to 1947. It took a lot of pick and shovel work to dig them out of the Library, so that in 1947 when I was at the Constitutional Convention I would know something of the proposals of the Judicial Council. Every one of these reports, year after year, made to the Governor and to the Legislature, lamented the fact that the Legislature did not act on the recommendations of the members of the Judicial Council, and they were the outstanding members of the Bar in the State of New Jersey. Year after year they said, "We will not repeat the recommendations heretofore made, but we renew those recommendations." I have a volume here, the Seventh Annual Report. It is just full of administrative law and research made of administrative law of all of the administrative bodies in the State of New Jersey. It was prepared by Nathan L. Jacobs at that time for the Legislature.

Therefore, subject to law may be subject to what has been considered and decided by the Supreme Court at its last sitting as being the law of the land. I think that is true in Federal practice as well as it is true in the State of New Jersey. I think as a layman, if I were ever involved in litigation, I would rather have the Supreme Court of the State of New Jersey interpret the constitution or the acts of the Legislature or their own rules than I would anyone else.

Now I don't believe that any member of the Judiciary Committee or any delegate to the Constitutional Convention meant for the Supreme Court to write all of the laws of the State of New Jersey. The line of demarcation between procedural law and substance is a very, very fine line. And who is better qualified to know when you step across the line than the members of the Supreme Court. In my opinion, I would rest my case with their judgment.

I think either Mr. Comford or Senator Wayner made reference to the Practice Law of 1912 and I will read you from the Seventh Annual Report of the Judicial Council of New Jersey, 1936: "The Practice Act of 1912 was enacted only after many years of agitation. The act of 1934 providing for rules of civil procedure in Federal courts was the result of agitation by the late Thomas W. Shelton from 1912 to the date of his death in 1930. Three years later one of his successors as Chairman of the Committee of the American Bar Association dealing with the matter reported that it was futile to continue the fight, and yet the very next year Congress passed and the President signed the law which Mr. Shelton had battled for

for nearly two decades."

Of course, you gentlemen who are members of the Bar know all about the delays that were in practice prior to the adoption of the new constitution. The court system in the State of New Jersey as a result of the Constitutional Convention has been acclaimed by all other legal jurisdictions as being the outstanding judicial article in any constitution in any state in the United States. I think the results that have been attained by the courts of the State of New Jersey, down to the courts of the lowest level, are due to the administrative power that was given to the Supreme Court, and are matters of great pride, or should be, for any one of us who are fortunate enough to be residents of the State of New Jersey. I think we have today the outstanding court system in all of English jurisprudence, and I certainly am not in favor of changing with a scant two or three years' experience the constitution as it was proposed and as it was submitted because of one case in which there may be some disagreement.

SENATOR O'MARA: Mr. Chairman --

THE CHAIRMAN: Senator O'Mara.

SENATOR O'MARA: May I ask Mr. Peterson a question? You will concede, I think, Mr. Peterson, that a substantial part of the whole body of the law is composed of legislative enactment; will you not?

MR. PETERSON: True.

SENATOR O'MARA: I was interested in your observation

that you wished that the minutes of the Committee in its executive session had been published. Did you mean to infer by that or leave with the Committee the thought that the Chairman of the Committee -- By the way, Judge Jacobs, while he was not the Chairman, was the Vice Chairman and he acted for all practical purposes as the Chairman of the Committee due to the incapacity for part of the time of Dean Somers; is that so?

MR. PETERSON: That is correct.

SENATOR O'MARA: What I am interested in finding out is whether or not in your opinion the report of Judge Jacobs where he says, "However, the Legislature would have power under the Committee proposal to alter those rules of practice analogous to the power now possessed by the Congress of the United States," -- whether that statement by the Acting Chairman of the Committee was at variance with the remarks that were made in the Executive Sessions of the Committee and which have not been published?

MR. PETERSON: Senator O'Mara, I wouldn't go that far, except to say that the delegates or rather the members of the Judiciary Committee did pay particular attention to all that was said by a man such as Justice Learned Hand and others equally prominent, and particularly the Federal court procedure. We understood or I understood, and I conferred with Mr. McMurray over the weekend, that the matter of procedure was absolutely, positively, definitely a matter for the Supreme Court and the Supreme Court alone, not subject

to legislative amendment. When you get into substance of the law, that is a matter for the Legislature.

SENATOR O'MARA: I am not getting into the substance of law. What I want to know is whether or not the report of Judge Jacobs, wherein he said, "However, the Legislature would have the power under the Committee proposal to alter these rules of practice," -- whether or not that represented the thinking of the Committee on the Judicial Article or whether there was any dissent to that.

MR. PETERSON: We didn't know what delegate Jacobs was going to say on the floor of the Convention after the adoption of the Committee's proposal.

SENATOR O'MARA: Well, did any member of your Committee take exception to Judge Jacobs' remarks on the floor of the Convention?

MR. PETERSON: You can be certain if I thought it was going to resolve into this, I would have, because it was my personal opinion that the Supreme Court would have unlimited powers, not subject to amendment, to write the rules of procedure.

SENATOR O'MARA: Aren't the words of Judge Jacobs ambiguous when he says, "However, the Legislature would have power under the Committee proposal to alter those rules of practice"? That can't mean more than one thing, as I see it.

MR. PETERSON: No, but, of course, only Justice Jacobs could answer for his words.

SENATOR O'MARA: What I want to know is whether or not any member of the Committee on the Judicial Article took any exception to these remarks of Judge Jacobs when he purported to speak for the Committee on the floor of the Convention?

MR. PETERSON: I believe that after he made that remark on the floor of the Convention there were no further meetings of the Judicial Committee. The Judicial Committee had concluded its work.

SENATOR O'MARA: There were further meetings of the Convention, Mr. Peterson. This meeting was one of the very earliest meetings at which any articles were discussed on the floor. I think it occurred August 5, 1947, and as you well remember, the Convention sessions ran through to September the 10th - I think it was.

MR. PETERSON: That is correct.

SENATOR O'MARA: Now was there any objection or any exception taken on the floor of the Convention by any member of your Committee to the report which Judge Jacobs made on the 5th of August?

MR. PETERSON: I am certain there was not.

SENATOR O'MARA: That is all, sir.

THE CHAIRMAN: Any other questions? If not, I will call on Mr. Josiah Stryker.

Mr. Julian STEVENS: Mr. Chairman and members of the Committee: I speak as expressing only my own personal views. I am not willing to accept what was said by the Judiciary Committee or what has been said here as to the understanding of the public who voted for this Constitution. It has been the unquestioned practice of our courts for many years to interpret the statutes and Constitutions by the language used rather than by what was said by the committee that proposed that language or on the floor of the Legislature. That practice differs from the practice of the United States Supreme Court, but it is well established. Now, what Judge Jacobs may have thought this meant or what the committee or some members of the committee may have thought this language meant certainly had no influence upon the people who voted for this Constitutional provision. It is a fundamental principle of our government that when our highest court has construed the Constitution or a statute, that construction is accepted. I think we are bound to take the belief that that is what this ambiguous language meant. If it was considered important to definitely fix the power of the Legislature to overrule the Supreme Court as to its rules of procedure, appropriate language for that purpose could have been adopted. I know that when I read the draft of this Constitution I did not know what "subject to law" meant. Law is common law as embodied in our decisions. It consists of acts of the Legislature; it even consists in an appropriate case of municipal ordinances, and "subject to law" is ambiguous, and when our highest courts have decided what it meant,

I think that settles the question, and that the real question which is pending before the Legislature is whether it is wise or unwise to now attempt to change the Constitution so that it will mean something that our highest court has determined that it does not mean. It is to that that I wish to address myself.

It is conceded by those who favor this resolution that the Supreme Court is thoroughly competent to make rules. I think it would be conceded that there is nobody in this State as competent to make rules of procedure for the courts. I have great respect for the members of the Legislature. But let's consider a moment how these rules were made. The Supreme Court called to its assistance members of the Bar from all over the State. It had the suggestions of many members of the Bar as to what should be embodied in these rules. The Supreme Court considered the rules of the Federal jurisdiction and all other rules. They made a thorough study of the matter and then drafted the rules which we now have.

Furthermore, we have the practice inspired by the constitution of an annual Judicial Conference composed of all of the members of the Judiciary of the State - of representatives of each Bar Association of the State, certain public officers and members of the public or laymen. Any suggestions with respect to a change in these rules may be made and argued and discussed annually at this convention and then considered by the court as to whether they should be adopted or rejected. We have now a situation where if a rule is

found to be not as perfect as it might be, it can immediately be changed by the Supreme Court. If the Legislature were to enact a rule which was not considered as workable or as perfect as it might be, it couldn't be changed until the next session of the Legislature.

We have also the very beneficial provision in the rules that if a rule works an injustice in a particular case - any rule, with only one exception, may be modified in its application to that case. So that the rules as made, if it is found in a particular case that they work an injustice - their application may be modified. With respect to a legislative act, the court could only comply with the act, no matter whether it worked injustice or whether it did not.

Now there seems to be some fear that their power may at some time be abused. We have had the statement made that absolute power is unwise - absolute power corrupts, I think.

SENATOR O'MARA: "Corrupts absolute."

MR. STRYKER: All right, we will make it that way. As a matter of fact, the Supreme Court will be deprived and may be deprived of its absolute power if it ever is abused. I have no fear that it will be abused. But it will be time enough to consider this amendment if and when this power is abused.

Our whole system of government is based upon delegated power. The people delegate to the Legislature power. Power is delegated to the Governor. Power is delegated to the Supreme Court. What more effective measure could we have than to delegate to the most

expert body in this field the power to make rules of procedure? It seems to me that this whole argument is based upon a distrust of the courts. If we ever get in the position where we do not trust our courts, we will be in a very serious situation. But if the time ever comes, as I have said before, when this power to make rules is abused, then it will be time enough to present this amendment. I don't believe there is any public demand for this amendment. The old argument against the present constitutional provision is based upon some disagreement as to what this ambiguous language meant, some distrust of the court's decision, some fear that this power may be abused. All that I can say to that, is that the power has been wisely and skillfully exercised, that nobody suggests that it has as yet been abused, and that if it ever is, then will be the time to suggest an amendment of this kind.

SENATOR PARLEY: Mr. Stryker, to clear the record, this Committee has not heard uttered one word as to the incompetence of the court. To the contrary, the representation has been made of their integrity and ability. However, we are not dealing with ability or integrity in this issue. We are back to the primary theory of government - of checks and balances. Do you agree with that?

MR. STRYKER: I agree with the primary principle of checks and balances, but I think that has very little to do with this situation. All that this constitutional provision as construed by the Supreme Court does, is to permit it to make its own rules. Now

there would be very little check and balance as to rules which the Legislature might make. If the Legislature made rules, the court could do nothing but follow them. So that the idea of checks and balances has little to do with this question.

SENATOR FARLEY: May I ask you a question, Mr. Stryker. You are a lawyer in a title company. There has been a foreclosure under the so-called blue book involving incompetents and infant defendants. Procedures are determined by those rules and you are ready to pass title and you represent a client. They ask your authority involving the procedure you followed in the foreclosure. You give your authority as the blue book and they say to you, "Does that involve substantive right which should be governed by statute." What would you do in that instance?

MR. STRYKER: I am not a lawyer for a title company.

SENATOR FARLEY: You are not a lawyer?

MR. STRYKER: I am a lawyer, but not for a title company.

SENATOR FARLEY: I am asking you a very academic and fundamental principle involving rights of infant defendants that I have always known to be substantive rights. This blue book determines the procedure involving the rights of those infant defendants and incompetents. Would you say the court should fix those rights?

MR. STRYKER: I would say that whatever procedure was adopted must conform to the rules so far as they were procedural rules, and I would accept the judgment of the Supreme Court as to

the line between procedural and substantive law.

SENATOR FARLEY: But you still haven't answered the question. Would you say they involve substantive rights?

MR. STRYKER: You haven't told me just what you are dealing with.

SENATOR FARLEY: Dealing with infants and incompetents in a foreclosure.

MR. STRYKER: I would have to know more about your question before I could answer.

SENATOR FARLEY: You are dealing with infants and incompetents in a foreclosure.

MR. STRYKER: Do you mean with the procedure in the foreclosure?

SENATOR FARLEY: Their rights under the law.

MR. STRYKER: If I were dealing with notice and procedure, I would be clearly of the opinion that that was procedural law.

SENATOR FARLEY: What have you to say as to determining the right of limitations in any action at law? Do you think that is the right of the Legislature or inherently the right of the court?

MR. STRYKER: The court has not determined the right of limitations, except in the case of the substitute for the writ of certiorari, and the present constitution has limited the power heretofore exercised by the court, which was a discretionary power.

I challenge the statement that before this constitution the Legislature had the power to limit the application for a writ of certiori. It is my recollection that the court has taken the position that the Legislature had no such power, but that as a matter of practice they have followed it if it was reasonable.

SENATOR FARLEY: Do you have any knowledge of, or information as to whether the greater number of delegates at the Constitutional Convention were laboring under the impression that "subject to law" meant what it was interpreted to mean in the Winberry decision?

MR. STRYKER: I don't know and I don't believe anybody else knows what the greater number of delegates thought about it. But I will say this: The greater number of delegates, or all of them, did not adopt this constitution. The constitution was adopted by the voters. The question is: What does this law mean? The constitutional provisions may not even mean what the delegates, or some of them, may have thought about it.

SENATOR FARLEY: Of course, the constitution could not have been presented to the electorate unless it was first approved by the delegates.

MR. STRYKER: That is very true, but it would never have been adopted if it hadn't received a popular vote. Now the question is: What did this language mean?

SENATOR FARLEY: What did it mean? Do you know?

MR. STRYKER: I accept the decision of the Supreme Court

as to what it meant. I think that there was an error on the part of the Judiciary Committee in not using clearer language. I agree with the Supreme Court that the language is ambiguous. When the question came before them, it was their duty to interpret it in accordance with their views, as to what it meant.

SENATOR FARLEY: Would it surprise you to know that the members of the Judiciary Committee - I'm not speaking for all of them - were of the opinion that it was very clear and the language meant exactly what it said?

MR. STRYKER: I don't know as it would surprise me, but if they held it was not ambiguous, I would disagree with them.

SENATOR FARLEY: Would it surprise you to know that people on public platforms were interrogated concerning this particular phrase and represented it to be very clear and mean exactly what it said, prior to the vote and prior to the Winberry decision.

MR. STRYKER: I wouldn't know anything about that. I do know when a constitutional provision of the State is construed by our highest court that that settles the question.

SENATOR FARLEY: You don't think this is of sufficient import, relative to the checks and balances under our theory of government?

MR. STRYKER: I do not. I think, as I said before, there isn't any check and balance so far as rules prescribed by the Legislature are concerned. The only difference is that if the

rules prescribed by the Legislature met with wide popular disapproval, it may result in some members of the Legislature not being returned. Whereas if there is wide disagreement with the rules prescribed by the court, that can be remedied by presenting an amendment - something of this character.

SENATOR FARLEY: At least the public and the electorate of New Jersey have recourse at the polls every two years when there is election of an Assemblyman and every four years, of a Senator if they disagree with the rules promulgated in either House; is that correct?

MR. STRYKER: That is true.

SENATOR FARLEY: If perchance - not that I say it would ever happen - there was an abusive administration, the only recourse would be a constitutional amendment under your interpretation; is that correct?

MR. STRYKER: If the power was abused, it could be corrected only by a constitutional amendment. I would guess though, Senator, that no member of the Legislature has ever failed of election because of some procedural rule which was adopted by the Legislature.

SENATOR FARLEY: Well, of course, that is a matter of conjecture, Mr. Stryker. You and I don't know those things.

MR. STRYKER: Of course, I don't know it, but I've been interested in rules for about fifty years and I think if any member of the Legislature had failed of election because of some

legislative rule adopted, that perhaps would have created quite some impression and been quite publicly proclaimed.

SENATOR DAVIS: Mr. Stryker, I would be interested to know whether the Winberry Decision added to or clarified the ambiguity that existed in your mind with respect to the meaning of the phrase "subject to law"?

MR. STRYKER: I would say, Senator, that when there is ambiguous language — and this isn't the only instance of ambiguous language; sometimes it even occurs in acts of the Legislature — and the highest court has determined what it means, that is what it means. Otherwise, I don't see how our government could be conducted.

SENATOR DAVIS: As I recall the opinion of the Supreme Court, the majority opinion said that this phrase meant subject to substantive law. Now have you any idea of how substantive law as used in this phrase can have any reasonable relation to the clause itself, giving the Supreme Court the right to prescribe rules of practice and procedure?

MR. STRYKER: I have an idea. It is appropriate, as I see it, for a court to prescribe the rules of procedure, which the court administers. It would be very inappropriate for a court to enact or attempt to enact substantive law. I think that I have that idea. As I said before, I have the idea that this language was ambiguous. I think that if the framers of the constitution wished to make it clear that the Legislature was to have the power

to change the rules of the Supreme Court, it would have been very easy to have used language which would have made it clear. As a matter of fact, I interpret what the Chief Justice wrote as an effort to have the constitutional provision clear instead of ambiguous. I speak of the Chief Justice, I mean Mr. Vanderbilt. This was before he was on the bench.

SENATOR DAVIS: Having in mind the principle of constitutional construction - that you have to construe, if possible, a constitutional sentence so as to give effect and meaning to every word in it - don't you think that the result of the Winberry Decision is to make the phrase "subject to law," as used here, redundant?

MR. STRYKER: I do not think so. I think if it meant subject to substantive law, it would not be redundant.

SENATOR O'MARA: On an intirely different tack, I would be interested in your observation as to whether or not all that was said in the majority opinion in the Winberry Case was necessary to the decision of that case on the facts that were presented to the court or whether it is mere dictum.

MR. STRYKER: I don't believe that I can answer that question. I might have difficulty in answering that question with regard to many other opinions.

SENATOR O'MARA: As I recall the facts, the question involved there was whether or not the limitation as to the time within which an appeal could be taken was the limitation as expressed

in the old statutes regulating appeals from the court - I think it is the Court of Chancery, although I am not sure about that--or whether it was the new limitation of time as set out in the rules adopted by the Supreme Court. Now the point was, as I recall it, that after the adoption of the shorter limitation in the rules, there was no attempt on the part of the Legislature to override that limitation. In other words, the rule-making limitation went unchallenged by the Legislature. It would seem to me, therefore, that the square question presented to the court was whether or not that new limitation as set out in the rule-making power should govern, and since there had been no attempt of the Legislature to change it, it seems clear that it should govern. My difficulty is this: Wasn't that the only question really which was before the court for decision, and is not the observations made in the majority opinion of the court as to the general power of the court to make rules regulating practice and procedure, unregulated or unrestricted by any legislative enactment, mere dictum which would not have the controlling force of precedence as to succeeding opinions of the court?

MR. STRYKER: I think that there was no actual conflict between the Legislature and the court in this case.

SENATOR O'MARA: That is right.

MR. STRYKER: But I think also that the majority of the court based its decision not only on that fact, but also in the

interpretation of the constitution, and I think they were wise in so doing because it was important that the meaning of that provision as construed by the court should be made public shortly.

SENATOR O'MARA: My point is this: Would the expressions of the majority opinion in that court in your opinion have the same binding effect as precedence for future decision if they had been squarely necessary for the decision of the issue before the court, as if they were not?

MR. STRYKER: It seems to me that when the court bases its decision on two different grounds, each of which supports it, that it can hardly be said that either of those are mere dictum, even though either one of those grounds would be decisive of the case.

THE CHAIRMAN: Any further questions? If not, I will call on Attorney General Parsons.

HONORABLE THEODORE D. PARSONS, Attorney General.

As some of you are perhaps aware, I appeared in the Supreme Court last year and submitted a brief and argued the cause entitled Winberry vs. Salisbury which involved the construction of Article VI, section 2, paragraph 3 of the Constitution of 1947, which provides that the Supreme Court shall make rules governing the practice and procedure in our courts. The arguments which I there presented on the construction of this clause prevailed and the ultimate decision of the Supreme Court in that cause reflects my views on the meaning of this clause in our present Constitution.

I do not propose to discuss here the pros and cons of the

arguments which sustain the legal soundness of that decision, but I do desire to address myself to the only issue which is properly before this Committee, that is whether our Constitution should now be amended in accordance with the proposal in Senate Concurrent Resolution No. 10 to make the power of the Supreme Court to make rules of practice and procedure subject to the Legislature.

I am firmly opposed to the proposed amendment and would like to state briefly my reasons.

In the first place I am opposed to any change since our present judicial system is working well and has been a complete and outstanding success. The practice and procedure established in our courts under the rules of the Supreme Court incorporate the most modern and advanced principles in this field. In a very short period of time under the guidance and direction of the Supreme Court our entire judicial system has earned national recognition and is widely acclaimed throughout the country as being a model in organization and efficiency. In a recent article in the American Bar Association Journal, Mr. Charles C. Porter of the bar of the State of Oregon pointed out that of all the states NewJersey took top honors for high judicial standards and had incorporated in its practice the highest number of the recommendations for minimum standards of judicial administration approved by the Association (36 A.B.A.J. p.614, August 1950). Not only has NewJersey been the subject of special study by reform groups in other states of this union, but delegations to study our system have been sent here from as far away as Japan and New Zealand.

The quarterly statistics compiled on the operations of all of the courts by the Administrative Director establish beyond any question that the new practice and procedure has greatly facilitated the trial and disposition of cases, and that the former delays for which our courts were criticized have been largely eliminated. As a practicing lawyer of many years experience in this State, I can personally assure you that any litigant can today get a prompt trial in any of our courts.

In conclusion on this point then it is my view that the present system has over a period of 2-1/2 years been a marked success and should not be changed except for compelling cause.

No one to my knowledge has contended that the court's rulemaking power has been abused. The proposed amendment is urged, however, on the theory that there may be abuse. Whether the ultimate rule-making power is vested in the Court or the legislature a possibility of abuse will always exist. History has shown in our own state and in many other jurisdictions that from time to time legislatures have failed to exercise their power to make rules of practice and procedure or otherwise abused it, and similarly that courts which have had the power have not always used it to good advantage.

I am convinced that our present Court is building a firm tradition for the proper use of the rulemaking power which is becoming so embedded in the thinking of our lawyers, judges, and citizens that it will not be easily overturned in the future. The Court has provided by its own rules for a Judicial Conference to be held each year consisting of all of the judges, representatives of

the state and county bar associations, the Board of Bar Examiners, ten distinguished laymen, representatives of the Legislature, the Attorney General, the County Prosecutors, and the Administrative Director of The Courts "to consider the status of judicial business... to improve procedure in the courts, and to exchange ideas with respect to the administration of justice." There is little liklihood that such a system will ever result in any abuse by the Supreme Court of its rulemaking power, but <u>if and when</u> abuse arises, it will <u>then</u> be time for the people to remedy the situation by constitutional amendment.

In any event we must not lose sight of the fact that the rulemaking power is confined to practice and procedure, and that the substantive law is still the province of the legislature. The theory of "checks" and "balances" which is of great importance in connection with certain powers of the executive, legislative, and judicial branches of the government is not villiated here. Indeed, as Dean Roscoe Pound has pointed out in his article entitled THE RULEMAKING POWER OF THE COURTS (12 A.B.A.J. p. 599) any attempt by the legislature to prescribe rules of practice in the courts violates the constitutional doctrine of the separation of powers:

> " None of the co-ordinate and co-equal departments of our polity can do its work effectively if the minute details of its procedural operations, as distinct from the substantive law it applies or administers, are dictated by some other department. That the legislature should claim such a power is something that comes down to us from the extravagant claims of the legislatures in the period of the legis-

> lative hegemony. The Legislature ought to leave judicial procedure to the judiciary as the judiciary must leave legislative procedure (except as prescribed sometimes by State constitutional provisions) to the Legislature."

The second major point which I desire to emphasize is that the power to make rules of practice and procedure can be exercised much more efficiently by the courts than it could be by the Legislature. The Supreme Court itself is composed of seven justices, each of whom has been engaged in the practice and the study of law as a life-time career. The justices devote their full time and energies to the judicial system and by reason of their activities are afforded the opportunity to observe the operations of the rules of practice and procedure in all of the courts. Similarly they are aided in their rulemaking activities by other trained judges and lawyers, directly, and through the Judicial Conference, and through committees of the state and county bar associations. Finally, they have the assistance of an administrative staff made up of experienced lawyers who are in daily touch with problems arising in the court system. Again drawing on my own experience as a trial lawyer and as Attorney General, I can assure you that it has already become a well settled practice in this State for any lawyer who, in the course of his work in a particular law suit, discovers a rule of practice which is not working well, to bring it to the attention of the Administrative Director, or one of the committees of the Judicial Conference or bar associations. They in turn bring the matter to the attention of the Supreme Court

in a report with recommendations, and rule amendments are promptly promulgated where necessary. All of the individuals taking part in this process then are trained lawyers and judges spending their full time in the law, and aided by years of experience.

Now on the other hand, let me very frankly state that our Legislature---which has other responsible duties far more important to the State than making court rules--is not an organization which is in a position to undertake rulemaking as effectively as the courts. In the course of the present session, I have attempted from time to time to review some of the more than 1,000 bills introduced in the two houses dealing with the substantive law of our state. I have marvelled that the members of the Senate and the House of Assembly have been able to find the time to study and review these measures, many of which are complicated matters of vital importance to our people. When it is recalled that the members of the Legislature are engaged only part-time in this public service, and that most of them are not lawyers the true extent of the burdens already borne by them becomes apparent. I think it is perfectly plain that the Legislature is not in a position to assume the further tremendous burden of undertaking to make or revise the court rules. If they attempted to do the job on the scale and with the thoroughness with which the Supreme Court has done so, they would have no time for other business. On the other hand, if they did not undertake the whole job, it would mean that they would never really become thoroughly familiar with the broad field and would merely intervene from time to

time, perhaps as the result of some pressure group, to change a particular rule without fully appreciating the true implications of the rule in the entire system.

With your permission I would like to quote again from Dean Pound's article, where the problem is stated admirably:

> ". . .Moreover, it is easy to bring professional opinion to bear upon the rulemaking power, whereas the difficulty of procuring legislative action with reference to even the most crying needs of judicial procedure is notorious. Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about; they will not, as has happened more than once when committees of the American Bar Association have gone before Congressional Committees--they will not have to be taught the existing practice and the mischief as well as the proposed remedy. When rules of procedure are made by judges, they will grow out of experience, not out of ax-grinding desires of particular law-makers."

Under the present system the Supreme Court is in continuous session, and if a rule is not working well today, it can be changed tomorrow. This flexibility is not possible in the legislature. For example, if today I brought to your attention the need for a rule change, by reason of the rules and laws governing the introduction and printing of bills, the necessary references to committees, the successive readings and the like, legislation could not be enacted to remedy the rule in question until the next session of the

legislature. In the intervening months the judges might be compelled to follow a statutory rule which was really causing an injustice to litigants.

In conclusion then, may I state that our present system has made our judicial establishment the best in the country. The Supreme Court has not abused its rulemaking power, but has used it well for the common good. I respectfully recommend that Senate Concurrent Resolution No. 10 should not become law.

SENATOR DAVIS: Mr. Chairman, may I ask the Attorney General a question?

THE CHAIRMAN: Senator Davis--

SENATOR DAVIS: Attorney General, don't you think not only whether there should be an amendment, but when the amending shall be done, is a question that can be safely left to the people?

MR. PARSONS: I thoroughly agree with you. If there is a question whether there should be anamendment, it should be left to the people, but I think in the first instance, under our constitution, the determination of whether there should be an amendment and when it should be submitted to the people rests with the Legislature, and it seems to me that this Committee, in determining whether an amendment should be submitted to the people, in itself then is determining whether our court system is creeking and breaking down. While the court system is going, I can't see why the Legislature should say that this amendment should be submitted.

SENATOR DAVIS: If I may paraphrase your position, your position

is that you do not feel that there is a sufficient demand at the popular level that the machinery of the amending process should be put in motion, although you concede that it is always proper that the people should have the determination of that question if a sufficient number are interested to justify the referendum; is that your position?

MR. PARSONS: No, my position is this: I can conceive no reason for submitting to the people what really is a moot question until there arises a need for an amendment. It seems to me that the legislature, in essence this committee, representing the legislature, bears the responsibility of determining whether there is a need for the amendment and until that need arises, then it seems to me it is a moot question to submit an amendment to the people.

SENATOR DAVIS: Even if we were to assume that a majority of the people wanted a change made in the rule?

MR. PARSONS: I certainly agree with that. Even if a majority of the people wanted it, until there is a need for the change and you have a smooth-running court system, it seems to me that no amendment should be submitted, sir.

SENATOR FARLEY: Mr. Attorney General, my questions are predicated academically on the theory of checks and balances. I agree with you that we have men of real ability in the top courts and all the courts. I think we have done an excellent job. Mr. Attorney General, I would like to ask you a question. In your every day duties when you run across a conflict of authority or a deficiency in the law, you don't

wait until that deficiency occurs, do you? Don't you make a recommendation to the Governor or the Legislature to correct it pronto?

MR. PARSONS: I try to.

SENATOR FARLEY: In such circumstances, rather than to permit a deficiency, and I say, possibly - I don't want this misstated because I have the utmost respect for the court - administration may be abused, fundamentally, don't you think it is sound to let the people determine whether or not the jurisdiction should be that of the legislature?

MR. PARSONS: I do not. I most vehemently and strongly believe that so far as the practice, the procedural rules in the court involving the technicalities of law, are concerned, especially in this State, of which I am proud -- and I think one of the things in this State of which we should be doubly proud is that we have a bi-partisan judiciary; we have representation on the courts from both parties -- the safest method and manner of handling them is by the trained personnel that are experienced with them.

SENATOR FARLEY: No question about it; if there is a hiatus as to jurisdiction, you as Attorney General certainly would make a recommendation that the matter should be disposed of forthwith, would you not, Mr. Attorney General?

MR. PARSONS: As I understand the law at the present time, there is no hiatus.

SENATOR FARLEY: That is correct. It is a question of whether or not the legislature should permit the people to vote on this.

MR. PARSONS: Certainly it is a legislative question. What I am trying to say to the chairman and the committee is that sound judgment indicates that a sound system should not be tampered with.

SENATOR FARLEY: Regardless of whether the jurisdiction is properly placed or improperly placed?

MR. PARSONS: Now you are asking me to say that the Supreme Court decided erroneously, which I will not do. I believe they decided properly.

SENATOR FARLEY: Mr. Attorney General, I have too much respect for the court to come to those conclusions. Basically, the question of jurisdiction first of all is inherent in the legislature; is it not? Increased and decreased jurisdiction of the court system is inherent in the legislature; isn't it?

MR. PARSONS: I don't understand that.

SENATOR FARLEY: The setting up of the court system must be determined first by the legislature.

MR. PARSONS: It is in the constitution.

SENATOR FARLEY: And without the function of the legislature, they couldn't possibly operate, could they?

MR. PARSONS: I don't suppose I could operate without your help either.

SENATOR FARLEY: The responsibility of jurisdiction, as far as the mechanics is concerned, is determined by the legislature by the mandate of the people to determine that you have a court system?

MR. PARSONS: Senator, I don't get the point. Maybe you and I are

far apart. I don't get what you are driving at.

SENATOR FARLEY: Let me ask you three questions. Retract all the others. What do you think is the function of the legislature relative to substantive rights, relative to policy and relative to jurisdiction? Do you think they belong to the courts or to the legislature?

MR. PARSONS: Substantive rights -- there is no question but that that belongs to the legislature. The legislature can act on substantive rights so far as it acts within the constitution.

SENATOR FARLEY: What would you say with respect to jurisdiction?

MR. PARSONS: The legislature, in my opinion, cannot interfere with the jurisdiction of the courts as set up in the constitution. Where the constitution has given the right to the legislature, then it may.

SENATOR FARLEY: I think you misinterpret the question. With new laws, you certainly would determine who would have jurisdiction, whether it be a governmental agency or by a judicial branch of government?

MR. PARSONS: That is right.

SENATOR FARLEY: As far as new laws are concerned, jurisdiction is determined by the legislature?

MR. PARSONS: Yes.

SENATOR FARLEY: What would you say about policy?

MR. PARSONS: Frankly, I don't get you on that.

SENATOR FARLEY: Thank you, Mr. Attorney General.

THE CHAIRMAN: Any further questions of the Attorney General? If not, I will call on Wayne Dumont.

MR. WAYNE DUMONT: Mr. Chairman and members of the Senate Judiciary Committee: Following in the footsteps of the Attorney General, I may seem very humble in these opinions, but I would like to take a few minutes to express them. In the first place, I feel as a member of the Bar and as an individual, that the court system has been profoundly effective and has done an excellent job in the rule-making field. The rules of this court system, set up to be effective September 10, 1948, were in the first instance formulated by a committee consisting of members of the Bench and Bar all over the State of New Jersey. Due consideration was given to the promulgation of the rules that were made and to the kinds of rules that were needed. And as a member of the Bar, I am rather pleased with the fact that the State Bar Association is opposing this resolution to transfer the rule-making power or the final say on the rule-making power from the Supreme Court of New Jersey which prescribes the rules for all of the courts in the State, to the Legislature.

I don't presume to know what was necessarily in the minds of the delegates at the Constitutional Convention at the time that they wrote the article setting up the Judiciary, but I do feel that the record that the court system has made in the past two and one-half years is an outstanding one in this State.

I should like to call the attention of the Committee and the

people here to the fact that the United States government was set up the same way as the State government on a system of checks and balances, a division of the government into three branches: the Executive, Legislative and Judicial. Each one of these branches was to act as a check and/or a balance on the other. I might refer you to a statement that was made by President George Washington back in September of 1796, 155 years ago, when in an address which was made just prior to the expiration of his second term as President of the United States he urged the continuation of the division of the government into three branches. And he warned against the encroachment of any one of these branches on either one of the other two. In other words, he had found the system of checks and balances had worked well during those eight years in which he had been President. One hundred and fifty-five years later, that advice is valid and good and should not be changed. I would like to quote you just briefly a number of the authorities that have been brought out in support of these arguments.

In the first place, former Dean Pound of the Harvard Law School, recognized as an outstanding authority in procedure as well as other fields of law, made this statement: "If we demand that our courts do things, we must give them the power to do things. We must set them free to do things. We must hold to the substantive law indeed, but we must not make the substantive law nugatory, by loading the courts with procedural requirements. We must cease to prescribe the details of procedure by legislation."

There have been many public statements quoted in publications since the adoption of this court system in New Jersey. From the pages of the American Judicatory Society Journal in February, 1948, this statement appeared: "Next September 15th the people of New Jersey will exchange America's worst court system for America's best. In adopting a new constitution last November the voters moved their state, so far as the machinery of justice is concerned, from the foot to the head of the class." I might say in passing that I don't agree with the statement that our court system before the constitution was anywhere near the worst in the United States. I do think that the present court system ranks with the best of any state in the Union.

I might also quote from the NewYork Times, and this was in the Magazine Section, January 25th, of this year: "The courts of New Jersey are now run as a business and undue delays have been eliminated. [illegible] has been accomplished in the past two and one-half years, but only after a hard fight. It was realized, as England realized many [illegible], that lawyers alone corrupt and law's delays. Some civic [illegible], lay-leaders and the press got behind the fight. The [illegible] responded to the pressure. A new constitution was [illegible] which, among other things, provided for a unified judicial system under the leadership of the Chief Justice. The results have been [illegible]."

The record that the courts have made has been borne out in the annual reports of the Administrative Director. I think all of us who

have practiced in the courts realize full well that the system of pre-trial conferences has greatly speeded up the calendar so that cases may be tried expeditiously, if they have to be tried at all; that the rule-making power which was placed in the hands of the Supreme Court of NewJersey and which was worked over by members of the Bench and Bar from all over the State has resulted in a set of good rules, which have made it possible to get cases on for trial in any court in this State within a period of a few months, so that all calendars at the present time, or almost all calendars are just about up to date.

I would like to see that system duplicated in any other court or any other state in the United States for these reasons: Because the court system has worked well. Because the rule-making power which has been committed to the Supreme Court of NewJersey has been exercised with fairness and justice and expedition to all the people who come before the courts of New Jersey. And because I think this resolution strikes and starts to impair very vitally and fundamentally, to break down the system of the three branches of government, the check and balance system, I urge respectfully and strongly that this resolution be disapproved. I don't think it is designed so much for the benefit of the citizenry as perhaps for political capital in the administration of justice in this State.

SENATOR O'MARA: I would be interested, Mr. Dumont, in the reason for your last remarks. No political motive has entered this hearing.

MR. DUMONT: It seems to me that when you have a good system, sir, and when a system works, that there is no reason for changing that system

so long as it is working well. Now, it seems to me all of these authorities, who have cited the efficiency and expedition with which the NewJersey courts have acted and worked, cannot be wrong. As a member of the Bar I have had a change -- a little opportunity, at least -- to observe the court system functioning myself. I don't think that a resolution of this kind would be proposed except for the purpose of perhaps making political capital out of the administration of justice in this State.

SENATOR O'MARA: Your remarks might not have been prompted by the fact that you are a candidate against the man who sponsored the resolution?

MR. DUMONT: That could be.

SENATOR O'MARA: May I ask you one more question?

MR. DUMONT: Go right ahead.

SENATOR O'MARA: I understood you at the outset of your remarks to extol the system of checks and balances as exemplified by the Government of the United States - the three branches of the government - is that right?

MR. DUMONT: That is right.

SENATOR O'MARA: You realize, of course, that the rule-making power of the Federal Courts is subject to the Congress of the United States?

MR. DUMONT: Yes, I realize that.

SENATOR O'MARA: So that the system of checks and balances in our State government by analogy would work just as well if the rule-making power of the court was subject to action of the Legislature?

MR. DUMONT: I do not agree with that.

SENATOR O'HARA: Show me the difference.

MR. DUMONT: In the first place the court system set up in this State prior to the adoption of the constitution of 1947 resulted in many delays, as we know, to litigants. I don't know of my own knowledge as a matter of research just how much the Legislature had to do with the promulgating of the rules of court prior to that time. From my own observation of how the court system has worked since September 15, 1948, it seems to me the rule-making power is in the right place and I don't see any reason to give it to the Legislature, despite the fact that I have great respect for their action when they are informed and properly informed as to the opinions of the people and as to their choices on vital issues.

SENATOR O'HARA: Does that thought come down to this, that you don't have as great trust in the Legislature of New Jersey as the Congress of the United States?

MR. DUMONT: I would say I have more trust in the Legislature of New Jersey than the Congress of the United States.

SENATOR O'HARA: Then I don't follow the logic of your reasoning, - if you didn't have trust in the United States --

MR. DUMONT: I was talking about the court system in this State.

SENATOR DAVIS: Mr. Dumont, can you point out a single act of the Legislature that relates to practice and pleading adopted prior to 1948 that adversely affected the administration of justice in this State?

MR. DUMONT: No, I can't refer to any specific instance. Neither can I refer to any specific instance since September 15th where the rules of the court damaged the people.

SENATOR DAVIS: You are familiar with the transfer of causes act, I assume.

MR. DUMONT: I have had a little experience with it, not a great deal.

SENATOR DAVIS: You realize, I suppose, that one of the arguments advanced for the integrated system was the avoidance of harassment to litigants --

MR. DUMONT: Yes.

SENATOR DAVIS: -- by being thrown out of one court when their suit should properly be brought into another.

MR. DUMONT: That is right.

SENATOR DAVIS: In your opinion, did the uniform transfer of causes act make that possible?

MR. DUMONT: I believe it did. I am not sure that it made it solely possible, but I think it is the main reason behind it.

SENATOR DAVIS: So that the criticism of judicial administration leading to the new constitution was largely directed at the Judicial Department rather than the Legislative, wasn't it?

MR. DUMONT: No, I don't think so.

SENATOR DAVIS: What was there that the Legislative Department did with respect to the practice and procedure in the courts that you feel caused or invoked any criticism of the Legislative Department

in that respect?

MR. DUMONT: I didn't say there was any criticism of the Legislative Department. I grant you that the present court system is a great improvement, although I don't agree with the American Judicature Journal that we previously had the worst court system in the nation. I agree with you that the transfer of causes is a very fine thing for parties who go in and have a question of law and equity, so they don't have to be concerned with trying their cases in two different courts.

SENATOR DAVIS: Do you subscribe to the position that the Attorney General made here a few minutes ago that no matter what a majority of the people of this State want on a matter affecting the constitution, that we should set up ourselves as judges to say what is good for them and not good?

MR. DUMONT: How can you say whether a majority of the people of New Jersey want a change?

SENATOR DAVIS: You answer my question.

MR. DUMONT: If a majority of the people in the State of New Jersey wanted a change, and I were convinced of that, that would be another matter. But I am not convinced of that.

SENATOR DAVIS: Do you, or do you not, subscribe to the position of the Attorney General on that question?

MR. DUMONT: His position, as I remember it, was not that you were trying or that we were trying to set up ourselves as judges as to what the people want. I agree with him that that is a moot question.

SENATOR DAVIS: And that no matter even if a majority of the people of the State want an opportunity to express themselves on this question, you feel that it is not good for them and we should deny them that opportunity to vote on it.

MR. DUPONT: If the majority of the people of the State want a decision on any question, and the fact that the majority of the people want that is made known, then I would certainly approve that a majority of the people have something to say about the question.

SENATOR DAVIS: That is all.

THE CHAIRMAN: Any further questions? I will now call on William Boyle of Camden.

JUDGE WILLIAM T. BOYLE: Gentlemen, I am not here to repeat a lot of matters that have been discussed. For many years, oh, several decades maybe, since I was admitted to the Bar, the lawyers of this State struggled for a new judicial system and now we have one. The previous speaker referred to the praises of this system from other states, and I know there is hardly a lawyer in any of the states of the Union who doesn't hold up and admire the recent system that has been established in the State of New Jersey.

Now that struggle was won by hard fighting. I remember as a member of the Judicial Council coming up to the Legislature over the years. I remember a young friend of mine was a member of the Legislature. We had a meeting at the Cartaret Club. He was very enthusiastic for our amendments. Some years ago down our way in Camden County, they had a political boss. It seems one of the members of the Legislature leaned back to the other fellow and said, "Harry, I changed my mind about this bill." And Harry says, "Oh, hell, Frank, general orders number one." Now this young man later on when I tried to get the vote of the members of the Legislature said to me, "General orders number one." I am referring now to the many struggles in the Legislature over the years in order to obtain this system, and now what are we back to? We are back to that ugly ogre of the recall of judicial decisions. Say what you please; we have heard it all over here. There is a criticism of the Chief Justice of the Court for writing this opinion. I can't see how some of the

men can square themselves as to whether the Chief Justice is the man of integrity the way they describe him. They refer to his opinion in the Constitutional Convention, but everybody knows that when the Winberry opinion was written, it was written by a Justice under his oath and writing, so to speak, and apparently this gathering indicates it, for history. I don't say that the original opinion was a cornerstone opinion. But when the opinion of the Chief Justice was written, he wrote under his oath as a Justice of the Supreme Court. That was his view of the law. He so declared it and he was not alone in that opinion. He was supported by a majority of the justices of the court.

Now over the years, I have been trying in every way to respect constituted authority. The opinion of the Chief Justice, from my training over the years, is entitled to the weight that it is given, especially when it was supported by a majority of that court. And, therefore, whether you quibble about the distinction between substantive law and procedural law, nevertheless, thedecdecisions were clearly outlined in that opinion and supported by a majority of the court. Who else had the right to interpret the constitution? Tell me; was it the Legislature? Of course not. It was the court. And when the court spoke, that was the end of it and that was the law.

The sad part of all of this to me, gentlemen, is that we are resurrecting that ogre of the recall of judicial decisions. That great famous wit and humorist Bowling said, "The court had their eyes and their ears on the ground watching and waiting for the

election returns."

Now if you are going to submit to the people what some few conceive to be an erroneous legal opinion, what sort of order are you going to have in our land. Say what you please; you are down to that ugly spectre of recall of judicial decisions by the people.

Now, so far as the membership of the Supreme Court is concerned, I think we could possibly have as good a court, but I don't think we could have a better court than the men that now constitute that court from every political faith with their various experiences - all men of honor and integrity. I am glad anyhow to stand up here and say that I am for that court. I am willing to say what they say is the law, is the law, and it is not because I say so but because all of you who are members of the Bar have learned it.

I thought that after we had this judicial system, it would be the end of it. I didn't think that we would raise a bug-a-boo of the great power that this court would have and that it would unjustly exercise it. I don't believe it. I feel that after all our experiences in trying to get a good court and trying to keep it in shape, that when the angel Gabriel blows his trumpet, there will be some fellows saying, "Let's throw the court out; let's take away their power." I am against the resolution.

THE CHAIRMAN: Mr. John Milton will be our next speaker.

MR. JOHN MILTON: Mr. Chairman and members of the Committee: I want to support the position taken by the Attorney General. I am

against the adoption of this resolution. And if I may anticipate being impaled upon Senator Davis's spear, I perhaps should in the beginning answer a question which I am sure he is waiting to ask me - whether or not if I believed a majority of the people wanted to amend the constitution, I would vote for or against it. I would say to him that if I didn't believe in the merit of the proposition, I would vote against it. And I think perhaps history would support me that usually the majority of the people are wrong.

I think it unfortunate that there has been drawn into this matter the letter of a gentleman who was at one time a political leader and later became a Justice of the Supreme Court, and similarly a statement made by Judge Jacobs. If we are to decide this question upon such a basis, we are going to be drawn into a morass - we will find quicksand swishing under our feet.

I recall in the days of the 1947 convention when tempers rose a little bit and I clashed with my good friend Mr. McMurray on how it was that a certain class of people were able to interpret public opinion so easily and so surely. I don't think anyone has a right to say what reason led the people of this State to vote for the approval of the constitution, no more than Senator O'Hara would be able to say that it was the frown of the leader in his county that led to his defeat for the nomination or his refusal to vote for the Wayner resolution. Who knows?

Senator Wayner pointed out in the analysis distributed by

the Secretary of State that nothing was said to indicate that the power to make rules governing the procedure was to reside in the courts. I answer him that nothing contained in the analysis points out the contrary, that it was to be left with the Legislature.

Now it may be that I didn't give to the statement made by Judge Jacobs the importance it should have had, perhaps because I was against the thing in principle. I wanted naught to do with the judicial amendment, and I began to think maybe I was right, being one of the minority, if you please. The majority of the Convention thought there should be the radical change in the court system that has been given to us. Perhaps I was too busy chasing around New Brunswck trying to corral some votes for my position to have heard the letter read. I don't remember it in fact, and had I heard it read, I doubt that it would have made the impression on me that now is claimed for it.

Be that as it may, as Mr. Stryker has pointed out to you, we have had for a century or more of judicial history in this State a rule from which we have never departed, that statutory construction is confined to the four corners of the instrument. Extraneous matters are never taken into consideration. Are we now going in determining whether a proposed amendment to the constitution shall be submitted to the people to depend upon: (a) the Governor thinks it was conceded that the Legislature should have the power to make rules to control the practice and procedure, or (b) that the Chief Justice

formerly thought that the power resided there; or perhaps there was question about it and the offending language should be deleted from the constitution? Are we going to decide a matter of this kind upon that sort of a basis? I think not. I think surely consideration of this question should be confined to whether or not on the face of the resolution there is proposed a change which is needed to cure a mischief. It provides a remedy. What evidence is there, as the Attorney General said, to support anyone in the claim that the power which the court decided was given to it has been abused? There is none, of course.

I am among other things thinking about a train, but I am counselling deliberation. This is a deliberative body, not deliberate. It should not be rushed into taking action on a matter of this kind.

Senator Farley in his discussion with the Attorney General, of course, was talking about deficiencies in administration. This is a constitution that we are talking of amending. Let me point out to you what history tells you is a safe guide. The constitution that was supplanted by the action of Senator Farley and Senator O'Hara, who swooted out the days of August in that gymnasium in New Brunswick, was enacted in 1844. For thirty years that remained the organic law of this State without change. It was not until 1873 that a commission appointed by the Governor made a report suggesting a number of changes, some of which were submitted to the people and were adopted by the people, they having voted favorably upon them. Others which the

commission recommended were not not submitted to the people. And, in passing, I may say one of the changes which might give the distinguished and reverent Senators a bit of a smile was a recommendation that there be a provision in the constitution safeguarding the members of the Legislature from bribery. The members of the Legislature didn't think well enough of that to submit it to the people, and in that I join with them. There was certainly no occasion for it.

There the constitution rested without further change until 1896 or 1897, another twenty years, when we had the anti-gambling amendments submitted to the people, who accepted and approved them.

Again the constitution rested without any attempt to change it until 1927 when we had the anti-zoning amendment.

Finally coming to 1937 or 1938, perhaps, Senator, when the racing amendment was proposed and accepted by the people.

In the hundred years of the life of that constitution, there were but four amendments or four occasions for its amendment that were submitted--that required submission to the people of amendments.

I suggest to you that out of that experience we should take a lesson. This rule-making power which the court has said rests with it, has been in operation but a few years. Let us not make haste. Let us move slowly. It may well be that the occasion will arise when action will have to be taken. It certainly in my judgment is not present now.

THE CHAIRMAN: Mr. Samuel Kaufman —

MR. SAMUEL KAUFMAN: Mr. Chairman, I subscribe to the views of Mr. Stryker and Senator Milton. I too was one of those who opposed the change in the judicial system and testified at the Convention, which was then presided over by Mr. Jacobs. I made my public recantation at a symposium of the Essex County Bar Association when I was asked to speak on the rules. The symposium was presided over by Judge Freund and I made the statement then, and I repeat it now, that I wouldn't go back to the old system if it were handed to me on a silver platter because when I studied the impact of the rules upon the administration of justice in this State, I came to the conclusion that when the history of judicial reform is written for the State of New Jersey, it is that series of rules which have been so efficient and which have speeded up the administration of justice.

I agree with Mr. Stryker that the Supreme Court is expert in the judicial process and that the Legislature is expert in the legislative process, and that the rule-making power with respect to these two departments of our government are safely vested in these two agencies. And I agree with Mr. Strykerthat the words "subject to law" in our present constitution were ambiguous. What we write today seems clear. When we come to interpret it a year or two years [illegible], we realize that our power of expression was not so clear. That is not unusual. If you take the words "due process" in our

Federal constitution, which have been on the books over a hundred and fifty years, and there have been over a thousand cases dealing with due process of law, you will find that the Supreme Court of the United States has never been able to define as yet what due process of law is. All they can say is: this case that you bring today violates due process and that case that we are deciding tomorrow is due process. But the definition to go in the books as to what due process is, they have never been able to define from that day to this.

Similarly when our court had before it the words "subject to law" dealing with procedure, all they could do was to define it in the light of what they had before it, and they defined "subject to law" as dealing solely with substantive law and not with procedural law. I wish Senator O'Hara were here right now because I would like to point out to him that there has been a bog-down in the Federal procedure under the Federal rules and I think that is due to the fact that the Supreme Court of the United States is not vested with the full power to make the rules for all the courts of the United States in the Federal sphere. They are bound and prescribed by the Congress. And a tremendous public opinion is arising now in many districts because the administration of justice in the Federal courts has bogged down. Decisions instead of being on substance have multiplied like rabbits in the procedural field where they oughtn't to be at all, and volumes are coming out every day so that you can't keep

track as to what the decisions are with respect to the Federal rules.

We don't have that problem here today. Once a rule is weak or inefficient, it only takes seven men a very short period of time - and they have done it already - they have demonstrated to the Bar and to the public that they will amend and make these rules efficient as quickly as possible. I think that is the supreme test of the efficacy of these rules. As against that, and it is proper, the legislative process moves much more slowly. A bill goes into the House; it goes to the Senate; it goes to committee; it goes to the Governor. There may be public hearings and it may be years before the bill is passed. The history of the Federal rules alone demonstrates how long it takes to put those Federal rules into practice. Having taught law for many years, I am not unmindful of the fact that in the past there have been statutes passed which dealt with just one specific procedural problem - one case - in the State of New Jersey that was of interest to somebody and a statute was passed to cover that one case. That can't happen with the Supreme Court because the Supreme Court isn't interested in any one case; it isn't interested in the plaintiff or the defendant or counsel. All that it is interested in is that the case shall be decided in conscience, under the constitution, under the background of our cases and under our unwritten common law, and I am opposed to the resolution for that very reason.

THE CHAIRMAN: Mr. Archibald Kreiger --

MR. ARCHIBALD KREIGER: Mr. Chairman, I am from Paterson, New Jersey. I am an attorney from Paterson. I speak here for myself and a few of my associates: Mr. Evans, former Speaker of the House; Mr. Duffy of Paterson; and Mr. George F. Miller of Paterson.

Gentlemen, it seems to be a difficult task at this time for me to try to add anything new to what has already been so wonderfully and completely covered by all of the prior speakers. But I never shirk an obligation and I have an assignment and like the good soldier I am going to go through with it and do the best that I can by way of supplement to what has already been stated.

It seems to me in listening to everything that has been presented to this committee today, that the fundamental question before this committee of the Legislature, which is sitting to hear argument of fact and other information with respect to this proposed resolution, is whether or not on its broadest basis there is a wide public demand for submission of this question to correct an existing evil of great public importance, which has manifested itself and cries out for relief. There are subsidiary questions, as I see it, which flow from that primary question that I have just stated, because running through this discussion of the resolution has been a clamor or contest as to where this power should reside. I can very well understand that the Legislature is anxious to possess this power, a power which it formerly possessed under the 1844 constitution and which seems to have been taken away from it by our present 1947

constitution. I can see the legislative hope for a reservation of that power or participating in it by the words "subject to law," which, according to some of the speakers, is intended to show evidence that the power instead of having been intended to be exclusive with the Supreme Court was to be shared or participated in by the Legislature. But it seems to me that the question, having been submitted, whether it was dicta or whether it was not dicta, we all must recognize it is the law and bow to it and accept the ruling that our Supreme Court, the highest court in New Jersey, has passed upon by a majority vote. It has concluded that in its opinion and from its interpretation of all relevant data submitted to the Convention and which came into existence, in operation, under the constitution, that the power was vested exclusively by the people in the Supreme Court. Now we can quarrel all we want like we do in law school and we can engage in very wonderful philosophical discussions similar to - how many angels can dance on the head of a pin - and things of that sort, but the fact is that the Supreme Court has decided the question that the power resides in itself.

SENATOR DAVIS: Excuse me, Mr. Kreiger. Doesn't the very existence of the resolution presuppose all that?

MR. KREIGER: I think it does, but the question before the Senate Committee today, as I understand it, is whether or not there is public need or whether there is public demand for submission of this proposed amendment to the people.

SENATOR DAVIS: I think that is what we are interested in.

MR. KREIGER: Exactly. I have stated in my judgment, Senator Davis and Mr. Chairman, that that is the primary question. All other questions are merely questions that flow from or are subsidiary to that primary question — Is there a public demand? Now is there today in existence or has there, as Senator Hilton said, been presented to your committee any evidence to indicate that there is a demand for submission of this question to the people? I have heard none. Has there been any evidence presented to this committee to show that there ought to be a change in the power from where it resides today? On the contrary, I think it is conceded by everybody that the competence of the court which has possession of the power today is beyond question. We could talk for hours about the competence of the present rule-making power. I happen to be a delegate - and have been for three years - to the Judicial Conference. It is made up in the broadest possible way of a cross-section of every possible line of thought, lay and legal, judicial and otherwise, legislative and what not. There isn't an area that is not explored at that Judicial Conference. Compare that with the legislative power of investigation. The Legislature is already burdened down with many fields of real matters of public interest and not the matter of day to day operation of rules.

As a matter of pure public interest, gentlemen, I have in my pocket today a decision of the Supreme Court which I was able to

pick up instead of having to wait for it until I received it in my office tomorrow, in which for the first time it construed a collection of seven rules of court which came up in connection with the disposition of this appeal - a very important question. Now those seven rules all were argued in different aspects by both sides. I took the same rules and I argued that they applied in one respect. My adversary took the same seven rules and he argued them in his aspect. We both couldn't be right. But what I point out is this: Who else but a body like a supreme court, which has not only the power to initiate, but the power to interpret and the power finally to adjudicate its own rules, could take these seven rules and thoroughly understand them and evidence the fact that they are part of an integrated system? That is where the rules, in my judgment, have displayed their greatest magnitude and their greatest importance that it is an integrated system. I recall very well years before under the old system when the Legislature had the primary power of rule-making, when every Monday when the Legislature was in session, the hopper would be filled by bills by various Assemblymen - young lawyers - who happened to lose a case and in whose judgment it was brought about because of a deficiency in some rule of procedure. Immediately the hopper would receive some bill intended to cure that thing. You certainly have more work to do, and you certainly, I am sure, have greater issues clamoring for solution and for submission or vote by the people than this issue which has not had any public clamor or public demand. I think for these reasons, and for those

reasons that I have expressed on behalf of my associates, that this resolution should not be adopted.

THE CHAIRMAN: Mr. Orlando H. Day --

MR. ORLANDO H. DAY: Mr. Chairman and gentlemen: I shall try to be very brief. I realize the hour is late, and frankly, I don't think I can add anything new in substance to what has been said. I shall simply try to summarize, as briefly as I know how, those points which have seemed to grow out of this subject, and are important to us.

Much has been said about the importance of checks and balances, and properly so. As we all know that stems from the desire of the public to protect itself against government. That philosophy is as old as the hills and the method by which it is done is equally old. It is embodied in Article III, I believe, of our constitution, the separation of powers article, which says the powers of government shall be divided among the three branches, namely, executive, legislative and judicial, and that no person belonging to any branch shall exercise any of the powers properly belonging to any other branch.

I tell you nothing that you don't know, but please step and think of it for a moment. By the philosophy of that article, the people intended that the courts should have no power to invade the legislative branch or the executive branch; and, of course, the executive

branch should not have any power to invade any of the others. Doesn't it follow - isn't it obvious that the Legislature -- I am speaking to you objectively -- has no business invading the judicial branch? Suppose this court had shown some signs of a design to usurp its power, to exercise its power improperly and to the disadvantage of the people. Is there any reason for assuming that, therefore, the legislative power should be set up as a check or balance against the exercise of the judicial power? Does not the public need protection against the legislative branch quite as much as against the judicial branch? I remind you again I am talking objectively. Why do we assume that if perchance at some future date the court oversteps its bounds, the legislative branch will be the champion of the people and to it, therefore, should go the power of overriding that court? For override you can, if the proposed amendment is to be adopted. Let's not fool ourselves. The branch of government which has the overriding power is the branch which has the power to make the rules of the court.

I would like to go back for a moment, if I may, to that Article III. It is rather elemental to say that the purpose basically of the constitution is to impose responsibility. Power comes second, or it should; responsibility comes first. What is the responsibility of the judicial department that was imposed on it by the constitution? Well, will anyone doubt it is the responsibility to administer justice? That is rather general, isn't it? What does that mean? It is just

as simple as the statement is general. It means you administer justice through practice and procedure in courts. In that manner we submit our controversies to the courts for decision. We have practice and procedure by which we refine and define the issues and have them tried and a decision rendered with certain appellate rights. That is all there is, gentlemen, to the administration of justice. What I am saying to you is that the responsibility for the administration of justice is placed on the judicial branch. To whom then should the power be given to carry out that responsibility? What are these rules of practice and procedure in the courts? Simply the rules by which they perform their function of carrying out the administration of justice. They should be designed to promote the greatest economy and the greatest efficiency and the greatest accuracy, and, of course, always be subject to substantive law. They can't take the rights of the infant to one-third of the proceeds of the sale, if you will, Senator, and by some rules of practice and procedure change those substantive rights. They can say whether he is going to have a guardian appointed within 30 days or 45 days or whether to send something by registered mail or by attorney. But I am off the track. The judicial branch has imposed upon it the responsibility to administer justice. I ask you, to whom shall the power of administering justice be delegated and how else could you administer it except by rules of practice and procedure in the courts?

Well, if you agree that the court having the responsibility should have the power, then in the phraseology of our constitution if

that is where the power properly belongs, it must not be exercised by the legislative or the executive branches. The constitution says so.

The people need protection against the legislature as well as against the courts, as well as against the Governor. Why not give this supervisory power to the Governor? We can't say who is most responsive to the people. We don't know. That is pretty phraseology, but we don't know, and I mean that literally. We don't know. A judge in our top court is chosen for his experience, for his reputation. He passes through a sieve. He has been subjected to public gaze for many years. He must meet the approval of the Governor. He must meet the approval of the Senate. And his appointment, usually for life, means that he has no other incentive or objective, gentlemen, than to do the best job he knows how on that bench. You say he is not responsive to the public need. I think what our court has done by the present rules is the best evidence it is responsive to the public needs.

The laymen who are most vociferous in their praise say, "oh, no, they may do something. Of course, they are nice boys and they have done a swell job so far and all the other states and jurisdictions are proud of what New Jersey has accomplished, and they give us great tributes and everything, but we are afraid that maybe some day out of approximately 100 men who constitute the Judicial Conference, maybe some day they won't be trusted any more." Then who will be? — the 81 members of the Legislature? Well, who are

these men on the Judicial Conference, besides every judge of every court in the State, except the local magistrates. -- There are 21 of them. -- There is the Attorney General and every prosecutor in the State of New Jersey. There are the majority and minority leaders of the Senate, and the President of the Senate; also the Speaker of the House and the majority and minority leaders of the House. Each county bar association has as many lawyers as that county has representatives in the Assembly. There are the Presidents of every county bar association; the officers and trustees of the State Bar Association. Can you think of anybody who has anything to do with practice and procedure in the courts who is not represented in that group? There are representatives of the legislative branch, and properly so, and, of course, the Attorney General is there with one eye out for the executive department.

Now, gentlemen, I said I would try to make this short. It is a subject which one can wax very enthusiastic about. I will simply pass over the other points that have been made many times. Really, it isn't our function to sit as an appellate court in review of the Supreme Court. That court is doing its job. The Council heard both sides of this question. It heard it in a constitutional way, in an established way, according to established methods of procedure. It had presented to it the arguments in favor of the meaning, subject to legislative control, and the arguments opposed to that meaning. To say that our court is a little intellectually

dishonest seems to be slightly out of place in a hearing of this sort. Just as it would be out of place for our court to say the Legislature is intellectually dishonest. The court has its sphere -- its job to do, its decisions to make. If we think -- forgetting what the court has done and making no attempt to set ourselves up as an appellate tribunal to review what the court has said -- that the practice of letting the judicial branch, which has the responsibility of administering justice, make the rules by which it will carry out its responsibility, is bad, then why is it bad?

I can think of only two reasons: Either the court is incompetent or unqualified to make them -- and that is a good reason for not letting them do it -- or this Judicial Conference of about 300 people isn't competent or qualified or is not to be trusted to do so. I have heard no other reason mentioned. If the court and the Judicial Conference and the men who are on it are not to be trusted and not competent, I don't want to stand up and say so. I don't want to say that of the 81 members of the Legislature. I don't know who their members will be five, ten or twenty years from now. I don't want to say they will be any more trustworthy or any more subject to external pressure.

Point one, I think the court has spoken and settled the law. Point two, I think if we are going to adhere to our constitution, we are going to put the power to administer justice where the responsibility is and that is in the judicial branch.

I would like to add, while I don't speak for Union County, it is a fact that the Union County Bar met and there were well over a hundred votes - it was practically unanimous - in opposition to any such resolution as this.

SENATOR DAVIS: Mr. Day, do you concede that from a point of view of merit in American constitutional history, at least, that the regulation of the practice of pleading within the court has always been a legislative function until the decision in the Winberry Case?

MR. DAY: In New Jersey that is so and I imagine elsewhere.

SENATOR DAVIS: Wasn't it true in the Federal Judicial Act of 1789?

MR. DAY: I think it was.

SENATOR DAVIS: Then what is the objection in continuing the normal and usual check and balance by the legislative department on the judicial in that respect? Is it because of some mistrust of the Legislature?

MR. DAY: No, I wouldn't say that. I would say that the best answer that I am capable of giving is this: Compare the experience that we had under the present, and you tell me whether you think the old practices were as efficient and economical and as much in the public interest. If they were, let's go back to the old system. There is nothing wrong about changing the system. Just because we have a new one doesn't mean there is anything inherently wrong in the old one.

SENATOR DAVIS: Don't you concede the greatest difference has taken place within the field of administration of the courts, to which this resolution is not directed?

MR. DEY: I don't believe I understand that question.

SENATOR DAVIS: Don't you feel that the improvement that you have noticed in the court system has been very largely due to the fact that the administrative powers of the Supreme Court have been strengthened by the new constitution?

MR. DEY: I wouldn't put emphasis on that. It has been very important and very helpful, but your pre-trial discovery, your opportunity to learn all about the facts of your adversary's case - your pre-trail conferences - this business of getting away from all of this hiding in ambush and coming to court and not knowing what the other fellow isgoing to say, has made possible more voluntary settlements than you have any idea of. Don't think I go running to court when after pre-trial discovery I know all the weaknesses of my case and the strength of my adversary's.

SENATOR DAVIS: The sentiment of the Bar in South Jersey is that pre-trial conferences have been an utter failure.

MR. DEY: Our experience has been the reverse.

SENATOR DAVIS: That is not the point.

MR. DEY: It is the pre-trial discovery that I am emphasizing, if you will pardon my interrupting you. It is the pre-trial discovery which is the basis that gives the pre-trial conference an opportunity

to narrow issues.

SENATOR DAVIS: I will agree with you on that. I think we are getting afield from the issue. The issue, as I understand it to be framed, is that the delegates or at least a substantial number of delegates at the Convention thought they were presenting one proposition to the public. Now it turns out as a result of this decision to be another. The sponsor of the resolution feels it is a good idea to submit the issue to the people. Now what harm can come of that?

MR. DEY: Well, I think the harm that can come of it is this: Let's see how I can best answer you. If I have a good situation today and I had a poor one yesterday, you say, what harm will it do if you go back to the people who have made it possible for you to have this good situation and ask them if they are sure they want you to have it or not? There is this potential harm in it; they may go off the beam and give me what we had before and then there is a tremendous amount of harm.

SENATOR DAVIS: It is their constitution.

MR. DEY: Yes and no. I am not trying to spar with you. Theoretically it is the constitution of the people. There are very few people who can possibly interpret a constitution and know what they are voting for. You know that, Senator. We here today are struggling with the difference between substantive law and adjective law. Do you think the people know about that? Do you think when you talk to the populous that walk up and down the street, they know the

implications of this proposal, that the court shall have the power to make rules and procedure for the courts? They say, what is that? Or if you ask them if the Legislature shall have it; they say, what are these things about anyway? I think we kid ourselves when we pretend on matters of this sort that the people know what they are voting on. They don't. If you go to them and show them something which is really intellectually dishonest, they will know it. I do not believe that the public are competent by their votes to say how we should regulate the practice and procedure in our courts - whether the Legislature is better constituted than the courts are - whether the Legislature might hamstring the courts by making rules which to the Legislature seem desirable.

THE CHAIRMAN: Any further questions?

SENATOR SUMMERILL: You have praised the Judicial Conference. Don't you think the Judicial Conference would be in better shape if the Legislature could pass a law making it permanent instead of, as it is now, being called at the discretion of the Chief Justice?

MR. DEY: At this point, Senator, I am not sure. All these things are matters of opinion and my opinion, of course, is no better than anyone else's. I think I sense what you have in mind. Perchance this same court which has this same rule-making power might amend the rules and get rid of the Judicial Conference. Is that it?

SENATOR SUMMERILL: Suppose the Chief Justice should neglect to call a Judicial Conference and disregard it in the future.

MR. DEY: We are going to assume the 300 members aren't big enough to control the Chief Justice and if he is that big, I am for him, 100 percent.

SENATOR SUMMERILL: He might be hard to control.

MR. DEY: If he functions, as he has been, and if he invites the Bar to submit its recommendations as he does; and if he is responsible for all those things, we want more of it. But I think many others have contributed many good ideas. You couldn't have a wider geographical representation among the people of this State so far as practice and procedure in the courts are concerned than you have in that conference. I don't know whether you will always need as large a conference as that after these rules have eventually become settled and tried and tested. Whether there will then be the same need, I don't know. If in your opinion, there will be, I would be in favor of a statute making that body a permanent body. I think it is an excellent check or balance against any one or two men on that Supreme Court going haywire.

SENATOR SUMMERILL: How large a segment do you think know about it?

MR. DEY: I don't know the answer to that. I don't know if there is one person who knows anything about this subject, or many.

THE CHAIRMAN: Any further questions? If not, I will call on William H. Evans.

MR. WILLIAM W. EVANS: Mr. Chairman and gentlemen of the Committee: Mr. Archibald Kreiger has very well expressed the thoughts I had with respect to the merits of this proposition. My only reason for rising is the fact that it has been called to the attention of the Committee that throughout the country our judicial system is regarded as a system that calls for commendation and is being largely patterned after by many of the states. Now I sit on the Board of Governors of the American Bar Association. I have the benefit of the opinions of the leading lawyers and judges throughout the country. I want to tell you that I have never heard one of them express anything else but the highest regard of the efficiency and the ability of the present Supreme Court. And on numerous occasions they have remarked upon the fact that the rule-making power residing in the Supreme Court is one of the most advanced and far-reaching and most important steps forward in judicial procedure that has ever been adopted. I have heard that said by Mr. Justice Clark of the Second Judicial Circuit at a meeting at which I think there were approximately seven of the Supreme Court Justices present, held at the United States Supreme Court House. I spoke to two of those Supreme Court Judges, Tom Clark and Mr. Justice Jackson, later, and I asked them if that was their opinion of New Jersey. They said nothing but the highest commendation of New Jersey . If you adopt this resolution, it would be one of the most backward steps in the history of judicature in this State. I hope that the Senate in its

wisdom and the House in its wisdom will never take that step.

THE CHAIRMAN: Are there any questions? Are there any others who desire to speak in opposition to this resolution? I understand there is one other.

MR. SMITH: My name is Sylvester Smith, Jr.

THE CHAIRMAN: You are speaking in favor of the resolution?

MR. SMITH: I am speaking against the resolution.

MR. SYLVESTER SMITH, JR.: I am from Newark, New Jersey. I was very much interested in the early days in the adoption of the legislation providing for the rule-making power in the Supreme Court of the United States. As a member of the American Bar Association, I at one time served on one of those committees. The revival of interest in that, due to Attorney General Cummings' interest and that of a number of other people, brought that about. But I think it is wrong to compare the situation in the Federal courts with that in New Jersey because the Achilles' heel of the Federal constitution is the judicial article. It is because of that Achilles' heel that we had the struggle in 1937 to remake the court by legislation - the court-packing proposal. The reason for the discussion at that time was that Attorney General Cummings said that if they could only get the new rule-making power adopted by reserving to the Congress the power to pass and approve these rules or to reject them, if they so desired -- I think that was the real argument and the basis for that discussion.

Now I am not impressed with these statements with reference to the Constitutional Convention because I was interested in the Constitutional Convention to see what effect it had and I understood in discussing this matter with the late George McCarter, who was a very dear friend of mine, that the encroachment on the substantive law by the rule-making power required there be some reservation of power and the phrase "subject to law" was included therein. We have discussed that first in the Commission's report and we have discussed it subsequently on other occasions and after this present constitution was adopted. He may have had more in mind than he expressed to me. But at that time, he discussed, for instance, the provisions of the Federal constitution which had substantive rights requiring due process of law where there were substantive rights and where procedural rules might affect them. He made such an argument before a committee of the State Bar Association at the time when I was an officer of the Association.

I want to say that I don't want anyone to feel that my friend, Senator Wayner, who comes from my home town of Phillipsburg, and for whom I have the very highest regard, is insincere in his views in this. I know he is one of the most sincere men I know and I have a high regard for him. My difference of opinion is based on my concept that the right place for rule-making power is dictated in the process of government as shown in England by the Parliamentary submission to the courts of rule-making power and in the United States,

in the courts. I subscribe to all of the remarks of Mr. Milton.

There is one thing I would like to suggest to you gentlemen of the Legislature, as a practical matter, because I think this is a practical question. No matter how you phrase this proposition, if you adopt this resolution and submit it to the people, you are going to find that it will be construed as an attack upon the present court system in its exercise of rulemaking power and I don't believe really that you can overcome that in presenting the issue.

I think the people will vote in my own county of Warren and in the rest of the State in favor of the new court system and they won't understand this tweedledee - tweedledum, subject to law, substantive right, etc. They would say, why shouldn't the courts have the power to make their own rules. If you do this, you are going to put the Legislature in a false position, for as I understand the sponsor of this resolution, he feels this decision of the court violated the intention of the Constitutional Convention. That may be. Mr. Watren, who was one of the greatest historical authorities on the constitution of the United States, in one of his publications said that if the Supreme Court had rendered its decisions during the lives of the members of the Constitutional Convention, they would have heard from Jonathan Dayton from New Jersey and perhaps James Madison because of the decisions. I am not so sure that James Madison felt Chief Justice Marshall in Marbury vs. Madison, was interpreting directly the intention of the Constitutional Convention of 1787, but I think his position was stated when he said, "The court must make the decision." I think it would be unwise and impractical to do anything at this time. If there is, and there may be some

time, a court that will exceed its power in rule-making, that will go too far, that will not perhaps follow the present method, then I think the check and the balance is in the power to amend the constitution and the power of the Legislature to institute this amendment or any appropriate amendment. When the Supreme Court rule-making power was adopted by the Congress of the United States, the power of the Congress to overrule the rules that were adopted by the court was specifically spelled out in no uncertain words. The words "subject to law", I agree with Mr. Stryker, were unfortunately a little more subject to debate and misinterpretation.

And finally, I think it would be unwise to submit this resolution to the public. If it were submitted I may misjudge the public sentiment, but I think the press and the people would be in favor of the court system and the real issues which I have heard presented by my friend Senator Heyner will be lost. It will go the way all things go when the people can't be made to understand the real issues. However, if there is an abuse of this power, then if such a proposal is made, it would not only receive the support of the people, but be understood by them. It can't be explained away by the Winberry decision.

THE CHAIRMAN: Are there any others who desire to be heard in opposition to the resolution? If not, I think Senator Heyner asked to be heard again.

MR. ROBERT B. WINNER: I realize that the time is getting late. But there has been an aspersion made that I have fostered this resolution for political purposes. I think that the Committee knows that I am not pressing this amendment for political purposes. Since coming to the Legislature in 1943, I sat as a member of a Law Revision Committee. We met with the Governor; we met with the Supreme Court. I have followed this problem quite closely. I talked with members of the Constitutional Convention. I talked with any number of people about this problem. I was told by a distinguished member of the judiciary that this was not a popular issue, that I could do myself no political good by standing for this proposition. I have been told that the people aren't interested in it, but my motive here has been to try to find out what the Constitutional Convention meant - what the people thought when it was presented to them. And I am convinced that those people who voted on it and the people in the Convention had an entirely different conception than the Supreme Court had. I am enjoined in that thought or thinking by no less a distinguished person than Chief Justice Case, who now sits as a member of that court, who pointed out the difficulty of weak courts and strong courts; weak legislatures and strong legislatures; weak governors and strong. He summed it better than anyone else when he said, "Therein lies the danger, when the court undertakes not to construe all, but to make it." And he put "make it" in italics. Now that is precisely that

this court has here. And I am not one of those who subscribes to the idea that a man when he leaves office as a Supreme Court Justice and has that mantle of supremacy that goes with the role of the judicial office, suddenly takes on the air of divinity. I think our government is going to live when we watch but the executive does, that the legislature does and that the judicial does. When one becomes too supreme, when one goes out of its way to usurp the functions of the other, I think it is my duty as a citizen and my duty as a representative of the people of Warren County to come here and speak for the people. I am firmly of that belief. I was taught that in law school by Noel A. Bowling, who has been referred to here today. His whole theory from the Federal level was - what did the framers intend? - what did they think about it? You have got to reflect their viewpoint. I say if this court was anxious to do that, they would have certainly assumed this situation. I think it is bad law. Already the Pennsylvania Law Review has written a short article on it. The Rutgers Law Review writes a critical article on it. The Harvard Law Review, I understand, is about to undertake an article. I say that when you let the court make rules - make law, you are wrong. After all, we don't want the executive overriding us when he has no right to. And by the same token we should say to the courts when they are making law, you must put a stop to it, or, at least, before that is done, let the people vote upon it. I say it is bad law. I say to you that the court has stood up and made law in this instance.

We have heard a lot about how wonderful the courts are and how nobody can criticize them. Now in Warren County where I come from - I have been practicing law since 1936 - we used to be able to get a trial in five or six months, maybe four months. We never had any long trial list as long as the Chief Justice would send up a Circuit Court Judge to hear cases. There was a period for two or more years when he never sent anybody up. But as long as the Circuit Court Judge was there and the lawyers were anxious to get their cases before him, there was no long delay. The only difference I can see is that you have got to go to court twice instead of once. This court has been able to do that through its absolute power of administration. They have the power to check calendars, but this court wants to go further than that, and I have watched it, and the members of the Law Revision Committee watched.

Shortly after the Constitution was adopted, we were asked to go to Nassau Tavern where we sat with the members of the Revision Committee of both the Senate and the Assembly. We sat with the members of the court and we sat with the Governor. And from then on we had many conferences with the liaison officer of the court and at all times we were led to believe that we in the Legislature had a part in the picture. But over the years, I think, the few years it has existed, the court suddenly has the notion that it wants to reform the law. It wants to usurp our function. I believe that firmly because this decision, the Winberry case, came along

just this way. There was a measure adopted by which there would be a commission, an advisory committee on Revised Statutes, and that was adopted in the last session of the Legislature and we had some very important people, I suppose, appointed to that Committee. Now that committee was supposed to draft new rules of practice and procedure and the Legislature was to enact it, but immediately the Supreme Court pronounces this opinion - you can't avoid it - in the first page of the opinion you get this statement: "Thus we have raised the meaning of the phrase "subject to law" and it is urged on us that the question should be promptly decided in view of the recent passage of Chapter 171 of the Laws of 1950, authorizing an Advisory Committee on the Revision of the Statutes to prepare a revision of Title II, Administration of Civil and Criminal Justice, and Title III, Administration of Estates, of the Revised Statutes and related acts." The court senses there is now to be undertaken this reform of Titles II and III. All that was necessary for the affirmance of that decision was a little stamp "affirmed." All of this is mere dicta; it is not necessary, but I view it consciously as a directive by the court to this committee to tell us what to do about reforming Title II and III. I can't see any denial of it. I am on the committee. I notice the committee works according to a schedule which I am convinced comes from the Chief Justice. And what do we have here today? We were informed as a committee that we were to get this before anybody else got it. I had to scout around the State House to find it. One of the provisions is that

we wipe out the rules of evidence over which we always had jurisdiction. The report says: "In the course of the work on the revision of Chapters 97 to 102, inclusive, of the Revised Statutes of 1937, and the supplements thereto, we have been confronted with the question whether evidence comes within the scope of the word 'procedure' as used in the constitutional provisions, giving the Supreme Court the power to make rules governing the practice and procedure in the courts. We have resolved this issue in the affirmative." They are going to wipe out the rules of evidence we might have set up by statute.

Also they have in here -- and after all, I always thought the issue of the Supreme Court Commissioner was a question of legislation--not the Supreme Court Commissioner, but Jury Commissioner -- it is arguable whether it should be in the Supreme Court or here. But we are told it resides in the Supreme Court, according to this. Not one of the members of the Committee, outside of these reporters, have seen this before. I interpret this - and I don't think I am alone; I don't think I have to hold these things in the background - as an effort of the court to encroach upon our legislative function. Because I can see if you let this court dominate the picture, you have to worry about absolute power. You have to worry about elderly men not understanding or interpreting the public opinion. I think the people would rather trust us in this issue than they would trust the court in this issue.

What is substantive law? Why a study of history from the time of the Norman Conquest on shows that the substantive law grew under practice and procedure. They had all of these Anglo-Saxon courts in the various shires in England and the king came over from Normandy andhe decided then that he was going to dispense justice. So what did he do? He set up the King's Bench and he sold a writ of trespass on the case, thus under the guise of practice and procedure, you find the substantive law develop.

Now the proponents say there is a well-set distinction between practice and procedure. My experience at law school and my knowledge of law shows there is a great, wide area where some may say it is practice and procedure - where some may say it is substantive law. But the Committee has said evidence is practice and procedure. If you don't like a rule of evidence, you don't come to the Legislature, you go to the Judicial Conference. What is the Judicial Conference? I attended two Judicial Conferences. I tell you how they operate. All of the committees send these reports, but accompanying each report is a two or three page release for the newspapers. I attended the last one. I met some people who were asked to speak for or against a proposition. But if the Judicial Council makes a recommendation, the final power resides in the Supreme Court - in those seven men; and what assurance do we have they won't be reactionary, that they will respond to the needs of the people. I say if we look back over the years, we will

find that the reforms with respect to practice and procedure, with respect to labor law, and with respect to preserving the rights of the individual, have in most cases come from the Legislature, it being more responsive to the will of the people. I say it is better to trust the Legislature who are elected and go before the people and have to get their views approved every so often than entrusting that job to a Supreme Court which is appointed in the first instance for seven years and then for life. I say that certainly with respect to administration, they have ample power, but now in this attempt to make law to the effect that practice and procedure is within their province, they have reached out beyond the point where it was originally intended that they act.

SENATOR DAVIS: May I ask a question? Who came up with this publication you have just been referring to?

SENATOR [illegible]: I will tell you frankly I was appointed to this Committee. We met in the Attorney General's Office, I believe, last summer. We were told that somebody would get us a stenographer and somebody would appoint a lot of reporters and that Title 2 and 3 would be revised. Then I had a letter from the Chairman. John Vauch was named as Secretary and Senator Clapp was named chairman. I had a letter during the course of the summer and finally we had another meeting and at that time the schedule was prescribed for us.

SENATOR DAVIS: What committee is this that came up with that?

SENATOR WEYNER: It consists of some reporters who have been appointed, I think there are about 70 names, and at the last meeting of the Committee I was informed that the schedule should be approved, that this letter be sent out to all members of the bar, that there will be a Judicial Conference on it in June and at that meeting it was decided that it was felt by the members of the Committee that we should have a special session with the legislature in September to enact this legislation which will come out of the work of this Committee. I say the entire Committee's efforts are going to be determined by this decision - "subject to law." Thank you very much. I might say the Judiciary, I think, is the prime mover of this.

THE CHAIRMAN: Any further questions? Does anybody else desire to be heard on this matter either for or against? If not, we will declare the hearing adjourned and I appreciate very much everybody who came down here and expressed their views.

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The following telegram was received by the Chairman:

"1951 April 9

"Senator Harold W. Hannold
Chairman, Judiciary Committee
State House
Trenton, New Jersey

"New Jersey CIO strongly supports SCR 10 proposing constitutional amendment to insure that Rule-making powers of Supreme Court are subject to public control through legislature if court's rule powers unchecked substantive rights of labor and people generally may be unjustly infringed urge committee report favorably SCR 10

"Harry Kranz
Legislative Director
New Jersey State CIO Council
772 High Street
Newark, New Jersey"

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