We reprint here the full text of Lord Wheatley's speech in the House of Lords of January 27 in which he gave the views of the judges of the Court of Session "Our Changing Democracy"(1). Their views on the role of the judiciary in a Scotland partly governed by the Assembly received much comment. Professor MacCormick's comment, published in **The Scotsman**, was amongst the most notable. Professor MacCormick has expanded his earlier statement for the **Yearbook.**

Accountability Professionalism & The Scottish Judiciary

Lord Wheatley D.N.MacCormick

Lord Wheatley

My Lords, I am afraid that I intend to depart from the pattern which the debate has so far taken and that for what I conceive to be a very good reason. The judges of the High Court in Scotland were invited to give their observations on the White Paper with particular reference to those matters in which they had a particular professional interest. These included matters such as the court system and its administration and where responsibility for that should lie. We accepted that invitation and came to a

1. **Our Changing Democracy: Devolution to Scotland and Wales** (1975 Cmnd. 6348), hereinafter referred to as "The White Paper".

collective judgment and the views which I shall express here this evening are the unanimous views of all the High Court judges in Scotland. I appreciate that normally a Member of your Lordships' House is expected to present his own views rather than to be the representative of those of others but, in these peculiar circumstances, the fact that the views which I am expressing represent the unanimous views of the judges of the High Court of Scotland will carry much more weight than could any personal contribution of my own. However, that very considerably circumscribes the area which I can cover.

Secondly, there is, as your Lordships know, a convention which we in Scotland accept. It is that judges should not become involved in public political controversy. As I know from personal experience on several occasions when a judge has been a member of a Royal Commission or of a departmental Committee of Inquiry, it is not only reasonable but probably right that he should explain publicly the recommendations of the Commission or committee and the reasons for them. However, when the subject enters the political arena and becomes politically controversial, we assume an elective silence on the political issues and confine ourselves, if we intervene at all, to constitutional or legal questions or views on practical matters affecting the law and its administration, where our views may naturally be expected and sought.

So, when the Scottish High Court judges considered the proposals in the White Paper in the narrow fields to which their attention had been directed, they did not consider those aspects with a political connotation or involvement. However, we sought to collect the views of all the judges on other matters. What we did not attempt to obtain, even had it been possible — which I doubt — were the collective views of the judges on whether or not there should be an Assembly and, if there were, what form it should take and what powers it should have. We confined ourselves to such matters as the law and the system of the courts and their administration on which we felt we were qualified to speak. We also considered the question of **vires**, to which reference has already been made by a number of noble Lords. Our views in that situation were naturally based on certain assumptions which flow from the proposals in the White Paper. However, I should say that many of those assumptions would be appropriate to any system of devolution within our sovereign state.

Those assumptions are, first, that there will be an Assembly with delegated legislative and executive powers constituted by an Act of the sovereign Parliament. May I say with respect to my noble and learned friend Lord Kilbrandon that I believe we in this country know what that is and know what its powers are and how those powers are exercised for whatever reason. It is the Queen in Parliament. Of course, if there were no Assembly this exercise of ours would be quite academic. It is an Assembly that we are considering, not a federal system, nor separation. If it were either of the latter, different considerations would naturally arise.

Secondly, it is a fundamental principle of the proposals that the sovereignty over the whole of the United Kingdom will remain with the Queen in Parliament. Thirdly, whatever precise scope of devolved powers

may be determined, they will essentially be limited. Fourthly, according to the proposals in the White Paper, legislation by the Assembly will be subject to Ministerial control on vires and to Government and Parliamentary control on policy. Fifthly, there will be considerable areas of law applicable to Scotland as part of the United Kingdom which will remain wholly within the responsibility of Parliament, and such United Kingdom law will be administered by the Scottish judicial system. Sixthly, the law enforcement of all criminal law applicable to Scotland, whatever its source — be it Parliament, or be it the Assembly — will, according to the White Paper proposals, continue to be a function of the United Kingdom Government through the Secretary of State and the Lord Advocate in their respective fields.

The seventh assumption is this. The appointment of the High Court judges, who serve both the Court of Session in civil matters and the High Court of Justiciary in criminal matters, will continue to be made on the recommendation of the Secretary of State and, where appropriate, the Prime Minister. The responsibility for tenure and conditions of office will not be devolved. May I pause there to observe that it would be quite illogical and wrong that appointments of the Queen's judges in Scotland should be made on the recommendations of her appropriate Ministers in the United Kingdom Government, but that such matters as tenure of office and conditions of service should be determined by the Assembly and its Executive.

While the White Paper is silent on the appointment of sheriff principals and sheriffs, we consider it would be wholly wrong in principle if they were treated differently from the High Court judges. They, like us, hold office under warrant from the Sovereign and, with minor exceptions, administer the same law, civil and criminal and from whatever source, as do the High Court judges: and constitutional propriety demands that their appointments should continue to be made by the Sovereign on the recommendation of her appropriate United Kingdom Government Minister. I can tell your Lordships that the sheriff principals, with the exception of my noble and learned friend Lord Wilson of Langside, who could not attend our meeting, are of the same opinion as the High Court judges, standing the present proposals in the White Paper so far as devolved powers are concerned. They depart from us on a question of how there should be a judicial review of vires, but I shall deal with that shortly.

The last assumption we make from the proposals in the White Paper is this. The court system in Scotland must be regarded as a unity and responsibility for that system at different levels must not be split. This is recognised in paragraph 149 of the White Paper where it rightly said that the splitting up of responsibility would pose — and, may I interpose, indeed create—

"difficult problems over such matters as jurisdiction, procedure and administration".

It is against that background that I turn to consider, from the constitutional and administrative point of view, the question of where the responsibility

for the court system and its administration should lie; whether it should remain with the United Kingdom Government, or be devolved, with or without qualifications, to the Assembly and its Executive. That question is raised in paragraphs 144 to 151 of the White Paper, and is ultimately left open.

The constitutional changes envisaged, if effected, will be a long-term policy. The people talk about the rich heritage of our Scottish law. I agree that it is a rich heritage. But it is our duty not just to look to the past and to the present, but to look to the future; not just to acknowledge and preserve that heritage, but to seek to improve it and hand it down to successors in even greater measure than our predecessors passed it down to us. What we should not do is, for reasons of expediency, derogate from the status of our law or our law courts. What I am about to say, in my personal opinion, should be a test for every function under consideration as to whether or not it should be devolved. But I shall confine and relate it to this question we are now considering of where the responsibility for a court system and its administration should lie. That question should be answered by considering where in the constitutional fabric which is contemplated lies the system which will best protect the status of our courts, the preservation of our standards, and the most effective administration of justice in the interests of the people of Scotland, for whose benefit the whole legal system should be devised.

The answer should not lie in lumping this function into a package deal, whether of a maximum or a minimum nature, as a compromise, or for expediency, or for political reasons, if the merits of the issue dictate that it should go elsewhere. It is the considered view of the Scottish High Court judges that the answer lies in accordance with the second alternative set out in paragraph 150 of the White Paper. I wish to remind your Lordships what that paragraph says, in the alternative:

"it is arguable that the courts are essential elements in the core of constitutional unity of the United Kingdom and in the fabric of law and order; and that since they have to deal with disputes involving both devolved and non-devolved law, they should not be the responsibility of an Assembly which has no functions in the non-devolved fields. The same factors of public policy and national security which are relevant to the police and prosecution functions . . . point towards maintaining United Kingdom responsibility for the courts and their jurisdiction, administration and procedure."

May I try to develop that? I have prefaced what I have to say on this by asserting that in a social democracy such as ours the courts and their administration should be as independent of the Executive as possible. Under the proposals, however altered or modified they might be, our courts will be administering United Kingdom law, and our own common law which, in many cases, marches in parallel with the English common law; community law, as well as legislation passed by the Assembly. In civil matters there will still be a right of appeal to your Lordships' House.

Nothing should be done to derogate from the status of our courts. Believing, as we do, that the courts and their administration should remain the responsibility of the sovereign Parliament, we tender arguments both of principle and of practical considerations to support that view. The principle is that the provision, maintenance and oversight of a judicial system in constitutional terms should be a function of the sovereign power, and that power after devolution will still be the Queen in Parliament. To give that function to a delegated body with limited powers which do not embrace the wide spectrum of the work of the courts would not only offend against the principle but might well lower, or appear to lower, the status of our courts in comparison with comparable courts in England. From the practical angle, the judicial system of Scotland must continue to be, in terms of structure, inter-related jurisdiction and procedures, both suitable for and capable of discharging the whole responsibilities of the system; that is, the administration of the whole law applicable to Scotland, which will consist, as I have said, of United Kingdom law, our common law, Community law and Acts of the Assembly in the devolved fields.

The court system in Scotland at each of its levels, and the jurisdictional and procedural relationship between the courts of different levels, can be considered properly only in the context of the totality of the functions it must discharge. The Court of Session (that is, the High Court judges), by acts of sederunt, prescribes the procedure for civil causes of all kinds in the Court of Session and in the sheriff court. The High Court of Justiciary (that is, the High Court judges), by acts of adjournal, regulates for all the criminal courts of Scotland on all matters of procedure not otherwise prescribed by Statute. In their capacity as judges of appeal these same High Court judges have constantly under review the work of all the courts in Scotland. They are accordingly, I would suggest, in the best position to see the work of all the courts in operation and to see whether procedural changes are necessary.

The Lord President of the Court of Session exercises powers of appointment to all kinds of statutory tribunals. I do not want to weary your Lordships, but am merely trying to illustrate the extent to which the administration of justice in Scotland at present is integrated and is regulated and controlled by the court system itself, free from Executive interference. It is true that the Executive is responsible for providing the staff and the buildings, but otherwise the administration of justice and the court system in Scotland is very much where it ought to be — within the hands of the court itself. It seems inevitably to follow from these factors and considerations that the system should remain with the Government and Parliament if the integrity of that system and its ability to discharge properly its functions are not to be impaired.

Power to innovate fundamentally in matters of the powers, jurisdiction and procedure of the courts within the system in any way which might disturb the broad relationship of these courts to each other, and the relative standing of these courts as courts of the United Kingdom, should not be confided to a subordinate authority with responsibility for only one of the sources of the law which the courts will administer. This, I must point out,

will in no way derogate from the power of an Assembly to legislate on substantive law in devolved fields; but the suggestion from various sources (some of whom should have known better) that some, if not many, of these powers of the court should be transferred to an Assembly or to a member of its Executive, however designed, be he lawyer or be he layman, could be destructive of a system which has stood the test of time and kept it virtually free and independent of the Executive.

May I now, very briefly I trust, refer to a somewhat related matter. Paragraph 163 of the White Paper states that the Government provisionally favour devolving to an Assembly power to legislate about control of the distinctly Scottish legal profession. I am not quite sure what "control" in that context means, and I am sure we should all like to have it made more clear. The legal profession performs a vital role in the administration of justice in Scotland. In particular, the Court of Session and the High Court of Justiciary depend, in the proper discharge of their functions and in the interpretation, administration and development of the law, upon the professional assistance of members of the Faculty of Advocates. The Faculty of Advocates is indeed an integral part of the College of Justice in Scotland, and control of it has always been vested in the court. In the opinion of the judges, the legal profession in its two distinct branches, in so far as it discharges functions in and connected with litigation, is so inextricably linked with the judicial system itself that responsibility and control of the profession in its relationship with the judicial system must lie where responsibility for that system and its administration lies.

May I lastly now turn to the question of **vires**. I gather from the debate in another place that that question is now very open; and it has been adverted to and criticised by various speakers tonight, particularly by the noble and learned Lord, Lord Hailsham of Saint Marylebone, my noble and learned friend Lord Kilbrandon, the noble Lord, Lord Hughes, and the noble Baroness, Lady Tweedsmuir. Accordingly, I do not want to go over the points that they made, but may I say that the idea that the ultimate decision on a matter of **vires** should rest with a Minister of the Crown is one that offends what we regard as all constitutional propriety.

In spite of the checks proposed while any Bill is going through the Assembly to satisfy the Assembly about its **vires**, and whatever checks may thereafter be made by a Minister of the Crown, there may be cases, even if they occur rarely, where the Assembly Acts exceed, at least in certain of their provisions, the powers devolved by the devolution Statute, or where conflict emerges between the provisions of the United Kingdom Statutes and Assembly Acts. It would seem contrary to sound constitutional principle and, one would think, wise public policy, that any person entitled to invoke the jurisdiction of the courts whose rights are affected by provisions which, **ex hypothesi**, are **ultra vires**, should be denied the protection of the courts. To admit the right of challenge would have the clear advantage of securing respect for the constitutional arrangements embodied in the devolution Statute, and may result in the development and acknowledgment of a body of principles governing the boundaries of the respective competences of Parliament and the

Assembly.

Let me deal with two arguments levelled against this. The first is simply the question that **vires** being decided by a Minister would produce finality and not hamper good government. I think that what was said by my noble and learned friend Lord Kilbrandon on that subject is the short and complete answer. Secondly, it has been said by a Minister in another place that since the **vires** of an Act of Parliament cannot be challenged in court, why should the Acts of Assembly be in a different position? He was not comparing like with like. It may be true of sovereign legislation passed by a sovereign legislative body; it is not true of Acts passed by a devolved legislative body whose powers are written into a constitution enacted in legislation by the parent legislature. It is, in our submission, in exactly the same position as legislation of subordinate nature which has been passed and always been subject to challange in the courts on the question of **vires.**

Nor do we believe that the question of **vires** should be examined in a vacuum by some judicial body. This is where we part company with the sheriffs principal. We have never believed in Scotland in courts setting up theoretical rules or making theoretical decisions which have to be followed in practical cases. We do not have McNaughten Rules or Judges' Rules. We believe that the law can best be determined, enunciated and applied through principles which have been determined from practical problems and considerations brought before the courts. With the best will in the world, the academic exercise might overlook some practical point not envisaged by the draftsman or spotted during the exercise. We accordingly believe that there should be written into devolution Statute an express provision that the **vires** of an Assembly Act can be challenged in court by a litigant. If that principle is established, the mechanics of how it would operate in practice in different cases could no doubt be left to be worked out by the courts themselves.

My Lords, I apologise for detaining your Lordships at this late hour with such a long speech, but I should point out that judges do not have any public relations organisation through which they can make known their views. It is very seldom that they are called upon to express a collective view. In my 22 years' practice on the bench this is the first time that this has happened. The only forum we have, because we cannot use the media, is the bench — and that is designed for other purposes. May I make this appeal, having put on public record in the only way we can the views of the High Court judges, that if these views commend themselves, not only to your Lordships but to others who are responsible for the ultimate decision on these matters, we feel that the status of our institutions and the nature of their administration will be preserved in a manner which the alternative might easily destroy.

D.N. MacCormick

This essay is a restatement of an argument which I advanced in two articles in **The Scotsman** on 5th and 6th February 1976. Since it follows the original text very closely I must at the outset record my gratitude to the editor of **The Scotsman** for permission to reproduce it in this form. The occasion of the original articles was the speech by Lord Wheatley on the Devolution White Paper . My aim is to contest the arguments advanced by Lord Wheatley. Against his proposition I wish to argue that the main legislative responsibilities for the administration of justice in Scotland ought to be devolved to the proposed Scottish Assembly. I contend that there are strong positive reasons for devolving these responsibilities and that these reasons outweigh the contrary arguments put in Lord Wheatley's speech.

Since his speech is reprinted in full in the present volume, I have refrained from giving references to the **Hansard** text. It will appear readily enough in what follows whether or not I have identified accurately, and dealt fairly with, the principal points in issue.

At the outset it must be acknowledged that Lord Wheatley spoke with the concurrence and prior approval of the whole superior judiciary of Scotland. What is more, both by virtue of his position as Lord Justice Clerk and of his personal eminence and his many contributions to public affairs he is entitled to the highest respect. In venturing to contest his arguments, I am more than conscious of the weight of authority which supports them, and I do so only with the respect which is due to that authority. I am also conscious that the Faculty of Advocates in a memorandum to the Secretary of State concerning the White Paper (published on 8th March 1976) took a similar line to Lord Wheatley's on material points; but I am fortified by the views expressed by the Law Society of Scotland in its memorandum of 8th January 1976.

One final word to conclude these introductory remarks: my own experience has been as a purely academic lawyer, and if direct experience of the practical, day-to-day administration of justice in Scotland were thought a necessary qualification for expressing an opinion on the present question, I would have to admit myself disqualified. What is more I am a member of, indeed a prospective Parliamentary candidate for, the Scottish National Party. If the arguments which follow fall short of their intended objectivity, the source of their bias is at least plainly declared.

As Lord Wheatley said, it is "the merits of the issue" which matter above all else, not any question of personalities or prejudices. To those merits I now turn; and shall treat firstly of the arguments of principle in favour of devolving legislative responsibility for the administration of civil and criminal justice in Scotland to the Scottish Assembly, secondly of the reasons of practical consequences which also favour that policy, and thirdly of the contrary arguments put by Lord Wheatley.

The context in which the question falls to be debated is one of proposals for devolution, so it is important to remember the essential logic of devolution. Whatever responsibilities in the way of legislation or administration are conferred on the Scottish Assembly or Scottish Executive, there remains in the U.K. Parliament the ultimate overriding power of the supreme legislature. The problematic aspect of devolution is to set the dividing line between what matters are transferred (subject to that ultimate power) and what matters are retained within the direct competence of the sovereign Parliament.

The dividing line which the White Paper aimed to establish — whether successfully or not — sets on one side all matters which are of specifically Scottish concern, except in so far as independent Scottish action might adversely affect the wider British constitutional economic or political systems. Responsibility for all matters falling on the other side of the line — matters of general British interest or concern — should be retained at Westminster.

Two essential reasons of principle are advanced in support of that proposal for devolution in the White Paper. There is the democratic principle that those who exercise public power ought to be answerable to those over whom that power is exercised and that the people specifically concerned with any issue ought to be free to determine and pursue their own priorities on a matter which **ex hypothesi** is not of vital concern to anyone else (see, e.g. paragraph 14 of the White Paper). But that principle presupposes some basis on which to determine units of government, for which reference may be made to the other principle which, in no tendentious sense, I would call the "nationalistic principle". As the White Paper says (para. 11), "Within the United Kingdom Scotland and Wales have kept their own identities, with distinctive elements of tradition, culture and institutions". The principle is that democratic political institutions ought to be established through which can be expressed such national identities as those of Scotland and Wales.

In terms of the dividing line established, it is difficult to conceive of an issue which more closely concerns the well-being of the community of Scotland than the administration within it of civil and criminal justice. Subject to a point made in para. 150 of the White Paper and discussed in the third section of this essay, the good administration of justice in Scotland is of predominantly, or even purely, Scottish concern. Both the democratic and the nationalistic principles therefore point unequivocally towards devolvement of legislative responsibility in this sphere — and also, so far as relevant, of Executive responsibility.

The conception of "responsibility" here involved is entirely different from that of "control", the use of which in the White Paper and elsewhere Lord Wheatley so justifiably deplored in his speech. Responsibility in a legislative or governmental sphere is often best exercised by abstention from, not assertion of, "control".

The force of our arguments from principle ought not to be underestimated. The two principles involved appear to command the support of a large and diversely constituted majority of people in Scotland, as well as

having informed the Government's approach to its devolution proposals. All recent opinion polls suggest that a majority of Scottish Conservative, Labour and Liberal voters favours legislative devolution for Scotland. For that devolutionist majority of those voters, these principles must be presumed to be implicit in their preferences. And certainly the nationalistic principle is for them far from absolute; it is qualified by reason of the assertion of a British as well as a Scottish identity, whence the insistence on maintaining overall political and economic unity. For members and at least some supporters of the Scottish National Party the two principles are not so qualified, and are taken to justify a policy of Scottish independence. From that point of view, devolution is seen as but a staging post on a progress to the recovery by Scotland of an entire responsibility for all its communal affairs.

Despite such differences of emphasis and of political aims, our statement of the principles can fairly be said to capture the gist of an opinion shared by the great mass of the Scottish electorate. Moreover, such principles deserve the assent of all those who value democratic forms of society within historically and culturally distinctive communities. As such they constitute the strongest of prima facie reasons for the devolution of responsibility for the court system.

But certainly general principles do not of themselves settle concrete cases. At best, they point towards solutions which should be adopted only if there are also practical reasons in favour, and if there are not decisive counterweighing considerations of practice and of principle.

II

What then are the practical considerations in favour of devolving to the Scottish legislature responsibility for the administration of justice in Scotland? One highly important one is the practicability of securing legislative changes when these are desired. Consider, for example, the recent report of the Thomson Committee, which proposed far-reaching and controversial changes in highly important aspects of our criminal procedure. Such proposals ought in their very nature to be a focus of careful and widespread discussion and debate in a democratic and civilised community.

In such debate much weight must be given to the opinion of those who are qualified and experienced in the working of the present system; but in the end of the day even the experts may be overridden.

If responsibility for the administration of justice were a devolved matter, the crucial debates would indeed take place in the Scottish Assembly among the elected representatives of those whose whose lives and liberties would be directly affected by the adoption or rejection of the proposals. It is hard to believe that there would be a long delay in finding parliamentary time to debate so vital an issue, or in finding time for such legislation (if any) as might be favoured by a majority.

By contrast, an effect of substantial devolution, must be to diminish (even beyond the present small quantum) the amount of precious

legislative time which the United Kingdom Parliament would be prepared to devote to legislation exclusively Scottish in character. (Be it noted that the same is true of the legislation concerning the ancient Universities of Scotland). So it would be increasingly difficult to secure adequate debating of such a matter at Westminster or, a fortiori, to achieve legislation when desired.

It might in those circumstances prove most expeditious to tack reforming legislation for the Scottish courts on to parallel or similar Bills concerning the administration of justice in England (or England and Wales). In which context, although in an opposite sense, one can only repeat Lord Wheatley's apprehensions concerning policies which "might well lower, or appear to lower, the status of our courts in comparison with comparable courts in England".

That apart, one can urge again the importance of the existence of an articulate, aware, and open-minded "legislative public opinion" (Dicey's phrase) upon such issues in Scotland. It is something of which we had far too little in Scotland for far too long. It is difficult to have legislative public opinion without a legislature, or on issues for which the legislatures in existence either lack responsibility or lack time and interest for full and searching debate.

The same argument, mutatis mutandis, can be applied across the whole spectrum of the administration of justice, of private law, of criminal law, and of a good deal of administrative law. These have come to be seen far too much as being issues for the experts alone; yet they profoundly affect the lives and happiness of the whole community. On the whole, Westminster has lacked time for, and five hundred and fourteen M.P.s have quite reasonably lacked serious interest in, Scottish law reform. One way to create a democratic awareness of Scots law and its importance to people is to create an elected Scottish Assembly with responsibility — again I stress "responsibility" — in relation to it.

To take a final example, another potentially controversial question of considerable importance to the general public, concerns jurisdiction in consistorial causes. Should divorce remain within the jurisdiction of the Court of Session, centralised in Edinburgh; or should jurisdiction be conferred on the Sheriff Court? It is difficult to believe that English M.P.s would be eager after devolution to have this debated in Westminster, with whatever result, the English legal system having some years since settled for a considerable degree of decentralisation of such matters to County Courts.

Whatever be the better view on this question, the answer is of considerable concern to people in Scotland, and of no concern at all to anyone else, except in a general and speculative way. It is again hard to think of a matter more appropriate on practical grounds, as well as on democratic grounds, for transfer to the competence of the Scottish Assembly.

It appears that there are strong reasons of practice as well as of principle in favour of devolving responsibility for the legislative framework within which the courts and the legal profession exercise their functions in the

administration of justice. Are these outweighed by counter-arguments? To that question I shall turn next, with a view to giving full consideration to the arguments advanced by Lord Wheatley.

The text of his speech, as I read it, seems to contain six main points of argument. Notwithstanding the profound respect which I owe to their author and his authority, I have not been answered by them, for reasons which will appear.

First, there is a practical argument rather hinted at than stated by Lord Wheatley; the Scottish Assembly might legislate badly, asserting ill-judged "control" over the system, and adversely affecting the quality of the justice administered there.

So it might. But to be a democrat is to believe that (a) such decisions ought to be taken by the elected representatives of the people directly affected by the decisions, who are the ultimate judges of right and wrong in the matter; and (b) that being so, the system builds in the best available, though not an infallible, protection against wrong decisions. The same is true of the U.K. Parliament, which by the same token might occasionally pass ill-advised, legislation itself and which could, in any event override Scottish Assembly legislation in any extreme case under a devolutionary system .

Secondly, there is Lord Wheatley's argument that it would be "quite illogical and wrong" to devolve legislative responsibility for the court system so long as the appointment by the Queen of her judges in Scotland remained (by convention) a matter upon which Ministers in the U.K. Cabinet gave the decisive advice.

But the reason (whether or not it is accepted as good or compelling) for retaining the function of advice on Scottish judicial appointments within the U.K. Ministry is, presumably, to avoid the risk of appointment of persons thought likely to favour the political or other ambitions of the Scottish Executive for the time being. Since the judiciary will have to pronounce on the validity of acts of the Scottish Executive (and perhaps Assembly as well), that may be thought necessary to securing the independence of the judiciary. As to that, it may be pointed out that the same applies to the U.K. Government, and that twice in the past 11 years decisions of the courts in Scottish litigation adverse to the Government have been reversed by retroactive legislation.

But the securing of the personal independence of the judiciary by the appointment of impartial individuals of the highest legal eminence is surely a policy materially different from the policy or policies involved in the provision of a legislative framework for the fair and expeditious disposal of questions raised before those eminent and impartial judges. There is a connection of course, but in my submission not so close and intimate as to make it "quite illogical and wrong" to have different authorities responsible for the different questions.

Thirdly, Lord Wheatley argues that the court system in Scotland must be regarded as a unity, and responsibility for that system at different levels must not be split (namely as between High Court and Sheriff Court levels) . I respectfully agree on this point, which is however neutral as between allocating such overall responsibility to Edinburgh or to

Westminster (given that the power of appointment of judges is a separate, or separable matter).

Fourthly, there is the argument stated in para. 150 of the White Paper, and adopted by Lord Wheatley; the argument which stresses that "the courts are essential elements in the core of constitutional unity of the United Kingdom and in the fabric of law and order". Here arises the caveat mentioned earlier; if an overriding value is set on "political and economic unity", then the court system may be conceived as an element in political though not (in any direct sense) economic unity.

I do not share that political premise, which may render my argument suspect upon this point. But I must say that I do not believe that to devolve legislative responsibility for the administration of justice would tend of itself to promote the termination of the existing Parliamentary Union. If anything, the reverse might be true, in the sense that resentment would probably be occasioned among the Scottish electorate if it were faced with a legislative assembly powerless to reform Scottish criminal procedure or civil procedure — especially if Westminster lacked the time or the interest to do so.

I am bound to say that the issue whether the kind of political and economic unity within which the peoples of the British Isles must live entails sharing a single sovereign Parliament with authority over a quasi-unitary judicial system, is a different question altogether from the immediate question whether or not to devolve legislative responsibility for the present Court system. It is a different question, and one which will in the end be answered quite independently of the present answer to the present question.

Fifthly, there is the argument, stated in the White Paper and by Lord Wheatley, that the laws to be administered by the Scottish courts will include legislation of the U.K. Parliament and of E.E.C. organs as well as Scottish common law and Assembly legislation; and that therefore the Assembly ought not to have the power to set the legislative framework for Courts whose law will emanate from all such sources.

It may be submitted in answer that whatever the sources of the law administered by any courts, one can best secure the efficient administration of all that law by allocating legislative responsibility to those bodies having the time and interest necessary for a careful and searching consideration of all relevant facts and circumstances.

In many matters — all day to day matters — that argues for the vesting of (delegated) legislative power in the courts themselves. As Lord Wheatley said, that is now the case, and ought to remain the case.

But there remain the wider, and more fundamental, questions which have been thought hitherto more appropriate to legislation by an elected body than to delegated legislation by the judiciary. As to these, the body which will qualify on 'time and interest' grounds will surely be the Scottish Assembly; no doubt the Westminster Parliament could be relied upon to use its built-in overriding power if the Assembly sought to use such power as a back door for invading the preserves of reserved legislative power.

Finally, we must consider Lord Wheatley's argument based on "the

principle . . "that the provision, maintenance and oversight of a judicial system in constitutional terms should be a function of the Sovereign power, and that power after devolution will still be the Queen in Parliament". Legal theories based on the idea of sovereignty are perhaps less widely accepted now than once they were. But even if the principle is accepted without demur, it is not clear that the conclusion drawn from it is a necessary deduction. The Sovereign power must provide, maintain and oversee the judicial system. But would it be a breach of the principle if the sovereign devolved the function wholly or partly to a subordinate but democratically elected Assembly? Would it be so even if the members of that Assembly would have the most direct and material concern to secure the continued operation of a just and efficient judicial system, such as we have in Scotland?

With deep respect, I do not believe that these questions must be answered in the affirmative. In the circumstances envisaged, delegation by the sovereign to a devolved but democratic authority is probably the best way in which it can fulfil its duty in the matter. The principle may be an absolute one, but the guidance which it provides in this context is certainly not absolute or unequivocal. Indeed as our two most noted proponents of theories of sovereignty, Austin and Bentham, observed, a sovereign body is necessarily such that it can act through delegates or not as it sees fit. Whether or not it should use a delegate for some particular purpose is a question the answer to which should be determined on the basis of a rounded view of the greatest overall advantage. And, by definition, the Sovereign power retains the ability to intervene if the devolved legislature should behave with manifest frivolity, ineptitude or bad purpose.

For the reasons here stated, I should submit that a rounded view of the greatest overall advantage does favour devolving legislative responsibility for the Court system, and indeed for as much as possible of private law, criminal law and administrative law. The principles and practical reasons in favour of doing so are not outweighed by the arguments of principle and practice which point in the opposite direction. Rather, they outweigh them.

At the bottom of the whole debate is a concern to preserve the impartiality and independence of the Courts and of the legal profession. That shines out from the speech of Lord Wheatley and from the memoranda presented by the Faculty of Advocates and the Law Society of Scotland. These are values, it is sometimes said, which must be kept out of politics and preserved from political interference, and the fear of such interference may have motivated some of the concern about devolution of the matters here under consideration. The truth, surely, is that such values are not non-political, but supremely political. The independence and integrity of the Court system are vital to the health of the body politic and to the security of every individual within it. As such they are supreme political values which ought to be accepted as being beyond mere party political controversy.

I have confidence in the political maturity and wisdom of the community of Scotland. If it is the case that the people of Scotland are not able to respect these values and to hold them above party controversy, then

they are not fit for any degree of self-government. But the devolution proposals are founded on the supposition that they are fit for that, and the supposition seems well founded. Even from the point of view of someone who accepted the White Paper scheme for devolution as basically sufficient and satisfactory, the case for including responsibility for the courts and the law within the scheme would be, in my submission, overwhelmingly strong.