

**NATIONAL EISTEDDFOD OF WALES
SIR BENFRO, TYDDEWI 2002**

ANNUAL LAW LECTURE

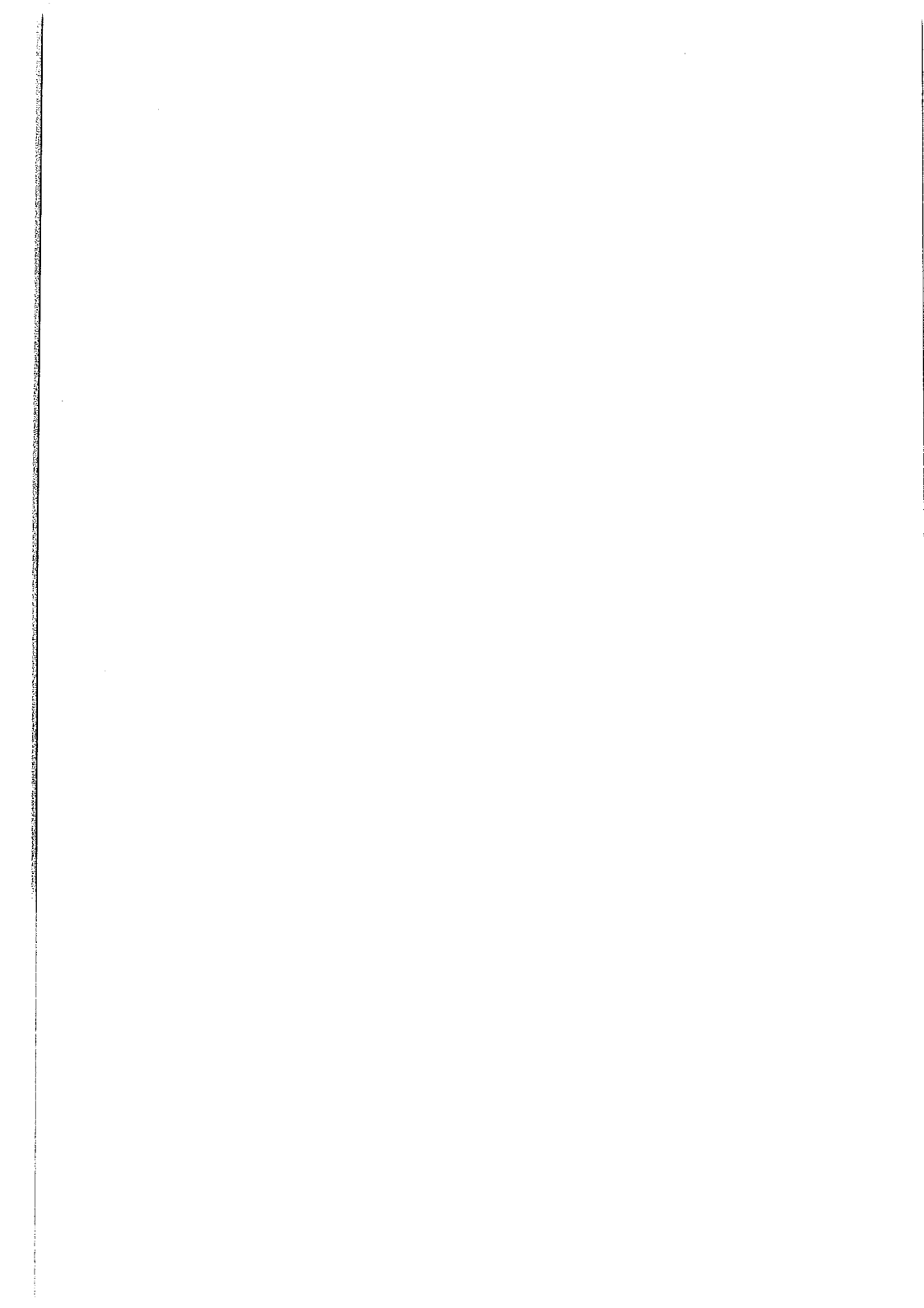
Changing a Camel into a Horse

**Observations on Necessary
Improvements in the
Constitution of Wales**

By Michael Jones



The Law Society
Cymdeithas y Cyfreithwyr



FOREWORD

It was a privilege for me to introduce Michael Jones to deliver the fifth Annual Law Lecture at the National Eisteddfod at St Davids.

The lecture was a continuation of the series which began at Bridgend in 1998 when His Honour Dewi Watkin Powell spoke on "The Law in Wales - Past, Present and Future".

As a former member of the Commission that prepared the Standing Orders for the National Assembly, Michael's observations on the necessary improvements to the constitution of Wales provide an unique insight into the existing political settlement for Wales.

Michael has always been known for his forthright views and incisive legal opinions, which have been utilised by many of his clients to their advantage over the years. He has also made enormous contributions to a number of institutions in Wales, giving freely of his time in support of his beliefs and interests.

I commend this lecture to you and encourage a continuing debate on its contents.

J Peter Davies
President
Associated Law Societies of Wales

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CHANGING A CAMEL INTO A HORSE

**OBSERVATIONS ON NECESSARY IMPROVEMENTS IN
THE CONSTITUTION OF WALES**

The English have a saying that a camel is a horse designed by a committee.

Wales has a camel of a constitution - it is awkward, lacks the popular appeal of a horse, creates problems for its jockey, who does not have much idea how to persuade the beast to cross the desert to the end of the road, which anyway is situated at an uncertain location.

Furthermore, this camel has been designed by a committee which has met from time to time over 40 years and certain it is that no committee meeting has taken place when every person of importance was present and co-operating to reach the same goal.

Today, I will attempt to trace back the present weaknesses of the Assembly to their sources in the weaknesses in the constitution of that institution. I will suggest that there are 5 respects, in particular, which display faults in the legal position of the Assembly. These 5 aspects fall conveniently under various heads which formed part of the degree course which I followed some 40 years ago and so I will start with a preface under the heading 'Constitutional History' before moving on to two separate points which both come under the broad heading of 'Constitutional Law', namely, in the first place 'Séparation des Pouvoirs' and secondly 'Division of Powers' namely the division of governmental powers between central government and devolved government. Point number 3 will concern master and servant, number 4 administrative law and lastly but not least taxation.

A CONSTITUTIONAL HISTORY - DESIGNING THE CAMEL

Before the government of Clement Attlee (1945-1951) there was really no separate constitution for Wales unless one counts the law closing the pubs in Wales on a Sunday, some pieces of legislation relating to the educational system necessary to recognise the existence of the Welsh language (Welsh Intermediate Education Act 1889, the foundation of the Central Welsh Board and so on), disestablishment of the Church of England in Wales and the Welsh Courts Act 1942 (which, for all practical purposes, was quite ineffective). Since the Acts of Union, 1536 and 1542, the history of Welsh legal institutions was one of steady decline. The Council for Wales and the Marches died in the course of the Civil War. The Court of Great Session was abolished in 1830 on account of its notorious corruption; this was a reform which stands with the abolition of the Grampound constituency in Cornwall as the only two reforms carried out by the Tories before the Great Reform Act of 1832, which of course led to all the reforms of the early years of the Victorian period.

Attlee's reforming measure was quite modest but it is now possible to see that this small step started the process which has led to the establishment of the Assembly. In 1948 was founded the Council for Wales and Monmouthshire, an appointed consultative body. In 1951 the Under Secretary in the Home Office was also appointed as Minister for Welsh Affairs by the Tories. Until 1957 the Minister for Welsh Affairs stayed in the Home Office. The importance of this office is made clear by the fact that the man appointed to fill it was a Scotsman, Sir David Maxwell Fyfe. The Welsh responded by giving him the nickname of 'Dai Bananas'.

In 1957, the Minister for Welsh Affairs moved to the Department of Housing and Local Government and we were given a Welshman as Minister, namely Lord Brecon.

In the same period, there was also bureaucratic devolution achieved by setting up a Welsh department of the Ministry of Education with its own Permanent Secretary and then a Welsh department of the Ministry of Agriculture. The Welsh Board of Health was set up in 1940 and indeed it was for that Board that the old Welsh Office in Cathays Park was built. Out of this grew the Welsh department of Housing and Local Government. From these various Welsh departments the Welsh Office was ultimately to be formed.

We had to wait for Harold Wilson in 1964 to appoint Jim Griffiths as the first Secretary of State for Wales. I have to say that the death of Aneurin Bevan was a great help towards the decision in this direction. He had been utterly opposed to devolution and, perhaps, in this, he was representative of MPs up to the present time who sit for constituencies in the old Monmouthshire, though the electorate has taken a different view with regard to devolution, since the electors of both Neil Kinnock's constituency and that of Llew Smith voted for devolution.

At first the Secretary of State had very limited powers but, bit by bit, responsibilities were added to his remit, one by one, or *ad hoc*, until in the 1970s it was possible for George Thomas to say when opposing calls for more devolution, 'I am the Minister of Roads, I am the Minister of 'Ousing, I am the Minister of Education, I am the Minister of 'Ealth...'

He was not entirely correct because the Secretary of State had indeed received some powers in the fields of roads, housing, education and health but other powers in those areas of responsibility remained in London.

Broadly speaking this devolution was restricted to executive powers without any legislative devolution and it is important to remember that the legislature also usually possesses functions of enquiry (e.g. questions in the House and Select Committees of Inquiry) and of discussing the actions of the Executive (e.g. debates in the House). It was seen that this situation led to a democratic deficit.

At the end of the 1970s there was an effort to spread devolution into the legislative, questioning and debating field with the Scotland and Wales Acts 1978.

The original spur for this attempt must be found in the victories of the Nationalist parties, both in Wales and Scotland, when Gwynfor Evans won the Carmarthen by-election in 1966 and the SNP won the Hamilton by-election in 1967.

In 1968 Harold Wilson appointed a Royal Commission on the Constitution - the well known English tactic derived from the cricket field of hitting the ball into the long grass where it is hoped that some time will go by before the ball comes to light again.

Unfortunately for Harold Wilson, he was back as prime minister when the Kilbrandon Commission report came in and there was no way of ignoring the

subject because the three Plaid Cymru members and the 11 SNP members were important in ensuring a majority for his Government.

The majority of the Commission had suggested that there should be devolution of the executive element to Assemblies, that were like county councils, to exercise at the same time executive and limited legislative and debating functions. The Labour Party had opposed giving any legislative powers to the Assemblies. The Tories were quite simply against devolution. Labour proposed establishing a powerful County Council for the whole of Wales which should take unto itself the powers previously exercised by various quangos like the WDA.

It is worth quoting evidence submitted by the two distinguished lecturers who have preceded me in delivering this lecture.

The second lecturer, now Lord Prys Davies, gave evidence which is summarised in the following manner in *Current Law Statutes Annotated 1978*:

'The changes he considered were

- (a) the transfer of more functions to the Secretary of State - this by itself would not be enough;
- (b) a directly elected Assembly which would be empowered to enact legislation in certain specified fields subordinate to Westminster legislation - a quasi federal solution he called it: this, he thought, would not carry enough support;
- (c) an Assembly to which specific executive powers would be transferred from central government departments, or from existing administrative or statutory bodies, which could coordinate the activities of local authorities and which could take over the functions of the Welsh Council and of other advisory bodies: there was, he thought, substantial support for such a body, adding significantly "although hitherto it has been conceived of as the top tier of a reformed Welsh Local Government structure" '

The view of the first lecturer, namely Judge Dewi Watkin Powell, was that the need was for 'a Welsh State endowed with all the powers of a modern State... This involves the ultimate transfer of the whole range of government to the new

state... The powers now exercised by the UK Parliament in relation to Wales will be transferred to the Parliament of Wales and the functions now exercised by the UK Government in Wales will be exercised by the government of Wales.

Gwynfor Evans added that Plaid Cymru demanded a separate state, a separate government and a separate administration and opposed any federal system. (Did someone say recently that Plaid Cymru never sought full independence?).

The Liberals favoured a federal solution.

It was the recommendation of Gwilym Prys Davies that broadly met with the favour of the Commission.

So in November 1976 a Scotland and Wales Bill was presented to Parliament. The following provisions should be noted:

1. One bill for the two countries
2. No referendum
3. No changes in local government
4. A structure of committees
5. No ministers, no cabinet
6. Executive committee formed by the leaders of each subject committee
7. Every decision of the Assembly to be subject to disallowance by the Secretary of State.

The bill moved very slowly forward in the face of opposition from the Tories and some Labour members, in particular those from north-east England. The government decided to move matters forward by bringing in a timetable motion (that is a guillotine resolution). But the government failed to carry this motion and as a consequence the bill was withdrawn.

November 1977 saw the presentation of fresh bills, one each for Scotland and for Wales, this time proposing to hold a referendum in the two countries to be passed by a favourable vote from 40% of the electorate, that is, not a simple majority of voters which of course is the usual system.

This was the start of making differences between Scotland and Wales because devolution to Wales was to be of executive functions only while Scotland was to have an Assembly (not a Parliament) with legislative functions. Wales was offered an Assembly rather like a county council but subjected to the power of the Secretary of State in a number of respects e.g. the Secretary of State would continue to appoint HM Inspectors, he would have the power to change rules as important to Wales as those of the Sports Council, he would in fact have the right to disallow any decision entrusted in the first place to the Assembly.

This Assembly would have had 80 members but without any provision for proportional representation. It seems likely that the Labour Party would have taken at least 60 of the seats. This Assembly would have had the power to deal with secondary legislation.

Broadly the areas of responsibility to be devolved were local government, planning, housing, education, fire services, health and social services, pollution, land use, land drainage, fishing in rivers (but not sea fishing) and not agriculture, ancient monuments, tourism, transport and roads (but not railways) and registration.

This bill became an Act but on St David's Day 1979 the Welsh people voted against devolution on these terms. The Scots by a majority voted for their proposals but without reaching the magic 40% of the whole electorate. Both countries met with the same fate - no devolution.

Jim Callaghan had to pay the price for his very lukewarm support for devolution. Plaid Cymru and SNP joined with the Tories and the Liberals to ensure the passage of a vote of no confidence in him and his government, the first such resolution to be passed for more than a century. In the necessarily following election he lost and there commenced the longest period of government by one prime minister.

We must move on to the arrival of John Smith as leader of the Labour Party. He was a Scotsman proud of his own country in contrast to the Welshman from Monmouthshire who preceded him. Sadly he died young and did not have the opportunity to present a bill or bills for home rule. His legacy was to leave a heavy obligation resting upon his successor and his cabinet, full of Scotsmen, to honour his memory by presenting home rule bills and by forcing them through parliament.

The pattern of the bill for Wales was like that which preceded it but without any provision for a special majority to approve the Act in a referendum. The Tories contributed rather more this time than bitter opposition. Wyn Roberts in the House of Lords pressed for Wales to have a cabinet and ministers and not just chairmen of committees. Also the bill proposed election through proportional representation.

So at last the main provisions of the Government of Wales Act are:

1. Devolution of executive and secondary legislative powers together with powers of investigation and debate. The set-up still show signs of county council style with the assembly, a corporate body, having subject committees and with a division of power between the chairman of each subject committee and secretary for the government department responsible for that subject.
2. The retention of less power in the hands of the Secretary of State. He does not have the power to disallow decisions. If there is a dispute as to the limits of the Assembly's power, such a dispute will be decided by the Judicial Committee of the Privy Council.
3. Devolution of power in more areas, most importantly devolution of agriculture. Less power altogether is kept in London.
4. Election of members by proportional representation. This has ensured the end of the domination of Wales by the Labour Party to the benefit of all and to drive out corruption.
5. Appointment of fewer members to the Assembly, 60 instead of 80. There are not enough members to carry out the work of the committees. The Scottish Parliament has 128 members for a country with a population of 5 million to be compared with 3 million Welsh. There are more members in the Ulster Assembly though the population of Ulster is only just over 1 million.

A camel is born.

B THE DEFECTS OF THE CAMEL

1&2 Constitutional Law

Naturally, the main weaknesses in the settlement fall under the heading of Constitutional Law. I wish to suggest that there are two problems which are most obvious, the first having to do with the doctrine of the well known Montesquieu, under the name 'Séparation des Pouvoirs' and the second having to do with the way that government powers are divided between central government i.e. the quasi-federal government at Westminster and the devolved or quasi-provincial government in Cardiff.

1. 'Séparation des Pouvoirs'

Montesquieu was a Frenchman living in France under the Ancien Régime. He observed the autocracy of the king of France and he saw also the comparative freedom that existed in Great Britain on one side and in Switzerland and the United Provinces on the other. He sought to explain the difference between autocratic constitutions and parliamentary constitutions which ensured a measure of liberty.

He decided that government powers fell into 3 categories, namely the administrative or executive category, the legislative category and the judicial category, and that freedom arose when these powers are kept in different hands, in England, in the hands of the king and his Cabinet as the executive, in the hands of Parliament as legislators and judges as the judicial element. It would appear that he had not noticed that the Lord Chancellor, as a member of the cabinet, the Presiding Officer of one of the Houses of Parliament, and as senior judge, constitutes a living disproof of the perfect division of powers. However, the position was very different in France where the king of course was the executive but also the sole legislator through personal decrees and also in the habit of taking over legal cases from the hands of his judges by the method known as *lit de justice*, that is by appearing in the court himself and giving orders to the judges as to the content of their judgements.

In English history, there were differences concerning the division of power between the king and Parliament. In the course of the Civil War the House of Commons tried to be an executive body as well as a legislature. The experiment

was a failure and very shortly Cromwell was named as executive and he, without waiting very long, came to the conclusion that the House of Commons was a nuisance and firstly he compelled the unruly element to vacate their seats and then decided to get rid of those who remained.

When drafting the Constitution of the United States, Thomas Jefferson, a Welshman by descent, was heavily under the influence of Montesquieu and his principles, and the U.S Constitution, are pervaded by the doctrine of Separation of Powers.

As I have suggested before, there is no figure like Jefferson to act as midwife to the Welsh Constitution and indeed very little attention was paid to Montesquieu's principles in framing that Constitution.

Before the Government of Wales Act there had been a certain amount of devolution of executive powers to the Secretary of State for Wales but this was devolution without any rational pattern - the slogan was 'Ad hoc rules!'. There had been no legislative devolution. There was some degree of judicial devolution following from the foundation of the Wales & Chester circuit with presiding Judges in accordance with the Courts Act 1971. These were responsible for organising the courts in Wales and, bit by bit, after this reform, Wales received its own official Referees Court under Judge Watkin Powell and a Chancery Court with Judge Micklem as its first Judge to be followed by Judge Hywel Moseley. Since devolution, Wales has gained an Administrative Court and is visited every term by the Court of Appeal. The judges have not dragged their feet in implementing devolution of the judiciary.

The first attempt at devolution to a democratic body of any sort was in the period 1976 to 1979. The objective was to transfer both executive and legislative powers to an Assembly, thereby ignoring both the experience of the Civil War and the teachings of Montesquieu and Jefferson.

After the failure of this attempt, on the second occasion there was again an intention to give powers to subject committees with a strong chairman. This was opposed by Wyn Roberts, Lord Roberts of Conway, who fought against this and, as a consequence, a measure of separation of powers was introduced into the system between the Cabinet and the First Secretary as the Executive and the remainder of the Assembly as legislators and debaters.

Since the foundation of the Assembly, efforts have continued to create a better distinction between the Executive and the legislative/debating element. The First Secretary and the Secretaries have taken the titles of First Minister and Ministers and collectively they use the style of Welsh Assembly Government. These are steps in the right direction.

However, the biggest problem is the absence of any devolution of legislative powers to the Welsh Assembly. This absence stands in stark contrast to the legislative powers of the Scottish Parliament and the Northern Ireland Assembly. It is argued that Scotland has a separate legal system and that the Westminster Parliament had little or no interest in legal reforms that were needed by the Scots.

Perhaps so.

However, the Northern Irish legal system has no substantive difference from the law of England. Why therefore is it not possible to entrust to us in Wales the right to change our law in those areas of responsibility which have been devolved? It is already obvious that the policy of the Welsh Government has moved along different lines in the fields of education, health, care of the elderly, student fees and other subjects and it is to be remembered that this has happened when the same party has been in power, both in London and in Cardiff. When a unanimous request for legislation is sent to London from the Assembly it is possible for one of Paul Murphy's spin doctors to refuse that request in contemptuous terms.

It is not acceptable for executive powers to be devolved without legislative powers being devolved at the same time. It is important also that the public can distinguish between the executive function and the legislative and debating function.

2. Division of Powers between the Centre and the Devolved Element

When there exists a federal or quasi-federal situation, it is important to decide how governmental responsibilities are divided and who is to obtain the residue of powers left over and not divided expressly. For example, in the United States, the States were the more powerful element and they hold the residue of power.

In Canada, the centre was stronger. This is not a problem where Wales is concerned because the constitutional settlement here is far from being a federal one and naturally the Assembly has no powers other than those which have been expressly given to it.

However, it is usual to divide the powers in relation to areas of responsibility. Invariably the central Government takes charge of foreign affairs and defence - this was the entirety of the powers of Austria-Hungary. Everything else went either to Austria or to Hungary. In the case of Scotland this is how matters have been dealt with. The Scottish Parliament is responsible in Scotland for education, agriculture, police, transport, health and so on.

In Wales, not one single area of responsibility has been transferred. Instead, the Assembly has inherited the powers that previously belonged to the Secretary of State. As I have said he was given powers *ad hoc* and not in accordance with any rational plan. Thus, we have a Minister for Education but she is not responsible for administering every law that deals with education. For example, decisions in relation to teachers pay on the whole stay in London. Wales has a Minister of Agriculture but he had to follow London's orders concerning foot and mouth disease. The Assembly cannot forbid planting GM seeds but it can forbid growing plants from such seeds. The Assembly has no responsibility for railways. It does not even have the same responsibility as that which belongs to the Passenger Transport Executives in England, which Executives exist in the Midlands, South Yorkshire, West Yorkshire, Tyne and Tees, Manchester and Merseyside. I could go on to the same effect in relation to health, economic development, culture and language and local government and of course in the field of finance.

First of all, it is essential that powers be devolved to Wales in relation to complete areas of responsibility and not Act by Act. The Assembly's lawyers have to spend far too much of their time trying to decide what are the precise powers of the Assembly. It is essential that there should be clarity as to the powers of the Assembly to administer and to pass subordinate legislation.

Secondly, it is not acceptable that Assembly Ministers should have to go on their knees to Paul Murphy to ask him to seek time in London to pass essential legislation for Wales. We need legislative powers in Wales. If London takes the view that a specific piece of legislation is not acceptable it is perfectly possible

to have a system to permit London to disallow a law passed in Cardiff. This system operated in Canada for many years. At least the Assembly would be able to formulate a law and pass it without permission from London and without seeking time at Westminster. If London did subsequently disallow a Welsh law it would then have to face the political consequences.

Thirdly, there is a need for devolution of certain additional areas of responsibility to Wales. Were there a Minister for Transport for Wales, how would he plan transport in Wales without any rights at all over the railways? Both Scotland and Northern Ireland have such powers. The West Yorkshire County Council has more power over railways in its area than are possessed by the Assembly over the railways of Wales. The Assembly has already intervened in railway policy - by contributing money to the improvement of the North Wales line, by organising the reopening of the Barry to Bridgend line and by planning the reopening of the line to Ebbw Vale. The Assembly needs statutory powers in this area, possibly to be jointly exercised with central government. There is no logical reason why the fire services should be within the remit of the Assembly and the police forces not so. There is no good reason why the Finance Minister of the Assembly should not receive European funds directly instead of them having to go through a sieve held by Mr. Gordon Brown.

There is a dire need for a fairer and clearer division of governmental powers between London and Cardiff.

3. The Lack of an Independent Civil Service

'No man can serve two masters'. (Matthew 6.24 (AV))

Thus says the Scripture. Holy Writ is correct of course and the principle is also part of the common law. However, the law admits the possibility of lending one master's servant temporarily to someone else. *Coggins and Griffiths v Mersey DHB* was the case taught to me to illustrate the principle of a servant *pro hac vice*.

The Assembly's servants are all servants *pro hac vice* i.e. they serve Wales and the Welsh Assembly for the time being. At the end of the day their true master will call upon them to remember their true loyalty. And who is their true master? Tony Blair is his name, the Civil Service Minister who is also First Lord of the Treasury, Prime Minister of the United Kingdom.

What happens to the highest servant when the master calls. The servant answers obediently the call of the true master and to blazes with the master *pro tem*. Putting it too high? No. Devolution and the future of Wales were passing through heavy seas in the Autumn of 1998. The pilot of the new devolution had just been dropped over the side of the boat after a moment of madness on Clapham Common. A new pilot had been called up and parachuted unwillingly back to Cardiff. There he found an assistant pilot namely Rachel Lomax, his Permanent Secretary. Just then the master called. He had work for Rachel Lomax in London which was far more important, and obediently the chief servant of Wales went. I was in the Welsh Office at the time that this news came through, sitting as a member of the Standing Orders Commission. The immediate response of the secretary of our committee was to ask how it was possible to carry on with devolution after losing Rachel Lomax on top of the loss of Ron Davies. It took an hour and a half of peace and quiet for the civil servants to face up to the shock and to start to come to terms with this loss and its effect on the future of devolution.

Rachel Lomax's successor is John Shortridge, now Sir John. Rhodri Morgan and the Assembly may depend on his service for as long as it pleases Tony Blair. When he retires or is moved, it is Tony Blair who will appoint his successor as he is responsible for every appointment of a civil servant with the Assembly from the Permanent Secretary down to the door keeper who opens the door of the regional office in North Wales.

The Bible says that a servant with two masters will love one and hate the other. Perhaps Welsh Civil Servants do not actually hate Wales but certainly they know that by having regard to the interests of the UK rather than the interests of Wales they may ensure promotion, should there be conflict between these two interests.

'He's over-stating it', you say. Let me tell you a true story that I had from a reliable source. In the process of appointing the Chief Legal Advisor to the Assembly, the Counsel General as he is called today, one candidate was asked what his response would be if Ron Davies as the First Secretary of the future (as he then was) were to wish to appoint some unsuitable friend to a post under the Assembly contrary to the rules. It became quite clear that the answer expected was that the Chief Legal Advisor answerable in principle to the Cabinet of the Assembly would tell tales to London behind the back of his temporary master.

'Remember your true master, obedient Welsh person' was the message. However the expectation of primary obedience to London is not the only weakness in the civil service.

Since there is only one 'Home Civil Service', movement between one department and another is easy. If a need arises for a new officer in the Education Department in Wales it is perfectly possible to move an Englishman from the Education Department in England or from the Department of Work and Pensions in England to take this position in Wales. The new official will neither know or understand very much about the differences in our Welsh education system. Perhaps he will learn something in his time with us until, after 4, 5, 6 years, comes the call back to London and a good job. Wales needs servants who understand the problems of Wales, the history of Wales, the separateness of Wales, servants who know that their promotion depends on succeeding in Wales not on keeping a careful eye on what will please that other master, the true master in 10 Downing Street, and all the company of civil servants who very naturally look after the interests of the Kingdom.

'Over-doing it you say again'. Let us take some other examples.

If the Chief Executive of Cardiff leaves his job, Russell Goodway and his cabinet will appoint his successor. Every local government officer in Cardiff is answerable to Cardiff Council; they are not on loan from the civil service. The Prime Minister of Ontario is the master of his own bureaucrats and does not have them on loan from Ottawa. The Prime Minister of New South Wales is in the same position.

It is true that Scotland is in the same position as Wales but in practical terms the Scottish Parliament keeps its servants for two reasons. Scotland has its separate legal system and it is essential to have civil servants who understand Scots Law. Also Edinburgh is quite far away and moving is more of a problem. Alas for Wales - as Martin Luther said in another connection, 'Woe to you Germany, so close to Rome and so far from heaven'. The train travels from London to Cardiff in two hours. An ambitious civil servant can put up with living here for four years in the interests of his career but the Assembly needs to be the only master of its servants and to have servants who see that the road to promotion rests on dealing with the problems of Wales in the interests of Wales.

4. Administrative Law

A great deal of administrative law is devolved in those areas of responsibility which have been devolved such as education, local government, health and so on.

The Assembly has the right to make subordinate legislation in various different ways extending from a full blown statutory instrument right down to a circular letter of instruction. There are in fact some eight or nine different forms of secondary legislation.

In the days before the existence of the Assembly, the Secretary of State did sometimes go his own way not following England's path. A development like that at Culverhouse Cross stands as a memorial to the decision of John Redwood to free Wales from the shackles of the old planning rule which tried to restrict commercial development to the centre of cities with a view to avoiding the destruction of old cities as has happened in the United States. Whether this freeing of shackles is an advantage to Wales is another question!

On the whole, however, secondary legislation in Wales was either on one piece of paper signed both by the Secretary of State for, say, Health and the Secretary of State for Wales or in two pieces of paper, one of which was more or less a carbon copy of the other or had been sufficiently adapted to deal with the Welsh language. As a rule the Welsh Office did not have to formulate policies for itself in respect of health, transport or agriculture. So there was no need for policy groups in these departments here in Wales. The policies came down on the fax from London. On the whole the work of the civil service in Cardiff was to administer London's policies.

The situation was somewhat different in the field of education and culture where the Welsh language compelled the Welsh Office to formulate policies to deal with the problem of the language, but on the whole it was no more than a matter of adapting London's policies.

There were of course economic problems special to Wales but to a considerable extent the responsibility for these was contracted out to the WDA.

I was asked to attend a number of seminars and lectures in the period leading up to the establishment of the Assembly and a view generally held was in

respect of the inadequacy of the staff of the Welsh Office both in number and in experience to deal with burdens that would fall upon them as soon as they became the staff of the Assembly. I remember clearly hearing this forecast from the lips of one who is now a leading member of the cabinet, namely Andrew Davies, and also from a very senior civil servant.

Since the arrival of the Assembly the inadequacy of the Assembly civil servants has been a matter of comment among those working in the fields of health, education and local government whom I have met and also has been noted by the political correspondents of television, radio and the press.

We need more civil servants to formulate policies suitable for Wales and to prepare subordinate legislation for Wales. Some work has been done, e.g. the creation of a different structure for the NHS in Wales. However, in education, in spite of a few minor variations, on the whole England's subordinate legislation is being followed quite slavishly.

For example, on 25 April 2002, the National Assembly approved the Education Development Plans (Wales) Regulations 2002 (S.I.2002/1187 (W.135)). These regulations revoked and replaced the 1999 Regulations passed by Parliament at the request of the Welsh Office just over a month before the Assembly acquired its powers. These new regulations provide a framework within which LEAs have to prepare an education development plan for their area.

They go into considerable detail as to those matters which have to be covered. For example, there are requirements as to special needs education, the education of travellers' children and the promotion of racial awareness [sic].

There are no requirements whatsoever in relation to setting targets for the achievement of the Assembly's stated aim of creating a bilingual Wales, no provision at all for recording the targets that some LEAs have set themselves for increasing the number of subjects where the medium of instruction is Welsh, and no requirement for planning to ensure that pupils who have enjoyed a Welsh-medium primary education should continue to study Welsh as a first language at secondary level and to study other subjects through the medium of Welsh.

In other words, these new Regulations effectively ignore the Welsh language in Welsh education and deal with Wales as if it were still part of England.

One must ask - what has devolution achieved in this regard?

Unfortunately, in this connection I have to criticise the opposition, Plaid Cymru, who have not taken advantage of their right to put down amendments to draft subordinate legislation, a right that does not even exist at Westminster. The opposition has allowed subordinate legislation to go through without debate. The opposition prefers to have open ended debates on matters outside the powers of the Assembly. This is not the way to prove the maturity of the Assembly to receive primary legislative powers.

5. Income for the Welsh Government

It is said that the main and historic responsibility of the Chancellor of the Exchequer is to draw up a budget i.e. to propose from year to year what the government has to or can spend on providing various government services and the income or revenue to pay for public expenditure. The Chancellor may borrow money if current revenue is not sufficient but, on the whole, the belief is that it is better to keep as close as possible to a balance between revenue and expenditure.

One of the marvels of the Welsh constitution is that we have a Finance Minister who has to worry about only one side of the balance sheet. Edwina Hart has to confine her attention to expenditure only. She has no power at all over the other side of her balance sheet because the Assembly that she serves has no power over that other side. Revenue is entirely in the hands of the Treasury in London which hands over money to Wales following the Barnett formula, a formula which its designer, Joel Barnett (Lord Barnett now) has himself said is unfair to Wales which receives less than it deserves and indeed also to England which pays more than they deserve to the Scots.

Wales is an under-privileged area and the greater part of Wales has the right to take advantage of money from the Objective One fund of the EU. Millions of pounds have been awarded by Europe to Wales. This money is being paid - not to Wales - but rather to the Exchequer in London. At the outset the Treasury were not prepared to send a penny to Wales. It was said that Wales already received extra money under the Barnett formula and the money from Europe was a bonus for London to help the UK to deal with its weaker brethren. After pressure was brought to bear over a long period, agreement was obtained to

release the European money to Cardiff in addition to the Barnett money. But not a farthing of the European money may be spent without finding a corresponding farthing from some other source. Certainly the Treasury was not going to contribute a red cent by way of corresponding funds. On this point there has been no movement. The government of Wales has no right to raise money itself. All that could be done, therefore, was to cut down on spending on education, health, roads etc in order to find the corresponding funds which are then doubled by the European money for spending on Objective One projects.

The Barnett formula is supposed to ensure that expenditure on education, health, roads and so on is at the same level in England, Scotland and Wales. Even if the Barnett formula operated fairly (and it does not do so because there has been no revision to the formula in the quarter century since its introduction), the effect of Objective One money is to redirect some of the money for education, health, roads and so on away from those objectives to create a corresponding fund in order that Wales may gain some benefit from the European money.

The unfairness of this system of financing Wales is obvious. Wales is in a worse situation than Scotland on two accounts. Firstly, Scotland does have the right to vary the income tax there by 3p in the pound and also the sociological changes in the three countries over the last quarter century have resulted in Scotland doing rather well under the Barnett formula.

There has been devolution also to London. Ken Livingstone has his own sources of income; he can demand money from local government in his area and he can also raise money from drivers who use London's roads - congestion fees. If John Prescott's current plans are put into effect for regional Assemblies in England those Assemblies will have power to raise revenue without going like beggars to the Treasury via the Secretary of State.

County councils receive much of their income from central government but they do have their own source of income - council tax and commercial rates. These are subject to rate capping, it is true, but they do give some freedom to the local authorities.

American states and Canadian provinces, länder in Germany, regions in Spain and so on all have some powers to raise their own revenue.

When the American Colonies were starting to become uneasy with the government of George III and in particular with the taxes on documents, imports and above all on tea, one of their slogans was 'No Taxation Without Representation'. Some Americans felt that an Englishman in North America should have the same rights to elect an MP as an Englishman in London.

For myself I feel that the slogan is equally true turned round, 'No Representation Without Taxation', that is, there is not much value in an Assembly or a Parliament which does not have its revenue within its own control. The Welsh Assembly will be a beggar until it can raise at least some of its income without seeking someone else's permission and without having to answer save only to those who have elected the Assembly and who will have to pay the taxes. It is an insult to fail to entrust to the Assembly powers which are possessed by the smallest community council in Wales, by the Scottish Parliament, by the London Authority.

With the right to tax will come the necessity for the Assembly to look at both sides of the balance sheet whereby the Assembly will acquire greater responsibility and dignity.

6. Metamorphosis to a Horse?

Many Welsh people see the Assembly as both ineffective and unnecessary. I do not belong to their number. I know the difference that has come from having a government that is near at hand and friendly instead of far away and strange. I know that Cardiff has become a true capital city, that Wales is starting to achieve some sort of respect throughout Europe. However, it is necessary to improve Wales' constitution.

Devolution is required of all the different powers - executive, legislative and judicial to the same degree for each power.

It is essential to have clarity as to the powers actually devolved, clarity both for administrators and for the general public. We must have an adequate civil service which is answerable to our government and which can govern at the highest level, that is, which can formulate policy as well as carry it out.

The Assembly must have some power to raise its own income and, by this means, accept more responsibility for the consequences of its decisions.

Then indeed we will have an Assembly which is more of a willing horse able to carry burdens and draw the carriage of state and no longer the ungainly camel which exists at present.