Many members of the Scottish legal profession were surprised, opening their Scotsman on January 24, 1990, to find a centre-page article by Professor William Wilson entitled The Death Sentence for Scots Law. It began:

"The Law Reform (Miscellaneous Provisions) (Scotland) Bill, presently before parliament, should be titled the Scots Law (Abolition) Bill because that indicates its object and probable effect. Like all such bills, it is a cocktail: on top float a few cherries and bubbles—easier divorce, control of charities, licensing reform—which will no doubt attract most of parliaments's attention.

"Under the surface, however, fulminates a toxic brew which may well prove fatal to the Scottish legal system and to the law of Scotland—the provisions which will alter the structure of the legal profession."

Up to that time, Bill Wilson had not generally been seen as the doughtiest champion of the Scottish profession nor, in particular, of the Faculty of Advocates which, after completing his period of devil-ling, he decided at the last moment not to join. But there could be no doubt as to the authorship of this scathing philippic. No-one else could have written:

"It seems surprising that we give an expensive education lasting several years to intending solicitors and advocates to equip them to appear in court, but, apparently, any Tom, Dick or Harry is to be able to come in off the street and give the judges the patter. It is a striking feature of the bill that it pays hardly any attention to legal education or, for that matter, to any other kind of education."

or this:

"No doubt we would be left with the criminal law intact, as the English would not want to go to Glasgow and if they went would not understand what the witnesses were saying."
Q.C.\(^1\) Perhaps, at the end of the day, honours were even between the two friends and Glasgow LL.Ds-to-be. At any rate, it is happily characteristic of the Scottish legal scene that it was Lord Advocate Rodger who was invited to deliver the first W. A. Wilson Memorial Lecture, beginning with a warm tribute to those special qualities which so endeared Bill Wilson to his students and contemporaries.

The Wilson/Rodger exchange in *The Scotsman* about the future of Scots law reminded the present writer of an earlier exchange between Walter Scott and some of his Whig contemporaries who were enthusiastic for reform. It would not have displeased Wilson to be cast in the role of Scott. Lockhart tells us\(^2\) that Scott was "earnest and serious in his belief that the new rulers of the country were disposed to abolish many of its most valuable institutions; and he regarded with special jealousy certain schemes of innovation with respect to the courts of law and the administration of justice, which were set on foot by the Crown Officers for Scotland. At a debate of the Faculty of Advocates on some of these propositions, he made a speech much longer than any he had ever before delivered in that assembly; and several who heard it have assured me that it had a flow and energy of eloquence for which those who knew him best had been quite unprepared."

"When the meeting broke up, he walked across the Mound, on his way to Castle Street, between Mr Jeffrey and another of his reforming friends, who complimented him on the rhetorical powers he had been displaying, and would willingly have treated the subject-matter of the discussion playfully. But his feelings had been moved to an extent far beyond their apprehension: he exclaimed, 'No, no—'tis no laughing matter; little by little, whatever your wishes may be, you will destroy and undermine, until nothing of what makes Scotland Scotland shall remain.' And so saying, he turned round to conceal his agitation—but not until Mr Jeffrey saw tears gushing down his cheek—resting his head until he recovered himself on the wall of the Mound."

Underlying Wilson’s *Scotsman* article was the belief that the Scottishness of the legal system lay, not in any special intellectual attributes, but in its availability to the ordinary man who had only to step off the street of any Scottish town to have access to the independent professional help and advice of a solicitor and, if need be, of an advocate. His argument was that continuity of the best traditions of the Scottish profession required the continued protection of monopoly rights—for solicitors in the field of conveyancing,\(^3\) for advocates in rights of audience. Competition theorists and the consumer movement

\(^1\) Now Lord Rodger of Earlsferry.
\(^3\) A monopoly imported from England in the Law Agents and Notaries Public (Scotland) Act 1891, s. 6; see *Attley v. Kirk* (1876) 3 R. 505, per Lord President, Lord Stair, LC, 1876; 2 S.C.R. 278.
might find this politically incorrect but it was part of "what makes Scotland Scotland".

This point of view was typical of those whose training for the law consisted in an ordinary M.A. completed by the age of 18 or 19, followed by the part-time LL.B. with a concurrent apprenticeship. Like most of his contemporaries, Wilson learned his law mainly by doing it. His pride in the "ordinariness" of the Scottish legal system is illustrated by his choice of an unpretentious monosyllable to describe the subject matter of his lucid restatement of many of its basic principles. The system of legal education which produced Wilson and many Scots practitioners of the same stamp was in tune with the Scottish legal profession, and with the legal system generally, at the same period. In 1960 they were, in essentials, what they had been since well before the Second World War.

Compared with the law of other countries, Scots substantive law remained static and uncomplicated. Gloag & Henderson was more than an "introduction" to the law of Scotland: it contained most of what the average practitioner needed to know. Its first edition of 1927 had been written to replace the 1911 edition of a book of Principles first published in 1754. Although the standard textbooks were wildly out of date (the second, 1929, edition of Gloag on Contract being amongst the more modern), they were still serviceable because the law had not changed much since they were written.

The conveyancing forms in current use were essentially shorthand versions of those that delighted Jonathan Oldbuck. The law of succession was the old law of most of continental Europe, and was not reformed until 1964 and then only through the determination of Lord Advocate Shearer. Irregular marriage had been abolished but recently enough for the present writer to have called the "blacksmith" from Gretna as a witness of marriage by declaration de praesenti.

Carson v. Coppen put paid in 1951 to any harebrained enthusiasm for new forms of security. Trusts could not be varied and trustees' powers of investment, in the absence of express authority in the trust deed, were limited to the "funds" of which Lady Bracknell so greatly approved but which, by 1960, had joined land as something that gives one position and prevents one from keeping it up.

Constitutional law consisted in a theory of the Constitution which was last seen in operation in the aftermath of Crichel Down. Administrative law was the law of local government. Ridge v. Baldwin was still to come and rediscovery of the supervisory jurisdiction of the Court of Session lay more than 20 years ahead.

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5 The late Lord Avonside.
6 Marriage (Scotland) Act 1939, brought into force by the Marriage (Scotland) Act 1939 (Commencement) Order 1940.
7 1951 S.C. 233.
Even in the growth area of personal injury litigation, contributory negligence as a total defence had only disappeared in 1945\(^{10}\) and the defence of common employment in 1948.\(^{11}\) The Occupiers Liability (Scotland) Act did not come until 1960.

The structure and procedures of the courts had changed relatively little since well before the turn of the century, and there were few statutory tribunals. The average age of both Divisions of the Inner House was over 70 and several judges were over 80. Nonetheless, the Second Division under Lord Justice-Clerk Thomson, with Lord Patrick beside him, was the most impressive court the present writer can remember, not excluding the House of Lords under Lord Reid.

The practising Bar was extremely small—considerably smaller than it had been at the beginning of the nineteenth century. Between 80 and 90 advocates practised almost exclusively in Parliament House, making occasional sorties to public inquiries and, in the case of juniors, to the sheriff court and the High Court circuits. (Two judges sat in Glasgow for one week per month.) There was no legal aid in criminal cases and most accused were represented by junior juniors who were paid travel and living expenses by the Crown.

The Court of Session sat every day except Monday with undefended divorces on Saturday morning. Most cases (appeals, reclaiming motions, proofs or jury trials) took two days, starting on Tuesday or Thursday. Dates for proofs and jury trials were fixed once a month by the Parliament House solicitors playing happy families with counsel’s diaries in the Principal Clerk’s little kingdom opposite the door to the bench of the High Court. Appeals, reclaiming motions and debates were listed, without prior consultation, in Friday’s rolls for the following Tuesday, and in Monday’s for the following Thursday.

Instructions frequently had to be passed to other counsel and the rawest junior could be called upon, at less than three days notice, to open an appeal before the Division or a debate in the Outer House. After quite a short time, most of the juniors had appeared with most of the seniors, and before most of the judges.

When defences were lodged, one automatic continuation of 14 days was allowed for adjustment of the pleadings. Thereafter any continuation had to be justified by personal appearance of counsel at the adjustment roll. Leave to amend after closing of the record was granted very grudgingly, if at all.\(^{12}\) Until the House of Lords insisted on a laxer approach, the rules of pleading were strictly applied and much linguistic ingenuity was devoted, for the pursuer, to guarding against the uncertainties of precognition\(^{13}\) and, for the defender, to

\(^{10}\) Law Reform (Contributory Negligence) Act 1945.

\(^{11}\) Law Reform (Personal Injuries) Act 1948.


\(^{13}\) See Lord Justice-Clerk Thomson in Kerr v. H.M. Advocate, 1958 J.C. 14 at p. 19. G. G. Stott Q.C. (Lord Stott) was particularly skilled in the art of deceptively simple pleading, being responsible, e.g. for the formula “The pursuer lost his footing” to cover all possible variants of “tripped”, “slipped” or “stumbled”
taking nice pleas to the relevancy, objections to evidence and motions to withdraw.¹⁴

Under this dispensation, cases moved fast. In *Strachan*,¹⁵ where the action began in March, a minute of amendment lodged on 27 November was refused because a jury trial had already been fixed for 18 December, all in the same year. The *Harris Tweed* case—apparently the longest Scottish civil proof then on record—was completed, including speeches, in just over 50 court days. Undefended divorces were frequently completed within eight weeks from precognition to decree.

Speed of dispatch was assisted by the absence of photocopiers. Until the appearance, in about 1961, of the Minnesota Minifax, which produced barely legible copies on self-destructing pink paper, productions had to be copied in a darkroom or by a typist who, if lucky, might have an electric typewriter.¹⁷

The infrastructure of an advocate’s practice was minimal. The four advocates’ clerks operated from a room about 15 feet square where they shared one coin-operated telephone. Their main function was to fix consultations and arrange for the typing of opinions and, if one was lucky, notes.

Advocates were expected to have “chambers” in the square mile north of Princes Street (“the area”), to which papers could be delivered and where consultations could be held.¹⁸ The majority lived in the area and held consultations in their study. Those who lived outside the area shared consulting rooms, principally at 9 India Street and 25 Heriot Row where the street doors were covered with brass plates. Manuel Kissen, Q.C., was unique in having his own private consulting room in Randolph Cliff.

Few fees were negotiated. For decades, the Faculty had worked on a scale of fees per item of work actually done (summons, defences, adjustment, unopposed motion, opposed motion, debate, proof, jury trial, etc.). The scale applied to almost all cases and even opinions, although it was said that, before the War, a really busy senior could command more. During the War, no-one charged more than the scale and this convention continued after the War. In about 1960 junior’s fee for drafting a summons or defences was raised to six guineas,

¹⁴ J. O. M. Hunter Q.C. (Lord Hunter) and G. C. Emslie Q.C. (Lord President Emslie) were the masters here.
¹⁵ See above, n. 12.
¹⁷ The volume of paperwork at that time can be illustrated by the fact that the writer had two long pockets made in the tails of his advocate’s tail-coat: one for papers for the day’s motions and the other for the papers for the day’s trial, proof or debate.
¹⁸ Parliament House was bolted and barred by 5 p.m. and was thereafter accessible only at the price of being as ‘umble as Uriah Heep to Mr Dewar, the resident superintendent. There were in any event only four consulting rooms in the Advocates’ Library and none in the Juridical Library in Charlotte Square, which was the only library open after 5 p.m. It was not until the mid-1970s that the empty ‘Drill Hall’ and bookstacks in the basement of the Advocates’ Library were refurbished to make it possible for advocates to practice entirely from Parliament House. There were those who opposed that project as extravagant expenditure on facilities which would never be fully used. At least one solicitor threatened not to instruct any counsel who had the luxury of Parliament House. The threat was not carried out.
senior’s fee for the first day of a proof to 45 guineas and junior’s to 30 guineas. Brief fees or fees for preparation were almost unknown except in the House of Lords where taxation followed English practice, the brief fee being 150 guineas.

The level of fees did not keep pace with inflation. The old rule had been that the fee was payable with instructions except in “spec.” cases19 where the instructing letter was marked “Fee after taxation”. Payment with instructions was impossible under the civil legal aid scheme introduced in 1949 and, for reasons which are not now very clear, the Faculty agreed to accept the words “Fee noted: x guineas”, typed at the foot of the letter of instructions, as the equivalent of payment with instructions.20

The consequence was that an advocate had virtually no control over the amount of his fee or the time of payment. Indeed, it was rumoured that the cashier of Dundas & Wilson, C. S., had a drawer in which he kept the cheques for counsel, already signed by a partner, until such time as he felt that counsel deserved to be paid.

This arrangement continued until 1971 when Faculty Services Ltd. was established in the teeth of opposition from solicitors and advocates’ clerks as well as some influential advocates.21 The best available information suggested that, at that time, the total annual income of the practising Bar (by then about 120 strong) was between £350,000 and £400,000.

Apart from a small portfolio of investments, the Faculty of Advocates, as such, had no regular income except the fees payable by intrants. Until 1966, entry money and associated fees of more than £400 had to be paid in a lump sum on presentation of the petition for admission. As will be seen from the figures quoted above, that was a serious barrier to entry.

A further barrier to entry was that the Faculty required intrants to pass examinations in general scholarship and law. Exemption from the law examinations was given, then as now, on a subject-by-subject basis to those who had passed university degree examinations at LL.B. standard.22 Exemption from the examination in general scholarship was granted to those who had a Scottish M.A. or an Oxbridge B.A.23 and, after 1966, to those who had attained first or second class honours in the full-time Scottish LL.B.

The normal preparation for the Scots Bar was the combined M.A., LL.B. degree, which could be achieved in five years24. Those who had

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20 The writer has the impression that this happened when civil legal aid was introduced, but the Stair Memorial Encyclopaedia, Vol 13, para. 1293, dates it to 1957.
21 “Edinburgh people, when they are getting something for nothing, are immensely grateful”: Jimmy Maxton speaking at the committee stage of the National Library of Scotland Bill (July 30, 1925).
22 For an explanation of the difference between the LL.B and B.L. degrees, see D. M. Walker, “Legal Education in Scotland, 1889-1988”, 1988 J.R. 184. The examination papers were the same for both degrees, which were differentiated by the pass mark. The writer’s impression is that the “LL.B. standard” was 66 per cent and the “B.L. standard” 50 per cent.
23 An Oxbridge B.A. in law counted as an “arts” degree.
24 At least one Scottish solicitor still in practice was fully qualified by the age of 21, having gone to university at 16.
taken the B.L. degree had to sit the examination in general scholarship. 25 This requirement was thought to have reached a pitch of absurdity when H.D.B. Morton, 26 who, as litigation partner of Biggart Lumsden, 27 had instructed most of the busiest members of the Bar, was subjected to an examination in logic and metaphysics.

The Faculty did not require any form of apprenticeship or practical training. "Devilling" (pupillage) with a practising advocate was a de facto requirement only because an intending advocate had to give up full-time paid employment for a year before admission ("the idle year"). Those who did the part-time LL.B. spent their first two years as "Bar apprentices" in solicitors' offices for which they were paid about £70 a year, 28 and devilled during their final year.

It was not until 1968 that the Faculty's Regulations as to intrants were comprehensively revised, abolishing the examination in general scholarship and making compulsory a period of training in a solicitor's office and a period of devilling. 29

The formal structure of the solicitors' branch of the profession had been substantially changed in 1949 with the creation of the Law Society of Scotland modelled on its much older English counterpart. Previously, the structure of the Scottish profession had been more akin to that of the profession on the continent, albeit with English overlays. The Faculties of Procurators, each with its own Dean, were the equivalent of the local bars of France or Belgium; and the Faculty of Advocates that of the Ordre des Avocats aux Conseils in France or the Ordre des Avocats à la Cour de Cassation in Belgium.

The Law Society of Scotland was given responsibility for administration of the civil legal aid scheme, the Accounts Rules and the Guarantee Fund, but it was some time before it was recognised, even by solicitors, as speaking for the profession as a whole. 30 Indeed, the idea that either branch of the profession needed to be "represented" by a professional body, whether internally or externally, was altogether novel. Except for those who listened to J. D. B. Mitchell, 31 "Europe" was not relevant, and neither the Faculty nor the Law Society had even heard of the CCBE, or the possibility of cross-frontier practice, until 1970. 32

25 Special exemptions were given to B.L.s who had served in the war.

26 Lord Morton of Shuna.

27 The Glasgow firm where he and Wilson worked together as reparation lawyers during the 1950s. They were close friends.

28 Bar apprentices with Messrs Simpson & Marwick, W.S., of whom the writer counts himself fortunate to have been one, were not paid but were given a set of Session Cases.


30 When the writer was elected Clerk of Faculty in July 1967, he paid a courtesy call on the Secretary of the Law Society, R. B. Lawrie, who later said he had been greatly surprised by this visit since he had had no previous contact with the Clerk of Faculty. When the new system for payment of counsel's fees was being set up in 1970-71, some solicitors claimed that the Law Society, with which the Faculty had negotiated, had no power to commit them.

31 Not, at that time, including the writer.

32 Scotland's introduction to the CCBE, on which England had enjoyed observer status for several years, was (like so much else) due to Lord Cameron who put the Clerk of Faculty in touch with Ercole Graziadei, the first President of the CCBE.
Very few solicitors’ firms had more than four partners, and there were many sole practitioners. A great many solicitors lived out their lives as qualified assistants since many—perhaps most—partnerships required a capital contribution except from the partners’ own sons. Insofar as there was specialisation outside the four big cities, the choice was essentially between court work (i.e. civil litigation, since nearly all criminal work was unpaid and undertaken by court solicitors on the Poors Roll) and conveyancing, wills, executries and the day-to-day work of the law agent and man of business.

The image of the solicitor as law agent ("doer") and man of business corresponded to what most solicitors actually did. One Charlotte Square firm which handled the affairs of a duke was said to be responsible for buying his toothbrushes, and one duke—perhaps the same duke—resigned from the New Club when it amalgamated with the University Club on the ground that "I’m damn’d if I’ll dine with my agent".

Some advocates and solicitors worked as legal advisers for central or local government, for nationalised industries or for those few quangos that existed. But most of these bodies instructed solicitors in private practice. The really influential lawyers in the public sector were not legal advisers employed as such, but the county clerks, town clerks and secretaries (i.e. chief executives) who were almost invariably solicitors.

In today’s terms, the Scottish legal system was unimaginably primitive. But, by and large, it worked and the ordinary Scots man and woman got a reasonably good service. In many respects, lawyers had a greater influence than they do now, not least in ensuring respect for the law on the part of public authorities.

As far as legal education was concerned, if academic folklore is to be believed, it was "utterly unsatisfactory":

"The timetables were designed to enable students to serve their professional apprenticeships concurrently with their studies, but while this had the slight benefit that students while studying had seen the inside of offices, met clients, handled bundles of titles, drafted pleadings, attended at court offices, stamp office and the like, gone to prisons to take precognitions and so on, their time and attention were divided. The system militated against thorough study, reading cases and periodicals, discussion and thought about their subjects. Study consisted in attending, noting and learning lectures.

"It was unbalanced; even given the existence of a course in Mercantile Law (which overlapped with that on Scots Law) the time devoted to Private Law and Criminal Law was totally inadequate. Three weeks for all contract, three hours for sale, five or six hours for delict, three hours for criminal law; no wonder there were whole tracts of law neglected and important topics never mentioned.... There was far too much reliance on part-time teaching by practitioners.

33 "Contracting out" is nothing new!
"Much of the instruction was mediocre, consisting of little better than dictation of what was in standard books. In most courses one quickly spotted what textbook the lecturer had based his lectures on. It was all geared to producing competent clerks, not to opening students' eyes to what Law was and did, or failed to do, in society, domestically and internationally."34

It is true that Professor George Montgomery read to his students each morning at 9 o'clock from a transcript of Gloag & Henderson, not forgetting the chapter headings ("Agreements defective in form province of writing"35 was solemnly announced—without punctuation—as one of the topics for consideration). His warnings against reliance on that invaluable work were greeted with rapture by his class. Many things might have been different if, in 1947, the Faculty of Advocates had elected Hector McKechnie to the Edinburgh Chair of Scots Law. But it should also be recorded that George Montgomery was a kind man who tried to know all his students by name and, in the most unobtrusive way, gave practical help to a number of them.

Intellectually, the pre-1960 system was far from being wholly rotten. In the decade before 1960, David Daube, Peter Stein and J. A. C. Thomas were teaching civil law in Scottish universities, Dewar Gibb and T. B. Smith were teaching Scots law, A. H. Campbell and A. E. Anton, jurisprudence and J. D. B. Mitchell, constitutional law. They and—practitioners though they were—the four professors of conveyancing (Farquhar MacKitchie, A. J. McDonald, G. L. F. Henry and J. M. Halliday) offered more than the reheated porridge of past years. On the bench in that same decade, Lord Reid, Lord President Cooper and Lord Justice-Clerk Thomson, to name but three, were products of what, in all essentials, was the same system. Without practitioners, the Stair Society would not have got off the ground.36

There was much good—even inspired—law teaching in Scotland before 1960. Those who want to know what it was like at its best need have gone no further than Bill Wilson's ordinary class, for his teaching belonged, in content and method, far more to the pre-1960 than the post-1960 tradition.

The combination of lectures and apprenticeship was not wholly unsatisfactory either. It is not only in the classroom that students can "have their eyes opened to what law is and does, or fails to do, in society", and it is more than a "slight benefit" for the law student to have experience of the realities of legal practice. Indeed, several of Wilson's Introductory Essays on Scots Law were designed to tell the full-time student what he would probably have learned in his first month in a law office.

The reforms of 1960, in the form they took, were possible only at a time when the universities were expanding and money was available

36 Leaving aside the considerable contribution of practitioner-scholars like Sheriff P. G. B. McNeill, it is interesting to note that the volume for 1951 (Vol. 14), Acta Dominorum Concilii et Sessionis, 1532-1533, was edited by Ian H. Shearer (Lord Avonside).
to recruit full-time staff and provide well-stocked libraries. They would not have been possible now. A particularly unhappy consequence of the way they were carried out was a divorce between the law schools and the practising profession, especially between the University of Edinburgh and Parliament House. Devoted part-time teachers like R. R. Taylor, Q.C.,\(^{37}\) from whom the writer learned almost all he knows about private international law, were discarded as worthless. The profession, for its part, behaved no better towards the new full-time teachers.

The prevailing atmosphere of mutual suspicion and distrust wasted valuable time and energy during a period of rapid change. It was almost 10 years before the Joint Standing Committee on Legal Education was set up in 1968, following the law teachers' conference at The Burn at Edzell to which the writer, as Clerk of Faculty, was invited to explain the proposed reform of the Faculty's entry regulations.

Succeeding years have had rocky patches, but they have shown what can be achieved: vigorous law schools attracting students from all over the world, a wealth of new law books, the *Stair Memorial Encyclopaedia* almost complete, and a profession incomparably better prepared for practice in a modern world. In spite of the "Scots Law (Abolition) Bill", the Scottish legal system is still operational and is still distinctively Scottish.

But experience also shows that the Scottish is no different from any other legal system in its liability to become stagnant—resistant to change rather than willing and able to meet it. Only the danger is greater in Scotland. John Buchan said in his speech at a dinner for Ramsay Macdonald in November 1931:

"We Scots are a strange folk. We despise incompetence, but we do not greatly admire success. Our sentimental allegiance has usually been given to heroic failures."

In 1996, the Scottish profession is subject to competitive pressures, and the law schools to financial and other constraints, which were unimaginable in 1960. The problem then was how to break out of a circle in which Scotland had no higher ambition for its law schools than that of preparing students for practice in the undeveloped legal system of a branch economy. Today's problem seems rather to be that of reconciling greatly enhanced academic and professional expectations with unprecedented financial and competitive pressures. If the waste of time, talent and energy that characterised the 1960s is to be avoided, it would be as well that the profession and the law schools face this problem together.

Even by continental standards, the Scottish system of legal education and training is now a long one. Students who have been allowed to embark on it feel, not unnaturally, that success in the degree should ensure them a place for the Diploma, that success in

\[\text{\textsuperscript{37}}\text{Later Sheriff Principal of Tayside, Central and Fife.} \]
\[\text{\textsuperscript{38}}\text{Quoted in Andrew Lownie, John Buchan, the Presbyterian Cavalier (1995), pp 297-8.}\]
the Diploma should ensure a place as a trainee, and that successful completion of traineeship should ensure a place in the profession. Legitimate or not, these are expectations which neither the law schools nor the profession are any longer in a position to meet, and the system as a whole is perilously dependent on government funding of the four-year degree and the Diploma.

It is true that the law schools now offer a range of options which ought, in theory at least, to prepare the law graduate for a wide variety of possible careers. It is neither necessary nor desirable to provide a place in the Scottish profession for every law graduate. But for the student who wants, as most do, to keep open the option of practice in Scotland, the choice of subjects for study at university is predetermined to a substantial extent by the professional requirements of the Faculty and the Law Society.

Professional bodies have to ensure that entrants to the profession are equipped with the minimum knowledge and competence to be let loose on the public. It does not follow that teaching in the law schools must cover all the detailed legal rules that the entrant is liable to meet with in practice. For one thing, there are too many rules in too many potential areas of practice for any course to cover them all. For another, the rules are quite likely to change, so that today's knowledge may be useless in five years' time. Some degree of selection in the scope of legal education and training is inevitable. This was recognised in 1960 and, broadly speaking, has been accepted ever since.

What has changed is the extent to which acceptance of a selective approach is now possible, not only for the law schools, but also for the profession. It has become an accepted part of the professional scene that practitioners should be able to specialise and to "advertise" their specialist skills. Post-qualifying legal education and distance-learning using modern technology are available to update and fill gaps in knowledge and to introduce the practitioner (and the law teacher) to new fields of law and practice.

Less obvious as yet, but potentially of greater importance, is the consequence of abolishing the "monopoly" rights of the two branches of the profession. So long as members of the public were compelled to address themselves to a solicitor or an advocate for the provision of particular services, the professional bodies were under a corresponding obligation to ensure that their entrants were competent to provide those services. The corollary of the public's right to choose other providers is that the profession is no longer responsible for ensuring universal provision. The theory, at any rate, is that the market will provide.

The professional bodies must, of course, continue to ensure (so far as it has ever been possible to do so) that the public is protected against incompetence and dishonesty on the part of their members. But that should concern the conditions under which lawyers are permitted to practise rather than the qualifications they must have in order to enter the profession at all.

The very length of time taken to qualify in Scotland, combined with difficulties of funding, has now become a deterrent to some who might have chosen the law as a career—particularly those late entrants
who might, with encouragement, have contributed wider knowledge or experience to the Scottish legal system. The cynic may say that any deterrent helps to reduce the problem of over-supply of law graduates. But financial barriers to entry are not the less objectionable because they are indirect, and squandering available talent is hardly the best way to ensure the survival of a legal system which, whatever its merits, remains small and vulnerable.

England offers a fast track to the late entrant which Scotland does not. It would be absurd if the requirements of mutual recognition were to produce a situation in which it would be quicker to qualify in England, and thereafter transfer to Scotland, than to qualify in Scotland in the first place.

There are those who say that short courses like the English one-year Common Professional Course are academically disreputable. That is as may be, but the late intrant can be fully qualified in England after three years (as a barrister) or four years (as a solicitor). In Scotland, the late intrant can qualify in less than five years only by foregoing that more intensive, and therefore presumably more formative, study at honours level which the reforms of 1960 were designed to promote. From the point of view of a history, philosophy or chemistry graduate, or of an engineer, surveyor or accountant, is it self-evident that two years’ study at ordinary level, taken at a pace suitable for students straight from school, are qualitatively superior to a one-year intensive course designed for the late intrant?

Study at master’s level (more intensive than anything contemplated in 1960) and study abroad (almost unimaginable then, except in America) are becoming the norm for young lawyers of talent. We might almost be getting back to the situation in the nineteenth century when Scots lawyers regularly went to study in Germany. But how many “lads o’ pairts” without parental support will be able to take advantage of these opportunities in future? Will late intrants be able to contemplate them at all? If they can, will they come back to practise or teach in Scotland?

The progress from ordinary to honours level followed by the Diploma and traineeship or devilling has its own logic. Just as the Scottish approach to teenage education has been to promote a broad range of study at school before specialisation at university, so the approach of the Scottish law schools has been to introduce the student to a broad range of topics before going on to consider any of them in detail. It is sensible, and ultimately more rewarding, to learn some Latin grammar and basic vocabulary before trying to read Latin poetry.

But the question that needs to be considered now is not whether, as a matter of principle, the curricula offered by the law schools progress from the general to the particular, but whether everyone must proceed through the same curriculum at the same speed, especially at the price for late intrants of never reaching the most challenging

39 The writer can say from personal knowledge that a number of such people are deterred.
part of it. The answer to this question seems to depend on what one expects the curriculum as a whole to achieve.

Leaving aside the view that law should be taught as a social phenomenon, it is conventional to draw the battle-lines between the proponents of “black-letter law” or “rules” and the proponents of “principles”. All would probably agree with the late Professor A. H. Campbell that their aim is to teach the student to “think in a lawyer-like way”. But some maintain that this should be done by concentrating on legal principles, leaving black-letter law for the Diploma or other courses for practitioners, while others insist that the essence of law teaching consists in the study of legal rules and how they are applied.

In truth, neither approach has ever been wholly valid. There are few, if any, fields of law which have been entirely based on principle or from which principle has been entirely absent. The division of moveable estate between widow’s part, bairns’ part and dead’s part was in one sense a rule and in another a principle. From a social point of view, it said something about the Scots’ view of the family and the rights of women which the English did not share. It would all depend on how the student was invited to look at it.

Wilson’s suggestion that a greater part of the curriculum should be devoted to statutory interpretation might, at first sight, be thought to argue in favour of the “black letter” or “rule-based” approach. Like most of his suggestions, it was more subtle than that.

It might, it is true, be inferred from the huge volume of treaty texts, legislative texts, regulations and guidelines with which the lawyer is now faced that the law has become more rule-based than it used to be. But it has become so in a highly sophisticated and diverse way. We are in the era of Pepper v. Hart[41] and other developments beyond imagining in 1960.

The Scottish Law Commission has just proposed the abolition of “Three Bad Rules in Contract Law”,[42] one at least of which—the rule against oral evidence to supplement a written contract—used to be as sacrosanct as any principle of the Ten Commandments. “Good faith” now has a statutory meaning operating alongside whatever meaning it may have had in the common law.[43] Which is the rule and which the principle?

Even in quintessentially “rule-based” fields of law like social security, employment, V.A.T. and company law, which affect widely different sectors of society and of the profession, the conscientious practitioner must now be familiar with quite new techniques of interpretation. They presuppose an understanding of, and a capacity to apply, “principles” of European Community law derived from a variety of legal traditions as well as an awareness of other languages.[44]

[41] [1993] A.C. 593.
[44] See, e.g. Case C-449/93 Rockfon A/S v. Specialarbejderforbundet in Danmark, judgment of December 7 1995, not yet reported; and, in the House of Lords, Commissioners of
If the law is changing fast, so is legal method. It used to be said (perhaps it is still being said) that Scots lawyers argue from principle while English lawyers argue from precedent. Comparison of the weekly parts of the *Scots Law Times* and the *Weekly Law Reports* suggest that the boast is an empty one, the ultimate proof of its emptiness being the speeches in the *Woolwich* case.45

What is significant now is not whether we argue from principle or precedent since courts on either side of the Border do both, but a thorough-going change in attitudes to the sources of law and the process of reasoning from them. In 1960 the House of Lords was bound by its own previous decisions. When this changed in 1966,46 could any teacher or practitioner have foreseen, not simply the result of *Woolwich*, but the authorities that would be cited and the reasoning that would be adopted by the majority?

On an even more fundamental level, there seems to be a growing divergence between those who think the judge should limit his ambitions to applying law made by others (essentially the attitude of the French revolutionaries) and those who believe that the judge is and ought to be a “law-giver” (a vision embodied in the statue of Forbes of Culloden in Parliament House). This has taken on political overtones in relation to the European Courts and, latterly, to judicial review and some of the radical judgments of the House of Lords.

The law student cannot be expected fully to understand this dispute without some sense of history and political science.47 The practitioner cannot ignore it since it is part of his job to predict for his client how the courts will interpret and apply the law.

It will be in the ability to deploy sophisticated skills in a rapidly changing legal environment that the lawyer of the future will have the edge on the bank, the building society or the accountant. At the very least, the elements of these skills must be available to the client in the high street, in the sheriff court and in statutory tribunals since it is there, far more than in Parliament House, that the new and unexpected problems are going to arise, usually at short notice. They will not be spotted, far less solved, by lawyers whose horizon is limited to yesterday’s law.

For the law teacher especially, it is an ever-present dread that he is teaching yesterday’s law. He may be doing so because practitioners or their professional bodies have urged him to concentrate on teaching what they regard as “relevant” skills. He may be doing so because people in power insist that the function of the modern university is to produce competent technicians. He may even be doing so in the belief that he is keeping alive “what makes Scotland Scotland”.

Bill Wilson saw farther than that. In his own idiosyncratic way he...
deployed the philosophical techniques he had learned on Gilmorehill to explore the effect of modern developments on the teaching and practice of law. His insistence on "the importance of analysis" goes to the heart of the problems which this essay has tried, in a rather impressionistic way, to identify.

It is useless, in 1996, to discuss legal education in the simple terms of a conflict between black-letter law or rules on the one hand and principles on the other, or between principle and precedent. The debate cannot be limited to whether particular skills should be taught in the ordinary class, the honours class, the Diploma or not at all. As a framework of discussion, these categories are no longer adequate. They need to be more carefully defined and new avenues explored.

To the question "What solution do you propose?", the writer can only take his cue from Bill Wilson and reply "Let us first, together, analyse what the problem is".