Most Scots are aware of the fact, and proud of it, that their law is different from other peoples' and, in particular, different from that of the English. Asked to say what the differences are, they might point to the third ('not proven') verdict; to the jury of fifteen deciding guilt by simple majority vote; to the system of prosecution by a public prosecutor independent of (but with power to direct) the police; or perhaps to the almost universal jurisdiction in civil and criminal matters of the local judge, the sheriff. In fact, none of these characteristics of the Scottish legal system owes anything to European influence, or only very remotely.

As proof of the European credentials of Scots law, it is frequently said that it is based on Roman law. But this is true, and always has been true, only in limited (albeit important) areas of private law. In those fields where Scots law is most civilian, the greater flexibility of English law has often been seen as something to be followed rather than avoided—see, for example, Professor George Joseph Bell's Preface to his Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence published in 1804, and the current Lord Advocate's Maccabean Lecture on the Codification of Commercial Law in Victorian Britain.1

Admittedly, Scots law has not had to go through the contortions of English law in order to recognise the jus quaesitum tertio. But the late Professor J. D. B. Mitchell used to maintain that Lord President Cooper's forthright rejection in 1951 of the floating charge, as being conceptually incompatible with Scots law,2 set back the post-war recovery of the Scottish economy by a vital ten years. So the civilian inheritance of Scots law may have been, at best, a mixed blessing.

Again, it is often said that Scots law is based more on principle than precedent. But the average observer of proceedings in a Scottish appeal court would need a big pinch of salt with which to swallow that assertion. It was, after all, the two Scots judges in the House of Lords who dissented in Woolwich Equitable Building Society v. Inland Revenue Commissioners,3 where the English majority overturned more than a century of precedent

on the basis of reasoning from principle proposed by the Regius Professor of Civil Law at Oxford. The reality is that, for most practical purposes, the Scottish legal system belongs firmly within the common-law family, and its most notable peculiarities are home-grown rather than European. Indeed, its most unusual feature might even be shocking to the continental observer. Scots criminal law remains substantially ‘common law’, only the more contemporary types of criminal offence being defined in legislative texts. Does this offend against the principle *nulla poena sine lege*?

The foregoing paragraphs may seem an odd way to begin the Scottish postscript to a book of essays whose Introduction portrays the Scots as being more European, and more internationally-minded, than the English. But we should not lose sight of Gibbon’s maxim that ‘The laws of a nation form the most instructive portion of its history.’

Scots law, with all its eclectic borrowings and homegrown idiosyncrasies, is a reflection of Scotland’s history. If Scots lawyers are more internationally-minded than the English, it is not because Scots law, as such, is more international—indeed the contrary is certainly true—but because the Scottish system is not, and has never claimed to be, self-sufficient. In this respect Scots law is no different from the law of other small jurisdictions throughout the European continent. They have inherited or borrowed much from Roman law, from canon law or from one of the great modern codifications. But, to a greater or lesser extent, they have retained some of their customary law or adapted other peoples’ law to the needs and preferences of their own people. So their lawyers are necessarily, to some extent, comparative lawyers. This creates a habit of mind which may, for want of a better word, be called ‘international’. It is this unaccustomed habit of mind which the process of European integration is now forcing upon lawyers who have been trained, and who have taught or practised, exclusively in one of the larger, self-sufficient systems. In former days it was possible for English, French, and German lawyers to view the legal map of Europe as divided between large monolithic structures—between common law and civil law, or between the Anglo-Saxon, Napoleonic and Germanic systems—to one of which they (and everyone else) belonged. They must now come to terms with the fact that Europe’s legal map is more of a patchwork, the variety of whose individual patches has to be taken into account both in the human rights and law reform activities of the Council of Europe and in the more pervasive demands of the European Community.

The early experiences of English lawyers in the Community were often such as to cause exasperation, both to themselves when faced with ready-made solutions devised by continental lawyers, and to those same continental lawyers who tended to see the common law as a cuckoo in the

*Decline and Fall of the Roman Empire*, ch. 44.
Community nest. Now, partly as a result of English influence, it is recognized that schemes for legal harmonization or reform are more likely to be adopted and implemented if they take account of what exists on the ground. The search is for solutions that offer compatibility rather than uniformity of laws. This search for common ground between diverse legal systems is unlikely, on the whole, to home in on the distinctive doctrinal solution of one of the major systems. The chosen solution is more likely to be eclectic or 'homegrown European'.

The result is that lawyers from the big, previously self-sufficient, systems now find themselves in the same position as Scots lawyers and lawyers from other small jurisdictions. By force of circumstances they have to become comparative lawyers. As the new Master of the Rolls showed in his 1991 F. A. Mann Lecture, and as the contributions to this book have shown again, this is both an informative and an enriching experience.

In his essay 'What is Comparative Law?,' Professor J. F. Garner observes that a study of the diversities between legal systems 'can be justified not only as a fascinating intellectual exercise, but also by reason of the wider knowledge they may bring to the basic principles of any one particular native system of law. They are also, of course, an essential tool in the preparation of law reforms in any one jurisdiction.' One does not have to search very far in recent writings on law reform to find it said by lawyers and laymen that England should abandon the adversarial system of criminal trial and plump for the juge d'instruction. But, as Professor Delmas-Marty observes in her contribution to this book, 'To the French lawyer, however patriotic he may be, this sudden admiration in England for the juge d'instruction looks distinctly odd'. The juge d'instruction is not, as is often asserted, an institution common to the 'civil-law systems' in general. Many never had such an institution in the first place, and others that did have abandoned it.

On the other hand, overall judicial control of the criminal process (of which the institution of juge d'instruction is only a part) is characteristic of most other systems. The Scottish system of public prosecution reflects this approach, although its historical origins are feudal rather than Napoleonic. Perhaps it is because the Scottish system is not fully understood as a compromise between adversarial justice and judicial control that, until the Runciman Commission began to make detailed enquiries, English law reformers have taken very little interest in it. The crucial point, made by Mr Spencer in his paper here, is that a number of important tasks should

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be done by someone in the interval between police investigation and trial which, in English criminal procedure, are usually done by nobody at all. In Scotland they are done by the Lord Advocate or his deputies, by the local Procurator Fiscal or, in some instances, by the local Sheriff.

In another respect, however, England may unconsciously be moving in the same direction since the Chief Inspector of Prisons is now a judge. Both England and Scotland should perhaps spend more time studying the French institution of juge de l’application des peines than that of juge d’instruction. The lesson to be learned from the discussion of the juge d’instruction surely is that useful borrowing from other systems depends on a proper understanding of what is being borrowed in its native context. The intellectual effort required is illustrated by the contributions of Professor Lorenz on the contractual jus tertii and Professor von Bar on liability for economic loss. It might be added that incautious assimilation of English and Scots law in both these fields has caused some confusion on both sides of the border.

The European Community does not, as such, contribute to the process of law reform outside the areas in which harmonization of laws is necessary to achieve Community objectives. But the fact of being in the Community and being forced to ‘do’ comparative law in a practical context contributes enormously to the capacity of lawyers from all the Community countries to make the good comparisons that lie at the root of using other peoples’ law in the process of law reform.

The need to learn is not confined to lawyers teaching and practising within their own national systems. No-one stands in more need of the insights that good comparison can give than those in the European Courts who have to find solutions compatible with, and so far as possible acceptable in, a wide variety of national jurisdictions. In this connection it is worth adding something to what has been said by Professor Henry Schermers and Dr Derrick Wyatt about the dissenting judgment and the oral hearing. Common-law observers of the EC Court of Justice generally find the absence of dissenting opinions a marked defect, and some of the arguments put forward against dissenting opinions are not very convincing given that they are allowed both in The Hague and in Strasbourg. But there is another consideration: the principle of collegiality.

Collegiality in the process of judgment means more than a willingness to sign a text that reflects the majority view and to keep silent about one’s private dissent. It is true that the result has to be decided by majority vote if there is a difference of opinion. But that is often only the first stage in the process of deliberation and discussion of a draft judgment. The minority are entitled to, and do, contribute actively to the debate after the decision of principle has been taken. They will help to point out flaws and obscurities in the draft and, by the end of several sessions, it may be very
difficult to remember who was in the majority and who in the minority on the first vote. Sometimes the process of discussing a draft will show that the minority was right in the first place and drafting must begin again. So collegiality becomes an attitude of mind. One of the current members of the EC Court of Justice has commented that 'deliberation is the heart of our activity'. Even more than in those national systems where it is indigenous, the process of judicial debate behind closed doors is one of the most important ways in which Community judges adapt their own habit of mind to a developing legal system in which the doctrinal position is seldom clear and even more rarely settled. This in turn affects the attitude of the Court to oral procedure.

Oral procedure in which the pleader simply repeats what has already been said in writing is not a profitable use of judicial time. It may be helpful that the pleader should summarize his arguments and draw attention to the salient points, but even here some of the effect will be lost in simultaneous interpretation. Dr Wyatt is right in saying that oral procedure at Luxembourg is usually best when the Court has indicated in advance the points on which it wishes to hear further argument. There is still a psychological problem.

Those who are familiar with court practice in the common-law world know that oral pleading there is not simply a matter of presenting arguments in a more or less lucid oral form. The debate between counsel and judge, sometimes sharp and not always kind, plays an essential part in defining the issues in the case, weeding out useless arguments and refining the good ones. The judge, who is himself an advocate by training and often still an advocate by instinct, may well ask questions or suggest propositions that will find no place in the judgment and may even reflect a position quite inconsistent with the eventual result.

It is more difficult for the judge bred in the collegial system to play this role. A question asked by a judge in anything but the most hypothetical way may give the impression of parti pris. It may be embarrassing to his colleagues and even shocking to an advocate bred in the same system who expects his judge to display total impartiality until the last stage of judgment. The cut and thrust of debate about facts and law that is so characteristic of common-law court procedure finds no place in most other systems, and the difficulties of introducing it to Luxembourg are only compounded by the problem of language. Similarly, it is not altogether straightforward to introduce more written procedure into British courts. The Master of the Rolls has observed\(^8\) that, 'it could be said that England has captured the worst of both worlds, by accepting written submissions without very significantly shortening oral arguments'.

\(^8\) F. A. Mann Lecture, 1991, see n. 5, above, at 526.
Professor Markesinis remarks in his Introduction that the aim in the series of seminars which gave rise to the present book was 'to discuss developments that were actually taking place whether we (or the majority of our compatriots) liked them or not'. A legal world without dissenting judgments and with only a skeletal form of oral procedure is not one in which common lawyers find themselves readily at home. But the European system is not monolithic. It is susceptible to change and will change in response to informed challenge. So, it is hoped, is the common-law system to which Scotland, very substantially, belongs.

Those who are engaged in learning from Europe can help in this process as teachers. A better understanding of other systems brings with it a clearer knowledge of one's own. Of all exercises in legal exposition, the most difficult is to explain what one has hitherto taken for granted. What lawyer can say with a clear conscience that he has never, when called upon for an explanation, replied 'It is so because it is so'? What lawyer would not be happy to be able to do better?