

MACCABAEAN LECTURE IN JURISPRUDENCE

The Codification of Commercial Law in Victorian Britain

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IN 1904 Sir Courtenay Ilbert, one of the first Fellows, was asked to give a lecture to the Academy to mark the centenary of the Code Napoleon.¹ He tells us that he hesitated to comply since ‘The subject of codification is vast; it does not much interest the present generation of Englishmen: one is tempted to think that all that is worth saying about it has been said already.’ In the event Sir Courtenay was not deterred by his own warning. So, even though his words remain true today, I can at least claim to be following his example when I propose to examine one particular aspect of this dread topic.

The history of attempts at codification in nineteenth-century Britain is the history of a movement which largely failed. Perhaps for this reason it has been somewhat neglected by modern writers, though there are signs that this is changing, and a discussion of the period down to 1850 has recently appeared.² In that period, and indeed later, much effort was expended on the criminal law. So scholars have tended to concentrate on the draft criminal codes and on the codes prepared for use in India.³ Nor is this surprising since the story is attractive and has a cast of well-known characters. It is set against a backdrop of the Indian Mutiny and other

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¹ Sir Courtenay Ilbert, ‘The Centenary of the French Civil Code’, (1903–1904) 1 *Proceedings of the British Academy* 253.

² M. Lobban, *The Common Law and English Jurisprudence* (Oxford, 1991), especially Chapters 5–7.

³ For the criminal and Indian codes see, for instance, W.R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (London, 1989), 598 *et seq.* with references.

troubles in India. There are clashes between strong-minded officials in London and others equally determined in Calcutta. Lord Macaulay, Sir Henry Maine, Sir James Fitzjames Stephen and Sir Courtenay Ilbert, all known from other exploits, succeed one another on the stage. Towards the end the scene switches back to London and we see the ubiquitous Frederick Pollock and Mackenzie Chalmers waiting to come on, clutching their digests on partnership and bills of exchange. Maitland, Sir Leslie Stephen and the Sidgwicks hover just off stage with Virginia Woolf and the Bloomsbury Group not far behind. Truly this is not mere legal history, but political, intellectual and cultural history in the grand manner.

It is also, if I may say so, extremely English. The various participants were at home in Oxford and London. They were involved in the affairs of the Empire. But there is little sign that they had any particular interest in Scotland or the law which applied there. Yet when Sir Mackenzie Chalmers' Acts on bills of exchange, sale of goods and marine insurance reached the statute book along with Sir Frederick Pollock's Partnership Act, they all applied to Scotland. In more recent years legal nationalists in Scotland have viewed these developments with less than complete enthusiasm and in particular the application of the Sale of Goods Act 1893 to Scotland has been portrayed as resulting from the 'imposition of foreign law' on the national legal system of Scotland.⁴ As in all the best tales of national betrayal a native Scotsman—surprisingly enough Lord Watson—is portrayed as one of the blackest villains.⁵ My aim this evening is to sketch a little more of the Scottish dimension and to suggest that in commercial matters at least we can better understand what happened if we look at the position in Britain as a whole.

To anyone with even a passing knowledge of British history the idea that businessmen in Victorian Scotland allowed English law to be imposed upon them may seem surprising. When we think of Scotland in that period, we think of Glasgow, the Second City of the Empire, and of the shipyards of the Clyde. We think of mighty shipping lines and of Sir William Burrell, so wealthy that he could devote himself to assembling the great Collection which bears his name. We think of Dundee magnates importing jute from India and amassing fortunes to build gracious mansions along the banks

⁴ Sir Thomas Smith, 'Pretensions of English Law as "Imperial Law"' in the article on Constitutional Law, *The Laws of Scotland Stair Memorial Encyclopaedia* Vol. 5 (Edinburgh, 1987), para. 717. The complaint runs as a *leitmotif* through Sir Thomas Smith's work. Smith invokes some remarks of Koschaker, but he had been careful to confine them to the reception of a foreign legal system as a whole: P. Koschaker, *Europa und das Römische Recht* (Munich and Berlin, 1947), 138 n. 1. Whatever else may have happened, there has been no wholesale reception of English law in Scotland.

⁵ See, e.g., T.B. Smith, *Property Problems in Sale* (London and Calcutta, 1978), 14.

of the Tay. In other words our impression is of booming commercial cities and of confident businessmen recognizing no superiors and few equals. If they were even remotely like that, then it would be surprising if this formidable mercantile community allowed English law to encroach against their will.

The picture has been obscured by a reluctance among some Scots lawyers to recognize that Scots law changed in character in the nineteenth century precisely because of the changes in Scottish society. Scottish businessmen were British businessmen who happened to work in Scotland; indeed in many spheres they were *the* British businessmen.⁶ It was these Scottish businessmen, and not their English cousins, who were most insistent that the law which governed their transactions should be modern⁷ and should help them trade in the larger English and Empire markets. They were practical men rather than romantic supporters of a native legal system of whose doctrines they would usually be entirely ignorant. So if any necessary change meant adopting a rule from English law, they saw this, not as some kind of defeat for Scotland and for Scots law, but as a step in the creation of that British commercial law which would help them sell their goods, to be carried by British railway companies or on British ships to British markets at home and overseas. In this way Scottish businessmen became enthusiastic supporters of a growing movement to assimilate the laws, and in particular the commercial laws, of England, Scotland and Ireland by embodying them in some kind of code. Although no such comprehensive code was ever produced, it is the existence of this current of opinion over many decades which explains why the four principal commercial law bills were all passed in a form which applied to Scotland. So far from there being any plot by English lawyers to impose their law on Scots Law, if it had been left to the English lawyers, this commercial legislation would almost certainly have applied to England and Wales only.

With pinpoint precision the Scottish institutional writer George Joseph Bell dated the rise of mercantile law in Scotland to 9 June 1772, when the first Scottish bankruptcy statute became law.⁸ To that date also perhaps one could trace the start of the movement to assimilate the commercial

⁶ On the development of Scottish industry see O. and S. Checkland, *Industry and Ethos Scotland 1832–1914* (second edition, Edinburgh, 1989), Chapter 1.

⁷ For the mid-nineteenth century see the important passage in I.G.C. Hutchison, *A Political History of Scotland 1832–1924: Parties, Elections and Issues* (Edinburgh, 1986), 93–5. It is by no means insignificant that it was written by a historian rather than a lawyer.

⁸ G.J. Bell, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence* (seventh edition by J.A. M'Laren, Edinburgh, 1870) Vol. 1, ix–x, Preface to Author's Editions.

laws of Scotland and England. The differences between the bankruptcy régimes in the two kingdoms were keenly felt by businessmen. As early as 1814 a committee of London merchants reported on a bill for reforming the Scottish legislation⁹ and, with neither system working well, for many years there were various proposals to develop a uniform scheme for both countries. Problems with bankruptcy were very much in the air in the middle of the nineteenth century, but by that time some people at least were beginning to think that other areas of commercial law should be assimilated.

If we imagine ourselves in the Advocates Library in Edinburgh in 1849, we shall see surrounded by books a gentleman who is not an advocate and not even Scottish. He is Mr. Leone Levi, a naturalized British subject settled in Liverpool, but by birth an Italian from Ancona.¹⁰ As yet he is not a lawyer, though in due course he will become a member of Lincoln's Inn and a Professor at King's College, London. Despite his lack of formal legal qualifications, Levi is writing or compiling a huge work on Commercial Law in which he compares the mercantile law of Great Britain with the codes and laws of commerce of sixty other states and, he adds, the Institutes of Justinian.¹¹ When the work began to appear towards the end of 1850, at the front of the first volume he placed an address to Prince Albert in which he suggested that on the occasion of the Great Exhibition deputations from all over the world should be invited to London to discuss the feasibility of preparing an international code of commercial law for the whole world. The project would take about three years to complete. In replying¹² the Prince Consort invoked good constitutional principle to avoid commenting directly on the somewhat Utopian scheme, but despite this rebuff the publication of his giant compendium brought Levi some renown abroad and in certain circles in this country.¹³ Buoyed up by this apparent success Levi pressed ahead with a scheme to assimilate the commercial laws of the

⁹ *Report of the London Committee on the Scotch Bankrupt Bill, 1814.*

¹⁰ Article on Leone Levi, *Dictionary of National Biography* Vol. 11, 1035 (J.M. Rigg). See also L. Levi, *The Story of my Life* (privately printed, London, 1888), 40. Cf. Note 103 below.

¹¹ L. Levi, *Commercial Law, Its Principles and Administration; or, The Mercantile Law of Great Britain Compared with the Codes and Laws of Commerce of the Following Mercantile Countries: Anhalt . . . Würtemberg, and the Institutes of Justinian* Vol. 1 (London, 1850), Vol. 2 (London, 1851).

¹² Vol. 2, xi–xii.

¹³ *Dictionary of National Biography* loc. cit.; G. Cohn, 'The Beginnings of the International Assimilation of Commercial Law', *The Progress of Continental Law in the Nineteenth Century* (edited by J. Wigmore, London, 1918), 351 *et seq.* But in this country at least Levi was obviously regarded by some as a somewhat bizarre and comic figure. See, for instance, 'Scoto-English Law Commissions and Law Assimilations—Mercantile Law Reform', (1853) 49 *The Law Magazine* 318.

United Kingdom, and on this topic he lectured to public meetings up and down the country.¹⁴

At about this period the active political life of Lord Brougham was coming to an end and he was seeking other outlets for his boundless energy. Throughout his career he had been a tireless worker for reform, and at no time had he excluded his native Scottish legal system from his attentions. In pursuit of his aims he had been a prime mover in setting up the Law Amendment Society which, as its name suggests, was dedicated to law reform.¹⁵

In 1852 spurred on by Levi's efforts the grandly named Edinburgh Committee for the Amendment and Consolidation of Commercial Law called on the Law Amendment Society to arrange a meeting of representatives of Chambers of Commerce and others from the three kingdoms of England, Scotland and Ireland to discuss the assimilation of their commercial laws.¹⁶ This suggestion was adopted and in November of that year a great conference was held in London with representatives from Edinburgh, Glasgow, Dublin, Liverpool, Birmingham, Manchester and many other manufacturing centres, though strangely enough commercial circles in London were not represented.¹⁷ The week before, a meeting in the Glasgow Chamber of Commerce had given only a cautious welcome to an emissary of the London Committee for the assimilation of the commercial and bankruptcy laws of England and Scotland, who had used the occasion for the most part to promote a pet scheme of Lord Brougham to reform the Scottish law of bankruptcy.¹⁸ But at the London conference, with Lord Brougham presiding, enthusiasm reigned and a series of motions was passed endorsing the need to assimilate the three systems of commercial law. Mr. Alexander Hastie, M.P., one of the Glasgow representatives, swept aside worries that England would swallow up Scotland in this matter since he was sure that the Law Amendment Society would wish 'to adopt that which was best in the laws of both countries.'¹⁹ The meeting agreed to set up a committee to carry the views of the conference to the Government and the following afternoon Lord Harrowby led a deputation to Downing Street to meet Lord Derby. The Prime Minister appeared to be sympathetic to

¹⁴ *Report of the Proceedings of the Conference on the Assimilation of the Commercial Laws* . . . (The Law Amendment Society, London, 1852), 22 (hereinafter '*Conference Report*'). For a text of his lecture to chambers of commerce in Leeds, Bradford and Hull, see L. Levi, *A Lecture on the Proposed National Code of Commerce* (Leeds, 1852).

¹⁵ Cf. R. Stewart, *Henry Brougham His Public Career 1778-1868* (London, 1985), 348-9.

¹⁶ *Conference Report*, 1. The Committee had been set up following a lecture to the Edinburgh Merchant Company on 24 March 1851. Cf. Levi, *The Story of my Life*, 44 *et seq.* and 66.

¹⁷ *Conference Report*, 3-5.

¹⁸ *Glasgow Herald*, 15 November 1852, 5.

¹⁹ *Conference Report*, 10.

the idea of a commission.²⁰ Before anything could be done, however, the ministry fell and it was not till the following Spring that the matter could be taken forward with the new government under Lord Aberdeen.

The upshot was that in June 1853 the government set up a Royal Commission to 'inquire and ascertain how far the Mercantile Laws of the different Parts of the United Kingdom of Great Britain and Ireland may be advantageously assimilated'.²¹ The Lord Advocate, James Moncreiff, who favoured the kind of assimilation which involved taking the best bits from each system, envisaged that the results of the Commission's work would probably be to 'lay the foundation of a general system of jurisprudence which, in the course of time, will be worked out to a consummation.'²²

In the event the results were somewhat less dramatic. The Commission quickly produced two reports²³ which were only partly implemented.²⁴ Indeed it has been said that the legislation which followed in 1856 changed the laws of England and Scotland without in fact making them the same.²⁵ What is interesting to notice is that, when the Commission asked about the practical difficulties encountered by businessmen as a result of the differences among the various legal systems, the witnesses could give them few actual examples.²⁶

For a time after 1856 attention turned away from the particular matter of commercial law. In England it was rightly seen that the statute book needed to be purged of out-of-date material and, though Lord Cranworth's scheme²⁷ for a Code Victoria came to nothing, at the beginning of the 1860s Lord Westbury's Statute Law Revision Acts made considerable progress in consolidating English statute law.²⁸ In a speech made at the time,²⁹ Lord

²⁰ *Conference Report*, 21–2.

²¹ *First Report of the Royal Commission 1854* (P.P. 445), 3.

²² Speech at Leith on 1 September 1853, *The Scotsman*, 3 September 1853, 3 (pages not numbered).

²³ *First Report 1854* (P.P. 445); *Second Report 1854–1855* (P.P. 1977).

²⁴ Cf. J. K. Kirkpatrick, 'On the Codification of Mercantile Law', (1880) 24 *Journal of Jurisprudence* 638, 640.

²⁵ His Honour Judge Chalmers, *The Sale of Goods* (London, 1890), viii. Much the same point was made, for example, in 'English Amendments of Scotch Law', (1858) 1 *Scottish Law Journal* 1, a generally hostile commentary on the 1856 Act. Levi felt extremely let down by what he saw as the meagre and unsatisfactory outcome of his efforts: Levi, *The Story of my Life*, 81–2.

²⁶ Introduction to the *Second Report*.

²⁷ House of Lords, 14 February 1853, Hansard Third Series Vol. 124, coll. 41 *et seq.*, especially at 58–66.

²⁸ For nineteenth-century developments see, for example, Sir Courtenay Ilbert, *Legislative Methods and Forms* (Oxford, 1901), 51–76.

²⁹ House of Lords, 12 June 1863, Hansard Third Series Vol. 171, col. 775; J.F. Macqueen, *Speech of the Lord Chancellor on the Revision of the Law* (London, 1863).

Westbury foreshadowed a more ambitious plan for an official digest of the statute and case law of England—no mention was made of Scotland—and in 1866 a Royal Commission was set up to see whether such a thing could be compiled. The importance of this scheme for present purposes is that it was seen as a possible way of securing the advantages of codification (for instance, a clear statement of the law within a manageable compass) without the disadvantages of a statutory code which might prove difficult to adapt to changing circumstances. Though the Commissioners reported in favour of the proposal and work was set on foot to draft specimen sections, the whole project eventually broke down.³⁰

But while it was still active, it came to the notice of Mr. John Dove Wilson, a young Scotsman of ample means and Liberal opinions.³¹ Since he features prominently in the story, it may be in order to introduce him slightly more fully. Having practised as an advocate for four years, in 1861 at the age of twenty-eight he was appointed sheriff-substitute (rather like a county court judge) in the small town of Stonehaven near Aberdeen. Being of an academic frame of mind, he soon began to devote his considerable leisure to the writing of legal textbooks. A new edition of a book on bills of exchange appeared in 1865³² and a brand-new work on Sheriff Court Practice followed four years later.³³ With these substantial achievements behind him, in 1870 Dove Wilson was transferred to Aberdeen and seems quickly to have immersed himself in the life of that city where he was to spend the rest of his life. In 1890 he resigned as a sheriff to become Professor of Scots and Roman Law in the University of Aberdeen in 1891.

In 1870 shortly after moving to Aberdeen Dove Wilson published a paper under the auspices of the Scottish Law Amendment Society.³⁴ In it he argued that the proposed scheme for a digest of English case law, while admirable in itself, did not go far enough. What was required was to institute a similar scheme for Scotland and to compile a digest of Scots law on parallel lines. He drew attention to the 'intimate relations which bind Scotland and England' and to the 'great desirableness of assimilating the law of the United Kingdom'. He thought that, in particular for mercantile law, 'the parallel arrangement could be carried out almost to the minutest details', but that in any event the parallel digests would eventually allow

³⁰ Ilbert, *Legislative Methods*, 61 n. 1.

³¹ S.D. Girvin, 'Professor John Dove Wilson of Aberdeen', 1992 *Juridical Review* 60; article on John Dove Wilson, *Dictionary of National Biography* (1901–1911) (A.H. Millar). I am grateful to Dr. Girvin for sending me a copy of his article before publication.

³² R. Thomson, *Bills of Exchange* (second edition by J. Dove Wilson, Edinburgh, 1865).

³³ J. Dove Wilson, *The Practice of the Sheriff Courts of Scotland* (Edinburgh, 1869). In the Preface he suggests that the law of procedure is suitable for codification.

³⁴ 'On the Expediency of Forming a Digest of the Law of Scotland', (1870) 14 *Journal of Jurisprudence* 195.

codes to be developed which 'could be made to embrace the law of the United Kingdom on all matters on which it was really desirable that the law should be the same.'³⁵

In arguing along these lines Dove Wilson was by no means an isolated figure on the Scottish legal scene. We have already come across Lord Advocate Moncreiff in 1853 favouring assimilation and he had spoken to the same effect at a meeting of the Association for the Promotion of Social Science, another vehicle for Lord Brougham's ideas, at Glasgow in 1860.³⁶ Dove Wilson's patron, the Solicitor General George Young, supported a large degree of assimilation in a speech in 1869.³⁷ Indeed he was widely suspected of favouring the total abolition of Scots law as a separate system.³⁸ At this period assimilation and codification were very much in the air and the legal press of Scotland recorded the discussions among Scottish lawyers and businessmen.³⁹ For instance in 1864 James Muirhead, the new Professor of Civil Law at Edinburgh, addressed the Chamber of Commerce there on the subject of 'Codification of the Mercantile Law',⁴⁰ pointing out that, even if codification of the whole legal system could not be contemplated, commercial law was an excellent place to begin. 'The mercantile laws of England and Scotland are both of comparatively modern growth;' he said 'neither contains anything that it would shock the affections of the people to see amended; the differences between them are insignificant, and with the assistance and under the guidance of calm, unprejudiced, rationally-minded merchants and jurists, might without much difficulty be reconciled and adjusted.'⁴¹ We are told that his remarks were well received. Even Lord Deas, usually thought of as an archetypal old Scottish judge, said that 'he did not think that anybody could doubt the expediency of' assimilating

³⁵ Ibid., 200.

³⁶ J. Moncreiff, *Introductory Address on Jurisprudence and the Amendment of the Law* (Edinburgh, 1860), 18–23.

³⁷ 'Inaugural Address to the Scottish Law Amendment Society', (1869) 13 *Journal of Jurisprudence* 113, 122.

³⁸ G.W.T. Omond, *The Lord Advocates of Scotland Second Series 1834–1880* (London, 1914), 269–70.

³⁹ See, for example, 'Curiosities of the Statute Book. Codification', (1857) 1 *Journal of Jurisprudence* 404; A. Burrell, 'The Assimilation of the Mercantile Laws of England and Scotland—its Progress and Prospects' as summarized in (1861) 3 *Scottish Law Journal* 38; R.V. C (ampbell), 'A British Code', (1867) 11 *Journal of Jurisprudence* 400; 'On Codification', (1873) 17 *Journal of Jurisprudence* 188; H. G(oudy), 'Codification in Germany', (1873) 17 *Journal of Jurisprudence* 227; J.A. Dixon, 'The Codification of the Law', (1874) 18 *Journal of Jurisprudence* 305. There is, of course, a vast parallel literature in England on codification, but Scottish discussions generally have the added dimension of assimilation.

⁴⁰ J. Muirhead, *Codification of the Mercantile Law* (Edinburgh, 1864).

⁴¹ Ibid., 17.

the mercantile laws of the United Kingdom 'in so far as it had been urged that night.'⁴²

Muirhead's talk is perhaps particularly worth noting for the comparisons which he made with developments in Germany.⁴³ Speeches on codification all tend—even today—to contain historical and comparative sections which may for instance begin with Hammurabi and pay short uninteresting visits to Justinian, Francis Bacon, the Code Napoleon and many more besides. But by the 1860s events were stirring in Germany and these were particularly instructive.⁴⁴ The German Confederation was, after all, made up of many states, each with its own legal system and rules. But in spite of this, and particularly in the realm of commercial law, much had already been done to assimilate the laws of the different states and to embody them in a single code. Beginning with the law of bills of exchange, German jurists had managed by 1862 to produce a Common Commercial Code which was brought into force throughout the Confederation. This example was particularly compelling to advocates of codification in this country since the German problem had been so much more complex than the British. If a single code could be developed for Germany, it was hard to see how it could be impossible here.⁴⁵ Argument from the German experience recurs in many of the talks and, as the years go by and nothing is done, speakers contrast the lack of progress in this country with the great strides being made by the German Empire.⁴⁶

But the simple fact was that, however many speeches were made or resolutions passed, it was a long time before any practical steps were taken to advance the cause of codification of commercial law. The subject first came to life again towards the end of the 1870s. Following the publication of his digest of the law of partnership, the young Mr. Frederick Pollock was paid £100 to draft a Partnership Bill for the Associated Chambers of Commerce.⁴⁷

⁴² Ibid., 19.

⁴³ Ibid., 15 *et seq.*

⁴⁴ See e.g. M. John, *Politics and the Law in Late Nineteenth-Century Germany* (Oxford, 1989), Chapter 2; F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (second edition, Heidelberg, 1967), 458 *et seq.*; H. Coing, *Europäisches Privatrecht* Vol. 2 (Munich, 1989), 20, and 570–2. On mercantile codes generally see Coing, Chapter 26.

⁴⁵ See e.g. J. Dove Wilson, 'Concerning a Code of Commercial Law', (1884) 28 *Journal of Jurisprudence* 337, 343–4.

⁴⁶ See e.g. the article cited in the previous note and the paper of Mr. (later Sir) John Macdonnell cited in note 90 below.

⁴⁷ Executive Council, 13 December 1878; Law Committee, 25 January 1879; Executive Council, 14 February 1879, *Associated Chambers of Commerce of the United Kingdom (hereinafter 'A.C.C.') Minute Book (4 August 1876–3 October 1883)*. Manuscript 14,476.3, Guildhall Library. There is a not entirely accurate account of the involvement of the A.C.C. in commercial law reform in A.R. Ileric, P.F.B. Liddle, *Parliament of Commerce* (London, 1960), Chapters 7 and 8. On codification see especially 86–7.

By June 1879 the bill was ready⁴⁸ and it was introduced later that session. Since it tried to do more than merely to restate the existing law, it ran into considerable difficulties and its progress was blocked for many years so that it did not reach the statute book until 1890.⁴⁹ In its original form it did not apply to Scotland but in the final stages of its passage through Parliament this was changed. The change was supported by the Faculty of Advocates who thought that the addition of a few words would be enough 'so to frame the Bill as to make it the means of effecting a complete assimilation of the laws of the two kingdoms on partnership.'⁵⁰

No sooner had they launched their Partnership Bill on its troubled voyage than the Associated Chambers of Commerce turned their attention to codifying the law on bills of exchange.⁵¹ Early in 1880 Mackenzie Chalmers was consulted⁵² but the Associated Chambers soon became rather bogged down in trying to ascertain the French and German law on the topic.⁵³ They appear to have been rescued from this diversion in March 1881 when a letter arrived from Sir John Lubbock, the President of the Institute of Bankers, offering to share with the Associated Chambers the cost of drafting a bill to consolidate the existing law on bills of exchange.⁵⁴ The Institute had become interested a short time before as a result of a lecture by Mackenzie Chalmers.⁵⁵ The offer was accepted and by June a bill,

⁴⁸ Executive Council, 13 June 1879, A.C.C.; Resolution adopted by Special Meeting of the A.C.C., 24 August 1880: *Resolutions adopted at the Special Meeting of the Association of Chambers of Commerce of the United Kingdom . . . August 24th and 25th, 1880*, 8; Report of the Executive Council to the Annual Meeting February 1st, 1881 with Appendix adopted by the Annual Meeting, 1 February 1881: *Reports and Resolutions adopted at the Twenty-First Annual Meeting of the Chambers of Commerce of the United Kingdom . . . on February 1st, 2nd and 3rd 1881*, 12 and 19. Cf. also 31.

⁴⁹ Cf. F. Pollock, *The Law of Partnership* (fifteenth edition by L.C.B. Gower, London, 1952), Preface to the Twelfth Edition, xiv–xv. The A.C.C. was determined that the Bill should become law. For instance, the President, Colonel E.S. Hill, M.P., made a special effort to obtain a second reading for it in 1889: Executive Committee, 21 June 1889, A.C.C. *Minute Book* (2 October 1883–14 June 1895). Manuscript 14,476.4, Guildhall Library.

⁵⁰ *Report of the Committee of the Faculty of Advocates on the Partnership Bill and other Bills relating to Companies*, 19 March 1890.

⁵¹ Annual General Meeting, 17 February 1880, A.C.C.

⁵² Executive Council, 12 March 1880, A.C.C. He was the author of *A Digest of the law of Bills of Exchange, Promissory Notes and Cheques* (London, 1878) which had been modelled on the work of Sir James Stephen and Frederick Pollock: Introduction iii.

⁵³ Executive Council, 21 May 1880, A.C.C. *Reports and Resolutions adopted at the Twenty-First Annual Meeting 1881*, 6, 19 *et seq.* and 33.

⁵⁴ Executive Council, 11 March 1881, A.C.C.

⁵⁵ Report of the Council to the Third Annual General Meeting of the Institute of Bankers on 18 May 1881, (1880–1) 2 *Journal of the Institute of Bankers* 422, 425. For the text of the lecture and discussion on 26 January 1881, see M.D. Chalmers, 'On the Codification of Mercantile Law, with Especial Reference to the Law of Negotiable Instruments', (1880–1) 2 *Journal of the Institute of Bankers* 113.

applying to England and Ireland only, was ready for Sir John to introduce in the Commons.⁵⁶ The bill made no progress until the following year. At that point up in Aberdeen Dove Wilson sprang into action and wrote to Sir John Lubbock. Calling upon his experience as the editor of a textbook on bills of exchange, Dove Wilson suggested that the bill both could and should be made to apply to the whole United Kingdom.⁵⁷ The Commons Select Committee were given power to extend the Bill to Scotland and at their invitation Dove Wilson first wrote an elaborate report and then, in June, travelled to London to give evidence to them. Having heard his evidence, the Select Committee immediately decided that the bill should indeed apply to Scotland.⁵⁸ The necessary amendments were made⁵⁹ and two months later it had received the Royal Assent. The Act proved an immediate success both in England and in Scotland and quite soon it was adopted in many parts of the Empire.

Dove Wilson's adventure with the bills of exchange bill brought him some immediate benefits. For one thing he had made contacts and come to know some of the leading commercial and legal figures of the time. Not surprisingly Dove Wilson was also able, if not to dine out, at least to lecture out on the basis of his exhilarating experience—an experience, moreover, which seemed to show what could be done if only matters were tackled with some vigour.

So in April 1884 we find him talking to the Aberdeen Chamber of Commerce 'Concerning a Code of Commercial Law' and calling for businessmen to demand a code of commercial law for the whole United Kingdom which, he reckoned, could be prepared within about five years.⁶⁰ The directors of the Chamber were so impressed by what

⁵⁶ Executive Council, 17 June 1881, A.C.C.

⁵⁷ Dove Wilson, 28 *Journal of Jurisprudence* 345–6. For the legislative history see also M.D. Chalmers, 'An Experiment in Codification', (1886) 2 *L.Q.R.* 125. It is proper to see the developments in Britain as part of a wider movement. Cf. J. Dove Wilson, 'Unification of the Law of Bills of Exchange' (1886) 2 *L.Q.R.* 297 and G. Cohn, in *The Progress of Continental Law in the Nineteenth Century* (Note 13), 362 *et seq.*

⁵⁸ *Report from the Select Committee on the Bills of Exchange Bill, with the Proceedings of the Committee 1882* (P.P.244).

⁵⁹ On the process of assimilation see the speech of Lord Avebury (Sir John Lubbock), 27 June 1900, *Official Report of the Fourth Congress of Chambers of Commerce of the Empire held in London on 26th, 27th, 28th, and 29th June, 1900* (London Chamber of Commerce [Incorporated], London, 1900), 39; cf. *Report by the Committee of the Faculty of Advocates on the Bills of Exchange Bill 1882*, 9 June 1882 and the *Report of the Committee of the Faculty of Advocates on the Sale of Goods Bill*, 20 March 1891, 1. See also the speech of R.V. Campbell cited in Note 83 below.

⁶⁰ 28 *Journal of Jurisprudence* 337, especially at 348–51.

he said that they immediately decided to petition the Prime Minister, Mr. Gladstone, and to circulate copies of Dove Wilson's speech to other Chambers of Commerce and to Members of Parliament.⁶¹ Even more importantly they decided to submit a resolution on the topic to a meeting of the Associated Chambers of Commerce later that year.⁶² This took place in Wolverhampton at the end of September and Dove Wilson was there to move the Aberdeen resolution calling for a Royal Commission to be set up to start the process of assimilating the commercial laws of the three kingdoms. The resolution was adopted and Dove Wilson was then deputed to prepare a memorial on the topic which was submitted to the Government in the name of the Associated Chambers of Commerce.⁶³

In due course, but only with great difficulty,⁶⁴ arrangements were made for a deputation to see Lord Chancellor Selborne about the matter when the Associated Chambers met in London the following February. Naturally Dove Wilson was included in the delegation. Lord Selborne had a considerable record in law reform, not least for his Judicature Act 1873. So much may have been expected of him. As it happened, however, the timing of the meeting could hardly have been more unfortunate for General Gordon's death at Khartoum had been announced a few weeks before and the meeting took place on the eve of a censure debate on the Government's handling of the affair. In addition the failure of the proposed criminal law code to make progress in 1879 had highlighted the problems which any large-scale scheme of codification was likely to meet in Parliament.⁶⁵ Whatever the reasons, when he met the delegation the Lord Chancellor was completely unreceptive, dashing all hope of any grand scheme for codification.⁶⁶ Even if a code were drafted, he said, it would never get through Parliament which would wish to scrutinize every provision. The wiser course was to concentrate on codifying suitable branches of commercial law and, if private members came forward with suitable bills for that purpose, facilities would be afforded for

⁶¹ Council of Aberdeen Chamber of Commerce, 29 April and 27 May 1884, *Minute Book of Aberdeen Chamber of Commerce* Vol. 3, 156-7, 164-5 and 166-7. Aberdeen District Council Archives.

⁶² Council Meeting, 16 July 1884, *Minute Book* Vol. 3, 174-5.

⁶³ Special Meeting of A.C.C., 30 September 1884, *Supplement to the Chamber of Commerce Journal* 10 October 1884, 3-5.

⁶⁴ See the remark of C.M. Norwood, M.P., the President of the A.C.C. to the Annual Meeting, 24 February 1885, *Supplement to the Chamber of Commerce Journal* 10 March 1885, 2.

⁶⁵ Cf. Ilbert, *Legislative Methods*, 128.

⁶⁶ 'Codification of Commercial Law', (1885) 78 *Law Times* 321. See also E.S., 'The Proposed Mercantile Code', (1885) 29 *Journal of Jurisprudence* 186.

their passing. Addressing those whom he called 'the gentlemen from Scotland', he said that if they could suggest any difficulties which had not been removed by the reforming legislation of 1856, 'then he should be extremely happy to consider any suggestions on that subject, but he did not think a Royal Commission would be necessary for that purpose.'⁶⁷ Although the Lord Chancellor's attitude was heavily criticized in the press, there was nothing which could be done. Looking back on the débâcle, the Aberdeen Chamber concluded: 'it need not be disguised that it involves a loss of valuable time, in a question in which time is of the utmost importance, as it cannot be supposed that the condition in which the laws of the United Kingdom at present exist can long be tolerated.'⁶⁸

Although Lord Selborne went out of office a few months later, no one seems to have thought it worthwhile resuscitating the grand scheme. Doubtless Lord Halsbury was not thought likely to be an obvious supporter. Rather, those who were interested in reform followed Lord Selborne's advice and brought forward piecemeal codifying measures usually under the tutelage of Lord Herschell.

So, as we have seen already, the Associated Chambers continued to press their Partnership Bill. They also initiated a bill to codify the law of arbitration but, despite Lord Bramwell's efforts, this ultimately came to nothing. More successful was the Factors Act 1889 which derived from a bill promoted by the London Chamber and the Institute of Bankers and which was applied to Scotland in 1890. Above all, the matter of sale was at last receiving attention. In 1888 Mackenzie Chalmers drafted a Sale of Goods Bill setting out the existing law for England and Wales⁶⁹ and it was introduced by Lord Herschell at the end of the session.⁷⁰ Modified and reintroduced in the Spring of 1889, this was the bill which eventually became the Sale of Goods Act 1893 and assimilated the laws of England and Scotland.

The idea that the bill was imposed on Scotland by English interests could hardly be less true. In fact the Scottish interests saw the risk that they would be left out and fought to make sure that the Bill was adapted to apply

⁶⁷ 78 *Law Times* 322.

⁶⁸ Report by Council to the Annual General Meeting of the Aberdeen Chamber of Commerce, 9 April 1885. *Minute Book* Vol. 3, 206–7. It says much for the determination of the Aberdeen Chamber that five years later they took the matter up again and submitted a motion on assimilation of commercial law for consideration by the A.C.C.: Council Meeting, Aberdeen Chamber of Commerce, 30 December 1890. *Minute Book* Vol. 3, 188 with 186. See further Note 75 below.

⁶⁹ Article on Sir Mackenzie Dalzell Chalmers, *Dictionary of National Biography* (1922–1930), (F.D. Mackinnon).

⁷⁰ 9 August 1888, *Hansard Third Series* Vol. 330, cols. 70–71.

throughout the United Kingdom.⁷¹ The first off the mark seem to have been the Faculty of Advocates. As early as June 1889 a Faculty Committee observed that a codifying bill which did not apply to Scotland would lose much of its value and they were reappointed to set about revising the Bill to make it applicable there.⁷² Nothing much seems to have happened until the spring of 1891 when there was a flurry of activity in Scotland. The Faculty of Advocates again decided that 'with some verbal amendments' the Bill could easily be adapted to Scotland.⁷³ The Aberdeen Chamber of Commerce wrote round to other Chambers in Scotland urging them to join in petitioning in favour of the Bill⁷⁴ and a representative from Aberdeen spoke in favour of extending the Bill to Scotland at the Annual Meeting of the Associated Chambers of Commerce.⁷⁵ The Glasgow Chamber prepared a petition which referred to the 'great and general advantage' of assimilating the laws on sale of goods and sent it to Lord Watson for presentation in the House of Lords. Lord Watson presented the petition and in due course told the Glasgow Chamber that he would put down amendments to make the Bill apply to Scotland.⁷⁶ He duly did so at the end of July and they were contained in the Bill when it passed the House of Lords.⁷⁷

The Bill made no further progress that session, but in May 1892 the Bill incorporating the Scottish amendments was reintroduced. The

⁷¹ For instance Professor Richard Brown urged 'upon the legal profession in Scotland that they take up arms in the same way as they did in regard to the Bills of Exchange Act and insist that Scotland be included': *Is it Expedient to Codify by Statute the Leading Branches of Commercial Law? Report of Proceedings before a Commission of the Glasgow Juridical Society, On Wednesday, 17th December 1890* (Glasgow Juridical Society, Glasgow, 1891), 14. The 'Commission' answered the question in the negative. Much useful secondary material on the Sale of Goods Bill is gathered in the references to H. Macdonald and others, 'Law Reform' in the article on Sources of Law (General and Historical), *Laws of Scotland Stair Memorial Encyclopaedia* Vol. 22 (Edinburgh, 1987), para. 643.

⁷² *Interim Report of the Faculty of Advocates Committee on the Sale of Goods Bill* adopted at a Faculty meeting on 1 June 1889. *Minute Book of Faculty of Advocates*, 593–4. National Library of Scotland. In the *Encyclopaedia* article cited in the previous note, the authors give the misleading impression, based on a secondary source, that the Faculty saw the application to Scotland as something which was likely to be imposed rather than something for which they were to aim.

⁷³ *Report of the Committee of the Faculty of Advocates on the Sale of Goods Bill*, 20 March 1891, 1.

⁷⁴ *Report of the Council to the Annual General Meeting of the Aberdeen Chamber of Commerce on 5 April 1892*, 9. The Aberdeen Chamber itself petitioned in favour of the Bill being applied to Scotland. For the text of the petition dated 14 April 1891, see *Minute Book* Vol. 3, 238–9.

⁷⁵ Speech of A.J. Brander, 5 March 1891, *Supplement to the Chamber of Commerce Journal* 10 March 1891, 23. See Note 67 above.

⁷⁶ *Report by Directors of Glasgow Chamber of Commerce to Annual General Meeting on 18 January 1892*, 12–13. Glasgow Chamber of Commerce.

⁷⁷ House of Lords, 30 July 1891, *Hansard Third Series* Vol. 356, col. 741.

amendments were not, however, satisfactory and the Glasgow Faculty of Procurators, who were in favour of the principle of the Bill, were very active in securing the introduction of many necessary changes during the course of the session.⁷⁸ The Bill fell again. It was introduced once more in 1893, but this time without the Scottish amendments. The Lord Chancellor, Lord Herschell, explained that the Bill could not possibly become law unless it were 'absolutely non-contentious'. He referred to the misgivings which had been expressed about some of the Scottish clauses the year before and indicated that he could re-introduce the Scottish amendments only if the position could be agreed.⁷⁹ Lord Watson replied saying that the differences of opinion were on 'comparatively trivial' points and he thought that agreement could be reached so that the Bill would not be put in danger.⁸⁰ About a fortnight later the Scottish amendments were back in the Bill⁸¹ and there they remained until it reached the statute book in the following January.

Two comments seem in order. First, so far from wanting to impose the Bill on an unwilling Scotland, Lord Herschell actually preferred to confine it to England if there was any risk that difficulties with the law of Scotland would endanger its passage through Parliament. Secondly, the Bill enjoyed a wide measure of Scottish support from businessmen in their chambers of commerce and lawyers in their professional societies. Interestingly the Faculty of Advocates who had been the first to support the measure and who had maintained that support for four years suddenly withdrew it at the last moment when a Faculty meeting came down against the Bill. They apparently decided that the form of codification was unsatisfactory and that the English rule on the passing of property should not be adopted.⁸² Not for the first time, nor indeed for the last time, the Faculty made its move too late to have any chance of affecting the outcome.

In truth the spirit of the age was against them. Codification of

⁷⁸ *Annual Report by the Committee on Bills of the Royal Faculty of Procurators in Glasgow to the General Meeting, 4 November 1892*, 4–12. Library of the Royal Faculty of Procurators, Glasgow.

⁷⁹ Speech of Lord Herschell, L.C., 21 February 1893, Hansard Fourth Series Vol. 9, col. 4.

⁸⁰ Speech of Lord Watson, Hansard Fourth Series Vol. 9, cols. 4–5.

⁸¹ 6 March 1893, Hansard Fourth Series Vol. 9, col. 1069.

⁸² Faculty Meeting, 10 March 1893 adopting the dissent in the *Report by the Committee of the Faculty of Advocates on the Sale of Goods Bill, 1893*, 10 March 1893. Among those who dissented was Professor Goudy. It would be difficult to detect this from his remarks a quarter of a century later: H. Goudy, *Address on Law Reform 3 July 1919 Society of Public Teachers of Law* (Oxford, 1919), 22–23.

commercial law was being promoted on all sides⁸³ and the rise of the New Imperialism encouraged an Empire-wide view of problems. So supporters of the codification of commercial law came to present it as a matter affecting the commercial health not just of the countries of the United Kingdom but of the Empire as a whole, an Empire which was having increasingly to compete with the growing commercial and industrial strength of Germany. Who better to tell forth this splendid theme than Professor Dove Wilson from Aberdeen? At least that appears to have been the view in London, for the Chamber of Commerce there specially asked the Aberdeen Chamber if Dove Wilson would move a motion on the codification of commercial law at the Second Congress of Chambers of Commerce of the Empire in 1892.⁸⁴ The Professor obliged and the resolution was safely carried.⁸⁵

In Scotland the momentum in favour of codification was maintained the following year when the Edinburgh Merchant Company arranged a series of three lectures on the topic, each by an advocate and each in favour of codification. To a sceptical observer they may appear rather uninspiring, but the Merchant Company apparently thought otherwise since they had the lectures printed and copies circulated widely to Members of Parliament and others.⁸⁶ In 1895 the Merchant Company took up the matter again⁸⁷ and early in 1896 a circular letter was sent to mercantile and legal bodies in

⁸³ Indeed the Faculty itself had supported such a code of commercial law for the United Kingdom as recently as 1891: Faculty meeting on 20 March 1891 approving the *Report by the Faculty Committee on the Sale of Goods Bill*, 20 March 1891, 2. Minute Book of the Faculty of Advocates, 632. It would appear that the official attitude of the Faculty was in fact generally in favour of codification. See for instance the speeches of Aeneas Mackay and Richard Vary Campbell representing the Faculty, *Report of Conference of Delegates from Legal and Mercantile Bodies in Scotland 13th July 1896* (The Merchants' Hall, Edinburgh, 1896), 31–7 and 41–5 respectively. Sheriff Campbell in particular was anxious to dispel any impression of a lack of enthusiasm on the part of the Faculty. None the less it is interesting to note that on 21 November 1894 the Faculty set up a Committee 'to watch over any proposals that might be made for alterations in Mercantile Law . . .'. The Committee was able to send delegates to meetings of legal bodies on the subject.

⁸⁴ Aberdeen Chamber of Commerce Committee, 9 June 1892, *Minute Book* Vol. 3, 367 referring to a letter of 31 May 1892 from the Secretary of the London Chamber.

⁸⁵ *Report of the Proceedings of the Second Congress of Chambers of Commerce of the Empire June 28th, 29th, 30th and July 1st 1892, Supplement to the Chamber of Commerce Journal* 14 July 1892, 47–9, reporting proceedings on 30 June 1892.

⁸⁶ H. Goudy, Ae. J.G. Mackay and R.V. Campbell, *Addresses on Codification of Law* (Edinburgh, 1893). For a contemporary comment on the lectures stressing the need to mobilize Parliamentary as opposed to mercantile opinion see 'A Word for Codification' (1893) 9 *Scottish Law Rev.* 203.

⁸⁷ Merchant Company, 15 October 1895, *Minute Book of the Merchant Company of Edinburgh* Vol. 19, 517. The Merchant Company, Edinburgh.

Scotland.⁸⁸ It is not perhaps surprising then that when the Third Congress of Chambers of Commerce of the Empire took place in June of that year Professor Dove Wilson was back in his place moving yet another motion on the need to codify the commercial law of the Empire.⁸⁹ The choice of Dove Wilson can be regarded as shrewd. He was recognized as something of an authority on the matter. More importantly, however, he could speak as someone coming from a country where English law did not prevail. For this reason he was well placed to argue that, if a code could be devised which could bridge the differences between English and Scots law, then surely it would easily bridge those gaps with other non-English systems in South Africa and Quebec, for instance. A code which could work in the United Kingdom could work throughout the Empire. So if only people would get on with codifying United Kingdom law, they would virtually simultaneously achieve the far wider goal of drafting a code for the Empire.⁹⁰ The main thing was to set to work quickly before the various countries of the Empire felt obliged to embark on their own codification schemes.⁹¹

Not surprisingly on this occasion Dove Wilson's motion was passed with acclamation, for the theme was seductive and fitted well with other resolutions calling for closer co-operation within the Empire. The tone of the congress had been set by a rousing opening address from Joseph Chamberlain in his role of Colonial Secretary.⁹² It must have seemed to the supporters of codification that if only they could hitch their wagon to the popular theme of imperialism and enlist Chamberlain's support,⁹³ then they would at last overcome their major difficulty of arousing the interest of politicians in their proposals. As we have seen, it was precisely this

⁸⁸ Circular letter dated 25 February 1896. Cf. Copy Statement for the Master etc. dated 16 December 1895 appended to the minute of their meeting, 16 January 1896, *Minute Book* Vol. 19, 543 and 545 *et seq.* and the Copy Report appended to the minute of the meeting of the Master and others, 11 June 1896.

⁸⁹ *Official Report of the Third Congress of Chambers of Commerce of the Empire June 9th–12th 1896* (London Chamber of Commerce [Incorporated], London, 1896), 48–56. See also the remarks of Lord Herschell on the occasion of the Second Reading of the Sale of Goods Bill, House of Lords, 17 March 1891, *Hansard Third Series*, Vol. 351, coll. 1181 *et seq.*, where he plays down the practical advantages at home and stresses the advantages of uniform provisions for the Empire.

⁹⁰ *Official Report*, 49. Cf. paper by Sir John Macdonnell, 52 (first column).

⁹¹ J. Dove Wilson, 'The Proposed Imperial Code of Commercial Law—A Plea for Progress', (1896) 8 *Juridical Review* 329, 344 and the speech of Sir John Macdonnell, *Official Report*, 55.

⁹² 'Commercial Union of the Empire', *Mr. Chamberlain's Speeches* (edited by C.W. Boyd, London, 1914) Vol. 1, 365; *Official Report*, 4 *et seq.*

⁹³ *Ibid.*, 367; *Official Report*, 4 (second column). By this time Dove Wilson was an active Liberal Unionist. Cf. *Glasgow Herald* 25 January 1908, 7 and *The Scotsman* 25 January 1908, 8. His confidence in Chamberlain shines through: *Official Report*, 49 (second column).

lack of political appeal which had caused all the previous schemes to fail since no-one was prepared to force the necessary legislation through Parliament.

After the Congress was over Dove Wilson stayed on in London to try to arrange meetings to give effect to the Congress resolution, but he found that the Agents-General for the colonies had gone off to a conference in Budapest and were not available.⁹⁴ So he returned to Scotland. But he was back in London on 6 August as part of a delegation which met Joseph Chamberlain and presented him with the Congress resolution. The meeting does not appear to have been a success since Chamberlain went no further than to suggest that, if they could tell him of any codifying measures already enacted in the United Kingdom which had not 'been adopted by the Colonies, he might possibly see the means of advancing the views of the deputation'.⁹⁵ This was a very far cry from support for a grand scheme of imperial codification.

Worse was to follow. In July, just after the Empire Congress, a meeting of Scottish businessmen and lawyers had assembled under the aegis of the Edinburgh Merchant Company and had enthusiastically endorsed the cause of codification of commercial law.⁹⁶ A committee was set up to raise the matter with the Government and they duly did so, forwarding a memorial to the Scottish Secretary and asking for a meeting. A curt letter was sent in return and the committee had to write again asking if he would meet them. In December the Scottish Secretary wrote declining to meet them and indicating that the Government had no plans to take up the matter of codification in its legislation for the next session.⁹⁷

So far as one can see, this rebuff really marked the end of active campaigning for codification of commercial law. By now it must have been plain even to the greatest enthusiast that there was no prospect of a British commercial code in the foreseeable future. So it was back to the small things. The Marine Insurance Bill⁹⁸ staggered uncertainly towards the statute book and company legislation was consolidated. But the great vision had gone. When the motion on commercial codification came up yet again at the next Empire Congress in 1900, Dove Wilson was not even there and the matter was treated almost perfunctorily.⁹⁹ By that time the

⁹⁴ See the remarks of C. M'Combie, representing the Aberdeen Chamber of Commerce, *Report of Conference* (Note 83 above), 18.

⁹⁵ *The Times*, 7 August 1896, 6.

⁹⁶ *Report of Conference* (Note 83 above). For a useful summary see 'Codification of Commercial Law', (1896) 4 *S.L.T.* (News) 66.

⁹⁷ 'The Proposed Codification of the Mercantile Law', (1897) 4 *S.L.T.* (News) 176 *et seq.*

⁹⁸ For the history of the bill from its introduction by Lord Herschell in 1894, see for instance M.D. Chalmers, *Marine Insurance Act 1906* (first edition, London, 1907), Introduction.

⁹⁹ *Official Report of the Fourth Congress of Chambers of Commerce of the Empire* (Note 59 above), 39–40. The resolution was moved by Lord Avebury.

South African War meant that rather graver issues dominated the imperial agenda. A little later the radical programme of Mr. Asquith did not leave businessmen or parliamentarians much time to bother about the somewhat intangible benefits of a commercial code. The moment had passed.

In looking back at the story a number of observations occur.

First, it was businessmen who were most prominent in advocating a commercial code. But in the discussions Scottish businessmen and lawyers appear to have taken a very active role. The explanation of this phenomenon is, I believe, to be found in the relative indifference of English lawyers in particular. English lawyers work within a large system and have often been scarcely aware of the existence of any other. They will therefore not even perceive that differences exist between the Scots law and the English law on a particular topic. By contrast Scottish lawyers can never ignore English law and so they tend to see the differences. At some periods these differences may be cherished, but in the nineteenth century there was certainly a large body of opinion which thought of them as simply inconvenient. It would therefore be natural if Scottish businessmen and lawyers were particularly interested in any moves to eliminate them. The interest in assimilation in turn led to an interest in codification as a means of bringing it about. Scottish lawyers and businessmen therefore had this additional and arguably more practical reason for supporting codification of commercial law.¹⁰⁰

It is indeed worth asking whether the campaign for assimilation and codification was designed to tackle a real problem which confronted businessmen of the time. It will be recalled that the Royal Commission on Mercantile Law could find few examples of actual problems. None the less the sustained active campaigning by chambers of commerce and others suggests that businessmen thought at least that the differences in the laws of England and Scotland caused actual difficulties. My impression is that with bills of exchange there may well have been actual problems. Partnership disputes on the other hand would not tend to cross the border, and so difficulties would be less likely to arise under that heading. So the incidence of real problems would vary from topic to topic.

Overall I incline to the view that proponents of codification probably exaggerated the difficulties which were experienced. After all, one of their own main arguments in favour of assimilation was exactly that, because commercial law was based on the practice of merchants, it really varied little between England and Scotland and so complete assimilation was

¹⁰⁰ As has often been observed, the desire to assimilate is a common driving force for codification. Cf. e.g. H. Coing, *Europäisches Privatrecht* Vol. 2, 19 *et seq.* and Ilbert, *Legislative Methods*, 160–2.

a relatively small step to take. In the end, as Maitland noticed, the differences between England and Scotland were not great enough 'to bring home to us in an acute form those evils which have plagued our neighbours.'¹⁰¹ Because the evils were not acute, politicians did not give a high priority to formal assimilation in a common code and so it did not come to pass.

Secondly, I believe that events on the Continent played a very important role in shaping the views of the Scottish lawyers who were active supporters of codification. Much ink has been spilled in describing how in the eighteenth-century young men who wished to become Scottish advocates would go to the Netherlands to study and how, with the Napoleonic Wars, this came to an end, leaving Scots law cut off and ripe for domination by English influences.¹⁰² Such a picture is rather over-simplified. What it overlooks is that, when Europe emerged from the Napoleonic Wars, young Scotsmen wishing to study law soon saw that German universities were in the forefront of legal scholarship.¹⁰³ So they wisely set off to learn their Roman law in places like Göttingen and Heidelberg.

The story is too long to tell here, but it is enough to say that during the nineteenth century we find a flow of intrants to the Faculty of Advocates who have had some of their education, usually probably just a semester, at a German university. This is conspicuously the case with many of those who supported codification. For instance, Professor Muirhead, who addressed the Edinburgh Merchant Company in 1864, had been to Heidelberg.¹⁰⁴ Similarly all three of the advocates who gave lectures to the same body in 1893 had studied in Germany: Aeneas Mackay and Richard Vary Campbell

¹⁰¹ F.W. Maitland, 'The Making of the German Civil Code', *The Collected Papers of Frederic William Maitland* Volume 3 (edited by H.A.L. Fisher, Cambridge, 1911), 474, 477.

¹⁰² E.g. T.B. Smith, 'Scots Law and Roman-Dutch Law: A Shared Tradition', *Studies Critical and Comparative* (Edinburgh and New York, 1962), 51–6.

¹⁰³ Cf. e.g. James Reddie, *Inquiries in the Science of Law* (second edition, London, 1847), vi. Incidentally, it was through his good offices that Leone Levi was introduced to Professor John More who took a leading role in advocating codification and who gained access for Levi to the Advocates Library. Cf. Levi, *The Story of my Life*, 39. His son John Reddie obtained the degree of doctor of laws at Göttingen where he matriculated on 1 October 1823: G. von Selle, *Die Matrikel der Georg-August-Universität zu Göttingen 1734–1837* (Hildesheim and Leipzig, 1937), 701 No. 30401.

¹⁰⁴ James Muirhead matriculated on 13 May 1854 and studied in the Faculty of Law. See G. Toepke, P. Hintzelmann, *Die Matrikel der Universität Heidelberg* Vol. 6 1846–1870 (Heidelberg, 1907), 225 No. 199. At this period Heidelberg under von Vangerow was particularly popular for the study of Roman Law. Cf. P. Classen, E. Wolgast, *Kleine Geschichte der Universität Heidelberg* (Berlin, Heidelberg and New York, 1983), 49 and the article on K.A. von Vangerow, *Allgemeine Deutsche Biographie* Vol. 39 (Leipzig, 1895), 479 especially at 481 (E. Landsberg).

at Heidelberg,¹⁰⁵ Goudy at Königsberg.¹⁰⁶ Dove Wilson was at Berlin in his youth and, when he was about to become a professor at Aberdeen in 1891, he prepared by going off to Leipzig.¹⁰⁷ This meant that these men were familiar with developments in Germany and indeed had sometimes been there when the German codes were under discussion. It is not surprising therefore that when they looked to the Continent they drew the lesson that there was a strong tide running in favour of assimilating what had formerly been divergent systems of law. After unification in 1871 Germany provided the best example, culminating in the Civil Code which was enacted just a fortnight after Dove Wilson spoke to the Empire Congress in 1896.¹⁰⁸ The lesson for Britain must have seemed clear: we too should move towards assimilating our systems and to do that we needed to have a code. The Germans had started with commercial law and we should do so too. So, paradoxically perhaps, those Scots lawyers who had studied abroad and been exposed to Civil Law influences became the most convinced of the need for English and Scots law to be united in a code based on the Common Law.

Finally it is legitimate to wonder just how popular codification really was among Scottish lawyers. Some of the main supporters seem to have been advocates who were not really in active practice: Dove Wilson was a judge, Goudy a professor. But others are not so easily dismissed: Aeneas Mackay combined literature with actual practice, while Richard Vary Campbell was very definitely among the leading practitioners at the Scottish bar at the time of his sudden death. So it would perhaps be too simple to classify the supporters of codification as practitioners in name only.

Yet one cannot avoid the suspicion that, when the Faculty of Advocates meeting came out against the Sale of Goods Bill in 1893, this was the voice of the ordinary members of Faculty that had never spoken yet.¹⁰⁹ Certainly

¹⁰⁵ Aeneas Mackay matriculated on 28 September 1862 and Richard Vary Campbell on 25 April 1863. Both studied in the Faculty of Law. See Toepke, Hintzelmann, *Die Matrikel der Universität Heidelberg* Vol. 6, 453 No. 251 and 465, No. 171 respectively.

¹⁰⁶ Cf. 'Professor Henry Goudy', (1893) 1 *S.L.T.* 113. The author remarks that Goudy 'has never lost the affection for the Fatherland, cherished by most of those who have known the romance of its student-life, spite of all the beer and tobacco.' The article referred to in Note 39 above is plainly the first fruit of Goudy's stay in Germany.

¹⁰⁷ Windscheid and Sohm attracted him to Leipzig: (1908) 15 *S.L.T.* 150, 151 (J.M. Irvine).

¹⁰⁸ John, *Politics and the Law in Late Nineteenth-Century Germany*, Chapter 7. In his *Rektorsrede* delivered in the same year Lenel sounded a timely warning against exaggerated expectations of a flowering of German legal science and practice as a result of the new code: O. Lenel, *Das Bürgerliche Gesetzbuch und das Studium des Römischen Rechts Rektorsrede*. Das Stiftungsfest der Kaiser Wilhelms-Universität Strassburg (Strasbourg, 1896), 15, 35–6; reprinted in O. Lenel, *Gesammelte Schriften* (edited by O. Behrends and F. D'Ippolito) Vol. 2 (Naples, 1990), 351, 371–2.

¹⁰⁹ Yet some at least, like Goudy and R.V. Campbell, were opposed to the particular Sale of Goods Bill rather than to the principle of codification.

Dove Wilson thought that, at best, proponents of codification could count on the acquiescence, rather than the active support, of practising lawyers. He always claimed that businessmen rather than lawyers had most to gain from codification and so they should do the most to promote it.¹¹⁰ His lack of faith in the majority of legal practitioners was probably well founded.

However that may be, the efforts to introduce a commercial code failed. I cannot say that I am sorry, for I have never been convinced of the advantages of codification—least of all perhaps now when we have so many excellent textbooks and when Community Law is creeping into every nook and cranny even of our statute law. But though the idea of codification has been rather out of fashion for the past decade or so, it is once more stirring. Two years ago the Law Commission produced a large Criminal Code for England and Wales.¹¹¹ Having looked back at the events of last century, I shall watch with interest, when this new code eventually embarks on its voyage towards the statute book, to see how it fares in negotiating¹¹² those parliamentary rocks on which all the great vessels of codification have foundered in the past.

Note. I am grateful to the following bodies for permission to consult and use their records and for assistance in doing so: the Faculty of Advocates, the Society of Solicitors in the Supreme Courts, the Royal Faculty of Procurators, Glasgow, the Edinburgh Merchant Company, the Aberdeen Chamber of Commerce and the Aberdeen District Council Archives, and the Glasgow Chamber of Commerce. I am also grateful to the Hon. Lord Davidson for reading and commenting on an earlier draft of the lecture.

¹¹⁰ (1884) 28 *Journal of Jurisprudence* 337, 348; (1896) 8 *Juridical Review* 329, 344–5.

¹¹¹ The Law Commission, *A Criminal Code for England and Wales* (Law Com. No. 177, 1989).

¹¹² Cf. *op. cit.*, Vol. 1, paras. 2.26 and 3.45–3.48. See the remarks of Lord Wilberforce seeking a new channel for such legislation: House of Lords, 6 November 1991, Hansard Vol. 532, coll. 274–5.