CHAPTER I

REPARATION AND THE VICTIM

WHEN we think of Edward I we can hardly separate him from the age in which he lived. Nor is it altogether necessary that we should. He was a great king, and it was a great age, and for most purposes that is enough. The king and the age—the man and the environment—were inseparable then, and we need not try to put them asunder now. To some it may seem proper to place the figure of Edward I high among the heroes of Church and State portrayed in stained glass, which for succeeding centuries has shown our respect, and his worth; to others (especially to some modern historians) he seems 'a little lower than the angels'—a good deal lower, in fact—and becomes noticeably more immersed in an environment which may be painted in darker colours. We need not be unduly alarmed; Edward I never set himself up as a teacher of mankind, and, as far as we can know, he only claimed to represent the current thought of his age. If we therefore examine the age in which he lived we may hope to find a contemporary estimation of the problems which faced him, whether they be religious, social, civil or criminal, and watch the endeavours of a well-informed, but not an expert, ruler to deal with them.

The appropriate machinery lay close at hand—legislation. In France, in England, in Spain, and elsewhere, when a large problem had to be tackled in broad and

general terms, it was a 'statute' or 'ordonnance' or some such device which embodied the king's commands to his lieutenants and to his people. There is no need to conceal the fact that 'statutes' and their like could bring with them some serious problems, some of which are not yet entirely solved. The political scientist will examine critically the idea of 'legislation'; the theologian will not be immediately satisfied that what it has created is truly 'law'; and the lawyer is not always certain what he should do with it—whatever one calls it—even in our own day: the problem of 'interpretation' is still with us. These were hazards which a legislator must nevertheless accept if he is to do anything, and it seems agreed in the Middle Ages that a ruler cannot avoid his duty to provide his people with justice.

Legislation is a powerful weapon; it is difficult to say that it is confined by any definite limits. Nevertheless, it is also an uncertain one, and it is by no means foreseeable what its effects may be, especially when young unskilful hands are fumbling with a strange new toy. Moreover, a legislator stands at a particular moment, an unknown past behind him, an inscrutable future before him. We, who live at a safe distance and need not be overmuch worried by the problems which beset Edward I, can make use of our advantages. His past and his future are both open to us, although he was but dimly aware of the one, and utterly ignorant of the other. That knowledge is for us to use. We can see his problems more clearly than he did; whether we shall judge them more wisely is another matter. The way to tackle the problems which confronted Edward I at the

end of the thirteenth century seems tolerably clear. First, there is the past which piled up mountains of difficulties, beneath which perhaps lay concealed some useful clues—if only they could be unearthed. Then we must consider the thought of those who up to now had succeeded in reaching some sort of conclusion—however tentative—about crime and criminal law. Next we must see what sort of results Edward I derived from his consideration of these matters, if indeed he or his advisers had given them adequate consideration. Finally, we must give thought to that ineluctable consequence of human action—its bearing on the future, and its results, good or bad, for the development of the criminal law.

When we look at our earliest Anglo-Saxon laws, they show us a world so different from ours that it is difficult to think of them as in any way relevant to our inquiry. Their most obvious characteristic, and their most significant one, is the all but total absence of any arrangement in them. No doubt there is a certain association of ideas, especially in the later Anglo-Saxon laws, which supplies some modicum of unity in them, at least for short intervals. Nor can we excuse this absence as merely the unskilful presentation of its laws by a nation which was still young in the legislative art. It is more than a question of form, and much more than a question of literary tricks and graces. We must regard it as showing that the draftsmen of these laws had not yet achieved the first rudiments of a vocabulary which would enable them to analyse the law into such categories as 'crime', 'tort', 'property', 'procedure' and the like, which are indis-

pensable if we are to consider, for however short a while, some point of law and its relationship with other legal rules and concepts. When we have to evaluate the work which has been preserved in the Anglo-Saxon laws, it should be remembered that its framers and draftsmen had to work without those tools of legal analysis and nomenclature which seem to us quite essential if our thoughts are to be directed accurately and usefully to the law and its problems.

That last point should also be considered from another point of view, that of Roman law. There we have a problem which will constantly meet us as we consider the course of English legal history. When we first have texts which purport to come from the kingdom of Kent and from the reign of its king Æthelberht, Roman law already had a thousand years of history behind it. A vast treasure of tried and tested legal results lay to hand in the *Corpus Juris* of Justinian, the fruit of the age-long experience of the City. As the age grew darker, it seemed almost miraculous that such a treasury of law should have been assembled and should be within the reach of at least some rare and favoured spirits, even if it be only in the much diluted form of the *Breviarium Alaricianum*.[1] Our own Aldhelm found that work heavy going, but it served to keep him away from a Christmas

[1] It has been supposed that Aldhelm took this book from Canterbury (where he read it) to Malmesbury (of which house he later became abbot), and that William of Malmesbury (who died in 1143) made a copy much later which is now in the Bodleian (Selden B. 16); from which copy it would seem that Aldhelm had been reading the *Breviarium Alaricianum* (M. R. James, *Two Ancient English Scholars*, pp. 13–14; F. M. Stenton, *Anglo-Saxon England*, p. 181; Pollock and Maitland, *History of English Law*, vol. 1, p. xxxii, n. 2).

party, nevertheless. The ready-made results of Roman law were often an immediate attraction to those scholars who made acquaintance with them for the first time. But much more profound in its ultimate result was the matchless gift of method.

We may distinguish, although we cannot altogether separate, these two aspects of Roman law. A medieval jurist or statesman may very well have been tempted to borrow the language or even the institutions of a foreign system whose results were there to be had for the taking, much as a modern schoolboy may be tempted to look up the answers at the end of the book. In either case the result is apt to be the same: the borrower, the taker of the short cut, will generally reveal himself when we examine carefully the nature of his new-won spoil. Did he invent it himself? Is it the result of his own thought and the outcome of his own experience? Or is it the work of other men (one might almost say, the product of a different culture) which the borrower has understood but imperfectly, if at all? The spread throughout the world of Roman law, like the much later spread of English parliamentary institutions, has not always been the rational outcome of the borrowers' own legal or political history.

In a famous passage Maitland has reminded us of how Glanvill came to distinguish civil from criminal causes,[1] and how in the next century Bracton learnt much from the canonist Bernard of Pavia.[2] It had to be

[1] Pollock and Maitland, *History of English Law*, vol. II, p. 477.

[2] *Ibid.* It is now suggested that Bracton in fact used Raymond of Penafort, who had been much indebted to Bernard of Pavia: see F. Schulz, 'Bracton and Raymond de Penafort', *Law Quarterly Review*, vol. LXI (1945), p. 286.

admitted that before the conquest 'what we may call the criminal law of England...was also the law of "torts" or civil wrongs',[1] and that, in spite of the prowess of Glanvill and Bracton, 'even at the present day we can hardly say that *crime* is one of the technical terms of our law'.[2]

The deeper and more lasting influence of Roman law was exerted in a more subtle and permanent manner, not in the transplanting of this or that turn of language, or of some useful legal device, but in the whole attitude with which it approached the problems of law. The spirit of a body of law, which was often alien in time and place to those who came into contact with it, was not to be learned in a day. The professional scholars acquired it first, and from the civilians and canonists (who necessarily spent much time in study of the books of Justinian) the new spirit spread to the theologians. In practice, the problem was how to write a book; but in its broadest aspect, the systematisation and orderly presentation of human knowledge was involved. To present theological, or legal, doctrine as a logical whole is in itself a searching test; its orderly arrangement can only be attempted after long and detailed study which is itself a criticism as well as an exposition.

The laws of the Anglo-Saxon kings have been scrutinised with great care by those scholars who are con-

[1] Pollock and Maitland, vol. II, p. 449.

[2] *Ibid.* vol. II, p. 573. On this there are some pertinent remarks in the chapter on 'Tort and Crime' in the late Sir Percy Winfield's *Province of the Law of Tort* (1931); on indictable trespasses see my 'Commentary on the Indictments' in B. H. Putnam, *Proceedings before the Justices of the Peace* (Ames Foundation), pp. cxxxiii ff. at clvi.

cerned to find the faintest traces of Roman influence, and the result of their search has been to show how little Roman influence is discernible. 'Eyes, carefully trained, have minutely scrutinized the Anglo-Saxon legal texts without finding the least trace of a Roman rule outside the ecclesiastical sphere.'[1] So wrote Maitland, and it is a reasonably accurate judgement.[2] It is certainly clear beyond doubt that there is no sign in the Anglo-Saxon laws that the greatest and most general lesson of Roman law had been learned: the texts present no trace whatever of any attempt to arrange their material. The nearest we get to a systematic treatment of a subject is towards the end of the period, when a number of provisions upon the same matter are put together in a roughly narrative form. The great lack which is so conspicuous is any systematic analysis of legal ideas.

If we look at our oldest surviving laws, those of King Æthelberht, it becomes clear how the draftsman went about the novel task of putting together the first piece of legislation in England. The general heading refers to the matters that follow as 'the dooms which King Æthelberht set up in Augustine's day'. There follow ninety clauses, mostly very short, whose arrangement discloses some slight association of ideas as a basis for their arrangement, but nothing more. The first clause contains a *calculus* of some sort which has to be guessed from the

[1] F. W. Maitland, *Historical Essays* (ed. H. M. Cam), p. 100.

[2] Some mercantile passages about shipping seem Roman (Pollock and Maitland, vol. I, pp. 102–3 n.) and Maitland himself regards the idea of treason as romanesque: *ibid.* vol. II, p. 503; T. F. T. Plucknett, 'Roman Law and English Common Law', *University of Toronto Law Journal*, vol. III, p. 26.

allusive terms which are used: 'God's property and the Church's, twelvefold; a bishop's, elevenfold; a priest's, ninefold; a deacon's, sixfold; a clerk's, threefold; Church-frith, twofold; maethl-frith, twofold.'[1] The payments (which are described as multiples of a 'basic charge', so to speak) seem to depend upon the value of the goods stolen, which the offender ought to restore 'twelvefold', or in whatever other proportion is indicated in the text just quoted. Although the text does not say why these sums should be paid, this conjecture[2] seems to be justified by the facts that the table quoted does not contain the term *wer*, nor the term *bot*, but simply the word *gylde*. The table seems therefore to be not concerned with those slayings which were the primary source of calculations based upon the *wer*, nor with those physical injuries which offenders atoned for by offering *bot* or compensation; there remains the plausible conjecture that it deals with property stolen from the various grades of churchmen mentioned—and we must remember that the kingdom of Kent had just embraced a new religion, and therefore had to provide for its ministers in its laws. The insertion of a new category of men into its social and legal system could be effected by only one means—legislation.

That may very well have been the principal consideration which drove Æthelberht to the desperate device of committing himself to legislation; but having engaged in

[1] Text in F. Liebermann, *Gesetze der Angelsachsen*, vol. I, p. 3, where the citation of this passage is 'Abt. I'; cf. *ibid.* vol. III, p. 4. The word *maethl* is a sixteenth-century conjecture.

[2] Bede himself, *Ecclesiastical History* (ed. C. Plummer, vol. II, p. 5), adopted this view.

that perilous enterprise, the opportunity was also a temptation to legislate on other matters at the same time. These other matters are highly miscellaneous; but many of them would now be classed as criminal. Some traces of arrangement are discernible. Thus, cc. 2–12 seem all to deal with sums of money due to the king. From c. 4 which is among them it will be noticed that robbing the king is somewhat less costly than robbing the Church or a bishop (c. 1), and from other chapters that payments become due to the king for robbery and violence to his servants. In contrast with these eleven chapters dealing with the king, the next two are enough to deal with the rights of an *eorl* or nobleman (cc. 13 and 14); the simple freeman (*ceorl*), on the other hand, seems to occupy an inordinate amount of space (cc. 15–85). There were many exciting things that might happen to him: and the phrase 'simple freeman' hardly expresses adequately the complexity and variety of social structure within which the *ceorl* lived and worked. Thus the lord would be entitled to eighty, sixty, or forty shillings according as to whether it was his first-, second- or third-class *laet*[1] who was slain (c. 26); and dealings might indeed involve the *mund* (protection) of a first-, second-, third- or fourth-class widow (c. 75). It is in the extended treatment of the simple freeman that we find some of the most remarkable provisions in Æthelberht's laws which seem to show that its basis had not yet had time to become Christian. There are passages which seem to

[1] On the meaning of this *hapax legomenon* in the Anglo-Saxon laws see Liebermann, *Gesetze*, vol. II, p. 564, and F. L. Attenborough, *Laws of the Earliest English Kings*, p. 177; the assumption seems to be that the lord of the *laet* received the payment.

indicate that marriage by capture was still possible (c. 82),[1] and that where the modern divorce court might award damages, Æthelberht would regard it a more suitable remedy for the seducer to pay the wife's[2] *wergild* and supply the injured husband with a new wife bought, paid for, and delivered at the seducer's expense (c. 31). No one would regard all this as easily compatible with the views of Christian marriage which were, in the fulness of time, to become the classical common law.

There are still other passages which bear unmistakable marks of antiquity. It seems sometimes to be asserted that liability may attach to a weapon which had become involved in unlawful enterprises, and that the lender of such weapons may have to meet a considerable liability if those weapons were used to slay a man, or in furtherance of a highway robbery (cc. 20, 19). That is not merely the thought of the year 600 or thereabouts: the same notions are to be found in the much more sophisticated laws of King Alfred shortly before the year 900. Indeed, shortly before the Conquest, Canute himself ventured to adopt a more modern attitude to those who do mischief with another man's weapon which came casually into their hands, and enacted[3] that the man who did the harm must pay for it; but the owner of the weapon must clear himself of any complicity in the affair.[4]

[1] Cf. Pollock and Maitland, vol. II, p. 365, n. 5.

[2] Attenborough, Liebermann and Schmidt differ upon the interpretation of this passage.

[3] II Canute 75. Cf. Alfred 19 § 2.

[4] The idea that there was some sort of presumption, which the lender ought to rebut, makes an early appearance in Alfred 19 § 2. Earlier still, the loan of a weapon which caused damage involved the lender in the payment of *bot*, without any complicity being alleged: Æthelberht 19, 20.