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Creating a Literature for the King's Courts in the Later Thirteenth Century: *Hengham Magna*, *Fet Asaver*, and *Bracton*

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ABSTRACT

The early common law produced a rich literature. This article examines two of the most popular legal treatises of the second half of the thirteenth century, *Hengham Magna* and *Fet Asaver*. It has long been recognized that these two treatises bear some relationship to each other. This article will attempt to establish that relationship, arguing that *Hengham Magna* and *Fet Asaver* were written by different people; that *Fet Asaver* borrows from *Hengham Magna*; and that the authors of both texts had independent access to the *Bracton* treatise. The article concludes by suggesting a new way to think about the legal literature of the later thirteenth century. It suggests that *Hengham Magna* and *Fet Asaver* do not represent a dramatic break with the earlier literature of the common law, as some scholars have suggested. They may instead represent an evolution of that literature to serve the needs of the practising bar.

I. Introduction

The early common law produced a rich literature. Between the 1250s and the 1280s a plethora of small treatises with names like *Cadit Assisa*, *Fet Asaver*, and *Modus Componendi Brevia* were written. They were copied into books we now know as statute books, small-format codices made for lawyers, estate managers, and landowners as handy and portable guides to conveyancing and litigation. These treatises are particularly interesting because they were written in a period of transition for the common law. The serjeants, lawyers who handled courtroom pleading, were starting to come into their own as a cohesive group of professionals during this period.¹ These short treatises appear to have played an important part in the formation of the fledgling English legal profession. Yet the history of this early literature of the common law is still not well understood. We know little about who wrote these texts and why.²

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¹Paul Brand, *The Origins of the English Legal Profession*, Oxford, 1992, 70–71.

²Recent scholarship has suggested that some of these texts were written as teaching materials for a course of lectures given around the courts in London sometime in the mid-thirteenth century. John

This article will examine two of the most popular treatises of the late thirteenth century. *Fet Asaver*, written in French, and *Hengham Magna*, written in Latin, appear in dozens of statute books and most likely would have been familiar to every serjeant practising before the king's justices and every estate steward who could afford a statute book. Scholars have long recognized that *Hengham Magna* and *Fet Asaver* were related to each other in some way. In certain sections the two treatises follow the same organization and even contain some very similar language. Earlier scholars have argued that *Hengham Magna* copied from *Fet Asaver* or that these similarities can be explained by a common author. In this article I examine those passages where the texts follow each other closely and argue that the key to understanding the relationship between these texts is the *Bracton* treatise. In the sections where *Hengham Magna* and *Fet Asaver* follow the same organization, both texts track the organization of *Bracton* as well. *Hengham* appears to be closer to the *Bracton* text, however, suggesting that the author of *Fet Asaver* borrowed from *Hengham* and not vice versa.

The priority of the texts is fairly clear; their authorship, however, is more difficult to establish. I argue from evidence internal to the two texts that it is more probable that the two texts were written by different people than that they shared an author. The author of *Fet Asaver* was most likely someone who borrowed and copied from *Hengham Magna*, not a common author who decided to switch to French later in his career. But who were these two authors? Paul Brand has made a compelling argument that *Hengham Magna* was authored by a clerk in the royal courts named John Blundel. Although *Fet Asaver* does not give us much purchase for identifying its author, it does contain some hints. The treatise seems to have been written from the point of view of a clerk or justice, rather than a lawyer. It omits portions of the court procedure that would have been useful to a lawyer or litigant, but that would not have been important to someone looking from the perspective of the bench. A picture emerges of two treatises written by clerks or justices of the royal courts, around the same time, and written in dialogue with each other.

The final section of the paper will suggest a new way to think about the early literature of the common law. Scholars of the period have often posited a dramatic break between the erudite, Romanist legal literature of the early thirteenth century, represented by the *Bracton* treatise, and the practical legal literature of the statute books. This is often seen as a sign of a shift in authorship, from justices and clerks of the courts to practising lawyers. If

S. Beckerman, 'Law-Writing and Law Teaching: Treatise Evidence of the Formal Teaching of English Law in the Late Thirteenth Century', in Jonathan A. Bush and Alain Wijffels, eds., *Learning the Law: Teaching and the Transmission of English Law, 1150–1900*, London, 1999, 33; Paul Brand, 'Courtroom and Schoolroom: The Education of Lawyers in England Prior to 1400', in *The Making of the Common Law*, London, 1992, 57, at 62–65.

Hengham Magna and *Fet Asaver* were both written by justices or clerks of the royal courts, and if they were written in dialogue with *Bracton*, we may have to modify our narrative of the early literature of the common law. At least some of the legal literature of the later thirteenth century was still being written by justices and clerks. Perhaps what we are seeing in texts like *Hengham Magna* and *Fet Asaver* is more of an evolution than a revolution in legal writing. Perhaps justices and clerks were beginning to see practising lawyers as one of their audiences and were adapting the erudite, Romanist literature of the early common law for their use. *Hengham Magna* and *Fet Asaver* are certainly different from *Bracton*. They are not nearly as Romanist in their outlook, for instance. They do not, however, herald a stark break with the tradition of *Bracton*. *Hengham Magna* and *Fet Asaver* look more like evidence of the clerks letting others into their literate circle than they do of lawyers setting out in a new direction. These treatises may, therefore, represent an important period of development in the English legal profession, when the bench began to actively engage with the bar.

II. *Hengham Magna*

Hengham Magna was one of the most popular treatises among lawyers of the late thirteenth century. At least eighty-seven manuscripts of the treatise survive, a very large number of survivals for this period.³ *Hengham Magna* is one of two treatises that have traditionally been attributed to Ralph de Hengham (c.1235–1311), who, after serving as a clerk to the justices Giles of Erdington and Richard of Middleton, became a justice himself, and served at different points in his career as chief justice of the King's Bench and the Common Bench.⁴ The text, along with a second, called *Hengham Parva*, was attributed to Hengham during his life; there are many manuscripts of the treatise bearing his name that can be dated to the late thirteenth century.⁵ *Hengham Magna* was traditionally dated, based on evidence internal to the text itself, to the period between 1272 and 1275, when Hengham was active as a justice.⁶

In a 1976 piece Paul Brand made a compelling case, however, that *Hengham Magna* was not the work of Ralph de Hengham. First, Brand argued for an earlier date for the treatise. To date *Hengham*, scholars like George Woodbine and William Huse Dunham had relied on references in

³Sarah Tullis, 'Glanvill after *Glanvill*', thesis submitted for the degree of Doctor of Philosophy, University of Oxford, Oxford, 2007, 141; William Huse Dunham, ed., *Radulphi De Hengham Summae*, Cambridge, 1932, lxxiii–lxxvii; J.H. Baker and J.S. Ringrose, eds., *A Catalogue of English Legal Manuscripts in Cambridge University Library*, Woodbridge, 1996, 64–65.

⁴Paul Brand, *Hengham, Ralph (b. in or before 1235, d. 1311)*, *Oxford Dictionary of National Biography*, 2008. Available online at: <http://www.oxforddnb.com/view/article/12924> (accessed 30 June 2015).

⁵Dunham, *Radulphi De Hengham Summae*, lxxiii–lxxvii.

⁶*Ibid.*, lxi.

the treatise to King Edward I, whose reign began in 1272.⁷ Both thought that the treatise must, therefore, postdate 1272. Brand argued that these references to Edward were likely updates made by people who were copying the treatise during Edward's reign. The treatise contains some sections that presuppose that Edward's father, Henry III, is still king. As Brand points out,

while it is common enough for copyists to modernize passages in the manuscripts that they are copying ... it is difficult, if not impossible ... to conceive of any convincing reason for a scribe or scribes to deliberately alter the text in front of them to make it less up-to-date and modern, by making it appear that Henry III rather than Edward I was the reigning monarch.⁸

If the treatise was written during Henry III's reign and updated during Edward I's, then 1272 actually represented the *terminus ante quem*, the date before which the treatise must have been written, or at least begun. Brand also argued, based on individuals mentioned in the treatise, dates contained within the treatise, and procedures described in the treatise, that the earliest it could have been completed was the year 1260.⁹ Brand thus moved the authorship of the treatise back by roughly a decade, to the period between 1260 and 1272. This redating, by itself, would not disqualify Ralph de Hengham as the author. It would place the authorship of the treatise around the time Hengham was serving as a clerk in the royal courts. He would have had at least five years of experience as a judicial clerk by 1260 and could very well have written a treatise on court procedure at that stage of his career.¹⁰

But Brand pointed out that there are good reasons to suspect that Hengham did not write the *Summa Magna*. There are major stylistic differences between *Hengham Magna* and the shorter treatise called *Hengham Parva*, the first version of which was written between 1278 and 1285, at the height of Hengham's career, when he was serving as chief justice of the King's Bench.¹¹ The attribution of *Hengham Parva* to Hengham has never been challenged. Both treatises are written in Latin, but, as we shall see, the style of *Hengham Magna* could be described as pretentious and difficult, while the style of *Hengham Parva* is simple and direct.¹² Brand pointed out that the two treatises show us that their authors had different grammatical

⁷George E. Woodbine, *Four Thirteenth-Century Law Tracts*, New Haven, CT, 1910; Dunham, *Radulphi De Hengham Summae*, xlv.

⁸Paul Brand, 'Hengham Magna: A Thirteenth-Century English Common Law Treatise and Its Composition', in *The Making of the Common Law*, London, 1992, 369, at 371–372.

⁹*Ibid.*, 373–375.

¹⁰Brand, *Hengham, Ralph* (b. in or before 1235, d. 1311), <http://www.oxforddnb.com/view/article/12924>.

¹¹Paul Brand, 'Legal Education in England before the Inns of Court', in Jonathan A. Bush and Alain Wijffels, eds., *Learning the Law: Teaching and the Transmission of English Law, 1150–1900*, London, 1999, 57, at 80–81.

¹²Brand, 'Hengham Magna', 384.

and syntactical preferences, one using ‘*utpote*’ to mean ‘as’ and the other using the simpler ‘*ut*’, for instance.¹³

Brand also pointed to the fact that *Hengham Magna* is most likely unfinished as evidence that it was written by someone other than Hengham. It appears from its introduction that the author of the *Summa Magna* intended to produce a much larger text than the one that has come down to us. The introduction leads us to believe that the treatise will cover the procedures for all of the different writs concerning land. The text, however, covers only the writ of right.¹⁴ One manuscript of the treatise contains a heading that reads ‘*secunda pars summe*’ (‘the second part of the summa’), which is followed by only a single paragraph.¹⁵ If this heading was in the author’s original draft of the treatise, it would indicate that he began to cover some of the material mentioned in the introduction, only to end the text abruptly at the beginning of a new section. Some passages in the treatise are also misplaced, indicating that it had not been well-edited.¹⁶

Brand argued that it was unlikely that Hengham would start to write a treatise right at the beginning of his career, then abandon it completely and never return to it at any point in the next forty to fifty years, particularly since it became a popular treatise during his lifetime.¹⁷ Brand’s argument is made even more compelling by his identification of an alternative author, one John Blundel, the keeper of the rolls and writs – a title rendered in Latin as *prenotarius* – of the common bench from 1257 to 1262.¹⁸ Blundel’s authorship would explain the detailed references in the treatise to the work of the *prenotarius*, as well as the references to decisions of Henry of Bath and Roger of Thirkleby, who were both justices of the common bench during Blundel’s term in that office.¹⁹ Blundel’s authorship is further bolstered by the names that appear in the treatise’s hypothetical land case. Richard le Jay and William Huse appear throughout as plaintiff and defendant. Brand discovered that Richard and William were real people who lived in or around the village of Harting in Sussex (also mentioned in two manuscripts of the treatise) in the 1250s and 1260s.²⁰ They appear to have been involved in real-life litigation – the record of which is now, unfortunately, lost – over land in the village.²¹ John Blundel bears a strange relationship to this case. A John Blundel of Harting may have been the tenant of the land that was the

¹³This also comes out in *Hengham Magna*’s use of ‘meaningless connective adverbs’, added solely for style. *Ibid.*

¹⁴*Ibid.*, 380–381.

¹⁵Lambeth Palace MS 499; Brand, ‘*Hengham Magna*’, 382.

¹⁶*Ibid.*, 382–383.

¹⁷*Ibid.*, 383.

¹⁸*Ibid.*, 388–389.

¹⁹*Ibid.*, 386, 389.

²⁰*Ibid.*, 376–378.

²¹*Ibid.*, 376–378.

subject of the litigation; 'J. Blundel' and 'John Blundel of Harting' appear in a writ in some manuscripts of the treatise.²²

The connection between John Blundel of Harting and John Blundel the *prenotarius*, if indeed there is any, is obscure. Brand suggests that Blundel used this case, with which he was probably familiar from his work as a clerk, as a way to insert his name into his treatise.²³ This is a reasonable conjecture. The treatises written in the royal courts in this period seem to have initially contained no attribution of authorship. The earliest versions of the *Bracton* treatise do not appear to have contained the author's name.²⁴ Other treatises produced within the circle of justices and clerks at Westminster, like *Casus Placitorum* and *Casus et Judicia*, are similarly anonymous. Why the authors of these treatises did not attach their names to them is a mystery, since presumably one of the reasons for writing such a treatise was to establish one's reputation. The group of justices and clerks who were producing these texts was fairly small, however, and it is likely that within their circles everyone knew who had written what.²⁵ Perhaps the same convention that impelled treatise-writers to include false protestations of modesty in their introductions led them to omit their names.²⁶ Blundel may very well have added this other John Blundel as a way of inserting his name into the treatise while winking at the authorial conventions of the court. Henry of Bratton did the same thing in the *Bracton* treatise, inserting his own name in a section on errors in writs.²⁷

The theory that Blundel authored the treatise would also explain its unfinished nature: Blundel died sometime between 1263 and 1265.²⁸ If it was begun in the early 1260s, he would have had only a short time to work on it before his death. This theory certainly makes better sense of the treatise than the theory that Ralph de Hengham simply dropped it early in his career.²⁹

²²Ibid., 378. This, again, is Lambeth Palace Library MS 499.

²³Brand, 'Hengham Magna', 378.

²⁴Henry of Bratton's name appears in the introduction of some manuscripts, but those that appear to be closer in the chain of transmission to the original simply bear the anonymous 'ego'. Samuel E. Thorne, 'Translator's Introduction', in Samuel E. Thorne, trans. and ed., *Bracton de Legibus et Consuetudinibus Angliae*, 4 vols., Cambridge, MA, 1968–77, vol.3, 1977, li.

²⁵The misattribution of *Bracton* to Henry of Bratton, who was not the primary author of the text, seems to have happened several years after Bratton's death, when the current generation of people working at Westminster were not terribly familiar with Bratton himself. Paul Brand, 'The Age of Bracton', in John Hudson, ed., *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, Oxford, 1996, 65, at 74.

²⁶See Dunham, *Radulphi De Hengham Summae*, 1.

²⁷Thorne, *Bracton de Legibus et Consuetudinibus Angliae*, 79. Brand thought that Bratton may have been replacing Martin of Pattishall's name for his own in this section, suggesting that Pattishall was, perhaps, the first author to work on the treatise and had inserted his name as an indirect way of marking his authorship. Brand, 'The Age of Bracton', 78.

²⁸Brand, 'Hengham Magna', 389.

²⁹Although one could imagine reasons why he would stop working on the treatise. If, as I suggest later, it was common in the royal courts to make one's mark by writing a learned work in the mould of *Bracton*, then Hengham might have begun this treatise to impress his superiors while he was still a clerk. With his appointment to the bench in 1270, he might have felt it no longer necessary, and, judging by the much

With his redating of the treatise, his arguments about its unfinished nature, and his presentation of the circumstantial evidence pointing to John Blundel, Brand paints a convincing picture of a work written not by a justice in the early 1270s, but by a senior clerk in the early 1260s.

Blundel's style could be justly described as grandiose: he uses rare and showy words such as *aliquantisper* (for some time) and *cordetenus*, a word encountered so seldom in Latin literature that it does not appear in most Latin dictionaries.³⁰ He probably had a fairly high level of education, perhaps beyond the level of training a Latin grammar school could provide. He uses styles preferred in university writing throughout:

I ask (*Quero*): I ask then of which nature this default ought to be, viz., whether it ought to follow through the Great Cape or the Little [Cape]. Solution: I say that the execution of this should be made through the Little Cape.³¹

The '*quero ... solutio*' (or often '*quaestio ... solutio*') format was common in schools texts of the time. It followed the scholastic form of argumentation.³² This indicates that Blundel had read some of the texts of law, arts, or theology that were being produced in Europe's universities. He may, however, have learned this style from the *Bracton* treatise, which was written in the style of a university *summa*.³³

Hengham Magna begins with a very grandiloquent introduction on the author's reasons for committing the procedures of the king's courts to writing:

Although the order of pleading in the court of the lord king, according to the laws and customs of the realm established before us continuously by our predecessors, is fair and just and also acceptable in all ways, yet this [is the case]: the fact that this order is not written down in the form of common writing impedes and delays for some time many [who are] trying to understand it. For if each human mind with wisdom had the power to remember, which is absurd, it would follow then that writing would produce nothing except to anticipate labour with labours. And because by writing [the mind] frequently and quickly remembers those things, which through the imperfection of its nature often subside and totter, I, not to instruct anyone upon the laws of the lands of such a realm, but in truth to provide a certain introduction for future correctors, have determined to compile [the order of pleading], not in the order in which I ought to have [written it], but in [the order in] which I knew, beseeching that the labours and knowledge of the labourer placed in this [work] acquit [me] and make excuse to the discerning. Accordingly writs of the lord king concerning pleas of land; and how and by which delays

less lavish treatise he wrote in the 1280s, he might have felt that a simpler treatise, like *Hengham Parva*, would be more useful to bench and bar alike.

³⁰Dunham, *Radulphi De Hengham Summae*, 1.

³¹'*Quero: Quero tunc cuius nature debet esse hec defalta, scilicet, utrum debet sequi per Magnum Cape vel per Parvum. Solutio: Dico quod per Parvum Cape fiet huiusmodi executio.*' Dunham, *Radulphi de Hengham Summae*, 44. See also *ibid.*, 30.

³²Manlio Bellomo, *The Common Legal Past of Europe*, Washington, DC, 1995, 143–144.

³³For an example of the *quaestio ... solutio* format, see Thorne, *Bracton*, vol.2, 323.

the tenant can defer litigation before the common appearance in court, and how the demandant ought to claim, and how the tenant ought to respond; and in which cases the view of the land can be denied and in which not; and the nature of exceptions both peremptory and dilatory, namely before the view of the land is made and after; and the method of making chirographs if the litigation is decided by fine and also the exceptions against that fine; and certain helpful examples for discussion of pleas of this sort, and of the jurisdiction of the county court and court baron when litigation from such courts are transferred; are contained below in their places.³⁴

Blundel's style gives lie to the protestation of modesty. The very sentence in which he makes his claim to poor knowledge of his subject is written in a high Latin style that plays with word order. This kind of statement of modesty was pro forma in contemporary works of high learning. But the introduction also tells us that this will be primarily a procedural text, dealing with the complaints, answers, and delaying tactics that litigants can use in court. The treatise does not disappoint. What follows is a text that takes its reader through all the twists and turns of bringing an action by writ of right, from acquiring the writ onward. Immediately following the introduction, the text takes an abrupt turn and, without introduction, gives us twelve different variants of the writ of right, probably taken from a register of writs.³⁵ The substantive discussion begins after those writs. It begins with a very short chapter on which pleas belong to the king's courts and which to the county courts.³⁶ This chapter does not, at first, appear to be about the writ of right, as it lays out the sheriff's jurisdiction over trespass and other matters.³⁷ This is merely a short detour, however, as the text then turns to the county court's jurisdiction over cases of right where the court baron has defaulted and failed to do justice to the litigant.³⁸ That is followed by a second, very short chapter on the jurisdiction of courts baron, a chapter which explains how one transfers an action

³⁴*Licet ordo placitandi in curia domini regis, secundum leges et consuetudines regni a primiceriis nostris protinus retro statutus, equus et iustus ac in omnibus acceptabilis extiterit, hoc tamen, quod idem ordo in forma communis scripture non registratur, quam plures se ipsum scire conantes aliquantisper impedit et retardat. Nam si mens humana singula cordetenus, quod absurdum est, memorare valeret, sequeretur tunc quod scriber nichil aliud faceret nisi laborem laboribus anticipare. Et quia scriptura frequenter et propere remorat ea que per labilitatem ingenii sepe sepius subsidunt et vacillant, ego non instruendum aliquem super huiusmodi regni legibus terrarum, verum etiam ad materiandum futuris correctoribus quedam introductive, non serie quo debui sed quo scivi, censui compilare, cernentibus ea supplicans, ut opera huic apposite et scientiam quietent operarii et excusant. Brevia siquidem domini regis de placitis terre; et qualiter et quibus dilationibus potest tenens litem differre ante commune apparitionem in curia, et quomodo petens opponere, et tenens respondere debet; et quibus casibus potest denegari virus terre et in quibus non; at natura exceptionum tam peremptoriarum et quam dilatariorum, videlicet, ante visum terre factum et post; et modus cirograffandi si per finem factum lis decidatur necnon et exceptions contra ipsum finem; act quedam exemplaris discussionem huiusmodi placitorum iuvantia, et de iurisdictione curie comitatus et baronis cum lis a tali curia translate fuerit; inferius suis locis continentur.* Dunham, Radulphi De Hengham Summae, 1.

³⁵*Ibid.*, 2–5.

³⁶*Ibid.*, 5–6.

³⁷*Ibid.*, 6.

³⁸*Ibid.*

brought by a writ of right from the court baron to the county court by way of a procedure known as *tolt*.³⁹ The third chapter lays out the procedure in the county court, and particularly the procedure by which a litigant could transfer his case from the county court to the royal court by writ of *pone*.⁴⁰ The writs at the beginning of the treatise and the first three chapters thus form a coherent whole. The writ of right was generally addressed to the plaintiff's lord, instructing that lord to do justice. The writs laid out at the beginning of the treatise could therefore be used to initiate proceedings in the court baron. The chapters following show the litigant how to get those proceedings from the court baron to the county court and from the county court to the king's.

The emphasis throughout the treatise is on ways to throw up roadblocks in the way of the plaintiff and to delay the defendant's answer for as long as possible, placing pressure upon the plaintiff to settle. The writ of right was notorious for these delaying tactics. The author admits that the writ of *pone*, which transfers the case from the county court to the king's, 'places the case outside of the county, where it is decided more quickly than in the bench [meaning the common bench, i.e. the court of Common Pleas, where the case will be sent after the writ of *pone*]'.⁴¹ The bulk of chapter three after the material on the writ of *pone* is on *essoins*. *Essoin* is simply Old French for 'excuse', and was used by the royal courts as a term for a valid reason for non-appearance. The author discusses the *essoins de malo lecti* (of bed-sickness) and *de ultra mare* (for a person who is beyond the sea) in detail, and tells the reader exactly how long each can delay litigation.⁴² The rest of the treatise takes us through a plea of right, day by day. Blundel tells us what happens on the plaintiff's first court day, and then on the second, third, fourth, fifth, and sixth, again with special attention to the ways in which the judgment can be delayed by a party's non-appearance and the procedures that could be used to secure appearance.

Hengham Magna is thus a comprehensive treatise on the writ of right. It explains the entire process associated with the writ, from obtaining the writ in chancery, to taking it to the lord's court, to removing it to the county court, to removing it to the king's court, and then takes the reader through the procedures of the king's court. It would have been eminently practical to the litigant who was involved in litigation concerning the writ. Given its unfinished nature, it is likely, had the text been finished, that it would have contained similar discussions of the other writs for land, like the writs of entry and the petty assizes, as the introduction suggests.

³⁹*Ibid.*, 6–7.

⁴⁰*Ibid.*, 8.

⁴¹*Ideo quia ponere aliquem loquelam extra comitatem ubi celerior litis habetur determinatio quam in banco.*
Ibid., 9.

⁴²*Ibid.*, 9–14.

One curious characteristic of Blundel's treatise is that it bears some relation to the *Bracton* treatise. *Hengham's* reliance on *Bracton* has long been recognized by scholars. Epitomes and reworkings of *Bracton* became fairly common in the last decade of the thirteenth century. The treatises known as *Fleta*, *Thornton*, and *Britton* were all derived in part from *Bracton* in the 1290s or early 1300s. *Hengham* could be regarded as the first epitome of *Bracton*.⁴³ The relationship between *Bracton* and *Hengham* is an odd one, however. *Hengham Magna* does not borrow any language directly from *Bracton*. Instead, it borrows *Bracton's* organization.⁴⁴ Woodbine first recognized that the topics covered in *Hengham* are covered in the same order in *Bracton* and mapped the chapters of *Hengham* onto the *Bracton* treatise.⁴⁵

Hengham Magna follows the order of *Bracton* in all but chapters eleven and twelve, but it does not use *Bracton's* organizational headings. It is almost as if Blundel took *Bracton*, peeled off the *Bracton* authors' overarching organizational scheme – the scheme represented by *Bracton's* subject headings – and applied his own to the text. The material is all presented in the same order, but gone is *Bracton's* arrangement into tractates on particular topics: the writ of right, essoins, defaults, and warranty. Instead, Blundel has organized his treatise around a fictional case brought by writ of right, taking it from the baronial court to the county court, then from the county court to the king's court, and following it as it makes its way through multiple appearances in the king's court. He breaks with *Bracton's* divisions in places; chapter six of *Hengham*, for instance, contains material from the end of *Bracton's* tractate on the writ of right and from the beginning of the following tractate, on essoins.⁴⁶ Blundel had clearly read *Bracton* and found his ordering of the material useful, but chose to rewrite all of the material itself and to outline the material differently for his reader, day by day rather than topic by topic.

If Blundel's treatise was written in the early 1260s, it is the earliest evidence we have for someone reading *Bracton*. The earliest surviving manuscripts of *Bracton* date to the last decades of the thirteenth century and are at least a generation removed from the original exemplar, which itself could not have been finished until the early 1260s.⁴⁷ The earliest direct evidence we have

⁴³T.F.T. Plucknett, *Early English Legal Literature*, Cambridge, 1958, 94.

⁴⁴*Bracton* is the only likely source for this organizational scheme. The *Glanvill* treatise covers similar topics, but in a different order.

⁴⁵Woodbine, *Law Tracts*, 19.

⁴⁶This is assuming that Blundel divided his original text into chapters at all. The chapter divisions may have been a later addition. The division into days of the plea is interwoven with the text, however, and seems to be original.

⁴⁷See George E. Woodbine, ed., *Bracton De Legibus Et Consuetudinibus Angliae*, 4 vols., New Haven, CT, 1915, vol.1, 5–20. The latest case in the treatise that can be dated was heard in the court *coram rege* in 1262. Thorne, *Bracton*, vol.2, 447; C.A.F. Meekings and David Crook, *King's Bench and Common Bench in the Reign of Henry III*, London, 2010, 137.

Table 1 Concordance of *Hengham Magna* and *Bracton*

Hengham	Bracton ¹	Topic in Hengham	Organization in Bracton
I. Tractate on the Writ of Right			
Ch. 1	fo.328–329 (4:47–51)	List of Sample Writs	
Ch. 2	fo.329b–330 (4:51–54)	Jurisdiction of the county and royal courts	
Ch. 3	fo.329b–330b (4:52–54) ²	Jurisdiction of the court baron, transferring to the county for default of justice	
Ch. 4	fo.331 (4:55–56)	Transferring a plea from the county court to the king's court by writ of pone, the writ of peace, essoins <i>de malo lecti</i> , <i>de malo veniendi</i> , and <i>de ultra mare</i>	
Ch. 5	fo.332–334 (4:57–64)	The first day of the plea in the king's court	
Ch. 6	fo.334b (4:64–87)	The forms of essoins, creating an attorney	Some material from the tractate on the writ of right
Ch. 7	fo.342–343 (4:85–87)	Creating attorneys	II. Tractate on Essoins
III. The Tractate on Defaults			
Ch. 8	fo.365–365b (4:149)	The Second Day of the Plea in the king's court	
Ch. 9	fo.365b–371b (4:149–167)	The Third Day of the Plea in the king's court	
Ch. 10	fo.375b–379b (4:176–189)	Of the nature of Exceptions	
Ch. 11	fo.367b–368b (4:155–159)	The Fourth Day of the Plea in the king's court	Out of order, but still tractate on defaults
Ch. 12		The Fifth Day of the Plea in the King's Court	Not contained in <i>Bracton</i>
Ch. 13	fo.380–383 (4:189–199)	The Sixth Day of the Plea in the King's Court	Continues with some material from the tractate on defaults
IV. The Tractate on Warranty			

Notes: I have largely followed Woodbine's concordance of the two treatises, although I have made modifications based on my own comparison of the texts. Woodbine, *Law Tracts*, 19, n.1. ¹I have included folio numbers as well as the page numbers in the Thorne edition and translation of the text. Woodbine thought this chapter of Hengham was derived from the *Glanvill* treatise, and could not be found in *Bracton*. ²Woodbine is correct that some of the material early in the treatise, particularly the material on the jurisdiction of the county court, may be borrowed from *Glanvill*. See G.D.G. Hall, ed., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, Oxford, 1965, 4 (Book I, chapter 4). The material covered in chapter three, on a default of justice in the baron's court, which allows the litigant to bring his case to the king's court, can be found in *Bracton* exactly where one would expect it to be found, however. Thorne, *Bracton*, 4:54.

of someone actually copying the treatise dates to 1278.⁴⁸ Blundel, however, was reading *Bracton* while Henry of Bratton, the last in the series of authors who worked on it, was still alive.⁴⁹ *Hengham Magna* is evidence

⁴⁸Paul Brand, 'The Date and Authorship of *Bracton*: A Response', 31 *Journal of Legal History* (2010), 217, at 241.

⁴⁹Bratton died in 1268. Brand, 'The Age of Bracton', 75.

that knowledge of the *Bracton* treatise was circulating at least among the clerks and justices of the royal courts in the early 1260s. Perhaps Bratton was loaning out the original manuscript. Perhaps he was giving lectures based on it. Perhaps copies were being made as early as the 1260s. How Blundel obtained his knowledge is not clear, but he obtained enough knowledge of the treatise to adopt its ordering as his own, even if he rejected its organizational headings and wrote all of the material anew.

III. *Fet Asaver*

The treatise called *Fet Asaver* appears in over eighty manuscripts of the late thirteenth and early fourteenth centuries.⁵⁰ Like *Hengham Magna*, it was copied into many of the small-format legal miscellanies that we often call statute books. *Fet Asaver* is a very different kind of text from *Hengham Magna*. It is written in French, the language spoken in court, and makes no claim to being a civilian *summa*. In contrast to *Hengham*, it contains a short, unpretentious introduction:

It is to be known (*Fet Asaver*) at the commencement of each plea which is pleaded in the court of the king that it is either a plea of land or of trespass or of both. And therefore it is to be spoken first of a plea of land, which cannot be pleaded outside of four manners [*maneres*]; either it is of fee and of demesne and of right, or of fee and of right and not of demesne, or of fee and of demesne and not of right, or of demesne and not of fee nor of right.⁵¹

This is the only introduction we get to the text; it then goes immediately into the first *manere* of pleading cases concerning land. This introduction does not give us a perfect picture of the way the text will proceed. The discussion of pleas of trespass does not come until the end of the treatise, covering only four pages in Woodbine's edition, after a short section on writs to recover advowsons, which is not mentioned in the introduction at all.⁵² The vast bulk of the treatise (fifty-four of its sixty-two pages in Woodbine's edition) covers the four *maneres* of pleading in cases of land, with the most attention being given to the first.⁵³ This is partly because much of the discussion in the first applies to the other three, and those other three sections simply refer back to what is said of the first *manere*.

In each of the *maneres*, the subsections of the text, the author takes us through the progress of a case as it worked its way through the court,

⁵⁰Tullis, 'Glanvill after Glanvill', 140; Woodbine, *Law Tracts*, 7; Baker and Ringrose, *Legal Manuscripts*, 64.

⁵¹'*Fet Asaver al commencement de chescun plai ke est plede en la court le Rey, ou ceo est plai de tere ou de trespass ou de ambedeus. E purceo est adire adeprimes de plai de tere ke ne poet estre plede fors en quatre maneres; ou ceo est de fee e de demine e de dreit, ou de fee e de dreit e nient de demeyne, ou de fee e de demeyne e nient de dreit, ou de demeyne e nient de fee ne de dreit.*' Woodbine, *Law Tracts*, 53.

⁵²*Ibid.*, 107–114.

⁵³*Ibid.*, 53–107.

explaining what happens on the first day of the case and, if it is not disposed of then, but adjourned to another day, what happens on the second, third, and fourth days. His organization within each *manere* is therefore the diurnal organization we find in *Hengham Magna* and, as with *Hengham Magna*, the treatise gives the impression that delay was crucial in thirteenth-century land cases, as the process it describes is that of forcing and delaying appearance. It tells us which types of essoins the defendant could use and what kind of process could issue from the court to distrain the defendant's lands and goods (i.e. take them into the king's hand until he complied and appeared in court). It discusses the exceptions that the defendant could bring to the writ.⁵⁴ It discusses voucher to warranty, that process by which a defendant could bring his own lord or another who had the obligation to do warranty for the land into court to defend the defendant's claim to the land on his behalf, a process which could itself delay litigation.⁵⁵

The first *manere* – which covers the writ of right, as well as writs of entry, writs of escheat, and the writ of advowson of a church in demesne, all of which employ similar procedures to the writ of right – runs from page fifty-three of Woodbine's text to page eighty-six, where the second *manere*, here called a *membre*, picks up.⁵⁶ The second *manere* or *membre* includes actions that have to do with rights in the land of another person, 'such as to fish in another's water, to pasture on another's soil, to have reasonable estovers [i.e. the right to take fallen branches for firewood, fences, and house repair] in another's woods, and in all other similar cases'.⁵⁷ This second *manere* only runs to page ninety-three in the printed edition, where the third *membre* on 'writs which are of fee and of demesne and not of right' begins. In this section of the treatise, the author discusses 'the writ of mort d'ancestor and its members, as the writ of cosinage, of aiel, and of reasonable part which is called nuper obiit'.⁵⁸ These are writs that have to do with recovering land one's ancestor held at the time of his death. The fourth *membre* covers the assize of novel disseisin.⁵⁹ It is very short, beginning on page 104 of the printed edition and running only to page 107, where the ordering into four *membres* ends and the text begins to discuss the three writs that can be brought to recover the advowson of a church (praecipe, darrein presentment,

⁵⁴Ibid., 65.

⁵⁵Ibid., 66.

⁵⁶Ibid., 86.

⁵⁷'E fet asaver ke aver fee e dreit e nient demeyne est sicom de pescher en autri ewe, pasture en autri soil, de aver renables estovers en autri boys, e en teus autres cas semblables.' Ibid., 86–87. It covers 'the writ of Covenant, Quare Eiecit, Quo lure, de Fine Facto, Warrantia Cartae, Quare Impedit', all of which 'are pleaded just as writs of trespass' according to the author. Ibid., 87.

⁵⁸'Ore est adire del terce membre de plai, ke est sur les brefs ke sunt de fee e de demeyne e nient de dreit; sicom del bref de Mortdauncestre et de ses membres, sicom del bref de Cosinage, del Ael, e de Renable Partie ke est appellee Nuper obiit.' Ibid., 93.

⁵⁹Ibid., 104.

and quare impedit).⁶⁰ This discussion runs to page 112. The remaining four pages of printed text are on pleas of trespass, of which the author tells us there are four *maneres*, although he does not cover them in anything like the detail we find in the four *maneres* of pleas of land.⁶¹ Like *Hengham Magna, Fet Asaver* ends rather abruptly, perhaps indicating that the treatise is unfinished.

It is difficult to say who wrote *Fet Asaver* and for whom. While the author's positioning within a text can often be a clue to the identity of the author, *Fet Asaver* takes a detached and omniscient approach to describing the procedures of the royal courts:

And so a man ought to vouch in this manner: 'I vouch to warrant by the aid of this court J. de B., son and heir of C. de B., whose body and a portion of whose land are in the wardship of that one, and a portion in the wardship of that one'. And so the clerk will ask why; and he will show his charter, and the clerk will enroll this [i.e. the fact that he had shown his charter], and ask where his guardians should be summoned; and he will say, 'this one in such a county and this one in such a county', as they are. And thus will the guardians be summoned by such a writ: [A specimen writ follows, in Latin].⁶²

This passage does not tell the reader what the parties *should* do. Rather, it tells the reader what they *will* do, in the language of detached description, giving us no hint as to the author's intended audience or his own point of view. When the author says that 'In all manners of trespass the trespassers are attached by attachment and by distress', he might have addressed himself to the litigant, telling the litigant that if he is having trouble getting the trespasser to appear in court, he should ask the court to compel his appearance by attachment and distress, or he might have addressed himself to the clerks and justices of the court, telling them that if the trespasser does not appear when summoned, they must see that the trespasser is attached and distrained by issuing particular writs.⁶³ He simply tells us, however, that the trespassers are attached and tells us what writs are used to do it. He does not even provide us with an actor in this sentence; the verb is in the passive voice, so we are not told who is doing the attaching. The author occasionally gives something that looks like advice to the litigant, such as 'and in this case, if the father is wise', indicating that perhaps litigants

⁶⁰Ibid., 107.

⁶¹Ibid., 112.

⁶²'E si deit hom vouchen en ceste manere: Jeo vouche a garaunt par leyde de cest court J. d. B., fiz e heir, C. de B., ki cors e partie des teres sunt en la garde cely, e partie en la garde cely. E donc demaundera le clerc pur quey; e il mustra sa charte, e le clerc le enrourera, e demaundera ou serront ses gardeyns somons; e il dirra, cely en tel counte e cely en tel counte, sicom il sunt. E donc serront des gardeyns somons par un tel bref.' Ibid., 74.

⁶³'E en totes maneres de trespass sunt les trespasours attachez par attachement e par destresse.' Woodbine, *Law Tracts*, 133.

or their lawyers are the intended audience, but even when he is giving advice he never specifically addresses the reader.⁶⁴

Passages like these could have been written by and for any of the participants in the judicial process. They could have been written by a court clerk. The clerks were the ones who actually made the enrolments, and therefore would have had access to the forms of enrolments and writs that appear in various places in the treatise. But this is all information that a practising lawyer, a serjeant or an attorney, would have known and could record for the benefit of the reader. The fact that the clerk enrols the charter is something a lawyer surely would have known; although it was the clerk's responsibility to keep the roll and to make new enrolments, litigants and lawyers were concerned with the rolls, as well. The roll could be brought out in future litigation and vouched. If the clerk misenrolled the judgment, the litigant might find himself out of luck when he tried to recover his land in the future. By the early fourteenth century, it seems to have been the attorney's responsibility to make sure that his client's judgment or charter was enrolled properly.⁶⁵

The orientation of the writing itself is not much help in determining who wrote the treatise, but the scope of the treatise suggests a clerk of the royal court. The author only included the types of writs with which judicial clerks would have been the most familiar: process writs. These are writs issued by the court itself to see that the proper procedures, such as taking land into the king's hand and appointing attorneys, were carried out.⁶⁶ He did not copy any of the original writs – what we think of today as the classic common law writs, such as novel disseisin, mort d'ancestor, and the writ of right – that were used to initiate litigation, as Blundel did at the beginning of *Hengham Magna*. Those writs would most often have been issued by chancery clerks, while the process writs would have been written out by the clerks of the court.⁶⁷ The clerks would have been intimately familiar with the variations in process writs. A serjeant or attorney, who was concerned with the process from the litigant's point of view, presumably would have been interested in the original writs. The choice of original writ, which was required to initiate litigation, was an important step in the process of bringing a lawsuit. A clerk or justice would be less interested in this decision. By the time he saw the case, this election would already have been made. He only needed to know how to lead the case along after that.

Fet Asaver also leaves out some other information that would have been important to a lawyer or litigant. In the section on writs of right, *Fet Asaver* begins in the king's court. As we have seen, however, a writ of right generally did not begin in the king's court. A litigant needed to bring the writ to his

⁶⁴'E en ceo cas, si le pere seit sages.' Ibid., 96.

⁶⁵Brand, *English Legal Profession*, 89.

⁶⁶Elsa de Haas and G.D.G. Hall, eds., *Early Registers of Writs*, London, 1970, lxvi.

⁶⁷See ibid., lxvi–lxxiv.

lord's court, then transfer the case to the county court by *tolt*, and finally transfer it to the king's court by means of a writ of *pone*. *Hengham Magna* takes us through all of this process, from the selection of the writ onward, but the first *manere* of *Fet Asaver*, which covers the same kinds of writs, skips over it.⁶⁸ This information would have been crucial to a litigant or his lawyer, but not so crucial to a clerk of the court.⁶⁹ This myopic view of litigation suggests an author who was looking at the case from the standpoint of the bench or the clerk's table, rather than the bar.

IV. Borrowing from *Bracton*

In his 1910 dissertation, *Four Thirteenth-Century Law Tracts*, George Woodbine noted that *Fet Asaver*, which he edited for the dissertation, bore some striking similarities to *Hengham Magna*.⁷⁰ Chapters five to thirteen of *Hengham* and the first *manere* of *Fet Asaver* cover the same material – the procedure required for the writ of right once the case had reached the king's court – and do so in roughly the same order, using the same diurnal organization. *Fet Asaver*, as the shorter of the two texts, covers this material in less detail. *Hengham Magna* runs to fifty pages in Dunham's printed edition where *Fet Asaver* runs to sixty-three pages in Woodbine's edition. Dunham's edition of *Hengham Magna* packs roughly twice as many words into a page, however. *Fet Asaver* is, therefore, roughly two-thirds the length of *Hengham Magna*.⁷¹ *Hengham Magna*, however, covers a smaller slice of the common law. It covers approximately the same material that *Fet Asaver* covers in its first *manere*. In other words, where *Fet Asaver* gives a brief overview of the procedure followed for all writs pertaining to land, *Hengham Magna* gives us a much deeper treatment of one subset of those writs, the writs of right. *Hengham* might have been originally intended to cover all of the writs pertaining to land; the treatise does appear to be unfinished. But if its author had continued on to cover the same material as the author of *Fet Asaver* and covered each subject in the same proportion as *Fet Asaver*, *Hengham* would be roughly twice as long as the French treatise.⁷²

⁶⁸Woodbine, *Law Tracts*.

⁶⁹It is important to note that the first *manere* also covers writs of entry, which began in the king's court, and they were more numerous than writs of right by the time *Fet Asaver* was written. Paul Brand, *Kings, Barons, and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, Cambridge, 2003, 337–339.

⁷⁰Woodbine, *Law Tracts*, 21.

⁷¹John Beckerman found that *Fet Asaver* can be recited in roughly seventy-one per cent of the time it takes to recite *Hengham Magna*. Beckerman, 'Law-Writing and Law Teaching', 37.

⁷²The first *manere* of *Fet Asaver* runs to thirty-three pages in Woodbine's edition. If we cut out the register of writs and the information on the county court at the beginning of *Hengham Magna*, material that is not in *Fet Asaver*, the rest of the treatise, which covers the same ground as the first *manere*, runs to thirty-two pages. As noted above, Dunham's edition packs about twice as many words into the page. The portions of *Hengham Magna* that correspond to material found in *Fet Asaver* therefore cover that material at twice the length.

Woodbine believed that the two texts were similar enough that there must be some connection between them – that the similarities could not be explained simply by the fact that they covered similar subject matter.⁷³ Woodbine noted that, ‘any one noticing the relationship between the two would very naturally be led, on first thought, to consider *Fet Asaver* a restatement of certain parts of the *Summa*’, but then argued that the similarities between the two treatises were the result of common authorship, not of copying from one to the other.⁷⁴ If *Fet Asaver* looks like a French translation of *Hengham Magna*, why reject that explanation in favour of the notion that the two treatises are very similar because they were written by the same person and that that person’s proclivities come out in both treatises in very similar ways? At the time Woodbine was writing, *Fet Asaver* had been dated to before 1267.⁷⁵ *Hengham Magna* was thought to have been written in the 1270s.⁷⁶ Given this dating, it was impossible for *Fet Asaver*, as the earlier of the two texts, to have copied from *Hengham*. Since Woodbine thought copying from the French *Fet Asaver* to the Latin *Hengham Magna* unlikely, common authorship seemed the only explanation. Woodbine’s explanation of the relationship between the two texts has been called into doubt, but no one since Woodbine has made a serious attempt to establish the relationship between the two texts.⁷⁷

Paul Brand’s redating of *Hengham Magna* reopens the possibility that *Fet Asaver* borrowed from *Hengham Magna* and that we need not attribute a common authorship to the two texts to explain their similarity. Of course it is possible to untether the question of borrowing from the question of common authorship. Indeed, Woodbine probably should not have collapsed the two issues. One text clearly borrowed from the other. Some sentences appear to be direct translations, either from the French to the Latin or from the Latin to the French. This level of similarity is unlikely to simply be a function of the two texts having been written by the same person. It strains the imagination to think that a single author would have written a sentence in Latin and then, at some later date and without turning to the original writing for reference, crafted a nearly identical sentence in French. It is far more likely that the author of the later text had the earlier text in front of him, whether he was the author of that earlier text or not.

I will therefore bracket the question of common authorship for the moment and first look at the borrowing from one text to another. The weight of the evidence is for borrowing from *Hengham Magna* to *Fet*

⁷³Woodbine, *Law Tracts*, 21.

⁷⁴*Ibid.*

⁷⁵*Ibid.*, 11.

⁷⁶*Ibid.*, 22.

⁷⁷William Huse Dunham, in his edition of *Hengham Magna*, offered some objections to Woodbine’s thesis of common authorship but did not offer an alternate theory. Dunham, *Radulphi De Hengham Summae*, lxxvi–lxxviii.

Asaver. The languages in which the two texts are written suggest that *Fet Asaver* was derived from *Hengham*. While it is possible that the author of *Hengham* took the much simpler, French-language *Fet Asaver*, translated it into Latin, and expanded on the discussion, the majority of the translation in the early common law goes in the other direction. There was some translation from French to Latin in the period; the plea rolls, which were the administrative records of the royal courts, were Latin-language records of oral proceedings that transpired in French. But it was not common in the twelfth and thirteenth centuries for French-language *texts* to be translated or reworked into Latin. Magna Carta was translated into French fairly early.⁷⁸ Geoffrey of Monmouth's Latin *Historia Regum Britanniae* was reworked into Wace's French *Brut*.⁷⁹ More importantly, parts of *Bracton* were translated into French for the text called *Britton*.⁸⁰ It seems more likely that *Fet Asaver* was an attempt to translate and digest *Hengham Magna* for a wider audience, for people who were not expert Latinists, than that *Hengham* was an attempt to rewrite *Fet Asaver* in an affected, less accessible form.

The *Bracton* treatise can also act as a sort of key to understanding the relationship between *Hengham Magna* and *Fet Asaver*. In the sections where the two treatises track each other – chapters five to thirteen of *Hengham* and the first *manere* of *Fet Asaver* – both treatises also track *Bracton*, and the evidence suggests that in those parts of the treatises Blundel was working directly from *Bracton* and the author of *Fet Asaver* was working from *Hengham Magna*. There are passages in which *Hengham* and *Fet Asaver* are much closer to each other than either is to *Bracton*, indicating that the authors of *Hengham* and *Fet Asaver* were not drawing from *Bracton* independently. *Hengham Magna* and *Fet Asaver* use the same organizational scheme, for instance. They both divide up their material according to the day of the plea. They take a case through the king's court, from the first appearance day, to the second, all the way to the sixth. *Bracton* is not divided in this manner. Both *Hengham Magna* and *Fet Asaver* place some of the material that appears in *Bracton*'s tractate on defaults on the second day of the plea. Nowhere in the tractate on defaults does *Bracton* mention the second day of the plea.⁸¹ Moreover, *Hengham* and *Fet Asaver* contain some sentences that must be direct translations from one to the other. *Hengham*'s chapter eight begins 'On the second day the defendant can make default securely by the custom of the realm provided he was essoined on the first day

⁷⁸J.C. Holt, *Magna Carta*, 2nd ed., Cambridge, 1992, 474–475.

⁷⁹Geoffrey of Monmouth, *The History of the Kings of Britain*, trans. Neil Wright, Woodbridge, Suffolk, 2007; Wace, *Roman De Brut: A History of the British*, trans. Judith Weiss, Exeter, 2002.

⁸⁰Francis Morgan Nichols, ed., *Britton*, 2 vols., Oxford, 1865.

⁸¹Thorne, *Bracton*, vol.4, 147–190.

by the procedure shown above';⁸² *Fet Asaver* similarly reads 'On the second day the defendant can make default if he was essoined on the first day'.⁸³ *Bracton* contains no corresponding sentence.

We see the same pattern in the tenth chapter of *Hengham*, which largely follows *Bracton*. This chapter covers two different issues. It begins with a heading 'On the Natures of Exceptions' (*De Naturis Exceptionum*) and then turns to the process by which the tenant of the land can ask that the view be made.⁸⁴ It ends with a rather long discussion of the situations in which a justice should grant the view and the situations in which he should deny it.⁸⁵ This parallels a section of *Bracton's* tractate on defaults beginning at f.375b.⁸⁶ *Bracton* contains a short discussion of exceptions there – they are covered at greater length in a full tractate on exceptions that begins at f.399 – before turning to the view.⁸⁷ *Fet Asaver* follows the same order when it covers this material, but once again *Hengham* and *Fet Asaver* are closer to each other than either is to *Bracton*. *Bracton* does not discuss the writ of *Quod Permittat* in this part of the treatise – indeed, the treatise contains very little discussion of that writ at all. In chapter ten of *Hengham*, however, we find, 'In *Quod Permittat* and in similar cases he can have the view and not vouch to warrant'.⁸⁸ *Fet Asaver*, at the same point in the discussion, has, 'in the *Quod Permittat* a man can have the view and not vouch to warrant'.⁸⁹ It looks very much like one of these sentences is a translation of the other, not merely the result of a single author who was thinking about the same things in two different texts. *Bracton* is the only likely common source for this section of text, and neither text could have taken the material on *Quod Permittat* from there.

One of the two shorter treatises therefore must have copied the other. The similarities between the two texts cannot be the result of a common source in *Bracton*. But did *Hengham* copy *Fet Asaver* or did *Fet Asaver* copy *Hengham*? The evidence suggests that the author of *Fet Asaver* was copying from *Hengham* here. Blundel appears to have been working directly from *Bracton* and even seems to have internalized some of *Bracton's* style, which he could not have got from *Fet Asaver*. *Bracton*, discussing the process by

⁸²'Secundo die potest reus facere defaultam secure ex consuetudine regni dum taxat si essoniatus fuerit primo die ordine premonstrato.' Dunham, *Radulphi De Hengham Summae*, 19–20.

⁸³'A la secunde journee poet le defendaunt fere default sil fust essonie al primer jour.' Woodbine, *Law Tracts*, 55.

⁸⁴Dunham, *Radulphi De Hengham Summae*, 35–36.

⁸⁵*Ibid.*, 36–37.

⁸⁶Thorne, *Bracton*, vol.4, 176.

⁸⁷*Ibid.*, vol.4, 245.

⁸⁸'In *Quod Permittat* potest habere visum et non vocare ad warrantum et in aliis consimilibus casibus.' Dunham, *Radulphi De Hengham Summae*, 37.

⁸⁹'Kar en le *Quod Permittat* si poet homme aver la veue e nient vouchier a garaunt.' The author goes on to discuss 'other such similar cases' (*autres tels cas semblables*), just as Blundel does in *Hengham Magna*. Woodbine, *Law Tracts*, 66.

which the county court may take jurisdiction if the demandant's lord fails to do him right, says that 'it very often happens (*multotiens contingat*) that the demandant fraudulently says the court has failed to do him right when there was no plea in the court of the chief lord, or though the lord was ready to do him right the demandant fraudulently betook himself to the county court'.⁹⁰ *Hengham* contains a very similar discussion, but adds a bit at the end making it clear that the lord can actually appear later in the proceedings, once the case has already been transferred from the county court to the king's court, and reclaim his court, 'yet this very rarely happens (*tamen raro hoc contingit*)'.⁹¹ There are very few places in the text where Blundel explicitly chooses to give his reader a sense of how often a particular procedure is used. That he does so in a place where *Bracton* does the same thing – albeit for a different procedure – suggests that Blundel was working directly from *Bracton*. *Fet Asaver* does not contain similar language.

The most powerful evidence that the copying in the sections of the two treatises that cover the writ of right likely flowed from *Bracton*, to *Hengham Magna*, to *Fet Asaver* is that there is some material that appears in both *Bracton* and *Hengham*, but not in *Fet Asaver*. *Hengham* contains specimen writs of right in the same place they are found in *Bracton*. They do not appear in *Fet Asaver*. *Bracton* and *Hengham* both contain material on the jurisdiction of the county court and transferring a plea brought by writ of right to the royal court. None of this appears in *Fet Asaver*, which begins with material that corresponds to chapter five of *Hengham* and f. 332 of *Bracton*. If we were to assume that *Fet Asaver* was the first of the two treatises and that *Hengham* copied from it, we would have to assume that *Fet Asaver* borrowed its organization from *Bracton* and superimposed the diurnal organization upon it; that Blundel then copied the organization from *Fet Asaver* and translated much of its text, but, being dissatisfied with its coverage, returned to *Bracton* to add material from *Bracton* that the author of *Fet Asaver* had not copied; that he added that material in precisely the order the *Bracton* authors had chosen for it; and that he even adopted some of the *Bracton* text's idiosyncrasies, like the reference to what is usually done in court, and added them to his treatise in the same places one finds them in *Bracton*. This is not impossible, but a far more likely explanation is that *Hengham* was written first. Blundel had *Bracton* in front of him when he was writing it, copied its organization, and superimposed the diurnal framework. The author of *Fet Asaver* then copied from *Hengham*, cutting his text down as he translated and recrafted *Hengham* into a simple and straightforward French.

⁹⁰Thorne, *Bracton*, vol.4, 54.

⁹¹Dunham, *Radulphi de Hengham Summae*, 7.

V. Bracton and *Fet Asaver*

Some of *Fet Asaver*'s Bractonianisms were mediated through *Hengham Magna*, but the author of *Fet Asaver* also had direct access to *Bracton*. If he was a different person than the author of *Hengham Magna*, then *Fet Asaver* provides us with a second witness to the circulation of the *Bracton* treatise during Henry of Bratton's lifetime. The *maneres* after the first do not correspond to anything in *Hengham Magna* and therefore cannot be derived from it. Any material in the second, third, and fourth *maneres* that derives from *Bracton* was therefore most likely gleaned directly from *Bracton*, not mediated through *Hengham Magna*. The second and fourth *maneres* contain no evidence of borrowing from *Bracton*, but the third *manere*, on writs on descent to heirs, may. Like *Bracton*, *Fet Asaver* treats writs on descent to heirs as a single family. The author tells us that the third *manere* 'is on the writs which are of fee and of demesne and not of right, such as the writ of mort d'ancestor and of its members, such as the writ of cosinage, of aiel, and of reasonable part which is called Nuper Obiit'.⁹² The author of *Fet Asaver* discusses the writ of Nuper Obiit for several pages, explaining why it belongs in this family of writs and explaining some of the procedural characteristics of the writ.⁹³ He then introduces a case based on the writ, where a father attempts to give part of his land to one of his daughters during his life in order to increase that daughter's share of his lands.⁹⁴ After his death, the other daughters sue, claiming that the land should be part of the inheritance, to be divided equally between them.⁹⁵ After five pages of discussion of Nuper Obiit, the author briefly discusses some of the finer points of counting in cases brought by all of the writs of this kind, and moves on to discuss a writ which is mixed in nature. Problems arise when two people have an equal claim to an inheritance, but stand in different degrees of relation to the deceased. So, if the deceased leaves a piece of land that will pass partly to his descendants, and leaves a son and a grandson – the son of a deceased son – both have a claim to the land. The assize of mort d'ancestor could only be brought by a child, sibling, niece, or nephew of the deceased.⁹⁶ A grandchild could not use it. He could use a separate writ, called a writ of aiel, which was designed for descendants more remote than children.⁹⁷ Son and grandson would therefore have to sue by separate writs, even though they were suing on the same claim. *Fet Asaver* explains that they 'can be

⁹²'Ore est adire del terce membre de plai, ke est sur les brefs ke sunt de fee e de demeyne e nient de dreit; sicom del bref de Mortdauncestre e ses membres, sicom del bref de Cosinage, del Ael, e de Renable Partie ke est appellee Nuper obiit.' Ibid., 93.

⁹³Ibid.

⁹⁴Ibid., 95–96.

⁹⁵Ibid., 96–96.

⁹⁶De Haas and Hall, *Early Registers*, 3.

⁹⁷Ibid., 283.

joined in the writ; and then they will both have a writ which has the nature of mort d'ancestor and of aiel'.⁹⁸ *Fet Asaver* then gives a sample of this writ before turning to the procedure followed when one brings a case by assize of mort d'ancestor.

This follows the pattern of a portion of *Bracton's* tractate on the assize of mort d'ancestor. A few pages into the tractate, *Bracton* provides a writ of Nuper Obiit.⁹⁹ The treatise contains only a few sentences of commentary on the writ, compared with several pages in *Fet Asaver*, and none of it addresses the case where the father attempts to gift land to one of his daughters during his life.¹⁰⁰ But it moves on immediately to discuss a writ that 'has in part the nature of a writ of mort d'ancestor and in part the nature of a writ of cosinage'.¹⁰¹ The treatise continues for several pages on this topic, using the writ of cosinage – a writ that could be used by collateral relatives of the deceased – where *Fet Asaver* uses aiel, but this difference is not significant because *Bracton*, oddly, includes grandchildren under the writ of cosinage.¹⁰² The writ of cosinage was invented by William of Raleigh, probably the primary author of the *Bracton* treatise, in 1235.¹⁰³ The writ of aiel was given official approval by the chancery in 1238.¹⁰⁴ It could be that when this part of the treatise was written, the writ of aiel was so new that the courts had not yet thought to call the writ by a different name, and instead folded cosinage and aiel into a single category.¹⁰⁵ The writs of cosinage and aiel, while they operated somewhat differently from the assize of mort d'ancestor, operated alike. There would not have been any very compelling reason to distinguish between cosinage and aiel initially. But by the time *Fet Asaver* was written, cosinage, aiel, and a third writ called besaiel were all regarded as separate writs and the author would probably have felt compelled to update *Bracton's* discussion to reflect this. *Bracton* continues on to discuss the same kinds of procedural issues with these writs that we find in *Fet Asaver*. Both texts contain specimens of the judicial writs that would be issued as the case progressed.¹⁰⁶ Overall, it would appear that at least a portion of the third *manere* draws its organization from *Bracton*.

⁹⁸ '[I]l covient ke le uncle e le neveu seient ioynt en le bref; e donc averont il ambedeus un bref ke avera la nature del Mortdancestre e del Aiel.' Woodbine, *Law Tracts*, 100.

⁹⁹ Woodbine and Thorne, *Bracton*, vol.3, 250.

¹⁰⁰ *Ibid.*

¹⁰¹ 'Habet enim in parte naturam brevis mortis antecessoris et in parte naturam brevis de consanguinitate.' *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Brand, *Kings, Barons, and Justices*, 54, n.43.

¹⁰⁴ H.C. Maxwell-Lyte, ed., *Close Rolls of the Reign of Henry III Preserved in the Public Record Office, A.D. 1237–1242*, London, 1911, 148.

¹⁰⁵ This may allow us to date those parts of the *Bracton* treatise that collapse the writs of aiel and cosinage into a single category more precisely. It at least suggests that they were written closer to 1238 than to 1262, the latest date that we know Bratton was working on the treatise.

¹⁰⁶ Woodbine and Thorne, *Bracton*, vol.3, 252–255; Woodbine, *Law Tracts*, 101–104.

Fet Asaver may also take something more fundamental from *Bracton*. Theodore Plucknett lauds *Fet Asaver*'s overarching division into four *maneres* defined as pleas of land 'of fee and of demesne and of right, or of fee and of right and not of demesne, or of fee and of demesne and not of right, or of demesne and not of fee nor of right'.¹⁰⁷ Plucknett presents this organization as both original and English, a case in which an author has 'succeeded in starting afresh on the endless task of framing an intellectual system out of the native materials of English law', and has done so with 'considerable originality'.¹⁰⁸ He contrasts this with the approach of the *Bracton* authors, who 'unhesitatingly went to the fountain-head of legal theory, the Romanists'.¹⁰⁹ What Plucknett fails to appreciate, however, is that *Fet Asaver*'s organization, far from being original, is probably an adaptation of a theoretical framework found in *Bracton*. And, far from being 'native' and 'English', it is actually a framework the *Bracton* authors developed to try to explain the workings of the English royal courts in a way that could be reconciled with the Roman law of property. *Fet Asaver*'s division into *maneres* appears to have been inspired by a Bractonian scheme for separating types of actions and rights in land which, in earlier work, I labelled the *causae possidendi*, or 'reasons for possession'.¹¹⁰ The *Bracton* authors use several versions of this scheme near the beginning of the treatise, in the heavily Roman-law influenced tractate on acquiring dominion over things.¹¹¹ In a subsection titled 'If a gift is made of another's property', Bracton tells us that 'A thing may be entirely and in every way another's, with respect to the right and the property, the fee and the free tenement, the usufruct and the bare use'.¹¹² He subsequently takes this apart, in the tractate on the assize of novel disseisin, and shows how a thing may be owned in different ways by different people:

[O]ne may have the right and the property and the fee in a free tenement and another the free tenement. One may have the fee and free tenement and another the [pure] right. One may have all these and another the usufruct. One may have all these and the use and another the fruits.¹¹³

The versions of the *causae possidendi* that appear throughout the treatise are all a little different from each other. A version of the *causae* that appears in the tractate on the assize of mort d'ancestor comes closest to what we find in *Fet*

¹⁰⁷Woodbine, *Law Tracts*, 53.

¹⁰⁸Plucknett, *Early English Legal Literature*, 95.

¹⁰⁹*Ibid.*

¹¹⁰Thomas J. McSweeney, 'Property before Property: Romanizing the English Law of Land', 60 *Buffalo Law Review* (2012), 1172 ff.

¹¹¹Woodbine and Thorne, *Bracton*, vol.2, 101, 102, 123, 127, 140. It also appears in other tractates of *Bracton*. *Ibid.*, vol.3, 132.

¹¹²*Ibid.*, vol.2, 101.

¹¹³'Notandum est inter cetera quod potest quis habere in libero tenemento ius et proprietatem et feodum et alius liberum tenementum. Item unus feodum et liberum tenementum et alius ius merum. Item unus hæc omnia et alius usumfructum. Item unus hæc omnia et usum, et alius fructum.' *Ibid.*, vol.3, 132.

Asaver. The author of this passage is glossing certain words of the writ. The assize of mort d'ancestor could be used by someone who claimed to be the nearest heir of the last person to die 'seised in demesne as of fee' of a piece of land. The treatise author, in explaining what it means to be seised 'as of fee' tells us that

[O]ne may be seised of land or a rent in his demesne as of fee and as of free tenement, or only as of fee and not in demesne, or only as of a free tenement, in demesne, but not in fee, as may be said of those who hold only for life in whatever way.¹¹⁴

Compare this to the introduction to *Fet Asaver*, which divides the *maneres* of writs by the types of rights they protect:

And therefore it is to be spoken first of a plea of land, which cannot be pleaded outside of four manners [maneres]; either it is of fee and of demesne and of right, or of fee and of right and not of demesne, or of fee and of demesne and not of right, or of demesne and not of fee nor of right.¹¹⁵

If we compare this to the version of the *causae* found in *Bracton's* tractate on mort d'ancestor, we see that there are some differences, but they are actually rather minor. The passage from *Bracton* speaks of holding (1) in demesne as of fee and as of free tenement, (2) as of fee but not in demesne, or (3) only as of free tenement, in demesne, but not of fee. It looks like the author is using three *causae* here, but in reality he is only using two, because 'demesne' and 'free tenement' are, for all practical purposes, synonyms. To hold land in demesne means to hold it with no free tenants beneath you. If Ranulph holds his land in demesne, he either works it personally or has villeins, unfree people, working it for him. The free tenant, by definition, holds in demesne. He may let the land out for a term of years, on a leasehold, but he would still be considered the holder in demesne, since his tenants would be considered non-freehold tenants.

If we use the terms *demesne* and *free tenement* interchangeably, then the passage in *Bracton's* tractate on mort d'ancestor and the introduction to *Fet Asaver* parallel each other very closely. They both divide pleas and rights in land according to whether they are pleas or rights (1) of fee and (2) of demesne/free tenement. *Fet Asaver* adds pleas of right, which, as we have seen, appear in other versions of the *causae* throughout the *Bracton* treatise. He jettisons the terms property, usufruct, and fruits, which are of Roman

¹¹⁴*Et unde ex præmissis colligi potest quod unus potest esse seisitus de aliqua terra vel redditu in dominico suo ut de feodo et libero tenemento simul, vel tantum ut de feodo et non in dominico, vel tantum ut de libero tenemento et in dominico, non tamen in feodo, sicut dici poterit de illis qui tantum tenent ad vitam quacumque ratione.* Thorne, *Bracton*, vol.3, 275.

¹¹⁵*E purceo est adire adeprimes de plai de tere ke ne poet ester plede fors en quatre maneres; ou ceo est de fee e de demine e de dreit, ou de fee e de dreit e nient de demeyne, ou de fee e de demeyne e nient de driet, ou de demeyne e nient de fee ne de dreit.* Woodbine, *Law Tracts*, 53.

derivation and were not used in any English writs.¹¹⁶ The *Bracton* authors themselves found it difficult to integrate these terms for rights in land into the English system of writs, and it would make sense for an author who is writing a treatise on the procedures of the royal courts, which contain no procedures for recovering property, usufruct, or fruits, to drop the Roman terms.¹¹⁷

It is likely that the author of *Fet Asaver* took the *causae possidendi* scheme, which he used as the organizing principle of his treatise, from *Bracton*; it does not appear in this format in other contemporary sources. Where in the treatise he got it from is not entirely clear, but we can be reasonably sure from the parallels in the third *manere* that the author of *Fet Asaver* had direct access to *Bracton*. *Hengham* does not incorporate any of the complex schemes for thinking about property rights in abstract terms that appear in these parts of *Bracton*.

VI. A common author?

The evidence suggests that *Fet Asaver* borrowed from *Hengham Magna* and not vice versa. If that is the case, then *Hengham Magna* must have been the earlier of the two treatises. But even if *Fet Asaver* copies material from *Hengham Magna*, this fact alone does not rule out Woodbine's theory that the two texts were written by the same author. Perhaps Blundel wrote *Hengham* and decided to adapt it for an audience that was more comfortable in French, adapting his material on the writ of right for *Fet Asaver* and returning to *Bracton* to provide the outline for the third *manere*. There is good reason to believe that the two treatises were written by different people, however. There is, of course, the difference in style: the straightforward French of *Fet Asaver* contrasts sharply with the grandiloquent Latin of *Hengham*. A single author may, of course, have adopted different styles because he was writing for different purposes and in different languages. He may have thought his two texts required different conventions. One has to wonder if the person who wrote the *Hengham* text, meant to impress and perhaps to exclude the unlearned from knowledge of court procedure, would have also wanted to write a text that made the law accessible to a wide audience, the serjeants, attorneys, estate stewards, and landowners who patronized the statute books and seem to have been more comfortable in French. But leaving the difference in language aside, there are differences in the style of the writing that are more difficult to explain. Blundel puts some flourish into his transitions in *Hengham Magna*, telling the reader where we have been and where we are going next:

¹¹⁶McSweeney, 'Property before Property', 1178–1181.

¹¹⁷*Ibid.*

The order of pleading in the court of the baron and in the county by writ of the lord king concerning the right has already been expressed above, when the complaint of those things has now been adjourned to the bench in full county by the writ which is called *pone*; it is [now] necessary to teach how those tenants and plaintiffs ought to proceed after that.¹¹⁸

He then turns to the first day of the plea in the king's court.¹¹⁹ *Fet Asaver*, in contrast, in a terse transition to the substance of the section, tells us, 'On the first day it is common for the defendant to essoin himself *de malo veniendi*', shifting immediately to the first day of litigation.¹²⁰ The two texts parallel each other to a great extent after this point.

There is also the appearance of Richard le Jay and William Huse, Blundel's model litigants, throughout *Hengham Magna*. Neither appears in any of the surviving copies of *Fet Asaver*. In chapter eight, where *Hengham* and *Fet Asaver* follow each other closely, *Hengham* gives the form of the enrolment as 'Richard le Jay offered himself on the fourth day against William Huse or his attorney'.¹²¹ *Fet Asaver* has 'This one offered himself on such a day against this one', substituting pronouns for the names of the parties and a generic 'such a day' for the day of the return day on which the offer took place.¹²² If Blundel wrote both, why not use Richard le Jay and William Huse, with whose case Blundel had some sort of connection, in both treatises? There is therefore a good chance that the two texts had different authors; Blundel would have had to make some remarkable adjustments to his style to have written both treatises.

VII. Conclusion: legal-literary culture in the 1260s

This article has advanced two major propositions: First, that the author of the treatise known as *Fet Asaver* copied from *Hengham Magna*. And second, that it is unlikely that the similarities between the treatises are the result of a common author. *Hengham Magna* and *Fet Asaver* were most likely written by two different clerks of the royal courts in the 1260s.

This new understanding of the relationship between *Bracton*, *Hengham*, and *Fet Asaver* opens up exciting possibilities for the study of the legal-literary culture of the justices and clerks of the royal courts. Scholarship to date has

¹¹⁸'Quoniam ordo placitandi in curia baronis et in comitatu per breve domini regis de recto superius exprimitur, [nunc] cum huiusmodi loquela in pleno comitatu per breve quod vocatur *Pone* adiurnata fuerit ad bancum, opus est docere quomodo ipsi tenentes et petentes de cetero debeant procedere.' Dunham, *Radulphi De Hengham Summae*, 14. The 'non' that appears in Dunham's text is a misreading and has been amended here to 'nunc'.

¹¹⁹*Ibid.*

¹²⁰'A la primere journee communement est al defendaunt sey essonier de mal de venue.' Woodbine, *Law Tracts*, 53–54.

¹²¹'Ricardus le Jay optulit se quarto die versus Willelmum Huse vel attornatus.' Dunham, *Radulphi De Hengham Summae*, 20.

¹²²'Cely sey profrist a teu jour vers cely.' Woodbine, *Law Tracts*, 55.

emphasized the break between the erudite, Romanist legal literature of the early thirteenth century and the practical legal literature that flourished from the 1260s onwards.¹²³ The major legal-literary production of the first half of the thirteenth century, the *Bracton* treatise, was a massive and ambitious tome written in the form of a civilian *summa* by a succession of English royal justices, all of whom had risen to the bench through long service as judicial clerks. It was an attempt to show that the work of the royal courts could be explained using the terminology and concepts of Roman and canon law.¹²⁴ From around the 1260s, however, short guides to pleading and conveyancing began to take over, according to the received narrative. We know that the break was not complete; *Britton*, *Fleta*, *Thornton*, and *Hengham Magna*, products of the second half of the thirteenth century, all drew heavily on *Bracton*. Still, Theodore Plucknett hailed *Fet Asaver* as part of a movement towards an entirely new type of legal literature. For Plucknett, 'the author of *Fet Asaver* deserves the highest praise, for it was he, more than anyone else, who "turned his eyes away from the glittering pages of the *Digest*" and struck out an original line of thought on his own'.¹²⁵ Where the *Bracton* treatise was written by justices of the royal courts, and in particular a group of justices who were clerics with training in Roman and canon law, Plucknett thought *Fet Asaver* represented the sensibilities of the new professional pleaders, the serjeants, laymen who had little use for learned tomes that attempted to explain English law in terms of the two learned laws.¹²⁶ It was one of 'the achievements of our new legal profession' as 'One or two of its members have succeeded in starting afresh on the endless task of framing an intellectual system out of the native materials of English law, and have succeeded in reaching a result of considerable originality'.¹²⁷

If we add *Fet Asaver* to the growing list of texts that were actively engaging with the earlier tradition of legal literature, the picture that begins to emerge is not one of rupture, but of continuity. *Fet Asaver* does not represent the fledgling legal profession's attempt to break away from the literature written by the Romanist clerks and justices. *Fet Asaver* is, rather, an outgrowth of that earlier culture, possibly written by a clerk of the court who, although he was writing in French and not Latin, was writing in the established style of the courts and in dialogue with his fellow clerks and justices. Rather than a lawyer who was

¹²³Plucknett, *Early English Legal Literature*, 94–96; See also J.H. Baker, *An Introduction to English Legal History*, 4th ed., London, 2002, 186–187. Brand, 'Legal Education', 58; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed., London, 1981, 41–42.

¹²⁴See McSweeney, 'Property before Property', 1139; Thomas McSweeney, 'English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law', 84 *Temple Law Review* (2012), 827.

¹²⁵Plucknett, *Early English Legal Literature*, 96.

¹²⁶*Ibid.*, 94–96.

¹²⁷*Ibid.*, 95.

rejecting the book-learning of the bench, the author was most likely a colleague of Bratton and Blundel who had early access to their work.

If the authors of *Hengham* and *Fet Asaver* were different people, *Fet Asaver* also gives us an additional data point for the early circulation of *Bracton*. Apart from the evidence of copying from *Bracton* in *Hengham Magna* and *Fet Asaver*, we have no evidence for *Bracton*'s circulation before Henry of Bratton's death in 1268; but it looks likely that both of these clerical authors had access to the treatise, and a fairly late recension of the treatise, close to the one that has come down to us in most of the surviving manuscripts. We know that several authors and editors worked on the treatise at different times. Parts of *Bracton* had already been written by 1236 and were updated to take account of changes in the law made by the Statute of Merton, which was promulgated in that year.¹²⁸ Someone, probably Henry of Bratton, was working on the treatise in the 1260s, when references were added to cases decided in that decade.¹²⁹ The version of the treatise that the author of *Fet Asaver* was reading must have been edited after 1235, since it draws its discussion of the mixed writ – the one that appears as a mixed writ of mort d'ancestor and of cosinage in *Bracton* and of mort d'ancestor and aiel in *Fet Asaver* – from *Bracton*. That mixed writ could not have been added to *Bracton*'s tractate on the assize of mort d'ancestor until 1235 at the earliest, the year Raleigh invented the writ of cosinage. The version of the text that the author of *Fet Asaver* was using in the 1260s therefore was probably the second recension of the text, the one that had been updated to take account of the Statute of Merton.

We have no evidence that the *Bracton* treatise had been copied for circulation already in the 1260s. None of the surviving manuscripts are that early, and we have no direct references to the treatise before 1278.¹³⁰ Nor do we have any textual witnesses to *Hengham Magna*'s circulation in the 1260s. If *Hengham Magna* and *Fet Asaver* were written by two different clerks in the royal courts, it opens up the possibility that these texts were being written within a small circle of people who were part of the judicial establishment and that those people had close ties to each other. Blundel and his anonymous colleague seem to have had access to each other's work, as well as to *Bracton*, which they very well may have borrowed from Henry de Bratton himself, before the text was widely available. The textual production of the royal courts was therefore not performed by solitary authors, but by clerks and justices in dialogue with each other. The relationships between texts may, therefore, tell us something about the relationships between the people behind

¹²⁸Thorne, 'Translator's Introduction', *Bracton*, xv–xvii, xxx.

¹²⁹Meekings and Crook, *King's Bench and Common Bench*, 137; Brand, 'The Age of Bracton', 75.

¹³⁰Brand, 'The Age of Bracton', 74.

them and offer some insight into the people who staffed the royal courts in the earliest period of the common law.

Even if these texts were produced by the judicial establishment, the justices and professional clerks of the court, they may have been written for the practising bar. The justices, particularly the most important ones, were often chosen from among the senior clerks of the court; no serjeant became a justice until the 1290s.¹³¹ The justices and serjeants were thus distinct social groups. But *Hengham Magna* and *Fet Asaver* were popular with the people who produced and consumed statute books, texts that appear to have been intended for litigants and practitioners. Some have suggested that the short treatises of the second half of the thirteenth century began life as lectures in a course designed for practitioners.¹³² If so, *Hengham Magna* and *Fet Asaver* may provide us with evidence that the justices and their professional clerks, the judicial establishment, were actively participating in the education of the bar.

It is not clear that the authors of *Hengham Magna* and *Fet Asaver* were going out of their way to write texts that were 'much more practical' than the literature that came before, however.¹³³ Although *Hengham Magna* and *Fet Asaver* both present themselves in some ways as very practical texts – they take their reader through a plea day by day, rather than arranging themselves according to topics that have little to do with the progress of a case through the court, as *Bracton* does – there is a sense in which neither text is terribly practical. Both texts focus heavily on the writ of right, a writ that had seen its day by the time they were written. The number of actions brought by writ of right declined markedly around mid-century. Where twenty were brought at the 1242–43 Somerset eyre, only eight were brought in the 1256 Northumberland eyre (out of 219 total actions brought at that eyre), and only one in the 1269 Northumberland eyre (out of 170).¹³⁴ The writ of right was being eclipsed by the petty assizes and the writs of entry.¹³⁵ These numbers do not give the full picture; many of the writs of

¹³¹Brand, *The Origins of the English Legal Profession*, 29.

¹³²Brand, 'Legal Education', 58–61, 76–77. John Beckerman ran an interesting experiment on the treatises of the later thirteenth century: he read them aloud and timed himself to get a sense of how long it would take to deliver one of them as a lecture. He found that *Fet Asaver* could be read in 105 minutes and *Hengham Magna* in 147 minutes. Beckerman concluded that these texts may very well have been produced as lectures for a 'basic course on common law remedies'. Beckerman, 'Law-Writing and Law Teaching', 35, 37.

¹³³*Ibid.*, 58.

¹³⁴Donald Sutherland, *The Assize of Novel Disseisin*, Oxford, 1973, 43; Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2 vols., Cambridge, 1898, vol.2, 565–567. Writs of right were already giving way to writs of entry by 1250, but they suffered a momentous blow with the introduction of writs of entry in the *post* in the early 1260s. As a percentage of the total number of actions brought, the writ of right suffered a fifty per cent decline between 1250 and 1270. Brand, *Kings, Barons, and Justices*, 337–339.

¹³⁵Pollock and Maitland, *History of English Law*, vol.2, 565–567.

dower operated as writs of right, and they were still fairly common in the 1260s, although not as common as the assize of novel disseisin, which receives no treatment in *Hengham Magna* and very little in *Fet Asaver*.¹³⁶

There is, of course, a possible explanation for *Hengham*'s sole treatment of the writ of right: it is probably unfinished. *Hengham* and *Fet Asaver* may have started with the writ of right for the simple reason that it is the most complex of the writs. They could use it to discuss all of the various essoins and exceptions, and then simply reference the discussion of those essoins and exceptions in the section on the writ of right when they discussed other writs. There may be another reason, however. The authors of these two treatises may have been following in the established legal-literary tradition of the royal courts. Previous texts written about the procedures of the king's courts had placed the writ of right first. The *Glanvill* treatise, for instance, puts the writ of right and its process front and centre.¹³⁷ It only gets to the petty assizes in the thirteenth of its fourteen books.¹³⁸ It may be that the production of a text was more important to a clerk's career than we had previously known. Perhaps producing a text in the established styles of other writing in the royal courts was the way clerks on the rise made themselves stand out to their superiors in hopes of promotion, either to the bench or through appointment to other offices or ecclesiastical benefices. The clerks John Blundel and his anonymous associate appear to have been continuing the legal-literary traditions of the judicial establishment. They were adapting them and translating them for a broader audience, but they were certainly not trying to break with them completely.

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¹³⁶C.A.F. Meekings, ed., *The 1235 Surrey Eyre*, 3 vols., Guildford, Surrey, 1979, vol.1, 60–62; Pollock and Maitland, *History of English Law*, vol.2, 565–567.

¹³⁷The first twelve books of *Glanvill* discuss actions of right or property, although they cover many different types of writs, including writs for dower and writs of naifty, for the recovery of a villein. G.D.G. Hall, ed. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, Oxford, 1965, 5–148 (Books I–XII). In a number of manuscripts of the late thirteenth century, *Hengham Magna* and *Fet Asaver* are bound together with a copy of the *Glanvill* treatise. Tullis, 'Glanvill after Glanvill', 54.

¹³⁸Hall, *Glanvill*, 148–171; H.G. Richardson and G.O. Sayles, *Law and Legislation from Æthelberht to Magna Carta*, Edinburgh, 1966, 106–107.

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