Legal History meets Lexical Semantics
Consideration - the origin of term and concept

A dissertation submitted to Ghent University in partial fulfilment of the requirements for the degree of Doctor of Law

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2017
“When I use a word,” Humpty Dumpty said in rather a scornful tone,  
“it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty,  
“which is to be master – that’s all.”

Lewis Carroll
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Preface

Innovative research can only see the light if the researcher is lucky enough to be surrounded by people who believe in her project. I had the privilege to be in this position. Many years ago, when I first discussed my research idea of combining and adapting linguistic methodologies to the study of law with Mark Van Hoecke, he immediately saw the potential of my project. It underwent a number of changes, and was carried out, at times, against all odds of family and health problems. But Mark never wavered and I will forever be grateful to him for his unfaltering support. Dirk Heirbaut and Bart Defrancq were two further unshakable pillars on this journey. No words can sufficiently acknowledge my appreciation of their encouragements and the many hours of time they offered so generously to advise me and discuss the many issues that the research raised. Paul Brand has also been very kind to make many helpful suggestions.

I would like to thank Stephen Engelhard, Tim Reynolds and Charles White for helping me so diligently with the proof-reading of the text and for making creative suggestions for improvements. A very special thanks go to Jean-Philippe Brondel for the very beautiful cover page and his helping hand with the lay-out, and to Pia for assisting me so expertly with the statistics. Last but not least, I would like to express special gratitude to colleagues, friends and family for their many signs of support, whether in form of discussions, words of encouragement or practical help.

* I can no other answer make, but, thanks,
  And thanks; and ever thanks.

Shakespeare (Twelfth Night)
Chapter I. Introduction

“Law in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilised society. And yet the study is seldom conducted in this manner. Law, like geography, is taught as if it were a collection of facts merely: the memory is employed to the full, rarely the judgment.”

Lord Kames, like so many of his contemporaries, embodied interdisciplinarity and, despite having enjoyed no university education, wrote with equal erudition about law, history, philosophy, religion, aesthetics, literary criticism and agricultural improvements. In the above extract from the introduction to his *Historical Law Tracts*, Kames not only shows himself as the staunch defender of the study of legal history that he was, but he also deplores what we would describe in today’s jargon as the compartmentalised autonomy of the study of law: seeing ‘facts’ in isolation with limited concern for contexts. Whilst the study and profound knowledge of autonomous ‘facts’ are no doubt essential, the contribution to scholarship is only truly informative and fascinating if context is created by taking a step back from the conditions of autonomy and adding dimension by comprehending the issues from a broader angle. The present research was born from such thinking and considerations.

Its aim was to trace the advent and early use of the concept of consideration in English contract law, by studying the doctrinal development in parallel with the corresponding terminological evolution between the 15th and 18th centuries. It was essential to adopt a two-track, interdisciplinary approach to the research and to mark out a research field beyond the mere content analysis of the case law and legal writings. On the one hand, the enquiry of the legal historian revealed the historical process of the legal thought that initiated this concept. On the other hand, the pragmatic and empirical angle of

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studying the language in its context by the linguist showed how legal thought was encoded in linguistic expressions and meanings. This allowed for a better understanding of the continuous interaction between the way legal thought creates meaning in language and language creates realities in law.

Interdisciplinarity is, as the term indicates, an approach that brings together two or more academic disciplines. It allows for thinking to make links between different fields of ideas and areas of study. Crossing disciplinary boundaries in this way liberates the creative thinker from the shackles of restrictive perceptions and practices associated with one or the other discipline. But it comes with the price of having to define an inter-disciplinary space linking the different subjects, in which the research is to be carried out. The majority of scholars find it a challenge to think and ‘feel’ across disciplinary categories. It is comparable to the phenomenon that few people are truly bi- or multilingual. And as counting, dreaming, swearing still tends to be in the same ‘first’ language for multi-linguists, researchers also relate intuitively to the theoretical and methodological paradigms of their ‘first’ discipline, which can become a stumbling block for interdisciplinary work. It is indeed possible that representatives from all the different disciplines involved in a given research initiative will be dissatisfied with the process and results because they are likely to be missing a paradigm that is familiar to them, while being confronted with a way of thinking and proceeding that is not.

This very point has been one of the main challenges for the present research. It felt at all times to be a fine balancing act between requirements established by the legal scholar, the historian or the linguist. Maybe, the best observation is to acknowledge that the balancing act was only possible to the extent that the inter-disciplinary space was defined in relation to the specificities of this particular research initiative, rather than on an absolute level. The research was then carried out in relation to the parameters of that specific ‘third’ space, which comes with all the imperfections of only including certain aspects of the theory and methodology from each discipline involved.
Legal history is, in itself, an interdisciplinary undertaking. Law is not totally independent of context but enjoys some autonomy and the historical approach takes law out of its semi-autonomous position to place it within its historical context. In this research, a further dimension was added, namely the study of language and terminology. However, the various disciplines are not brought together in equal measure. This is primarily an enquiry into the diachronic evolution of legal thinking in relation to a particular issue, and the study of the relevant language is a tool in this enquiry. The novelty of the approach in relation to legal texts lies in the use of corpus linguistics methodologies as models for a better understanding of the development of legal thinking beyond the mere content approach that legal research usually practices.

But the tension of combining the study of law and that of language remained. Matilla describes it as follows: (my emphasis)

“Legal science is mainly interested in abstract entities – concepts – that are to be found in the background of terms, that is, in the meanings of terms. This science systematises the legal order through legal concepts. Terms are designations of concepts, necessary to legal science. However, the primary interest of this science does not have bearing on legal terms but on the concepts themselves. By contrast, in legal linguistics it is the terms as such that constitute the primary object of research.”

The present study has attempted to bring together the two ‘sciences’ in an inter-disciplinary space that makes linguistics a means for studying legal concepts.

For the linguistic community, the methodology and conclusions are of interest in relation to the use of specialists’ language and terminology - language for special purposes or LSP. From the linguistic study of the concept of consideration, we observe the opposite of what has so far been described in

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2 Corpus linguistics studies language based on large collections of computerised texts using linguistic software, which retrieves alphabetically or otherwise sorted lists of linguistic data from the corpus.

the area of LSP, namely a semantic shift from everyday vocabulary and the
general register of ordinary life via repeated use in a legal context with
increasing legal connotations to a highly specialised, incomprehensible and by
now sometimes archaic register. This semantic development moved in the
opposite direction from what is usually associated with LSP studies.

However, the diachronic corpus linguistics approach does not result in a full,
general and statistical linguistic analysis of the language of law reporting
between the 15th and 18th centuries. Such an approach, typical for the linguistic
research community, was not imported into the inter-disciplinary space. The
use of linguistics methodologies was restricted to revealing a specific
development of legal thinking and doctrine. It is the study of how legal concepts
materialise, evolve and are translated into the letter of the law that stands at
the centre of the inter-disciplinary space created for this research.

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From our 21st century view, we often perceive long-standing, well-established
legal concepts and the language used to express them as having been carved
in stone as far back as the legal mind can remember. Yet, the customary law
set-up of the late Middle Ages allowed more readily for the intellectual and
doctrinal process involved in the development of a concept to be revealed. The
language used is frequently less set and settled in comparison to that of
dogmatic writing or statute law. Studying this language and terminology
reveals how legal concepts materialise, evolve and translate into the letter of
the law. This is the underlying interest of the present research.

The object to be examined is the common law concept of consideration, its
historical development and how its terminology changed and shifted
throughout this evolution. In today’s perception, the doctrine of consideration,
as a central element to contract formation, appears so well anchored in
contract law and in our legal minds, that we may find it difficult to imagine its
development took a tortuous and at times haphazard path, stretching over
several centuries. The forerunners of consideration arose in a medieval legal world of archaic procedures and complex technicalities, and where the need was increasingly felt for the development of a tool that could meet the rising commercial needs in terms of contracts and quasi-contracts. But various strands from different legal issues came together in the idea that informal promises should be enforceable. The evolution was somewhat haphazard because the facts in case law tended to appeal to different established legal actions. Every decision related to specific facts and was then extrapolated onto wider issues but it was not devised as part of an overall doctrine of contract law. Indeed, there was no general common law theory of contract law at the time - that would be initiated only in the 18th century by Blackstone and his treatise-writing contemporaries. Today’s contract law doctrine of offer and acceptance as the moment when a promise becomes binding was unknown then; there was no requirement, as there is in modern contract law, for the plaintiff to show that a contract had been made. Instead, it had to be demonstrated that a promise had been made for good consideration but had not been honoured.

To retrace the development along this path was the ambition of this research, but the approach was to go beyond looking at the mere content of the historical material and to study the language used in the ‘making’ of the concept of consideration. Language as an act of communication encodes meanings in accordance with the socio-political, cultural and historical contexts in which they are uttered. Similarly, the language used in particular in legal proceedings is the product and a reliable indicator of these contexts and of how laws are created, practiced and interpreted. There is continuous interaction between the way laws create meaning in language and how language creates realities in law. Consequently, studying the language means gaining a better

understanding of the contexts and the realities of the law, including prior legal-discursive traditions.

The function of language that is of particular interest to this research is its representational aspect, as it encodes our experience of the world and thus conveys a picture of reality. Researching that representational aspect informs us about the concordance between the historical and conceptual development of ‘consideration’ and the way the relevant terms and vocabulary have been used, changed and shifted throughout this evolution, most notably the increased abstraction of both the legal concept and the language. For example, considering the vocabulary used in relation to the concept of making informal agreements enforceable by looking beyond the traditional grammar classification of the words in question and considering the function they play, we can get a more complete and in-depth picture of the evolution of that vocabulary.

The methodology adopted to reveal how language and the evolution of legal concepts interact is to examine the language in question in its textual context. The use of corpus linguistics methods and linguistics/concordance software is ideal for this sort of empirical approach, as it allows for systematic diachronic analysis of authentic evidence of large scale electronically held corpora.

But it was the application of corpus linguistics and the interpretations of the results that revealed some of the main methodological challenges, mainly because (common law) lawyers and linguists have different views and methodologies for the evaluation of textual evidence. In law based on legal precedents, some shifts in legal thinking can, at times, originate in a few short sentences (maybe even in a mere subordinate clause) that can be found in a discussion, legal argument, decision or mere dictum. Essential for common law legal thinking is that some of these points, however fleetingly touched upon in a legal action, form the basis (precedent) for taking the law into specific directions. In other words, the textual evidence for such shifts in legal thinking/decision may be very slim at times. A linguist, on the other hand, works
on the basis of a lot of textual evidence, which forms the support for an empirical approach of analysing language-in-use rather than mere content analysis. This paradox was not easy to resolve in the inter-disciplinary space and it may well be a contentious issue that satisfies neither discipline. But, as mentioned above, the linguistics methodologies were used as tools to indicate tendencies in legal thinking. The purpose was not to make a full analysis of the language in the Year Books and Law Reports.

The results confirmed tendencies sufficiently definite to show a concordance between the hesitant and at times confused development of the concept of consideration and the terminology used in discussions of the issue in case law. It also revealed the many proposals and attempts that were made before legal thinking settled on the terminology as we know it today. The study showed how a prepositional expression denoting a causal relationship (en consideration de) gave rise to a fully-fledged legal term crystallising the new concept which had hitherto only be expressed through paraphrase. This raises interesting questions of how neologisms develop. Of particular interest is the observation that while certain aspects of the new legal action were already established and confirmed in subsequent cases, the terminology still lingered behind and remained on well-trodden paths. So for example, the promissory notions increasingly present in informal agreements were not necessarily expressed by the use of the term ‘promise’. With today’s hindsight, we understand that promise was actually already at the heart of the new legal thinking, but the terminology continued to refer to prior discursive elements of proprietary concepts. While the legal mind was progressing along a path of new ideas, the language expressing such innovations remained conservative.

The following chapters will take us on a journey retracing the evolution of the concept of consideration from the legal as well as the linguistic angle. The next chapter discusses the notion of legal concepts and their relation to language and specialised terminology. The method of combining the two areas of study in an approach akin to Begriffsgeschichte will be outlined briefly. Chapter III describes the view this research took of language, how language encodes
meanings and how it interacts with law and legal thought. It also includes an explanation of the corpus linguistics methodologies that were used for the research. In chapter IV, we travel back in time to the 14th century and consider the legal language that dominated England for three hundred years and how this Anglo-Norman import intermingled and interacted with the local vernacular until it was abolished in the early 17th century. Chapter V takes us on a similar journey, though this time through the intricacies of the common law concept of consideration. Having thus become acquainted with the cultural and linguistic landscape of multilingual England and its specific situation of medieval legal text production, as well as with the origins and historical evolution of the legal concept of consideration, chapter VI describes in detail the corpus linguistic analysis that was carried out in order to highlight the concordance between the development of the concept of consideration and the terminology used in the discussions of the issue in the case law. This includes an explanation of how the different corpora of texts taken from the Year Books and Law Reports were constituted, as well as a detailed description of the methodology applied. The last chapter will summarise the observations and conclusions that can be drawn from the research.

The case law used for this research has been drawn from the Year Books, the Lawbook Exchange, the Selden Society series, the Ames Foundation publications or the English Reports, Full Reprint. All documents can be accessed electronically through www.heinonline.org. The first three are listed under the title of ‘Selden Society Publications and the History of Early English Law’, the last one can be found under ‘English Reports’. A detailed description of each can be found in annex 2. All reported cases mentioned are usually listed with their name and two references: one relating to the name of the original report and one to the compilation in which they can be found on HeinOnline.

Examples for case references:
Watton v Brinth (1400) Y.B. 2 Hen. IV, 3, 9, or LBEx:
- first the name of the case and the date it was reported (between brackets), N.B. many early cases do not have a name;
- followed by the reference of the original report: here it can be found in the Year Book (Y.B.) during the second year of the reign of Henry IV, sometimes the legal term is also included (Michaelmas: Oct.-Dec., Hilary: Jan.-Apr., Easter: Apr.-May, Trinity: June-July);
- followed by two numbers signposting the section within the Year Book;
- followed by ‘or’ and the reference for finding it on HeinOnline: here it is in the Lawbook Exchange publications.

Cleymon v Vyncent (1535) Y.B. Trin. 27 Hen. VIII, 23, 21 or 119 Selden Society at 46-47:
- case dated 1535;
- originally reported in the Year Book of the Trinity term of the 27th year of the reign of Henry VIII;
- two numbers to signpost the specific section;
- ‘or’ in the 119th volume of the Selden Society series at pp. 46-47 on the HeinOnline database.

Norwood v Reed (1558) 1 Plowd. 180 or 75 Eng. Rep. 277:
- cases dated 1558;
- originally reported in the first volumes of the Plowden Reports in section 180;
- ‘or’ in volume 75 of the English Reports, Full Reprint, on page 277 on the HeinOnline database.

A table of cases can be found in annex 5. The table is subdivided into one sorted by date and one in alphabetical order. It lists the cases mentioned in the theoretical discussion of the concept of consideration, that is in chapter V.
Chapter II. Legal concepts and terminology

In this discussion of legal concepts, I have resisted the temptation to start by defining the concept of law itself, as this would go well beyond the ambit of the research. In any case, many eminent legal scholars, throughout the centuries, have offered definitions of the concept of law, some of which are modified by the rise of supra-national legal systems such as international law, EU law etc. In the present study, the concept of consideration was examined in its evolution from a collection of piecemeal legal rules established in the case law and for pragmatic requirements, to a fully-fledged doctrine that still dominates today’s contract formation in the common law. The underlying question to ask relates to the stage in this development at which this array of piecemeal rules began to be considered a legal concept. In other words, the object of the research is the process of bundling together a collection of rules into a legal concept, and the approach was to study the language as an indicator for this process.

To track the advent and early use of the concept of consideration in English contract law and to trace the historical process of legal thought that constituted this concept required a wider ambit than just the description and analysis of the content of the case law and legal writings. Though these are essential units of analysis, they must be placed within their diachronic contexts for the conceptual shifts in thought and meaning to be revealed.

This approach is akin to the Begriffsgeschichte work undertaken in German-speaking academia, in particular by scholars such as Brunner, Conze, Koselleck and Meier who worked on the encyclopaedia Geschichtliche Grundbegriffe.¹ This monumental work is a historical study of the concepts and semantic fields that constitute the language of social and political thought and

economic structures, and provides insights into the meanings and uses of words and concepts in classical, medieval and modern languages. The aim of the *Geschichtliche Grundbegriffe* project was to test the hypothesis that the main concepts used in German political and social language were transformed during what Kosselleck, one of the principal editors, called the *Sattelzeit* – the period between approximately 1750 to 1850, a century of crisis and transition, during which conceptual change led to transformations in political, social and economic structures.

One of the methodological principles applied by the editors of the *Geschichtliche Grundbegriffe*, was to analyse the semantic fields of political and social language, because language offers a reliable indicator of the thinking and contexts in which concepts are established and are shifting in meaning. Methodologies imported from linguistics sciences, such as philology, historical semantics and structural linguistics are essential tools for *Begriffsgeschichte* research. In the *Geschichtliche Grundbegriffe*, these were used for the

“purpose of charting both continuities and discontinuities in the use of concepts. Concerned to identify persisting meanings in concepts transmitted from the classical or medieval thought, it also studies decisive shifts of meaning in concepts that continue to be designated by the same word. Finally, it seeks to identify neologisms.”

The application of linguistics methodologies to the analysis of concepts historically was related to the shifts in their meanings throughout the period of structural political, social and economic transformations. In other words, the study of the language used to discuss society, politics and economics was

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combined with the identification of the transformations in the structures during the Sattelzeit.

This particular aspect of the *Begriffsgeschichte* approach guided the present research of tracing the historical process of legal thought that constituted the advent and early use of the concept of consideration in English contract law. Linguistic means of expression are central to law and legal texts are endowed, besides the informative and communicative purposes, with prescriptive and/or performative functions, which make, for example, their translation into another language or socio-political and cultural context particularly complex. The study of law is, among others, an enquiry into the abstract entities that make up a legal order. Law is a phenomenon entirely created by man, it does not exist as such in the physical world. Consequently, the language used to describe this phenomenon is intrinsically linked to its specific reality. This contrasts with the natural sciences, which represent to a certain degree an objective reality and where the language used to describe it cannot change that physical reality, though admittedly conceptual systems in natural sciences and the language to express them are also conditioned and influenced by the societal and cultural contexts. The legal reality of a legal system exists through the linguistic means of expression.

A concept, according to a general definition as, for example, in the Oxford English Dictionary, is a general idea or notion, a universal; a mental representation of the essential or typical properties of something, considered without regard to the peculiar properties of any specific instance or example. In other words, concepts are constituents of thought, abstract representations created by the human mind on the basis of features specific to a thing or matter. A ‘term’ is the verbal expression of a concept and is usually a part of the conceptual system of a specialised language or language for special propose (LSP).

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In law, a clear dividing line is not always drawn between legal conceptions and non-legal conceptions. According to Hohfeld,\(^7\) this is because of a failure to differentiate between purely legal relations and the physical and mental facts that create such relations. He believes there are two reasons for this confusion. First of all, in a specific issue, the ideas associated with each set of relations can be very similar, leading to a blending of legal and non-legal quantities. For example, the early action of debt in medieval common law was applicable to real contracts where a res had passed between the parties.\(^8\) It was based on the proprietary notion of possessing a corporeal entity. Rights could be transferred if they were embodied in a physical thing, the premise being that the defendant had received something (a res) from the plaintiff and, hence, there had been a *quid pro quo*. In other words, the action of debt was based on a proprietary notion (physical/mental facts leading to a legal relation) rather than promissory one (legal relation) and it evolved around the fiction that the lender was claiming what belonged to him, rather than what the object of a promise was. Historically, in the example of debt, there was no differentiation between the physical and mental facts that constitute the legal relation and the actual legal relation itself.

This was emphasised by a general ambiguity in the legal terminology, which is the second reason for the confusion between legal conceptions and non-legal conceptions. Hohfeld discusses the term ‘property’ as one example for such looseness of the terminology:

“Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc. relate; then again – with far greater discrimination and accuracy – the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a ‘blended’ sense as to convey no definite meaning whatever.”\(^9\)

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\(^7\) W. N. Hohfeld (1913-1914) Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, in: 23 Yale Law Journal, 16-59, at p. 20

\(^8\) The action of debt also applied to formal contracts under seal specifying a sum.

Hohfeld also cites Mr. Justice Smith in the leading case of *Eaton v Boston Concord & Montreal Rail Road Co*: ⑩

“In a strict legal sense, land is not ‘property’, but the subject of property. The term ‘property’, although in common parlance frequently applied to a tract of land or chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing.”

In the example of ‘property’, we can observe how the term is being used in relation to corporeal and incorporeal entities alike, hereby further obscuring the differentiation between legal and non-legal conceptions. In the case of legal relations, the term is used figuratively. One of the reasons for this ‘looseness’ of legal terminology is that although certain terms refer to highly complex legal concepts, the actual language is imported from general language registers and many terms refer to everyday physical things, while actually describing an abstract legal concept. Pollock and Maitland described this as follows:

“Few, if any, of the terms in our vocabulary have always been technical terms. The license that the man of science can allow himself of coining new words is one which by the nature of the case is denied to lawyers. They have to take their terms out of popular speech; gradually the words so taken are defined; sometimes a word continues to have both a technical meaning for lawyers and a different and vaguer meaning for laymen; sometimes the word that lawyers have adopted is abandoned by the laity.” ⑪

This demonstrates perfectly the difference between the notion of concept as a cognitive category (constituents of thought) on the one hand, and as a linguistic category (semantic meaning) on the other. ⑫ To understand the fundamental nature of legal language, it is important to make that distinction. But it also shows the intrinsic link between the two and the inevitable confusion that can be created when they come together.

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⑩ (1872) 51 N. H., 504, at p. 511
Legal terminology, as Pollock and Maitland have pointed out, has often migrated from general language into the specialised legal register. A lot of it is the result of linguistic short-cuts, adapting the ordinary language to serve the functional needs of practising lawyers.\(^\text{13}\) Ordinary language terms are given specialised meanings by each legal system. This specialised meaning is conceptually related to the core meaning of the word in common speech. ‘Offer and acceptance’ is one such example: these words reflect the core idea that was taken up by contract law doctrine, yet the ambit of the semantic field of those words in law is different and much wider than in the ordinary language. Similarly the collocation ‘in consideration of’ and even more so the term ‘consideration’ have been subject to this kind of semantic shift, as this study is demonstrating. Malinowski\(^\text{14}\) goes so far as to write that a general language term which has not undergone this semantic shift cannot be treated as a law term. It goes without saying that there are many other types of legal terms, such as for example technical terms in a stricter sense, that relate to institutions and concepts, which do not exist outside the legal field. A legal term can be formed in a variety of ways. Apart from terms migrating from general language to specialised legal terminology, a term can also be borrowed from a foreign legal language or new terms or neologisms may be created.

As already mentioned in the previous chapter, lawyers and linguists approach (legal) language from a different view point. Lawyers tend to adopt a deterministic view of legal terms,\(^\text{15}\) while for the linguist the legal terms are in their nature mainly polysemic, their intended meaning being dependent on the context in which they occur.\(^\text{16}\) As legal systems are in a constant state of

evolution and change, are not isolated but influence each other in both time and space, we can observe a high frequency of polysemy in legal terminology.\textsuperscript{17} This polysemy together with the fact that legal discourse dealing with everyday problems or phenomena is often addressed to society at large, can create the illusion of comprehension by the lay person. But even among lawyers, polysemy causes confusion in legal interpretation and translation. In legal translation, the difficulties of transferring legal concepts from one legal culture/language to another can be addressed by combining conceptual analysis and cognitive linguistics. This allows us to determine the set of characteristics brought together in a particular concept, and the relation between a characteristic and the concepts it describes.

So much for a brief discussion of legal concepts and the language to describe them. Before turning to the question of retracing the \textit{making} of a concept and the concurring shift in meanings of the terminology, let us first consider the angle from which language was considered for this research.

Chapter III. Language, functional linguistics and corpus linguistics

1. Language: the theory of functional linguistics

Starting with the angle on language, we first need to outline how this research considered language, how language is used to encode meanings and how it interacts with law and legal thought.¹ According to the Oxford English Dictionary, language has a multitude of meanings. These can relate to the concept of language, to specific linguistic systems, or systems of communication, including non-verbal, signal or gestural communication or expression in music and art, to computing, to manner/style of expression or specific jargon, to a community of people or a nation etc. In this research, we are not concerned with language as a mental faculty nor with the human capacity for language as universal and altogether innate and as a unique development of the human brain². Nor will this research explore the structuralist view of language as a system of symbols and as a closed system in which elements are held in balance and are assembled according to specific (grammatical) rules. In the structuralist approach, meaning is not given in advance but is created with the formation of the sign itself and it is not rooted in some universal logic but is the result of entirely arbitrary decision on the part of each linguistic community. Consequently, if two communities construct different meanings for the same thing, there is no objective basis for deciding which meaning is better or right.³

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The premise on which this research is based, is that of language as an act of communication. It is a pragmatic view which stresses the function, notably the social function, of the use of language when people interact with each other. This approach has been adopted mainly in the context of socio-linguistics and linguistic anthropology. In the context of examining the use of legal language, the approach which emphasises usage, communicative function and social context of language seems the most appropriate to adopt. The theory of language to be discussed here is generally known as systemic functional linguistics, or systemic functional grammar or systemic linguistics and was first adopted by Michael Halliday in the 1980s.4

It offers an account of language as it is used in actual social situations and is, in this sense, always concerned with the meaning, communicative functionality and rhetorical purposes of language. At the heart of systemic linguistics is the understanding of the communicative properties of written and spoken texts of all types (why a text means what it does and why it is valued as it is), as well as the understanding of the relation between language, on the one hand, and culture, community, social grouping and ideology, on the other.5

For functional linguists, language appears to have developed and is used for three purposes, which Halliday has called metafunctions:

(i) **Ideational metafunction**, encodes meanings of experience which realise field of discourse (‘experiential meanings’). It refers to the use of language to represent experience and construct a view of reality with the various categories language offers to talk about real-world happenings. There are three main constituents: processes (typically expressed as verbs identifying entities and states of affairs), participants (typically expressed as nouns

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identifying entities), and circumstances (typically expressed as adverbs or prepositional phrases acting to provide some context to the first two elements).

An example of the simplest clause constituent structure in the experiential function would be:

The train departs
(participant) (process)
The dog barked
(participant) (process)

This becomes more elaborate when other participants are added:

My uncle missed the train
(participant) (process) (participant)

Or circumstance is added:

The train departs at six o’clock
(participant) (process) (circumstance)
My uncle missed the train by five minutes
(participant) (process) (participant) (circumstance)

(ii) *Interpersonal metafunction*, encodes meanings of attitudes and relationships which realise tenor of discourse (‘interpersonal meanings’). It refers to the use of language to represent interaction between speakers, the way they construct and fill social roles, adopt and/or express attitudes/points of views, form relationships and alliances and so on. A speaker can adopt four basic interpersonal positions (which can be complicated, qualified and extended): declarative (offering information), interrogative (demanding information), imperative (commands in relation to action or response rather than information) and offer (willingness to supply action and response).

There are many elements that indicate interpersonal meanings and it is not possible to go into any detail. For a better understanding, here are few examples:

- mood (order, apologise, invite, reject, describe etc.): Sit down! Please be seated.
- modal auxiliary: will (inclination/futurity), can (ability/possibility), should or have to (obligation); e.g. I will collect her. I could go and collect her after work. You should go to the station now!
- use of pronouns: I, you, we, our, your; e.g. Before we begin, I would like to like to set out the main stages of our trip together.

(iii) **Textual metafunction**, encodes meanings of text development which realise mode of discourse ('textual meanings'). It refers to the use of language to organise the experiential and interpersonal meanings into a coherent, connected and unified entity. The most prominent textual function in this context is what has been termed the ‘theme’ which indicates the angle or the point of departure adopted by the speaker. Themes can be subdivided into simple, multiple, topical, interpersonal or textual themes. The rest of the clause is called ‘rheme’.

The following example illustrates how the organisation of a text informs the textual meaning:

<table>
<thead>
<tr>
<th>THEME</th>
<th>RHEME</th>
</tr>
</thead>
<tbody>
<tr>
<td>My dog</td>
<td>chased the cat all around the garden.</td>
</tr>
<tr>
<td>The cat</td>
<td>was chased all around the garden by my dog.</td>
</tr>
<tr>
<td>All around the garden,</td>
<td>the cat was chased by my dog.</td>
</tr>
</tbody>
</table>

From the simple examples above, we can see how meanings are encoded in what linguists call 'text' which is a piece of language in use that can be of any length and in either written or spoken form. It is “language that is functional”. A text, in this sense, is a coherent collection of meanings appropriate to its context. The way the text’s meanings are combined gives the text its texture and the text’s structure rests on the mandatory structural elements used in the combination of these meanings. Encoding the meaning depends on two surrounding contexts, illustrated in figure 1 below. The context of culture refers to the general outer cultural environment in which a text occurs. It includes elements such as conventions of address, politeness, discourse etc., which shape meanings within a particular culture. It has been described

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“as the sum of all the meanings it is possible to mean in that particular culture”\(^7\).

Within that general context of culture, there is an inner context, which functional linguists have named the ‘context of situation’ and which refers, as the term indicates, to the specific situation in which a text occurs and in which meanings are formed. It includes “the things going on in the world outside the text that make the text what it is”.\(^8\) Linguists have identified three basic parameters of the situational differences within context of situation, namely field, tenor and mode. Field relates to experimental meanings, tenor to interpersonal meanings and mode to textual meanings, as described above in relation to the metafunctions of language (also illustrated in figure 2 below).

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The study of language developed by linguists who consider language as an act of communication, and who show how meanings are encoded by examining the extra-linguistic levels of context of culture and of situation, will stress the function, notably the social function, of the use of language when people interact with each other. The lexical or grammatical analysis considers the elements in the language by describing how it functions. This approach has been adopted in the present research. The lexical and grammatical patterning surrounding key terms, such as ‘consideration’, ‘assumpsit’ or ‘promise’ were examined in relation to their functional purposes, which has revealed the extent of the abstraction and technicality of the legal language.

Moving beyond traditional grammar classification of words and considering the function they play, we can shine a very different light onto the meanings and realities they represent. In our quest to understand the evolution of the use of ‘consideration’ in the context of developing the concept of

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consideration in contract law, we can examine diachronically the experiential function and meanings encoded from the experience that conveys a picture of reality. As illustrated in the figure 3 below, the experiential function of language is to be understood by proceeding from the centre outwards from PROCESS, realised by the verbal group, interacting with the PARTICIPANTS, realised by the mainly nominal groups and placed into context by the CIRCUMSTANCE(S) of human experience, expressed by adverbial groups, prepositions phrases and sometimes nominal groups acting as if they were adverbs.

![Figure 3 : Patterns of experience in the clause](image)

In the case of, for example, the phrase ‘in consideration of’, we are on the outer layer of the experience:

- **something is (done)** = PROCESS
- **in relation to something or someone** = PARTICIPANTS
- **in consideration of** = CIRCUMSTANCES

For example:

“Such a promise might be made in consideration of delivering up a letter.”

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11 Haigh v Brooks (1839) 10 Ad. & E. 309 or 113 Eng. Rep. 119
In contrast, when studying the experiential function of the word consideration in its technical and abstract uses, we find ourselves in the middle layer of the functional constituents represented by the three rings in figure 3 above, namely that of the participants in the process, most commonly realised by nominal groups. For example:

"Such a consideration appears not to be sustainable."\(^ {12}\)

Or adapting the example given above:

The consideration for the promise consists in delivering the letter.

The methodology most appropriate to reveal how language and the evolution of legal concepts interact, is to examine the language in question in its textual context. The use of corpus linguistics methods and linguistics/concordance software is ideal for this sort of empirical approach, as it allows for systematic analysis of authentic evidence. The rest of this chapter will describe corpus-based and concordance methodologies, including how these relate specifically to the research question and historic sources selected for this project. Also discussed will be the way that sampling decisions were taken, revised and adjusted, and the way corpora and sub-corpora were constituted. The specifically technical details will be dealt with in chapter VI.

2. Corpus linguistics

Corpus and concordance work as a method of exegesis on the basis of detailed searches of words and phrases in multiple contexts and among large amount of texts, goes back as far as the Middle Ages, when biblical scholars manually indexed the words of the Holy Scriptures.\(^ {13}\) Subsequently,

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\(^{12}\) Meyer v Haworth (1838) 8 Ad. & E. 467, or 112 Eng. Rep. 916

\(^{13}\) M. Albaric (2004) Hugues de Saint-Cher et les concordances bibliques latines (XIII-XVIII siècles, in: L-J. Bataillon, G. Dahan, P-M Gy (eds.) Hugues de Saint-Cher (+1263), bibliste et théologien: Etudes réunies, 467-479
it has also been practised by literary scholars\textsuperscript{14} and lexicographers.\textsuperscript{15} The first computer-generated concordance tools appeared in the 1950s, when it took twenty-four hours to process 60,000 words and used punched-card technology for storage! Modern corpus work, as we know it today, emerged in the 1980s and 1990s.

Corpus linguistic methodologies have been used in a number of domains\textsuperscript{16} ranging from language teaching\textsuperscript{17} and translation\textsuperscript{18}, to literary criticism\textsuperscript{19} and media language/discourse analysis,\textsuperscript{20} just to name a few. Enquiries using digitally held corpora allow for access to large bodies of texts of naturally occurring language, that can be searched electronically, according to given criteria with a few mouse clicks, providing information on the data that is both quantitative and qualitative, and is empirical rather than intuitive. Our own intuition of the relative frequency of words, phrases and structures can be little more than vague and general. And while we may be conscious about the frequency of lexis, it is highly unlikely that we have any precise intuitions

\textsuperscript{14} e.g.: A. Becket (1787) \textit{Concordance to Shakespeare}, London: G.G.J. and J. Robinson
\textsuperscript{15} e.g.: S. Johnson (1755) \textit{Dictionary of the English Language: in which The Words are deduced from their Originals, and Illustrated in their Different Significations by Examples from the best Writers}; Ancestor of the OED (first published in 1884 as unbound fascicles) \textit{A New English Dictionary on Historical Principles}; Founded Mainly on the Materials Collected by The Philological Society
\textsuperscript{16} For an overview, see e.g. E. Tognini-Bonelli (2001) \textit{Corpus Linguistics at Work}, Amsterdam and Philadelphia: John Benjamins
about the frequency of grammatical categories. Corpus linguistics methodologies can be purely descriptive and ideologically neutral, but can also be used in discourse analysis and coupled with critical approaches.\footnote{K. O’Halloran (2011) Critical discourse analysis, in: J. Simpson (ed.) The Routledge Handbook of Applied Linguistics, London and New York: Routledge, 109-125} This is best done by undertaking a diachronic linguistic and semantic analysis using corpus linguistics methodologies. Besides providing an empirical basis for studying language in use, corpus work also has a heuristic function to the extent that the analysis of the material systematized in a corpus generates new knowledge. By using algorithm-based analytical tools, the researcher may find him/herself confronted with results that were unexpected.

Besides statistical information, linguistic concordance tools allow for search terms to be placed within their textual context (KWIC\footnote{Key Word In Context} lines), which in turn reveals the patterns associated with particular uses of the search term. If we start from the premise of communicative functionality of language, it may be more productive to look at patterns first, rather than at meaning in an isolated fashion. If a word has several meanings or its meaning has shifted throughout time, we will find a tendency for each meaning to be associated most frequently with different patterns, consequently words which share a pattern also tend to share aspects of meaning\footnote{Examples of this are given in S. Hunston, G. Francis (1998) Verbs Observed: A Corpus-driven Pedagogic Grammar, in Applied Linguistics, 19/1, 45-72}. This approach dismantles the traditional distinction between grammar and lexis\footnote{Of the traditional split between ‘grammar’ and ‘lexis’, Sinclair wrote: “In the explicit theoretical statement of linguistics, grammatical and lexical patterns vary independently of each other. In most grammars, it is an assumption that is obviously taken for granted … Equally, it is rare for a dictionary to note the common syntactic patterns of a word in a particular sense.” in: J. Sinclair (1991) Corpus Concordance Collocation, Oxford: OUP, at p. 103}. Sinclair argues that the two do not operate independently, as separate systems, but together, as a single system: lexical items cannot be described without reference to their grammatical patterning, meaning is dependent upon grammar and vice-versa, all grammar patterning is dependent upon lexical choice. Sinclair reverses the common (Chomskyan) assumption that grammatical...
generalisation arises from an underlying rule and believes such generalisations to be derived from the observation and extrapolation of experience:

“The new evidence suggests that grammatical generalizations do not rest on a rigid foundation, but are the accumulation of the patterns of hundreds of individual words and phrases. The language looks rather different when you look at a lot of it at once”.

Work on electronically held corpora and with linguistics software obviously offers the perfect basis for observations of language in use.

The type of corpus constituted for this research is diachronic in nature, which means we are dealing with a collection of texts that vary along the parameter of time. Strictly speaking most linguistic corpora are constructed in this way, but what makes a corpus diachronic is for the corpus compiler to divide it into successive periods according to self-determined criteria. Quantitative analytical methods have been applied to the growing field of corpus-based socio-linguistics investigating, for example, parameters such as gender, dialect and genre in grammatical change. But standards of how to interpret statistically the frequency changes in diachronic data are still debated. The present research is less concerned with purely sociolinguistic premises but

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uses corpus linguistics methods for the purposes of illustration. Yet, it is essential to strike the appropriate balance in the interactive relation between human processing (human analyst), computer processing (software) and corpus data (database), which largely depends on the extent the human analyst delegates the responsibility for analysis to the computer.\(^{29}\) In the corpus work carried out for this research, the linguistic software is a tool for sorting and counting data but the analysis, evaluation and interpretation of the data provided by the software is done by a human researcher providing the necessary linguistic, legal and historical insights. The aim of the present analysis is not to provide a full statistical linguistic analysis, as corpus-based socio-linguists would do, but rather to reveal trends in the use of language and semantic contents to retrace the concordance between the evolution of a new legal concept and that of the language used to describe it.

Apart from socio-linguistics, the diachronic approach to corpus work is relevant to terminological studies, as it provides essential insights for the sort of terminological work, akin to Begriffsgeschichte, adopted in this research. ‘Terms’ are usually defined as words, compound words or phrases used in a definite or precise sense in some particular subject, expressing a notion or concept, or denoting an object of thought.\(^{30}\) It has been argued that a diachronic approach to terminology questions the traditional opposition between words and terms. Instead it may be:

“more appropriate to consider terms as lexical entities which transcends the boundaries of expert language and can also be used by the general public in non-specialised communication.”\(^{31}\)

This has been described as a process of de-terminologization.\(^{32}\) However, the linear terminological evolution studied in this research takes, in fact, the opposite path. Rather than moving from the specific to the general, it shifts


\(^{30}\) Oxford English Dictionary definitions 13 a & b


from general language usages of specific words and phrases to a highly
technical and abstract legal use of the very same words and phrases. 
Corpus-work on a diachronic corpus divided into successive periods, is an 
essential tool to reveal this process, in particular because it allows for the 
relevant words/phrases to be placed in their context and as they appear in 
the texts under consideration. In this way, we can study the terminological 
evolution and various transitional situations of general usages via usage in 
legal contexts to abstract usage of an autonomous legal concept.

2.1. Constituting a corpus - representativeness

A corpus is usually defined as a systematic collection of naturally\textsuperscript{33} occurring 
texts of both written and spoken language that has been computerised. It 
offers the empirical basis for carrying out systematic linguistic investigations 
on authentic evidence. The fact that it is held digitally and searchable 
electronically offers possibilities that are not otherwise available. Yet, the 
corpus linguistics methodologies only make sense if a corpus is designed in 
such a way that it forms a representative basis for making generalisations 
about a language as a whole or as defined by the underlying premises of the 
research. The overall corpus design is conditioned by the methods of text 
sampling and sampling decisions made by the researcher whether conscious 
or (in part) unconscious. Only a well-defined conception of what the sample 
is intended to represent will subsequently allow for choices to be evaluated 
as to the adequacy or representativeness of the corpus. It is less a question 
of sample size and more one of being representative for the range of text 
types in the target population (the latter of which has to be defined in turn) 
and for the range of linguistics distribution in the population.

\textsuperscript{33} Natural language, as opposed to artificial or constructed language devised for international 
communications, computer programming or mathematical purposes, is language that has 
evolved naturally, is hereditary and in extended use (see definition in the OED).
Biber\textsuperscript{34} has developed a very comprehensive set of principles for achieving ‘representativeness’ in corpus design, which will not be repeated here. His main message is that corpus design is cyclical, the bottom-line being:

“that the parameters of a fully representative corpus cannot be determined at the outset” \textsuperscript{35}

He has represented this process schematically as follows:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{biber_cyclical_process.png}
\caption{Biber’s cyclical process to achieve ‘representativeness’ in corpus design}
\end{figure}

This process of continuously revising the design of the corpus following empirical research carried out on the initial pilot corpus in order to adjust the design parameters, has been an important part of the process of constituting a corpus for this research. This was particularly relevant in view of the complexity of working with medieval texts of a specialised but not very uniform register. It has meant that the standard corpus-based strategies of extracting data could not be applied as such but had to be adjusted to the specificities of the medieval Year Books and Tudor/early Stuart Law Reports. It was precisely the cyclical process of revising the corpus design in response to further empirical investigation that allowed for adjusting and refining the constitution of the corpus, including the creation of new sub-corpora. The way that sampling decisions were taken, revised and adjusted, and the way corpora and sub-corpora were constituted in relation to diachronic aspects and on the basis of the search terms, are described in the next section (2.2). The technical details are further discussed in chapter VI.

2.2. Corpus for this research – sampling decisions

The initial sampling decisions for constituting the present corpus were fairly straightforward but evolved cyclically, both in relation to the time span of the selected documents and in relation to the types of cases that were selected for inclusion in the corpus. It was thought that the most representative naturally occurring language in relation to the evolution of the concept of consideration would be found in the reports of cases that lawyers were extracting as early as the 1220s from the plea rolls. While plea rolls remained the most authoritative source of precedents their formulaic Latin language and the use of phrases instead of detailed assertions, the omission of the evidence, the arguments of counsel and the reasons for judgments, meant that debates and arguments were less prominent in those records. But precisely these elements would reveal the dynamic process of the evolving conceptual thinking on a particular legal issue. A mere record of the formalised results of a legal case without including the exchanges between the parties that led to the decision, is a poor reflection of the legal and conceptual thinking involved in the decisions. These could not be captured in set formulae.

The Year Books and early Law Reports did not supplement the rolls for official purposes. There is no evidence of appointments or payments of official reporters, and the Year Books were not preserved with the records and office-books of the courts. Their “purpose must have been to record the intellectual aspect of litigation.”36 In that sense, discrepancies between the earliest reports must not be seen as lacking historical authenticity as precedents, but rather as a way of teasing out specific ideas and suggestions in a case by adapting the facts. For these reasons and for the purposes of this research, these sources allow for plenty of insights into the development of thought on the enforceability of informal agreements.

Yet, their use is not without challenges, as they are neither systematic nor official, nor standardised, but scant, personal and erroneous in matters of factual details at times. This was particularly the case up to the early Tudor period, at which point the reports began to change in character as a result of developments in the legal systems during the renaissance period. From the late 15th century, the reports dealt more with the discussion of substantive law and less with the type of tentative pleading that could be found in the earlier Year Books.

Moreover, the texts from which the corpus was constituted, are reports and notes in varying registers, different structures and styles. The texts were written in Anglo-French, except for three (later) documents which are in Middle English. The facts of the case are sketched briefly and the arguments described succinctly. Some entries appear as scant as a note that may have been scribbled on a spare piece of parchment. Frequently, official records are paraphrased in Latin, but these Latin texts were not taken into account for constituting the corpus. The diversity in register that can be found throughout the texts under consideration, is not only due to the different format of reporting and the long time span during which they were written, but also because the reported cases were heard in differing circumstances. For example, reports of cases that came before the King’s Council and Star Chamber contain a lot of formal language addressed to the King in forms of praise, pleas, requests or prayers etc.

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37 The Year Books have been compared to the (early) Lois de Lille, see D. Heirbaut (2012) The spokesmen in medieval courts: the unknown leading judges of the customary law and makers of the first continental law reports, in: P. Brand, J. Getzler (eds.) Judges and judging in the history of the common law and civil law: from antiquity to modern times, Cambridge: CUP, 192-208
38 Select Cases in the Council of Henry VII (1485-1509) (75 Selden Society); Select Cases Before The King’s Council in The Star Chamber, vol. I, A.D. 1477-1509 (16 Selden Society); Select Cases Before The King’s Council in The Star Chamber, vol. II, A.D. 1509-1544 (25 Selden Society)
39 Select Cases before the King’s Council, 1243-1482 (35 Selden Society); Select Cases in the Council of Henry VII (1485-1509) (75 Selden Society); Select Cases Before The King’s Council in The Star Chamber, vol. I, A.D. 1477-1509 (16 Selden Society); Select Cases Before The King’s Council in The Star Chamber, vol. II, A.D. 1509-1544 (25 Selden Society)
An interesting feature, to be found in particular in the Year Books, is the paraphrasing of direct speech. Changes and shifts in language are generally considered to take place in the spoken form first, before materialising in the written one. But it is only the relatively recent technical means of sound recording that can offer genuine empirical proof for such developments. For the late Middle Ages and early Renaissance period under consideration here, we have to rely on written records that are produced albeit by and for the small elite of literate people in a generally illiterate society. This raises the so-called ‘bad data’ problem that the written record does not reliably reflect the linguistic changes in the spoken language. While paraphrasing direct speech is nowhere near as good evidence as a sound recording may be, it does offer some limited glimpses of the spoken interaction in court hearings. Ingham has used these documents in comparison with the legal register written-mode origin texts in the Parliament Rolls of the same period, to investigate the language change in Anglo-Norman. While such a purely linguistic approach is not the object of this research, the use of paraphrased, admittedly selected, direct speech offers insights into the evolution of the legal mind.

The size of the Year Books and Law Reports sources, in terms of word tokens, was not ascertainable as the HeinOnline database does not offer the possibility of counting the word tokens. The implications of this on the methodology will be discussed in greater detail in chapter VII 1.3.

Standard corpus linguistics requires that decisions be made about the target population that the sample is supposed to represent. This includes considerations of the boundaries and hierarchical organisation of the target population. In order to evaluate the adequacy and representativeness of a

40 M.S. MacMahon (1994) Understanding Language Change, Cambridge: CUP, e.g. at p. 8
43 Word tokens are the total number of words in a text.
corpus, it is essential to decide which texts are included and excluded from the population, what text categories are to be included and what are their definitions.⁴⁴ In the present research, the possibilities of sampling decisions are much conditioned by the relative scarcity of readily available electronically accessible original language documents. A well-defined conception of what the sample is intended to represent could be drawn up but not necessarily applied in detail due to the limitation of available sources. This has meant that texts of different styles, formats and registers, as described above, were all included, as long as it was believed the texts could reveal the legal thinking relevant to the development of the concept of consideration. Whatever their diversities, the texts’ commonalities lie in the fact that they are the results of lawyers listening to arguments discussed in court. The target population is lawyers (in the generic sense) who communicate about legal court cases because it was recognised that opinion of the courts and serjeants⁴⁵ were good indicators for the law and for accepted practice. This dynamic process was best captured in the abstracting and annotating of legal texts and case notes that were a part of the legal self-education in the rapidly evolving common law system. In addition to excluding the rolls and official court documents for the reasons mentioned above, the sources that can be found at the Inns of Court were not considered for lack of available time.

Sampling was ring-fenced by the time span chosen as most appropriate to reveal the intellectual evolution relating to the research question. The concept of consideration materialised in the 16th century and the initial corpus was constituted on the basis of the occurrence of that word in Tudor documents. But to have concentrated solely on that century would have precluded any investigation of the origins of the new action. To understand

⁴⁵ Serjeants at (the) law or serjeants of (the) law are members of a superior order of barristers at the English bar, from which, until 1873, the common law judges were chosen. Formally created under Henry II, the order was abolished by the Judicature Act 1873. The etymology of the term can be found in the Latin serviens ad legem (one who serves [the king] in matters of law).
the intellectual evolution that lead to the rise of the new concept, it was necessary to go back in time and examine its forerunners, namely trespass on the case and the action of assumpsit, both evidence for the emerging idea during the 14th century\textsuperscript{46} that it was necessary to enable certain informal undertakings and promises to become legally enforceable. The resulting diachronic corpus was subject to the cyclical readjustment and refinement described earlier, and divided into sub-corpora of successive periods. This has led to the initial corpus being supplemented by further corpora constituted from available documents from the 14th and 15th centuries. As it was technically (intellectual property limitations) not possible to load all the Year Books and Law Reports into the linguistics software, the sampling decision was made to search the documents for words thought relevant to the question at hand: assumpsit, promise, consideration. This sampling decision has meant that the corpus was constituted of text extracts that, by the virtue of the occurrence of the terms listed, were likely to deal with the legal issue to be studied. In addition, the words ‘consideration’ and ‘promise’ that were likely to occur in other contexts than a specifically technical one, could also be examined in these other contexts. This also allows for any shifts from the general usage to a special language usage to be revealed.

So much for the methods of how sampling decisions were taken, revised and adjusted, and the way corpora and sub-corpora were constituted in relation to diachronic aspects and on the basis of the search terms. The technical details are discussed further in chapter VI.

\textsuperscript{46} The first trespass on the case actions were reported in the second half of the 14th century. Actions of assumpsit emerged in the 15th century.
Chapter IV. Legal language in England from the 14th to the 17th centuries

As discussed in the previous chapter, law cannot be imagined without the use of language and, in particular, without the use of written language for the common law. The way meanings are encoded in spoken or written form depends on the context of culture, on the one hand, and on the context of situation, on the other. Medieval text production is never truly monolingual and the linguistic landscape of multilingual England was particularly diverse. As in other parts of Europe, besides the vernacular, Latin was the language of the learned, the church, the administration and the law. Specific to England was that the invading Normans imported their Norman-French language. This paved the way for future language contact opportunities, as well as for the import of French culture (literature etc.) and certain legal concepts, such as feudal law.

Boundaries between the three languages were porous and language contact phenomena such as, code-switching and calque \(^1\) meant there were continuous interplay and lexical borrowings, in particular, between continental (Parisian-basin) French, Norman-French, insular French and Middle English on English soil. Rothwell provides us with examples which clearly show that, at times, the French of England went its own semantic way irrespective of developments in continental French dialects. \(^2\) So, Anglo-

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\(^1\) Code-switching and calque are common phenomena among multi-linguals. Code-switching in linguistic terms is the practice of alternating in conversation between two or more languages or language varieties, using them in a way consistent with the phonology and syntax of each language. Calque, also called loan translation, occurs when a phrase or word is borrowed from another language by literal translation and introduced in the target language as a new lexeme. It is the a very common type of word-formation in a multi-lingual environment. See G. Miller (2002) The Death of French in Medieval England, in: C. Wiltshire, J. Camps (eds.) Romance Phonology and Variation, Amsterdam/Philadelphia: John Benjamins Publishing, 145-160, at p. 149; W. Rothwell (1998) Arrivals and Departures: The Adoption of French Terminology into Middle English, in: 79 English Studies, 144-165

French and the absorption of French words into Middle English were the results of language contacts on *English soil*. In other words, Anglo-French was a contact variety of French in its own right and should be considered as a part of the medieval French dialect continuum.\(^3\) To that extent the French language in England both influenced English and was influenced by it.

It is, however, important to stress that the linguistic situation in England was multilingual rather than diglossic. In his ground-breaking article of 1959, Ferguson\(^4\) defines diglossia as:

"... a relatively stable language situation in which, in addition to the primary dialects of the language (which may include a standard or regional standards), there is a very divergent, highly codified (often grammatically more complex) superposed variety, the vehicle of a large and respected body of written literature, either of an earlier period or in another speech community, which is learned largely by formal education and is used for most written and formal spoken purposes but is not used by any section of the community for ordinary conversation."

This was subsequently extended by Fishman\(^5\) to include the use of unrelated languages beyond mere dialectical variations. The linguistic situation of medieval England was somewhat different to the ones Ferguson\(^6\) had in mind when he formulated his concept, mainly because of the inherently unstable situation of the languages in question. The Middle Ages was an era when texts interchanged their languages both in terms of phraseology as well as lexis, responding to constantly changing socio-cultural and (geo-) political circumstances. Language contact models were therefore extremely complex with:

"deeply interwoven lexical borrowings back and forth from English to French and from French to English that makes the boundaries of our

\(^6\) Greece: the alternation of Katharevusa and Demotic, Switzerland: the alternation of Swiss German and German, Arabic-speaking countries: the coexistence of literary and dialectal Arabic, Haiti: the alternation of Creole and French.
modern dictionaries of 'Middle English' and 'Anglo-Norman' themselves problematic.\(^7\)

The “relatively stable language situation” of Ferguson's diglossia definition does not correspond to the realities of medieval text production, at least not during the period when both Middle English and the French of England were in constant mutation. From the period of early modern or Tudor English, when English had gained the upper hand and ousted French in all but a few sectors, Law French showed characteristics of being a “very divergent, superposed variety” as defined by Ferguson. If the concept of diglossia could be used it may be in relation to that period. Yet, the hierarchical notion of \(H(igher)\) (the prestigious, codified varieties used in education) and \(L(ower)\) varieties is not necessarily applicable. Law French was not highly codified but in a gradual process of degeneration and it never underwent the kind of successive cycles of renaissance that, for example, Latin experienced. Yet the use of French in the law continued because it had developed appropriate vocabulary for expressing legal concepts. This vocabulary was in the process of being totally absorbed into the English language during the Tudor era.

It has traditionally been argued that the everyday use of French was abandoned from the mid-13\(^{th}\) and especially 14\(^{th}\) centuries in favour of English, and that French declined into a corrupt language. It was described as “\textit{mauvais français […] en Angleterre}”\(^8\) and “gradually became a dead language that […] always had to be taught”\(^9\). Price\(^10\) describes it as “a language in advanced state of decline.” He adds that:

“grammatically it was often little more than 'bad French' […] Late Anglo-Norman is characterised by so many and such marked deviations from any other kind of French at the time as to lead one to the view that what we have before is not just another authentic


\(^9\) M. Pope (1934) \textit{From Latin to Modern French}, Manchester: Manchester University Press; at p. 424

speaker French but incorrect French written by people for whom it was foreign language and whose command of it was inadequate."

The key lies in the notion of deviation from any other kind of French: as long as the French of England is being compared to Continental French, it will appear as an imperfectly learned second language on the path to serious degeneration. If the Insular French was indeed in such decline, it appears difficult to explain why this language was still being used for legal education and legal writing.

More recent research - a lot more work is still required in this field - has suggested the French of England as a contact variety of French in its own right. And it is this very language contact that has put the French of England on a different path from the Continental French, in relation to lexis or morphology, for example. Ingham shows how supposedly deviant grammatical features, such as chaotic gender-marking on articles and modifiers, or the lack of a tonic/atonic object personal pronoun distinction, or the extension of the -er ending of the first conjugation to other classes can be explained with a view to the wider historical contexts of language contact influences and a general medieval dialect continuum. In other words, we are not dealing with divergence due to imperfect second language acquisition, but with disparity between first language dialects.

1. **French in Medieval England**

The story of French in medieval England started with the advent of Norman rule over a realm that included England from 1066, consolidated by centuries of Plantagenet rule, vast estate holdings in France and feudal alliances to the

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French crown. In England the door was opened to the French and their language and diverse dialects. But the exact impact of the French language and culture on the English medieval linguistic and cultural landscape is still subject to considerable debate. A lot of the thinking, at least until the middle of the 20th century, about the linguistic situation in medieval England was skewed by the fact that linguists and historians alike relied for decades on writings that appear to have misinterpreted or ignored historical sources, common linguistic experience and actual Anglo-Norman-French material.13 The view that French had first been brought over by the conquering Normans, imposed on the English, then used as a vernacular in a bilingual setting and ultimately adopted as an official language in the second half of the 13th century, was held by a number of writers14 on Anglo-Norman-French. It has since been questioned by academics,15 based on more recent empirical research using modern linguistic methodologies. The impact and influence of French on the linguistic landscape of medieval England is much more subtle than has been argued hitherto.

Long before the Norman conquest, the Anglo-Saxons had used the vernacular to set down their laws in writing, unlike the Germanic tribes in

continental Europe who used Latin.\textsuperscript{16} Old English had been more mature than the Norman-French of William I’s time, which was still developing from its Latin origins. And according to Woodbine, this is the reason why the Norman kings did not use Norman-French in their documents, though (besides mainly Latin) they did use English.\textsuperscript{17} In other words, English was not a \textit{lingua rustica} incapable of literary culture and inadequate for official use. There can be no doubt that the invading Normans brought with them their Norman language and dialects, yet the extent to which it became a widely spoken language imposed in England, let alone a vernacular, is far less clear.

First of all, the English were no strangers to the Norman language. There had been numerous contacts between the two cultures in the past. Aethelred, King of the English from 978 to 1013 and again from 1014 to 1016, married Emma of Normandy (985-1052) with the intention of pacifying Normandy and uniting against the invading Vikings who frequently used Normandy as their base to raid England. Aethelred, Emma and their children took refuge in Normandy during the two years that King Sweyn Forkbeard of Denmark had conquered England. When Cnut of Denmark became King of England in 1016, Aethelred’s son Edward (later Edward the Confessor), who subsequently ruled England between 1042 and 1066, went into exile for two decades, probably mainly in Normandy. Edward brought back a number of Norman customs, such as the sealing of documents, and the seal-keeper and document secretary was described with the Norman-French term of \textit{canceler}.\textsuperscript{18} In 1051, William, later the Conqueror, had visited his childless cousin King Edward in England and the visit was returned. So, the Normans and the English were, at least on the level of their ruling class, no strangers to each other.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} H. Brunner (1907) The Sources of English Law, in: Committee of the Association of American Law Schools \textit{Select Essays in Anglo-American Legal History}, vol. 2. at p. 8
\item \textsuperscript{17} G. Woodbine (1943) \textit{The Language of English Law}, 18 Speculum 385-436, at p. 404 fn. 3
\item \textsuperscript{18} D. Mellinkoff (1963) \textit{The Language of the Law}, Boston: Little, Brown & Co., at p. 60
\end{itemize}
\end{footnotesize}
Secondly, the long held view that the conquerors tried to oust the English language when they landed on the southern shores, is a misinterpretation of the historical evidence. William saw himself as the rightful successor to the English throne, not as a conqueror. He tried (unsuccessfully) to learn English and was acclaimed King in French by the Normans and in English by the local population at his coronation in 1066. He vowed to the French and English of London to uphold the law as it had been under Edward the Confessor. He was, in other words, not set on dismantling the structures of English society, but rather to operate through them if appropriate. This also holds true for the tale that the use of French in the law was attributed directly to the Norman conquest and seen as a hallmark of Norman tyranny. This line of thinking goes back to some anonymous historical writings that have since been revealed as a 14th century forgery. But its narrative continued to live in the writings of prominent authors such as Fortescue (15th century) or Selden (17th century). As there was no-one at Pevensey with a tape recorder in 1066 to greet the disembarking invaders, the nature of the speech they used must remain a matter of conjecture, but it is most unlikely that it could be adequately described in terms of any all-embracing formula such as 'Norman dialect'. In fact, the irretrievable loss of any substantial evidence of the spoken language output at the time of the invasion means we know very little about the overall English linguistic landscape of the 11th century.

20 "Wil'm kyng gret [...] and ealle tha burhwaru binnan Londone Frecisce and Englisce freondlice. and ic kyde ewo that ic wylle that get beon eallra thaera laga weorde the gyt waeran on Eadwerdes daege kynges [...]" Charter of William I to the City of London, in: W. Stubbs (1913) *Select charters and other illustrations of English constitutional history*, Oxford: The Clarendon Press, at pp. 82-83
21 An interesting exception to this is the imposition of political feudalism by the invading Normans and with it the import of Norman-French feudal vocabulary. Though Susan Reynolds has argued that it could not have been the Normans who imported feudalism to England; in her opinion feudalism was a later development (*Fiefs and Vassals: The Medieval Evidence Reinterpreted*, Oxford: OUP, 1994). This is an ongoing debate!
22 The so-called 'Norman yoke'
23 G. Woodbine (1943) *The Language of English Law*, 18 Speculum 395-436, at p. 403
Thirdly, the premise that, following the Norman invasion, French became the vernacular in England in a bilingual set-up is a misinterpretation of the sources. If the term 'vernacular' is used in its Oxford English Dictionary definition of a language - that it is naturally spoken by the people of a particular country, rather than one acquired for commercial, social or educative purposes - there appears to be no evidence that Norman-French became the spoken language of the people in England in general as a result of the Norman invasion.\[25\] Similarly, there can be no question of bilingualism in the Oxford English Dictionary sense of the habitual use of two languages colloquially. The English outnumbered the incoming conquering forces. Yet, Orr speaks of a “state of almost complete bilingualism”\[26\], and Legge states that “most people, down to the very poorest, were bilingual.”\[27\] In view of the lack of evidence of the spoken language output, as mentioned above, these writers can only have relied on written sources. But, considering the widespread illiteracy of 11th century England, one cannot infer complete bilingualism from the existence of some Anglo-Norman-French texts, to which the great majority of the population would not have had access. Suggett, unwittingly contradicts herself by calling the Anglo-Norman

“a true vernacular whose roots had penetrated deeply into all classes of English society who could read and write.”\[28\]

As we have seen from the Oxford English Dictionary definition, vernacular refers to spoken, not written language, and if Suggett refers to the classes who could read and write she actually excludes the bulk of the population. So, neither at the time of the Norman conquest, nor for the century that followed, can there be any question of French as a vernacular tongue outside


the Norman elite, neither in the true sense of the word, nor in quantitative terms.

Nevertheless, it can be said that medieval England was multilingual to the extent that these languages were in use, but the distribution of that use was by no means uniform.\textsuperscript{29} Within a century, as a result of intermarriage, it was no longer possible to distinguish who was of Norman and who of English birth among the freemen.\textsuperscript{30} The language the Normans had brought with them blended into the English linguistic landscape and was evolving fast along its own insular path. From the 12\textsuperscript{th} century, the French of the Parisian basin was becoming a more accepted standard for written texts in a large part of Northern France, yet the different local languages with their diverse dialectical features continued to co-exist. In a parallel movement, the French of England, despite its specific insular features, became a recognised standard intelligible beyond dialectical restrictions, which was a major advantage over English.\textsuperscript{31}

Fourthly, the invading army of 1066 was by no means a homogeneous Norman group. William had contracted many Bretons, contingents from Picardy and further up the French coast, and included those provided to him by the Count of Flanders. In addition, the social aspect of dialectical fragmentation makes it unlikely that a common speech was even shared by the Norman section of the army.

During the 13\textsuperscript{th} century, on both sides of the Channel, French began to develop into a language of culture, education, science, diplomacy and administration (including the law). In other words, French was used as a


vehicle for ideas, a position that hitherto had been occupied only by Latin\(^{32}\) and its advantage over English was that it could be understood more widely, while English was not comprehended beyond England’s shores.\(^{33}\) In other words, it is less a question of French being turned into an official language during the 13\(^{th}\) century and much more that the upward surge of French, as the main non-classical currency for creativity in the cultural and administrative spheres, offered the possibilities to handle and transmit new ideas and concepts. Woodbine argues that the increasingly generalised use of written French in medieval England was not a result of the Norman conquest (Norman-French) but due to the French literary revival (Central-French sources) during the reign of Henry II and his wife Eleanor of Aquitaine,\(^{34}\) and subsequently, although this is disputed,\(^{35}\) to the major influx of French officials following Henry III's marriage to Eleanor of Provence in 1236, a period dubbed 'that other French invasion.'\(^{36}\) The age of French as a language of 'learning and gentility' was well under way.\(^{37}\) Hence, French was becoming more dominant, not through demographic weight but in relation to cultural prestige.

Meanwhile, during the years following the Norman invasion, English\(^{38}\) was neglected as a language of learning and literature, but it continued on its path of being a popular tongue and was in constant contact with the other languages. It was developing in a rather disorderly fashion,\(^{39}\) fragmented by dialects, with no rules on grammatical structure or spelling, an unsettled

\(^{33}\) The great diversity of dialects in England meant that even within its own borders people did not necessarily understand each other.
\(^{34}\) G. Woodbine (1943) The Language of English Law, 18 Speculum 395-436, at p. 404 fn.3
\(^{36}\) G. Woodbine (1943) The Language of English Law, 18 Speculum 395-436, at p. 402
\(^{38}\) This was the period of Middle English, which was in use in England between approx. 1100 and 1500, linking the Anglo-Saxon language with its Germanic influences of Beowulf to the early Modern English of Shakespeare. It developed out of Old English (with major changes in the grammar, pronunciation and writing) and massively incorporated chunks of Norman-French and Latin. Its literary high point was the work of Chaucer.
\(^{39}\) G. Marsh (1869) The Origin and History of the English Language, at p. 380
alphabet, and no language dictionaries (as opposed to glossaries) nor any grammatical manuals to impose uniformity.\textsuperscript{40} The 13th century saw a rise in feelings of English identity, starting with the loss of Normandy, the Barons' War (1258-1265), in part a reaction against foreign (French) influence, and later the hostilities with France that started the Hundred Years' War (1337-1453) during the reign of Edward III. The English Channel began to be conceptualised as a peripheral boundary marking a border, rather than a central conduit that could carry a traveller from one half of the realm to the other, as had been the case following the conquest and during the rule of the early Plantagenet/Angevin kings.

The English language played an essential role in this quest for English identity. Its use became increasingly the common currency of communication, not just among the 'lower classes'. This rise in (linguistic) English identity found its expression in the 1362 Statute of Pleading, written (ironically!) in French and attempting to oust French in favour of English. Although it is concerned with the specific use of language in court pleadings, the text of the statute provides us with interesting information about language usage in general (my emphasis):

"[...] les leyes custumes & estatutz du dit realme [...] sont pledez monstre & juggez en la lange Franceis, quest trop desconue en dit realme; issint q les gentz q pledent ou sont empledez en les Courtz le Roi & les Courtz dautres, nont entendement ne conissance de ce quest dit p' eulx ne contre eulx p lour Sergeantz & auts pledours; et q resonablement les dites leyes & custumes sront le plus tost apris & conuz & mieultz entenduz en la lange usee en dit realme, et p tant chescun du dit realme se p'roit mieultz govner sanz faire offense a la leye [...]"\textsuperscript{41}

\textsuperscript{40} D. Mellinkoff (1963) \textit{The Language of the Law}, Boston: Little, Brown & Co., at p. 84
\textsuperscript{41} Pleading in English Act 1362 (36 Edw. III. Stat. 1. c. 15): "[...] the laws, customs and statutes of the said realm [...] are pleaded, shewed and judged in the \textit{French tongue}, \textit{which is much unknown} in the said realm; so that the people who plead or are impleaded, in the king's court, and in the courts of others, have no understanding nor knowledge of that which is said for them or against them by their serjeants and other pleaders; and that reasonably the said laws and customs are learnt, known and better understood in the \textit{tongue used in the said realm}, and so every man of the said realm can better govern himself without offending the Law [...]" (my own translation). The original text can be found on \url{www.heinonline.org} - Statutes of the Realm – 1 (1235-1377) at p. 375.
Three interesting facts are worth pointing out: first of all, French is described as a language ‘trop desconue’, secondly pleading should be undertaken in the tongue that is generally understood (English), and thirdly this statute talks about the 'people' who come to court and 'every man' who wishes to respect the law and defend his belongings. In other words, although we are dealing with the restricted situation of a court of law, the statute describes the general linguistic landscape of every man, in which English was considered the tongue generally used and French as the one too little known. It is helpful to draw on the distinction Ormrod\(^{42}\) makes between speaking a language, and merely comprehending it (fully or partially) by listening or reading. He argues that the (top) elite, such as the royal family, the members of the central administration, the senior judiciary and some of the high nobility, all knew how to speak French, whether that was its dialect of Languedoc of Northern France and the southern Low Countries, the insular Anglo-Norman French or the technical jargon of Law French. They continued to use French in oral communication until the end of the 14\(^{th}\) century and beyond for certain purposes. However, by the end of the 13\(^{th}\) century, the use of French among the lower ranks of the polity, the gentry and bourgeoisie was largely a mere pragmatic skill for understanding administrative, accounting and court/legal documents. That increasingly limited knowledge of French after the 13\(^{th}\) century contributed during the 13\(^{th}\) and 14\(^{th}\) centuries to the development of Law French in the courts and of Anglo-Norman French as the recognised language of written communication in royal and civic governments. It is, in fact

“the employment of French as a formal and authoritative language of process actually increased in inverse proportion to its use as a language of generalised social exchange.”\(^{43}\)

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A further distinction must be made between language as a spoken or written means. While the 1362 Act was a statutory abolition of Law French as the spoken language in the courts of law, it appears to have had little effect on the written language of court records - law reporting continued in French, which is, however, no proof of what language was actually spoken in court. It is likely that French continued to be used in the Inns of Court and the educational process, as much of the training centred around the elaborate forms of oral debate. The fact that the statute was not scrupulously followed by lawyers, may indicate that the legislator had underestimated the influence of the bar, rather than question the linguistic landscape as it had been painted in the statute.

While French was affirmed as the language of the law, its more general use was declining, restricted to the noble, wealthy and powerful. Yet its standing as the language of learning meant that English speakers enhanced their language with 'high-class' foreign usage or simply because, at times, they found the French vocabulary more effective. Surveys show that the period of the most extensive penetration of French words into English was 1251-1400. Crystal estimates that of the 27,000 words which got absorbed into the English language during that time, 22% (approx. 5940 words) were words of French origin (2,500 French words in the period 1375-1400 alone). Baugh claims that during the Middle English period, about 10,000 French (including Anglo-French and continental French) words entered into the English language, of which some 7,500 are still in use today. These words were absorbed in different ways: a French word may simply

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45 The reforms undertaken during the reign of Edward I (1272-1307) substantially settled the jurisdiction of the common law courts and thus professionalised the practice of the law. This resulted in a significant rise in the power of the bar and the legal profession in general.
replace an Anglo-Saxon one or be juxtaposed to it, expressing a new meaning, or even name something new or unknown. The generally held view is that French words were borrowed in the context of cultural life, of the nobility, of social elites, and of political and religious powers, while the basic vocabulary of the English language relating to semantics of daily life, popular culture and emotions remained Anglo-Saxon.\(^{51}\)

The socio-linguistic take on this would be that language typically evolves when individuals diversify their social relations, and hence become mediators between their own social circle and the new one(s) they operate in. The French of the English upper classes trickled further into English society by the inevitable interaction between the lords and their servants, bailiffs and manorial stewards and the increasingly professionalised administrative classes in institutions relating to justice, administration and representation. Lawyers, royal officers and parliamentary representatives further propagated the absorption of French words into the English language in their interaction with their own circles.\(^{52}\) In addition, but on a different level, literary grandees of the 14th century like Chaucer, Wycliff and Langland continued to enrich Middle English, already permeated by French vocabulary, with cultural importations from a variety of sources in several languages.

Given that medieval text production is not truly monolingual and that boundaries between languages are porous, language contacts meant there was continuous interplay and lexical borrowings between the languages. But


Anglo-French was a contact variety of French in its own right and should be considered as a part of the medieval French dialect continuum.

2. Law French

The linguistic landscape of medieval England was inhabited by three languages - Latin, English and French, though not in equal shares - but in continuous and subtle intermingling, in particular of the French and English languages and cultures. The role each language played, changed and evolved both in time and in terms of geographical and geo-political distribution. It is precisely that intermingling/interlocking of tongues that can be so well observed in the medieval language of the English common law. Blackstone, quoting Lord Bacon, wrote:

“Our laws […] are mixed as our language: and as our language is so much the richer, the laws are the more complete.”

Admittedly, Blackstone also included the entire history of the

“intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans.”

As mentioned earlier, the use of French in the law was previously attributed directly to the Norman conquest and seen as a hallmark of Norman tyranny. However, this contradicts William I's promise to uphold the law as it had been under Edward the Confessor, as well as the general message he wanted to promote, that he was the rightful successor to the crown. It is interesting to note that the political feudalism that was brought over and imposed by the Normans came with the vocabulary that described it. These Norman-French terms of feudal import described the relationships and functioning of feudalism, unknown as such in England before the Norman invasion. However, in general, the Normans did not use French but Latin in their legal documents. It is, therefore, likely that they continued to do so on arrival in

England. It is also important to note that the French language of Westminster and of the King's Court had evolved from the tongue brought over by the conquering Normans two centuries before (see above), into a dialect with strong Picard and Angevin influences and as a part of the medieval dialect continuum.

The textual evidence of the earliest surviving plea rolls of the English royal courts from the 1190s shows the use of Latin, though it is unlikely that it was also spoken in court. Writs and charters were written in Latin, but some were in English and a few in both languages. It is a fact that in the second half of the 13th century, French became the language used for some official documents, legal tracts, treatises and statutes (though writs, plea rolls and other official records remained in Latin) – “something happens to make Englishmen write about law in French and frame statutes in that language.”

Though it may well be that French was introduced in the royal (common law) courts when these were established under Henry II (1154-1189) who was French-speaking though he understood English.

From the textual evidence we can see that from the time of Edward I (1272-1307), French was the language used for the formal initiation and

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55 Two centuries later the Record's Commission's Statutes of the Realm shows the first twelve entries between 1236 and 1267 (incl. Statute of Merton 1236, Statute of Marlborough 1267) to be still all in Latin.
58 G. Woodbine (1943) The Language of English Law, 18 Speculum 395-436, at p. 405, footnote 3 for textual sources used and statistical analysis of languages used.
60 G. Woodbine (1943) The Language of English Law, 18 Speculum 395-436, at p. 402
subsequent argument conducted in the courts.62 This would, however, have been a different tongue from the Norman-French William I brought over from Normandy. Under Henry's great grandson, Edward I, major constitutional, administrative and judicial reforms were put in place. The judiciary was professionalised and began to form an organised legal body. This improved standards of professional conduct, but it also meant that the law was becoming a 'closed profession'.63 This was emphasised by the use of a language not generally comprehensible by the ordinary man and further separated lawyers from laymen.

During that same period, court case reporting, which unlike later law reporting also included personal comments, notes, criticisms and speculations, was first compiled in the Year Books.64 These were written in French, which does not necessarily mean it was also the language spoken in court pleadings.65 Brand66 has cited evidence that would suggest the use of spoken French in pleadings, but the evidence in favour of either scenario is slight. It is most likely that it was a bilingual set-up but we do not know in what proportions. French was probably used for the specifically legal parts, while proverbial phrases may well have been in English. The language of monopoly for statutes had hitherto always been Latin. In the second half of the 13th century, French began to be used, and it dominated by the 14th

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century. Practical pleading compilations also appeared in French, e.g. *Brevia Pleidez* (1260, also known as *Brevia Placitata*), *Fat Asaver*, *La Court de Baron* (c.1265), *Le Ple de la Coroone*, as well as the 15th century law books, such as Littleton's *Tenures* (1481/82) and the *Statham's Abridgment of the Law* (1490s), 16th century Fitzherbert *La Graunde Abridgement* (1541) collection of Year Books cases and attempt to provide a summary of English law, Brooke *Le Graunde Abridgement* (posth. 1578) etc. French also became the language of English legal instruction and for moots in the Inner Temple.

A century after the 1362 Statute of Pleading, Fortescue suggested that the courts took no notice of the provisions, because lawyers could not do without the “terms which pleaders do more properly express in French than in English.” Law reporting continued in French until the 17th century, though this is no proof for what language was actually spoken in court. But in many case reports, we find entire passages in English in the French language report. These usually referred to declarations made (in written or spoken mode) by one of the parties to the case. It is reasonable to conclude that the English passages were verbatim original language transcripts of what had been declared and were reproduced as such in the Law French reports.

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67 Record's Commission's *Statutes of the Realm* show the following entries: first twelve entries between 1236 and 1267 (incl. Statute of Merton 1236, Statute of Marlborough 1267) are all in Latin; 1275: first Statute of Westminster in French; then three in Latin, two in French, two in Latin, three in French etc.; 1285: Statute of Westminster is both in Latin and French; 1290: eleven entries in Latin and nine in French; Statute of Mortmain and all statutes of 1291-95 are in Latin; 1297: confirmation of Great Charter in both Latin and French; until 1307 (end of reign of Edw. I) nine statutes in Latin, seven in French; 1307-27: one in both Latin and French, six in Latin, fifteen in French; during reign of Edw. III of 55 entries 52 were in French. Data from G. Woodbine (1943) *The Language of English Law*, 18 Speculum 395-436, p. 401, ft. 4


71 e.g. a case dated 1560 reported by Benloe (82) in 123 Engl. Report pp. 63-65: “Et auxy il plede ue certain bill del dit seignior W. P. per q il declare que il & le seignior Audely & seignior Russel were pleased and also did nominate and appoint and fully agree that I Lord Bray should marry the said Anne, upon which our pleasure, nomination and assent the said marriage was solemnized per que le dit J. Seignior Bray prist a feme le dit Anne …” See
The intriguing question of why the use of French in the law rose and persisted, has preoccupied generations of writers and been the subject of much speculation. Some\textsuperscript{72} have connected the phenomenon to the contemporary major influx of French courtiers following Henry III's marriage to Eleanor of Provence in 1236. But it is likely that the Barons' War and the not-very-Francophile Edward I put a stop to this development, and yet French persisted. In all probability and given the innate conservatism of lawyers, French was the most convenient and practical language to use in the English courts. Latin, though the language of the learned, was more rigid and archaic and lend itself less well for adaptation to the new situations of an evolving society and legal system. English, on the other hand, was still fairly untried in the 13\textsuperscript{th} century, especially in relation to the demands of the writ systems that required strict adherence to the prescribed form of the writ, any lapse from which would bring about a failure of an action. With Latin as the source language, it was easier to transpose more precisely into the closely related French as the target language than into the very different English. In other words, French was the most operative language at that time and it therefore played a pivotal role in that era when the foundations of the English common law systems were being laid. It was like a dual building site of two edifices that propped each other up: the law and the development of its concepts, on the one hand, and the language and the evolution of its technical, specialised vocabulary, on the other. Brand argued that the existence of a specialist legal vocabulary in insular French can be traced back to before the emergence of the legal profession and, while it does not as such owe its existence to that profession, its future evolutions certainly happened at the hands of the English lawyers.\textsuperscript{73}

\textsuperscript{72} G. Woodbine (1943) The Language of English Law, 18 Speculum 395-436, at p. 402
The “English bar and bench [...] used Anglo-French to create an entirely new legal vocabulary, the basis indeed of a new jurisprudence, by giving special meanings to ordinary words.”

Maitland described it as the “elaboration of rough native material into a highly technical, but at the same time durable, scheme of terms and concepts.”

The continuous and highly specialised use of French within the closed ranks of lawyers resulted not only in the formation of specialised Law French but also in a separation of this professional jargon from French that was massively imported into English. The central residue was the technical part of Law French, while the everyday terminology was gradually taken over by English. What we are left with is a “lingering professional dialect, more often written than spoken.” But it evolved in sophistication and abstractness in parallel with the development of law and legal concepts it was used to describe and was like a kind of shorthand. It became “highly technical because English lawyers had been able to make a vocabulary, to define their concepts, to think sharply as the man of science thinks.”

Once the upswing of the legal profession and the law in general went hand in hand with the blossoming of Law French, the two were intrinsically linked, and survived even during a period when in general terms French gave way to English. Law French was like a hyphen that kept alive the general framework of an earlier vocabulary and syntax until a time when English had become a full and flexible language and had appropriated all the necessary French elements, expressions and vocabulary.

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Law French was not a foreign tongue, but started as the general French of Westminster Hall with all the inconsistencies in its spelling. Yet, as described above, its use was more operative than the less learned English. Later, when Coke translated Littleton’s *Tenure* from Law French into English, he carried over a great many terms without much change, which in itself is an indication of the extent to which technical Law French easily became a part of the English law language, e.g. the French *fee simple* became fee simple, the French *fee tail* became fee tail, the French *heires* became heirs.

Pollock and Maitland have drawn up a (non-exhaustive) list of French words basic to the law vocabulary:

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<th>action</th>
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<th>judges</th>
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More than half of these came into written English with a legal meaning by the middle of the 14th century. Today, we would recognise this list to be no

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80 E. Coke (1703 - 10th ed.) *Commentary upon Littleton*, at f.1a

81 E. Coke (1703 - 10th ed.) *Commentary upon Littleton* at f.18b

82 E. Coke(1703 - 10th ed.) *Commentary upon Littleton* at f.1a

83 F. Pollock, F.W. Maitland (1898) *The History of English Law*, London: CUP, at p. 81
longer exclusive to the field of law, nor would we think of most words as particularly foreign, they have become common currency in contemporary English. Yet, a great many terms have very specifically technical legal meanings. If we take the words 'trespass' and 'covenant', for example, it is understood by the ordinary man as a wrongdoing or transgression in the case of the former and as an agreement in the broad sense of the latter. And yet, it has very precise meanings for the common law lawyer who applies these terms to very specific circumstances. So both lawyer and non-lawyer use the same terms but still speak different languages.

Moreover, a number of Law French terms and phrases have survived in today's common law English that are distinct from both the English words of French origin and modern French:84

\begin{itemize}
\item alien, in the sense of to transfer
\item cestui que trust
\item chose in action
\item de son tort
\item estoppel
\item estoppel in pais
\item esquire
\item fee simple and fee tail, which like attorney general retain the French word order
\item laches
\item metes and bounds
\item oyez
\item pur autre vie
\item quash
\item roll, as in judgment roll
\item save, in the sense of except
\item speciality, in the sense of sealed contract
\item voire dire
\end{itemize}

In its beginnings, the French used in the law was not as such a technical language. But with time and the general decline of French in England, Law French became a highly specialised use of that language within the closed confines of the legal profession and abstract from everyday usages. The

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language contact was such that, on the one hand, the French used in the law took an independent path from the French that became widely absorbed into the English language. On the other hand, lawyers speaking native English and acquiring French, constituted the link that allowed for great quantities of French words with legal connotations to penetrate the English language.\(^{85}\)

3. **Protecting privileges**

During the 16\(^{th}\) century, Law French was still used at the Inns of Court and very occasionally in the law courts. The early law reports\(^{86}\) were also written in French. The legal profession hung onto this idiom that had shaped their law, legal thinking, habits and the construction of their concepts and arguments. Coke\(^{87}\) described Law French as:

> “vocabula artis [...] so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them [...]”

He practiced what he preached in the sense that in his translation of Littleton he simply transferred much of the technical Law French vocabulary straight into English.\(^{88}\) In his *Commentary upon Littleton* (1628), Coke thought Law French to be “most commonly written and read, and very rarely spoken.”\(^{89}\) In other words, he acknowledged the use of Law French as very restricted. But when he published his *Reports* (1600-1615), he did so in French, because he contended that:

> “it was not thought fit nor convenient, to publish either those or any of the statutes enacted in those days in the vulgar tongue.”

He used the language to which he was accustomed and warned at the same time that publishing his reports in English would raise the risk that:

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\(^{86}\) The so-called 'old' reports first appeared during the reign of Henry VIII and ran until 1865.

\(^{87}\) For example: *fee simple* became *fee tail*, *heires* became *heirs*.

\(^{88}\) One of the reason Coke hung onto French may also have been his fear of unwanted interference by King James I, who turned to Roman law with its wider powers for the king, while Coke was a staunch defender of parliamentary sovereignty. Coke also had a keen interest in ensuring that the legal profession did not lose touch with its corporate intellectual memory of English law embodied in the older body of case law and legislation in Law French.

\(^{89}\) E. Coke (1832 - 19\(^{th}\) ed.) *Commentary upon Littleton*, at p. xxxix
“the unlearned by bare reading without right understanding might suck out errors, and trusting to their conceit, might endamage themselves, and sometimes fall into destruction.”\(^{90}\)

In other words, the reading of the law should be restricted to those who understand the tongue in which it is written. This is echoed by Bulstrode\(^{91}\) in the introduction to his reports where he describes the use of French as:

“being most proper [...] and most convenient for the Professors of the law, who indeed are the only competent judges thereof. For the laws of England, do best commend themselves to them that understand them.”

This echoes the charge that has been levelled against the use of Law French. Bentham famously wrote that:

“a large portion of the body of the law was, by the bigotry or artifice of lawyers, locked up in an illegible character, and in a foreign tongue.”\(^{92}\)

It is an idiom known to the noble and wealthy classes and their sons, often educated in the law. Even from the time when English became more common, the wealthy, keen to maintain their privileges, through land law in particular, continued the use of Law French for the reasons mentioned above, but also to “lock up trade secrets in the safe of an unknown tongue.”\(^{93}\)

John Warr\(^{94}\) suggests that:

“the unknownness of the law, being in a strange tongue; whereas, when the law was in a known language, as before the Conquest, a man might be his own advocate. But the hiddenness of the law, together with the fallacies and doubts thereof, render us in a posture unable to extricate ourselves; but we must have recourse to the shrine of the lawyer, whose oracle is in such request, because it pretends to resolve doubts.”

\(^{90}\) 3 Co. Rep. at xl  
\(^{91}\) E. Bulstrode (1658, reprinted 1688 - 2nd ed.) The Reports of Edward Bulstrode of the Inner Temple. In Three Parts, London: Lee, Pakeman and Bedell, Part II: To the Reader  
\(^{92}\) J. Bentham (1823) A Fragment on Government, Or, A Comment on the Commentaries, London: E. Wilson, at p. xxxv  
\(^{94}\) J. Warr (1650/1810) & The Harleian Miscellany, London: Dutton (new ed., this pamphlet was originally from 1649, it contains the debate leading up to the 1650 Act) at pp. 221-223. John Warr was a Leveller and independent reformer of law, arguing for the participatory liberty of the individual as the basis of all legal norms. Levellers and reformers like him initiated the process of establishing individual liberty at the centre stage of the political process. Later this was fully developed by Locke and the modern natural law tradition.
There is little evidence for this being a deliberate process, but it was certainly a collateral benefit for the powerful. As Mellinkoff pointed out, it had been done before by the Celts who apparently perpetuated their customary law in a “learned archaic language.” It is significant that the general movement of making things more accessible to the ordinary man during the Interregnum of 1649-1660, brought a major onslaught on the use of Law French, which, by that time, had become totally incomprehensible to anyone but the initiated.

4. Demise of Law French

The use of Law French made the language of the English common law increasingly technical, abstract and detached from the common tongue. Particularly rich borrowings had been made from other languages, also including remnants of Old English and Middle English, as well as many words with Scandinavian etymologies. But the bulk came from Latin directly or indirectly through French or French sources. An ‘addiction’ to a ‘grand mixture of languages’, including deposits of Celtic and Norse, Latin and French has brought the warehouse of word material to overflowing, producing a number of phenomena, such as word doubling, bilingual synonyms, multiplying words etc. which contributed to the language of the law being wordy, opaque and unclear. Add to this the use of court hand, abbreviations and increased condensation by the printers, and it is not surprising that the reforms of the Commonwealth period included the language of the law, which had not been accessible to the ordinary literate layman for centuries and which the revolutionaries wanted to abolish in favour of a pocket book code in plain English.

97 The term ‘law’ came into Old English in about the year 1000 from the Old Norse, where in turn it had been derived from Old Icelandic words.
During the Interregnum, an Act of Parliament\textsuperscript{100} attempted to abolish the use of any language other than English in all law writings and proceedings. It was a blanket ban and stipulated that:

"[...] Report-Books of the Resolutions of Judges, and other Books of the Law of England, shall be Translated into the English tongue [...] all Reports-Books of the Resolutions of Judges and all other Books of the Law of England, which shall be Printed, shall be in the English tongue onely [...] all Writs, Proces and Returns thereof, and all Pleadings, Rules, Orders, Indictments, Inquisitions, Certificates; and all Patents, Commissions, Records, Judgements, Statutes, Recognizances, Rolls, Entries, and Proceedings of Courts Leet, Courts Baron, and Customary Courts, and all Proceedings whatsoever in any Courts of Justice within this Commonwealth, and which concerns the Law, and Administration of Justice, shall be in the English Tongue onely, and not in Latine or French, or any other Language then English [...]"

This was greeted with little enthusiasm by the legal profession, who felt deprived of their privileged position and had little patience for what they perceived as an unprofessional break with tradition. William Style (1658), who saw himself forced to make his “reports speak English” from his Law French personal notes,\textsuperscript{101} wrote in his introduction that he had obeyed authority, but that:

“the part of the Common Law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others, than to defend themselves.”

Prior to the Rump Parliament statutory reforms reportedly promoted by Bulstrode Whitelocke, only one set of printed common law reports\textsuperscript{102} was written in English, although the equity reports from the Chancery, first printed at that time were written in English from the 1590s. During the decade of the Interregnum, ten reports were published, of which only two were originally composed in English, while the others were written in French but immediately

\textsuperscript{100} An Act for turning the Books of the Law, and all Proces and Proceedings in Courts of Justice, into English; November 1650 Acts and Ordinances of the Interregnum, His Majesty's Stationery Office, London 1911 at pp. 455-456

\textsuperscript{101} W. Style (1658) Narrationes Modernae, London: Lee, Pakemen, Bedel, Adams, Introduction: "...taken by me in Law-french..."

\textsuperscript{102} The Reports of that Learned Sir Henry Hobart (1641), London
translated into English by the publishers, as required by statute. With the restoration, some law reports were once again published in French and the pleading form reverted to Latin. Benloe, Jenkins and Yelverton (all in 1661), Latch (1663), Jones, Rolle and Savile (all in 1675), Palmer (1678), Siderfin (1683-84), Saunders (1686) all published their reports in French. But the clock could not be turned back. The English language had become a more integral part of the common law, e.g. Hardes (1693) reports are in English and after 1704 all reports were in that language.\textsuperscript{103} By that time, Law French had been totally absorbed by English and its use was banned in 1731 by statute,\textsuperscript{104} an instrument that confirmed an established situation rather than introduced a radical change. Its aim was to protect:

"those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attornies, who use a character not legible to any but persons practising the law: To remedy these great mischiefs, and to protect the loves and fortunes of the subjects [...] more effectually than heretofore, from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language, be it enacted [...] all proceeding whatsoever in any courts of justice [...] and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue and language whatsoever, and shall be written in such a common legible hand and character, as the acts of parliament are usually ingrossed in, and the lines and words of the same to be written at least as close as the said acts usually are, and not in any hand commonly called courts hand, and in words at length and not abbreviated [...]"

The use of Law French had come irreversibly to an end. With the 1731 Statute, the use of English was officially established in the law and all other languages banned. Yet two years later, it was necessary to enact further legislation\textsuperscript{105} to allow for expressions such as \textit{nisi prius, habeas corpus} etc. to be used, which had become so entrenched in the legal vocabulary that it appeared impossible to anglicise them. Moreover, the legacy of Law French

\textsuperscript{103} W.S. Holdsworth (1924) \textit{A History of English Law}, vol. VI, London: Methuen, at pp. 552-554
\textsuperscript{104} Proceedings in Courts of Justice Act 1730, 4 Geo II. c. 26
\textsuperscript{105} 6 Geo. II, c. 14; 6 Geo II c. 6
even in today’s common law English is undeniable. But the development of such a highly technical and precise legal language has also meant that a certain rigidity renders it incapable of the slightest change, with the inevitable result that “both the law and the language will tend to lose touch with common life.” 106 Blackstone remarked very pertinently in his Commentaries of the purpose of the reforms to make the law more comprehensible for the common people:

“I know not how well it has answered, but am apt to suspect that the people are now, after many years’ experience, altogether as ignorant in matters of law as before.”

The exclusive use of English for the common law from the 18th century coincided with more general developments in English law during that century, in particular in the fields of tort and contract, which moved the common law further away from its Anglo-Norman roots. English now played a similar role to the one of Law French during the times of Edward I as the linguistic vehicle for the reforms. Starting with Blackstone in the second half of the 18th century, a number of treatise writers sought to systemise the common law or certain aspects of it, using English as their language. Law French, which had once displaced Latin, had now itself been ousted by English: *sic transit gloria mundi.*

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Starting from the premise that the way meanings are encoded in spoken or written form depends on the contexts of culture and of situation, the present chapter has outlined these two parameters, by describing the general cultural and geo-political environment in which these texts occurred, as well as the cultural and linguistic landscape of multilingual England that are specific to medieval legal text production. Chapter VI will describe the terminology and semantic shifts of the language in (mainly) legal reports on the concept of consideration and legal enforceability of informal agreements. The methodology used to evaluate such linguistic evolutions, was a diachronic

linguistic and semantic analysis using corpus linguistics methodologies. This, in turn, informs the research on the concordance between the historical and conceptual development of consideration and the way the relevant terms have been used, changed and shifted throughout this evolution, most notably the increased abstraction of both the concept and the language. However, before going there, the following chapter will first discuss the origin and early development of the concept of legally enforceable informal agreements, its origins in the action of trespass on the case and debt, via the action of assumpsit, to the early 17th century doctrine of consideration.
Chapter IV: Legal Language in England from the 14th to the 17th centuries
Chapter V. The Origins of the Concept of Consideration

Through the centuries, the doctrine of consideration has puzzled judges, lawyers and legal scholars. Those educated in the civil law tradition find themselves confused by the basic premise of the doctrine that is both similar and different to their own thinking as embodied in the doctrine of *causa*. English law has, in particular since the accession of the United Kingdom to the then European Communities, been confronted by the insularity of this doctrine and it has been one of the stumbling blocks in the many attempts to streamline contract law at European Union level.

But legal historians are also puzzled by the diverse and sometimes contradictory historical explanations of the first ideas that consideration should be a prerequisite for the enforceability of an informal agreement and of its promotion to a fully-fledged legal doctrine central to contract law.¹ The diversity of historical theories by so many eminent scholars shows that the concept actually emanated from a diversity of distinct legal sources and it would be a wild oversimplification to believe that the concept evolved along a single linear path. Baker outlines what he calls a ‘vexed subject’ as follows:

“Was ‘consideration’ an unbroken development of a single idea from medieval times; or was there a break with medieval thought, and perhaps a combination of different ideas? Was it a wholly indigenous development; and, if so, was it an incidental consequence of the exigencies of the forms of action or a direct result of juristic speculation about contractual liability? Alternatively, was it something reflected or borrowed from the canon law or the Civil law? And, if so, was the influence brought to bear on the common law directly through Renaissance humanism, or indirectly by way of the canonist chancellors or ecclesiastical judges?”

Studying the case law, we can find evidence that various strands from different directions came together in the idea that informal promises should be enforceable. In other words, when this idea materialised, it originated from different legal issues, which is precisely why it is so complex to untangle the strands and understand the process. The case law added bits and pieces that were diverse because the facts of the various cases tended to be different: malfeasance, nonfeasance, trespass, deceit, detriment, benefit/gain, forbearance etc. Every decision related to specific facts and was then extrapolated onto wider issues but in the absence of any attempts at developing an overall theory of contract formation. Today’s puzzlement about the historical evolution of consideration probably matches the lack of unanimous thinking among lawyers at the time when the concept materialised.

This is also reflected in the language and terminology used throughout the 16th century, in particular. Holdsworth contends that, as boundaries of traditional actions were being pushed and widened, it became

“obvious that some word or expression was needed to differentiate the agreements which could be enforced […], from the agreements which could not.”

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3 W.S. Holdsworth(1925) History of English Law vol. VIII, London: Methuen, at p. 3
But the terminology settled only hesitantly, which may reflect a concordance between the complexity of the concept’s evolution and the terminology used to express it. This will be discussed in the following chapter.

The forerunner of consideration – the writ of assumpsit – arose in a medieval legal world that was governed by procedures that were complex and archaic at times. Between the 13th century and the reforms of the 19th century procedural formalities dominated the common law thinking. In its earlier stages, the common law must have been anterior to the forms, but the formulae through which justice was centralised and administered by the king’s court in the 12th and 13th centuries were ‘frozen’ as part of the due process of law guaranteed by the charters of liberties. This immutable formulary framework gave rise of a formalistic legal culture. There were two kinds of legal complaints in the early jurisdictions: the complaint of a wrong and the demand for a right. The law of obligations as we know it today has its early roots in the latter and in the writs that were in the praecipe form.

“It was by argument based upon this elementary difference between the kinds of possible claim, rather than by unreasoned interplay between ‘forms of action’ seen as primeval entities, that the common law of obligations was hammered out.”

Rights and remedies were significant to the extent that relevant procedures gave them form. But by pushing persistently against the procedural limitations of the writ system, it developed into a tool that met rising commercial needs in terms of contracts and quasi-contracts. It is one of the best “illustration of the flexibility and power of self-development of the Common law” because its evolution was more akin to organic shifts, than to large legislative changes; it worked within the adaptation of old rules and

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4 To commence proceedings in the Common Pleas and King’s Court, a plaintiff had to purchase a royal writ from the king’s Chancery. This was at first exceptional and a royal favour before it became a right gradually extended to all plaintiffs.
8 J.A. Ames (1913) Lectures on Legal History and Miscellaneous Legal Essays, Cambridge: Harvard University Press, at p. 166
principles to new circumstances and needs. The present chapter will describe the story of how the action of assumpsit and the concept of consideration arose and evolved between the late 15\textsuperscript{th} and 17\textsuperscript{th} centuries and again in the 18\textsuperscript{th} century. Much has already been written on this topic and details can be read in the abundant literature produced by many eminent scholars. This chapter outlines the history of the concept with the aim of juxtaposing it to the evolution of its language and terminology. This will allow for the search for possible concordances between the two, which will reflect on the legal thinking and minds behind the court decisions.

1. **Transactional agreements – early notions**

Before 1066, English contract law was rather rudimentary. There were Anglo-Saxon ordinances relating to trade and exchange and local courts exercised some limited jurisdiction based on customs, administered at local fairs, markets and ports. A sale was an executed contract and it is doubtful whether there was any elaborate notion of debt. There existed some rules aimed at preventing dealings in stolen goods\textsuperscript{9} or dealing with vendor's warranty of title\textsuperscript{10} and quality\textsuperscript{11} of goods sold.

The 12\textsuperscript{th} century Justinian revival had a very limited impact on the development of English contract law, mainly because the way that traditional practices applied by the local courts were far removed from the *ius commune* doctrines. Prior to the 16\textsuperscript{th} century, the enforcement of informal contracts was left as a matter of policy to the largely non-writ jurisdiction of the non-royal courts (county courts, hundred courts and seignorial court). The jurisdiction of the King's Court, established in the latter part of the 12\textsuperscript{th} century, was limited to the specific types of cases that were subject of standardised types of original writs, though causes and forms of action went on developing over the 13\textsuperscript{th} and 14\textsuperscript{th} centuries. Foreign influences could not easily get a foothold

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\textsuperscript{9} IV Edgar, 6-11 (962-963)  
\textsuperscript{10} II AEtheired, 8-9 (991)  
\textsuperscript{11} Oaths 7 in F. Liebermann (1903) *Die Gesetze der Anglesachsen: hrsg. im Auftrage der Savigny-Stiftung*, Halle an der Saale: Niemeyer at p.399
in the common law that "had already developed an inflexible system of procedure." 12 Glanvil knew enough about the *ius commune* to correctly describe and define the Roman classification of contract, though apparently he did not feel himself bound by these definitions13. The treatise that bears Bracton’s name "endeavoured to express common law in Romanesque language."14 But it was more concerned with criminal law and property law, than with principles of contract.

The two common law actions from which the medieval law relating to transactions arose were the action of covenant and the action of debt. There were two further contractual remedies in English law: *detinue*15 and *account*16, both of which were based on real contracts. It is important to stress that the word ‘contract’ in the early Year Books refers to a narrower sense than is understood today. Contract was seen in terms of real contracts covering the transactions where a duty arose from the passing of a *quid-pro-quo*, such as a sale or a loan. The formal or speciality contracts were described as grants, obligations or covenants17.

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15 Dating back to the 12th century, *detinue* is one of the oldest forms of action in common law and relied upon for the recovery of personal property or their value in money from a person who refuses to give it up.
16 Dating back to the 13th century, *account* was less concerned with the obligation to pay a sum due (action of debt) and more with the prior obligation to enter into account in order to ascertain if and what was owed. Before 1300, it was a remedy mainly for the breach of obligations owed by fiduciaries, such as a bailiffs who owed to their lord of the manor. By the early 14th century, the scope of the action was much wider, it was extended to commercial relationships.
17 “*Chescun graunt et chescun demaunde par resound du graunt doit ester par especialité. Mès d’autre contracte com de baille, ou de apprest si puist homme demaunder par sute*" (Every grant and every demand by reason of a grant ought to be by specialty. But as regards other contracts, as, for instance, bailment or loan, one can demand by suit), Frisk in *Loveday v Ormesby*, (1310) YB 3 Edw. II, 25, or 20 Selden Society at p. 191.
1.1 Action of covenant

By the time of Bracton, agreements made on the basis of delivering objects as security or personal sureties faded in favour of other instruments. For important agreements, it was held best to formalise them in writing and as early as 1235, maybe also for reasons of widespread illiteracy, a seal was applied to written covenants by the parties as a sign of their acknowledgement of the written document.

In Bracton the action of covenant is described, apparently unknown to Glanvil. For a contract to be enforceable it must either be real, that is money or chattels have passed, or formal which, according to Bracton, requires a deed under seal with the stipulatio. The strict requirement of the seal means that beyond it becoming 'a promise well-proven', it had become a promise 'of a distinct nature of which a distinct form of action was provided'. It transpires from Bracton that there was no room, at that stage, for the notion of a consensual contract.

In the 13th century, and according to a statute of 1285, the variety of writs of covenant was infinite and the action was applicable on the face of it to all consensual agreements. But this seemingly comprehensive action soon played only a minor role in the history of contract: a covenant was an agreement and the deed was evidence of an agreements by the early 14th century. In other words, it was less a question of substantive law but rather one concerned with proof. Sealed contracts were enforceable on the mere

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18 The Anglo-Saxon wed, called gage after the Norman Conquest consisted of a valuable object (though its value could be of symbolic nature).
19 The Anglo-Saxon borgh, called pledge after the Norman Conquest consisted of a person rather than a thing.
basis that they were formal and to contend, as was said from the mid-16th century, that a 'seal imports consideration' has little to do with the doctrine of consideration as we know it today. It is only with the action of assumpsit that the idea grew of informal agreements as actions in their own right.

Agreements to do something could not be enforced in the King's Court without a sealed document. However, this rule did not apply to obligations to pay money or to deliver goods. Sealed documents were not always practicable in commercial undertakings. Therefore, actions of debt and detinue could be brought on the basis of a *quid pro quo*.

### 1.2 Action of debt

The authors of *Glanvil* and *Bracton* wrote about *causa debendi*\(^{25}\) (reason for owing) in the language of the *ius commune*. However, in the Year Books this was set out in terms of *quid pro quo*. The action of debt was applicable to formal contracts under seal specifying a sum (debt on an obligation) and to real contracts where a *res* had passed between the parties (debt on a contract). The latter was a way to protect creditors claiming on the basis of informal contracts, the premise being that the defendant had received something (a *res*) from the plaintiff and, hence, there had been a *quid pro quo*. Barton\(^{26}\) argues that the expression was not exclusively associated with the action of debt. Milsom\(^ {27} \) has traced the development of the action of debt, also in its relation to *quid pro quo*. In an action from 1458, it was argued that debt will lie when there is a *quid pro quo*, and it was held, *per* Moyle and Davers, that something which was of no benefit to the defendant could constitute a *quid pro quo*, or be at least an equivalent.\(^ {28} \)

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\(^{25}\) The *causae debendi* listed in *Glanvil* are five examples of contracts in the *ius commune*: *mutuum*, *commodatum*, sale, lease and deposit (*Glanvil*, x. 3).


\(^{28}\) “...il n’est un mere contract, uncore il est tant en effet: car l’accord fuit q il prendra la file a feme; en ql cas le def. ad Quid p quo...” in Y.B. 37 Mich. Hen VI, 8, 18, or LBEx.
At the early stages when a common law action was used to enforce informal contracts on the basis of debt (specific sums lent or otherwise owed) or detinue (chattels sold or lent), there was nothing resembling a general idea of civil obligation based on promise or agreement or some sort of consensual contract. The action of debt was based on a proprietary notion rather than promissory one. In other words, it evolved around the fiction that the lender was claiming what belonged to him, rather than what the object of the promise was. While the actions of debt and detinue constitute the earliest recognition of the enforceability of oral agreements, these are not as such the origin of modern contract law in relation to informal agreements. The action of debt was riddled with technicalities and procedural complexities that excluded many meritorious claims for enforcing informal agreements. The common law only recognised parol agreements that were based upon a quid pro quo, but it took a rather broad view of this concept.

The common law courts, eager to expand their jurisdiction, began to develop tort actions in trespass based on a very flexible form of writ, ‘actions on the case’, that provided a remedy in the form of damages for the invasion of personal or property interests and could be used in many different situations. It was tried by jury, hence moving away from wager of law. Among the torts that were developed at that time, was an action in which the plaintiff alleged that the defendant had entered into an informal agreement with him and subsequently caused him some damage by a defective performance. That ‘trespass on the case’ became known as assumpsit.

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30 The term ‘tort’ was first used in English in the legal context in the 1580s. The word is derived from Old French and Anglo-French tort (injury), which has its origin in the Medieval Latin tortum. The term was used in Law French well before then in phrases such as tort e force and de son tort demene.
31 A wager of law was a medieval form of trial in which the defendant was required to produce a set number of witnesses who could swear to his or her innocence.
2. Making informal agreements actionable: assumpsit and its forerunner trespass on the case

The medieval King's Courts, though aware of the ideas of contract, were not very pro-active in the development of notions and principles relating specifically to contract law as we know it today. As explained above, the instruments most used were covenant and debt, but their development was hampered by technical rules: the insistence on a sealed document for the former and the application of the doctrine of quid pro quo for the latter. Milsom pointed out that with the rise of assumpsit, the term 'covenant' was disabled from its original function and was gradually replaced by the term 'contract'. However, the latter came with its own medieval meanings, which added to the confusion among historians.

The action of assumpsit became common at the beginning of the 16th century, and arose primarily from the action of trespass on the case, that is of a wrongful act directly causing harm or injury. It consisted in the recovery for the negligent performance of an undertaking. Actions in trespass providing a remedy in damages for the invasion of personal or property interests, developed long before there were actions on the case. There was a time when trespass was a broad enough category to include felony, criminal misdemeanour and disseisin, as well as those remedied by the actions of trespass and trespass on the case. Later, trespass stood for a large category of original writs, though none of these writs actually employed the word 'trespass'. But trespass are essentially actions of tort not contract, and liability only arose in a scenario where the plaintiff was passive and did not

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32 A proper doctrinal system of contract law only materialised from the writings of the nineteenth century doctrinal writers, who borrowed extensively from the 17th and 18th century natural lawyers.
participate in any way. It is the element of an assumpsit, of having made an
undertaking, that would render such cases actionable.

The term assumpsit has its origin in the Latin term *assumere* and, in the
context of the law, was used within the phrase *assumpsit et fideliter promisit*.
The defendant 'assumed and faithfully promised' to the plaintiff to do
something. While the basis in a trespass action had been the occurrence of
damage, in the case of assumpsit it became the breaking of a promise. The
way the action of assumpsit crystallised and developed was a way of seeking
a new form of action within the limits of what had already been established,
such as in the action of covenant and debt, by gradually pushing the
boundaries, but without making any major changes to the law. Ames qualifies
it as:

“hard to find a better illustration of the flexibility and power of self-
development of the Common Law. [...] In its origin an action of tort,
[assumpsit] was soon transformed into an action of contract, becoming
afterwards a remedy where there was neither tort nor contract. Based
at first only upon an express promise, it was afterwards supported
upon an implied promise, and even upon a fictitious promise. Introduced
as a special manifestation of the action on the case, it soon
acquired the dignity of a distinct form of action, which superseded
debt, became concurrent with account, with case upon a bailment, a
warranty, and bills of exchange, and competed with equity in the case
of the essentially equitable quasi-contracts growing out of the principle
of unjust enrichment.”36

The rise of assumpsit does not take a linear path of evolution: the need to
create some action making parol undertakings enforceable came from
different quarters. The account that follows is not to be taken as a linear
description, but an attempt to describe the various strands of cases and legal
thinking that led to the development of the concept of consideration.

36 J.A. Ames (1913) *Lectures on Legal History and Miscellaneous Legal Essays*, Cambridge:
Harvard University Press, at p. 166
2.1 Malfeasance

Among the reports in the early Year Books that cover the first quarter of the 14th century, two cases stand out as situations where money was exchanged for the making of a promise subsequently not honoured. In the Year Book of 14 Edward II (1321), we find an early example of a surgeon’s negligence case: forty shillings were exchanged for the promise to cure a hand wound, but the hand was lost instead.\(^{37}\) It was held that there was a lack of speciality required for a covenant. During the Eyre of Northamptonshire of 1329-30\(^{38}\) a certain William Seymour took fees from two different gentlemen for the term of his life and promised to assist them rightfully or wrongfully.\(^{39}\) It was claimed this was a customary thing to do. The case was held not to be one of conspiracy but of ambidexterity.\(^{40}\) In neither case, can we find the sort of language that will become characteristic for later trespass on the case or assumpsit actions.

As we move into the second half of the 14th century, there are a number of cases where the resulting loss or damage or destruction of chattels were construed as quasi-trespasses – Milsom\(^{41}\) calls them ‘naturally trespassory’ – while, with today’s perspective, the nature of the situation was fundamentally more contractual, but could not be sustained as such back then for want of a covenant without deed. The common law had generally been more advanced in developing the notion and principles of tort rather than those relating to contract and a series of cases had served to “introduce the idea of contract into actions of trespass.”\(^{42}\) In other words, notions of trespass were being used to overcome outmoded and excessively technical pleading procedures.

\(^{37}\) “…ly promist de ly garrir de la play pur xl. S., et il resceut les xl. S. et il nad my garry, eynz par sa defaute il ad perdu sa mayn” (1321) 14 Edward II, or 85 Selden Society at 353

\(^{38}\) (1329-1330) 3 & 4 Edward III, or 97 Selden Society at 237

\(^{39}\) “…prist de lui argent e feez e lui promist de eyder a torte e a droit en mesme le plee”

\(^{40}\) Ambidexterity here refers to jurors taking bribes from both sides for their verdict. Incidentally, this is the earliest sense in English of the word, before it was used in the more general language sense.


in matters of contract. Milsom argues that, for example, in the *Humber Ferry case* the ferryman was not liable in covenant because the complaint was of damage actually caused, rather than of failure to fulfil a ‘contractual’ obligations. These cases were actions of trespass for wrongfully inflicted physical harm on persons, goods and land. Referring to the medieval notion of legal liability in tort, Ames argues that such actions could only be brought when the plaintiff did not participate in any way. In the words of Newton C.J.: “Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action.”

These trespass cases did not fit squarely into the original notion of tort that the injury was caused by the negligent conduct of a stranger without the participation of the plaintiff, because the latter voluntarily allowed for the defendant to come into contact with his person/property. This authorisation meant that the plaintiff took upon himself the risk of injury/damage, unless the defendant undertook (assumpsit) to do something in accordance with his skills and professional status. In the words of Newton, C. J.: “If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me.”

Ames insists that in these early cases of recovering damages for injuries to person or property caused by the active misconduct of the defendant, the action was regarded as actions in tort, not contract, because the notion of negligence was at issue, not that of assumpsit. It is the element of an

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44 see below (Lib. Ass. 22 Edw. Ill Folio 94a-94b, p.41, or LBEx.)
45 *Case against a horse-doctor mentioned by J.A. Ames (1913) Lectures on Legal History and Miscellaneous Legal Essays*, Cambridge: Harvard University Press, at p. 131, ft. 5.
assumpsit, of an express, unilateral undertaking, that rendered such cases against surgeons, carpenters and also bailees actionble.

The first case usually associated with this development is the Humber Ferry Case or Bukton v Tounesende of 1348. Ferryman Tounesende undertook to carry Bukton’s mare over the river. The horse was lost in the process as Tounesende had overloaded his vessel. As the common law stood then, the plaintiff should have brought an action in contract/covenant. However, this required a sealed document and only applied to failure to perform agreements. Bukton would not have succeeded going down that road in his local court. A stroke of luck had it that the King’s Court was sitting in York just at that time. They had developed the action of trespass for wrongfully inflicted physical harm on persons, goods and land. Yet, at that stage these actions still required proof of the use of vi et armis, or force and arms and a breach of the King’s peace. Surprisingly, the King’s Bench found in favour of the plaintiff’s action of trespass to apply to the damage and loss caused by a badly-performed agreement.

This case has sometimes been hailed as landmark in the history of contract law and one of the "earliest cases in which an assumpsit was laid in the declaration". According to Holdsworth, it illustrated that "special variety of trespass or deceit on the case which came to be known as the action of assumpsit". However, Plucknett argues that although the report of the case includes the Law French words ‘empris a carier’ (undertake to carry),

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48 For a detailed discussion of actions on the case against bailees for negligence in the custody of the things intrusted to them, see J.A. Ames (1913) Lectures on Legal History and Miscellaneous Legal Essays, Cambridge: Harvard University Press, at pp. 132-136
49 Lib. Ass. 22 Edw. Ill Folio 94a-94b, pl.41, or LBEx
50 “…avoit empris a carier sa jument pris en son bateau oustr l’eau de Humbr safe & sain…” Lib. Ass. 22 Edw. Ill Folio 94a-94b, pl.41, or LBEx
51 “…per quel surcharge le jument perist, a tort…” Lib. Ass. 22 Edw. Ill Folio 94a-94b, pl.41, or LBEx
52 “…Il semble que vous luy fistes tresp’ quant vous surcharge le bateau, p que sa jument perist…” Lib. Ass. 22 Edw. Ill Folio 94a-94b, pl.41, or LBEx
53 J.B. Ames (1913) Lectures on Legal History and Miscellaneous Legal Essays, Cambridge: Harvard University Press, at p.130
54 W.S. Holdsworth (1923) History of English Law vol. III, p. 430
there was no actual mention of an assumpsit. The action was not in case, which had not yet been developed, but in trespass. Plucknett contended that:

“the proceedings were initiated, not by writ, but by the less formal bill or querela which still lingered in the provinces and which explains the anomaly of trespass successfully applied without any direct and unauthorised act of interference. The case, in short, was not a precedent but a freak.”

Kiralfy argues that since the action was for trespass without relying on *vi et armis*, the emphasis was not on the defendant's act but rather on his default. For Kiralfy, the fact that assumpsit was not mentioned was a main difference with later assumpsit actions but not an essential one in view of the fact that the formula mentioned on the original roll of this case resembles substantially the 'formulae' of subsequent assumpsit actions. Either way, once the action was admitted it “offered a fruitful soil for experiment”. In 1370, just over twenty years later, the decision in *Waldon v Marshall* went the same way. The defendant, who undertook (manucepit) to cure the plaintiff's horse, had done so negligently (ita negligenter) and the animal died. He argued unsuccessfully that the action rested upon an undertaking and thus a covenant requiring a deed. Plucknett contends that all parties involved recognised a fundamentally contractual situation, but opted for “juggling with trespass because they felt unable to sustain an action in covenant without a deed”. The court found against the defendant on the grounds that his negligence had caused the plaintiff damage.

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59 Y.B Mich. 43 Edw. III, 33, 38, or LBEx.
60 “… quod praedictus Johannes manucepit equum praedicti Will' de infirmitate, & postea praedictus John' ita negligent' curam suam fecit, quod equus suus interit…” Y.B Mich. 43 Edw. III, 33, 38, or LBEx.
62 “… pcq vo fists vostre cure ita neg!, issint q le chival morust, p q il est reason de maint cest bre espec …” Y.B Mich. 43 Edw. III, 33, 38, or LBEx.
These cases where plaintiffs seek to recover damages for physical injuries to person or property caused by the active misconduct of the defendant, cannot be regarded as actions of contract but are more akin to claims in tort.

Stating assumpsit played an increasingly essential part in the count, but any notion of consideration, as an element of return or detriment incurred, was of no relevance at that stage. Stating assumpsit was one of the elements that lead to the damage of person or property, but it was not the basis on which an action of contract could be brought. During the 15th century, this view continued to be held. It is eloquently set out by Newton in a trespass action on the case in 1436:

“… if a carpenter makes a covenant to make a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass on my case. So if a smith makes a covenant with me to shoe my horse well and properly, and he shoes him and lames him, I shall have a good action. So if a leech takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have an action on my case. So if a man makes a covenant with me to plough my land in seasonable time, and he ploughs in a time which is not seasonable, I shall have an action on my case. And the cause in all these cases that there is an undertaking and a matter in fact besides that which sounds merely in covenant … the plaintiff has suffered a wrong in all the aforementioned cases.”

It is interesting to note that there is no use of the technical term ‘assumpsit’, the undertaking is still described in the vocabulary of general language.

63 Surgeons undertaking to cure the plaintiff or the plaintiff’s animals: Y.B. 43 Edw. III, 6, 11; 11 Rich. II, Fitz. Abr. Act. on the Case, 37; Y.B. 3 Hen. 36, 33; Y.B. 19 Hen. VI, 49, 5; Y.B. 11 Edw. IV, 6, 10; Powtyney v Walton, 1 Roll. Abr. 10, 5, Slater v Baker, 2 Wills. 359; Sears v Rentice, 8 East, 348; Prior v Rillesford, 17 Yorks. Arch. Soc. Rec. Ser., 78

64 The defendant undertook to do something and did it badly. Consequently, the plaintiff who relied upon the undertaking, suffered damages.

65 Y.B. 14 Hen. VI, 18, 58, or LBEx

66 “… enprend sur luy a me sainer de mes maladies…” Y.B. 14 Hen. VI, 18, 58, or LBEx

67 “… un empris & un matier en fait…” Y.B. 14 Hen. VI, 18, 58, or LBEx
While it is an action of trespass on the case and, hence, a claim in tort, the repeated use of the term covenant, cannot deny a link to contractual thinking.

2.2 Nonfeasance

So much for the malfeasance of an express undertaking that results in damages for the plaintiff. An altogether different scenario was failing to act on an undertaking, which arose from situations of nonfeasance. Cases brought on nonfeasance at the beginning of the 15th century were unsuccessful.68 In *Watton v Brinth*69, one of the carpenter cases of a house, begun but not finished, the issue of negligence was mentioned70 but not discussed, and the case was dismissed for want of a deed in an action of covenant. From the discussion of the 1436 case mentioned above, it appears no distinction was made between misfeasance and nonfeasance, it was all just a question of covenant.71 The basic idea of trespass/quasi-trespass was not helpful to the nonfeasance scenario and this lay at the heart of the difficulty of bringing nonfeasance cases under the misfeasance type of assumpsit action. A new legal principle was needed, and it was found in the notion that breaching an undertaking amounts to a deceit.72

The original writ of deceit goes back to the beginning of the 13th century and, like the bill of deceit at that time, these were essentially penal in nature concerned with abuse of legal procedure.73 In the late 14th century, the action of deceit was used to render express warranties of the quality of goods sold enforceable. From coupling express warranty with deceit, it was only a small

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68 Entries for assumpsit for nonfeasance can be found in the plea rolls in 1370, though no reported cases in the Year Books before 1400. See S.F.C. Milsom (1981) *Historical Foundations of the Common Law*, London: Butterworth, at p. 323, footnote 1 & 2
69 Case of 1400 in Y.B. 2 Hen. IV, 3, 9, or in LBEx
70 “…le chose ust ester commence, & puis p negligence nient fait…” Y.B. 2 Hen. IV, 3, 9, or in LBEx
71 “…car la nul tort est sup q le fesance dun chose, eins le non fesance dun chose, le quell sonne seulement en un covenant…” Y.B. 14 Hen. VI, 18, 58, or in LBEx
step of imagination to use it in cases of a breach of an express assumpsit, which in turn offered a solution to the issue of nonfeasance. In 1428, a plaintiff brings an unsuccessful claim of nonfeasance on the basis of a writ of deceit.\footnote{Un hom port un br sur son Case n natur de br de Deceit.“ Y.B. 7 Hen. VI, 1, 3, or LBEx. The action failed for want of a quid pro quo, hence lacking a bargain.} In the Somerton’s Case\footnote{Original writ: Y.B. 11 Pasch. Hen. VI, 1, 25, or LBEx.; arguments should be read in the following order: Y.B. 11 Hen. VI Trin., 55, 26; ibid., Hil., 18, 10; ibid., Pasch., 24, 1, or LBEx} (1433), the defendant, as legal counsel for the plaintiff, undertook the duties to purchase or lease a manor. But instead he became someone else’s counsel and negotiated the lease for that person.\footnote{...le dit W. assumpsit … il fauremt & en deceit de luy ad disco ve son consel’, & fuit devenu Consel’ ove u R. a luy fait achet l’dit man…” Y.B. 11 Trin. Hen. VI, 55, 26, or LBEx} The legal argument evolved around issues of covenant, but there was a mention that issues of covenant may be transformed into deceits by subsequent events.\footnote{...il duit av’ acc d Covenant, mes s’il discove s consel, & deviant del’ Consail un aut a purchaser cest man a luy, or c’est un deceit de ql j’aurai acc sur mon cas…c’ê un deceit & changer tout cest q fuit devant forse covenant entr les parties, des ql deceit il aura…” Hil. Hen. VI, 18, 10, or LBEx} The facts in this case do not relate strictly speaking to nonfeasance because the defendant, by making the lease with someone else, acted in a way that made it impossible for his undertaking to be honoured. Similar arguments based on similar facts were voiced in the Doige’s Case\footnote{(1442) Y.B. 20 Trin. Hen.VI, 34, 4, or LBEx} , where the case was adjourned. But Brooke in his abridgement of that case makes a distinction between the action of deceit, in which the defendant disables himself, from that of an action on the case for nonfeasance.\footnote{Milsom\footnote{S.F.C. Milsom (1981) Historical Foundations of the Common Law, London: Butterworth, at p. 330} argues that Doige’s Case was not an attempt to obtain a remedy in tort for the failure to perform a promise, it was not a test case aimed at liberalising contract law. The decision was whether the claim of deceit was sufficiently separate from covenant, although the latter would not have succeeded for want of a sealed document. In 1476, an action of ‘deceit on the case’\footnote{En un action de Disceit s son case…” in Y.B. 16 Pasch. Edw. IV, 9, 7, or LBEx} was successfully upheld against the defendant, who had been paid the purchase price for some land and enfeoffed another.

\footnote{“Un hom port un br sur son Case n natur de br de Deceit.“ Y.B. 7 Hen. VI, 1, 3, or LBEx. The action failed for want of a quid pro quo, hence lacking a bargain.}
Nonfeasance of undertakings made for money was finally recognised as actionable in 1504. It is important to note that equity was ahead of the common law courts in providing relief to purchaser who had paid but had not delivered, a particularly aggravated sort of deceit because the plaintiff's loss enriched the defendant.

The next stage in the evolution of consideration came when, during the 16th century, this was extended to cases where the defendant enjoyed no benefit from the deceit that caused loss or damage to the plaintiff. In 1520, an action was successfully brought on a sale made by the plaintiff to a third person on the strength of the defendant's promise that the price should be paid. No benefit to the defendant arose from the declaration nor from its breach, but the deceit meant a loss for the plaintiff. The point was taken up by St German:

“If he to whom the promise is made have a charge by reason of the promise ... he shall have an action ... though he that made the promise had no worldly profit by it.”

This was a definite signpost that points to the recognition of parol agreement and a stepping stone for the next stage in the development: that of the recognition of mutual promises. The basis of assumpsit had gradually moved from the 'end of the story' - deception of the plaintiff - to the 'beginning of the story' - the assumpsit and hence matters were discussed in terms of promises (contract) rather than deceits (tort). Thus opening the door to the concept of mutual promises was the ultimate springboard allowing for the leap from tort (deceit) to contract (promise) to be completed. In Norwood v

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82 “...si jeo covenant p argent de fair un mese p tiel jour, & jeo ne fay, Acc sur le cas gist p le non fes...”; “...Et posifo que jeo covenant denfleoffer un home de un acre pcel' de mon man, & jeo vens tout le man a un autr; icy Action sur le cas gist p cest deceit...” Y.B. 20 Mich. Hen. VII, 8, 18, or LBEx


84 Y.B. 12 Mich. Hen. VIII, 11, 3, or LBEx: “...le testat dit a luy, s'il ne paie a vous, jeo vous paier, s qf promes le pl' deliv les bns a le dit J.N. & le dit J.N. devint nif d paier le pl...”


Reed (1558)\(^87\) it was said that “every contract executory is an assumpsit in itself” and in *Strangburgh v Warner* (1589)\(^88\) it was acknowledged that “a promise against a promise will maintain an action upon the case”.

### 2.3 Indebitatus assumpsit

In the middle of the 16\(^{th}\) century the action of *indebitatus assumpsit* materialised, which was primarily a new form of procedure, rather than the creation of a substantive new right. Two elements, hitherto established, came together in this new action: debt and deceit. Since the 12\(^{th}\) century, the action of debt was not based on any promissory element but on the presence of a *quid pro quo* (e.g. a *res* had passed). *Indebitatus assumpsit* arose from situations where the indebted (*indebitatus*) defendant (expressly) undertook (*assumpsit*) to pay a particular sum of the debt by a certain date. It is possible to argue that in such situations, the plaintiff has a classic action in debt, but also one in assumpsit on the subsequent promise to pay, if he was deceived by the defendant who was not fulfilling his undertaking. For a while, the distinction between the two actions was upheld, and thereby the boundary between debt/contract and trespass/deceit/tort. This was spelt out in a case of 1535: a plaintiff could only have an action in debt if there was *quid pro quo*. Alternatively, an agreement could be actionable under covenant if there was speciality. In the absence of either of these elements, an action on the case was possible by virtue of an assumpsit.\(^89\) Brooke,\(^90\) in his *Graunde Abridgement* mentions the same case by drawing, nevertheless, a sharper distinction between debt and promise:

> “…*home est endetted a moy et il promise de payer devant Michelmas ieo puis aver accion de dett sur le contract ou accion del case sur le...*”

\(^87\) (1558) 1 Plowd. 180, or 75 Eng. Rep. 277  
\(^88\) (1589) 4 Leonard 3, or 74 Eng. Rep. 686  
\(^89\) “...car jeo enten que on n’aura br de Det mes ou un contract est, car le defendant n’ad *quid pro quo*, mes l’action est solem fonde s l’assumpsit, q sonne meremt in covenat: & s’il fuit p especialte, le pl’ aura cc d Covenat, mes etat q il n’ad espec, ceo me see, il n’ad auc remedy si no Action sur son cas... car l’agrément le pl’ apres fait cee un assumption a luy in Ley...come me semble il n’aura acc de Det: car icy n’est asc contract, ni le def.,’ad *quid pro quo*; purq il n’ad auc remedy sino Acc sur son cas...” Y.B. 27 Mich. Hen.VIII, 24, 3, or LBEx  
\(^90\) R. Brooke (1573) *La Graunde Abridgement, Action sur le cas*, pl. 5
It is interesting to note the absence of the word promise in the original reports, almost as though it needed these few more years between the Year Book report and Brooke’s Abridgement for the promissory element to be named in more definite terms.

For these early *indebitatus assumpsit* cases to succeed, it was necessary to show an express promise which was subsequent to the debt – *quod postea assumpsit* – because if the undertaking was made at the time of the contract, debt would lie and not assumpsit. Debt based on a simple contract required a *quid pro quo*, words of agreement were said in creating the debt. An action of assumpsit had to be distinguished from the initial debt and demanded, therefore, a new promise made subsequent to the debt. But as actions of assumpsit became more commonplace throughout the 16th century, it was getting increasingly more complex to distinguish between promises to pay money and promises to do other things.

The next stage in the development of the action of assumpsit may have less to do with fine minds wanting to advance legal thinking, but more with the rivalry and power struggle between the courts. Assumpsit, considered as a form of trespass, could be brought in both the King’s Bench and in the Common Pleas. Actions of debt, however, were restricted to the Common Pleas. In an attempt to gain the upper hand in the fierce competition for jurisdiction between the courts, the King’s Bench began to allow for assumpsit to be used in actions to recover specific sums of money, instead of insisting on an action of debt, which was outside its jurisdiction. Consequently, the King’s Bench was keen to make *indebitatus assumpsit* equivalent to debt: where a debt existed, a subsequent assumpsit was

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91 “…il duist av dit quod postea Assumpsit, car sil Assumpsit al temps del contract donqs det gist sur ceo & nemy Assumpsit mes si apres le contract il assume, tunc action gist sur lassump aitermt nemy…” (1572) in Dalison 84, 35, or 123 Eng. Rep. 293
presumed in law. This brought considerable business to the King’s Bench, as the process was swifter and litigants could use barristers instead of the costly serjeants.

In its rivalry with the Common Pleas, which continued diligently to make the distinction outlined above, the King’s Bench decisions tended to be reversed by the Exchequer Chambers that consisted only of Common Pleas judges. This wrangling came to a head and was settled in the final instalment of the Slade’s Case in 1602, in which Coke appeared for the plaintiff and Bacon for the defendant. Slade had bargained and sold wheat and rye to the defendant who promised to pay a sum of money at a fixed date in the future. He failed to honour this undertaking and pleaded non assumpsit modo et forma. It was held that the case could lie upon simple contract as well as an action of debt. There must have been reluctance amongst the members of the Exchequer Chamber, but it was Coke’s report of the case that came to matter. Indebitus assumpsit became an alternative to debt at the plaintiff’s choice, and the plaintiff could recover damages as well as the original debt, but such a recovery would be a bar to an action of debt. If the debt was one of instalments, assumpsit could be brought on the first default, while debt could only be brought when all payment deadlines had passed. Holding that

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92 Edwards v Burre (1573) Dalison 104, 45, or 123 Eng. Rep. 310
93 The Exchequer was the oldest of the three common-law courts. It has a complex story of divisions into various different institutions. The Court of Exchequer Chamber at the time of Slade’s Case referred to here is the appellate court for common law civil actions which heard references from the King’s Bench, the Court of Exchequer and, from 1830, the Court of Common Pleas.
the mutual executory agreement of both parties imports in itself action upon
the case, as well as action of debt, and that every executory contract
imported in itself an assumpsit, meant that the assumpsit need not be proved
but would be assumed. Having thus made indebatus assumpsit equivalent
to debt meant that the distinctions between debt/contract and deceit/tort
became blurred and the scheme of forms of actions was less clear and
certain. In Edgcomb v Dee\(^6\) the Slade decision was described as an:

> “illegal resolution … grounded upon reasons not fit for a declamation,
much less for a decision of law... And that which is so commonly now
received, that every contract executory implies a promise, is a false
gloss, thereby to turn actions of debt into actions on the case: for
contracts of debts are reciprocal grants.”\(^7\)

Having moved from assumpsit brought upon explicit undertakings, then
allowing indebatus assumpsit to lie upon a subsequent promise, to the
possibility of bringing an action based on the original contract rather than on
the subsequent assumpsit, the next step was to also imply a contract,
because if assumpsit can be implied, it follows that contract can be implied.
By extending the legal presumption of an assumpsit to that of contracts, the
possibility was created for a large variety of implied contracts and eventually
quasi-contracts to be remedied by the action of assumpsit. The decision of
Warbrook v Griffin\(^8\) in favour of allowing ‘an implied promise of every part’
confirmed this shift in legal thinking. It became rapidly clear that the
potentially open-ended scope of the action of assumpsit would need a
controlling element to ring-fence promises that show genuine undertakings
because not every promise made can be deemed enforceable. A detriment
or debt for which the promise was made, would be such an indicative
element that distinguished enforceable promises from a bare promise.

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\(^6\) (1670) Vaughan, 101, or 124 Eng. Rep. 984

\(^7\) The decision was also criticised because the new procedure meant that wager of law was
no longer a part of it. For some (more conservative) it was a sort of constitutional right of the
English, the loss of which compromised a valuable safeguard.

\(^8\) (1610) 2 Brownl. & Golds. 254, or 123 Eng. Rep. 927
We have travelled a long way from the original trespass cases against surgeons and carpenters, where it was necessary to show the making of an undertaking. It is from these original uses of assumpsit to enforce an undertaking made by the defendant that the technical action of special assumpsit eventually emerged, which was more akin to a contractual action but retained elements of the tort action of deceit.

With the notion of (informal) promises, comes the question of their enforceability and, as we have seen so far, a corpus of doctrine had developed during the 16th century, to delimit the actionability of informal promises. It is in this context that we can find (some of) the roots of the idea of consideration such as the circumstances in which a promise was made and as the motivation for making a promise enforceable. The question that now required resolution related to the underlying reason for the promise. This may appear as akin to quid pro quo, but that particular concept was originally rooted in proprietary thinking, in the recovery of a res. Approaching the issue from the angle of why a promise was made, appeals to a promissory concept. It may also appear to relate to the civil law doctrine of causa, yet continental legal thinking tended to theorise entire legal constructs and contractual doctrines, which was rather foreign to the English common law lawyer, whose formulary system was not equipped to consider the field in its entirety. Contracts were not perceived as an overreaching construct but compartmentalised according to specific forms of actions.

2.4 Causa as a romano-canonical import

Lorenzen99 contends that the common law doctrine of consideration evolved and remained outside the influences of the ius commune, and all that was borrowed was the phrase ex nudo pacto non oritur actio, which incidentally

described something very different in English law than it did in the ius commune. In Rann v Hughes\(^{100}\) the court said:

“It is equally true that the law of this country supplied no means nor affords any remedy to compel the performance of an agreement made without sufficient considerations. Such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law.”

In the substantial bulk of assumpsit/consideration case law we find a relatively frequent occurrence of the word ‘cause’ often used interchangeably with ‘consideration’. As late as 1574, consideration was defined as “cause or meritorious occasion”\(^{101}\). But this usage can be attributable mainly to the fact that the word ‘cause’, imported from French, was much used in the language of legal actions and in a specific technical way. The use of the word ‘cause’ was wide-spread in the legal jargon well before the rise of assumpsit. Adopting this word later in the context of consideration need not point to any Roman origin of either word or concept. The ius commune division of contracts/enforceable pacts and nude pacts found no corresponding distinction in the common law. Not all common law agreements based upon good consideration would be recognised as contracts or vested pacts in the ius commune. In addition, a common law agreement without consideration may be enforceable in the ius commune if it was a *mandatum, constitutum* or an agreement to make a gift (*donation*).

The influence the canon law doctrine of *causa*, used by the ecclesiastical Chancellors during the late 15\(^{th}\) century, may have had on the development of the concept of consideration is unclear. In his very comprehensive account of contract in equity, Barbour concluded, though with “considerable hesitancy [...] to make any generalisations” and after having studied the chancery proceedings:


\(^{101}\) Calthorpe’s Case (1574) 3 Dyer 334b, or 73 Eng. Rep. 756
“The chancellor held that one might make a valid promise to do anything which was reasonable and possible, and that the obligation resulting from such a promise ought to be performed because the promisor had deliberately and intentionally assumed the obligation. By this I do not mean that the chancellor enforced any and all promises. But in his analysis of parol contract he did not require as an essential condition to a right of action that the promise should have been deceived or that the promisor should have been benefited. Rather did he enquire whether the enforcement of a particular promise would further some general interest. If the promisor has led the promise to alter his position on the strength of the promise, there lies upon him a moral duty to fulfil that promise. It is desirable, in the interests of the community at large, that such promises should be enforced. […] I believe that such a promise [of money for a marriage] was enforced because of the purpose of which it was given.” 102

Barbour's explanation shows clearly that, at a time when the common law still considered primarily the promisee and whether he sustained damages due to a malfeasance or nonfeasance/deceit, chancery examined the position of the promisor and the circumstances and purposes for which the promise was made. Questions of detriment to the promisee and benefit to promisor were of secondary importance. Barbour continues:

“… I do believe that all these cases [in equity] can be explained from the principles of canon law. Therein seems to me the only adequate and reasonable explanation. It is very probable that the chancellor as a judge in the chancery did not proceed to the same lengths as he would have done in the ecclesiastical court. But when confronted with a new situation in chancery he did apply so far as possible the principles of that system in which as a churchman he was trained. This indirect reception is not demonstrable with mathematical precision; it seems to me, however, that the whole line of decision in equity points unequivocally towards the canon law.” 103

In other words, it appears that the canon law principle of cause was applied in equity and that was a known fact. In 1414, the Commons complained that


the Chancery was undermining the common law with romano-canonical imports. But there is no hard evidence as to any reception into the common law, though some cross-fertilisation cannot be excluded.

A comparison between the concept of consideration and the civil doctrine of *causa* reveals a more narrow interpretation of what constitutes good consideration by the English courts. Most agreements supported by good consideration and actionable in the common law would also be valid according the broader doctrine of *causa*. However, the opposite is not true. Lord Wright contends that the *cause* as a precondition for the validity of a contract, written into the French Civil Code (Articles 1108 and 1131) is even wider “than what used to be described as moral consideration […] it would, it seems, include the motive or impulse of charity or generosity”

The influence the civil law doctrine of *causa* had on Lord Mansfield and some of his colleagues, in particular in relation to the notion of a moral obligation inherent in the making of a promise, and the concept they developed of moral consideration to support a contract, will be discussed in section 4 of this chapter.

It is from the context of the motivations for a promise that the use of the phrase *in consideratione* emerged, namely to describe precisely these underlying reasons for the existence of the promise. Once assumpsit was presumed, it was the matter fixed in the consideration clause that pointed to the defendant’s obligation, independently of whether he had subsequently acknowledged the obligation. Here lies the immediate (though not only) origin of the consideration clause and terminology.

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104 4 Rot. Parl. 84, no. 46
105 Lorenzen discusses such cases, e.g. a written guarantee without valuable consideration nor with any intention to make a donation, but made with a desire to act fairly and generously in the execution of a contract previously entered into, would fail under common law for want of good consideration but would be seen as sufficient *causa* for the guarantee in a civil law tradition; in: E. Lorenzen (1919) *Causa* and consideration in the law of contracts, in 28 *Yale Law Journal*, 621-646, at p.639
3. **Concept of consideration**

3.1 **Terminology**

As we saw earlier, from the moment that an undertaking to carry out a bargain began to be separated from the principle bargain during the 16th century, it became necessary to find some word or phrase that would link the recital of the principal bargain to the subsequent assumpsit clause in order to explain the motivation of the undertaking. Otherwise, and as the Student told the Doctor, the undertaking was held to be without a cause and hence unenforceable because it must be considered as *nudum pactum*. Here lies the origin of the ‘in consideration of’ clause, but at that early stage its semantic content did not go beyond expressing a technical requirement for an action on the case upon a promise - it was still a long way off being a principle in its own right.

Anyone reading the substantial bulk of assumpsit/consideration case law, is struck by the relatively frequent occurrence of the word ‘cause’ often used interchangeably with ‘consideration’. But this was mainly attributable to the fact that the word ‘cause’, imported from French, was much used in the language of legal actions and in a specific technical way. When reading, for example, the Edward I and Edward II Year Books in the original French language, the use of the word ‘cause’ is very prominent. Some were general language usages, and these were generally translated by non-contemporaneous translators with ‘reason’ or ‘motive’. But the bulk of the occurrences were in a technical legal context, often embedded in a description of legal procedure, such as for example:

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108 The medieval Latin *causa*, *caussa* migrated into the living languages as Italian and Spanish and Provinçal *cosa*, Old Northern French *cose*, but also the French *chose*, in the sense of matter or thing, which is the sense of *causa* to be found in the Salic Law, in Gregory of Tours and the Capitularies. From the 13th century, the Latin *causa* could be found in the French of the law courts in the form of *causa* or cause, or *encheson*, meaning cause or by the reason of.
- cause de forfeiture (cause of forfeiture)\textsuperscript{109}
- cause accioun (cause of action)\textsuperscript{110}
- cause del doun (cause of the gift)\textsuperscript{111}
- qil est cause de la garde (he is the cause of the wardship)\textsuperscript{112}
- la cause de ceti bref fut accepte de la Chancerie (the cause of this writ was entertained by the Chancery)\textsuperscript{113}

Or bound up with some legal procedure, such as for example:

- responet a la cause (answer to the cause, which was the leasing of tenements on consideration of marriage)\textsuperscript{114}
- quidez vous par ceste cause aver seisine (do you think for this cause to have seisin)\textsuperscript{115}
- ceo est la cause del abatement de vostre bref (it is the cause of the abatement of your writ)\textsuperscript{116}
- le tenant par cause fit remuer la parole par un recordari (the tenant, for a cause, removed the plea by a Recordari)\textsuperscript{117}

The use of the word ‘cause’ was widespread in the legal jargon well before the rise of assumpsit. Adopting this word later in the context of consideration need not point to any ius commune origin of either word or concept. Nor does it exclude that there may have been a link.

In the late 15\textsuperscript{th} and early 16\textsuperscript{th} century, quid pro quo was frequently mentioned in the same breath as consideration, or at least as the element that makes a parol agreement enforceable. Holmes\textsuperscript{118} famously said that:

“the requirement of consideration in all parol contracts is simply a modified generalization of quid pro quo to raise a debt by parol.”

\textsuperscript{109} (1304) 4 YB Hil. 32 Edw. I, in: Year Books of the Reign of King Edward the First, Selden Society Publications and the History of Early English Law (www.heinonline.org), at p. 37
\textsuperscript{110} (1304) 4 YB Hil. 32 Edw. I, ibid at p. 37
\textsuperscript{111} (1303) 3 YB Mich. 31 Edw. I, ibid at p. 389
\textsuperscript{112} (1305) 5 YB Mich. 33 Edw. I, ibid at p. 39
\textsuperscript{113} (1304) 4 YB Mich. 32 Edw. I, ibid at p. 341
\textsuperscript{114} (1294) 2 YB Mich. 22 Edw. I, ibid at p. 499
\textsuperscript{115} (1307) 5 YB 35 Edw. I, ibid at p. 439
\textsuperscript{116} (1294) 2 YB Mich. 22 Edw. I, ibid at p. 349
\textsuperscript{117} (1306) 5 YB Hil. 34 Edw. I, ibid at p. 153
\textsuperscript{118} O.W. Holmes (1885) Early English Equity, Law Quarterly Review, 162-174
Quid pro quo was traditionally associated with debt, but as Barton and Milsom have shown, the concept of reciprocity expressed by quid pro quo has also appeared in actions other than debt and did not always apply to just proprietary exchanges. It included a situation where something that was of no direct benefit to the defendant could be considered as quid pro quo or at least equivalent to one. While the action of debt was still in use, a sharp distinction between quid pro quo and consideration was not always made. For example, in Bret v J.S. the term quid pro quo was used to distinguish a valuable consideration (a mother’s love for her son) from one that consisted of an element given in return (the son’s continued board).

Since the times of Glanvill, a sale was executed by delivery - detinue for the goods could be brought by the buyer once the money was paid, while the seller could bring debt for the price once the goods had been delivered; it followed that if neither party performed there was no action. Writs were phrased in the simplest of terms to reflect such a notion of reciprocity: ‘whereas, in return for a sum of [pro] money agreed or paid beforehand, A had undertaken to do X for B…’ The action arose either through nonfeasance or misfeasance, viz A failed to carry out his undertaking. The resemblance to the ‘in consideration of’ clause does not escape today’s reader, but during the 15th century, we are still firmly within a proprietary notion of exchange and reciprocity. During the 16th century, the undertaking to carry out a bargain began to be separated from the principle bargain. Baker has called this a ‘verbal divorce’, designed to circumvent the technical problems of overlapping remedies. The pro-clause was re-phrased: ‘whereas, for a sum of money agreed or paid, A had agreed to do X for B [= bargain], and A had agreed to do X within a certain time [= undertaking]’. Here, it is difficult to

121 “… uncore il est tant en effet …” in Y.B. 37 Mich. Hen. VI, 8, 18, or LBEx
123 Glanvil x. 14; Bracton f. 62, Fleta, ii. 58, §8
justify the undertaking in terms of a sum of money paid, the word ‘and’ being the only element that links it to the principle bargain. This has meant that the action either lies on the bargain or covenant, or on the mutual promise. In the case of the former it would fail on procedural and evidential grounds, in case of the latter, it was necessary to show that the promise is actionable independently. Baker\textsuperscript{125} cites \textit{Marler v Wilmer}\textsuperscript{126}, an unreported King’s Bench case of 1539, as an example for this type of dilemma. One of the points discussed was:

“that it does not appear in the declaration for what cause \textit{quam ob causam} he made the aforesaid undertaking, either for money paid beforehand, or receipt of part of the aforesaid goods, and so \textit{ex nudo pacto non oritur actio}’.

This confirms what the Student had told the Doctor: that an undertaking without a \textit{causa} is unenforceable because it is \textit{nudum pactum}.\textsuperscript{127} It became necessary to find some word or phrase that would link the recital of the principal bargain to the subsequent assumpsit clause in order to explain the motivation of the undertaking. Here lies the origin of the ‘in consideration of’ clause, but at that early stage its semantic content did not go beyond expressing a technical requirement for an action on the case upon a promise.

On examining the King’s Bench Rolls, Baker\textsuperscript{128} found that the \textit{in consideratione} clause appeared for the first time in 1539, then again the next year and at least thirty-two times until 1550, but he found little uniformity in their form or function. Sometimes the phrase was combined with the word \textit{pro}, other times a mere alternative or when it was more apt and elegant to use it. The phrase could, however, also express something more akin to reason/motivation, as can be found in the general form \textit{pro diversis aliis}

\textsuperscript{126} KB 27/1111, m. 64, see Baker (2013) at p. 1180, footnote 11
causis et considerationibus ipsum E adtunc et ibidem moventibus. This relates to the concept of causa and it can be argued that the consideration clause combines the quid pro quo and causa notion, which may be an important element why that phrase finally triumphed over its terminological rivals and was widely adopted from the mid-16th century.

On the question of terminology, Holdsworth contends that, at first, words such as 'cause' and 'occasion' were used in a general sense, as it became "obvious that some word or expression was needed to differentiate the agreements which could be enforced […], from the agreements which could not." In chapter 24 of St. German’s Second Dialogue, where the student explains what a nude contract or naked promise is and whether any action may lie thereupon, we find in a text of 2589 word tokens only one occurrence of the term quid pro quo, 3 uses of ‘consideration’, 7 of ‘cause’ and 7 of ‘recompense’. The word ‘promise’ occurs 74 times, but the discussion surrounding the issue is hardly matched by settled vocabulary. As late as 1579, Rastell makes an entry for a bare or naked contract, which does not include the word consideration, but rather 'recompense'. He defines contract in terms of bargain and covenant (contracte est vn bargeine ou couenaunt per enter ii. parties) and equates consideration with quid pro quo or "one thing given for another" (vn chose est done pur auter que est appelle quid pro quo […]en consideration de […] que vous dones a moy ceux font bone

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131 W.S. Holdsworth(1925) History of English Law vol. VIII, London: Methuen, at pp. 3-4
132 "par lescrit qil mest avant il suppose qe il nous fra certein services les queux sont la cause de sa demande..." Y.B. 6, 7 Edw. II, or 36 Selden Society at 83 per Westcot arg.; "dont del hure qe ceste annuite fu grante issint pur les services issint les services sont loccasion..." in: (1312) Y.B. 5 Edw. II, or 33 Selden Society at 2, per Herle arg.
133 see definition of consideration as "cause or meritorious occasion" in Calthorpe’s Case (1574) 3 Dyer 334b, or 73 Eng. Rep. 756. A keyword search of ‘occasion’ in the corpora constituted for this research does not confirm a frequent use of the word in assumpsit cases.
134 W. Rastell (1579) Exposition of Certaine Difficult and Obscure Wordes and Termes of the Lawes of This Realme, Newly Set Fourth & Augmented, Both in French and English, for the Helpe of Such Younge Studentes as Are Desirous to Attaine the Knowledge for the Same. Whereunto Are Also Added the Olde Tenures, 1 v., London: In adibus Richardi Totelli, www.heinonline.org - Selden Society Publications and the History of Early English Law
contractes, pur ceo que il ad vn chose pur auter). There is no separate entry for ‘consideration’. But over fifty years later, a contract is defined as “a covenant or agreement with a lawful consideration or cause” in Cowell’s *Interpreter*135. It is interesting to note that way into the 17th century ‘consideration’ and ‘cause’ are still used as synonyms, but this definition demonstrates a move away from the notion of bargain towards something more akin to a meeting of minds and the use of the word 'lawful' gives us to understand that there is a legal definition of 'consideration', which is given separately as the “material cause of a contract, without the which, no contract bindeth.” In *Sharington v Strotton*136 a familiar friend and acquaintance was considered as:

“no sufficient cause for the payment […] as is requisite in contracts, and also in covenants upon consideration.”

A more general description of ‘consideration’ can be found in *Calthorpe’s Case*137:

“A consideration is a cause or meritorious occasion, requiring a mutual recompense, in fact or in law. Contracts and bargains have a *quid pro quo*.”

From these examples it appears that the terminology used in discussing the concept of consideration was not settled. But there are also cases where the use of the consideration clause was more in line with the later terminology when the concept was well established:

“In an action upon the case, the plaintiff declared, that the defendant, assumed and promised to pay to him …”138

By the end of the 16th century, the use of the consideration clause became more common place, signposting the facts which were relied upon to make the contentious promise enforceable by assumpsit. In *Whorwood v*
Gybbons\textsuperscript{139} it was the opinion of the whole court that (my emphasis):

“insomuch as the proviso was made by him by whom the debt was due, that it is a good consideration, and that it is a common course in actions upon the case against him by whom a debt is due, to declare without any words in consideratione.”

Similarly, in the \textit{Sidenham and Worlington’s Case}\textsuperscript{140} it was said (my emphasis):

“If there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day: for in an action upon the case, upon a promise, the defendant, for, and in consideration of 20l. to him paid, (postea scil.) that is to say, at a day after super se assumspit, and that is good…”

But in many of these cases, including the last one just mentioned, the words ‘cause’ and ‘consideration’ still frequently appear side by side as synonyms.

### 3.2 The concept of consideration

As discussed previously, the concept of consideration emanated from a diversity of legal sources and this may in part be a reason why its terminology settled only hesitantly. The use of terms such as for example ‘cause’ and ‘\textit{quid pro quo}’ would inevitably have intertextual connotations that may have interfered, at times, with the new emerging legal thinking. In \textit{Manwood v Burston}\textsuperscript{141}, Chief Baron of the Exchequer Manwood mentions three “manners of considerations upon which an assuipos may be grounded”. Subsequently, this was often considered as a definition of consideration, but the plural form points to a list, rather than a doctrine. Yet, such a ‘list’ of conditions under which actions of assuipos would lie is an important step for establishing that “compendious word”\textsuperscript{142} which would differentiate the promises that could be enforced from those that could not.

\textsuperscript{139} (1587) Gouldsborough 48, or 75 Eng. Rep. 986 (my emphasis)
\textsuperscript{140} (1585) 2 Leonard, 224, at 225, or 74 Eng. Rep. 497, at 498; (my emphasis)
\textsuperscript{141} (1587) 2 Leonard 203, or 74 Eng. Rep. 479
\textsuperscript{142} W.S. Holdsworth (1925) \textit{History of English Law} vol. VIII, London: Sweet & Maxwell, at p. 7
In his lectures on legal history, Ames\textsuperscript{143} identifies three theories advanced by different legal scholars on the origins of the concept of consideration. Holmes believes consideration to be a ‘modified generalisation’ of \textit{quid pro quo}. Salmond sees consideration as originating from the \textit{ius commune} principle of \textit{causa}, introduced into the common law via equity. Finally, Hare traces a straight line back to the action on the case for deceit, making the plaintiff’s detriment a forerunner of the consideration of all parol contracts. Whatever the merits of these theories, it reveals that it is impossible to link consideration to just one single source, which is also Ames’ conclusion. This takes us back to the introductory paragraphs of this chapter, namely that the rise of assumpsit and the development of the concept of consideration did not take a linear path of evolution, because the need for an action that makes parol undertakings enforceable came from different quarters originating in a diversity of distinct legal issues and situations.

We have seen how the element of loss to the promisee due to a deceit of the promisor, was a part of the original nature of the action of assumpsit. This led to what was then generally known as special assumpsit and can be found in today’s theory on consideration as detriment to the plaintiff. Another source was the action of debt, when some actions of debt began to be absorbed within the more general field of contract, though the development of \textit{indebitatus assumpsit} and consideration became a way of demonstrating the motivation for making a promise. In addition, mutual promises in consensual contracts also developed the notion that a promise could be the consideration for a counter-promise. This constitutes what we would call today a bilateral contract and it enables either side to sue for breach unilaterally without averring performance. The extent of the influence the canon law doctrine of \textit{causa} had on the development of the concept of consideration has not clearly been demonstrated.

\textsuperscript{143} J.A. Ames (1913) \textit{Lectures on Legal History and Miscellaneous Legal Essays}, Cambridge: Harvard University Press, at p. 129, see also footnote 2, 3 and 4.
During the late 16th and 17th centuries, the notion that a promise can only lie if the motivation of the undertaking can be demonstrated was gradually being kneaded into a doctrine, pushing the limitations of established actions and procedures by degrees. But the diversity of the legal ideas from which that concept sprang has led to contradictory rulings, sometimes based on rather similar facts. There appeared no general will to forge any general principles that may underlie the application of the concept and courts took their decisions, each following their own agenda of their particular locality raised by the facts of the specific cases at hand. It is, therefore, difficult to offer a strictly linear and chronological account of how the concept of consideration evolved during that period. We will, therefore, discuss the development of the concept of consideration by following how certain principles originally raised by the application of special assumpsit or indebitatus assumpsit evolved in the subsequent case law. Re-tracing the path consideration took from concept to doctrine goes hand in hand with comprehending the evolution of what constituted consideration. Originally, it arose from the need for an element to ring-fence the enforceability of parol undertakings. The extent and effect of the concept was decided gradually through case law.

Some have made attempts to define what consideration meant. In *Sidenham v Worlington*144 Periam, J. called it:

“…a moving cause or consideration precedent, for which cause or consideration the promise was made.”

In an earlier case,145 the type of consideration that would impose liability was described as:

“…a cause or occasion meritorious, requiring a mutual recompense in fact or law.”

Also relevant to this were notions such as the benefit/detriment analysis and *quid pro quo* was never very far away. These criteria will be discussed in greater detail below.

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144 (1585) 2 Leonard 224, or 74 Eng. Rep. 497
145 *Calthorpe’s Case* (1574) 3 Dyer 334b, or 73 Eng. Rep. 756
Adequate consideration

One issue raised by different sets of facts was the question of what constituted adequate consideration. The English commercial mind has never been much preoccupied with the value of what was given in an exchange. If people are foolish enough to accept inadequate consideration in return for lavish promises, this will not be interfered with by the courts. In the words of Hobbes:

“The value of all things contracted for, is measured by the appetite of the contractors: and therefore the just value, is that which they be contended to give.”\(^{146}\)

This is also reflected in the common law decisions. In *Sturlyn v Albany*\(^ {147}\) the court adjudged for the plaintiff “for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action.”

But the question of adequacy is bound up with whether consideration is seen in the *causa* sense, in which case it touches on motivation that may extend its span to past and continuing events. If consideration is taken in the *quid pro quo* sense, the focus remains on the reciprocal exchange promised or done. Adequacy in a *quid pro quo* scenario can, in theory, only be properly evaluated in relation to some sort of reciprocal exchange and remuneration. But such inadequacy of consideration has never been recognised as a defence in the medieval common law.\(^ {148}\) This would suggest that the essence of the concept of consideration lies indeed in the notion of whether there is good reason for the promise, other than material/value reciprocity, which is treated as legally insignificant. An exception to this would be if the promise and consideration could be valued in precise monetary terms. The action in *Richards v Bartlett*\(^ {149}\) raised precisely that point, but it was decided, not on the absence, but rather on the inadequacy of the consideration. The

\(^{146}\) Th. Hobbes (1651/1996) *Leviathan*, Oxford : OUP ; Part I, chapter 15, paragraph 14, at p. 100 (p. 75 in the original 1651 edition)
\(^{147}\) (1587) Cro. Eliza. 67, or 78 Eng. Rep. 327
\(^{149}\) (1584) 1 Leonard 19, or 74 Eng. Rep. 17
disparity of monetary value was thought relevant because it showed the lack of consideration.

**Consideration in time**

Simpson\(^{150}\) has listed four elements of time as important for evaluating consideration:

- past or executed consideration
- continuous consideration
- present consideration
- future or executory consideration.

Consideration that is executed and past at the time of the promise is not good consideration. This was first implied by the Student in his dialogue with the Doctor when he argued that only contracts involving imminent or future mutual exchanges can be enforced.\(^{151}\) In common law this principle was laid down in *Hunt v Bate*\(^{152}\) when it was held that (my emphasis):

> “there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff to do so much, but he did it off his own head.”

In the second case reported under that name a distinction was made for cases where marriage was the consideration, which was held as:

> “good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant.”

The rule established in *Hunt v Bate* was subsequently followed in many cases.\(^{153}\)

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\(^{152}\) (1568) Dyer 272, or 73 Eng. Rep. 605

The notion of ‘continuous’ consideration was raised in a case also involving marriage. In *Marsh v Rainsford*154:

“the father’s natural affection doth continue, and her advancement is sufficient cause of the promise.”

The continuity of the father’s affection made the fact that there had been no request irrelevant. Thus a continuous consideration was seen as a present consideration. This also allowed for a debt precedent to be held as good consideration for a subsequent promise to pay a debt: “The debt here always continues, and no charge can be made of this, but by payment of it.”155

Accepting future or executory consideration appears an obvious premise and it was frequently raised in relation to marriage agreements. But the assertion of future or executory consideration must be distinguished from cases where a promise was averred as consideration.156 This distinction between present promise to perform an act and future act was made in *Fuller’s Case*.157 If the plaintiff is to rely on a future act rather than a promise to perform an act as consideration, he needs to show performance. Because the defendant could not have sued if the act had not been performed. If, on the other hand, the plaintiff alleges a promise as consideration, an action by the defendant would be allowed without having to show performance. This was set-out nicely in the subsequent case of *Lampleigh v Braithwaite*158:

“For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose [...] But if it be executory, as in consideration, that you shall serve me a year, I will give you ten

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155 reported as Marsh v Kavenford (1587) in Cro. Eliz. 59, or 78 Eng. Rep. 319; as Marsh and Rainsford’s Case (1588) in 2 Leonard 111, or 74 Eng. Rep. 400
156 Hodge v Vavisour (1616) 3 Bulstrode 222, or 81 Eng. Rep. 188
158 (1586) Godbolt 95, or 78 Eng. Rep. 58
159 (1616) Hob 105, or 80 Eng. Rep. 255
pounds; here you cannot bring your action ‘till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration…”

The distinction between promise and future act as consideration was also made indirectly in cases dealing with mutual promises as consideration. It is clearly set out in the passage from *Lampleigh v Braithwaite* quoted above. But the issue was dealt with much earlier in *West v Stowell* when a promise to pay £10 was made against the promise to win an archery match. The decision was not reported, but the argument in favour of holding that mutual promises is good consideration was argued by Mounson J.:

“…the consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration, for all the communication ought to be taken together.”

Manwood J. objected on the grounds that the bettor was not a party to the archery match and such consideration could only hold if both promising parties were also both involved in the match. The principle to recognise mutual promises as good consideration can be found in many subsequent cases.

### 3.3 Types of consideration – some examples

From the early common law premise that a promise was actionable if it was given in return for a payment or some sort of recompense (i.e. the concept of...

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159 (1577) 2 Leonard 154, or 74 Eng. Rep. 437  
bargain as a two-sided agreement)\textsuperscript{161} emerged the idea that promises made for considerations other than money or recompense could also be enforceable. In the \textit{Golding’s Case}, Egerton said that:

“In every action upon the case upon a promise, there are three things considerable, consideration, promise and breach of promise.”\textsuperscript{162}

\textbf{Recompense - benefit/detriment}

Beyond the notion of recompense as consideration emanated the more general principle that a benefit to the promisor constitutes good consideration. Actions involving marriage as consideration (see below) are good examples for this line of thinking. Also relevant in this context are cases where the plaintiff has performed some service of the promisor.\textsuperscript{163} The rule that a benefit to the promisor or a detriment to the promisee can constitute good consideration was set out by Coke in \textit{Stone v Wythipol}\textsuperscript{164}:

“..no consideration can be good, if not, that it touch either the charge of the plaintiff, or the benefit of the defendant, and none of them is in our case, for the plaintiff is not at any charge, for which the defendant can have any benefit, for it is but the forbearance of the debt, which she was not compellable to pay…”

A series of cases brought in the Elizabethan courts have adopted this principle\textsuperscript{165} and these are the best evidence to refute the premise that the concept of consideration emanates from the single source of \textit{quid pro quo}.

While the facts in many cases can be seen in terms of both benefit to the promisor and detriment to the promisee, there are situations when an actual

\textsuperscript{161} “…a bargain and sale is, when a recompense is given by both parties; as if a man bargains his land to another for money, here the land is a recompense to the one for the money, and the money is a recompense to the other for the land, and thus is properly a bargain and sale.” \textit{Sharington v Strotton} (1564) 1 Plowden 298 at 303, or 75 Eng. Rep. 454 at 461

\textsuperscript{162} (1586) 2 Leonard 72, or 74 Eng. Rep. 367


\textsuperscript{164} (1588) 1 Leonard 113, or 78 Eng. Rep. 106, or (1593) Cro. Eliz. 126, or 78 Eng. Rep. 383; see also \textit{Richards v Bartlet} (1584) 1 Leonard 19, or 74 Eng. Rep. 17

benefit is non-existent, such as for example in cases of gratuitous contracts of bailment or loan which lacked an element of remuneration. In St. German the student says:

“…if I promise to another to keep him such certain goods safely to, such a time, and after I refuse to take them, there lies no action against me for it. But if I take them, and after they be lost or impaired through my negligent keeping, there an action lies.”

This may also include situations when work that was requested was performed without the success hoped for and thus without benefit to the promisor, as was the case in *Lampleigh v Braithwaite* where the plaintiff did not obtain the pardon from the King that the defendant had asked him to secure. Here the promisor enjoyed no benefit but the promisee, having relied on the promise for payment, had to bear the detriment of having journeyed at his own expenses to see the King.

**Forbearance**

Linked to the benefit/detriment debate is another scenario, namely that of an act of forbearance and whether it could constitute sufficient consideration to uphold an agreement. Holdsworth identifies three types of cases where an act of forbearance is at issue:

(i) when the promise was made in consideration of a forbearance to prosecute a groundless claim: in *Stone v Wythipol* it was held that forbearance to prosecute an invalid claim was no consideration. While a

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168 (1616) Hob 105, or 80 Eng. Rep. 255


three centuries later confirmed this rule, forbearance to prosecuting a 
*bona fide* claim did amount to good consideration.

(ii) when a promise was made by a creditor to his debtor that, in
consideration that the debtor would pay or promise to pay his debt wholly or
in part, the creditor would release him: in *Pinnel’s Case* a rule which had
already been voiced in previous cases, was confirmed that:

> “…the payment of a lesser sum on the day in satisfaction of a greater,
cannot be any satisfaction for the whole, because it appears to the
judges that by no possibility, a lesser sum can be satisfaction to the
plaintiff for a greater sum…”

This was about the discharge of an agreement and the rule laid down that
the payment of the whole or a part cannot constitute a discharge nor can it
be a consideration for an agreement to discharge a contract. However, in
another line of cases, the court held that obtaining a speedy, though only
partial payment but without a legal action was good consideration for a
promise to release a debt because of the benefit derived from such part-
payment by the promisor. In *Reynolds v Pinhowe.***

> “all the court held that it to be well enough; for it is a benefit unto him
to have it without suit or charge.”

This was confirmed in subsequent cases until the matter was finally settled
in the 19th century: a part payment by a debtor to his creditor cannot be good
consideration for a promise by the creditor to release his debtor.

(iii) when a promise was made by a third party that he would do something
for one of the parties to a subsisting valid contract, if that party would perform
or promise to perform his duty under the contract: this situation arose rarely and is reminiscent of a promise-in-consideration-of-a-promise
scenario where consideration has been recognised as valid. But the courts

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171 *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449
174 e.g. *Bagge v Slade* (1613) 3 Bulstrode 162, or 81 Eng. Rep. 137; *Flight v Crasden* (1625) 
175 *Foakes v Beer* (1884) 9 A.C. 605
176 *Sherwood v Woodward* (1600) Cro. Eliz. 700, or 78 Eng Rep. 935; *Bagge v Slade* (1613)
3 Bulstrode 162, or 81 Eng. Rep. 137
went further in these cases by stressing that the receipt of payment was a benefit to the creditor and this was the main reason for them to hold the consideration as valid.

**Charitable promises**

The rule that promises failing to provide a benefit to the promisor should also be actionable is reiterated by the Student in his dialogue with the Doctor:

“all promises shall be taken in this manner: that is to say, if he to whom the promise is made have a charge by reason of the promise, which he has also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it.” 177

If this applies to ‘all’ promises that should also include charitable promises and those made for the benefit of third parties. This may involve promises to pay school/tuition fees for a youngster or to pay a medical doctor to cure a poor man etc. The common element in these scenarios is the lack of direct benefit for the promisor. This is reminiscent of the many cases involving promises of payment in consideration of a marriage, but as described below, the account of marriage was distinguished from other charitable promises on the grounds that the father enjoyed the pleasure of the advancement of his daughter. Injurious reliance without benefit to the promisor was at issue in *Lord Grey’s Case* 178 which explicitly approved an earlier decision. 179 Simpson 180 recounts the discussions from a number of further cases, some of which were inconclusive but, as he points out, in none of them was there explicit reference to the charitable nature of the promises in question. But he believes it was likely that the demands of Christian charity may have swayed the courts to allow gratuitous promises to be actionable in assumpsit.

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179 Jordan’s or Tatam’s Case (1535) Y.B. 27 Mich. Hen. VIII, 24, 3 or LBEx.
However, it would be erroneous to conclude that the element of detriment was seen as consideration for the promise. Simpson\textsuperscript{181} argues that:

“the natural requirement derived from a theory of injurious reliance is that the detriment must be induced by the promisor, not that it should be the motive for the promise, and the difference, though nice, is not always unimportant.”

**Friendship, love and natural affection**

The area most associated with the *causa/motivation* outlook was that of natural love and affection. The consideration clause has been used prominently in the context of marriage. Anyone systematically reading *assumpsit/consideration* cases will be struck by the relatively high proportion of actions where marriage is at issue. This is also borne out by examining the ‘consideration’ corpus (ECc) that was constituted for this research from volumes 72, 73 and 123 of the English Reports and where we find the word marriage 61 times in a proximity span of twenty words to the left and to the right of ‘consideration’. The same search methodology on the same corpus found consideration 51 times in proximity of ‘covenant’, 25 instances of ‘assumpsit’, 20 instances of ‘promise’ and 13 instances of ‘debt’ but again only twice in the proximity of ‘contract’.

Friendship and affection (outside the family/marriage) was held to be insufficient consideration.\textsuperscript{182} Though temporarily questioned in Lord Grey’s *Case\textsuperscript{183}* by linking friendship to benefit consideration, the principle established in *Hunt v Bate* prevailed. The case law provides a more complex answer to the question of whether love and affection within the family constitutes consideration. In *Sharington v Strotton\textsuperscript{184}* several aspects of love and natural affection as consideration were discussed and Plowden argued that the continuance of male heirs constituted good consideration because:


\textsuperscript{182} *Hunt v Bate* (1568) Dyer 272, or 73 Eng. Rep. 605 : “…promises for this friendship to save him…”


\textsuperscript{184} (1564) 1 Plowden 298, or 75 Eng. Rep. 454
“men are for the greatest part more reasonable than women, and have more discretion to guide and manage things than women have, for to govern and direct is more suitable to the capacity of the male than of the female.”

Also, excluding female heirs in favour of men, ensured a continuance of the name. It must be stressed that the central issue in this case was whether a use would lie. The argument against allowing this consideration was clearly grounded in a *quid pro quo* approach, arguing that brotherly love and long acquaintance constituted no monetary value:

“…the consideration ought to be to him that is seized of the land, for if he has no recompence, there is not cause why the use of his land should pass; And none of the considerations contain a recompence here, for the continuance of the land in his blood and name of B. is no recompence to him, nor cause worthy to raise a use; no more is the brotherly love and favour which he bore to E.B., or to his other brothers, for although these causes induce affection, yet every affection is not sufficient cause to alter the use. For if a man grants to J.S. that in consideration of their long acquaintance, or of their great familiarity, or of their being scholars together in their youth, or upon such like considerations, he will stand seized of his land to his use, this will not change the use, for such considerations are not looked upon in the law as worthy to raise a use, because they don’t import any value or recompense […]”

The counter-argument favoured looking beyond purely monetary value at the wider motivation for an undertaking:

“If I make a contract with another, that if he will take my daughter to wife, I will give him £20, in this case if he takes her to wife, he shall have an action of debt for the £20 […] and yet I have nothing for it, and if it was not out of regard to nature, this should be called a nude contract, *et ex nudo pacto non oritur actio*. But, Sir, my daughter is advanced by the marriage, which is a sufficient consideration to me for the £20. So that a consideration proceeding from nature is a sufficient consideration in our law. And from these reasons and cases it is manifest that things proceeding from nature are respected not only in philosophy, but also in our law, and are of great force and operation in our law, and therefore are esteemed to be good and sufficient considerations. From whence it follows that the consideration of A.B., here expressed for the provision of his heirs males is a sufficient consideration to raise a use in the land […]
[...] the continuance of the land in the name of B. [...] seems to be a good consideration to raise a use [...] here A.B. deserves to be praised and commended for his gratuity by all those of the name of B. And therefore for these reasons there is a sufficient consideration in the limitation of the name to raise a use. [...] the continuance of the land in his brothers and others of his blood, it is also founded upon nature. [...] From whence we see that by the law of nature, and by the law of the realm, and by the law of God (which in intent approves them both) brotherly love and advancement of one’s blood is taken to be of great effect, and seems to be a sufficient consideration to raise a use in land [...]."

In 1588\textsuperscript{185}, the decision went the other way (this was partly also because the consideration was past):

“Love is not a consideration, upon which an action can be grounded; the like of friendship...”

But maybe more important for the debate was that in cases where love/affection was declared as consideration to pass a use, it was held as constituting good consideration. It appears that when passing a use the wider underlying motivation, namely to strengthen family settlements in particular in relation to landed property, was given more prominence. This can also be traced back to actions where marriage was considered good consideration to support a covenant to pass a use\textsuperscript{186} and to the recognition of consideration in equity.\textsuperscript{187}

Cases involving marriage as consideration offer yet another scenario. In the second case reported under \textit{Hunt v Bate},\textsuperscript{188} a definite distinction was made between cases involving friendship as consideration and those where marriage was the consideration. In cases of the latter sort, the promise and

\textsuperscript{185} \textit{Harford and Gardiner’s Case} (1588) 2 Leonard 30, or 74 Eng. Rep. 332
\textsuperscript{186} \textit{Assaby v Lady Manners} (1516) Dyer 335a, or 73 Eng Rep. 520
\textsuperscript{188} \textit{Hunt v Bate} (1568) Dyer 272, or 73 Eng. Rep. 605
consideration were frequently not contemporaneous, but love and natural affection was seen as constituting continuous consideration, even in cases that did not involve a use. In *Sidenham v Worlington* Anderson said that “marriage is always a present consideration.” This was confirmed in *Marsh v Rainsford* where Wrey, J. held that:

“here the natural affection of the father to his daughter, is sufficient matter of consideration.”

In other words, love and natural affection in the context of family and marriage is continuous, precisely because of the family/marriage bond and, as part of a wider principle, it should be upheld as good consideration. In *Browne v Garborough*, Shuttleworth appears to confirm the family restriction by arguing that the woman at the centre of a marriage deal:

“was a mere stranger to the defendant; and there was no reason for him to give her one hundred pounds in marriage.”

In the event, the court found that a family link between the woman and the defendant did exist and the issue was therefore not discussed further.

*Barker v Halifax* was also about past consideration, but assumpsit in consideration of a marriage was held as good “for the affection and consideration always continues.” The element of continuity was also accepted in *Brett v. J.S. and his Wife* where natural affection of a mother for her son was not accepted as a sufficient consideration to ground an action without an express *quid pro quo*, which was the son’s continued board in this case:

“... But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become due...”

Similarly, in *Townsend v Hunt* per Berkley J.:

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189 (1585) 2 Leonard 224, or 74 Eng. Rep. 497
190 (1586) 2 Leonard 111, or 74 Eng. Rep. 400
191 (1587) Cro. Eliz. 64, or 78 Eng. Rep. 324
192 (1599) Cro. Eliz 741, or 78 Eng. Rep. 974
“it had been a consideration continuing, as in consideration of marrying his daughter or cousin, which is a gift in frank-marriage, it had been good…”

From this line of cases, it can be concluded that love and natural affection in the context of family/marriage constitutes an exception to the general principle that past consideration is not enforceable, because the family/marriage link renders the consideration continuous. In other words, while love and natural affection does not, as such, constitute consideration in assumpsit, a promise made in consideration of love and natural affection and in consideration of a past act could be actionable.

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From the discussion so far it is striking to observe that the (mainly) 16th century case law concerned itself with exploring the issue of when a breached promise was actionable rather than laying down what constitutes a binding promise. This can be explained in part by the evolution from the refusal (13th/14th c.) to enforce any agreement wanting a seal or quid pro quo, stretching actions of trespass to include misfeasance and later non-feasance during the late 14th and 15th centuries, to allowing certain undertakings and informal promises to become legally enforceable in the late 15th and 16th centuries. With this last step came the inevitable necessity to ring-fence the possibility of bringing an action for a breached promise. In the words of Plowden reporting Sharington v Strotton:

“And, Sir, by the law of this land there are two ways of making contracts or agreements for lands or chattels. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration.”

In other words, consideration was used to check the floodgates from opening too wide, and to limit assumpsit action to those where the promise was supported by consideration. It was not devised as part of an overall doctrine.

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195 (1564) 1 Plowden 298 at 308, or 75 Eng. Rep. 460 at 470
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of contract law. Indeed, there was no general common law theory of contract law at the time - that would be initiated only in the 18th century by Blackstone and his treatise-writing contemporaries. Today’s contract law doctrine of offer and acceptance as the moment when a promise becomes binding, was unknown then and there was no requirement, as there is in modern contract law, for the plaintiff to show that a contract had been made. Instead, it had to be demonstrated that a promise had been made for good consideration but had not been honoured. In the words of Houghton, J.:

“A contract by parole on good consideration is as strong (binding) as a covenant by deed…”

The rules about what type of consideration could be legally enforced evolved rather haphazardly, as we have seen from the description of the case law above. But as Simpson points out, it would be inappropriate to view these rules as revealing some underlying reality in terms of social conditions or ideas.

4. Consideration as a moral obligation – the concept in the 18th century

Towards the end of the 17th century, the language and terminology used in cases involving consideration had settled and evolved into technical jargon. But the underlying concept, though much more ascertainable by then, had developed in a piecemeal fashion. It was only from the mid-18th century that treatise writers began to voice the need to search for a more general theory of contract, no doubt encouraged by the very comprehensive writings of Pothier on the subject. An 1806 English translation of the Traité des obligations was widely known in both England and America, though some

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196 Winter v Foweracres (1618) 2 Rolle 39, or 81 Eng. Rep. 645
198 Traité des obligations, selon les règles tant du for la conscience, que du for extérieur, was first published in France in 1761-1764; a first American translation was published by F.X. Martin in 1802: A Treatise on Obligations considered in a Moral and Legal View, Newburn, NC: Martin & Ogden; an English translation followed in 1806 by Sir William Evans: A Treatise on the Law of Obligations, Or Contracts (republished in Philadelphia in 1826, 1839 and 1853)
may have already read it in its French original, and it had a major influence on a great many Anglo-American writers on contract.

On a more general level, the late 17th and 18th centuries saw considerable shifts in socio-political thinking shaping Western societies and England was no exception to these influences of the Enlightenment, although as Fifoot interjects:

“England [...] had not yet abandoned the defects or privileges of insularity. Her contact with the Continent was precarious, and it was not surprising that an intellectual movement, European in essence, should be translated into terms at once less magical and less drastic...”

But the basic premise was similar, namely the rejection of extrinsic authority in favour of the voice of reason and natural law. A figure at the centre of these changes and a leader in wanting to move the law away from the land-centred outlook and rigid professional traditions and procedures was William Murray, 1st Earl of Mansfield. Of Scottish descent, he acquired, as a student at Oxford and in Lincoln’s Inn, a broad legal knowledge that went well beyond the confines of the English legal system. He was well-read in French, Dutch and Scottish law and legal writings, and was particularly interested in a comparative approach, which served him well when he set about correcting the insularity of English law. He was a child of the century that followed the Glorious Revolution of 1688, when the political system was no longer grounded in authority but based on reason.

He is generally known for his contributions to the area of commercial and maritime law, aiming to make international commercial law an integral part of both the common law and equity. Relying on his knowledge of other systems of law, he went beyond the traditional thinking of established categories and models and his comparative outlook allowed him to find solutions by breaking away from rigid professional traditions and procedures. His understanding of the learning of continental lawyers allowed him, on the one hand, to view

critically the law and procedures he was confronted with, and on the other hand, he was able to adapt continental rules to the English legal system to modernise its workings. However, he was not advocating large legislative changes to the law; rather he worked towards an adaptation of old rules and principles to the new circumstances and needs of modern times. And by delving into his knowledge of continental systems of law and writings, he was able to ground his decisions on underlying principles that were acceptable to both the English and continental lawyers. His basic premise was that cases should always be interpreted in view of underlying principles. While he acknowledged that the workings of precedents cannot allow rules of law to be overturned, “the cases must if possible be so interpreted as to bring them into conformity with those principles.”

This is reminiscent of Scottish law where:

> “the search was not for the appropriate form of writ, but for the legal principle involved […] The formulary system and the fictions of the English common law, the outcome of pure empiricism, find no counterpart in the history of the law of Scotland.”

It is also from Scottish law that Mansfield imported a theory of consideration he thought more appropriate than the concept that had been worked out in the English courts hitherto. His basic premise was to prevent unjust enrichment and he developed this idea in *Moses v Macferlan* when he said that:

> “If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff’s case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it).”

The first attempt to actively reform consideration can be found in his ruling of *Pillans and Rose v Van Mierop and Hopkins*, a merchant law case in

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204 (1760) 2 Burr. 1005, or 97 Eng. Rep. 676, at p. 678
205 (1765) 3 Burr. 1663, or 97 Eng. Rep. 1035
which the defendant’s promise lacked consideration in any technical sense. It is a case well known for a number of innovative propositions, one of which was his equation of consideration with mere evidence of an agreement:

“I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds &c. there was no objection to the want of consideration.”

He also affirmed that the law of merchants and the law of the land were the same and that the concept of *nudum pactum* did not exist in the usage and law of merchants. He concluded that:

“in commercial cases amongst merchants, the want of consideration is not an objection.”

Mansfield’s point was historically justifiable to the extent that consideration had been seen as part of the toolbox that ring-fenced agreements to distinguish enforceable and non-enforceable promises. Hence, consideration was part of a ‘list’ of technical conditions under which actions of assumpsit would lie. The question of evidence had been addressed by the 1677 Statute of Frauds\(^\text{206}\) imposing the written form for certain types of agreements. Mansfield concluded that the statute replaced the older requirement of considerations.\(^\text{207}\) This decision brought English law momentarily closer to continental laws by sketching deliberate intention as the test of a binding contract.

However, this attempt at reforming consideration was reversed in 1778 by the House of Lords’ ruling in *Rann v Hughes*:

“…the present case did not afford a pretext of any benefit or indulgence stipulated for by the defendant, or anything to be done or omitted by the plaintiffs, as a consideration for the promise stated to have been made by the defendant…”\(^\text{208}\)

\(^\text{206}\) An Act for prevention of Frauds and Perjuryes, Statute of the Realm: vol. 5: 1628-90, at pp. 839-842; originally published by Great Britain Record Commission, s.l, 1819; www.british-history.ac.uk

\(^\text{207}\) “And the Statute of Frauds proceeded upon the same principle.” (1765) 3 Burr. 1663 at 1669, or 97 Eng. Rep. 1035 at 1038

\(^\text{208}\) (1778) 4 Bro. P.C. 27, or 2 Eng. Rep. 18, or 7 T.R. 350
This reversal did not prevent Mansfield from pursuing his reforms of the law relating to consideration. It led to his attempt to introduce the concept of moral consideration to support a contract. This was based on the notion that a moral obligation is inherent in the making of a contract and it was an attempt to import into the doctrine of consideration his own view that the basic function of a contract was to implement the intentions of the parties. If the basis of moral obligation could be accepted, it would allow for the distinction between written and oral agreements to become obsolete. Mansfield’s efforts to reform the English law was a less glorious chapter, because although supported and propagated by several of his colleagues, the reforms did not last.

But to view moral obligations as the primary factor that makes a promise actionable, was not just an inspiration from across the Scottish border. The equitable conception of consideration had allowed for an exception to the rule that consideration must move from the promise. Furthermore, traces of the notion of moral consideration could already be found to a certain extent in the action of *indebitatus assumpsit*. The decision in the *Slade’s Case*\(^\text{209}\) had established that the existence of a preceding debt imports a promise and *indebitatus assumpsit* will lie despite the fact that there had been no express promise to pay. In 1697, a defendant was held bound to a debt incurred during his minority\(^\text{210}\) and a couple of years later a promise to pay a debt bared by the Statute of Limitation was enforceable.\(^\text{211}\) In both cases, *indebitatus assumpsit* was brought on a preceding debt that had incurred but was not enforceable. The last two cases were used by Mansfield as precedent to support his view in *Hawkes v Saunders*.\(^\text{212}\) But in contrast to the earlier cases, the Mansfield’s reasoning relied entirely on equitable considerations, which weakens considerably the link to the earlier cases as precedents.

In *Hawkes* Mansfield started by discussing:

\(^{209}\) (1602) 4 Co. Rep. 92a  
\(^{210}\) *Ball v Hesketh* (1697), Comb. 381, or 90 Eng. Rep. 541  
\(^{211}\) *Hyleing v Hastings* (1699) 1 Ld. Raym. 389  
\(^{212}\) (1782) 1 Cowp. 289, or 98 Eng. Rep. 1091
“…whether the defendant having assets sufficient to pay all the debts and legacies, is, or is not sufficient consideration for her to make a promise to pay the legacy in question? As to that point, the rules laid down at the Bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an assumpsit, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an assumpsit. Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promise, the honesty and rectitude of the thing is a consideration.”

Referring to Hyleing v Hastings and Ball v Hesketh, he continues:

“As if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations: or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries […] In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration.”

In Atkins v Hill,\(^\text{213}\) Mansfield talks about “obligations which would otherwise only bind a man’s conscience.” Similarly, in Trueman v Fenton\(^\text{214}\) Mansfield relied on arguments akin to equitable principles, rather than the more restrictive common law view that the existence of a precedent debt is good consideration:

“The debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them…”

The concept of moral consideration survived Mansfield for a few decades and was adopted by a number of his colleagues. As Holdsworth point out, Mansfield’s appeals to moral and natural law were:

\(^\text{213}\) (1775) 1 Cowp. 284, or 98 Eng. Rep. 1088
\(^\text{214}\) (1777) 2 Cowp. 544, or 98 Eng. Rep. 1232
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“attractive to the minds of the lawyers of his day; and so the idea that a conscientious obligation could be consideration for a promise was speedily taken up.”

It had almost become an accepted doctrine. Twenty years after Mansfield’s death, references to his idea of moral consideration were made in Lee v Muggeridge:

“Lord Mansfield C.J. thought the rule of nudum pactum was too strict, and that it was competent for parties to make their own agreement on deliberation, and if they did so think fit to make them, that they must be subject to them. It is now fully recognised in the law, that if there be, even in the strictest morality, the foundation for a promise, and the promise be accordingly made, it is binding. It is a new ligament, though not a new consideration; for if there were a new consideration, it would be clearly good.”

In Atkins v Banwell Lord Ellenborough C.J. said that “a moral obligation is a good consideration for an express promise.” He confirmed this in Wing v Mill with the words: “In this case both the legal and moral obligation obtain.” As late as 1863, we can find Pollock C.B. referring to the concept of moral consideration, although this was perhaps more a linguistic expression lingering from the past than a discussion of the underlying concept. One of the questions under consideration was:

“…whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so. Such consideration has been sometimes called a moral consideration…”

But the concept had its critics well before then. In a note appended to their report of Wendall v Adney Bosanquet and Puller attempted to limit the idea of allowing an express promise founded simply on an antecedent moral obligation to be sufficient to support an assumpsit. They argued that the

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216 (1813) 5 Taunt. 36, or 128 Eng. Rep. 599
217 (1802) 2 East 505, or 102 Eng. Rep. 462
218 (1817) 1 B. & Ald. 104, or 106 Eng. Rep. 39
219 Flight v Reed (1863) 1 H. & C. 703, or 158 Eng. Rep. 1067 at 1072
220 (1803) 3 Bos. & P., 247 at 250, or 127 Eng. Rep. 137 at 138-141
expression of this concept as used by Mansfield may appear of a general nature at first, but:

“...yet the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond what the older authorities seem to recognise as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise [...] Lord Mansfield appears to have used the term moral obligation not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempt the party in that particular instance from legal liability [...] An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.”

This was an attempt to argue for a more restricted reading of the case law and that ‘moral consideration’ could not be reconciled with old cases. It was, however, not adopted in subsequent actions such as Lee v Muggeridge.

Eventually, in Eastwood v Kenyon221 the court (per Lord Denman C.J.) returned to a more technically strict reading of consideration by putting aside the concept of moral consideration, saying that:

“the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.”

The Mansfield episode in the history of consideration is not only interesting from the point of view of legal theory, doctrinal developments and legal history, but also from the linguistics and terminological angle. The era of the Enlightenment comes not only with new ideas but also innovations in terminology and shifts in semantic contents. This will be explored in further detail in the following chapter.

221 (1840) 11 Ad. & E. 438, or 113 Eng. Rep. 482
Chapter VI. Corpus linguistic analysis

In the previous chapters, we became acquainted with the cultural and linguistic landscape of multilingual England and its specific situation of medieval legal text production, as well as with the origins and historical evolution of the concept of consideration. From our 21st century perspective, this doctrine may appear carved in stone: as far back as the legal mind can remember, we see the concept and the language used to describe it as long-standing and well-established companions. Yet, from the discussion in the previous chapter, we can observe that the path taken has been a tortuous mountain climb rather than a straight run on a stretch of Autobahn. The concept originated in a variety of legal issues and one needs to untangle the different strands to understand the process. It is, of course, in the nature of the common law, especially in its early stages, to evolve in a more organic fashion, pushing boundaries without making major changes to the law. Ames\(^1\) believed that the action of assumpsit and later the concept of consideration was a picture book example of this.

In the context of the customary set-up of the common law, the twists and turns the concept of consideration went through can be examined by studying the case law, which can be found in the Year Books and Law Reports. These are neither systematic, nor official, nor standardised but scant and personal at times, but still offer us plenty of insight into this development. In a second step, reported in the present chapter, these same sources were exploited for examining the language describing the concept of consideration. The terminology was analysed diachronically to reveal the evolution of the conceptual perception, on the one hand, and the corresponding semantic shifts, on the other. The aim was to evaluate the concordance between the historical and conceptual development of ‘consideration’ and the way the relevant terms and vocabulary were used,

\(^1\) J.A. Ames (1913) *Lectures on Legal History and Miscellaneous Legal Essays*, Cambridge: Harvard University Press, at p. 166
changed and shifted throughout this evolution, most notably the increased abstraction and technicality of both the concept and the language.

The underlying premise for this approach is the deep-level and intrinsic link between language and law, as law cannot be imagined without the use of language and, in particular, without the use of written language. The account of language that is most appropriate to adopt is one which emphasises usage, communicative function and social contexts. A study of language as it is used in actual social situations and is concerned with meaning, communicative functionality and rhetorical purposes\(^2\). The function that is of particular interest to this research is the representational aspect, which encodes our experience of the world and thus conveys a picture of reality. Considering the vocabulary used in relation to the concept of making informal agreements enforceable by looking beyond the traditional grammar classification of the words in question and examining the function they play, we can get a more complete and in-depth picture of the evolution of that vocabulary. This is best done by undertaking a diachronic linguistic and semantic analysis using corpus linguistics methodologies. It is important to stress that corpus linguistic work not only provides an empirical basis for examining the language, but it has also a heuristic function to the extent that the analysis of the material systematized in a corpus generates new knowledge. The researcher may find him/herself confronted with results that were unexpected. The theoretical framework and methodological choices were set out in chapter III above.

1. **Methodology**

This chapter describes the process used to constitute the corpora that formed the basis for the study. Furthermore, it deals with the linguistic analysis and will describe the (statistical) results in detail.

1.1. Sources

The sources from which the documents were drawn for constituting the corpora can be divided into six groups. The full bibliographical information is listed in annex 1 and 2:

- Anglo-Norman source texts available on the Anglo-Norman On-Line Hub. It includes 76 texts in electronic form, containing more than 5 million tokens and covering all registers of Anglo-Norman usage. The majority of the sources are from the second half of the 14th century, though a few date from the mid-13th century. The majority of these documents can be dated and localised, which offers greater certainty that they come from the said periods and have not been subsequently rewritten. The corpus material consists, among others, of correspondence, chronicles in both prose and verse, government statutes and treatises, ordinances, romance and epic texts, religious and devotional prose, texts on hagiography, language pedagogy and philosophy etc. It is not a specifically legal corpus, though it includes legal texts. The corpus that was constituted from these sources is referred to as ANC (Anglo-Norman corpus).

- The very early legal sources, before informal contracts were enforceable, but trespass on the case actions began to materialise, the quasi-trespasses nature of which being of a fundamentally contractual nature; this covers the 14th century and includes sources such as the Year Books of the reigns of Edward II, Edward III and Richard II. The corpus that was constituted from these sources is referred to as ESC (Early sources corpus).

- The York and early Tudor sources, spanning about 150 years from the 15th century, during which the action of assumpsit materialised and with it the shift from primarily proprietary thinking to that of promissory exchange. The corpus that was constituted from these sources is referred to as SSC (Selden Society corpus).
The Elizabethan and early Stuart sources that can mainly be found in volumes 71, 73 and 123 of the English Reports Full Reprint, an era that saw the establishment of the concept of consideration as an element vital for the enforceability of promises and informal contracts. The corpus that was constituted from these sources is referred to as EC (Elizabethan corpus).

The Stuart sources that can be found in volume 81 of the English Reports Full Reprint. By that time, the concept of consideration was well established. The corpus that was constituted from these sources is referred to as SC (Stuart Corpus).

The Mansfield sources have been drawn from a variety of reports. It is a collection of cases decided by Lord Mansfield and his colleagues, in which the idea of consideration as moral obligation was defended. These date from the mid-18th to the early 19th century. The corpus that was constituted from these sources is referred to as MC (Mansfield corpus).

The size of the sources, in terms of word tokens, was only ascertainable for the Anglo-Norman texts. The sources from the HeinOnline database do not offer the possibility of counting the word tokens. Therefore, statistical analysis such as relative frequencies of search terms cannot be undertaken in the conventional way. This issue will be discussed in greater detail in section 1.3. below.

The sources are presented in both their original language (Latin, Anglo-French, Middle/Early Modern English) and an English translation undertaken by the editor at the time of the publication of the material. Most texts were written in two, sometimes three languages (Anglo-French, Middle/Early Modern English, Latin) though one language usually dominated. The earlier texts had many Latin passages or were entirely in Latin; these were not taken into account. The majority of the original language sources are in Law French and passages in Middle/Early Modern English tend to be transcripts.
of declarations made by one of the parties to the action. All lexical and proximity searches were undertaken only on the main original language body of texts from the Anglo-French and Middle/Early Modern English sources; all (English) translations, editors’ footnotes and introduction, or other editorial explanations etc. were disregarded. The searches took into account the different Anglo-French and Middle/Early Modern English spellings and the technique for covering all varieties had to be adapted to each document.  

1.2. Corpora

A corpus is usually defined as a systematic collection of naturally occurring texts of both written and spoken language that has been computerised. It offers the empirical basis for carrying out linguistic investigations. The collection of texts is ‘systematic’ because the content and structure of the corpus is built according to extra-linguistic principles, in particular in relation to the way texts are chosen and sampled. The theoretical question relating to corpus design and its representativeness was discussed in chapter III above. The corpus for this research was purpose-built, adapting traditional corpus linguistics methodologies to the specific situation of multilingual, medieval legal texts. The process of constructing the corpus was the result of trial and error, very much in the vein of what Biber described as the cyclical movement of continuously revising the design following empirical research carried out on the initial pilot corpus in order to adjust the design parameters.

A detailed list of the corpora constituted from these sources can be found in annex 3. The corpora in text form are accessible via the drop-box set up for this project. All details for accessing and using the drop-box are described in annex 4. The documents used to constitute the corpora are electronically accessible through the following databases:

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3 The spellings that were taken into account when constituting the corpora and undertaking the linguistic analysis are listed in annex 3.

4 Naturally occurring language is language that has evolved naturally, is hereditary and in extended use.

(i) www.anglo-norman.net - The Anglo-Norman On-Line Hub:
   - Anglo-Norman textbase

(ii) www.heinonline.org - Selden Society Publications and the History of Early English Law:
   - Ames Foundation Publications
   - Selden Society (Annual) Series
   - English Legal History Classics

(iii) www.heinonline.org - English Reports:
   - English Reports – Full Reprint (1220-1867)

The material is electronically searchable, though due to constraints of copyright, it could not be downloaded in bulk. Therefore, it was decided to constitute the corpora on the basis of the occurrence of specific search terms. In other words, the source texts (e.g. volumes 72, 73, 123 of the English Reports – Full Reprint) were searched for keywords that would typically occur in the context of discussing informal agreements (e.g. consideration). All texts in which the search term occurred were downloaded as extracts. Texts were chosen because they contained the search terms. No discrimination was made on the basis of legal content or importance of the legal decision in question: landmark cases were included as much as unimportant ones. The criteria for selection were lexical not legal.

Every downloaded document had to be reformatted in .txt form, so as to make it compatible with the linguistic software. The documents were subsequently put together in one of the subcorpora according to specific criteria. In view of the variety of medieval spellings, in particular in the Anglo-French texts, the searches had to take the form of a fuzzy\(^6\) or wildcard\(^7\) query. In some documents, the spelling was so chaotic that a combination of several search techniques had to be applied, to make sure nothing was missed.

\(^6\) The ‘fuzzy’ search function is based on an ‘edit distance’ algorithm that search for terms similar in spelling.

\(^7\) In a ‘wildcard’ search an asterisk is used to replace one or more characters in a search term at its beginning or its end. A wildcard search is helpful in locating variations of a particular word, e.g. searching for considera* would include all words that begin with these none letters but may end differently, including considerations, considered, considerable etc.
The result was a series of purpose-built corpora that were constituted in a way and according to criteria unusual for classic corpus linguistics methodologies. The following twelve corpora/subcorpora were constituted/used:

The Anglo-Norman corpus (ANC)
The database was used as corpus.

The early sources corpus (ESC)
Three early Year Book corpora based on the following search terms:
- assumpsit (ESCa)
- consideration (ESCc)
- promise (ESCp).

The Selden Society corpus (SSC)
Three late York and early Tudor corpora based on the following search terms:
- assumpsit (SSCa)
- consideration (SSCc)
- promise (SSCc).

The Elizabethan corpus (EC)
Three Elizabethan corpora based on the following search terms:
- assumpsit (ECa)
- consideration (ECc)
- promise (ECp).

The Stuart corpus (SC)
One corpus based on the search term ‘consideration’ (SCc).

The Mansfield corpus (MC)
Two 18th/19th century corpora drawn from Mansfield’s case law and based on the search term ‘consideration’ (MC).

The subcorpora were not constituted systematically on the basis of the same search terms, except for ‘consideration’. This was, in part, due to time constraints and hence a question of producing the most effective results by searching the various time periods with the most relevant terminology. The
choice of search terms was guided by the doctrinal evolution of the concept of consideration. For example, it made more sense to use the term ‘assumpsit’ as the basis for a 16th century corpus, which corresponded to the ‘golden age’ of that particular action, rather than for a 18th/19th century corpus when the action had become obsolete. The reason the sources up to the 17th century were searched for more terms than the later sources is that the 15th/16th centuries were a pivotal time in the evolution of the concept. Changes in the use of terminology and semantic meanings were most likely to be found during that time.

The 18th century Mansfield corpus (MCc) was compiled in a different way from the one covering the earlier centuries. For the Selden Society, the Elizabethan corpora and the Stuart corpora, texts for inclusion in the corpus were chosen on the basis that a specific search term occurred in the documents from which the text extracts were drawn – ‘assumpsit’, ‘promise’ and ‘consideration’. Case reports were singled out, not on the basis of content or whether this was primarily a contract/consideration case, but on the presence of the search term(s). In other words, the approach was to ‘follow’ specific terms, independent of the legal context in which these occurred. The opposite approach was adopted for the Mansfield corpus: the case reports were selected on the basis of their content and whether these were a part of the corpus of cases stipulating Mansfield’s doctrine of consideration as moral obligation.

1.3. Size of sources and corpora

To ascertain the size of the source texts, in terms of word tokens, was a major difficulty in the methodology for this study. The Anglo-Norman On-Line Hub textbase provides the user with the information of how many word tokens it contains, as is usual for a database constituted for linguistic purposes. However, HeinOnline is a tool for lawyers and legal scholars, and it does not prioritise defining the number of word tokens in a document. This complicates some statistical analysis, such as relative frequencies of search
terms, as these cannot be undertaken in the conventional way. The frequency of a term is only of significance if we can put this in proportion by juxtaposing it to the total number of tokens in the original text. If we cannot ascertain the number of word tokens in the source texts used for the linguistic analysis, we lack a common denominator on the basis of which to make comparative analysis between the different texts.

It was considered that the next best common denominator to word token is a page count for every source document. Although this will not provide a very precise basis as documents tend to have different lay-out etc., it is still an *indication* of the length of a text. In the case of the sources used for this study, the evaluation of the length of texts on the basis of page count rather than word count, provides a suggestion, if not an exact indication, of the length of the sources texts.

![Chart 1: size (number of pages) of the sources from which the corpora SSC, EC, SC and MC were constituted. The block representing the Selden Society sources do not include the Year Books of Edward II and III, which represent 6,450 pages and which were searched separately as part of the early sources.](chart.png)

A corpus constituted on the basis of, for example, the term ‘consideration’ reflects the frequency of that term in the original sources. In the absence of
word token statistics for the sources, the page count has been used to calculate that relative frequency. Examples for a relative frequency calculation: there are 102 instances of ‘consideration’ in the Selden Society sources and 465 in the Stuart sources. Their relative frequencies will be calculated as follows:

for the SS sources: \( \frac{102}{4109} = 0,0248 \)

for the S sources: \( \frac{465}{941} = 0,4942 \)

This means we have, on average, 0,025 instances of ‘consideration’ for every page in the Selden Society sources and 0,494 instances for every page in the Stuart sources. While these are not exact figures, the trend is undeniable.

As explained above, the source texts were used to constitute a series of corpora by selecting text extracts surrounding the occurrence of specific search terms. But the size of each corpus is no reflection of the size of the sources from which they were drawn. By using the concordance tool Antconc, it was possible to ascertain the word tokens for each corpus. If we take the consideration subcorpora as example, we can see from the chart below that these subcorpora are very different in size from the sources from which they were constituted. The reason for this is easy to explain: the fewer occurrences we have for a search term in the sources, the fewer text extracts will be downloaded. As the term ‘consideration’ occurred considerably less in the vast Selden Society publication sources, the corpus that was constituted from these sources is rather small, but that is less a reflection of the size of the sources and more one of the relative scarcity of the term.

Any searches of the specific ‘consideration’ corpus for other terms, such as for example ‘contract’ or ‘covenant’ will show frequencies in relation to the size of that particular corpus but not in relation to the size of the original sources. This has meant that it was only possible to ascertain a comparative proportional trend of the terms on which the various corpora were constituted, namely ‘assumpsit’, ‘promise’ and ‘consideration’. Due to
constraints in time, it was impossible to compile more corpora based on other search terms.

![Chart 2: size (word tokens) of the ‘consideration’ corpora SSCc, ECc, SCc and MC](image)

With these figures and explanations in mind, we conclude that it would make no sense to use the token count of the different corpora as a basis to show comparative quantitative analysis and relative frequencies. It would reflect the opposite of what can actually be observed. It was therefore decided that for this type of analysis a page count was a more representative common denominator: even if less precise, it still reflects an approximate evaluation of the length of the source texts.

1.4. Linguistic analysis

The linguistics software used for this study is the AntConc⁸ concordance program, which is fully Unicode compliant, meaning that it can handle data in

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⁸ AntConc is a concordance program developed by Laurence Anthony, Director of the Centre of English Language Education at the Waseda University in Japan. There are versions available for Windows, Mac & Linux. The particular version used for this research is: AntConc 3.4.4m (2014). The program can be downloaded at the following pages, which also includes links to online guides and video tutorials: http://www.antlab.sci.waseda.ac.jp/antconc_index.html
any language, including all European and Asian languages. Therefore, the
dmultilingual nature of the corpus used for this research did not cause a
problem. However, the diversity in medieval spelling could not be smoothed
over by the software.

AntConc allows us to create word lists and search the text files for words,
phrases and patterns, though not all the tools it offers are relevant to this
study. Once a corpus is uploaded into the software, we can obtain the figures
for the number of words the corpus contains (word tokens) and the number
of unique word forms - as opposed to total numbers - that can be found in
that corpus. We must be aware that the statistics for the word tokens/forms
may be skewed by the spelling variations as the software does not recognise
two different spellings of the same word as one word token.

By far the greatest challenge of the linguistic analysis was the varying
spellings or grammatical forms typical of medieval text production. While the
HeinOnline database has a fuzzy search function that searches for terms
similar in spelling, the linguistic software does not have this facility. It has
meant that certain search functions had to be done several times, once for
each spelling variation, which could be half a dozen times for each search
term. It is also likely that some freak spellings were not picked up. Proximity
searches became exponential because every spelling of every term had to
be tried in combination. At times this issue can be overcome by wildcard
searches, which allow for a special character to replace one or more
characters at the beginning or end of a search term. This is, however, not
always appropriate nor did it always deliver satisfactory results.

The corpus was usually first searched with the term on the basis of which it
was constituted. In other words, if I have constituted a corpus by searching
the sources for the word 'consideration', and its various spelling variants, I
will search the corpus I have uploaded into the concordance tool for the word
consideration and its various spelling variants. The search window size for
this search in this study will always be set at 100. The results were displayed
in the so-called pre-set KWIC format, which is the most common way to show concordance lines. ‘Key Word In Context’ shows the search term in its context as found in the original text. These can then be sorted according to the words to the left and right of the search term and, hence, provide an excellent overview of the type of contexts in which the search terms occur. All KWIC tables used for this research can be found in the drop-box. In the table below we have an example of ten KWIC lines from the corpus extracted from volume 72 of the English Report on the basis of the search term ‘consideration’ and its various spelling variants. The lines are cited here merely to illustrate the methodology. They were sorted according to alphabetical order of the word that precedes the search term.\(^9\) This was adopted for all the KWIC tables used for this research. It facilitates looking for a particular terminological construction. By grouping these together it also gives us a precise idea of their numbers of occurrence. These few lines are also a good illustration of the spelling variations, some of which can be quite unpredictable.

| , upon full hearing whereof, and due and advised | consideration had of the said Conveyance, and of a |
| le case hors del court fuit referre ai | consideration des 2 Chiefe Justices Popham &amp; |
| tiel proviso no sont ptes queux ont ascis | considerae~n pur raiser lour estates. Et del auter |
| eclare sur estate execute, que ne besoigne ascun | consideraen: mes si fuisset use declare sur coven |
| sont mise en 1° endenture ils ne sont available | considera- csns, car les pols sont q ils ove |
| cestuy que vie; lc reason est default de | consideracin en cestuy que vie de jinder, si come |
| pur 24. ans est void estate pur fault de | consideracon en les covenantees, & donq le pchein |
| , quia n’est expss que el covenant en | consideration dadvanceit ou pferiit des issues |
| le fait que le covenant est fait en | consideration dadvancer les issues de son corps, |
| devant marriage Pson single nosme sans expssen en | consideracin de marriage ; en quel case ne fuit a |

Table 1: KWIC lines (extract) for ‘considera*’, vol. 72 of the English Report

Besides the keyword search and KWIC display function, AntConc also offers the possibility of an ‘advanced search’ with more complex possibilities. It enables the search of KWIC lines with a second search term or set of search terms, either by typing them in one per line, or by uploading a list of search terms from another file. It is further possible to define the parameters for the

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\(^9\) Level 1: 1L; Level 2: 1R; Level 3: 0
context words and a word span which within the second (set of) search term(s) must appear. For example, a corpus is searched for the main search term ‘consideration’, which produces a number of KWIC lines. These lines can then be advanced searched with a number of other terms, for example ‘promise’ or ‘contract’. The word span adopted for this research is the widest possible context window that AntConc offers, namely 20 words to the left and 20 words to the right of the main search term – ‘consideration’ in this example. If, in our example, we find the word ‘promise’ to appear significantly more often than the word ‘contract’, we may conclude that the concept of consideration is more frequently discussed in a context of promise-making than in a context of contract.

The choice of secondary search term(s) to be used in specific advanced searches was guided by the doctrinal development of the concept of consideration. In view of the diversity of medieval spellings, these searches could be very time-consuming, hence it was a matter of producing the most effective results by searching the various time periods with the most relevant terminology.

Another possibility, searching for words or patterns that cluster together with the words immediately to the right or the left of the search term, is offered by the software’s so-called clusters tool. The results can be ranked by frequency, range and probability. The cluster minimum and maximum size can be defined. For this study it was always set at minimum 2 and maximum 5. Below are a few examples selected from the ‘consideration’ corpus of volume 72 English Reports. The column ‘range’ refers to the number of documents in which a particular cluster could be found.

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on left)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>17</td>
<td>13</td>
<td>consideration de</td>
</tr>
<tr>
<td>4</td>
<td>10</td>
<td>8</td>
<td>consideration que le</td>
</tr>
<tr>
<td>8</td>
<td>4</td>
<td>2</td>
<td>consideracon de marriage</td>
</tr>
<tr>
<td>11</td>
<td>4</td>
<td>3</td>
<td>consideracon que e pl</td>
</tr>
<tr>
<td>22</td>
<td>3</td>
<td>3</td>
<td>consideration ne fuit sufficient</td>
</tr>
</tbody>
</table>
Table 2: clusters of 'consideration' in vol. 72 of the English Report

Furthermore, the collocate tool was used in this study. It offers information on the sequence of words or terms that co-occur with the search term more often than would be expected by chance. The window span can be determined to the left and right of the search term. For this study it was always set at 10 words to the right and left of the search term. The results can be sorted by total frequency, frequency on the left or right of the search terms, or the start or end of the word, or by the value of a statistical measure between the search term and the collocate. Below are a few selected lines from the same corpus by way of illustration: (window: 10L, 10R)

Table 3: collocates of 'consideration' in vol. 72 of the English Report

The instability of spelling and grammatical forms in medieval texts meant that the results of these various linguistic search tools, could only be seen as indications rather than exact statistical information. Moreover, it is important to stress that the information obtained by using these various linguistics tools, is linguistic/lexico-grammatical information, rather than legal
information. We are, at this stage, less concerned with content and more with lexical and grammatical choices, with linguistic form and function that were used to realise meaning and convey a picture of reality as it was then in the legal minds.

Besides applying these automated linguistic tools, the analysis will also consider the language that provides the context in the concordance lines for the search term (mainly promise and consideration). For these purposes, the language in the KWIC lines resulting from the various concordance searches has been grouped into three main types of language uses for the purpose of this study:

(i) general language meaning/use:
This is language comprehensible to the ordinary man.

   e.g.: “The court’s decision was made in consideration of all the facts.”

(ii) general language meaning but use in a legal context:
This is also comprehensible to all, but the legal context in which this language occurs adds legal meanings that may only be picked up by those with some legal training.

   e.g.: “The payment was promised in consideration of the marriage to his daughter.”

(iii) specialist/technical/abstract meaning and use:
This language is abstract to a point that its meaning can no longer be understood by a non-specialist.

   e.g.: “The instrument imported a prima facie consideration.”

The main pointers to the use of technical language can be observed in the interaction between the lexical and grammatical patterning, because every meaning of a specific word will tend to have different patterns. Firth famously said: “You shall know a word by the company it keeps.” Grammar and lexis do not operate independently and as separate systems, but

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together as a single system\textsuperscript{11}. Words with technical meanings ‘behave’ differently from the same words in general language contexts. In our example (iii) above we find ‘consideration’ as a full noun, rather than in the causal link phrase of ‘in consideration of’ that is typical for general language usages.

We need to add the Latin uses. This does not refer to the Latin texts or passages, which have usually been disregarded altogether, but to the occurrences where the search term was embedded in a legal Latin phrase in an otherwise Anglo-French or Middle/Early Modern English text.

There is, no doubt, some overlap between the different groups and the categorisation may appear somewhat artificial at times, but for the purpose of this study, it is essential to group concordance lines together for evaluation.

The rest of this chapter discussing the results of the various linguistic studies, is structured chronologically, starting with the earliest actions of trespass on the case that predated the concept of consideration and ending on Mansfield’s idea of consideration as a moral obligation. In addition, the chapter is subdivided into separate sections for each item of terminology.

\section*{2. General language register}

Before turning to the sources that are at the centre of this research, namely the Year Books and Law Reports, it may be of interest to take a brief look at texts in registers other than the legal one. This is to observe how the main lexical item in this study – consideration – is used in mainly non-legal texts during the 15\textsuperscript{th} century.

To start with, a look at the definition in today's online Oxford English Dictionary shows 'consideration' to have manifold meanings. These can be divided into three groups:

- four of the eight definitions describe consideration in terms of careful thought/contemplation, viewing, observing typically over a period of time, taking into account, motives/reasons, deliberation/opinion/conclusion;
- two definitions deal with the notion of kindness/thoughtfulness for another and esteem, importance, consequences among men and for things;
- two definitions present consideration as payment or reward and as the promise/object of a contract.

In the English language, the beginning of the use of 'consideration' dates back to the Middle English of the 14th century (consideracoun, consideracioun, consideracion), with its etymological root in the Latin word considerationem (nom.: consideratio and the noun of the action from the past participle stem of considerare meaning to examine) and the Old French 12th century term of consideracion.

The definition in Anglo-Norman French of the word 'consideration'12 that can be found in the Anglo-Norman Dictionary13 is divided into four usages:

1. examination, reflection, study, contemplation;
2. opinion, conclusion;
3. idea, motive;
4. legal decision, purchase.

The Anglo-Norman On-Line Hub also includes an electronically available corpus of 76 original language source texts, as described above in section 1.1. Searching that corpus for the terms 'consideration' in its various Anglo-Norman spellings, we obtained 62 hits, as follows:

- 32 hits for "consideracion"
- 1 hit for "consideratione"
- 17 hits for "consideracioun"

---

12 The word can be found in following spelling variations: consideracion, consideracione, consideracioun, consideracion, consideration.
- 2 hits for "consideraciun"
- 10 hits for "consideration"

The majority of the sources are from the second half of the 14th century and a few date from the mid-13th century.

None of the results showed the use of the term in the legal sense, such as for the purposes of purchase/debt or in the context of a promise, agreement or exchange. The sense was always pertaining to the general language register. In the majority of the cases, the meanings were: taking into account, having regard for, with regard to, in view of, etc. In two occurrences, the search term appeared in the sense of contemplation/meditation and in both cases the source text was of a religious nature.

A collocates analysis with a span of 10 words to the right and 10 to the left of the search term, revealed the following:

- 15 hits for "priere", all of which occurred in the Anglo-Norman Letters and Petitions documents and not in specifically religious sources. The word was always a part of the same structure:
  "considera*\textsuperscript{14} de ma/noz/nostre/susdites priere". It leads to the reasonable conclusion that it is probably a standard form in the register of petitions.

- 10 hits for "regard", all except 2 following the pattern of:
  "considera*et regard". These all occurred in the same source, the Foedera, conventiones, litterae; et cujuscunque generis acta publica, inter regis Angliae, ab ingressu Gulielmi I. in Angliam, A.D. 1066. It may be reasonable to conclude that this is a part of the register of this sort of text.

- 10 hits for "bon/bone", in 3 cases bon* was found before considera*, in 7 cases it was placed after the search term, in 3 of which it occurred in the same phrase:
  "consideration a ce qui/q'a/que, a l'effect que bone accorde".

\textsuperscript{14} Wildcard search: the asterisk is used to replace one or more other characters in a search term at its beginning or its end. It is used in the so-called wildcard searches, which are especially helpful in locating variations of a particular word.
An advanced proximity search of the Anglo-Norman Hub sources texts with a span of 20 words to the right and 20 to the left of the search term, confirmed that ‘consideration’ was not associated with typical contract words such as promise, covenant, contract or agreement. There were no proximity hits for any of the four terms, despite the fact that these terms occurred in the corpus:

- 443 hits for the various spellings of the word ‘promise’ (promess, promês, promese, promis, promesse, pramesse, premés, premesse, premis);
- 89 hits for the various spellings of the word ‘contract’ (contract, contracte, contrait, contraite, contrat, contret);
- 256 hits for the various spellings of the word ‘covenant’ (covenant, covenand, covenaunt, covenante);
- 3 hits with the various spellings of the word ‘agreement’ (agreement, agrément, engrément).

The proximity search with words that are particularly associated with medieval informal agreements, such as debt and trespass, showed no proximity hits between the word consideration and words like debt and trespass, although these terms occurred in the corpus:

- 462 hits with the various spellings of the word ‘debt’ (dette, det, dete, debt, debte, depte, deite, deitte, debit, lecte, doite, duyte, decies, decetes, dettus);
- 743 hits with the various spellings of the word ‘trespass’ (trespas, tresaas, trespass, trespasse, trepsaz, trepas, tresaas, trepace, trepase, trespass, trepaz, treppas, tresspas).

However, a proximity search between ‘contract’ and ‘covenant’ and other terms typically associated with informal agreements, showed the following results.\(^{15}\)

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\(^{15}\) All the various spelling variations listed above have been respected in the search, which was carried out for every combination for spelling between both the search term and the proximity term.
Chapter VI: Corpus Linguistic Analysis

<table>
<thead>
<tr>
<th>Search term</th>
<th>hits</th>
<th>proximity (20L, 20R)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>contract covenant debt promise trespass agreement</td>
</tr>
<tr>
<td>contract</td>
<td>89</td>
<td>- 19 15 1 11 0</td>
</tr>
<tr>
<td>covenant</td>
<td>256</td>
<td>19 - 17 6 14 0</td>
</tr>
</tbody>
</table>

Table 4: ‘contract’ and ‘covenant’ as terms/proximity to other terms in the Anglo-Norman On-line Hub corpus

All quantitative information has been summarised in the table below (proximity search of 20 words to left and right):

<table>
<thead>
<tr>
<th>search term</th>
<th>hits</th>
<th>prox. of consideration</th>
<th>prox. of contract</th>
<th>prox. of covenant</th>
</tr>
</thead>
<tbody>
<tr>
<td>consideration</td>
<td>62</td>
<td>-</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>promise</td>
<td>443</td>
<td>0</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>contract</td>
<td>89</td>
<td>0</td>
<td>-</td>
<td>19</td>
</tr>
<tr>
<td>covenant</td>
<td>256</td>
<td>0</td>
<td>19</td>
<td>-</td>
</tr>
<tr>
<td>agreement</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>debt</td>
<td>462</td>
<td>0</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>trespass</td>
<td>743</td>
<td>0</td>
<td>11</td>
<td>14</td>
</tr>
</tbody>
</table>

Table 5: search terms/proximity to ‘consideration’, ‘contract’, ‘covenant’ in the Anglo-Norman On-line Hub corpus

The Anglo-Norman Hub is not a specifically legal source and despite the fact that it is relatively small and limited\(^{16}\) corpus material, it is reasonable to conclude that in the second half of the 14\(^{th}\) century, the term consideration tended to occur in general language meanings, such as examination, reflection, study, contemplation, opinion, conclusion, motive. It could not be found, as yet, in a general context of making promises or concluding agreements, contracts or covenants, nor in situations of debt or trespass,

\(^{16}\) Limited in particular in relation to register. In view of wide-spread illiteracy, written texts were not very common and reflected the learned man’s mind and vocabulary rather than those of the masses. The corpus includes 76 texts in electronic form, containing more than 5 million tokens and covering all periods and registers of Anglo-Norman usage.
though admittedly the Anglo-Norman Hub includes very few specific legal
texts.

3. Law reporting

The Year Books and Law Reports were at the centre of this study, though for
comparison’s sake, abridgements and lexicons were also studied (see
sections 4 and 5).

This section on law reporting is divided into three main parts, one for each of
the following search terms: assumpsit, promise and consideration. Each of
these subsections will be introduced with a chronological overview for every
term, followed by a detailed quantitative linguistic analysis using AntConc, on
the basis of the corpora constituted for the study.

3.1 Assumpsit and its forerunner Trespass on the case

As briefly explained in the previous chapter, the concept of consideration was
born from the action of assumpsit, the essence of which was the notion of
making an undertaking to do something. Assumpsit materialised in the 15th
century and arose primarily from the action of trespass on the case (13th
century), that is of a wrongful act directly causing harm or injury and
consisting in the recovery for the negligent performance of an undertaking. It
is, therefore, also interesting to examine the language used in the formulation
of this new action as the forerunner to the later evolving concept of
consideration.

The 14th & 15th centuries Year Books and Reports

When considering the 14th century law reporting material from the reign of
Edward II, Edward III and Richard II 17 we find no references to any
conceptual thinking that informal promises may be enforceable. Any cases
that could be considered as forerunners for the actions of assumpsit are all

17 Detailed references for these Year Books can be found in annex 2 (iii) and (iv).
classified as trespass on the case actions. They are about making an undertaking, but were construed as quasi-trespasses because, although fundamentally of a contractual nature, procedurally speaking an action of covenant would not have succeeded for lack of deed under seal. While in the first half of the 14th century, we find very little evidence of such actions, they became more prominent in the latter part of that century.

The lack of references to the enforceability of informal promises is reflected in the lack of vocabulary that may express any such discussions. In the Edward II and Edward III Year Books, half a dozen uses of ‘consideration’ are all in the general sense of ‘taking into consideration/having considered’. One mention of ‘assumpsit’ can be found in a Latin language context18 and another, similar one, in the Anglo-French text.19 Furthermore, we have 7 references to ‘promise’ in the original Law French text, four of which were part of declarative statements promising to undertake duties graciously, and that gifts and promises would not distract men from carrying out their duty to the best of their abilities.20 Among the case reports of these early Year Books that cover the first third of the 14th century, two cases stand out as situations where money was exchanged for the making of a promise subsequently not honoured.21 However, in neither case can we find the sort of language that will become characteristic of later trespass on the case or assumpsit actions.

Once we move into the second half of the 14th century, we come across actions like the Humber Ferry case22, which many considered the first action taking the law into a new direction23. This was later disputed, among

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18 “...illam conclusionem assumpsit”; in: (1310) 3 & 4 Edward II, or 22 Selden Society at 118
19 “...de pus qe le baron ad assume la tennaunce en sa persone par son plee”; in: (1329-1330) 3 & 4 Edward III, or 98 Selden Society at 598
20 For example: “En le comencement del eyre nous vous promisses de faire grace de ceo qe a nous appendoit”; in: (1329-1330) 3 & 4 Edward III at 97, or 98 Selden Society at 195; “...et ceo ne levrai pur doun ne pur promesse ne pur amur ne pur haungre ne pur nul ren qe issi ne servirai a moun power”; in: (1321) 14 Edward II, or 85 Selden Society at 12
21 (1321) 14 Edward II, or 85 Selden Society at 353; (1329-1330) 3 & 4 Edward III, or 97 Selden Society at 237 These cases are discussed in greater detail in chapter V, p. 76-77
22 Bukton v Tounesende (1348) Lib. Ass. 22 Edw III Folio 94a-94b, pl. 41, or LBEx
23 J.B. Ames (1913) Lectures on Legal History and Miscellaneous Legal Essays, Cambridge: Harvard University Press, at p.130: “earliest cases in which an assumpsit was laid in the declaration”; W.S. Holdsworth(1923) History of English Law vol. III, at p. 430: “special variety
others by Plucknett, who considered that the case ‘was not a precedent but a freak’ 24. Yet, once the action was admitted it ‘offered a fruitful soil for experiment’ 25. And with the decision in Waldon v Marshall 26, just over twenty years later, we can safely say that the new action and its novel thinking were gaining definite ground. Admittedly, both reports are very short, but the language in both bears little resemblance to the linguistics expressions of the later assumpsit cases:

In the 7 lines of the Humber Ferry Case (1348), the main key words are:

- avoit emprist a
- a tort
- nul tort
- covenant
- trespass

In the 17 lines of Waldon v Marshall (1369), we have the main key words:

- manucepit
- emprist
- contra pacem
- peace
- covenant
- negligence

Following those cases and in the YB 40-50 Edward III (1366-1377), we find an extensive use of the term ‘trespass’, frequently collocating with vi & armis 27, which was a precondition in these early cases: proof was required of the use of force and arms and a breach of the King's peace for such trespass action to succeed. This was a remnant of criminal law from which these actions originated. Beside the typical trespass vocabulary, such as maliciosē fixit, damages, tort, diligence and guarantee, we increasingly come across terms that describe the making of undertakings, mainly in the form of il

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26 Y.B Mich. 43 Ed. III, 33, 38, or LBEx
27 e.g. YB 46 Edw. III, 19b, or LBEx (“Trespass port devers un Ferrer, de ceo q il enclowe son chival”)
emprist/imprist (he undertakes). In *Waldon v Marshall* the action is worded in Latin with *manucepit* as the term to signal the undertaking made. In a surgeon’s negligence case of 1374 we find, in the 43 lines, 12 uses of *emprist* (or variants) to describe the action. We find 5 uses of *emprist* (and variants) in the 36 line report. In the 7 volumes of the Richard II Year Books we have no match for the key word search of *assumpsit*.

As we come to the 15th century sources, we find a continued use of the trespass vocabulary, as well as *emprist* often in a context of covenant. For example: *Emprise de faire at pl’ un novel meason deins un certain temps … my fait le meason a tort.* During Henry VI’s reign (1422-1461), actions on the case dealt increasingly with the notion of deceit. These arose from facts, not of mal-feasance, but of non-feasance. Hence, the notion of trespass or quasi-trespass was no longer appropriate and a new principle was needed: the breach of an undertaking became considered as deceit. In cases where the plaintiff’s loss enriched the defendant, it was seen as aggravated deceit. The use of the word *emprist* gave way to a frequent use of *assumpsit* in Latin phrases together with an increased occurrence of terms such as deceit, bargain, covenant, *quid pro quo* and. In the discussion of some of these cases, the judges allude to past cases or hypothetical scenarios, but again the terms used are usually dominated by bargain and covenant, rather than *emprist* : for example: “… *le covenant le def. fuit; jeo face covenant ove un carpend pur me fair un meason; face covenant ove moy a fair etc…”

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28 *YB 43 Edw. III, 33, 38, or LBEx*
29 *YB 48 Edw. III, 6, 11, or LBEx* (“*Action sur le case vers Surgeon, que emprist de curer home del plague, & luy mahim*”) 30 Detailed references in annex 2 (iii), electronically accessible on HeinOnline 31 *YB 11 Hen. IV, 33, 60, or LBEx* (“*Action sur le case vers carpenter pur non feasant de meason*”) 32 Action on the case examples : 7 Hen.VI, 1, 3, or LBEx : deceit, bargain, *quid pro quo* ; 9 Hen. VI, 53, 37, or LBEx : deceit sur le cas, bargain ; 11 Hen. VI, 18, 24, or LBEx : extensive Latin use of *assumpsit* and Anglo-French use of *assumpc, assumer, assumption* ; 14 Hen. VI, 18, 58, or LBEx : extensive use of covenant ; 20 Hen. VI, 94, 4, or LBEx: deceit, bargain, covenant. 33 14 Hen. VI,18, 58 ; see also : 26 Hen. VI, 55, 12, or LBEx
The 16th century Year Books and Reports

In the 16th century reports we find a timid use of the term assumpsit or similar. Assumpsit cases were still not labelled as such in the early 16th century. Many were categorised in the Index of Subjects by the (modern) editor as such, but the word 'assumpsit' did not often appear in the reports. It was the nature of the case that attracted the label. In other words, while the new action was increasingly becoming a legal reality, the textual evidence did not shown the term assumpsit as an established legal technical term or category. The key words in the actual case reports tended to be: undertaking, condition, obligation and the legal vocabulary is covenant, debt, contract, trespass. These assumpsit cases were often reported by paraphrasing, in conditional clauses, what one of the parties is alleged to have said or promised:

- "... Si jeo baile biens a un home a garder savement, et il empreint a ceo faire ..." 34
  (If I bail goods to someone to keep safely, and he undertakes to do this)

- "... le testatour dit a luy, si il ne paya vous jeo voile payer, sur quel promesse le pleintife delyver lez bienz ..." 35
  (the testator said to him, 'If he does not pay you, I will pay'; upon which promise the plaintiff delivered the goods)

- "Si home assume sur luy a moy a arrer et seminer ma terre ..." 36
  (If a man undertakes for me to plough and sow my land ...)

- "... home assume sur luy de paier ..." 37
  (A man took upon himself to pay)

In the Caryll Reports, the editor lists five reports as dealing with assumpsit, three of which actually contain the word assumpsit, as well as emprist/empreint (undertook/undertakes). In these cases, ‘assumpsit’ tends to be a part of a Latin phrase, rather than integrated into the Anglo-French text

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34 Hayden v Raggeldon, CP 40/992, m. 451, in Caryll Reports, or 116 Selden Society at 608
35 Cleymond v Vyncent, YB Trin. 27 Hen. VIII, 23, 21, or 119 Selden Society at 46-47
36 From BL MS. Hargrave 322, 13v, in Dyer Lost Notebooks, or 110 Selden Society at 466
37 Lord Zouche v Digby, in Dyer Lost Notebooks, or 110 Selden Society at 416
as it was later. The key words in the other two are trespass, debt and covenant.

In *Johnson v Baker*\(^{38}\) (1493) "... le defendant de ceo [fair] accordant super se assumpsit [...] A que le defendant dit que non assumpsit modo et forma [...] le pleintiffe ad alledged que emprist le charge sur lui [...]ceo fuit le chose que covient estre traverse et nemy quod non assumpsit ...";

(... the defendant took upon himself (super se assumpsit) to do this accordingly [...] To this the defendant said *Non assumpsit modo et forma* [...] the plaintiff has alleged that the defendant undertook the charge [...] and that was the thing which ought to have been traversed (not *Non assumpsit*) ...).

In *Orwell v Mortoft*\(^{39}\) (1505) "..., quel chose a faire le defendant super se assumpsit [...]"

[...] et luy chargerla per cest parol 'super se assumpsit' ...";

(... the defendant took upon himself to do this [...] and charge him by the words 'took upon himself (super se assumpsit).

In *Hayden v Raggeldond*\(^{40}\) (1510) "... Si jeo baile biens a un home a garder savement, et il emprent a ceo faire ...";

(... If I bail goods to someone to keep safely, and he undertakes to do this ...)

In the Selden Society edition of the Year Books 12-14 Henry VIII (1520-1523), the Index of Subjects lists the action of assumpsit as relevant in two cases. Yet the word does not appear in the reports. The key words that describe the actions are 'promise' and 'damage'\(^{41}\), 'covenant', 'contract', 'grant', 'condition' and favour\(^{42}\). Similarly, in the English translation of the Dalison reports (1552-1558), we find the 'assumpsit' twice to describe the type of action at hand\(^{43}\), but the action is not described as such in the French original text.

In the second volume of the Dyer Lost Notebooks (second half of 16\(^{th}\) c.), six cases come under the category of assumpsit, the reports of which show

\(^{38}\) C.P., Hil. 1493. Record CP 40/914, m. 104, in: 115 Selden Society at 135

\(^{39}\) C.P., Mich. 1505, in: 116 Selden Society at 494

\(^{40}\) CP 40/992, m. 451, in: 116 Selden Society at 608

\(^{41}\) Cleymond v Vyncent (King's Bench 1520), in: 119 Selden Society, at 46

\(^{42}\) Southwall v Huddelston and Reynolds (Common Pleas 1523), in: 119 Selden Society, at 139

\(^{43}\) Benger v Pert (1552 King's Bench) KB 27/1162, mm. 89, 134; Rolf v Aucher (1557 King's Bench) KB 27/1182, mm. 40,156, 169, 186
more extensive use of the word 'assumpsit' (7 hits in the six reports), as well as other synonyms, such as assume/assuma (4 hits) and assumption (5 hits). All were translated by Baker with 'undertake/undertaking', which underlines that we are well within the ambit of meaning that is fundamental to an action of assumpsit - someone undertaking to do something. Staying with this Dyer Lost Notebook for the moment, we can observe that the act of making an undertaking can be expressed using the verb form, such as:

“... home assume sur luy de paier ...”\(^{44}\) (a man took upon himself to pay)

“Si home assume sur luy a moy a arrer et seminer ma terre...”\(^{45}\) (If a man undertakes for me to plough and sow my land)

We also find uses of the noun form in specifically legal phrases:

“... In evidence sur lissue Non assumpsit modo et forma, fuit agree per curiam ...”\(^{46}\) (In evidence upon the issue Non assumpsit modo et forma, it was by the court...)

“Action sur le case sur assumption/assumpsit”\(^{47}\) (action on the case of an undertaking/assumpsit)

The remaining noun form uses, accompanied by an article or adjective, are more akin to abstract concepts or discussions thereof. For example, in a case\(^ {48}\) from the Northampton assizes on the autumn circuit of 1571, we can read: “... Lassumpsit covient estre all plaintife mesme, ou al ascun auter a que le plaintife agree, autrement nest bon. Et sil count dun simple assumpsit, et levidence prove un conditionell assumpsit, levidence nest bon ...”

(An assumpsit must be to the plaintiff himself, or to some other person to whom the plaintiff agrees, or else it is not good. And if he counts of a simple assumpsit, the evidence proves a conditional assumpsit, the evidence is not good).

Other examples:

“Et per luy si lassumpsit soitt conditionell, destre performe del parte le defendant, et il dit Ne assuma point modo et forma, cest conditionell promis del parte le defendant ne garrant le lissue le defendant, car conditionell

\(^{44}\) Lord Zouche v Digby, in Dyer Lost Notebooks, or 110 Selden Society at 416

\(^{45}\) BL MS. Hargrave 322, fo.13v, in Dyer Lost Notebooks, or 110 Selden Society at 466

\(^{46}\) Northampton assizes, autumn circuits 1559, in Dyer Lost Notebooks, or 110 Selden Society at 420

\(^{47}\) in Dyer Lost Notebooks, or 110 Selden Society at 453 (dated 1573) and 466 (undated)

\(^{48}\) Northampton assizes, autumn circuits 1571, in 110 Selden Society at 452
assumption est assumption." (And, according to him, if the undertaking is conditional [on something] to be performed on the defendant's side, and he says 'He did not undertake in the manner and form [alleged]', this conditional promise on the defendant's side does not warrant the defendant's issue, for a conditional undertaking is an undertaking.)

“... fuit agree per curiam [...] que un express promise et assumpsit a paier le monie pur le baraine ...” (...it was agreed by the court [...] that there should be given and put in evidence an express promise and undertaking to pay the money for the bargain ...)

The Selden Society ‘assumpsit’ corpus (SSCa)

To complete a more detailed linguistics analysis and obtain more quantitative data, a corpus (SSCa) based on the search term ‘assumpsit’ (including all its medieval spelling variations) was constituted from the original language sources that can be found in the Selden Society (Annual) Series and which cover the period between the late 13th and the mid-16th centuries. The corpus compiled from that search is extremely limited as the term assumpsit or similar occurred little in these documents. It consisted of 8,173 word tokens and 2,162 word types; the original source material consisted of 4,109 pages. Only 12 documents were downloaded that contained the search terms assumpsit, assumption or assume. These appeared 39 times:

<table>
<thead>
<tr>
<th>SSCassumpsit</th>
<th>12 docs. / 8,173 word tokens / 2,162 word types</th>
</tr>
</thead>
<tbody>
<tr>
<td>search term</td>
<td>hits</td>
</tr>
<tr>
<td>assumpsit (incl. various spellings)</td>
<td>16</td>
</tr>
<tr>
<td>assumption (incl. various spellings)</td>
<td>11</td>
</tr>
<tr>
<td>assume (incl. various spellings)</td>
<td>10</td>
</tr>
<tr>
<td>assumpsisset</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>39</strong></td>
</tr>
</tbody>
</table>

Table 6: search term ‘assumpsit’ in Selden Society ‘assumpsit’ corpus

49 From Chr. Yelverton Rep., BL MS. Hargrave 322, fo. 13r, in 110 Selden Society at 457
50 Dyer Lost Notebooks, or 110 Selden Society at 420
51 Detailed references can be found in annex 2 (iv).
52 All in varying forms and spellings.
16 times as assumpsit, 11 times as assumption and 10 times in the verb form. In the case of assumpsit, the word occurred 6 times in a Latin legal phrase and in 3 cases it was found at the beginning of the case in between brackets signposting the grounds for the action. The term never occurred in a Middle English context. In other words and according to this (albeit restricted) corpus, the use of assumpsit was rare in Middle English law reporting.

Advanced proximity searches gave the following results. The terms in the left hand column were used first each as a primary search term in the SSCa – these results can be found in the middle column. In a second step, the same terms were used in a proximity search of 20 words to the right and left of the main search term. These results are in the right hand column.

<table>
<thead>
<tr>
<th>search term (incl. various spellings)</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>assum*</td>
<td>39</td>
<td>-</td>
</tr>
<tr>
<td>consideration</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>contract</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>covenant</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>debt</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>promise</td>
<td>15</td>
<td>8</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>trespass</td>
<td>4</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 7: search terms/proximity to ‘assumpsit’ in Selden Society ‘assumpsit’ corpus

Consideration, contract and quid pro quo do not appear very prominent in this corpus, while assumpsit is discussed more frequently in the context of debt, tort, covenant and promise. The search terms, hits and proximity hits occurred mainly in texts from the first half of the 16th century, rather than in earlier texts. In view of the restricted size of the corpus, these figures can only be of indicative value. The clusters and collocates tools did not reveal meaningful results.
The way assumption is used in these concordance lines, is mostly interchangeable with assumpsit in the non-Latin context, including the surrounding vocabulary with which the search terms is associated. For example, compare “levidence prove un conditionell assumpsit”53 with “car conditionell assumption est assumption”54. This case of metalinguistic55 use appears to suggest that by virtue of the definitional description, the term is established. Similarly, “un expres promise et assumpsit a paier”56 and “le defendant trauerz le promis etlassumcion”57. We even have assumption in the legal phrase “El port sur le cas sur assumption”58. The verb form describes the process of making an undertaking. This descriptive form renders the action less abstract.

The Elizabethan ‘assumpsit’ corpus (ECa)

This corpus was compiled from the original language sources that can be found in volumes 72, 73 and 123 of the English Reports,59 of which only the documents in Law French and Middle/Modern English were used, and not the contemporary English translations. The period covered by these reports spans from Henry VII to Charles II, which is from the end of the 15th century until the mid 17th century. Some reports from the time of Richard II are also included. De facto, the great majority of cases that constituted the corpus are from the Elizabethan era.

The selected reports were searched for the term 'assumpsit' (in its various spellings), constituting a corpus (ECa) that includes 51 files (35 from vol. 71, 8 from vol. 73, 8 from vol. 123) and has 40,226 word tokens and 6,127 word types; the original source material consisted of 1,831 pages. The corpus was

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53 Dyer Lost Notebooks Reports, or 110 Selden Society at 452
54 Dyer Lost Notebooks Reports, or 110 Selden Society at 457
55 ‘Metalinguistic’ here relates to the function of language in which the language itself is discussed.
56 Dyer Lost Notebooks Reports, or 110 Selden Society at 420
57 Spelman Reports, or 93 Selden Society at 3-4
58 Dyer Lost Notebooks Reports, or 110 Selden Society at 466
59 The full references can be found in annex 2 (v).
uploaded into the AntConc software and searched for the word assumpsit, which produced 182 concordance lines. Also included were the verb forms 'assume/assuma', which feature prominently in the context of assuming an undertaking/promise and have replaced the verb *emprist/imprist* that featured prominently in the earlier reports mentioned above, but were found to be totally absent in this particular corpus.

<table>
<thead>
<tr>
<th>search term</th>
<th>hits</th>
</tr>
</thead>
<tbody>
<tr>
<td>assum*</td>
<td>182</td>
</tr>
<tr>
<td>assumpsit</td>
<td>128</td>
</tr>
<tr>
<td>assumpsits</td>
<td>1</td>
</tr>
<tr>
<td>assumysit</td>
<td>2</td>
</tr>
<tr>
<td>assump</td>
<td>1</td>
</tr>
<tr>
<td>assumptionis</td>
<td>1</td>
</tr>
<tr>
<td>assumptionem</td>
<td>1</td>
</tr>
<tr>
<td>assumption</td>
<td>10</td>
</tr>
<tr>
<td>assume</td>
<td>38</td>
</tr>
<tr>
<td>emprist/imprist</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 8: search term ‘assumpsit’ in the Elizabethan ‘assumpsit’ corpus

From the textual evidence collected and set out in the tables below, we can observe that in the latter part of the 16th century, the use of the term assumpsit was more extensive than in earlier sources as described above, and there was no longer the previous great variety of forms and spellings. Other vocabulary that tended to appear in actions on the case and actions of assumpsit in the earlier sources continued to be prominent in this mainly Elizabethan corpus and shows that assumpsit is still being used in the context of issues of debt (113 hits), rather than contract (15 hits). Debt appears by far the most frequent situation in which assumpsit arises, followed by covenant trespass/quasi-trespass scenarios (e.g. trespass,
damage(s)). The proprietary element of quid pro quo is absent, while the promissory notion (42 hits for ‘promise’) is more prominent.

<table>
<thead>
<tr>
<th>search term</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>assum*</td>
<td>182</td>
<td>-</td>
</tr>
<tr>
<td>consideration</td>
<td>82</td>
<td>23</td>
</tr>
<tr>
<td>contract</td>
<td>15</td>
<td>7</td>
</tr>
<tr>
<td>covenant</td>
<td>35</td>
<td>2</td>
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<tr>
<td>debt</td>
<td>113</td>
<td>22</td>
</tr>
<tr>
<td>promise</td>
<td>42</td>
<td>9</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>trespass</td>
<td>26</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 9: search terms/proximity to ‘assumpsit’ in the Elizabethan ‘assumpsit’ corpus

The application of the clusters and collocates tools did not reveal meaningful results. But the examination of the 182 concordance lines presents a very different picture from the one obtained from the earlier Selden Society corpus. The term appears firmly integrated into the Law French language as a word in its own right, no longer needing an accompanying explanation, nor necessarily placed within a Latin context or phrase. It occurs as a term expressing an established concept. Also, the interchangeability with the word assumption is considerably less frequent than in the earlier sources. While in the SSCa, we can find assumpsit in 41% of the concordance lines and assumption in 28%, in the mainly Elizabethan corpus under discussion here, assumpsit (excluding the other spelling variations) occurs in 70% of the concordance lines, while assumption appears only 5.5% of the time.

The Law French phrase, in which we find assumpsit most frequently is action sur le case sur assumpsit or similar variants. It appears 41 times and frequently acts as the signpost for the nature of the action. While in the earlier corpus, it tended to be the modern editors who labelled actions as
assumpsit, in this later corpus we find the categorisation clearly highlighted in the original sources. The term is used in a highly technical way. Not only can it be found between two full stops as a simple statement of fact or signposting the type of action, but it is frequently combined with a definite article (l'/le) or with prepositions such as *en/in/sur/pur*. We can also see assumpsit repeatedly occurring in combination with *non*, such as *sur non assumpsit* or *plead non assumpsit*, and a few times in Latin phrases, such as *indebitat(us) assumpsit, non assumpsit modo & forma or super se assumpsit*. In 20% of the concordance lines the term assumpsit can be found a second time within twenty words to the left and right of the search term.

The application of the clusters and collocates tools did not reveal meaningful results.

### 3.2 Promise

Before studying the term ‘consideration’ in depth, it may be of interest to pause and examine the use of the word ‘promise’, the notion of which is an important signpost on the road to the concept of consideration.

In the early Year Books and Selden Society sources where we can clearly observe an increase with time of the use of promise:

<table>
<thead>
<tr>
<th>date</th>
<th>source</th>
<th>'promise'</th>
</tr>
</thead>
<tbody>
<tr>
<td>end 13th C</td>
<td>Earliest Engl. Reports (111, 112, 122, 123 SS) - 947 pages</td>
<td>2</td>
</tr>
<tr>
<td>14th C</td>
<td>Y.B. Edward II &amp; III – 6449 pages</td>
<td>7</td>
</tr>
<tr>
<td>end 14th C</td>
<td>Y.B. Richard II – approx. 759 pages</td>
<td>3</td>
</tr>
<tr>
<td>1422</td>
<td>1 Henry VI (50 SS) – 131 pages</td>
<td>none</td>
</tr>
<tr>
<td>1409/1470</td>
<td>10 Edw. IV &amp; 49 Hen. VI (47 SS) – 172 pages</td>
<td>none</td>
</tr>
<tr>
<td>1477-1509</td>
<td>Select Cases Before The King’s Council in The Star Chamber, vol. I (16 SS) – 278 pages (Middle English)</td>
<td>4</td>
</tr>
<tr>
<td>1485-1509</td>
<td>Select Cases in the Council of Henry VII (75 SS) – 169 pages (Middle English)</td>
<td>6</td>
</tr>
</tbody>
</table>
The 13th & 14th centuries Year Books and Reports

As discussed in chapter V above, the concept of consideration originated in the growing need to allow informal agreements to become enforceable under certain circumstances. The earliest actions were (quasi-) trespass on the case, from which the action of assumpsit developed. Viewed from our 21st century perspective, we clearly consider these to be situations at the heart of which a promise was made and relied upon.

As we observed from the Anglo-Norman sources, which date from roughly the same period, the word ‘promise’ occurred 443 times, which is a similar frequency to ‘debt’ (462 instances). We also find 265 instances of ‘covenant’ and 743 instances of ‘trespass’, but only 62 instances of ‘consideration’. In the early legal sources the use of the word promise appears rather reluctant and, hence, the corresponding notion somewhat tentative. Instead, the meanings are expressed in terms of undertakings to be assumed. The step from the hitherto proprietary thinking of a contractual exchange in actions of debt, was still too deeply rooted, to give way to the new promissory thinking of assumpsit and later the concept of consideration.

The result that may surprise at first is the seven matches for promise in the Year Books of Edward II and his successor Edward III. It must be stressed that these specific sources represent a substantial corpus by themselves,

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60 Detailed references can be found in annex 2 (iii) and (iv)
covering three quarters of a century, while most other sources only cover about half of that time span. Four references were part of declarative statements promising to undertake duties graciously, and that gifts and promises would not distract men from carrying out their duty to the best of their abilities.\textsuperscript{61} Of the 7 matches for ‘promise’, only one – promising to cure a wounded hand - described a situation that was characteristic for trespass on the case or assumpsit actions.\textsuperscript{62} In the Year Books of the reign of Richard II, which covered the last quarter of the 14\textsuperscript{th} century, we find three references to ‘promise’, all in the report of the same case, namely a 1383 action in debt for the payment of a hundred shillings or a pipe of wine for developing businesses on behalf of the defendant.\textsuperscript{63} This 13\textsuperscript{th} and 14\textsuperscript{th} century textual evidence, confirms that the use of the term ‘promise’ in the context of making an informal agreement enforceable was not widespread.

\textbf{The 15\textsuperscript{th}, 16\textsuperscript{th} and 17\textsuperscript{th} centuries Year Books and Reports}

Moving to the 15\textsuperscript{th} century sources, we do not find a vastly increased use of the word promise either. In the Select Cases Before The King’s Council in The Star Chamber, vol. I\textsuperscript{64} and the Select Cases in the Council of Henry VII\textsuperscript{65}, the term occurs ten times, but in only three cases does it relate to a contractual situation. It is also interesting to note that these two reports are in Middle English rather than Law French and there is a more frequent use of ‘promise’ in the non-contractual/legal sense.

By the end of the 15\textsuperscript{th} and beginning of the 16\textsuperscript{th} century, informal agreements could no longer be disregarded for lack of deed. Relief was granted to

\textsuperscript{61} For example: “\textit{En le comencement del eyre nous vous promismes de faire grace de ceo qe a nous appendoit}”; in: (1329-1330) 3 & 4 Edward III, or 97 Selden Society at 195

\textit{“...et ceo ne levrail pur donue ne pur promesse ne pur amur ne pur haungre ne pur nul ren qe issi ne servirai a moun power”}; in: (1321) 14 Edward II, Part I, or 85 Selden Society at 12

\textit{“...ly promist de ly garrir de la play pur xl. S., et il rescueut les xl. S. et il nad my garry, eynz par sa defaute il ad perdu sa mayn”}; in: Eyre of London, (1321) 14 Edward II, Part II, or 86 Selden Society, at 353

\textsuperscript{62} (1383) 6 Richard II, or Ames Foundation Publications, at 217

\textsuperscript{63} Select Cases Before the King’s Council in the Star Chamber commonly called The Court of Star Chamber, vol. I (A.D. 1477-1509) 16 Selden Society

\textsuperscript{64} Select Cases Before the King’s Council in the Star Chamber commonly called The Court of Star Chamber, vol. II (A.D. 1509-1544) 25 Selden Society
Chapter VI: Corpus Linguistic Analysis

damages due to malfeasance, nonfeasance and deceit, but also in cases
where the defendant had no benefit from the deceit yet the plaintiff suffered
loss and damage. In 1523 St. German wrote in his Dialogue 66 which was not
a law report but more akin to a treatise:

“If he to whom the promise is made have a charge by reason of the
promise […] he shall have an action […] though he that made the
promise had no worldly profit by it.”

This clearly indicates that the focus of the newly evolving action, was less the
plaintiff’s deception/defendant’s deceit (tort) but rather the
promise/undertaking (contract) made at the start of the interaction between
the two parties. Yet, despite the fact that St. German uses the term ‘promise’
in his writings, it took a while to trickle through and feature prominently in the
law reports to describe and discuss the enforceability of informal
agreements.

During the Elizabethan reign in the 16\textsuperscript{th} century and into the early 17\textsuperscript{th}
century, the use of the word ‘promise’ not only increased, but also adopted a
more specifically legal meaning, as it appeared in restricted contexts of
contract formation.

The Selden Society ‘promise’ corpus (SSCp)

Two corpora were constituted based on the word ‘promise’ to carry out a
detailed linguistics analysis and obtain more quantitative data: the SSCp and
the ECp. 67 The corpus (SSCp) compiled from searching the 13\textsuperscript{th} to mid 16\textsuperscript{th}
century Selden Society sources 68 for the word promise consists of 53
downloaded documents with 88 matches for the search term, 33,862 word
tokens and 7,485 word types; the original source material consisted of 4,109
pages.

66 Ch. St. German (1518/1974), Doctor and Student, Second Dialogue, Chapter 24, edited
by T. Plucknett, J. Barton (1974) for the Selden Society, vol. 91
67 For an overview of the corpora, see annex 3.
68 Detailed references are listed in annex 2 (iv).
From the advanced proximity search of 20 words to the right and left of ‘promise’, we cannot observe any outstanding figures (see table below). It appears that promise is more often discussed in a context of covenant and debt than contract. The term assumpsit also figures more prominently than consideration in the context of making promises.

<table>
<thead>
<tr>
<th>search term</th>
<th>hits</th>
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</tr>
</thead>
<tbody>
<tr>
<td>promise</td>
<td>88</td>
<td>-</td>
</tr>
<tr>
<td>assumpsit/assumption/assume</td>
<td>14</td>
<td>4</td>
</tr>
<tr>
<td>consideration</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>contract</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>covenant</td>
<td>27</td>
<td>1</td>
</tr>
<tr>
<td>debt</td>
<td>29</td>
<td>0</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>trespass</td>
<td>8</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 11: search terms/proximity to ‘promise’ in the Selden Society ‘promise’ corpus

The application of the clusters and collocates tools did not reveal meaningful results.

The word ‘promise’ is never a technical term. It always describes the act of making a declaration or assurance to another person, stating a commitment to giving/doing/refraining from doing something or guaranteeing that a specific thing will or will not happen. In the 88 concordance lines from the SSCp, we find that the use of ‘promise’ in a contractual context (i.e. the exchange of a promise in consideration of something) only accounts for 36% of the concordance lines (32/88). In the other cases, we are dealing with promises in general or in situations of affirming loyalty.

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69 See definitions in the Oxford English Dictionary
Looking closely at the 32 concordance lines where ‘promise’ appears in a contractual context, we can observe that the surrounding vocabulary is highly technical, littered with legal terms and a significantly high proportion of the vocabulary is related to payments and finances in general. In 66% we find some specifically legal terminology within 10 words of the search term, such as covenant, testator, plaintiff, defendant. In just under half of the KWIC lines (47% or 15/32) we find vocabulary related to financial matters, such as payment, paying, money, argent.

As the corpus spans a long period of time, the documents of the early 16th century sources were isolated, removing the documents drawn from texts of the other centuries. This allows for a better understanding of the tendencies during the early 16th century, which was a pivotal time for both the development of the concept and terminology. Studying these 56 (early 16th c.) concordance lines separately, it was found that in 43% of the KWIC lines (24/56) ‘promise’ was used in a contractual sense. As we shall see later, this will considerably increase as the century progresses.

**The Elizabethan ‘promise’ corpus (ECp)**

The second corpus built on the search term of ‘promise’ was constituted from the Elizabethan material that can be found in volumes 72, 73, and 123 of the English Reports (ECp). It contains 35 documents (9 from vol. 72, 14 from vol. 73, 12 from vol. 123), has 32,213 word tokens and 6,041 word types and shows 87 hits for promise; the original source material consisted of 1,831 pages.

In this corpus, we can observe that ‘promise’ appeared considerably more frequently in a contractual context than in the SSCp, namely in 79 out of the 87 KWIC lines. This represents a leap of 55 points to 91% (79/87). The fundamental meaning of ‘promise’ remains a general language one, but it is the context that changes. Of the 79 KWIC lines that deal with a contractual situation, we find the search term surrounded by specifically legal
terminology (e.g. assumpsit, covenant, demurer, testator etc.) in 53 lines (67%) and by vocabulary relating to financial matters (e.g. payment, pay, debt, sum etc.) in 28 lines (35%).

From the proximity search, we can observe that ‘promise’ occurs in contexts that also discuss notions of consideration, assumpsit and debt, though only the first can be found in closer proximity spanning twenty words to the left and right:

<table>
<thead>
<tr>
<th>search term (incl. various spellings)</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>promise</td>
<td>87</td>
<td>-</td>
</tr>
<tr>
<td>assumpsit/assumption/assume</td>
<td>47</td>
<td>8</td>
</tr>
<tr>
<td>consideration</td>
<td>57</td>
<td>15</td>
</tr>
<tr>
<td>contract</td>
<td>17</td>
<td>4</td>
</tr>
<tr>
<td>covenant</td>
<td>37</td>
<td>3</td>
</tr>
<tr>
<td>debt</td>
<td>45</td>
<td>2</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>trespass</td>
<td>11</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 12: search terms/proximity to ‘promise’ in the Elizabethan ‘promise’ corpus

‘Consideration’ also comes high on the list of words with which ‘promise’ tends to collocate: it is ranked 29th of 659 collocate types with a frequency of 11 in a word span of 10 to the left and right, while assumpsit is ranked 44th with a frequency of 7.
Table 13: collocates of ‘promise’ in the ECp

While the context in which ‘promise’ occurs may tend to be a contractual one, the more frequent occurring clusters involving ‘promise’ come from the general language. The first technical language clusters ‘promissionem & assumptionem’ and ‘sur case sur promise’ appear only once or twice respectively.

Table 14: clusters with ‘promise’ in the ECc
This table is also a good illustration of how the inconsistency in spelling results in every spelling variation having a value of its own.

3.3 Consideration

Turning to the main focus of this analysis, namely the word ‘consideration’, we can observe a steady increase in its use in law reporting. In this section we will examine this rise and analyse the shifts in semantic content of the term.

The 13\textsuperscript{th}, 14\textsuperscript{th} & 15\textsuperscript{th} centuries Year Books and Reports

In the 13\textsuperscript{th}, 14\textsuperscript{th} and 15\textsuperscript{th} century law reporting sources\textsuperscript{70}, the word 'consideration' is very rarely used and any occurrence has a general language meaning such as: considering a question, having regard to, in recognition of, etc. The original Latin texts frequently include the phrase \textit{ideo consideratum est} which is also a general language use, though embedded in a specific legal context.

In the 947 pages of the four volumes of the Earliest English Law Reports\textsuperscript{71} all dated from the end of the 13\textsuperscript{th} century, we can find no hits in any original Law French source texts for 'consideration' in its various spellings. The word is used neither in a general sense nor with a specifically legal meaning. In the eight Year Books of Richard II's reign, dating from 1378-79 and 1382-1390\textsuperscript{72}

\textsuperscript{70} Earliest English Reports vol. I, II, III, IV (to 1284, 1285-1289, 1279-89) 111, 112, 122, 123 Selden Society; Year Books of Richard II (1378-79, 1382-1390) Ames Foundation Publications; (1422) Year Book 1 Henry VI, 50 Selden Society; (1470) Year Books of 10 Edward IV and 49 Henry VI, 47 Selden Society


and representing some 759 pages, there are no hits in any original source texts for 'consideration' in its various spellings.

The 15\(^{th}\) century sources edited for the Selden Society show similar trends. For example, the Year Book of Henry VI from (1422)\(^{73}\) provides no hits for 'consideration' in its 131 pages. The same is true of the 172 pages of the Year Books of 10 Edward IV and 49 Henry VI (1470)\(^{74}\), while in the Caryll Reports (1485-1499)\(^{75}\), we find 2 matches for 'consideration', both used in general language contexts.

The 16\(^{th}\) & 17\(^{th}\) centuries Year Books and Reports

It is only in the 16\(^{th}\) century sources\(^{76}\) that we find the term consideration used more frequently and in an increasingly technical legal sense. In the Year Books of 12-14 Henry VIII's reign\(^{77}\), covering the years 1520-1523, we have 21 matches for 'consideration', exclusively used in the legal sense as payment or reward or as the promise/object of an agreement. A proximity search between 'consideration' and other contract vocabulary\(^{78}\) reveals that although there are similar numbers of hits for both 'consideration' and 'contract', these two search terms cannot be found in proximity of 20 words from each other. The same holds for 'promise', 'covenant and 'debt'. There are, however, 14 proximity matches with grant/graunt (out of a total of 215 hits for grant/graunt).

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\(^{73}\) (1422) 1 Henry VI, 50 Selden Society, edited by C.H. Williams; London: Bernard Quaritch, 1933

\(^{74}\) (1470) Year Book of 10 Edward IV and 49 Henry VI, edited by N. Neilson, 47 Selden Society, London: Bernard Quaritch 1931


\(^{78}\) All the various spelling variations listed above have been respected in the search, which was carried out for every combination for spelling between both the search term and the proximity term.
Similarly, in the Dalison reports\textsuperscript{79} the 6 matches for ‘consideration’ are all in the legal sense. In the reports from the lost notebooks of Dyer\textsuperscript{80}, the 36 matches for ‘consideration’, only 9 are in the general sense, while the remaining 27 hits are all in the legal sense. The proximity searches in the Dyer Notebooks show the same trend as for the Henry VIII Year Books: 8 proximity matches between ‘consideration and grant/graunt (out of a total of 162 hits for grant/graunt), 2 for ‘covenant’ and 1 hit for ‘promise’ and none for ‘debt’ and ‘contract’.

As the 16\textsuperscript{th} century progressed, and even more during the first half of the 17\textsuperscript{th} century, we find ‘consideration’ used increasingly in specifically technical legal meanings. The lexical and grammatical patterning surrounding ‘consideration’ signposts an abstract and autonomous concept, rather than a descriptive general language context, which has been prominent hitherto. This will be discussed in detail in relation to the Elizabethan and Stuart corpora under the heading for the specialist and abstract uses.

**The Selden Society ‘consideration’ corpus (SSCc)**

Three sets of corpora were constituted based on the word ‘consideration’ for a more detailed linguistics analysis: the SSCc for the early period, the ECc for the Elizabethan reign and the SCc for the early Stuart era.\textsuperscript{81} This study aims to reveal not only the use of the term ‘consideration’ in quantitative terms but also in relation to semantic shifts; this section will, therefore, examine in greater detail the language that constitutes the context of the use of ‘consideration’ and which will enable us to draw conclusions on the semantic evolution of that term.


\textsuperscript{81} For an overview of the corpora, see annex 3
The SSCc compiled from searching the 13\textsuperscript{th} to mid 16\textsuperscript{th} centuries Selden Society sources\textsuperscript{82} for the word ‘consideration’ consists of 57 downloaded documents with 38,899 word tokens and 6,716 word types; the original source material consisted of 4,109 pages. Searching that corpus for ‘consideration’ resulted in 102 matches, while the search for other terms showed that covenant, debt and trespass were more prominent than contract. The advance proximity search gave no significant results.

<table>
<thead>
<tr>
<th>search term (incl. various spellings)</th>
<th>hits</th>
<th>proximity</th>
</tr>
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<tbody>
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<td>consideration</td>
<td>102</td>
<td>-</td>
</tr>
<tr>
<td>assumpsit/assumption/assume</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>contract</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>covenant</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>debt</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>promise</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>trespass</td>
<td>12</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 15: search terms/proximity to ‘consideration’ in the Selden Soc. ‘consideration’ corpus

The element that characterised this corpus, in particular in comparison to the later corpora of the Elizabethan and Stuart era, discussed below, is the high frequency of ‘consideration’ in a general language meaning. In 43\% of the concordance lines we find consideration used in the sense of ‘taking into account’. It is also interesting that the context of these general language KWIC lines is almost exclusively in Middle English. For example:

“In tender consideration whereof, and for asmuch as the saied Lorde Dier did greadeflie mislike our service and manner and dealing in the publique administration of justice....”\textsuperscript{83}

\textsuperscript{82} Detailed references are listed in annex 2 (iv)
\textsuperscript{83} In: Reports from the Lost Notebooks of Sir James Dyer Part 2 or 110 Selden Society 314
It only occurs three times in Anglo-French. For example:

“Sir, le defendant gist languishant en son lict, par que nous priomus que il poit estre par attornay. Mes jeo say bien que sans tiel consideration il ne respondra par attorney, mes convient apere en proper person…”

In 17% of the concordance lines, consideration is used in a general language meaning but embedded in a legal technical context and in 38% of the lines the word has a technical meaning. An example for each:

“Nota que si home a cest jour ou devant grant al auter per son fait que en consideration de son bon service que il ad fait ou a faire a luy ou en consideration que son file marier ove moye ou mon fittes que il avera tout le terre en un ville et cest graunt est per fait et nient enrollle que ore nul use est alterate sur cest graunt entant que il va per voy de graunt et done soit execute per liverey de seisin …”

“Et cest plee per Portman Justice et Gawdy Serjeant fuit tenus bon plee en barr et le bargaine bon et cest consideration alter le use en le terre comen que la est un rent reserve devant lestatute…”

<table>
<thead>
<tr>
<th>SSCconsideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>language</td>
</tr>
<tr>
<td>General language</td>
</tr>
<tr>
<td>General legal language</td>
</tr>
<tr>
<td>Technical language</td>
</tr>
<tr>
<td>Latin</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
</tr>
</tbody>
</table>

Table 16: ‘consideration’ in the SSCc

84 “Sir, the defendant is lying sick in bed, and so we pray that he may appear by attorney. I am quite aware that in other circumstances he would not be able to answer by attorney, but must appear in his own person…” in: Reports of Cases by John Caryll Part 1, or 115 Selden Society 113

85 “Note that if someone at the present day (or before) grants to someone else by his deed that, in consideration of his good service that he has done or is to do for him, or in consideration that his daughter should marry me or my son, he should have all the land in a vill, and this grant is by deed and not enrolled, no use is altered upon this grant inasmuch as it goes by way of grant and gift and takes no effect until the gift is executed by livery of seisin.” in: Reports of William Dalison, or 124 Selden Society 50

86 “And this plea was held a good plea in bar by Portman J. and Gawdy, serjeant, and the bargain good; and this consideration alters the use in the land even though there is a rent reserved before the statute…” in: Reports of William Dalison, or 124 Selden Society 60
Of the 102 KWIC lines, 48 are in Middle English, of which 41 lines are of the general language category, 5 lines of the general legal language and 2 lines of the technical language:

### SSCconsideration – Middle English uses

<table>
<thead>
<tr>
<th>language</th>
<th>matches</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>General language</td>
<td>41</td>
<td>85.5%</td>
</tr>
<tr>
<td>General legal language</td>
<td>5</td>
<td>10.5%</td>
</tr>
<tr>
<td>Technical language</td>
<td>2</td>
<td>4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>48</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 17: Middle English uses of ‘consideration’ in the SSCc

It appears that the technical legal sense of ‘consideration’ was developed in Law French and not exported at this stage into Middle English.

The high proportion of general language use is also reflected in the results applying the collocate and clusters tools. When searching for the words that collocate with ‘consideration’, the first general terms that can take on a legal meaning in a legal context, are ‘graunt’, which also appears 112 times in the entire corpus, and ‘terre’ which can be found 182 times in the entire corpus. The first two specifically technical terms are: ‘feffee’ (36 times in the whole corpus) and ‘indenture’ (11 times in the entire corpus).

### SSCconsideration

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>freq (L)</th>
<th>freq (R)</th>
<th>collocate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>81</td>
<td>38</td>
<td>43</td>
<td>the</td>
</tr>
<tr>
<td>2</td>
<td>54</td>
<td>23</td>
<td>31</td>
<td>le</td>
</tr>
<tr>
<td>23</td>
<td>13</td>
<td>10</td>
<td>3</td>
<td>graunt</td>
</tr>
<tr>
<td>32</td>
<td>10</td>
<td>3</td>
<td>7</td>
<td>terre</td>
</tr>
<tr>
<td>65</td>
<td>6</td>
<td>5</td>
<td>1</td>
<td>feffee</td>
</tr>
<tr>
<td>71</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>indenture</td>
</tr>
</tbody>
</table>

Table 18: collocates of ‘consideration’ in the SSCc
The same can be observed from the cluster search. Any clusters occurring most frequently have general language meanings. The technical legal language cluster ‘est implie consideration’ only occurs twice. Similarly, the cluster ‘consideration dun mariaige’ which has a general language meaning but within a legal language context can also be found in only two instances.

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on left)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>7</td>
<td>7</td>
<td>consideracion whereof</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
<td>5</td>
<td>consideration of</td>
</tr>
<tr>
<td>13</td>
<td>2</td>
<td>2</td>
<td>consideracion of the premisses</td>
</tr>
<tr>
<td>20</td>
<td>2</td>
<td>2</td>
<td>consideration dun mariaige</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on right)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>12</td>
<td>12</td>
<td>in consideracion</td>
</tr>
<tr>
<td>2</td>
<td>7</td>
<td>7</td>
<td>in consideration</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>4</td>
<td>en consideration</td>
</tr>
<tr>
<td>8</td>
<td>3</td>
<td>3</td>
<td>ascun consideration</td>
</tr>
<tr>
<td>19</td>
<td>2</td>
<td>2</td>
<td>est implie consideration</td>
</tr>
</tbody>
</table>

Table 19: clusters with ‘consideration’ in the SSCc

The Elizabethan ‘consideration’ corpus (ECc)

The corpus constituted from the Elizabethan sources consists of 114 downloads (60 documents from vol. 72, 7 documents from vol. 73, and 47 documents from vol. 123). It has 176,449 word tokens and 13,787 word types; the original source material consisted of 1,831 pages. As before, this can only be treated as indicative in view of the spelling variations.

The concordance search for consideration with AntConc in this particular corpus gave 392 concordance hits. A proximity search, using the advanced search tools showed the word 'consideration' to be found 51 times within 20 words of 'covenant', 25 instances of 'assumpsit', 20 instances of 'promise' and 13 instances of 'debt' but again only twice in the proximity of 'contract'.

The same corpus, originally selected on the basis of the occurrence of the term ‘consideration’, was also searched for other search terms. All results can be found in table 20 below.

<table>
<thead>
<tr>
<th>Search term</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>consideration</td>
<td>392</td>
<td>-</td>
</tr>
<tr>
<td>assum*</td>
<td>109</td>
<td>25</td>
</tr>
<tr>
<td>contract</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>covenant</td>
<td>299</td>
<td>51</td>
</tr>
<tr>
<td>debt</td>
<td>79</td>
<td>13</td>
</tr>
<tr>
<td>promise</td>
<td>51</td>
<td>20</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>trespass</td>
<td>41</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 20: search terms/proximity to ‘consideration’ in the Elizabethan ‘consideration’ corpus

From this textual evidence and the proximity search, in particular, it appears that the term consideration can frequently be found in discussions involving covenant. The latter occurs 299 times in this corpus, and in 17% of the cases it can be found in the proximity of 20 words to the left and to the right of consideration. Debt is less prominent than it had been during the preceding centuries, when the occurrence of the word debt tended to outstrip that of covenant (see above). We also have a low frequency of the term contract, of which only 13% can be found in the proximity of consideration.

Of particular interest is the relatively higher frequency of the word promise, of which 39% can be found in the proximity of consideration in this particular corpus (not to be confused with the previous corpora, SSCp and ECp, 87 The various spellings were covered.
88 Using the advanced search tool searching in the proximity of twenty words to the left and to the right of the search term, for specific other terms. The various combinations of the different spellings were all covered.
compiled specifically with the search term ‘promise, described in section 3.2 above). To obtain contextual information on the 51 occurrence of ‘promise’ in the ECc, the 51 concordance lines were studied more closely. These KWIC lines show that the notion of promise was frequently in a context of legal discussion. In almost 75%, the word promise could be found in close proximity (10 words to the left and right) of specifically legal vocabulary or legal phrases. In the other cases, vocabulary relating to financial matters, such as paying/payment, selling, administrator, assets were in close proximity to the ‘promise’. As far as the legal vocabulary is concerned, in approximately half of the 51 concordance hits for promise, we find in its immediate vicinity words such as assumpsit, consideration, covenant, grant, action, judgement, demur, plaintiff etc. In 8 concordance hits, promise is a part of the more abstract legal expression: *action sur le case sur promise*, or just *action sur promise*.

The application of the collocation and clusters tools gave no significant results. It underlined once again how inconsistency in spelling could skew the results, as every spelling variation has a collocate/clusters value of its own.

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>freq (L)</th>
<th>freq (R)</th>
<th>collocate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>380</td>
<td>206</td>
<td>174</td>
<td>le</td>
</tr>
<tr>
<td>8</td>
<td>116</td>
<td>62</td>
<td>54</td>
<td>est</td>
</tr>
<tr>
<td>21</td>
<td>59</td>
<td>16</td>
<td>43</td>
<td>marriage</td>
</tr>
<tr>
<td>28</td>
<td>46</td>
<td>33</td>
<td>13</td>
<td>covenant</td>
</tr>
<tr>
<td>36</td>
<td>34</td>
<td>16</td>
<td>18</td>
<td>terre</td>
</tr>
</tbody>
</table>

Table 21: collocates of ‘consideration’ in the ECc
As far as the occurrence of the term ‘consideration’ in the ECc is concerned, we find the term in a more specifically legal technical use rather than in a general language one, in the overwhelming majority of the 392 concordance lines.

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on left)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>34</td>
<td>26</td>
<td>consideration de</td>
</tr>
<tr>
<td>2</td>
<td>22</td>
<td>20</td>
<td>consideration del</td>
</tr>
<tr>
<td>9</td>
<td>6</td>
<td>4</td>
<td>consideration de marriage</td>
</tr>
<tr>
<td>13</td>
<td>4</td>
<td>2</td>
<td>consideracon de marriage</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on right)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>38</td>
<td>27</td>
<td>in consideration</td>
</tr>
<tr>
<td>2</td>
<td>30</td>
<td>18</td>
<td>en consideration</td>
</tr>
<tr>
<td>5</td>
<td>9</td>
<td>9</td>
<td>en consideracin</td>
</tr>
<tr>
<td>14</td>
<td>4</td>
<td>2</td>
<td>en considerac</td>
</tr>
<tr>
<td>4</td>
<td>11</td>
<td>11</td>
<td>bone consideration</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
<td>5</td>
<td>ascun consideration</td>
</tr>
<tr>
<td>13</td>
<td>4</td>
<td>2</td>
<td>available considerac</td>
</tr>
</tbody>
</table>

Table 22: clusters with of ‘consideration’ in the ECc

<table>
<thead>
<tr>
<th>Language</th>
<th>matches</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>General language</td>
<td>43</td>
<td>11%</td>
</tr>
<tr>
<td>General legal language</td>
<td>111</td>
<td>28%</td>
</tr>
<tr>
<td>Technical language</td>
<td>227</td>
<td>58%</td>
</tr>
<tr>
<td>Latin</td>
<td>11</td>
<td>3%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>392</strong></td>
<td>-</td>
</tr>
</tbody>
</table>

Table 23: ‘consideration’ in the ECc

Latin uses

The word consideration occurs 11 times in a Latin text context. These were not included in this study, as it would contribute little to the understanding of
how the language used in the development of the concept of consideration shifted from a general language use to a specialised one. The Latin uses of consideration can usually be found in a (or several) Latin phrase(s) within an Anglo-French text, rather than in an entirely Latin text. For example:

\[\text{...in consideratione maritagi}^{89}\]
\[\text{...pro considerationibus pradict’ ad omnis tempora}^{90}\]
\[\text{...quod quidem judicium quo ad consideration}^{91}\]
\[\text{...ideo consideratum est.}\]

Its use tends to be in the general language meaning of ‘taking into consideration’, rather than in the contractual sense of the element that makes an informal agreement enforceable.

**General language uses**

In the sub-section of general language use, consideration is to be understood in terms of careful thought/contemplation, viewing, observing typically over a period of time, taking into account, motives/reasons, deliberation, opinion or conclusion; also included is the notion of kindness and thoughtfulness for another and esteem, importance, consequences among men and for things. In 43 concordance hits of this particular corpus, ‘consideration’ appears within the context of a general language meaning. For example:

\[\text{... et pur difficulty le case hors del court fuit referre al consideration des 2 Chiefs Jutices Popham & amp;}^{92}\]
\[\text{... et apres argument & consideration del Case lea Justices ...}^{93}\]
\[\text{... l’opinion de eux touts sur conference ensemble, et consideration ewe de tous les livres et cases ...}^{94}\]
\[\text{... ceo fuit l’opinion sur consideracon de tous les livres ...}^{95}\]
\[\text{... n’est done sur deliberate consideration de le statute ...}^{96}\]

\[^{89}\text{1 Anderson 19, or 123 Eng. Rep. at 331-334, 1 Anderson 138, or 123 Eng. Rep. at 395-398}\]
\[^{90}\text{72 Eng. Rep. 635}\]
\[^{92}\text{72 Eng. Rep. 872-3}\]
\[^{93}\text{1 Anderson 12, or 123 Eng. Rep. at 327}\]
\[^{94}\text{Moore (K.B.) 145, or 72 Eng. Rep. at 495}\]
\[^{95}\text{Moore (K.B.) 540, or 72 Eng. Rep. 744}\]
In the remaining 338 concordance hits, we find the term ‘consideration’ appearing in a continuum of uses ranging from general language use in a legal context to an technical use in a specialised context. The general legal use can be defined in terms of consideration as payment or reward and as the promise/object of a contract. It describes a concrete situation of a causal link between two elements necessary to making an agreement: something is said/given/paid/done in consideration of something said/given/paid/done. These were the basic elements required for the formation of a legally binding informal agreement. When the term is used in an abstract way – e.g. “the instrument imported a prima facie consideration” - it no longer refers to a concrete causal link between two events, as is the case with the expression ‘in consideration of’. Instead, it has become a cover term expressing an abstract concept or range of ideas.

While the collocation ‘in consideration of’ is a general language construct adopted in the legal context of contract, it can be used in a wide range of semantic meanings, both legal and non-legal. When consideration is used as part of a specialised language, it is restricted semantically to the specialised contexts in question. It tends to be combined with a relatively restricted set of technical words, which in itself points to technical language: the more limited the vocabulary in proximity, the more specialised the language. Grammatical features are further important pointers to the use of specialised language. In concordance lines that show a more abstract use of the word consideration, it tends to be used as full noun, sometimes even in a one-word sentence. To that extent it is a cover term that stands for abstracts concepts and thus becomes a part of specialised and technical language.

---

96 Moore (K.B.) 439, or 72 Eng. Rep. 681-682
General language in legal use and context

In just over 28% or 111 of the 392 concordance lines we find the word consideration in the causal collocation ‘in consideration of’ or different variations. In the corpus, this phrase is in its Middle/Modern English versions as well as the Anglo-French equivalents en/in consideration d’/de/del/do/dun. Also included are similar causal phrases such en/in consideration que and pur consideration del. In other words, while the term consideration appears as a noun, it does not behave as a full noun, but rather depends on the phraseological pattern without which it would not have the same meaning. The function of this phrase is to provide a causal link between two events or elements at the centre of the concept of striking an informal agreement.

With reference to the functional linguistic conception of language, as discussed in chapter III/1, the phrase ‘in consideration of’ was studied in relation to the experiential function and meanings encoded from the experience of reality. In the case of this particular phrase, we are on the outer layer of the experience:

- something is (done) = PROCESS
- in relation to something or someone = PARTICIPANTS
- in consideration of = CIRCUMSTANCES

For example:

…le covenant est fait en consideration avancer les issues de son corps…

…le use est limit per fait en consideration de brotherly love…

…le case sur l’assumpsit del def. en consideration que le pl’ assume…

…count que le def. en consideration que le pl’ avoit vendus al def…

…le dit. def. pur consideration del marriage fait perenter le fitz…

---

97 See in particular figure 3 in chapter III/1
98 Moore (K.B.) 495, or 72 Eng. Rep. 717
99 Ibid.
100 Moore (K.B.) 548, or 72 Eng. Rep. 750
101 Moore (K.B.) 700, or 72 Eng. Rep. 849
102 Benloe 58, or 123 Eng. Rep. 45
'Consideration' in these general legal language uses is a part of the outer blue layer of experience and thus twice removed from the inner core of the experience. We will see later how this changes in the KWIC lines where consideration can be found in legal technical meaning.

When considering the KWIC concordance lines in greater detail, we can observe that the language to the right of the search term tends to describe common events, ‘things’ done or affections, duties and services undertaken by people. By far the most common word is marriage which occurs 34 times. Similar matters such as natural affection, the bringing up of children, fatherly care or brotherly love, loyal service can also be found as elements in the consideration of which agreements are made. Furthermore, words relating to financial matters such as payments or debts or the mention of specific sums of money can be found in 16 concordance lines and the words plaintiff or defendant 18 times. The language to the left of the search term is of a more specialised nature. We can count considerably more technical terms describing legal instruments or legal persons or titles. ‘Covenant’ occurs 9 times before the search term, in contrast to twice after it. ‘Indenture’ can be found 8 times before and only once after the search term. ‘Assumpsit’ a dozen times before but only twice after it. The financial vocabulary is also more technical: we can find words such as fine, purchase, fee, which were far less prominent before the search terms. Furthermore, words relating to property and related legal instruments or legal titles occur more frequently before the search term, such as intestate, legacy, estate, grant, possession, heirs, testator, enfeoffor, executor etc. In other words, the collocation ‘in consideration of’ in the context of law reporting appears to link specifically legal instruments or concepts with more common events, ‘things’ done or affections, duties and services undertaken by people, frequently in a private or family context.

From this textual evidence, we can observe that the word consideration occurs in general language uses expressing the causal link between two elements or events that are necessary for striking an agreement. However,
the textual context clearly shows that we are dealing with specialist technical matters of the law. While the collocation ‘in consideration of’ could be used in any situation of exchange, in this corpus we have a relatively restricted set of vocabulary concerned with legal instruments and persons, payments, indenture, estate etc. in exchange of mainly marriage and other family matters. In other words, both the meaning and function of the collocation is in a general language sense but it is the lexical and semantic context that is highly technical.

Specialist and technical uses

In 58% or 227 of the 392 concordance lines, the word consideration can be found in a specialised context more akin to an abstract concept. It is frequently a one-word sentence, where the word is between two full-stops and thus signposting a conceptual meaning. As discussed above, the main pointers to the use of technical language can be observed in the interaction between the lexical and grammatical patterning. The word ‘consideration’ in the technical context is no longer embedded and dependent on a causal prepositional phrase but appears and behaves as a full noun and in combination with adjectives, articles, pronouns and prepositions.

The most common accompanying elements (words span of 20 to the left and right) are adjectives (60 times or 26%) that usually precede the noun, such as good, effectual, valuable, available, (in)sufficient etc. The combination with determiners is also frequent, for example definite articles, mainly in the singular form: *le(s) consideration(s)* (47 times or 21%) or quantifying determiners such as *nul* or with prepositions such as *pur, sans, sur, de* etc. (38 times or 17%).

<table>
<thead>
<tr>
<th>words accompanying ‘consideration’</th>
<th>occurrence</th>
<th>percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>adjectives, e.g. good, effectual, valuable</td>
<td>60</td>
<td>26%</td>
</tr>
<tr>
<td>determiners, e.g. le, les</td>
<td>47</td>
<td>21%</td>
</tr>
<tr>
<td>prepositions, e.g. pur, sans, sur, de</td>
<td>38</td>
<td>17%</td>
</tr>
</tbody>
</table>

Table 24: words associated with ‘consideration’ in the ECc
As far as verbs are concerned, only those directly associated with the noun ‘consideration’ were taken into account. Any verb associated with other words, even if in the immediate vicinity of ‘consideration’ was not taken into account. The verb mostly associated with the noun ‘consideration’ is ester (to be), in 42 of these concordance lines it can be found before and in 32 lines after the noun. The verbs aver (to have) and faire (see table 5 below) are also more frequent than average. Although these are the among the most frequent used verbs in the English language, all three represent material processes and associate the noun consideration in a function of participants within the clause. In roughly 28% we can find the noun consideration in the traditional class of subject, while in two thirds of the concordance lines, we find the noun can be categorised as object, usually directly linked to a verb.

<table>
<thead>
<tr>
<th>verb</th>
<th>to left (10 words)</th>
<th>search term</th>
<th>to right (10 words)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ester (être)</td>
<td>42 consideration</td>
<td></td>
<td>32</td>
</tr>
<tr>
<td>aver (avoir)</td>
<td>6 consideration</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>faire</td>
<td>8 consideration</td>
<td></td>
<td>8</td>
</tr>
</tbody>
</table>

Table 25: verbs associated with ‘consideration’

Moving beyond traditional grammar classification of words and considering the function they play, we refer to the functional linguistic conception of language, as discussed in chapter III/1. As the word consideration appears in its technical and abstract uses, its experiential function shifts from the outer blue layer to the middle green layer, namely that of the participants in the process, most commonly realised by nominal groups.

Examining the experiential meaning of ‘consideration’ in its specialised use, we can observe that the way experience and reality is encoded in those cases represents a major shift in the function of the use of ‘consideration’. With reference to the functional linguistic conception of language, as
discussed in chapter III/1, the experiential function of ‘consideration’ moves from the outer blue layer to the middle green layer, namely that of the participants in the process, most commonly realised by nominal groups. In this way, it becomes a signpost to signal an autonomous concept, rather than a causal connector, as discussed in the previous paragraph. Considering the unit of meaning rather than the unit of analysis according to traditional grammar, we find that the role in which the word consideration appears is that of participant (notion of ‘thingness’), sometimes as actor, sometimes as goal. The examples given below show that the term tends to appear in a context of material processes (what-happened? or what-did-X-do?) rather than behavioural processes (encoding physiological or psychological behaviour) or mental processes (reflecting the inner world of cognition, perception, (dis)liking, inclination).

Example from the ECc:

...per le ley a luy payer, & ideo le consideracon fuit insufficient...\textsuperscript{104}

...Accin sur le case sur assumpsit, le consideration fuit q le pl' assume al estranger...\textsuperscript{105}

...lour reason fuit pur cease que nul consideration est expresse en le fait pur raiser...\textsuperscript{106}

...le consanguinity est consideracon imply...\textsuperscript{107}

...les Feffees sais consideration ou cause pur que ils aver use...\textsuperscript{108}

... sur consideration do marriage ill Covenant...\textsuperscript{109}

...limit use sur covenant il covient daver effectual consideracon...\textsuperscript{110}

...nul use est create per le dit covenant & consideracon, mes cease deviant un covenant...\textsuperscript{111}

\textsuperscript{103} See in particular figure 3 in chapter III/1
\textsuperscript{104} Moore (K.B.) 685, or 72 Eng. Rep. 839
\textsuperscript{105} Moore (K.B.) 573, or 72 Eng. Rep. 767
\textsuperscript{106} 1 Anderson 141, or 123 Eng. Rep. 397
\textsuperscript{107} Moore (K.B.) 684, or 72 Eng. Rep. 838
\textsuperscript{108} 2 Anderson 201, or 123 Eng. Rep. 620
\textsuperscript{109} 2 Anderson 199, or 123 Eng. Rep. 619
\textsuperscript{110} Moore (K.B.) 381, or 72 Eng. Rep. 642
\textsuperscript{111} Moore (K.B.) 121, or 72 Eng. Rep. 481
We find the function of ‘consideration’ at the heart of the experiential meaning of the language used. In the role of participant, it relates to a material process and the strength of the experiential meaning can be such that a single word is sufficient to signify the concept. In other words, in the specialised and technical uses of the term, the strength of its experiential meaning has been underlined in comparison to its use in the phrase ‘in consideration of’, as described above.

In addition, the information generated by the AntConc tool further underlines the technical nature of the texts and language. It shows that a dozen specifically legal terms can frequently be found both in the vicinity of the search term, and in the rest of the corpus: e.g. use, covenant, plaintiff, estate, assumpsit, indenture etc. Similarly, there are words that are not particularly technical in the sense that they come from everyday language use, but take on a specific legal significance in a legal context, such as marriage, terre, promise etc. In general, the term ‘consideration’ tends to be combined with a limited set of words, which is further indicative for the use of specialised language.

The Stuart ‘consideration’ corpus (SCc)

The Stuart corpus constituted on the basis of the search term ‘consideration’ (including the various spellings) consists of 151 documents downloaded from volume 81 of the English Reports – Full Reprint on the HeinOnline data base. These include the original Law French versions of the reports compiled by Henry Rolle and Jeffrey Palmer between 1614 and 1629, mainly during the reign of James I of England (1603-1625) but also including a few years of the reign of Charles I (1625-1649). The corpus has 132,582 word tokens and 9,697 word types; the original source material consisted of 941 pages. Similarly to the previous corpora this is only indicative in view of the spelling variations, though by the 17th century spelling was less chaotic than in the earlier periods.
The concordance search for consideration with AntConc shows 465 concordance hits. A proximity search using the advanced search tool showed the term 'consideration' to be found 42 times within 20 words of 'assumpsit', 11 instances of 'contract', 17 instances of 'covenant', 24 instances of 'debt' and 62 instances in the proximity of 'promise'. The corpus, originally selected on the basis of the occurrence of the term 'consideration', was also searched for all these words in the main search function rather than just the proximity search tools. The results can be found in table 26.

<table>
<thead>
<tr>
<th>Search term</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>consideration</td>
<td>465</td>
<td>-</td>
</tr>
<tr>
<td>assumpsit</td>
<td>162</td>
<td>42</td>
</tr>
<tr>
<td>contract</td>
<td>93</td>
<td>11</td>
</tr>
<tr>
<td>covenant</td>
<td>191</td>
<td>17</td>
</tr>
<tr>
<td>debt</td>
<td>193</td>
<td>24</td>
</tr>
<tr>
<td>promise</td>
<td>222</td>
<td>62</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>61</td>
<td>1</td>
</tr>
<tr>
<td>trespass</td>
<td>59</td>
<td>1</td>
</tr>
</tbody>
</table>

Tables 26: search terms/proximity to 'consideration' in the Stuart 'consideration' corpus

The search for the word 'assumpsit' was undertaken a little differently from previous searches on earlier corpora. When the Elizabethan corpus was searched with assum*, we obtained 8 different word forms and spellings, as we can learn from table 8 above. Searching the Stuart 'consideration' corpus with assum* we only obtained 4 different word forms and spellings:

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112 The various spellings were covered.
113 Using the advanced search tool searching in the proximity of twenty words to the left and to the right of the search term, for specific other terms. The various combinations of the different spellings were all covered.
- verb form ‘assume/assumed/assumer’: 79 hits
- assumpsit: 160 hits
- assump: 2 hits
- assumson: 1 hit

By the 17th century, the use of the word ‘assumpsit’ had become more settled, stable and technical. It was no longer used interchangeably with ‘assumption’ or the verb form. The verb forms and the one hit for ‘assumsion’ were, therefore, disregarded and only ‘assump/assumpsit’ were used.

Using ‘assumpsit’, ‘contract’, ‘covenant’, ‘debt’ and ‘promise as concordance search terms and applying the advanced search tool revealed their proximity to each other. The most striking element in these concordance and proximity searches is the increased occurrence of the word ‘promise’. It has become more prominent in this 17th century ‘consideration’ corpus than it was in the earlier corpora. Of the 222 occurrences of ‘promise’, we find that:
- in 28% of the hits we find the word ‘consideration’ in the vicinity (62/222)
- in 10% we find ‘assumpsit’ (22/222)
- in 7% we find ‘debt’ (16/222).

The words ‘covenant’ and ‘debt’ continue to be prominent but ‘contract’ still lags behind. It appears from this textual evidence that the discussions involving ‘consideration’ have moved towards a context also involving also the notion of promise, but are not yet firmly within the context of ‘contract’.

The results from applying the collocates and clusters tools show that the language surrounding the search term is not particularly technical.
Table 27: collocates of ‘consideration’ in the SCc

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>freq (L)</th>
<th>freq (R)</th>
<th>collocate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>532</td>
<td>293</td>
<td>239</td>
<td>le</td>
</tr>
<tr>
<td>4</td>
<td>261</td>
<td>139</td>
<td>122</td>
<td>est</td>
</tr>
<tr>
<td></td>
<td>(23)</td>
<td>62</td>
<td>29</td>
<td>(ester)</td>
</tr>
<tr>
<td>15</td>
<td>96</td>
<td>64</td>
<td>32</td>
<td>bon</td>
</tr>
<tr>
<td>16</td>
<td>90</td>
<td>52</td>
<td>38</td>
<td>case</td>
</tr>
<tr>
<td>24</td>
<td>62</td>
<td>38</td>
<td>24</td>
<td>defendant</td>
</tr>
<tr>
<td>25</td>
<td>59</td>
<td>35</td>
<td>24</td>
<td>promise</td>
</tr>
<tr>
<td>36</td>
<td>46</td>
<td>21</td>
<td>25</td>
<td>plaintiff</td>
</tr>
<tr>
<td>46</td>
<td>36</td>
<td>17</td>
<td>19</td>
<td>assumpsit</td>
</tr>
</tbody>
</table>

Table 28: clusters with ‘consideration’ in the SCc

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on left)</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>10</td>
<td>10</td>
<td>consideration est</td>
</tr>
<tr>
<td>14</td>
<td>9</td>
<td>9</td>
<td>consideration que le plaintiff</td>
</tr>
<tr>
<td>21</td>
<td>5</td>
<td>4</td>
<td>consideration de marriage</td>
</tr>
<tr>
<td></td>
<td>(24)</td>
<td>(4)</td>
<td>(consideration del' marriage)</td>
</tr>
<tr>
<td>23</td>
<td>4</td>
<td>4</td>
<td>consideration a faire</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on right)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>49</td>
<td>32</td>
<td>le consideration</td>
</tr>
<tr>
<td>5</td>
<td>13</td>
<td>9</td>
<td>est bon consideration</td>
</tr>
<tr>
<td>14</td>
<td>7</td>
<td>4</td>
<td>valuable consideration</td>
</tr>
</tbody>
</table>

The concordance lines for the term consideration were grouped in the same four types of language uses as was done with the Elizabethan corpus (ECc) discussed above. The results are summarized in table 29 below:
### Table 29: consideration' in the SCc

<table>
<thead>
<tr>
<th>Language</th>
<th>matches</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>General language use</td>
<td>9</td>
<td>2%</td>
</tr>
<tr>
<td>General legal language</td>
<td>155</td>
<td>33%</td>
</tr>
<tr>
<td>Technical language</td>
<td>294</td>
<td>63%</td>
</tr>
<tr>
<td>Latin</td>
<td>7</td>
<td>1,5%</td>
</tr>
<tr>
<td>Total</td>
<td>465</td>
<td>-</td>
</tr>
</tbody>
</table>

**General language and Latin**

The most obvious change in relation to the earlier corpora is the drastic fall in the general language use. From 43% of the concordance hits in the SS (15th/early 16th century), and 11% in the Elizabethan corpus (EC), to a mere 2% during the early Stuart reign cases. The general language meanings relate to the court taking specific factors into consideration during the process of their decision. There are no major quantitative changes in the Latin uses, though there is considerably less variety in the Latin phrases in the present corpus. In 6 out of the 7 occurrences, the word is part of the phrase *ideo consideratum est*. In the remaining 96.5% of the concordance hits, we find the word consideration in a continuum of uses ranging from legal connotations to specialised legal language.

**General language in legal use and context**

In over 33% or 155 of the 465 concordance hits, the word consideration is a part of the causal phrase ‘in consideration of’ and other variations, such as *en consideration d’un/de/del/que, in consideration d’un/de/del/inde/que* etc. As observed in the corpora discussed previously, the term appears as a noun, yet it does not behave as a full noun, but is embedded in a phraseological pattern without which it would not have the same meaning. The phrase provides a causal link between two events or elements at the centre of the concept making an informal agreement. However, the language
surrounding the phrase is not specifically technical, as had been the case in
the ECc. The words that can be found most frequently in the immediate
vicinity of the phrase are: (span of 10 words to left and right)

<table>
<thead>
<tr>
<th></th>
<th>to left (10 words)</th>
<th>search term</th>
<th>to right (10 words)</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>assumepsit</td>
<td>14</td>
<td>consideration</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>defendant</td>
<td>25</td>
<td>consideration</td>
<td>18</td>
<td>43</td>
</tr>
<tr>
<td>plaintiff</td>
<td>19</td>
<td>consideration</td>
<td>29</td>
<td>48</td>
</tr>
<tr>
<td>promise</td>
<td>19</td>
<td>consideration</td>
<td>16</td>
<td>35</td>
</tr>
</tbody>
</table>

Table 30: words associated with ‘consideration’ in the SCc

The language to the right of ‘consideration’ within the causal phrase tends to
relate to everyday matters, that may typically be the subject of an informal
agreement:

- marriage, love, natural affection, parental link: appear in 28
  concordance lines (18%) immediately after the causal phrase;
- payment/debt/sums of money: appear in 77 concordance lines (almost
  50%) immediately after the causal phrase.

No pattern can be observed in the language to the left of the phrase; it is
neither specifically technical nor abstract. In other words, in this corpus the
phrase ‘in consideration of’ retains its legal connotation but without being
embedded in highly technical language.

Specialist and technical uses

In just over 63% or 294 of the 465 concordance lines, the word consideration
has taken on a specialised and abstract meaning. It appears and ‘behaves’
as a stand-alone noun with the usual noun-attributes such as adjectives,
articles, pronouns and prepositions. The most common accompanying
elements are adjectives (107 times or 36.4%), such as good, valuable,
sufficient, natural etc. and determiners such as definite and indefinite articles
(77 times or 26.2%), or quantifying determiners such as *nul* (11 times or 3.7%). Also relatively frequent are prepositions such as *de*, *sur*, *sans* etc. (48 times or 16.3%).

<table>
<thead>
<tr>
<th>words accompanying ‘consideration’</th>
<th>occurrence</th>
<th>percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>adjectives, e.g. good, effectual, valuable</td>
<td>107</td>
<td>36%</td>
</tr>
<tr>
<td>determiners, e.g. <em>le</em>, <em>les</em>, <em>nul</em></td>
<td>88</td>
<td>30%</td>
</tr>
<tr>
<td>prepositions, e.g. <em>pur</em>, <em>sans</em>, <em>sur</em>, <em>de</em></td>
<td>38</td>
<td>17%</td>
</tr>
</tbody>
</table>

Table 31: words associated with ‘consideration’ in the SCc

The verb mostly associated with ‘consideration’ in these concordance lines is *ester* (to be). It can be found 98 times immediately before and 66 times immediately after the search term. The data for the three verbs to be, to have, and to do can be found in the following table:

<table>
<thead>
<tr>
<th>verb</th>
<th>to left (10 words)</th>
<th>search term</th>
<th>to right (10 words)</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>ester</em> (être)</td>
<td>98</td>
<td>consideration</td>
<td>66</td>
<td>164</td>
</tr>
<tr>
<td><em>avoir</em></td>
<td>2</td>
<td>consideration</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td><em>faire</em></td>
<td>11</td>
<td>consideration</td>
<td>7</td>
<td>18</td>
</tr>
</tbody>
</table>

Table 32: verbs associated with ‘consideration’

All three verbs indicate material processes (i.e. processes indicating what happens or what X does) and associate the noun consideration with a function of key participant in the clause, rather than on a more peripheral level of circumstances surrounding the process. This is a grammatical signpost to signal that in these concordance lines the word consideration refers to a concept in its own right rather than a mere causal connector as was the case when the word appeared in the phrase ‘in consideration of’. In other words, as a unit of meaning and function, it is as that of participant (notion of ‘thingness’) – at times in the role of actor, at other times in that of goal. The strength of its experiential meaning has been underlined to a point that even as a single word it is sufficient to signify an abstract concept.
This is also borne out by the semantically restricted language that surrounds the word consideration in the concordance lines. Similarly to the ECc, the same terminology tends to appear: specifically legal terms such as plaintiff, defendant, assumpsit, use, covenant, indenture, conveyance etc., or general language words with specific legal connotations, such as marriage, promise, money etc.

4. Abridgments

For the sake of completeness, it was also decided to briefly examine other documents, such as Abridgements. It must be stressed that abridgements are not as such cases reports but collections of cases for easy reference. The terms in which the cases are described and the words used do not necessarily reflect the language actually used in court at the time of the hearings, but express how the author of the abridgement understands, evaluates and categorises the cases. In other words, it reports the law as it is in the mind of a particular abridgment author. Written later than the original report, it still reflects the way these cases were seen at the later time of writing the abridgements.

The Abridgement of Cases to the End of Henry VI\(^{114}\) spans from Edward III until Henry VI (1327-1413). Reading through it, we find that assumpsit is not listed, though we can find 24 entries for action on the case (\textit{accions sur le cas}). Most of them are what was later called trespass on the case, though the word trespass does not appear either. The key words in these actions are \textit{a tort}, \textit{negligence}, \textit{vis et armis}, \textit{gift}, \textit{bargain conspiration}, \textit{emprist sur luy}. The actions with \textit{emprist sur luy}, in particular, are what would be later classed as assumpsit actions.

\(^{114}\) N. Statham (1490) \textit{Abridgement of Cases to the End of Henry VI}, Rouen: Per me. R. Pynson, \url{www.heinonline.org} - Selden Society Publications and the History of Early English Law; Henry VI reigned until 1461.
In Fitzherbert’s *Le Graunde Abridgement* 115 52 cases of *accion sur le cas* are listed. These deal with a variety of matters, such as debt, grants, deceit, *vi et armis*, bargain/warranty, covenant. The notion of promise is not mentioned. Assumpsit as such is not discussed in any detail either, though there are two cases that use the phrase *emprist sur luy* and two others with *assuma sur luy/nous*. The Fitzherbert Abridgement further lists one case of contract (discussion on action of contract v. covenant) 31 cases of covenant and 184 cases of debt. In the last category of cases we frequently find key words such as payment, rent count, annuity, grant, contract. But the basic concept of a debt action can be found in the notion of obligation: *det sur/par obligacion*

In his 1573 Abridgement 116 Brooke lists 123 cases of *action sur le case*, of which 17 deal with situations of assumpsit in the sense of an undertaking. He adopts a greater use of the term assumpsit; in 4 cases the word even figures in the title and in 11 we finds it in the description of the case. The verb *emprendre* (to undertake), usually in the form of *il emprist*, appears in 7 cases, sometimes alongside assumpsit.

The word assumpsit is used in varying degrees of abstraction. It ranges from more descriptive uses, generally in the verb form, such as *home fait promise ou assumpc de faire chose* 117 and *defend assumps de paier* 118, to more abstract, usually noun, uses such as *issue sur non assumpsit* 119 and *case sur assumptio* 120, *action sur case sur Assumps* 121. It is also interesting to compare how Brooke abridged the cases in his collection of 1573 with the original Year Book reports written earlier. In one of the surgeon’s negligence

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118 Brooke (1573) at 7, case 105 (original report YB 33 Hen. VIII, or LBEx.)
119 Brooke (1573) at 4, case 5 (original YB report 27 Hen. VIII 24, or LBEx.)
120 Brooke (1573) at 5, case 40 (original YB report 11 Hen. IV 33, or LBEx.)
121 Brooke (1573) at 7, case 107 (original YB report 34 Hen. VIII, or LBEx.)
cases, Brooke described that the defendant *emprist de cur le pl dun wounde*. He also used the word *assumpc*. The original Edward III Year Book report for the year 1374 presented this action as a *trespas sur son case*. There was also a discussion of *vi et armis, ne contra pacem*, which in these early days was a prerequisite for engaging an action of trespass. The notion of an undertaking is expressed in extensive use of the verb *emprendre* (to undertake), usually in the form of *il emprist*; the word *assumpsit* does not appear. This comparison is very telling of the evolution that the enforceability of informal contracts has undergone in the two centuries that separate these two reports of the same case. At the time of the original case, the notion of *assumpsit* had not emerged, and cases were still firmly grounded in the action of trespass, which eventually gave way to the action of *assumpsit*. But in his report written 200 years later, Brooke reconceptualised the facts of the case using parameters of his own time that were not available at the time the case occurred.

Similarly, a case abridged by Brooke from the time of Henry VIII (1535/36), deals with the question of whether an undertaking to pay a debt is an action on debt. Brooke presents the debate of the case as *aver accion de dett sur le contract ou accion del case sir le promise et issint ceo est in deivers respectes, car sur le promise ne gist acc de dett*. His use of the word *promise* is interesting, introducing a notion absent from the Year Book report fifty years earlier. While both the reports and the abridgment present this case as one about an undertaking through their extensive use of the word *assumpsit* (and various variants), the concept that such an undertaking is a promise does not appear in the Year Book report, but only in the abridgement. There we find the undertaking (25 uses of *assumpsit* and variants) described in terms of 'agreement' (22 uses of agreement or the verb form). This reflects the evolution that the action of *assumpsit* has undergone during the

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122 Brooke (1573) at 4, case 24 (original YB report 48 Edw. III 6, or LBEx.)
123 See discussion in chapter V above
124 Brooke (1573) at 4, case 5 (original YB report 27 Hen. VIII 24, or LBEx.)
intervening years.\textsuperscript{125} And in general, it is striking that in these early assumpsit cases the key words tend to be actions, obligation, duty, conditions, guarantees, undertaking and covenant/contract/debt. The notion that something was promised may appear as inherent in these action to us today, but it was never expressed as such in the use of the vocabulary.

A century later the very comprehensive abridgement of Henry Rolle\textsuperscript{126} presents a very different picture. In the section on Action sur Case we find a dozen chapters on assumpsit and consideration, which are also headed as such. They date mainly from the mid 16\textsuperscript{th} century to the mid 17\textsuperscript{th} century, though a few cases from either side of the time scale are also included. A manual analysis of the vocabulary in the selected 168 cases shows that 'consideration' is the term that appears by far the most frequently (231 times), followed closely by 'promise' (155 times), then 'assumpsit' (40 times), 'obligation' (39 times) and 'agreement' (11 times). So, by the mid 17\textsuperscript{th} century, not only are assumpsit cases classified as such, but the terminology used reflects that these actions on informal undertakings are discussed in terms of consideration and promise as the elements that make an informal agreement enforceable. This is certainly a very different representation to the abridgements discussed hitherto.

5. Lexicons and dictionaries

Looking at references works, we would today call lexicons, dictionaries or glossaries - though the works considered here do not use these terms - we also find the evolution of the concept of assumpsit and consideration reflected in the terminology used. Such reference works tend to be thought of as an orderly list of definitions and meanings of relatively reliable and stable units. Yet it can be argued that dictionaries represent much more and that

\textsuperscript{125} See discussion in chapter V
\textsuperscript{126} H. Rolle (1668)\textit{ Abridgment des Plusieurs Cases et Resolutions del Common Ley}, London: Printed for A. Crooke [and 12 others], www.heinonline.org - Selden Society Publications and the History of Early English Law
their compilation and use are ‘communicative occasions occurring under characteristic circumstances’.\textsuperscript{127}

In 1579, Rastell\textsuperscript{128} records no separate entries for 'assumpsit' nor 'consideration', though there is one for bare or naked contract, which does not include the word consideration, but rather 'recompense'. He defines contract in terms of bargain and covenant (\textit{contracte est vn bargeine ou couenaunt per enter ii. parties}) and the term 'consideration' is used to describe \textit{quid pro quo} or "one thing given for another" (\textit{vn chose est done pur auter que est appelle quid pro quo [...]en consideration de [...] que vous dones a moy ceux font bone contractes, pur ceo que il ad vn chose pur auter}). This language of one-thing-for-another still points to the remnants of the proprietary notions that were central in the earlier actions of debt. So does the use of the words \textit{quid pro quo}, which was the standard terminology in debt and clearly expresses a bargain and equivalence of exchange. Yet, by the mid 16\textsuperscript{th} century, the action of assumpsit had evolved to include the concept of promise. And, despite the more proprietary language described above, Rastell mentions promise in the second, more explanatory, half of his entry on contract:

-"...mes si vn home fayt promise a moye que ieo auera xx s. & que il voyle este debitour a moy de ceo..."

(but if a man make promise to mee that I shall have twenty shyllinges, and that hee will be debitour to mee thereof)

-"...mes si asun chose fuyt done pur le xx. s. mesque il ne fuit forsque al value de vn dernier, donques il fuit bone contracte... “

(but if any thinge were geuen for the xx. shillinges though it were not but to the value of a peny, then it had ben a good contracte)


\textsuperscript{128}W. Rastell (1579) \textit{Exposition of Certaine Difficult and Obscure Wordes and Termes of the Lawes of This Realme, Newly Set Fourth & Augmented, Both in French and English, for the Helpe of Such Younge Studentes as Are Desirous to Attaine the Knowledge for the Same. Whereunto Are Also Added the Olde Tenures}, London: In adibus Richardi Totelli, www.heinonline.org - Selden Society Publications and the History of Early English Law
Here we have clearly moved on from the idea of basic *quid pro quo*, to one of a more 'symbolic' exchange, of what we would today think of as consideration, in order to 'confirm' the promise and thus make it enforceable. To our 21st century reality and knowledge, this definition may appear paradoxical, as it introduces both the more proprietary concept of *quid pro quo* and the concept of confirming the intention of a promise through an exchange that does not reflect the actual material value of the exchange. It is unlikely to have appeared as such to the lawyers of the mid 16th century, who were still in a transitional phase of evolution and change. The legal concepts at issue were not yet settled in a definite way but were still being developed in the courts.

In Cowell's *Interpreter* over fifty years later, a contract is defined as 'a covenant or agreement with a lawful consideration or cause'. In other words, we move away from notion of bargain towards something more akin to a meeting of minds and the use of word 'lawful' gives to understand that there is a legal definition of 'consideration'. Cowell also includes definitions of 'assumpsit' and 'consideration'. The former describes assumpsit as a

"voluntary promise made by word, whereby a man assumeth, or taketh upon him to performe or pay any thing unto another. This word containeth any verball promise made upon consideration, which the Civilians expresse by divers words, according to the nature of the promise..."

Consideration is defined as

"the materiall cause of a contract, without the which, no contract bindeth. This consideration is either expressed [...] or else implied..."

For comparison's sake, it is interesting to leap forward two centuries and consider the entries in Wharton's Law Lexicon. The definitions are much

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130 J.J.S. Wharton (1848) *Law Lexicon, or Dictionary of Jurisprudence: Explaining All the Technical Words and Phrases Employed in the Several Departments of English Law, including also the Various Legal Terms Used in Commercial Transactions; Together with an Explanatory as well as Literal Translation of the Latin Maxims Contained in the Writings of*
more detailed and definite, especially in comparison to the 1579 Rastell entry. A contract is described as "a deliberate engagement between competent parties [...] founded upon the mutual agreement of the parties." A contract must be made "upon a legal consideration to do, or to abstain from doing, some act." Here, the concept was expanded by notions represented in the use of words such as 'deliberate', 'competent', 'mutual' and the inclusion of non-feasance as well as feasance. Wharton also takes the definition of 'consideration' beyond Cowell's 'materiall cause'. He describes consideration as "the price, motive, or matter of inducement of a contract, which must be lawful in itself." This lexicon shows that by the mid 19th centuries, the legal concepts governing contracts have been settled in a broader and more detailed manner.

6. Consideration as moral obligation in the Mansfield corpus

As we fast-forward to the 18th century, we come to an episode in the history of the concept of consideration that lasted a few decades - roughly the second half of the 18th century - which is of particular interest because it represents a temporary innovation in doctrinal thinking accompanied by shifts in terminology. The lawyer at the centre of these attempts to change the concept of consideration into a moral obligation, was Lord Mansfield, but there were a number of fellow judges who adopted his approach and this was reflected in their rulings. Consequently, the idea lasted beyond Mansfield’s death. As late as 1863, we can find references to the notion of consideration as moral obligation.

The corpus that was constituted for the purpose of the 18th/19th century part of the study was compiled in a very different way to the ones described previously in this chapter. The reason is that the purpose of this part of the study is not a continuation of the research done on the 15th, 16th and 17th
centuries corpora. Instead it offers some insight into how the use of terminology in particular types of cases was guided by new ideas in the underlying legal thinking. In other words, we are pursuing a specific aspect of the concept of consideration, namely Mansfield’s idea of seeing it as a moral obligation. This is also the reason why the study of the Mansfield corpus is presented in a separate section in this chapter, rather than as a continuation of section 3.3 above. It is important to stress that in the 18th and 19th century, the language situation is very different to that of the late Middle Ages and Renaissance. The language used was no longer Law French, nor Middle English but Modern English, which had already been the subject of the Great Vowel Shift, inflectional simplification and Johnson’s linguistic standardisation. The language is a lot more structured and precise.

So far, the texts for inclusion in the corpora discussed were chosen on the basis that a specific search term occurred in the documents from which the text extracts were drawn – consideration, promise, contract etc. Case reports were singled out, not on the basis of content or whether this was primarily a contract/consideration case, but on the presence of the search term(s). In other words, the approach was to ‘follow’ specific terms, independent of the legal context in which these occurred. For the compilation of the Mansfield corpus, the case reports were selected on the basis of their content and whether these were a part of the corpus of cases stipulating Mansfield’s concept of consideration as moral obligation. Moreover, in order to reveal Mansfield’s idea, the corpus was searched with terms that had not figured in relation to the earlier corpora, such as obligation, duty, conscience, all terms that were likely to indicate the context of Mansfield’s idea of consideration as a moral obligation. Each search was restricted to the noun form in both singular and plural. This study is more limited compared to the earlier ones described above. It does not attempt to demonstrate the use of the search term(s) in the 18th/19th century law reports in general but only in the specific cases dealing with consideration as moral obligation.
The Mansfield corpus (MC) consists of 51 cases that are reported in 56 downloaded documents, as 5 cases were reported twice. Most decisions were taken between the 1760s and the 1840s. Two cases before that period were included (1731 & 1759)\(^{131}\) and two from the mid 19\(^{th}\) century (1860 & 1863).\(^{132}\) A full list of the cases can be found in annex 2 (vi). The corpus has 136,788 word tokens and 6,347 word types; the original source material consisted of 161 pages. A concordance search for the term consideration shows 714 hits. The corpus is comparable in size to the ECc and SCc, but the page count for the original source texts is significantly lower:

<table>
<thead>
<tr>
<th>Ref.</th>
<th>page count of original sources</th>
<th>files downloaded</th>
<th>Word tokens</th>
<th>Word types</th>
<th>Hits for ‘consideration’</th>
</tr>
</thead>
<tbody>
<tr>
<td>ECc</td>
<td>1,831</td>
<td>114</td>
<td>176,449</td>
<td>13,787</td>
<td>392</td>
</tr>
<tr>
<td>SCc</td>
<td>941</td>
<td>151</td>
<td>132,582</td>
<td>9,697</td>
<td>465</td>
</tr>
<tr>
<td>MC</td>
<td>161</td>
<td>56</td>
<td>136,788</td>
<td>6,347</td>
<td>714</td>
</tr>
</tbody>
</table>

Table 33: 16\(^{th}\) – 19\(^{th}\) ‘consideration’ corpora

The language used in the Mansfield corpus is a largely standardised English, with the exception of one KWIC line which is in Law French. This contrasts with the Law French of the Selden Society sources and English Reports that were still subject to spelling variations and included sections in Latin and some Middle/early Modern English.

In comparison to the legal sources of the previous centuries, the MC shows a striking increase of the use of ‘consideration’. The concordance and advanced proximity searches provided the following results:

\(^{131}\) Hayes v Warren (1731) 2 Strange 933 or 93 Eng. Rep. 950; Exeter Corporation v Trimlet (1759) 2 Wils. K.B. 95 or 95 Eng. Rep. 705

Chapter VI: Corpus Linguistic Analysis

<table>
<thead>
<tr>
<th>Search term</th>
<th>hits</th>
<th>proximity</th>
</tr>
</thead>
<tbody>
<tr>
<td>assumpsit</td>
<td>156</td>
<td>32</td>
</tr>
<tr>
<td>conscience</td>
<td>52</td>
<td>5</td>
</tr>
<tr>
<td>consideration</td>
<td>714</td>
<td>-</td>
</tr>
<tr>
<td>contract</td>
<td>320</td>
<td>32</td>
</tr>
<tr>
<td>covenant</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>debt</td>
<td>403</td>
<td>63</td>
</tr>
<tr>
<td>duty</td>
<td>56</td>
<td>14</td>
</tr>
<tr>
<td>moral(s)/morally/morality</td>
<td>111</td>
<td>45</td>
</tr>
<tr>
<td>obligation</td>
<td>160</td>
<td>35</td>
</tr>
<tr>
<td>promise</td>
<td>739</td>
<td>268</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>tort</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>trespass</td>
<td>18</td>
<td>0</td>
</tr>
</tbody>
</table>

Tables 34: search terms/proximity to ‘consideration’ in the Mansfield corpus

These findings are also reflected in the results for the collocate and the clusters functions. ‘Promise’ is the first noun to appear in the list of collocates and the list of clusters with the search term on the left, sorted by frequency:

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>freq (L)</th>
<th>freq (R)</th>
<th>collocate</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>246</td>
<td>76</td>
<td>170</td>
<td>promise</td>
</tr>
<tr>
<td>18</td>
<td>112</td>
<td>86</td>
<td>26</td>
<td>sufficient</td>
</tr>
<tr>
<td>25</td>
<td>86</td>
<td>75</td>
<td>11</td>
<td>good</td>
</tr>
<tr>
<td>58</td>
<td>36</td>
<td>20</td>
<td>16</td>
<td>new</td>
</tr>
<tr>
<td>59</td>
<td>36</td>
<td>15</td>
<td>21</td>
<td>assumpsit</td>
</tr>
<tr>
<td>62</td>
<td>32</td>
<td>25</td>
<td>7</td>
<td>moral</td>
</tr>
<tr>
<td>79</td>
<td>26</td>
<td>16</td>
<td>10</td>
<td>obligation</td>
</tr>
<tr>
<td>100</td>
<td>22</td>
<td>16</td>
<td>6</td>
<td>contract</td>
</tr>
</tbody>
</table>

Table 35: collocates of ‘consideration’ in the MCc (window span: 10L, 10R)
As far as the register of the language is concerned, the same categorisation of language use was applied as for the previous corpora discussed above:

<table>
<thead>
<tr>
<th>Language</th>
<th>matches</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>General language use</td>
<td>14</td>
<td>2%</td>
</tr>
<tr>
<td>General legal language</td>
<td>106</td>
<td>15%</td>
</tr>
<tr>
<td>Technical language</td>
<td>594</td>
<td>83%</td>
</tr>
<tr>
<td>Latin</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>714</strong></td>
<td><strong>-</strong></td>
</tr>
</tbody>
</table>

Table 37: 'consideration' in the MCc

**General language and Latin**

The general language use is very low. In 14 lines we find ‘consideration’ in the sense of taking into account when forming an opinion. There are no concordance lines in Latin.
General language in legal use and context

In 106 concordance lines, we find ‘consideration’ used in a general language meaning but in a specific legal context, namely within the causal phrase ‘in consideration of’ which links the two elements of striking an agreement: something is said/given/paid/done in consideration of something said/given/paid/done. During Mansfield’s time and well into the 19th century, these were still the elements required for the formation of a legally binding informal agreement, since the doctrine of offer and acceptance that governs today’s contract formation thinking, was not yet established.

The use of the phrase is more stable than had been the case in the previous Law French corpora where we could find any permutation a number of possibilities:

\textit{en/in/pur consideration d’/de/del/do/dun/que}.

In the Mansfield corpus, we find

- in consideration of (73 times)
- in consideration that (20 times)
- in consideration thereof (12 times)

and one equivalent Law French phrase \textit{en consideration que}.

The vocabulary surrounding the phrase in the 106 KWIC lines is dominated by the words ‘plaintiff’ and ‘defendant’. In half of these concordance lines, we can find one or both of these words once or several times in a word span of 10 words to the left and right of the phrase. In general, the language is not very technical. In 20% of the lines, we find a legal technical term, such as legacy, executor, assumpsit. In 24% of the lines, a term relating to financial matters is in the vicinity of the phrase.

Specialist and technical uses

In 83% of the concordance lines, we find ‘consideration’ has a specialised legal meaning. In these cases, it appears as a noun with the vested role of full participant in the process, rather than as a part of the layer representing
the circumstances surrounding the process. The grammatical and lexical patterning underline this function. In three quarters of the lines the noun is immediately preceded by elements that are typically associated with a full noun, such as determiners and adjectives.

<table>
<thead>
<tr>
<th>words immediately preceding 'consideration'</th>
<th>occurrence</th>
<th>percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>determiner, e.g. a, the, that, any, no</td>
<td>284</td>
<td>40%</td>
</tr>
<tr>
<td>adjectives, e.g. good, legal, moral, valuable</td>
<td>252</td>
<td>35%</td>
</tr>
</tbody>
</table>

Table 38: words preceding 'consideration' in the MCc

This is also confirmed by the results from the search for collocates (see table 35 above). The first four adjectives in the list of collocates sorted by frequency are sufficient, good, new, and moral. These tend to be to the left of the search term.

As to processes, it is the verb ‘to be’ that occurs most frequently and in direct association with ‘consideration’. This verb expresses a finite stand - something is or it is not. The language is of a definite nature and rarely moderated by words that express modality of possibility, such as may, might or could.

<table>
<thead>
<tr>
<th>verb</th>
<th>to left (10 words)</th>
<th>search term</th>
<th>to right (10 words)</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>to be</td>
<td>205</td>
<td>consideration</td>
<td>84</td>
<td>289</td>
</tr>
<tr>
<td>others</td>
<td>120</td>
<td>consideration</td>
<td>117</td>
<td>237</td>
</tr>
</tbody>
</table>

Table 39: verbs associated with ‘consideration’ in the MCc

The first verbs that figure in the collocate list sorted by frequency are three forms of ‘to be’:

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>freq (L)</th>
<th>freq (R)</th>
<th>collocate</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>335</td>
<td>184</td>
<td>151</td>
<td>is</td>
</tr>
<tr>
<td>9</td>
<td>269</td>
<td>151</td>
<td>118</td>
<td>was</td>
</tr>
<tr>
<td>13</td>
<td>189</td>
<td>90</td>
<td>99</td>
<td>be</td>
</tr>
</tbody>
</table>

Table 40: collocates of ‘consideration’ with ‘to be’ in the MCc (window span: 10L, 10R)
As far as collocates for ‘consideration’ are concerned, we find ‘to be’ in the past and present forms high on the list. ‘Promise’ is also the first noun that appears in the ranking, according to frequency:

<table>
<thead>
<tr>
<th>rank</th>
<th>freq.</th>
<th>range</th>
<th>cluster (search term on left)</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>26</td>
<td>14</td>
<td>consideration was</td>
</tr>
<tr>
<td>8</td>
<td>21</td>
<td>13</td>
<td>consideration for the promise</td>
</tr>
<tr>
<td>9</td>
<td>19</td>
<td>12</td>
<td>consideration for a promise</td>
</tr>
<tr>
<td>11</td>
<td>18</td>
<td>10</td>
<td>consideration is</td>
</tr>
</tbody>
</table>

Table 41: clusters with ‘consideration’ in the MCc

From the textual evidence collected from the Mansfield corpus, we can observed definite shifts in the use of terminology.

*******

Each set of findings in relation to the various search terms and corpora, discussed so far, is rendered more interesting when put in a diachronic and comparative perspective with the information drawn from all the findings. The overall picture of the evolution of the term ‘consideration’ shows a striking increase in its use. The relative frequencies in the table below were calculated in relation to the page count for each set of sources. The results were multiplied by 1000 to avoid too many decimal places.

<table>
<thead>
<tr>
<th>search term (various spellings)</th>
<th>SSsources (4,109 pages)</th>
<th>Esources (1,831 pages)</th>
<th>Ssources (941 pages)</th>
<th>Msources (161 pages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>consideration</td>
<td>102</td>
<td>392</td>
<td>465</td>
<td>714</td>
</tr>
</tbody>
</table>

Table 42: ‘consideration’ in the four sets of sources. The relative frequency is calculated in relation to the total pages that make up each source
If we consider the frequencies of other terms in the four ‘consideration’ corpora (not the original sources as a whole), we can observe that the frequencies for both ‘assumpsit’ and ‘covenant’ level out with time, while ‘contract’ and ‘promise’ rises. The absolute frequencies were counted as they occurred in each ‘consideration’ corpus, not in the sources. The relative frequencies were calculated in relation to the tokens in each corpus.

<table>
<thead>
<tr>
<th>search term (various spellings)</th>
<th>SSCc (38,899 tokens)</th>
<th>ECc (176,449 tokens)</th>
<th>SCc (132,582 tokens)</th>
<th>MC (136,788 tokens)</th>
</tr>
</thead>
<tbody>
<tr>
<td>assum*</td>
<td>5</td>
<td>109</td>
<td>162</td>
<td>156</td>
</tr>
<tr>
<td></td>
<td>0,13</td>
<td>0,62</td>
<td>1,22</td>
<td>1,12</td>
</tr>
<tr>
<td>contract</td>
<td>1</td>
<td>15</td>
<td>93</td>
<td>320</td>
</tr>
<tr>
<td></td>
<td>0,03</td>
<td>0,09</td>
<td>0,70</td>
<td>2,34</td>
</tr>
<tr>
<td>covenant</td>
<td>18</td>
<td>299</td>
<td>191</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>0,46</td>
<td>1,69</td>
<td>1,44</td>
<td>0,04</td>
</tr>
<tr>
<td>debt</td>
<td>14</td>
<td>79</td>
<td>193</td>
<td>403</td>
</tr>
<tr>
<td></td>
<td>0,36</td>
<td>0,45</td>
<td>1,46</td>
<td>2,95</td>
</tr>
<tr>
<td>promise</td>
<td>8</td>
<td>51</td>
<td>222</td>
<td>739</td>
</tr>
<tr>
<td></td>
<td>0,21</td>
<td>0,29</td>
<td>1,67</td>
<td>5,40</td>
</tr>
<tr>
<td>quid pro quo</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>0</td>
<td>0,02</td>
<td>0,007</td>
<td>0,02</td>
</tr>
</tbody>
</table>

Table 43: search terms and relative frequencies in relation to the word tokens in the SSCc, ECc, SCc and MC
The increased use of 'contract' points to the fact that consideration was discussed in the context of contracts, as we would expect from our 21\textsuperscript{st} century viewpoint. Finally, the concordance search for moral*: moral, morals, morally, morality produced 111 matches. Only one match was found in the seven corpora complied from the Selden Society, Elizabethan and Stuart sources, spanning several centuries altogether.

Chart 4: search terms (relative frequencies in relation to the word tokens) in the SSCc, ECc, SCc and MC

So much for the linguistic study revealing an overall picture of the evolution of the term ‘consideration’ and its surrounding language. The last chapter will discuss the conclusions that the results from the study show from a diachronic perspective, as well as the concordances that were revealed between the evolution of the term and concept of consideration.

\textit{Habent sua fata verba.}
Chapter VII. Conclusions

“We may put it, by way of comparison, that whereas the historian of French law has a continuity of language with a discontinuity of law, his English counterpart has a continuity of law with a discontinuity of language.”¹

The aim of this research was to trace the advent and early use of the concept of consideration in English contract law, by studying the doctrinal development in parallel with the corresponding terminological evolution between the 15th and 18th centuries. The question of continuity and discontinuity of law and language is, therefore, at the heart of the research question.

The issue of continuity or discontinuity of law is bound up with that of customary or codified law. English law was never subject to the kind of sweeping tabula rasa that was experienced in France during the 18th century. Changes in English law tended to be the result of gently pushing boundaries and then exploiting the wriggle-room obtained. There was continuity, which does not preclude changes, though these were perceived as part of a continuum rather than any radical transformation. The concept of assumpsit and later of consideration is a prime example of changing the law by shifting the categories for legal actions. In the courts there was a need to make agreements legally binding without having to resort to the very complex procedures of deeds (see chapter V). It is this process of conceptualisation of informal, yet legally enforceable, promises and agreements, that is at the heart of this study.

Whether there was continuity or discontinuity of language in England is more complex to assess, and depends on the extent to which the multilingual landscape of medieval England is perceived as a linguistic continuum. This

¹ Year Books of 11 Edward II (1317-1318), J.P. Collas, W.S. Holdsworth (eds.) 61 Selden Society, at p. xiii (J.P. Collas)
has been discussed at length in chapter IV. The fact is that there were continuous interplay and lexical borrowings, in particular, between continental (Parisian-basin) French, Norman-French, insular French and Middle English on English soil. This resulted in substantial absorption of French words into Middle English, the evidence of which can still be found in today’s English, as well as in our contemporary legal English. But at a time when both language and the common law were evolving substantially, the use and substantial imports of French vocabulary in England did not go hand in hand with the import of legal concepts. These may or may not have corresponded to the imported terms, except for land law, which was brought over by the conquering Normans, together with its specific terminology. An example other than the words discussed in this study is the term *tort*, which came into the 11th century Old French from the Medieval Latin *tortum*, meaning wrong, injustice, from *tortus, tortum* (wrung, twisted), past participle of Latin *torquere* (to twist, wring). It has that sense in the 12th century Chanson de Roland and troubadour literature. The law of tort, as we know it today, goes back to the 13th century in the form of actions of trespass and action as on the case and various terms were used to describe concepts of personal remedies. But in the context of legal action for breach of duty, the term *tort* first appeared in English in the 1580s and the action evolved and expanded considerably during the centuries that followed, today covering intentional and negligent infliction of economic loss as well as some emotional, psychological, reputational (etc.) injuries. In other words, the term *tort* has evolved from the Old French general meaning of injustice and wrong (still its modern French meaning) to cover today’s very specialised type of wrong. The term must have appeared convenient to use as the action of trespass on the case evolved, but it was not imported into English with any other sense other than the general (French)

2 compare *tortum facere*, in Art. 20, 23 and 26 of the Edictum Pistense by Charles the Bald of 864 (A. Boretius and V. Krause, Capitularia regum francorum, II (Monumenta Germaniae Historica, Legum, II), Hannover, Hahn, 1897, nr. 273, 310-328
3 Verse 1051: *Paieunt tort e christiensuntdroit*
4 e.g. Guillaume de Cabestaing: *Fis amans deugran tort perdonar (Lo jornqu’ie us)*
5 The term was used in Law French well before then in phrases such as *tort e force* and *de son tort demene*.
language meaning. It gradually developed its very specialised legal meaning. While its etymological root is still intact, it describes an autonomous legal concept. We are no doubt dealing with two different sets of language – French (dialects) and English – but this example shows how it is possible to perceive the medieval linguistics landscape in England as a continuum as far as the language of the law is concerned.

In this study on the history of the concept of consideration, language was seen as a continuum. The use of Law French continued to flourish and expand while Anglo-French in other registers was declining from the 14th century. Case law reporting was written in French, though this was not necessarily the language spoken in court pleadings. But in many case reports, we find entire passages in English in the middle of the French language report of what appears verbatim transcripts of declarations (written or spoken) made by one of the parties to the case. It is reasonable to conclude that the English language figured alongside French in court proceedings, though we do not know in what proportions. It is likely there was a constant code switching between the two languages without the need for translation, linguistic or conceptual adjustments, nor the danger of anything lost in translation. It is on this basis that the present study considered the original language texts as a language continuum, i.e. as a continuous collection of texts independent of whether the language was Law French, Middle English or early Modern English.

To return to Collas' view of (dis)continuity of law and language, it may be nuanced by suggesting that in both law and language there were changes but within a continuum. In the law, boundaries were nudged, categories extended to let new legal actions in through the back door. The corresponding language, always in need of new terms for emerging legal concepts, did not go as far as introducing neologisms, but relied on everyday vocabulary that gradually evolved into specialised terminology, signposting autonomous legal concepts in concordance with the evolution of legal conceptual thinking.

*******
At the heart of this study was the extent to which the historical and conceptual development of the concept of consideration were matched by changes and shifts in the language, terms and vocabulary used, most notably in relation to the increased abstraction and technicality of both concept and language. This was revealed by undertaking diachronic linguistic and semantic analysis using corpus linguistics methodologies. It is important to stress at this point that the study was not meant either as a full inquiry into the history of the concept of consideration, nor as a complete analysis of the language used in the early Year Books and Law Reports. The research undertaken was of an interdisciplinary nature, using linguistics methodologies of analysis as tools to reveal the evolution of specific legal thinking and ideas, namely in relation to the enforceability of informal contracts.

The underlying premise of the research was that tracing the historical process of legal thought which constituted the concept of consideration, required a wider ambit than just the description and analysis of the content of the case law and legal writings. Though these are essential units of analysis, they must be placed within their diachronic contexts for the conceptual shifts in thought and meaning to be revealed. This approach is akin to the Begriffsgeschichte work undertaken in German-speaking academia (see chapter II). One of the methodological principles they applied was to analyse the semantic fields of political and social language, because language offers a reliable indicator of the thinking and contexts in which concepts are established and shift in meaning. The study of law is, among other things, an enquiry into the abstract entities that make up a legal order. Law is a phenomenon entirely created by man, it does not exist as such in the physical world. The customary law set-up of the late Middle Ages allowed for the intellectual and doctrinal process involved in the development of a concept to be revealed more readily. Consequently, the language used to describe this phenomenon is intrinsically linked to its specific reality. Studying this language and terminology reveals how legal concepts materialise, evolve and translate into the letter of the law.
We often perceive long-standing, well-established legal concepts and the language used to express them as having been carved in stone as far back as the legal mind can remember. The doctrine of consideration is a central element to contract formation; it appears so well anchored in contract law and in our legal minds, that we may find it difficult to imagine its development took a tortuous and at times haphazard path, stretching over several centuries (see chapter V). The forerunners of consideration arose in a medieval legal world rigid with archaic procedures and complex technicalities, where the need was increasingly felt for a tool that could meet growing commercial needs in terms of contracts and quasi-contracts. But various strands from different legal issues came together in the idea that informal promises should be enforceable - the evolution was somewhat haphazard. This is reflected in the terminology, which settled only hesitantly and shows a concordance between the complexity of the concept’s evolution and the terminology used to express it. Also relevant in this context is the linguistic landscape of multi-lingual medieval England and the continuous switching between Law French and Middle and later Modern English (see chapter IV).

In this research, language was considered as an act of communication that encodes meanings in the socio-political, cultural and historical contexts in which they are uttered (see chapter III/1). The language of the law is no exception, as its use, in particular in legal proceedings, is the product and a reliable indicator of these contexts and of how laws are created, practiced and interpreted. The methodology most appropriate to reveal how language and the evolution of legal concepts interact, is to examine the language in question in its textual context. The use of corpus linguistics methods and linguistics/concordance software are ideal for this sort of empirical approach, as they allow for systematic analysis of authentic evidence (see chapter III/2).

For this research, a diachronic corpus was compiled, which is a collection of naturally occurring texts that vary along the parameter of time. It constituted the empirical basis for carrying out systematic linguistic investigations on
authentic evidence. The fact that it is held digitally and searchable electronically offers possibilities that are not otherwise available. The corpus was compiled by continuously revising its design following empirical research carried out on the initial pilot corpus in order to adjust the design parameters. This was particularly relevant in view of the complexity of working with medieval texts of a specialised but not very uniform register, including two languages neither of which was standardised.

The sources from which the documents were drawn to constitute the corpus can be divided into six groups from which twelve subcorpora were compiled:

- **Anglo-Norman sources**
  - Anglo-Norman corpus (ANC)

- **14th century sources (Year Books Edward II, Edward III and Richard II)**
  - Three subcorpora based on the following search terms:
    - assumpsit (ESCa)
    - consideration (ESCc)
    - promise (ESCp).

- **York/early Tudor sources (approx. 1440 – 1550) Selden Society docs.**
  - Three subcorpora based on the following search terms:
    - assumpsit (SSCa)
    - consideration (SSCc)
    - promise (SSCp).

- **Elizabethan/early Stuart sources (approx. 1550 – 1610)**
  - Three Elizabethan corpora based on the following search terms:
    - assumpsit (ECa)
    - consideration (ECc)
    - promise (ECp).

- **Stuart sources (17th century)**
  - One corpus based on the search term ‘consideration’ (SCc).

- **Mansfield sources (approx. 1750 – 1860).**
  - Two 18th/19th century corpora drawn from Mansfield’s case law and based on the search term ‘consideration’ (MC).
All sources could be accessed electronically via the HeinOnline database. The size of the sources, in terms of word tokens, was only ascertainable for the Anglo-Norman texts. The sources from the HeinOnline database do not offer the possibility of counting the word tokens. Therefore, statistical analysis such as relative frequencies of search terms cannot be undertaken in the conventional way.

This textual evidence collected from the corpora that were constituted from the Year Books and Law Reports spanning from the late 14th century to the mid-19th century, was the empirical basis for evaluation. At the centre of the study we find the concept of consideration and its immediate signifier, namely the use of the word ‘consideration’. But in order to provide context, the study also included ‘consideration’ in a general language use, as well as other relevant terms, such as ‘assumpsit’ and ‘promise’. The underlying language theory was discussed in chapter III. The corpus linguistics methodology, the linguistics analysis and all detailed results were described in chapter VI. In the present chapter we will conclude by considering the results from a diachronic perspective with the information drawn from all corpora, to present the findings in a comparative and contrastive way and in order to reveal an overall picture of the evolution of the term and concept of consideration.

The two corpora compiled on the basis of the word ‘assumpsit’ are texts drawn from the earlier Year Books and Law Reports, spanning a period from the 14th to the end of the 16th century (see chapter VI 3.1). The word ‘assumpsit’, which we associate today with the newly emerging notion that informal promises could be enforceable, lagged behind in its establishment as a legal technical term. Until the 16th century, the vocabulary used in cases we would see essentially as actions of assumpsit, is not yet settled nor specialised. The language, in particular in the early cases, is descriptive, with relatively little use of nouns that express established concepts and very little specific terminology, except for a few Latin legal phrases. In other words, while the new action of assumpsit was increasingly becoming a legal reality, the
textual evidence up to the end of the 15\textsuperscript{th} century did not show the term assumpsit as an established legal technical term or category.

It is only from the latter part of the 16\textsuperscript{th} century, that the use of the term assumpsit became more prominent. By the turn of the century and the early 17\textsuperscript{th} century, the term appears firmly integrated into the Law French language as a word in its own right and no longer needing an accompanying explanation, nor necessarily placed within a Latin context or phrase. It occurs as a term expressing an established concept. It has the grammatical function of a noun accompanied by an article or adjective and thus offers a use more akin to an abstract concept. It has also been found in a definitional use in: \textit{conditionell assumption est assumption}. It never appears in a Middle English context. It seems that at this stage, the increased specialisation of the language happened in Anglo-French rather than in the more vernacular Middle English. From the textual evidence that spans from the 14\textsuperscript{th} to the early 17\textsuperscript{th} centuries, we can observed a definite evolution from tentative uses of the term assumpsit to its firm establishment as a term in the legal vocabulary. Thus embedded in the specific terminology of making agreements, it clearly sign-posts the concept of enforceability of certain promises.

The two corpora compiled on the basis of the word ‘promise’ are texts drawn from the same sources and time span as the assumpsit corpora (see chapter VI 3.2). The term ‘promise’ and its corresponding contractual notion, which are actually at the heart of the new concept, also struggled to emerge. The sources for the 13\textsuperscript{th}, 14\textsuperscript{th} and 15\textsuperscript{th} centuries showed very little textual evidence for the use of the term ‘promise’ in the context of making an informal agreement enforceable. Despite the fact that St. German used the term in his writings at the beginning of the 16\textsuperscript{th} century, it only began to feature prominently in the context of the enforceability of informal agreements later that century. Although the use of the term in a strictly contractual sense was known, it was not necessarily in widespread use. The concept of a promissory rather than proprietary basis for informal agreements was still not reflected in a substantial
way in the use of the vocabulary used to describe such cases in the earlier sources, while ‘debt’ and ‘covenant’ remained prominent.

The use of the word ‘promise’ adopted a more specifically legal meaning, as it appeared in restricted contexts of contract formation. In the ECp, ‘promise’ appears in a contractual context in 79 of the 87 KWIC lines, which represents a leap of 55 point to 91%. This semantic shift towards a contractual meaning begins during the Elizabethan reign and will be confirmed in the 17th and 18th centuries, as can be observed from the Stuart and Mansfield corpora.

For both terms, ‘assumpsit’ and ‘promise’, we can see from the frequency of their use in the corpora just described and in the ‘consideration’ corpora, that the use in the early sources was tentative. Moreover, in the case of ‘promise’ it was not used in a strictly contractual sense. As far as ‘assumpsit’ was concerned, while the new action was gaining ground, the vocabulary did not follow at the same speed. Both terms were used increasingly with time; ‘promise’ soared exponentially, while ‘assumpsit’ levelled out as the action became obsolete.

The main focus of the research centred around the word ‘consideration’ (see chapter VI 3.3). From the study of the Anglo-Norman On-line Hub, we can observe that ‘consideration’ was a term in use in the second half of the 14th century, though it tended to occur in general language meanings, such as examination, reflection, study, contemplation, opinion, conclusion, motive. It could not be found in a general context of making promises or concluding agreement, contracts or covenant, nor in situations of debt or trespass.

The study of the Year Book and Law Reports, spanning from the 14th to the early 19th centuries, as well as a selection of abridgments and lexicons, has revealed the changes in language and the semantic shifts of the term ‘consideration’ as the new legal concept of enforcing informal agreements emerged. It is of particular interest to observe the process of increased terminological abstraction alongside the consolidation and development of the
concept. To reveal this evolution, four corpora were compiled from the original language sources of the Year Books and Law Reports on the basis of the occurrence of the search term ‘consideration’:

<table>
<thead>
<tr>
<th>Ref.</th>
<th>Page count of original sources</th>
<th>Files downloaded</th>
<th>Word tokens</th>
<th>Word types</th>
<th>Hits for ‘consideration’</th>
</tr>
</thead>
<tbody>
<tr>
<td>SSCc</td>
<td>4,109</td>
<td>57</td>
<td>38,899</td>
<td>6,716</td>
<td>102</td>
</tr>
<tr>
<td>ECc</td>
<td>1,831</td>
<td>114</td>
<td>176,449</td>
<td>13,787</td>
<td>392</td>
</tr>
<tr>
<td>SCCc</td>
<td>941</td>
<td>151</td>
<td>132,582</td>
<td>9,697</td>
<td>465</td>
</tr>
<tr>
<td>MC</td>
<td>161</td>
<td>56</td>
<td>136,788</td>
<td>6,347</td>
<td>714</td>
</tr>
</tbody>
</table>

Table 44: 16th – 19th century ‘consideration’ corpora

The use of the term ‘consideration’ rises considerably with time and so do the hits for proximity to other key terminology, which suggests an increased intensity in the preoccupation with the concept. We can observe two exceptions to this trend, namely ‘covenant’ and ‘assumpsit’. The use of the latter levelled out as the concept became obsolete. As to covenant, it was a legal instrument used less widely over time, as other instruments became more prominent, notably in the area of informal agreements.

In the 13th, 14th and 15th century law reporting sources, the word 'consideration' is very rarely used and any occurrence has a general language meaning. It is only in the sources from the 16th century that we find the term used more frequently in a legal sense. Yet, key word searches for 'promise' and 'contract' showed few hits, while the terms 'covenant' and 'debt' usually occur a great deal more. Long-established concepts and terminology were still prominent, despite the fact that conceptual boundaries shifted. This corresponds to the fact that both the actions of debt and covenant, as forefathers of contractual promises, were not yet seen in terms of contractual agreements or notions of promise but tended to be related to proprietary concepts, rather than promissory ones. While the use of the term ‘assumpsit’ levels out, as the action
becomes obsolete, there is an increase in the use of ‘contract’, which rises in parallel from the 17\textsuperscript{th} century onwards.

Beside this basic quantitative data, which shows a general increase, we can also observe a shift in the semantic content of the term ‘consideration’. This is best revealed by studying the register of the language, in which the term is embedded. For the sake of this study, four language registers were defined, as explained in chapter VI under section 1.3. In the comparative table and chart below, we can find the quantitative analysis of the language registers in the concordance lines that featured ‘consideration’ as search term.

<table>
<thead>
<tr>
<th>language</th>
<th>SSCc</th>
<th>ECc</th>
<th>SCc</th>
<th>MC</th>
</tr>
</thead>
<tbody>
<tr>
<td>General language</td>
<td>44</td>
<td>43</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>43 %</td>
<td>11%</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>General legal</td>
<td>17</td>
<td>111</td>
<td>155</td>
<td>106</td>
</tr>
<tr>
<td>language</td>
<td>17%</td>
<td>28%</td>
<td>33%</td>
<td>15%</td>
</tr>
<tr>
<td>Technical language</td>
<td>39</td>
<td>227</td>
<td>294</td>
<td>594</td>
</tr>
<tr>
<td></td>
<td>38%</td>
<td>56%</td>
<td>63%</td>
<td>83%</td>
</tr>
<tr>
<td>Latin</td>
<td>2</td>
<td>11</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>2%</td>
<td>3%</td>
<td>1,5%</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>102</td>
<td>392</td>
<td>465</td>
<td>714</td>
</tr>
</tbody>
</table>

Table 45: language register in the ‘consideration’ corpora SSCc, ECc, SCc and MC

General language uses of ‘consideration’, as represented by the blue part of the stacked columns in chart 5 below, fall substantially with time. In the earlier sources, it is frequently used in the sense of the court or the judges ‘taking (something) into account’ when reaching a decision. From the late 16\textsuperscript{th} century, this use is less frequent: in the Elizabethan corpus it falls to a 11% share. It is interesting that the context of these general language KWIC lines in the ECc is almost exclusively in Middle English. It only occurs three times in Anglo-French. This suggests that the increased specialisation of the legal language appears to have happened in Anglo-French rather than Middle English.
The principal semantic shift in the use of the term ‘consideration’ appears to have happened during the 16th century. We can observe two main changes. First, there is an increased use of the collocation ‘in consideration of’ as a causal conjunction between the two elements or events necessary for striking a contractual agreement. While this particular collocation could be used in any situation of exchange, the textual context clearly shows that we are dealing with specialist technical matters of the law. It is a relatively restricted set of vocabulary concerned with legal instruments and persons, payments, indenture, estate etc. in exchange of mainly marriage and other family matters. In other words, both the meaning and function of the collocation is in a general language sense but it is the lexical and semantic context that is highly technical.

Second, as we move further into the 16th and towards the 17th centuries, we find ‘consideration’ in technical uses. The lexical variety of its textual context is relatively poor and semantically restricted. The term consideration tends to be combined with a limited set of words, which is indicative for the use of specialised language. Furthermore, it appears as a full noun in a function of
participants, accompanied by adjectives and prepositions, and associated with material processes. The term can also be found as a one-word sentence, where the word is between two full-stops and thus pregnant with conceptual meanings. All these grammatical pointers put the word consideration in prime positions within the clauses, a position where it appears in its own right and as a signpost for a concept, rather than as a mere causal link between two other prime elements. It is in this sense that the word is used in a way akin to a concept.

As we come to the decisions taken by Lord Mansfield and his fellow judges between the mid 18th and the early 19th century, we have a very different language situation (see chapter VI 6). The language is Modern English and had already been the subject of the Great Vowel Shift, inflectional simplification and Johnson's linguistic standardisation. It means that the use of language and terminology is a lot more structured. Moreover, the selection criteria were different from the other corpora: case reports were not chosen because a specific search term occurred in the documents from which the text extracts were drawn – consideration, promise, contract etc. The corpus compiled for this part of the study was built by selecting cases on the basis of their content and whether these were a part of the corpus of cases stipulating Mansfield's concept of consideration as moral obligation.

The occurrence of both 'consideration' and 'promise' rises exponentially in comparison to earlier corpora. 'Promise' is the first noun to appear in the list of collocates and the list of clusters with 'consideration'. 'Contract' is also more prominent than it had ever been before in the informal agreement/consideration context. It suggests that consideration was discussed in the context of contracts, as we would expect from our 21st century perspective. Finally, the wildcard concordance search for moral* (moral, morals, morally, morality) showed an important presence, in comparison to only one match that was found in the seven corpora complied from the Selden Society, Elizabethan and Stuart sources, spanning several centuries.
The shift in the use of the terminology at the time of Mansfield cannot be denied. The quantitative data of the linguistic analysis not only shows a more intensive and precise use of specialised terminology and language, but also bears witness to the new aspects of the concept, namely that informal agreements are seen as contracts and that there is a moral element inherent in the making of a promise, which is a definite, though short-lived, *rapprochement* with the civil law concept of *causa*.

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The quantitative analysis has revealed the use and development of the vocabulary associated with the concept of consideration. We have observed a linear evolution showing not only a rising trend in the use of the word ‘consideration’, but also leading to a more intensive use of the term in a legal-technical context and to describe an autonomous legal concept. As to the development of the idea of enforcing informal agreements from a conceptual point of view, we observe a concordance between the two, yet with a gap in time as the terminology tends to lag behind.

In the table below, a selection of relevant cases has been listed with the vocabulary that dominated each case. This is by way of illustration of how the language evolved from the hesitant use of diverse terms to a more settled and structured language.

<table>
<thead>
<tr>
<th>Date</th>
<th>terminology</th>
<th>case law/legal writings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1300-1350</td>
<td><strong>“defaute”</strong></td>
<td>surgeon negligence⁶</td>
</tr>
<tr>
<td>1321</td>
<td>&quot;lui promist de eyder a tort e a droit&quot;</td>
<td>assistance’</td>
</tr>
<tr>
<td>1329</td>
<td>&quot;emprist a carier&quot;, “covenant”, “trespass”⁷</td>
<td><em>Humber Ferry case</em>⁸</td>
</tr>
<tr>
<td>1348</td>
<td></td>
<td>(malfeasance)</td>
</tr>
<tr>
<td>1350-1400</td>
<td><strong>“manuecept”, “emprist”, covenant”, “negligence”</strong></td>
<td><em>Waldon v Marshall</em>⁹</td>
</tr>
<tr>
<td>1370</td>
<td></td>
<td>(malfeasance)</td>
</tr>
<tr>
<td>1374</td>
<td><strong>“emprist”</strong></td>
<td>Action on the case¹⁰</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(surgeon)</td>
</tr>
</tbody>
</table>

⁶ YB 14 Edw. II
⁷ 3 & 4 Edw. III or 97 Selden Society, 237
⁸ *Bukton v Tounesende* (1348) Lib. Ass. 22 Edw III Folio 94a-94b, pl. 41, or LBEx
⁹ Y.B Mich. 43 Ed. III, 33, 38, or LBEx
¹⁰ YB 48 Edw. III, 6, 11, or LBEx
### Chapter VII: Conclusions

<table>
<thead>
<tr>
<th>Period</th>
<th>Year</th>
<th>Term(s)</th>
<th>Case Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1400-1450</td>
<td>1400</td>
<td>“covenant”, “negligence”</td>
<td><em>Watton v Brinth</em> (^{11}) (non-feasance)</td>
</tr>
<tr>
<td></td>
<td>1429</td>
<td>“deceit”, “bargain”, QPQ</td>
<td>Action on the case (^{12})</td>
</tr>
<tr>
<td></td>
<td>1431</td>
<td>“deceit”, “bargain”</td>
<td>Action on the case (^{13})</td>
</tr>
<tr>
<td></td>
<td>1433</td>
<td>“assumpsit” in Latin phrase, “assumpc”, “assumer”, “assumption”</td>
<td>Action on the case (^{14})</td>
</tr>
<tr>
<td></td>
<td>1436</td>
<td>“non feasance”, “covenant”</td>
<td>Trespass on the case action (^{15})</td>
</tr>
<tr>
<td>1450-1500</td>
<td>1476</td>
<td>“bargain”</td>
<td>(successful) action of “deceit on the case” (^{16})</td>
</tr>
<tr>
<td></td>
<td>1493</td>
<td>“super se assumpsit”, “non assumpsit mode et forma”, “emprist”, “quod non assumpsit”</td>
<td><em>Johnson v Baker</em> (^{17})</td>
</tr>
<tr>
<td>1500-1550</td>
<td>1504</td>
<td>“covenant”, “non fes”, “deceit”</td>
<td>non-feasance recognised (^{18})</td>
</tr>
<tr>
<td></td>
<td>1518</td>
<td>“promise”</td>
<td><em>St German</em> (^{19})</td>
</tr>
<tr>
<td></td>
<td>1522</td>
<td>“jeo done terre en tayle icy est consideration”</td>
<td>replevin (^{20})</td>
</tr>
<tr>
<td></td>
<td>1535</td>
<td>“det”, “assumpsit”, “assumpc”, “assumption”, “agreemt”, “covenat”, “contract”</td>
<td>Action on the case (^{21})</td>
</tr>
<tr>
<td>1550-1600</td>
<td>1553</td>
<td>“en consideration que son file marier”</td>
<td>uses with/without consideration (^{22})</td>
</tr>
<tr>
<td></td>
<td>1572</td>
<td>“assumpsit”, “contract”, “det”, “assume”</td>
<td>Action on the case (^{23})</td>
</tr>
<tr>
<td></td>
<td>1573</td>
<td>“en considerac q”, “assume de payer”, “assumpsit”</td>
<td><em>Edwards v Burre</em> (^{24})</td>
</tr>
<tr>
<td>1600-1650</td>
<td>1602</td>
<td>“assumpsit”, “en consideracin de”, “contract”</td>
<td><em>Slade v Morley</em> (^{25})</td>
</tr>
<tr>
<td></td>
<td>1623</td>
<td>“le surrender des patents est ben consideration a faire novell grant”</td>
<td><em>Seignior Zouch v Sir Edward Moore</em> (^{26})</td>
</tr>
<tr>
<td></td>
<td>1629</td>
<td>“le consideration del sanke &amp; amor la pier est continuant”</td>
<td><em>Besfich &amp; Coggill</em> (^{27})</td>
</tr>
<tr>
<td>1750-1850</td>
<td>1765</td>
<td>“whether this be a promise without a consideration”</td>
<td><em>Pillans v Van Mierop</em> (^{28})</td>
</tr>
<tr>
<td></td>
<td>1782</td>
<td>“to make a consideration to support and assumpsit”</td>
<td><em>Hawkes v Saunders</em> (^{29})</td>
</tr>
</tbody>
</table>

\(^{11}\) Case of 1400 in Y.B. 2 Hen. IV, 3, 9, or in LBEx
\(^{12}\) 7 Hen. VI, 1, 3, or LBEx
\(^{13}\) 9 Hen. VI, 53, 37, or LBEx
\(^{14}\) 11 Hen. VI, 18, 24, or LBEx
\(^{15}\) Y.B. 14 Hen. VI, 18, 58, or in LBEx.)
\(^{16}\) Y.B. 16 Pasch. Edw. IV, 7, or LBEx
\(^{17}\) C.P., Hil. 1493. Record CP 40/914, m. 104 or 115 Selden Society 135
\(^{18}\) Y.B. 20 Mich. Hen. VII, 8, 18, or LBEx
\(^{20}\) Gervys v Cooke, (1522) YB 12-14 Hen. VIII, or 119 Selden Society, 108 at 117
\(^{21}\) Y.B. 27 Mich. Hen.VIII, 24, 3, or LBEx
\(^{22}\) Reports of William Dalison, or 124 Selden Society, at 50
\(^{23}\) Dalison 84, 35, or 123 Eng. Rep. 293
\(^{24}\) Dalison 104, 45, or 123 Eng. Rep. 310
\(^{25}\) 4 Co Rep. 92 a.
\(^{26}\) 81 Eng. Rep. 795-96
\(^{27}\) 81 Eng. Rep 1219-1221
\(^{28}\) *Pillans and Rose v Van Mierop and Hopkins*, (1765) 3 Burr. 1663, or 97 Eng. Rep. 1035, at p. 1040
\(^{29}\) *Hawkes v Saunders*, (1782) 1 Cowp. 289, or 98 Eng. Rep. 1091
The idea that failing to honour an undertaking should be actionable emerged in the second half of the 14th century in a number of trespass on the case actions, first for malfeasance then for non-feasance, coupled at times with deceit. The action of debt and *indebitatus assumpsit* was also added to the already mixed bag of legal actions (see the brown, green and light blue parts of the table). The *Slade case* in 1602 clarified the content and ambit of the action of assumpsit. But, while the new action was increasingly becoming a legal reality, the textual evidence until towards the end of the 16th century does not show the term ‘assumpsit’ as an established legal technical term or category, nor does it show the vocabulary in the actions on the case to be very uniform. We can frequently find the verb ‘to undertake’ (*emprist*), some use of ‘assumpsit’, though frequently embedded in a Latin phrase, akin to a legal formula. There are repeated references to ‘covenant’, ‘bargain’ and ‘debt’, all notions emanating from older actions but based on proprietary rather than promissory concepts. It appears as though the new legal thinking could not overcome old established categories of proprietary concepts. The terminology used was hesitant and remained on well-trodden paths. The term ‘promise’ and its underlying notion only figured tentatively in the case law. With today’s hindsight, we understand that promise was actually already at the heart of the new legal thinking, in particular in *indebitatus assumpsit* cases. But then it had to be discussed more intensively and for a longer period of time, in particular in the *indebitatus assumpsit* cases, to emerge as a proper concept in its own right. The uncertainty in the use of the vocabulary is a witness to that hesitancy in the legal thinking.

30 *Barrell v Trussell*, (1811) 4 Taunt. 117, or 128 Eng. Rep. 273, at p. 274
Following the greater clarity that the *Slade* case brought in 1602, we can not only see the rise in the use of the word ‘promise’, but also that of the causal phrase ‘in consideration of’ that links one promissory part of the informal agreement to the other. As this concept is tried out, discussed and challenged in the courts, it becomes more established and settled. This can also be observed in the use of the terminology. We have moved from ‘consideration’ as a general concept to ‘in consideration of’ in a general context, to ‘in consideration of’ in a specifically legal context (though still within a general language understanding), to ‘consideration’ as the linguistic expression of a legal concept. As the concept gained in stature, so did its position as an autonomous concept. This was reflected in the use of the term ‘consideration’, no longer solely in the context of a causal connector but as an stand-alone noun and cover-term for the conceptual thinking of how to make informal agreements enforceable. The term ‘consideration’ stood hitherto for a legal concept, that has continued to evolve to the present day.

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This research has examined the concept of consideration in the English common law, but to conclude on a more general note, it must be stressed that this type of study need not be restricted to either the Middle Ages/Renaissance or the common law of contract. The approach and methodology adopted are cognitive models that have allowed us to go beyond the conceptual and doctrinal framework of the law and gain a deep level understanding of the origins and evolution of legal thinking and the terminology. Two general concluding remarks should be made here.

First, studying the language of the law from a diachronic terminological angle in combination with the basic premises of the Begriffsgeschichte approach, reveals the etymological, terminological and historical aspects of terms. Such knowledge of the emergence and evolution of terminology equips us with a better understanding of how to adapt and use it differently in the present and future. This may be relevant, for example, in the context of legal language
reforms.

The language of the law has long been criticised as archaic, complex and pompous, thus, excluding large parts of the population from understanding it.\(^{32}\) And indeed, the language used in the law forms a part of the rather grand institutions and practices that have developed due to historical traditions, its normative nature, prescriptive and performative functions and the basic premise that the letter of the law is supreme. The fact that some terms have everyday language meanings, such as ‘consideration’, only adds to the confusion. Any attempts to reform the legal language, usually with the aim to make it more widely accessible, must start from a deep-level understanding of the significance of terms, including their historical evolution. The kind of linguistic research that was carried out for this study offers essential insights into such deeper understanding.

Moreover, diachronic terminological studies may also be relevant in the context of newly emerging bodies of law, such as environmental law that has developed over a relatively short period of time and has thus missed out on the benefits of a more ‘organic’ evolution in relation to conceptual foundations and the relevant language and terminology.\(^{33}\) Similarly, corpus linguistics methodologies have also been advocated by members of the US judiciary as a tool for statutory interpretation.\(^{34}\)

Second, a linguistic and terminological approach also contributes to a better comprehension of the conceptual evolution of the law and of its socio-cultural content. This represents an important contribution to a better understanding of the differences or similarities between legal systems. A better grasp of the origins and evolution of specific aspects or elements of the law or a legal system, can contribute to a contextual approach for, among others,

\(^{33}\) C. Laske (forthcoming) Environmental law: lexical semantics in the quest for conceptual foundations and legitimacy  
\(^{34}\) e.g. Justice Thomas Lee of the Utah Supreme Court, article forthcoming in the Yale Law Journal: Judging Ordinary Meaning
comparative law, legal translation or legal harmonisation projects. Moreover, a deep-level understanding of the concepts of law through the study of its language, provides context when tracing the law’s “first rudiments among savages, through successive changes, to its highest improvements in a civilised society”, as advocated by Lord Kames. To that extent, this is an approach essential for all students of the law. The linguistic and terminological diachronic analysis, as set out in this study is an important methodological tool that should be in every student’s learning kit in order to deepen the understanding of their subject. It is context that renders facts truly informative…

… wodurch doch allein alles Wissen erst Wert bekommt. (Schiller)

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  - Henry IV & Henry V 1399-1422
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  - 3 (Years XXII-XXXII)
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  - 5 (Years XXXIII-XXV)

  Year Books of Richard II:
  - 2 Richard II 1378-79
  - 6 Richard II 1382-83
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  - 8-10 Richard II 1385-87
  - 11Richard II 1387-88
  - 12 Richard II 1388-89
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  - 2 and 3 Edward II 1308-1309 and 1309-1310 (Year Book Series II or 19 Selden Society)
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  - 4 Edward II 1311 (Year Book Series X or 63 Selden Society)
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  - 5 Edward II 1312 (Year Book Series XII or 33 Selden Society)
  - 6 Edward II 1312-1313 (Year Book Series XIII or 34 Selden Society)
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  - 7 Edward II 1313-1314 (Year Book Series XVI or 39 Selden Society)
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  - 10 Edward II 1316-1317 (Year Book Series XX or 52 Selden Society)
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  ➢ Keilwey (1688):
  REPORTS d'ascuns CASES (qui ont evenus aux temps dy Roy Henry le Septieme de tres heureuse memoire, & du tres illustre Roy Henry le huitiesme, & ne sont comprises deins les livres des Terms & Ans demesmes les Roys.) Seliges hors des papiers de ROBERT KEILWEY, Esp.; par JEAN CROKE, Sergeant al Ley, Jades Recorder del City de Londres & Prolocuteur del meason des Communes es derniers jour du rege de la Royne Elisabeth. 1688.
  Ovesque les Reports d'ascuns Cases prises per le Reverend Juge Guilleaume Dallison un des Justices del Bank le Roy, au temps de la Rayne Elisabeth & per Guilleaume Bendloe Serjeant al Ley au temps de la mesme Royne; touchants la construction de divers Acts de Parliament par equité.
  La tierce Edition embelle de plus que deux milles References aux autres livres cybien Ancient que Moderne de la ley, Jamais encore imprimès.
- Moore (1688):

The English Reports - King's Bench Division containing:
  - Benloe (1661):
    also containing in English translation:
    Dyer, volumes 1, 2 and 3; Brook's new cases; these were disregarded.

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    Les REPORTS de GULIELME BENLOE, Serjeant del Ley, Des divers PLEADINGS et CASES en le COURT del COMON-BANK, en le several Roignes de les tres Hault & Excellent Princes, le ROY HENRY VII., HENRY VIII., EDW. VI., & le ROIGNES MARY & EIZABETH. 1689
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The English Reports - King's Bench Division containing:
  - Rolle (1675):
    Les REPORTS de HENRY ROLLE Searjeant del' Ley, de divers CASES en le COURT del' BANKE le ROY. En le Temps del' REIGN de ROY JAQUES. Colligees par luy mesme & Imprimees par L'Original. 1675.
  - Palmer (1721):
    The REPORTS of SIR JEFFREY PALMER, Knight and Baront; ATTORNEY GENERAL to His Most Excellent Majesty, KING CHARLES the SECOND; The Second Edition. 1721
  - also containing in English translation:
    Bulstrode; this was disregarded.

(vi) **Mansfield & co cases:** (in alphabetical order) – HeinOnline – English Reports, Full Reprint – Eng. Rep. reference

*Atkins v Banwell*
(1802) 2 East 505, or 102 Eng. Rep. 462

*Atkins v Hill*
(1775) 1 Cowp. 284, or 98 Eng. Rep.1088

*Barnes v Hedley*
(1809) 2 Taunt. 184, or 127 Eng. Rep. 1047

*Barrell v Trussell*
(1811) 4 Taunt. 117, or 128 Eng. Rep. 273

*Haigh v Brooks*
(1839) 10 Ad & E. 309, or 113 Eng. Rep. 119

*Brooks v Haigh*
(1840) 10 Ad & E. 323, or 113 Eng. Rep. 124

*Clarke v Shee*
(1774) 1 Cowp. 197, or 98 Eng. Rep. 1041

*Cooper v Martin*
(1803) 4 East 77, or 102 Eng. Rep. 759

*Exeter Corporation v Trimlet*
(1759) 2 Wils. K.B. 95, or 95 Eng. Rep. 705

*Earle v Oliver*
(1848) 2 Ex. 71, or 154 Eng. Rep. 410

*Eastwood v Kenyon*
(1840) 11 Ad. & E. 438, or 113 Eng. Rep. 482
Flight v Reed
(1863) 1 H. & C. 703, or 158 Eng. Rep. 1067

Grenville v Da Costa
(1797) Peake Add Cas. 113, or 170 Eng. Rep. 213

Hawkes v Saunders
(1782) 1 Cwmp. 289, or 98 Eng. Rep. 1091

Hayes v Warren
(1731) 2 Strange 933, or 93 Eng. Rep. 950

Holliday v Atkinson

Jestons v Brooke
(1778) 2 Cwmp. 793, or 98 Eng. Rep. 1365

Lee v Muggeridge
(1813) 5 Taunt. 36, or 128 Eng. Rep. 599

Lindon v Hooper
(1776) 1 Cwmp. 414, or 98 Eng. Rep. 1160

Littlefield v Shee
(1831) 2 B. & Ad. 811, or 109 Eng. Rep. 1343

Martyn v Hind
(1776) 2 Cwmp. 437, or 98 Eng. Rep. 1174
(1776) 1 Dougl. 142, or 99 Eng. Rep. 94

Mawson v Stock

Mayor Yarmouth v Eaton
(1763) 3 Burr. 1402, or 97 Eng. Rep. 896

Meyer v Haworth
(1763) 8 Ad. & E. 467, or 112 Eng. Rep. 916

Montefiori v Montefiori
(1762) 1 Black. W. 363, or 96 Eng. Rep. 203

Moses v Macferlan
(1760) 2 Burr. 1005, or 97 Eng. Rep. 676

Munt v Stokes
(1792) 4 T.R. 561, or 100 Eng. Rep. 1176

Nightingal v Devisme
(1770) 5 Burr. 2589, or 98 Eng. Rep. 361

Paynter v Williams
(1833) 1 C. & M. 810, or 149 Eng. Rep. 626

Pillans and Rose v Van Mierop and Hopkins
(1765) 3 Burr. 1663, or 97 Eng. Rep. 1035
Price v Neal
(1762) 1 Black. W. 390, or 96 Eng. Rep. 221

Randall v Morgan
(1805) 12 Ves; Jun. 66, or 33 Eng. Rep. 26

Rann v Hughes 1778
(1778) 4 Bro. P.C. 27, or 2 Eng. Rep. 18
7 T.R. 350, or 101 Eng. Rep. 1014

Reech v Kennegal
(1748) 1 VEs. Sen. 123, or 27 Eng. Rep. 932

Shadwell v Shadwell
(1860) 9 C.B. (N.S.) 159, or 142 Eng. Rep. 62

Smith v Bromley
(1760) 2 Dougl. 696, or 99 Eng. Rep. 441

Stock v Mawson
(1798) 1 Bos. & Pul. 286, or 126 Eng. Rep. 907

Tate v Hilbert

Thomas v Thomas
(1842) 2 Q.B. 851, or 114 Eng. rep. 330

Thornton v Illingworth
(1824) 2 B. & C. 824, or 107 Eng. Rep. 589

Trueman v Fenton
(1777) 2 Cowp. 544, or 98 Eng. Rep. 1232

Wells v Horton
(1826) 2 Car. & P. 383, or 172 Eng. Rep. 173

Wendall v Adney
(1803) 3 Bos. & P., 247 at 250, or 127 Eng. Rep. 137

Weston v Downes
(1778) 1 Dougl. 23, or 99 Eng. Rep. 19

Williams v Moor
(1843) 11 M. & W. 256, or 152 Eng. Rep. 798

Wing v Mill
(1817) 1 B. & Ald. 104, or 106 Eng. Rep. 39

(vi) Abridgements – HeinOnline - Selden Society Publications and the History of Early English Law - Abridgements

➢ N. Statham (1490):
Abridgement of Cases to the End of Henry VI (original title page lacking)
N.B. Henry VI reigned until 1461
Rouen: Per me. R. Pynson
R. Brooke (1573):
*Le Graunde Abridgement*
London: In Aedibus Ricardi Tottelli

Fitzherbert (1577):
*Le Graunde Abridgement, Collecte par le ludge tresreuerend monsieur Anthony Fitzherbert, derniерment Conferre ouesque la Copye escript et per ceo correcte, ouesque le nombre del feuil, per quell faciement poies trouer les cases cy Abrydges en les Liuers dans, nouelment annotе: iammais deuaunt imprimes. Auxi vous troueres les residuums de lauter liuer places icy in ceo liuer en le fine de lour apte titles*
London: In Aedibus Ricardi Tottelli,

H. Rolle (1668):
*Un Abridgment des Plusieurs Cases et Resolutions del Common Ley*
London: Printed for A. Crooke [and 12 others]

(vii) **Lexicons and dictionaries** – HeinOnline - Selden Society Publications and the History of Early English Law – alphabetical search

W. Rastell (1579)
*Exposition of Certaine Difficult and Obscure Wordes and Termes of the Lawes of This Realme, Newly Set Fourth & Augmented, Both in French and English, for the Helpe of Such Younge Studentes as Are Desirous to Attaine the Knowledge for the Same. Whereunto Are Also Added the Olde Tenures*
London: In adibus Richardi Totelli

J. Cowell (1637)
*Interpreter: Or Booke, Containing the Signification of Words*
London: Printed for William Sheares

J.J.S. Wharton (1848)
*Law Lexicon, or Dictionary of Jurisprudence: Explaining All the Technical Words and Phrases Employed in the Several Departments of English Law, including also the Various Legal Terms Used in Commercial Transactions; Together with an Explanatory as well as Literal Translation of the Latin Maxims Contained in the Writings of the Ancient and Modern Commentators (From the London ed.)*
Harrisburg, Pa.: I.G. M'Kinley & J.M.G. Lescure
Annex 3 - Corpora

SSC = Selden Society publications corpus
EC = Elizabethan corpus
SC = Stuart corpus
MC = Mansfield corpus

The corpora constituted from the sources listed in annex 2.

**Selden Society publications** listed under (iii) in annex 2:

<table>
<thead>
<tr>
<th>Ref.</th>
<th>Search term/criteria (all spelling variations)</th>
<th>Number of downloaded files</th>
<th>Word tokens</th>
<th>Word types</th>
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<tbody>
<tr>
<td>SSCa</td>
<td>assumpsit</td>
<td>12</td>
<td>8,173</td>
<td>2,162</td>
</tr>
<tr>
<td>SSCp</td>
<td>promise</td>
<td>53</td>
<td>33,862</td>
<td>7,485</td>
</tr>
<tr>
<td>SSCc</td>
<td>consideration</td>
<td>57</td>
<td>38,899</td>
<td>6,716</td>
</tr>
</tbody>
</table>

**English Reports – Full Reprint**, listed under (iv) in annex 1: 72, 73, 123 ER => EC

<table>
<thead>
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<th>Word types</th>
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<td>51</td>
<td>40,226</td>
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<tr>
<td>ECp</td>
<td>promise</td>
<td>35</td>
<td>32,213</td>
<td>6,041</td>
</tr>
<tr>
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<td>consideration</td>
<td>114</td>
<td>176,449</td>
<td>13,787</td>
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</tbody>
</table>

**English Reports – Full Reprint**, listed under (iv) in annex 2: 81 ER => SC

<table>
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<th>Word types</th>
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<tr>
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<td>132,582</td>
<td>9,697</td>
</tr>
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</table>

**English Reports – Full Reprint**, listed under (v) in annex 2: Mansfield cases => MC

<table>
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<th>Number of downloaded files</th>
<th>Word tokens</th>
<th>Word types</th>
</tr>
</thead>
<tbody>
<tr>
<td>MC</td>
<td>Mansfield/co. decisions</td>
<td>56</td>
<td>136,788</td>
<td>6,347</td>
</tr>
</tbody>
</table>
The following spellings were taken into account when constituting the corpora and undertaking the linguistic analysis:

**assumpsit**: assumpsits, assumysit, assump, assumptionis, assumptionem assumption, assumcion, assume, assuma

**consideration**: consideracion, consideracioun, consideraciun, consideracon, consideracoun, consideration

**contract**: contracte, contrait, contraite, contrat, contret

**covenant**: covenand, covaunt, covaunte, covenance, covenantz, couenaunces, couenantz, couenaunt

**debt**: , debte, depte, dette, det dete, deite, deitte, debit, decte, dectes, doite, duite, duyte, dejaes, detus

**promise**: promise, promess, promès, promese, promis, promisse, pramesse, pramez, premez, preméz, premesses, premis
Annex 4 – Drop box

A number of corpora were constituted for the linguistic aspect of this study. These are listed in annex 3 and much of the discussion in chapter VI is based on these corpora.

Eight corpora were used particularly intensively for the detailed linguistic studies using concordance, clusters and collocate tools.

‘Assumpsit’ corpora:

<table>
<thead>
<tr>
<th>Ref.</th>
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<th>Downloaded files</th>
<th>Word tokens</th>
<th>Word types</th>
</tr>
</thead>
<tbody>
<tr>
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<td>4,109</td>
<td>12</td>
<td>8,173</td>
<td>2,162</td>
</tr>
<tr>
<td>ECa</td>
<td>1,831</td>
<td>51</td>
<td>40,226</td>
<td>6,127</td>
</tr>
</tbody>
</table>

‘Promise’ corpora:

<table>
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<th>Downloaded files</th>
<th>Word tokens</th>
<th>Word types</th>
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<tr>
<td>SSCp</td>
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<td>53</td>
<td>33,862</td>
<td>7,485</td>
</tr>
<tr>
<td>ECp</td>
<td>1,831</td>
<td>35</td>
<td>32,213</td>
<td>6,041</td>
</tr>
</tbody>
</table>

‘Consideration’ corpora:

<table>
<thead>
<tr>
<th>Ref.</th>
<th>Page count of original sources</th>
<th>Downloaded files</th>
<th>Word tokens</th>
<th>Word types</th>
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<tbody>
<tr>
<td>SSCc</td>
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<td>57</td>
<td>38,899</td>
<td>6,716</td>
</tr>
<tr>
<td>ECc</td>
<td>1,831</td>
<td>114</td>
<td>176,449</td>
<td>13,787</td>
</tr>
<tr>
<td>SCc</td>
<td>941</td>
<td>151</td>
<td>132,582</td>
<td>9,697</td>
</tr>
<tr>
<td>MC</td>
<td>161</td>
<td>56</td>
<td>136,788</td>
<td>6,347</td>
</tr>
</tbody>
</table>

The corpora, i.e. the downloaded files in .txt form can be found in the drop-box constituted for this project. The drop-box is accessible via the following link: https://www.dropbox.com/sh/2vson7i2lvwfsai/AACJLVjs5pwJl0zzN2BZEE06a?dl=0

It contains three main files, one for each search term: ‘assumpsit’, ‘promise’, and ‘consideration’. In each file we can find the subcorpora put together in a sub-file with a label that refers to the original sources from which the corpus was constituted and to the search term on the basis of which the corpus was put together. For example, SSCa*assum* is a corpus drawn from the Selden
Society sources (‘SSC’), as listed in annex 2, and on the basis of the search assumpsit (‘a’). Also included is the information of how the search was undertaken (‘*assum*’); in this example it was a wildcard search, which allowed for the spelling variations to be taken into account.

Moreover, next to each subcorpus are further documents that show the results of the various studies using concordance, clusters and collocate tools. Documents labelled ‘KWIC’ show the concordance lines around a search term. These Key Word In Context lines are the results of the search of a corpus with a specific search term. For examples, KWIC SSCc*considera*1L1R, lists the textual context lines of searching the ‘consideration’ corpus from the Selden Society sources (SSCc), as listed in annex 2, with the wildcard search *considera*. It also shows that the concordance lines were sorted alphabetically, first one word to the left, then one word to the right (1L1R).

Documents with the label ‘collocates’ show the results of searching a particular corpus for the collocates in relation to a particular search term. For example, ‘SSCc collocates’ is the list of words with which ‘consideration’ collocates in the Selden Society consideration corpus. The list is sorted by frequency and shows the first 125 collocates.

There are also documents labelled ‘clusters’, which show the results of searching a particular corpus for the clusters in relation to a particular search term. For example, ‘SSCc clusters’ is the list of words which cluster with ‘consideration’ in the Selden Society consideration corpus. The list is sorted by frequency and shows the first 30 clusters to the left of the search term and the first 30 clusters to the right of the search term.

The lists of collocates and clusters were not included when the application of those tools did not deliver significant results.
Annex 5 – Table of cases

The tables of cases (one sorted by date and one in alphabetical order) lists the cases mentioned in the theoretical discussion of the concept of consideration, that is in chapter V.

<table>
<thead>
<tr>
<th>Date</th>
<th>Case name</th>
<th>Original report references</th>
<th>Report reference</th>
<th>page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1294</td>
<td>Anon.</td>
<td>2 Y.B. Mich. 22 Edw. I</td>
<td>SS/YBEdw I, at 499</td>
<td>94</td>
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<td>1294</td>
<td>Anon.</td>
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<td>SS/YBEdw I, at 349</td>
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<tr>
<td>1303</td>
<td>Anon.</td>
<td>3 Y.B. Mich. 31 Edw. I</td>
<td>SS/YBEdw I, at 389</td>
<td>93</td>
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<td>1304</td>
<td>Anon.</td>
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<td>SS/YBEdw I, at 37</td>
<td>93</td>
</tr>
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<td>1304</td>
<td>Anon.</td>
<td>4 Y.B. Hili. 32 Edw. I</td>
<td>SS/YBEdw I, at 341</td>
<td>93</td>
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<tr>
<td>1305</td>
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<td>5 Y.B. Mich. 33 Edw. I</td>
<td>SS/YBEdw I, at 39</td>
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<td>SS/YBEdw I, at 439</td>
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<td>1310</td>
<td>Loveday v Ormesby</td>
<td>Y.B. 3 Edw. II, 25</td>
<td>20 Selden Society 191</td>
<td>71</td>
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<td>1312</td>
<td>Anon.</td>
<td>Y.B. 5 Edw. II</td>
<td>33 Selden Society 2</td>
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<td>1313</td>
<td>Anon.</td>
<td>Y.B. 6, 7 Edw. II 83</td>
<td>36 Selden Society 83</td>
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<td>Anon.</td>
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<td>86 Selden Society 353</td>
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<td>1329</td>
<td>Anon.</td>
<td>3 &amp; 4 Edw. III</td>
<td>97 Selden Society 237</td>
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<td>1348</td>
<td>Buxton v Tounesende</td>
<td>Lib. Ass. 22 Edw. III, 94a-94b, 41</td>
<td>Lawbook Exchange</td>
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<td>1400</td>
<td>Watton v Brinth</td>
<td>Y.B. 2 Hen. IV, 3, 9</td>
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<td>Somerton's Case - legal arguments</td>
<td>Y.B. 11 Hen. VI Trin., 55, 26;</td>
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<td>1516</td>
<td>Assaby v Lady Manners</td>
<td>Dyer 335a</td>
<td>73 Eng Rep. 520</td>
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<td>Anon.</td>
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<td>1535</td>
<td>Jordan's or Tatam's Case</td>
<td>Y.B. 27 Mich. Hen.VIII, 24, 3</td>
<td>Lawbook Exchange</td>
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<tr>
<td>1539</td>
<td>Marler v Wilmer</td>
<td>KB 27/1111, m. 64</td>
<td>in Baker (2013) at 1180</td>
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<td>1549</td>
<td>Newman v Gybbe</td>
<td>KB 27/1152, m. 135</td>
<td>in Baker (2013) at 1182</td>
<td>96</td>
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<td>1556</td>
<td>Pecke v Redman</td>
<td>2 Dyer 113a</td>
<td>73 Eng. Rep. 248</td>
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<td>1557</td>
<td>Joscelin v Shelton</td>
<td>3 Leonard 4</td>
<td>74 Eng. Rep. 503</td>
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<td>1558</td>
<td>Norwood v Reed</td>
<td>1 Plowden 180</td>
<td>75 Eng. Rep. 277</td>
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<td>KB 27/1111, m. 64</td>
<td>in Baker &amp; Milsom at 492</td>
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<td>Rogers v Snow</td>
<td>Dalison 94</td>
<td>123 Eng. Rep. 293</td>
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<td>Edwards v Burre</td>
<td>Dalison 104, 45</td>
<td>123 Eng. Rep. 301</td>
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<td>73 Eng. Rep. 756</td>
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<td>2 Leonard 154</td>
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<td>73 Eng. Rep. 797</td>
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<td>1 Leonard 19</td>
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Annex 6

Reigns of Kings and Queens between 1066 and 1900

House of Normandy
William I 25 Dec. 1066-1087
William II 26 Sept. 1087-1100
Henry I 5 Aug. 1100-1135
Stephen 26 Dec. 1135-1154

Angevins (House of Plantagenet)
Henry II 19 Dec. 1154-1189
Richard I 3 Sept. 1189-1199
John 27 May 1199-1216

Plantagenets
Henry III 28 Oct. 1216-1272
Edward I 20 Nov. 1272-1307
Edward II 8 July 1307-1327
Edward III 25 Jan. 1327-1377
Richard II 22 June 1377-1399

House of Lancaster
Henry IV 30 Sept. 1399-1413
Henry V 21 March 1413-1422
Henry VI 1 Sept. 1422-1461

House of York
Edward IV 4 March 1461-1483
Edward V 9 April 1483
Richard III 26 June 1483-1485

House of Tudor
Henry VII 22 Aug. 1485-1509
Henry VIII 22 April 1509-1547
Edward VI 28 Jan. 1547-1553
Mary I (alone) 19 July 1553-1554
Philip & Mary 25 July 1554-1558
Elisabeth I 17 Nov. 1558-1603

House of Stuart
James I 24 March 1603-1625
Charles I 27 March 1625-1649
[Interregnum 1649-1660]
Charles II 30 Jan. 1649 (de jure); restored 29 May 1660-1685
James II 6 Feb. 1685-1688
William & Mary 13 Feb. 1689-1694
William III (alone) 28 Dec. 1694-1702
Anne 8 March 1702-1714
House of Hannover
George I 1 Aug. 1714-1727
George II 11 June 1727-1760
George III 25 Oct. 1760-1820
George IV 29 Jan. 1820-1830
William IV 26 June 1830-1837
Victoria 20 June 1837-1901

King James VI of Scotland was proclaimed King of England in 1603 following Elisabeth I, who died without a direct heir. James styled himself ‘King of Great Britain’. However, the kingdoms of England and Scotland were united as the United Kingdom of Great Britain only in 1707 during the reign of the last Stuart ruler, Queen Anne.

As far as Ireland is concerned, Henry VIII assumed the style ‘King of Ireland’ in 1541. But the two kingdoms remained distinct until the Act of Union of 1800, when the Kingdom of Ireland became part of the ‘United Kingdom of Great Britain and Ireland’. Following the partition of Ireland in 1922, the kingdom was described as ‘United Kingdom of Great Britain and Northern Ireland’.