

12-16-2022

## Caroline I.B. Laske, *Law, Language and Change. A Diachronic Semantic Analysis of Consideration in the Common Law*

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### Repository Citation

Warren Swain, *Caroline I.B. Laske, Law, Language and Change. A Diachronic Semantic Analysis of Consideration in the Common Law*, 14 J. Civ. L. Stud. (2022)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol14/iss1/17>

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## BOOK REVIEW

LAW, LANGUAGE AND CHANGE. A DIACHRONIC SEMANTIC ANALYSIS OF *CONSIDERATION* IN THE COMMON LAW, by Caroline I.B. Laske, Brill, 2020, ISBN 978-90-04-42848-5, 242 pp., €116.00/\$140.

The doctrine of consideration is one of the great survivors of the common law. It first emerged in something like the modern form in the mid-sixteenth century. Consideration has fended off challenges to its continued existence on more than one occasion in the intervening centuries. Despite its longevity, many modern English lawyers would endorse the sentiments of Lord Goff in *White v Jones*,<sup>1</sup> who said that “our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by an unnecessary doctrine of consideration.” The requirement of consideration must appear even more perplexing to those schooled in the civilian tradition. It was no great surprise that consideration was excluded when it came to drawing up model rules for European private law in the Draft Common Frame of Reference.<sup>2</sup> This book nevertheless still has some important lessons for civilians. *Causa* and consideration whilst not identical, share a similar function. Both doctrines are a condition for the validity of informal contracts. At a time when *causa* seems under some threat, for example in the 2016 reforms of the French Code civil, an account of the history of consideration is particularly apposite. A good understanding of consideration is highly desirable for those who want to engage in the debates about the value of *causa*.

The strongest reason for the continued requirement of consideration is a not unreasonable concern that some of the work done by consideration will fall on other legal doctrines with uncertain results.<sup>3</sup> There is a systemic explanation for its survival as well. For the most part, the doctrine of consideration has caused few problems. English common law is not noted for making the sort of radical change required by removing the doctrine of consideration. Rather, change tends to take place incrementally. S.F.C. Milsom

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1. [1995] 2 AC 207, 262-263.

2. CHRISTIAN VON BAR ET AL, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE Ch 4, Section 1 (Book 2, Sellier 2009).

3. This was a point made by Phang J.A. in Singapore, *Gay Choon Ing v. Loh Sze Ti Terence Peter* [2009] SGCA 3, [114]-[116].

summed up the general rule: “Fundamental change happens slowly and by stages so small that nobody at the time could see them as in any way important.”<sup>4</sup>

Consideration has been examined by legal historians many times before. There was a rash of scholarship on the origins of the doctrine of consideration as recently as the 1970s.<sup>5</sup> In one of those contributions, A.W.B. Simpson argued that, “Any study of the doctrine of consideration must begin by fixing the ordinary meaning of the word; a legal concept evolves through the progressive refinement of a concept which is not in origin specifically legal.”<sup>6</sup> Simpson was involved in the Oxford Linguistic Philosophy movement in the 1950s, so it isn’t too hard to see his starting point. Laske would agree with Simpson’s observation. Her aim, she explains, “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.”<sup>7</sup> However, her inspiration is different from Simpson. She characterises it as “akin to *Begriffsgeschichte* work undertaken in German-speaking academia,”<sup>8</sup> and contends that the same approach used in social and political thought and economic structures can be applied to a legal doctrine. Legal history is, by definition, interdisciplinary. Various sub-disciplines have grown up in recent times. To name just a few, these include intellectual history, economic, colonial, and feminist perspectives.<sup>9</sup> A linguistic analysis is still much more unusual. Laske explains that “The present study has attempted to bring together the two ‘sciences’ in an *inter-disciplinary* space that makes linguistics a

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4. S.F.C. MILSOM, *A NATURAL HISTORY OF THE COMMON LAW* 75 (Columbia U. Press 2003).

5. John Barton, *The Early History of Consideration*, 85 LQR 372 (1969); J.H. Baker, *Origins of the Doctrine of Consideration, 1535-1585*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 336-58 (Morris S. Arnold et al. eds., U. North Carolina Press 1981). More recently, see David J. Ibbetson, *Consideration and the Theory of Contract in the Sixteenth Century*, in *TOWARDS A GENERAL LAW OF CONTRACT* 67-123 (John Barton ed., Duncker and Humblot 1990).

6. A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 329 (Paperback ed., Clarendon Press 1986).

7. CAROLINE I.B. LASKE, *LAW, LANGUAGE AND CHANGE. A DIACHRONIC SEMANTIC ANALYSIS OF CONSIDERATION IN THE COMMON LAW* 1 (Brill 2020).

8. LASKE, *supra* note 7, at 10.

9. For a flavour of the enormous variety, see MARKUS DUBBER & CHRISTOPHER TOMLINS, *THE OXFORD HANDBOOK OF LEGAL HISTORY* (Oxford U. Press 2018).

means for studying legal concepts.”<sup>10</sup> She distinguishes between a standard “full, general and statistical analysis of the language of law reporting”<sup>11</sup> and her approach here, which involves “the study of how legal concepts materialise, evolve and are translated into the letter of the law.”<sup>12</sup>

Chapter 3 contains quite a lot of necessary discussion of the methodology of functional linguistics, which might be of greater interest to specialists. Indeed, it won’t be much of a surprise to legal historians to learn that the meaning of words depends on cultural context and situation. Chapter 4 takes us into the different types of language used in a legal context: Latin, French, Law French, and English. Laske provides a serviceable summary of the rise of the English language in legal usage. On page fifty-nine, we get on to the doctrine of consideration.

Chapter 5 is called “The Origins of the Concept of Consideration”, but Laske actually provides a brief history of the development of the law of contract from the Anglo-Saxon’s times to the eighteenth century. There are some questionable points of detail and emphasis in this section. Laske observes that, “Between the 13th century and the reforms of the 19th century, procedural formalities dominated common law thinking.”<sup>13</sup> This observation is true up to point if she is talking about the superior courts as opposed to more local courts. But expressed in these terms, Laske underplays the ingenuity of the common lawyers. Her book provides two illustrations of the point: the use of fiction in the development of the writ of trespass and the patently false allegation of *vi et armis*, and the use of the *indebitatus* clause in assumpsit. In such a world, formality is sometimes the handmaiden of legal development; it is not necessary its jailor. Oddly, one procedural matter that is highly relevant to the growth of assumpsit and the seminal litigation in *Slade’s Case*<sup>14</sup>—the different modes of proof in debt and assumpsit (wager of law as opposed to a jury trial)—isn’t mentioned at all. In fact, the jury is central to the history of contract law following the rise of assumpsit.

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10. LASKE, *supra* note 7, at 3.

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 62.

14. (1602) 4 Co Rep 91 (a).

It would be surprising if the jury trial did not have an impact on the application of the doctrine of consideration as with much else.

Laske's characterisation of the law prior to the rise of assumpsit is also open to challenge. The idea that English contract law before 1066 "was rather rudimentary"<sup>15</sup> is a rather anachronistic way of looking at things. In any event, there was a degree of continuity between pre- and post-Norman law, both in reference to transactions by pledge and agreements more generally.<sup>16</sup> It is difficult to know what to make of the statement "It is only with the action of assumpsit that the idea grew of informal agreements as actions in their own right."<sup>17</sup> Whilst it is true that from the fourteenth century in the royal courts, a deed was required in covenant,<sup>18</sup> this hardly means that the action played a "minor role in the history of contract"<sup>19</sup> or that no one thought that there could be informal contracts. The difficulty was rather that with the imposition of a deed in covenant, gaps appeared in the mechanisms for enforcing informal contracts in the royal courts. Some of these were significant. No general action on an informal agreement was possible in the royal courts because trespass and trespass on the case were deemed not to be appropriate in cases of non-feasance.<sup>20</sup> It is quite another thing to assert that "The action of debt was riddled with technicalities and procedural complexities that excluded many meritorious claims for enforcing informal agreements."<sup>21</sup> Debt, after all, remained a very popular action into the nineteenth century. Some debt was formal and used a deed (debt on a bond). Debt on a contract did not require a deed but relied on the presence of *quid pro quo*. That being said, it could not be used for some transactions. When land was conveyed and the buyer failed to pay the price, debt could be used, but it could not be used in the reverse situation where the price was paid but the land was not conveyed.<sup>22</sup> Debt on a contract was also unavailable when someone had

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15. LASKE, *supra* note 7, at 63.

16. JOHN HUDSON, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND VOL II 871-1216 691-708* (Oxford U. Press 2012).

17. LASKE, *supra* note 7, at 65.

18. *Id.*

19. *Id.*

20. *Id.* at 73-74.

21. *Id.* at 67.

22. *Shipton v. Dogge* (1442) YB Trin. 20 Hen VI fo. 34, pl. 4.

failed to perform a service. However, in this situation, debt on a conditional bond was a very useful device, albeit that a deed was needed because it could cover a range of contracts for service.<sup>23</sup> The local courts and the, rather significant, mercantile courts could also be used. Instead of a single remedy, a patchwork of remedies and courts provided a pretty good range of options. There is after all no reason to think that as now, more than a tiny number of actions ever reached the superior courts.

Laske contends that “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,”<sup>24</sup> and this is probably the only conclusion that can be drawn. Laske then provides an overview of some of the familiar elements of consideration including the rule that consideration need only be sufficient, it need not be adequate, the idea of benefit and detriment, and the cases on forbearance. She makes the interesting point that in as much as natural love and affection was ever valid consideration, it was confined to the special category of marriage cases—a fact that is supported by counting up the references to marriage and consideration in the Year Books and Law Reports.<sup>25</sup> Having suggested that consideration “was not devised as part of an overall doctrine of contract law,”<sup>26</sup> Laske concludes that rather “consideration was used to check the floodgates from opening too wide and to limit assumpsit action (sic) to those where the promise was supported by consideration.”<sup>27</sup> She then suggests that a theory of contract law was only initiated in the eighteenth century by Blackstone and his contemporaries.<sup>28</sup> It is, of course, difficult to attribute motive in the way that consideration developed. It was undoubtedly some limit on the action of assumpsit. Perhaps the more interesting question is how much of a restriction consideration really was on the action in practice. It does not follow at all that there were no substantive ideas underpinning assumpsit.

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23. A.W.B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 LQR 392 (1966).

24. LASKE, *supra* note 7, at 89.

25. *Id.* at 99.

26. *Id.* 104.

27. *Id.*

28. *Id.*

Whilst the thinking of lawyers was often implicit rather than explicit, Ibbetson has shown very convincingly that lawyers did think of assumpsit as founded on a bilateral agreement rather than a promise.<sup>29</sup> Eighteenth-century writers did begin to explore the rationale of contract. The doctrine of consideration was a major obstacle to a coherent approach. Even Henry Ballou writing in the 1730s, influenced by the Natural Law theorists, was unable to reconcile the basic idea that contracts were formed by assent with the English requirement of consideration. These problems were magnified by the rise of the will theory in the nineteenth century. Legal writers were not alone in seeing difficulties with consideration. Judges felt the same. Laske concludes the chapter with Lord Mansfield. Several aspects of her entirely conventional account are open to challenge, including the claim that Lord Mansfield was advocating a doctrine of unjust enrichment in *Moses v Macferlan*<sup>30</sup> or that he favoured a moral consideration doctrine. The rest of the book's material is novel because it involves an entirely linguistic analysis of the doctrine of consideration. Laske's source materials are some printed yearbooks and reports, along with some dictionaries, abridgments, and some more general language texts. Naturally, this excludes manuscript reports.

Chapter 6 looks at the regularity and context of the words, "assumpsit", "promise," and "consideration" over time. Chapter 7 reviews the results of this statistical analysis. Most of the conclusions are not very surprising. But they do confirm the existing impression that the action of assumpsit did not immediately settle down into a particular terminological form until the sixteenth century,<sup>31</sup> that promise as a term to describe contractual liability was rather marginal,<sup>32</sup> and that consideration was in general use before lawyers adopted it but became common in a legal sense from the sixteenth century.<sup>33</sup> Nor is it very surprising that by Lord Mansfield's time, consideration was becoming more technical and precise in its use.<sup>34</sup>

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29. IBBETSON, *supra* note 5, at 102-105.

30. (1760) 2 Burr 1005, 1 Wm Bla 219. On this point, see *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

31. LASKE, *supra* note 7, at 179. On this point, see J.H. BAKER, 6 OXFORD HISTORY OF THE LAWS OF ENGLAND 1483-1588 839 (Oxford U. Press 2003).

32. LASKE, *supra* note 7, at 182.

33. *Id.* at 184

34. *Id.* at 190

A little more unexpected is Laske's claim that during the eighteenth century, the term "moral" was often a proximate term to "consideration."<sup>35</sup> This assertion was evidenced by looking at the prevalence of the words in a sample of cases which "specifically dealt with the consideration as a concept of moral obligation"<sup>36</sup> between the 1760s and 1840s. In the same sample, she also searched for "obligation", "duty" and "conscience."<sup>37</sup> But the fact that these patterns show up in a group of specially chosen cases covering ninety years does not convincingly demonstrate that Lord Mansfield was wedded to the concept of moral consideration. In many of the leading cases, Lord Mansfield did refer to "conscience", but he made free use of terms like "natural justice" and "equity" as well. This kind of language needs to be placed against more fluid notions of precedent. It is going too far to say that he was advocating a legal concept of consideration that included moral obligations in any broad sense. The two leading authorities *Atkins v Hill*<sup>38</sup> and *Hawkes v Saunders*<sup>39</sup> were not decided on the basis that a moral obligation provided good consideration.<sup>40</sup> Lord Mansfield was at pains to stress that quite the contrary, these were cases where there was more than a moral obligation or, as he put it, an obligation which "would otherwise only bind a man's conscience."<sup>41</sup> These were cases concerning the distribution of estates in which the plaintiff was trying to bring a claim against the executor in their representative or personal capacity rather than pursuing a claim in Chancery. Lord Mansfield's other examples of claims barred by infancy, limitations, or bankruptcy were a very limited set of moral obligations. It is better to think of these as examples of cases of legal obligation barred by a technicality. Nevertheless, some early nineteenth-century judges did toy with a broader idea of moral consideration. Bosanquet and Puller described

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35. *Id.* at 186

36. *Id.* at 184.

37. *Id.* at 168.

38. (1775) 1 Cowp 284.

39. (1782) 1 Cowp 289.

40. W. Swain, *The Changing Nature of the Doctrine of Consideration 1750-1850*, 26 *JLH* 55, 62-65 (2005).

41. *Atkins v Hill* (1775) 1 Cowp 284, 288-289; *Hawkes v Saunders* (1782) 1 Cowp 289, 290.

these events in their note to *Wennall v Adney*<sup>42</sup> written in 1814, but just as quickly, the idea seemed to fizzle out.

Laske concludes by claiming that “a linguistic and terminological approach also contributes to a better comprehension of the concept of evolution of the law and its socio-cultural content.”<sup>43</sup> Her study shows both the strength and limits of this approach. It is clearly useful to know that consideration was in wider non-legal use before lawyers adopted it. A linguistic analysis reflects the rise of assumption and the way in which consideration became a prevalent technical legal term in the eighteenth century. At the same time, a linguistic analysis does not tell us very much about why either of these things occurred. There are some limits to this approach, even on its own terms. It is difficult to come to robust conclusions without regard to the context. The law reports themselves changed very significantly throughout the study. On a superficial level, the printed reports got longer. Judgments were reported in more detail. There is no reason to assume that the substance of consideration was constant either. In the sixteenth century, consideration reflected the idea of a bargain or exchange and in this respect was similar to the requirement of *quid pro quo* in debt. There were always some cases which are quite difficult to fit within that model. By the nineteenth century, consideration was closely bound together with the idea of serious intention so that whilst the language of benefit and detriment continued to be used for good historical reasons, the veneer of reciprocity was very thin indeed. The results of the linguistic approach will certainly be of interest. But to be truly interdisciplinary, a study like this needs to be more fully immersed in the substantive legal doctrine than this present one.

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42. (1814) 3 B & P 249 (note).

43. LASKE, *supra* note 7, at 196.