

INTRODUCTION TO LEGAL METHOD

Second Edition
by
John H. Farrar and
Anthony M. Dugdale

Sweet & Maxwell

INTRODUCTION
TO
LEGAL METHOD

Second Edition

by

JOHN H. FARRAR, LL.M., Ph.D.

*Barrister of the High Court of New Zealand; Professor of Law
at the University of Canterbury, New Zealand and formerly
at University College, Cardiff.*

and

ANTHONY M. DUGDALE, B.A., B.C.L.

Lecturer in Law at the University of Bristol.

LONDON
SWEET & MAXWELL
1984

*First edition 1977
Second impression 1978
Third impression 1981
Second edition 1984*

*Published by Sweet & Maxwell Limited of
11 New Fetter Lane, London.
Computerset by Promenade Graphics Limited, Cheltenham
and printed in Great Britain by
Richard Clay (The Chaucer Press) Limited, Bungay, Suffolk.*

British Library Cataloguing in Publication Data

Farrar, John H.

Introduction to legal method.—2nd ed.

1. Law—England

I. Title II. Dugdale, A.M.

344.2 KD660

ISBN 0-421-29770-0

ISBN 0-421-29780-8 Pbk

*All rights reserved. No part of this publication may be
reproduced or transmitted, in any form or by any means,
electronic, mechanical, photocopying, recording or
otherwise, or stored in any retrieval system of any nature,
without the written permission of the copyright holder and
the publisher, application for which shall be made to the
publisher.*

©
J. H. Farrar and A. M. Dugdale
1984

To
Susannah, Sarah, Nicholas
and
Rebecca

PREFACE TO THE SECOND EDITION

THE first edition of this book received a general welcome. In one instance criticism of the book appeared somewhat gratuitously destructive but for the most part the critics were constructive in their approach and we hope that this edition has benefited from at least some of their comments. The second edition is written by both of us. We have together revised the whole but Tony Dugdale has taken specific responsibility for Chapters 3, 4, 6, 13 and 14, and has written Chapters 5, 8 and 10. John Farrar has taken specific responsibility for Chapters 1, 2, 7, 10 and 11, and has written Chapters 15 and 16. Ann Farrar has revised Chapter 9. The result is a substantially re-written second edition. The book has been revised to accommodate case law and statutory developments, the authors' experiences using the book for both law and liberal studies and to meet some of the criticisms made by others. There is new material (including in some cases new chapters) on

- (1) legal classification
- (2) law and fact
- (3) dispute resolution including dispute resolution in the welfare state
- (4) precedent
- (5) interpretation of statutes
- (6) the role of the European Convention on Human Rights and the legislative powers of the EEC with particular reference to problems of sex discrimination
- (7) law reform and the pattern of legal change
- (8) comparative legal cultures
- (9) justice and policy.

Other new features include extended treatment of case law, legislation and codification in operation. Overall an effort has been made to use more examples from the substantive law to illustrate the 'method' themes of the book.

We hope that these changes improve the book and help it to fulfil its aims of liberalising introductory law courses, showing how lawyers think and helping students to think for themselves about

legal issues, and supplementing books on the legal system. In spite of appearances writing a book of this kind is not easy. We are especially grateful for the criticism and advice of colleagues, in particular David Feldman, Keith Stanton, Brenda Sufrin, Harold Wilkinson and Clive Ward. We would also like to thank Julie Smith for wordprocessing our manuscript.

February 1984

JOHN FARRAR AND
ANTHONY DUGDALE

PREFACE TO THE FIRST EDITION

THE aim of this book is to introduce the reader to law and legal method and to stimulate thought about law and society. Part I of the book introduces law by discussing the nature and functions of law, the classification of law and the basic techniques of social control used in the legal system. Part II introduces legal method more specifically by discussing the general problems of law and fact, legal categorisation and reasoning, the particular data and ground rules relating to case law, legislation, codification, legal literature and the impact of membership of the EEC. This Part is supplemented by three appendices which set out specimen legal sources, give instruction in legal bibliography and provide a detailed study of the case law process. Throughout Parts I and II there is an attempt to relate law to its social background and this is the special focus of Part III of the book which deals with socio-economic change, the limits of law and the underlying questions of policy and values. The book does not deal in any detail with the institutions of the legal system which are already adequately dealt with elsewhere and it is hoped that, together with works on the institutions, it can be used in a first-year course on the legal system in the universities and polytechnics. I have used the bulk of the material for that purpose in the LL.B. course at the University of Bristol. The main problem I encountered was the lack of a suitable accompanying text on legal method—a gap which this book attempts to fill. It is hoped that it will, therefore, be of some use to first-year law students in helping them to acquire a basic knowledge of legal rules, an understanding of the relationship of law to the social and economic environment in which it operates and the ability to handle facts and apply abstract concepts to them, which the Ormrod Report identified as the objectives of the academic stage of legal education. At the same time it is hoped that it will assist others (such as social scientists) who are keen to learn something of the lawyer's viewpoint and some basic detail about legal sources. Lastly it is hoped that it might be of some use to continental lawyers who need to be familiar with English legal method. The book reflects some experience which I have had in teaching EEC

officials on courses held at the University of Bath from which, in all honesty, I probably learned as much as I taught about the differences between the various systems.

Although footnotes are used in the text I have tried to keep them to a minimum, and have added a bibliography of further reading at the end. I apologise for the table which appears on pages 205 *et seq.* Ideally, I would have liked to have inserted details of abbreviations, but there was insufficient space. As it is, there is a lot of detail crammed into a relatively small space. I only hope its utility will outweigh its unattractiveness.

The genesis of this book owes a great deal to Professor Glanville Williams' *Learning the Law*. It differs from that book, which is and will remain a guide, philosopher and friend to the aspiring law student, in the following respects. It is less didactic in style. It concentrates on legal method in more detail, and it attempts to give a prologue to a social view of law in the way described above. It makes frequent comparisons with Scots law and other systems. In some of these respects it owes something to Pollock's *A First Book of Jurisprudence*; Derham, Maher and Waller's *Introduction to Law*; and Levi's *Introduction to Legal Reasoning*. The late Professor Friedmann's *Law in a Changing Society*, Sir Rupert Cross, *Precedent in English Law* and Professor Robert Summers' *Law: its Nature, Functions and Limits* and his recent articles on legal techniques and process values have all been drawn upon for useful comment and examples. I have also profited from attending a seminar given by Professor Summers on the limits of law.

Despite its relative brevity this has not been an easy book to write. Whatever merit (if any) it has is due in some measure to students and colleagues who have discussed things with me. Amongst these I would particularly thank Neil Johnson, Dorothy Nelson, Hugh Beale, Stephen Jones, Brenda Sufrin, Tony Dugdale, and David and Carolyn Yates.

Last, for those sceptical academics who might think that to use this kind of material at the beginning of the first year is expecting too much too soon—all I can say is that it has been shown to work in the past with what I think was a moderate degree of success. I found student response on the whole to be enthusiastic. They seemed to use the training to advantage in other subjects, and jurisprudence was not such an alien subject to them in the third year.

ACKNOWLEDGMENTS

THE extract from *Essays in Jurisprudence and the Common Law* is reproduced by kind permission of Professor A. L. Goodhart and Cambridge University Press (© Cambridge University Press 1931).

Extracts from “The Ratio of the Ratio Decidendi” (1959) 22 M.L.R. 597 are reproduced by kind permission of Professor Julius Stone and The Modern Law Review Ltd.

Extracts from *Law: its Nature, Functions and Limits* (2nd ed.), are reproduced by kind permission of Professor Robert S. Summers and Prentice-Hall Inc., Englewood Cliffs, N.J., U.S.A. (© 1972, 1965 Prentice-Hall Inc. All rights reserved).

The extract from [1975] C.M.L.R. is reproduced by kind permission of Common Law Reports Ltd.

The Education Act 1975 and Statutory Instrument 1974 No. 654 are reproduced by kind permission of Her Majesty’s Stationery Office.

The extract from [1976] 1 Q.B. is reproduced by kind permission of The Incorporated Council of Law Reporting for England and Wales.

TABLE OF CASES

Abbot v. R. (1976)	107
Anderson, W. B. & Sons v. Rhodes (1967)	106
Anns v. Merton London Borough (1977)	110, 117, 119, 120, 121, 122, 125
Ashcroft v. Mersey Regional Health Authority (1983)	58
Attorney-General v. Prince Augustus of Hanover (1957)	145
Australian Consolidated Press Ltd. v. Uren (1969)	107
Bank of England v. Vagliano (1891)	175
Bastin v. Davies (1950)	186
Beamish v. Beamish (1861)	106
Becke v. Smith (1836)	138, 153
Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft (1975)	142, 152, 154, 201
Bole v. Horton (1673)	106
Boys v. Chaplin (1968)	99
Breker v. Wright (1982)	107
British Railways Board v. Herrington (1972)	98
Broome v. Cassell & Co. (1971)	106
Brown v. Brown (1967)	153
— v. The Russian Ship Alina (1880)	153
Brownsea Haven Properties Ltd. v. Poole Corporation (1958)	145, 146
Buchanan (James) v. Babco (1978)	154
Bulmer, H. P. Ltd. v. J. Bollinger S.A. (1974)	201
Burton v. British Railways Board (1982)	201
Bushell v. Secretary of State for the Environment (1981)	68
Button v. D.P.P. (1966)	190
Caltex Oil v. Dredge Willemstad (1976)	110, 116, 119
Camden (Marquis) v. I.R.C. (1914)	154
Campbell, <i>Ex p.</i> (1869)	154
Candler v. Crane, Christmas & Co. (1951)	107, 110, 114, 120
Carter v. Bradbeer (1975)	148
Cassell & Co. v. Broome (1972)	106
Cattle v. Stockton Waterworks (1875)	110, 111, 114
Chandler v. D.P.P. (1964)	154
Clark v. MacLennan (1983)	222
Cocks v. Thanet District Council (1982)	40, 41
Cordell v. Second Clanfield Properties Ltd. (1968)	188
Cox Toner Ltd. v. Crook (1981)	42
Davis v. Johnson (1979)	100, 101, 154, 202
De Falco v. Crawley Borough Council (1980)	157, 158, 164, 166
Defrenne v. Sabina (No. 43/75) (1981)	201
Dennis v. Charnwood Borough Council (1982)	68, 216, 217
Denver v. Holmes	153
Din v. London Borough of Wandsworth (1981)	159, 163, 164, 168
D.P.P. v. Schildkamp (1971)	154
— v. Stonehouse (1978)	58

Dixon v. Bell (1816)	127
Donoghue v. Stevenson (1932)	73, 84, 87, 90, 105, 110, 111, 114, 115, 116, 117, 118, 119, 121, 124, 215
Drew v. Drew (1870)	191
Duport Steels Ltd. v. Sirs (1980)	152
Dutton v. Bognor Regis Urban District Council (1972)	122, 124, 215, 216, 217
Dyson v. Kerrier District Council (1980)	159, 163, 165
Esso Petroleum Co. Ltd. v. Mardon (1976)	42
Europe, A. M. & S. Ltd. v. E.C. Commission (1983)	201
European Commission v. United Kingdom (1982)	201
Evans v. Hughes (1972)	58
Farrell v. Alexander (1977)	154
Fatuma Binti, etc. v. Mahamed Bin Salim (1952)	107
Fielding v. Morley Corp. (1899)	153
Fothergill v. Monarch Airlines (1981)	148, 153, 154
Froom v. Butcher (1975)	56
Gallagher v. McDowell Ltd. (1961)	127
Galloway v. Galloway (1954)	92
Gammell v. Wilson (1981)	214
Garland v. British Rail Engineering Ltd. (1982)	201
—— v. Jekyll (1824)	184
Gartside v. I.R.C. (1968)	153
Geelong Harbour Trust County v. Gibbs Bright & Co. (1974)	106
Gouriet v. Union of Post Office Workers (1978)	43
Greenlands Ltd. v. Wilmshurst (1913)	190
Hadmor Productions v. Hamilton (1982)	154
Hanlon v. Law Society (1981)	153, 154
Harper v. N.C.B. (1974)	106
Hart v. The Riversdale Mill Co. Ltd. (1928)	92
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964)	110, 115, 116, 117, 118, 120, 121, 124, 125, 126, 127
Heydon's Case (1584)	140, 141, 142
Home Office v. Dorset Yacht Co. (1970)	75, 110, 116, 117, 120, 121, 125
Hunter v. Chief Constable of West Midlands (1982)	43
Imperial Tobacco Co. Ltd. v. Attorney-General (1981)	43
I.R.C. v. Hinchy (1960)	153
Islam v. London Borough of Hillingdon (1981)	158, 164
J.E.B. Fasteners v. Marks Bloom & Co. (1981)	110, 118
Jenkins v. Kingsgate (Clothing Productions) Ltd. (1981)	201
Jones v. N.C.B. (1957)	68
Junior Books Ltd. v. Veitchi (1982)	80, 98, 106, 110, 119, 120, 121, 247
Kellum v. Johnson	153
Kennedy v. Stewart (1889)	191
Knüller (Publishing, Printing and Promotions) Ltd. v. D.P.P. (1973)	9
Le Lievre v. Gould (1893)	110, 111, 114
Lead Smelting Co. v. Richardson (1762)	154

Table of Cases

xxi

London Street Tramways Co. v. L.C.C. (1898)	96
Lupton v. F.A. & A.B. Ltd. (1972)	105, 106
MaCarthys Ltd. v. Smith (1981)	201
McLaren Maycroft & Co. v. Fletcher Developments Co. Ltd. (1973)	42
McLoughlin v. O'Brian (1982)	80, 242, 247
Malone v. M.P.C. (No. 2) (1979)	201
Maunsell v. Olins (1975)	136, 141, 143, 152, 153, 181
Messineo v. Beale (1978)	42
Midland Bank Ltd. v. Hett, Stubbs & Kemp (1979)	110, 116, 120
Miliangos v. George Frank (Textiles) Ltd. (1976)	78, 80, 96, 106, 107, 221
Ministry of Housing v. Sharp (1970)	110, 115, 118, 120
Morgans v. Launchberry (1973)	221
Morris v. English, Scottish & Australian Bank (1957)	107
National Panasonic (U.K.) Ltd. v. E.C. Commission (1980)	201
Negro v. Pietro Bread Co. Ltd. (1933)	107
Nolton v. Lord Ashburton (1914)	110, 115, 120
Nokes v. Doncaster Amalgamated Collieries (1940)	153
Norwhale, The, John Franetovich & Co. (Owners) v. Ministry of Defence (1975)	153
O'Reilly v. Mackman (1982)	43
Oliver v. Ashman (1961)	211, 212, 213, 219
Paisner v. Goodrich (1957)	154
People v. Frank G. Heilman Co.	153
Pettit v. Pettit (1970)	221
Pickett v. British Rail (1980)	213, 214
Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (1982)	58
Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (1982)	217
Polemis, <i>Re</i> (1921)	102
Police Authority for Huddersfield v. Watson (1947)	107
Prudential Assurance Co. v. Newman (1981)	68
Qualcast (Wolverhampton) Ltd. v. Haynes (1959)	56
R. v. Board of Trade, <i>ex p.</i> St. Martins Preserving Co. (1965)	154
— v. Casement (1917)	184
— v. Ghosh (1982)	106
— v. Gould (1968)	106
— v. Hammersmith & Fulham London Borough Councils (1983)	172
— v. Ion (1852)	187
— v. The Judge of the City of London Court (1892)	152, 153
— v. Kelt (1977)	154
— v. Local Commissioner for Administration, etc. (1979)	154
— v. McIvor (1982)	106
— v. National Insurance Commissioner, <i>ex p.</i> Viscusi (1974)	68
— v. North Devon District Council, <i>ex p.</i> Lewis (1981)	161, 163, 165
— v. O'Connell (1844)	106
— v. Preston Appeal Tribunal, <i>ex p.</i> Moore (1975)	58, 63, 68
— v. Taylor (1950)	99, 101
Randal v. Richmond & D.R. Co.	153
Read v. Joannoa (1890)	107

River Wear Commissioners v. Adamson (1877)	138
Roberts Petroleum v. Bernard Kenney Ltd. (1983)	42
Robinson v. Torbay Borough Council (1982)	161, 163
Ross v. Caunters (1980)	80, 110, 118, 120, 221
Royal Court Derby Porcelain Ltd. v. Raymond Russell (1949)	154
Rugby Water Board v. Shaw-Fox (1973)	104
Schorsch Meier GmbH. v. Henning (1975)	106
Schwebel v. Telekes (1967)	42
Scott Group Ltd. v. McFarlane (1978)	110, 118, 120
Sharpe v. E. T. Sweeting & Son Ltd. (1963)	127
Smith v. Bristol City Council (1981)	172
Sparham-Souter v. Town & Country Developments (1976)	216, 217
Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. (1973)	80, 110, 114, 119, 120, 127
State v. Standard Oil Co.	153
Stock v. Frank Jones (Tipton) Ltd. (1978)	137, 153, 221
Sunday Times v. United Kingdom (1979)	201
Sussex Peerage Case (1844)	143, 152
Tichborne v. Weir (1892)	190
Vacher & Sons Ltd. v. London Society of Compositors (1913)	153
Vestey v. I.R.C. (1980)	98
Wait, <i>Re</i> (1927)	181
Wait & James v. Midland Bank (1926)	181
Western Excavating (E.C.C.) Ltd. v. Sharp (1978)	42
Whitehouse v. Jordan (1981)	51, 55, 58, 60, 61, 65, 67, 217, 220
Woods v. W. M. Car Services (Peterborough) Ltd. (1981)	42
Woolmington v. D.P.P. (1935)	42
Worringham v. Lloyds Bank Ltd. (1981)	201
Young v. Bristol Aeroplane Co. Ltd. (1944)	99, 100, 101
Young, James and Webster v. The United Kingdom (1981)	201

TABLE OF STATUTES

1601	The Poor Relief Act (43 Eliz. 1, c. 2)	146	1975	Education Act (c. 2)	130
1846	Fatal Accidents Act (9 & 10 Vict., c. 93)	212, 213, 214	1976	Congenital Disabilities (Civil Liability) Act (c. 28)	218, 219
1882	Bills of Exchange Act (45 & 46 Vict., c. 61) ..	178, 227	1977	Housing (Homeless Persons) Act (c. 48) ..	40, 157, 158, 160, 163, 164, 165, 166, 167, 168, 172, 207, 208
1890	Partnership Act (53 & 54 Vict., c. 39) ..	174, 185, 227		s. 2	172
1893	Sale of Goods Act (56 & 57 Vict., c. 71)	178, 179, 180, 227		s. 3	156, 169
	s. 14 (1)	126		(1) (a) (b)	168
1906	Marine Insurance Act (6 Edw. 7, c. 41)	227		(2) (a) (b) (i) (ii) ..	168
1949	Consolidation of Enactments (Procedure) Act (12, 13 & 14 Geo. 6, c. 33)	175		(3)	169
1958	Prevention of Fraud (Investments) Act (6 & 7 Eliz. 2, c. 45)	26, 27		(4)	169
	s. 3	26		(4) (a) (b)	169
1965	Law Commissions Act (c. 22)	174		(6)	169
1968	Trade Descriptions Act (c. 29)	24		s. 5	169
	Theft Act (c. 60)	174		s. 17	150, 155, 156, 159, 160, 161, 162, 165, 166, 167, 168, 170
1970	Administration of Justice Act (c. 31)	97		(1)	163, 169, 170
1972	Defective Premises Act (c. 35)	215, 217		(2)	170
	s. 1	215		(3)	169, 170, 172
	s. 3	215		(4)	170
	European Communities Act (c. 68)	194, 200		Unfair Contract Terms Act (c. 50)	180
	s. 3	148	1978	Interpretation Act (c. 30)	146, 147
	Criminal Justice Act (c. 71)—		1979	Arbitration Act (c. 42)	54
	s. 36	92		Sale of Goods Act (c. 54)	178, 180, 227
1973	Fair Trading Act (c. 41)	24, 26	1980	Competition Act (c. 21) ..	26
1974	Consumer Credit Act (c. 39)	131	1981	Contempt of Court Act (c. 49)	193
			1982	Employment Act (c. 46)	193
				Administration of Justice Act (c. 53)	214, 219

CONTENTS

<i>Preface to the Second Edition</i>	<i>page</i>
<i>Preface to the First Edition</i>	vii
<i>Acknowledgments</i>	ix
<i>Table of Cases</i>	xi
<i>Table of Statutes</i>	xix
	xxiii

Book I *INTRODUCTION TO LAW*

1. THE NATURE AND FUNCTIONS OF LAW	3
“Truisms” about Human Nature	3
Social Order and Law	4
The Normative Character of Law and Morality	8
The Legitimacy of Law	10
2. METHODS OF SOCIAL CONTROL THROUGH LAW	13
The Penal Technique	15
The Grievance-Remedial Technique	20
The Private Arranging Technique	23
The Constitutive Technique	25
The Administrative-Regulatory Technique	26
The Fiscal Technique	27
The Conferral of Social Benefits Technique	27
Combinations of Techniques	29
The Legal Techniques and the Sources of Law	29
3. CLASSIFICATIONS OF LAW	31
Subject Classifications	31
Law and Equity	32
Civil and Criminal Law	37
Public and Private Law	39
Conclusion	42

Book II
SOURCES OF LAW AND METHODS
OF LEGAL REASONING

4. LAW AND FACT	47
<i>Whitehouse v. Jordan</i> : The Brain-Damaged Baby	47
Who Should Decide a Question—Layman or Judge?	50
Who Should Decide a Question—Trial Court or Appeal Court?	52
When Does a Decision on a Question Bind Future Courts?	56
Conclusion	57
5. FACT FINDING AND DISPUTE RESOLUTION	59
The Adversary Method	59
The Inquisitorial Method	62
Merits of the Methods	64
Non-Adjudicatory Methods	66
6. DETERMINING THE LAW	70
Sources of Law	70
Legal Language	72
Legal Reasoning and Logic	74
Legal Reasoning and Justification	76
The Limits of Legal Reasoning	78
Conclusion	79
7. CASE LAW	81
Analogy, Rules and Precedent	82
The Formulation and Application of Case Law Rules	85
The <i>Ratio Decidendi</i>	85
<i>Obiter Dictum</i>	89
Finding the Ratio of Decisions in Appellate Courts	91
Distinguishing Cases	93
<i>Stare Decisis</i> and the Hierarchy of Courts	96
A Comparison with the Position of Case Law in French and German Law	103
Conclusion	103
8. CASE LAW IN OPERATION	108
The Categories of Negligently Caused Economic Loss	108
The Case Law Development	111

Conclusion	119
Extracts from the Speech of Lord Roskill in <i>Junior Books Ltd. v. Veitchi Co. Ltd.</i> [1983] A.C. 520 at pp. 539 <i>et seq.</i>	121
9. LEGISLATION	128
An Outline of the Legislative Process	128
Mechanics of Enactment	129
Legislation and Language	131
Clear and Problem Cases	133
Interpretation of Legislation by the Courts	134
Current Judicial Practice	149
Reform Proposals	150
10. LEGISLATION IN OPERATION	155
The Scheme of the Housing (Homeless Persons) Act 1977	155
The Problems	156
Intentional Homelessness—A Wider Perspective	162
Extracts from the Housing (Homeless Persons) Act 1977	168
Code of Guidance to the 1977 Act	170
11. CODES AND CODIFICATION	173
Bentham and the History of Codification in England and Wales	173
Choosing an Appropriate Model	174
Interpretation and the Role of the Judge	175
The Pros and Cons of Codification	176
Codification in Operation—The Sale of Goods Act 1979	178
12. DOCTRINE	182
General Comparisons of Approach	182
The Position of Doctrine in English Law	182
The Status and Influence of Doctrine	186
The Citation of Modern Writers	187
13. THE EUROPEAN INFLUENCE	192
The European Convention on Human Rights	192
The European Economic Community (EEC)	193
Institutional Framework	194