

**Six Basic Ideas About Legal Proof:**  
Lectures and Aphorisms

**Table of Contents**

Introduction and Aphorisms .....	i
Lecture I: General Theory of Legal Proof .....	1
Power .....	1
Reason.....	2
Burden of Proof .....	4
Benefit of the Doubt.....	6
Proof.....	9
Legal Proof.....	11
Facts in Issue.....	13
Lecture II: Two Different Kind of Legal Proof .....	15
The Standards of Proof .....	15
The Third Standard of Proof.....	18
A Spectrum of Standards? .....	20
Two Kinds of Legal Proof .....	22
Proof and Truth.....	23
Shifting and Splitting the Burden of Proof .....	25
The Unified Evidentiary and Persuasive Burdens .....	26
Shifting the Burden of Proof: Pleading.....	29
Affirmative Defences.....	31
Pleading in the Alternative.....	32
Splitting the Burden of Proof.....	35
Wigmore’s Treatment of the Split Burden.....	38
Quasi-Criminal Civil Cases .....	39
Conclusion .....	41

Lecture III: Proof of a Document: Probate .....	45
Introduction.....	45
Formalism .....	50
Documents .....	53
Proof of a Will .....	55
The Technical Nature of Succession Law .....	55
A Very Brief History .....	57
The Formalities of Execution.....	58
Testacy and Intestacy .....	61
Bentham on the Formalities of Execution .....	61
Reversing the Burden.....	64
Testamentary Capacity.....	66
Knowledge and Approval .....	70
Conclusion .....	70
 Lecture IV: Proof and Presumption in Tort Law .....	 73
The Plaintiff-Friendliness of Different Torts.....	75
Plaintiff-Friendliness in Negligence .....	76
The Spectrum of Presumptions.....	80
Torts Actionable <i>Per Se</i> .....	82
Intention and Knowledge.....	84
Intention, Voluntariness and Action .....	88
The Imprecise Nature of Presumptions.....	90
The Ordinary-Course-of-Business Presumption.....	91
<i>Res Ipsa Loquitur</i> .....	93
Causation.....	95
Breach of Fiduciary Duty.....	97
Remoteness .....	98
Damages.....	99

Lecture V: The Persistent Myth of Conclusive Proof.....	103
The Dramatic Power of Conclusive Proof .....	104
The Mythical Status of Cross-examination.....	106
Oaths in Medieval English Law.....	108
A Very Short History of Common Law.....	110
The Jury .....	114
The Oath-Challenge in Ancient Greek Law .....	118
Physically Conclusive Proof: Ordeals in Medieval England.....	124
The <i>Basanos</i> -Challenge in Ancient Greek Law.....	125
Legal Fictions .....	127
<i>Apophugon</i> – A Legal Fiction in Classical Athens.....	128
Legal Fictions and Legal Myths .....	129
Torture and Ordeal.....	131
The Myth of Conclusive Proof in Modern Law.....	134
Legal Rules and the Myth of Conclusive “Proof” .....	136
Estoppel.....	138
<i>Autrefois Acquit and Autrefois Convict</i> .....	140
Conclusion .....	141
Lecture VI: Speculation on the Future of Legal Proof .....	143
The Rationalist Model .....	144
Basic Changes in Law.....	147
What Future Cases Will Reveal.....	154
Closing Words .....	158

APPENDICES .....	159
------------------	-----

Lecture II

Appendix 1: The Standard of “Proof” on a Question of Law .....	159
Appendix 2: The Blue Bus Problem .....	161
Appendix 3: What is Quasi-Criminal?.....	164
The Railroad Fire Cases.....	165
A Political Explanation.....	168
Appendix 4: Wigmore’s Analysis of <i>Menomenie</i> .....	171

Lecture III

Appendix 5: An Informal Approach to Probate.....	173
Appendix 6: A Hard Case of Intestacy .....	174

Lecture IV

Appendix 7: “On the 30 <sup>th</sup> , or at the latest, the 31 <sup>st</sup> ” .....	175
Appendix 8: Predicting the Future .....	177
The Value of Money .....	179
Appendix 9: Negligence and Contributory Negligence.....	184
Appendix 10: No-Fault .....	186
Appendix 11: Simpson’s Comment on <i>Rylands</i> .....	188

Introduction

Appendix 12: Twining’s Assumptions .....	189
--	-----

BIBLIOGRAPHY