

# Contextualizing Relations Between Presumptions and Legal Fictions: An Analysis of the Chinese Civil Code

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## Abstract

This research aims to achieve two goals: first and foremost, clarify the similarities and dissimilarities among statutory (legal) presumptions, judicial (factual) presumptions and legal fictions. The second is to provide a set of theoretical tools that can correctly distinguish two types of presumptions from legal fictions, so as to facilitate the accurate identification and application of those three by Chinese judges in their judicial practice. This study mainly adopts two research methods: legal theory analysis and law article analysis. The research results of this paper mainly are: first, compared with legal fictions, two types of statutory presumptions are more or less refutable. Their differences are as follows: on the one hand, the scope of refutation is different; on the other hand, the difficulty of refutation is different, too. Second, litigators are forbidden to refute the conclusive part of an applied legal fiction, but they can disprove its premise fact. By nature, that refutation is “a challenge against the lawfulness of that legal fiction’s usage”. Third, for related ultimate facts, the using of statutory presumptions will not lead to their reversed burden of persuasion. Fourth, when the principle of presumptive fault is applied, as for the issue of whether the defendant has subjective fault or not, the related burden of persuasion will be reversed to be assumed by the defendant. By comparison, in the usage of statutory presumptions, there will be no inversion of burden of persuasion. Fifth, direct denials, indirect denials and defenses can be used to rebut premise facts of the legal fiction, basic facts of two types of statutory presumptions, and presumptive facts of the refutable statutory presumptions. Sixth, when direct denials and indirect denials are launched, the evidence is the disproving evidence (Gegenbeweis). When the defenses are raised, the evidence is the proving evidence (Hauptbeweis). Seventh, the successful effect of discrediting basic facts of refutable statutory presumption: the using of that presumption lacks legitimacy, so the corresponding presumptive facts are untenable, too. Eighth, the successful effect of contradicting the presumptive facts of the refutable statutory presumption: while those presumptive facts are proved groundless, the related basic facts will be considered as confirmed continually. And finally, the successful effect of disproving basic facts of irrefutable statutory presumption: because it has been proved that the using of that presumption is lack of lawfulness, the related presumptive facts can not be sustained, either. By making use of those aforesaid study results, 28 statutory presumptions and 30 legal fictions are identified in the Civil Code of China.

**Keywords:** criteria of differentiation, the statutory presumptions, the legal fictions, the Civil Code of China, Articles analyses

## 1. Introduction

In China, the relationship between statutory presumptions and legal fictions has always been controversial and perplexing. For example, Article 58 of *the Tort Liability Law of China* (hereinafter referred to as *the TLL*) provides that “The medical institution shall be presumed to be at fault if damage is inflicted on patients under any of the following circumstances: (1) Violation of the provisions of laws, administrative regulations, rules, etc., relating to diagnostic and treatment practices; (2) Concealment of or refusal to provide medical records related to the dispute; and (3) Forgery, falsification or destruction of medical records.” After doing partial adjustment to the text of the aforesaid Article 58, the National People’s Congress of China (hereinafter referred to as the NPC) promulgated it

as Article 1222 of the Civil Code of China (hereinafter referred to as *the CCC*). <sup>1</sup>*The CCC* became effective on the New Year's Day of 2021. And *the TLL* was abolished and replaced simultaneously.

Although the new law (Article 1222) has already replaced the old one (Article 58), the academic disputes related to those two Articles are far from over. Specifically, there are two different interpretations of their contents. The first interpretation is “the theory of refutable presumptive fault”. This theory is held by many scholars in the academic circle. It is believed that this new Article (and its old counterpart) is about the presumption of fault of medical institutions in three situations. In the litigation, the party who is negatively affected by the said presumption should be allowed to prove that he/she/it has done nothing unlawfully to overturn the said fault presumption. For example, *the Textbook on Tort Liability Law of China* (edited by Prof. Wang Li Ming) holds that “when a patient suffers damage, if there is one of the circumstances specified in Article 58 of *the TLL*, the related medical institution should be presumed at fault, but it is not to presume that the medical institution is at fault for sure. In other words, the medical institution can prove that they are not at fault by adducing the disproving evidence.” In addition, Professor Zhou Cui also holds that view, he thinks that “the presumption here is a legal presumption (*Fa Lǚ Tui Ding*), and medical institutions should be allowed to produce the rebutting evidence to overthrow it”, that is, as long as it is a legal presumption, it is certainly allowed to be overturned. At the same time, the second interpretation is “the theory of irrefutable fault determination”. This theory was adopted by the NPC, Professor Liang Hui Xing, Professor Yang Li Xin and others. When the Constitution & Law Committee of the NPC deliberated the “*Tort Liability Law (Draft)*”, Mr. Hu Kang Sheng, Chairman of that Committee, pointed out that the so-called “The medical institution shall be presumed to be at fault” in Article 58 of that *Draft of TLL* is different from the so-called “presumed to be at fault” in paragraph 2 of Article 6 of *the same Draft*, but “a direct determination”. Professor Liang Hui Xing also holds the opinion that the “presumption of fault” in Article 58 is not a real presumption, but a “direct determination” made by the legislators in advance. Its legal effect is equivalent to another technical concept “be deemed/be regarded as (*Shi Wei*)”. In addition, Professor Yang Li Xin clearly indicated in Article 101 [the nature of presumed medical negligence] of the proposed draft of the judicial interpretation on *TLL* of China that: “If a medical institution is presumed to be at fault in accordance with Article 58 of *the TLL*, the court shall determine that the medical institution is at fault; the medical institution shall not be allowed to overturn the said presumption of fault.” (Zhang Haiyan, 2012)

In order to solve the puzzle of whether Article 58 of *the TLL* (now the revised Article 1222 of *the CCC*) is a “refutable presumption of fault” or an “irrefutable fault determination”, we should solve some related theoretical problems in the first place: (1) what are the connections and differences between various types of presumptions and legal fictions? (2) Can relevant litigants deny and defend legal presumptions and legal fictions? (3) Will these rebuttals and defenses affect the related burden of persuasion (Objektive Beweislast/*Zheng Ming Ze Ren*) and the related burden of producing evidence (Subjective Beweislast/*Ju Zheng Ze Ren*)? On the basis of solving those three problems, this author will further analyze Articles in *the CCC* of China, and divide them into the group of legal presumptions and the group of legal fictions respectively. By undertaking a task like that, this treatise is not only good for judicial practitioners to apply the related Articles, but also helpful for the academic community to further its research on the relevant Articles of *the CCC*.

Before concluding the discussion in this section, the author will briefly explain the meaning of some abbreviations appeared in the ensuing parts of this paper:

the BSP stands for the beneficiary of an applied statutory presumption in a civil trial. the PAASP means the party adversely affected by an applied statutory presumption. the *CCC* is equal to the Civil Code of China. The SPC means the Supreme People's Court. the RSP is the abbreviation for the refutable statutory presumptions, which allows the litigant adversely affected by the applied presumption to adduce evidence to overturn the basic facts of that presumption or its presumed facts. The ISP represents the irrefutable statutory presumptions, which only allows the parties adversely affected by the applied presumption to present evidence to overturn the basic facts of that presumption, but not to overturn its presumed facts.

## 2. Literature Review

In order to find out the status quo of relevant researches in Chinese academic circles, the author logged in to China National Knowledge Infrastructure (CNKI) (website: <https://www.cnki.net/>) on May 24, 2022 and did the corresponding data collection and analysis. Although not unique, CNKI is the most authoritative, comprehensive

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<sup>1</sup> Article 1222: “If a patient is harmed in the course of diagnosis and treatment, it is presumed that the (related) medical institution is at fault under one of the following circumstances: (1) Violation of the provisions of laws, administrative regulations, rules, etc., relating to diagnostic and treatment practices; (2) Concealment of or refusal to provide medical records related to the dispute; and (3) Loss, forgery, falsification or illegal destruction of medical records.”

and timely updated online academic literature learning and downloading platform in China.

Specifically, this author does literature research mainly through the following four methods: first, search the website with the keyword of “legal presumption”, and find a total of 27 relevant literatures published from October 1991 to September 2021. Among them, there are 2 master’s degree theses and 6 papers concerning criminal law issues. Secondly, a total of 125 relevant literatures published from January 2001 to December 2021 were searched on that website with the keyword of “factual presumption (*Shi Shi Tui Ding*)”. Among them, there are 17 papers on criminal law issues and 8 papers on administrative law issues. In addition, among the said 125 literatures, 23 are master’s degree theses. Third, a total of 113 relevant literatures published from January 2005 to December 2021 were found on that website with the keyword of “legal fiction (*Fa Lü Ni Zhi*)”. Among them, there are 55 papers related to criminal law issues, 2 articles concerning comparative law studies, and 1 article irrelevant to this topic. In addition, among the said 113 literatures, there are 2 doctoral dissertations and 22 master’s theses. Fourth, a total of 306 relevant literatures published from June 1982 to February 2021 were identified on CNKI with “be deemed/be regarded as” as the keyword. All of them are articles related to civil law issues.

Judging from the data in the preceding paragraph, the research on legal presumption, factual presumption and legal fiction in Chinese academic circles presents the following three characteristics:

First, there is a certain amount of literature accumulation on the respective studies of the three, but the degree of scholars’ attention on those three varies greatly. Among them, the number of literatures devoted to the study of legal fiction is the largest. There are 306 papers retrieved with the keyword “be deemed/be regarded as” and 55 treaties retrieved with the keyword “legal fiction”, a total of 361 strong. This author believes that the main reason behind this situation is that there are a large number of provisions in civil and commercial laws of China that involve the interpretation and application of legal fiction. At the same time, the number of literatures devoted to the factual presumption is in the middle, with a total of 100 literatures involving civil law issues. The reason behind this phenomenon is: if there is no direct evidence in the trial of a pending case, in order to help judges overcome that proof predicament, it is necessary to strengthen the use of indirect evidence (*Jian Jie Zheng Ju*) and the related rules of thumb. Therefore, it is inevitable for scholars to pay attention to the related issues. In contrast, the number of papers specializing in legal presumption is the least, merely 27. After deducting 6 papers on criminal law issues, there are only 21 related to civil law matters. Under this circumstance, strengthening the research on legal presumption is an issue that Chinese academic circles urgently need to pay attention to. In this regard, this paper attempts to do a gap-filling job.

Second, there are obvious deficiencies in the research on the relationship between legal presumption and factual presumption, which is specifically demonstrated by the following fact: in the aforesaid literature search period, this author only found 4 related literatures (Wang Xiongfei, *On the Fact Inference and the Presumption of Law*, 6 Hebei Law Science, (2008); Chu Fumin: *Quasi Legal Presumption -- the Intermediate Field Between Factual Presumption and Legal Presumption*, 5 Contemporary Law Review, (2011); Zhang Yunpeng, *Questions on Quasi Legal Presumption – a Discussion with Chu Fumin*, 3 Journal of Liaoning University (Philosophy and Social Science), (2013); Du Beiqin, *On Legal Presumption and Factual Presumption*, Jan. (Vol. 2) Legal System and Society, (2013)). This shows that in China, research on the connection and difference between those two types of presumptions is very weak. By expounding on that subject, the author intends to make a contribution in this respect.

Third, there are obvious shortcomings in the research on the relationship among factual presumption, legal presumption and legal fiction, which is specifically showed by the following fact: in the above-mentioned literature search period, this author only found 11 relevant literatures. Among them, the earliest one is Professor Jiang Ping’s “*Be Regarded as, Presumption and Burden of Proof in Civil Law*” published in the 4th issue of “Tribune of Political Science and Law” in 1987. The other 10 related papers are: Zhao Gang & Liu Haifeng, *On Presumptions in Evidence Law*, 1 Science of Law, (1998); Lu Peng, *The Difference between the Conclusive Presumption and the Fiction*, 1 Tongji University Journal (Social Science Section), (2003); Wang Xuemian, *On Logic Foundation of Presumption- And on the Relationship between Presumption and Fiction*, 1 Tribune of Political Science and Law, (2004); Lao Dongyan, *Misunderstandings in the Study of Presumptions*, 5 Science of Law, (2007); Long Zongzhi, *The Dividing Line and Application of Presumptions*, 1 Chinese Journal of Law, (2008); Mao Shuling, *Presumption and Legal Fiction*, 11 Journal of Heilongjiang Administrative Cadre Institute of Politics & Law, (2010); Li Kun, *Presumption and Legal Fiction: From the View of Rape Statutory*, 2 Journal of Hunan Police Academy, (2013); Sun Mengjie, *A Comparative Study on the Provisions of “Presumption” and “Be Regarded as” in China’s Civil Law*, 1-2 The Pedagogical Science Forum of Huai Yin Normal University, (2014); Qiao Guangyao & Liu Wanqi, *From Classification to the Dividing Line - on Presumption and Legal Fiction*, 5 Journal of People’s Public Security University of China (Social Sciences Edition), (2016). This illustrates that in China, the research on the connection and difference between two kinds of presumptions and legal fiction is a neglected topic among its academicians,

too. This paper intends to do some loophole-patching work in this area. In addition, due to the limited space of this article, the author's research will be limited to the relevant theoretical studies, and does not involve the collection, classification and evaluation of related case laws.

### 3. Analysis of key Concepts of Presumptions

#### 3.1 *The Concept, Nature and Logical Premises of Presumptions*

In the realm of litigation, the so-called presumption is actually the use of indirect evidence to prove, that is, when there is no direct evidence or the available direct evidence is not enough to verify the truthfulness of the facts to be proved, reasoning is carried out through the normal relationship between indirect evidence and the facts to be vindicated, and assumes that the facts to be proved are true. Here, the so-called "normal connection" is actually the rule of thumb. According to the legal theories of Romano-Germanic Law System, "The rule of thumb (Erfahrungssätze) is a general conclusion based on experience and drawn from a large number of similar facts, which is either general life experience or special professional knowledge." (Jauernig Othmar, 2003). In the Common Law System, the rule of thumb is also based on the connection of probability.

According to different standards, presumption can be divided into three categories: (1) legal presumptions and factual presumptions; (2) refutable presumptions and irrefutable presumptions; (3) presumptions of substantive law facts and presumptions of procedural law facts. The above-mentioned category (1) is divided according to whether there is a legal basis or not; category (2) is clearly divided according to whether it can be refuted or not; and category (3) is divided according to the specific law field in which the presumed fact takes effect. Of course, these classification criteria are far from absolute, and there are overlapping relationships existing among those categories. For example, both legal presumptions and factual presumptions can be refutable presumptions, but irrefutable presumptions can only be legal presumptions. As another example, the presumptions of substantive law facts can be either factual presumptions or legal presumptions. However, based on the principle of unequivocal yet limited provisions for trial proceedings, the presumption of procedural law facts cannot be factual presumptions.

What is the nature of presumptions? We can elaborate on this problem from two angles of negation and affirmation. First of all, from the perspective of negation, "presumptions are not evidence. Presumptions can be conclusive or refutable." (Lu Peng, 2003). The reason why presumptions can be disproved is that one of the indispensable premises of presumptions is the rule of thumb. In line with human experience and common sense in most cases, the existence of basic facts has a great impact on the status of the corresponding presumed facts. Specifically speaking, the two "could be in the relationship of principal and subordinate, or they are in the state of incompatibility. As for the so-called mutual causation, it means that if the cause fact exists, it is safe to assume that result fact also exist, and vice versa. The so-called principal-subordinate relationship between two facts means that when a fact exists, the relevant fact will exist, too. The so-called incompatibility means that, if a fact exists, it is safe to assume that related fact does not exist. The stable connection between the basic facts and the presumptive facts is labeled as the rule of thumb in Romano-Germanic Law System and the probability in the Common Law System severally. Because the way to obtain this 'rule of thumb' is 'induction', this rule of thumb is not tenable in every specific situation, that is, it can be falsified." (Ye Mingyi, 2007). Meanwhile, the so-called conclusive presumptions are also called irrefutable legal presumptions. The main reason why such presumptions are irrefutable is that legislators have injected the pursuit of certain values in the related legislative documents (for example, to solve the problems of "litigation deadlock due to lack of evidence" or "the input and output of proof are seriously out of proportion", etc.). Secondly, "viewed from the perspective of the methods of proof, presumption can be defined as a method of proof. For instance, a scholar holds that 'presumption is a method of proving the existence or non-existence of facts, as well as a method of judicial proof.'" (Wang Xuemian, 2004). Specifically, whether it is legal presumption or factual presumption (inference), they are all the methods that judges can use to prove the existence or non-existence of facts in a given case. However, the former is a statutory alternative method of proof, while the latter is a general one. The so-called alternative proof method refers to the use of presumption instead of direct evidence proof.

This paper holds that there are three logical premises of various presumptions: the first is the rule of thumb. As it has been explained above, it won't be repeated here. The second logical premise is the basic fact. In order to ensure the comparatively high accuracy of the presumptive facts, the basic facts must be true. Basic facts mainly include the following ones: (1) the basic facts which have been vindicated by the beneficiary of a statutory presumption (hereinafter referred to as the BSP); (2) the basic facts are those that need not to be proved. For example, 7 types of facts need not to be proved in Article 10 (1) of *SPC's Provisions on Evidence in Civil Proceedings* (Fa Shi [2019]

No. 19).<sup>2</sup> (3) The admitted facts by litigants can also be used as the basic facts of presumptions. In addition, it is worthwhile to note that “the clause of all remaining possibilities” provided by certain laws and judicial interpretations of Supreme People’s Court (hereinafter referred to as SPC) should not be deemed as the basic facts, “because the descriptions of basic facts in presumption rules should be specific and clear. The provision that is commonly known as a ‘clause of all remaining possibilities’ is a one that allow adjudicators to make discretionary inference, which is mistakenly considered as a presumption rule.” (He Jiahong, 2008). “This also vividly demonstrates that relevant provisions of presumption in valid laws and judicial interpretations of China are still in disarray, there is an urgent need to unify and regulate them.” (He Jiahong, 2008). The third logical premise of all kinds of presumptions is the specific value pursuit injected by legislators. “For example, the law provides that a person who has been missing for 7 years can be legally presumed dead. First of all, there is the connotation of natural inference in the basis of this presumption, because according to the rule of thumb, a person who has been missing for many years is often dead; Secondly, there are also man-made traces, because according to the law of nature, a person who has been missing for 5, 6, 6 and a half years or 7 and a half years may have died. However, the presumption rule artificially chooses 7 years and requires that period of 7 year has lapsed. That is to say, as long as it is one day short of 7 years, the judge cannot legally presume that the missing person has died. This kind of time line obviously belongs to the category of man-made requirement. However, because presumptions are methods of fact finding suitable for the state of ambiguity, this artificial boundary is often necessary for the adjudication. The judge in charge of the adjudicating affairs can not accurately know whether the missing person has died, and subsequently it is impossible for him/her to figure out the exact moment of death. However, taking the need to maintain the stability of social relations and social life into consideration, the legislator requires the judge to declare a person’s death after the expiry of a particular period of time. If there is no such a clear time limit, the judge will be at a loss in the face of such a situation, or make apparently inconsistent decisions (for similar cases).” (He Jiahong, 2008).

### 3.2 Theoretical Explanations of the Relationship between Legal Presumptions and Factual Presumptions

The so-called legal presumption refers to the presumption clearly stipulated by laws or valid judicial interpretations promulgated by SPC. According to the requirements of legal presumption, as long as the basic facts exist, the adjudicators shall make the corresponding inferences. “Unlike other rules of evidence, presumption rules are often established in substantive laws.” (Chen Ruihua, 2015). Therefore, it is more accurate and appropriate to call the presumptions provided by law as statutory presumptions or presumptions by legislation (*Li Fa Tui Ding*). At the same time, the factual presumption refers to the judicial method in which the judge deduces another fact according to the known facts and the rule of thumb in daily life. A scholar specially pointed out: “Strictly speaking, whether it is explicitly provided by law or at the discretion of the judge, the object of presumption should point to the ‘facts of the case’ always, that is, it is all about the presumption of facts. Therefore, it is better not to use the term ‘the factual presumption’ for the inference activities carried out by the adjudicators.” (Mao Shuling, 2010). This author totally agrees with that view. In the ensuing parts of this paper, this author will use the statutory presumption to refer to the aforesaid legal presumption and the judicial presumption (*Si Fa Tui Ding*) to refer to the aforementioned factual presumption.

The judicial presumption “belongs to the category of proof methods, which is a kind of discretionary deduction and identification mechanism for case facts (the issues to be proved), that is, a normal mode for the parties and the adjudicators to prove and identify the objects of proof.” (Wang Xiongfei, 2008). In other words, similar to the statutory presumption, the factual presumption is also an indirect method of proof. In the application of judicial presumptions, it also involves the logical reasoning and its conclusion based on the basic facts and related rule of thumb. “In terms of nature, it belongs to a kind of factual inference.” (Qiao Guangyao & Liu Wanqi, 2016). And “this understanding is also recognized by the evidence theory of Romano-Germanic Law. For example, in Japan, the theory of evidence law recognizes that presumptions are divided into legal presumptions and factual presumptions, and factual presumptions ‘are the inferences of facts according to rules of thumb, and they are the same meaning as the reasonable fact-findings.’” (Long Zongzhi, 2008).

This paper holds that the similarities between judicial presumptions and statutory presumptions are demonstrated in three aspects: first, both involve basic facts, relevant rules of thumb and reasoning methods of formal logic. Secondly, there is a close relationship between judicial presumptions and statutory presumptions. Its detailed

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<sup>2</sup> Article 10: (para.1) For any of the following facts, a party concerned shall be exempt from the burden of proof: (1) A law of nature, theorem and a law of science; (2) A widely-known fact; (3) A fact that can be presumed according to a legal provision; (4) A fact that can be presumed according to a known fact and a rule of thumb; (5) A fact confirmed by an effective arbitration award of an arbitral institution; (6) An ultimate fact confirmed by legally effective ruling of the people's court; (7) A fact certified by a valid document of notarization.

representation is: “from the perspective of historical evolution, legal presumptions are often developed or transformed from fact presumptions.” (He Jiahong, 2008). Thirdly, when the judge applies those two presumptions, the burden of persuasion of the related factual issue won’t be “shifted” or reversed.

At the same time, undeniably, there are at least 12 apparent differences existing between judicial presumptions and statutory presumptions: (1) In terms of classification of theoretical concepts, the judicial presumption is an integral part of litigation proof (proof by direct evidence as well as reasoning and inference by indirect evidence are all components of the so-called litigation proof), whereas the statutory presumption is a statutory method to substitute the aforesaid litigation proof. (2) Statutory presumptions can be divided into the refutable statutory presumptions (hereinafter referred to as the RSP) and the irrefutable statutory presumptions (hereinafter referred to as the ISP). In contrast, all judicial presumptions can be refuted or overturned. (3) The scope of statutory presumptions’ usage is larger than that of judicial presumptions. For example, the moment when judicial presumption takes effect is in the process of a particular litigation, and it is a method used by judges in the free evaluation and assessment of evidence. This is quite different from the situation in which the statutory presumption is established in advance by the legislative organ and then applied in a specific case. (4) In addition to the rules of thumb, statutory presumptions also involve a series of value pursuits that legislators desire to materialize (such as the proximity and crisis of proof, avoiding the occurrence of deadlock in trials, the balance of power between or among litigants, improving judicial efficiency, the notion of social protection, the dangerous nature of the related things, the sharing and transformation of losses, deterrence and prevention, etc.). In contrast, judicial presumptions only involve the application of the rules of thumb and various reasoning methods of formal logic, and does not involve those aforesaid value pursuits stressed by the legislators. (5) In terms of statutory presumptions and judicial presumptions, the parties’ assumption of the related burden of persuasion and the burden of producing evidence involved are obviously different. As 5.2 of this paper has elaborated on this matter in details, it won’t be repeated here. (6) The judge cannot freely decide to use statutory presumption or not. In other words, when there is a valid and relevant statutory presumption, the judge must apply that statutory presumption. In contrast, only when there is no related statutory presumption can the judge be allowed to decide to apply the judicial presumption or not. (7) In essence, statutory presumptions are legal issues to a considerable extent. This is manifested as: on the one hand, as far as the proof of basic facts is concerned, they are typical factual issues. However, on the other hand, they demonstrate the features of legal issues when adjudicators shall dutifully deduce the corresponding presumptive facts based on proven basic facts. In another word, “Since presumption is a lawfully ‘fictionalized’ fact, it should be a legal issue in essence.” (Long Zongzhi, 2008). “In the form of expression, legal presumptions exist not only in the articles of substantive laws but also in the provisions of procedural laws.” (Wang Xiongfei, 2008). By comparison, the judicial presumption is a simple matter of fact. Neither substantive laws nor procedural laws have made systematic and comprehensive provisions on such inferences. In addition, “factual presumption is easier to evolve into a form of judicial arbitrary than legal presumption due to the former’s lack of legal restrictions.” (Zhang Yunpeng & Xu Jing, 2007). (8) As the judicial presumption is a factual issue, it “belongs to the realm of free evaluation of evidence, only applicable on the base of case by case, and has the characteristics of judicial arbitrariness, and has nothing to do with mandatory demands expressed by law. This is the fundamental difference between fact presumptions and legal presumptions.” (Wang Xiongfei, 2008). In other words, as far as judicial presumption is concerned, “although the basic facts are established, the judicial organs are still allowed to deal with them at their discretion. They may or may not reach the corresponding conclusion, whether to find the existence of a certain fact or not should depend on the consideration of other specific facts and evidence (in the same case).” (Long Zongzhi, 2008). By comparison, in the application of statutory presumption, as mentioned in the preceding parts of this paper, this kind of presumption is a legal issue to the larger extent, so the judge shall not conduct his/her free evaluation of evidence against it, but shall directly put it into use as required by the legislators. “Legal presumption originates from the compulsory provisions of legislation, which directly excludes the judge’s free evaluation of evidence.” (Wang Xiongfei, 2008). (9) Both statutory presumptions and judicial presumptions may encounter disproving evidence, “but the difference between them is that once the disproving evidence against statutory presumptions (*Tui Ding*) is confirmed, the related presumptive facts will be like a bubble bursting and will no longer be effective; however, judicial presumptions (*Tui Duan*) are not. Although the disproving evidence is tenable, it is still necessary to comprehensively consider all the other evidence of the instant case and think over whether the evidence supporting the presumptive facts can outweigh the opposing evidence or not, so as to meet the required standard of proof.” (Long Zongzhi, 2008). (10) Although both of them involve the application of syllogism, there are obvious differences in their respective contents and structures. The said differences mainly are: “The conclusion of the factual presumption is reached by resorting to the inference (*Tui Li Tui Lun*). The logical process of its deduction is as follow: Taking the related rule of thumb as the major premise and the verified basic fact (indirect fact) as its minor premise, the corresponding presumptive fact is deduced by the form of inductive reasoning, analogical

reasoning, abductive reasoning and deductive reasoning, which is also called the inferential presumption (*Tui Lun Tui Ding*); (in contrast,) the conclusion of the legal presumption is reached by observing the related law provisions, and the logic process of its deduction is as follow: Taking the related law provisions as the major premise, taking the proven basic fact (indirect fact) as its minor premise, to get the corresponding presumption fact by using the way of deductive reasoning. Therefore, it can be seen that the logical form for the factual presumptions covers all kinds of reasoning methods under formal logic, mainly inductive reasoning, which reflects that the core of the factual presumption lies in the use of rules of thumb; while the logical form of the legal presumptions is only syllogism (a general mode of deductive reasoning), which shows that the essence of the legal presumptions lies in the strict application of related legal provisions by judges under the condition of completely excluding their free evaluation of evidence. In addition, from the perspective of the basis of presumptions, that is, the role played by the rules of thumb in the logical process, rules of thumb directly serve as the major premises of logic in the factual presumptions; however, in the legal presumptions, as the related legal provision itself is already designated as the major premise of the ensuing reasoning, the relevant rule of thumb is no longer deemed as the said major premise, but hidden behind the legal presumption instead.” (Wang Xiongfei, 2008). (11) As far as judicial presumptions are concerned, the opposite party is allowed to refute the rule of thumb that is used as the major premise. Of course, this refutation is not a defense, but a denial (the direct denial or the indirect denial). In contrast, if the statutory presumption is applied, it is generally not allowed to disprove the relevant rule of thumb. In the statutory presumption, the rule of thumb, the specific form of logical reasoning and the related value pursuits are all pre-selected by the legislators. In the application of statutory presumptions, the related law article is actually the major premise of the syllogism. In this case, it is generally not allowed for the opposite party to doubt and challenge that major premise. On rare occasions, if it is reasonable to presume that doubts and challenges alleged by the party adversely affected by a statutory presumption (hereinafter referred to as the PAASP) against the related law article (the major premise) are substantiated, and local courts have accumulated a certain number of similar cases, it is likely to attract the attention of relevant authorities, so as to solve this problem by promulgating relevant judicial interpretation or even amending the relevant law. (12) As for the specific forms of expression, statutory presumptions and judicial presumptions are quite different. “It is worthwhile to think over the idea of establishing a system of guiding cases, and using those selected decided cases to resolve certain universal problems existing in the application of judicial presumptions, such as the inference of beforehand knowledge of something, the inference of illegal possession, etc. because the appropriateness of inference has a high degree of context dependence, only in the form of specific cases, can the appropriateness of inference be better understood and grasped. The rule of inference is a kind of guiding and inducing one in nature, which is more suitable to be expressed by selected guiding cases. But the rule of statutory presumptions is always mandatory and definite, which is more suitable to be expressed by abstract and definite law articles.” (Bian Jianlin, Li Shuzhen & Zhong Dezhi, 2009).

Although there are at least 12 obvious differences between judicial presumptions and statutory presumptions, there is also a certain correlation between them, that is, from the perspective of historical development, as mention in the above parts, statutory presumptions are often developed or transformed from the related judicial presumptions. This author thinks that the aforesaid twelve differences are actually caused by some legislative factors added by the legislators when converting judicial presumptions into statutory presumption. In other words, under the precondition of clearly defining the relationship and distinction between the two, judicial presumptions have the significance and value to continue to exist as a particular type of presumptions. Therefore, it is difficult for this author to agree with Prof. Long Zong Zhi’s view on denying and canceling the legal status of judicial presumptions.

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#### 4. Legal Fictions and Presumptions

##### 4.1 Significations of Legal Fictions

According to Professor Jiang Wei, the legal fiction “is characterized by forcibly confirming the existence of purely fictitious facts, or forcibly identifying totally different facts as the same, so it is a legislative fiction by nature.” (Mao Shuling, 2010). Generally, legal fictions have the following four characteristics: “first, the nature of the two facts in the fiction is different, the legislator is completely aware of that; second, the two facts in the legal fiction should not be based on high probability in logic; third, the purely fictitious fact in the fiction can not be overturned;

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<sup>3</sup> “One of the manifestations of confusion in the concept concerning presumptions is to divide presumptions into two types: legal presumptions and factual presumptions, and equate inferences with factual presumptions. This kind of classification and treatment confuses the concepts of presumption and proof, and blurs the function and significance of presumption mechanism.....In the written law system of China, the recognition of factual presumptions is more likely to result in judicial arbitrariness.” (Long Zongzhi, 2008).

Fourth, the content of the legal fiction is not ‘something that can be taken for granted’, it is only for special reasons that the legislator grants the legal effect of one provision to another situation that is not in compliance with the former, therefore, whose scope of application cannot ‘be expanded’.” (Zhang Haiyan, 2012)

“The fundamental function of the legal fiction lies in expanding the scope of application of law by regarding fact A as fact B.” (Wang Xuemian, 2004). In other words, just like the interpretation of laws, the legal fiction is also a kind of legislative method to make up for the defects and deficiencies of the enacted law, to maintain the stability and authority of law in technology, so as to ensure that it can better meet the needs of society, and timely and effectively regulate social relations. Therefore, there are only statutory legal fictions, no “factual (judicial) fictions”.

#### 4.2 Similarities and Dissimilarities of Legal Fictions and Presumptions

As mentioned above, presumptions are generally divided into the group of judicial presumptions and the group of statutory presumptions, and statutory presumptions can be further divided into two sub-groups: the RSPs and the ISPs. “As for the said classifications, it should be noted that presumptions are methods of using ‘the basic fact A’ to deduce the ‘lawful existence of the presumptive fact B’. The prerequisite of its application is that the said basic fact is true and reliable. Whether the parties are allowed to rebut---this standard is aimed at the conclusion resulted from the application of a presumption, rather than the basic facts used in that presumption. If the basic facts have yet been verified, the corresponding presumptive conclusion will lose its basis of construction. In this case, the use of that presumption to identify facts is lack of legitimacy. Therefore, the rebuttal against the basic facts is actually a challenge to the lawfulness of the application of that presumption, rather than a challenge against the presumptive result of that presumption’s usage.” (Qiao Guangyao & Liu Wanqi, 2016). Being fully aware of this is of great significance to master the classification standards and the subordinate concepts, and to identify the presumption type that is truly comparable with legal fictions.

“As for the factual presumption, due to its lack of written and normative legislative provisions, the distinction between that type of presumptions and the legal fiction is self-evident.” (Long Zongzhi, 2008). Therefore, this paper won’t do any further elaboration on that subject. In addition, the difference between the RSPs and legal fictions is quite obvious. This is clearly demonstrated as the following 4 points: First, as far as the RSP is concerned, the PAASP can not only disprove its presumptive fact but also try to discredit its basic fact. As far as the legal fiction is concerned, the law forbids the parties from disputing the conclusive part of that legal fiction, so the party adversely affected by that legal fiction can only refute whether the “premise fact” applicable to the fiction is tenable. For example, the first paragraph of Article 138 of *SPC’s Interpretations on How to Implement the Civil Procedure Law of China* (Fa Shi [2015] No. 5, as revised by Fa Shi [2020] No.20, and further revised by Fa Shi [2022] No. 11) is a typical legal fiction in the sense of adjective law. It provides that: “When legal instruments are to be served by public announcement, announcements may be posted in the bulletin board of the relevant court and at the domicile of the party on whom the legal instruments shall be served. Alternatively, announcements may be published on newspapers, via information networks and on other media. The date of announcement shall be the date of the last announcement posted or published. Service of legal instruments by public announcement shall be conducted in the manner prescribed by relevant special requirements, if any. The legal instruments shall be deemed as served upon expiration of the announcement period.” The law forbids the parties from denying the conclusive part of that legal fiction (i.e. the said legal instruments are deemed as served), but the parties can disprove the ‘premise facts’ applicable to that fiction (i.e. the court has not conducted the service by public announcement by utilizing the related statutory form, and the announcement period has not expired). Second, as far as the RSP is concerned, there is a reasoning process from the basic facts to the presumed facts pursuant to the rule of thumb. Of course, as mentioned in the preceding parts, as far as the statutory presumption is concerned, that mental process based on the rule of thumb has been completed by the legislators for the judges well in advance. In contrast, there is no such deduction process based on the rule of thumb when a legal fiction is applied. Third, as far as the basic facts are concerned, the BSP should bear its burden of persuasion. At the same time, the “burden of persuasion for the presumptive facts which should have been assumed by the same BSP has been temporarily relieved due to the application of relevant provisions of law (that is, the so-called “temporary internal convince held by the presiding judge” mentioned by German Prof. H. Pruetting, or the “bursting bubble” theory recognized by Rule 301 of US Federal Rules of Evidence). When it is clear that the PAASP can not provide sufficient rebuttal evidence, the aforesaid relieving situation will be changed from temporary to permanent. In contrast, the application of a legal fiction has nothing to do with the normal and reversed distribution of burden of persuasion.

The ISPs refer to a lawful indirect proof method that the legislator forbids the PAASP from questioning and challenging the presumptive facts based on the consideration of materializing certain legal values in the trials. Because “this kind of presumptions can only be legal presumptions, not factual presumptions,” (Lu Peng, 2003). Therefore, strictly speaking, we should label all “irrefutable presumptions” as the ISPs or the conclusive



presumptions.

As far as the ISP is concerned, it is crystal clear that the PAASP is forbidden to disprove its presumptive facts. However, the PAASP can figure out ways to discredit the basic facts. Theoretically speaking, Refutations are composed by the denials and the defenses. This kind of refutation against the basic facts can be a direct denial, an indirect denial, or a defense allegation. It should be noted that whether the basic facts can be rebutted is not the decisive factor in identifying whether a presumption can be refuted or not. Just as the preceding paragraphs showed, the refutation against the basic facts is “a challenge against the lawfulness of that statutory presumption’s usage”. Quite on the contrary, as far as the refutable presumptions (including the RSPs and refutable judicial presumptions) are concerned, the PAASP can not only disprove their basic facts (like the ISPs, that refutation is essentially “a challenge against the lawfulness of the applicable presumption”), but also can discredit the presumptive fact itself.

Among all kinds of presumptions, it is the ISPs that are truly hard to be distinguished from the legal fictions and those two are too easy to be confused together. The confusability of the two is mainly demonstrated in the following four aspects: first, based on the specific legislative goals and policies, the conclusions obtained from the application of both are irrefutable. Second, the parties adversely affected by both of them can doubt and challenge the facts used as the premises of their applications severally. As far as the used legal fiction is concerned, the refutation against its premise fact is a kind of “question against the lawfulness of the applicable legal fiction”. As far as the applied ISP is concerned, the refutation against its basic facts is a kind of “question against the lawfulness of the applicable presumption”, too. Thirdly, in the application of a legal fiction and an ISP, the judge has neither judicial discretion nor the need to infer in line with the rule of thumb, and there is no room for free evaluation of the related evidence. Fourthly, as mentioned above, the judge’s application of an ISP also includes the reasoning process of syllogism, that is, taking the related law articles as the major premise and the basic facts (indirect facts) as the minor premise, the presumptive facts are subsequently derived by using the deductive reasoning. As far as the application of legal fiction is concerned, there is also a similar process of thinking and reasoning, that is, taking the related law articles as the major premise and the verified premise facts as the minor premise, and using the deductive reasoning to determine whether the said legal fiction should be applied or not.

Based on one-sided understanding of those similarities, some scholars mixed them up. The following views are typical: “As for the nature of presumption, that is, whether it is a kind of legal fiction. Obviously, an ISP is precisely a fiction, but it cannot be said that presumptions are fictions as the whole.” (Zhao Gang & Liu Haifeng, 1998). “Legal fictions and presumptions are very similar in form. Sometimes the boundary between legal fictions and legal presumptions is not very clear. Especially, presumptive fictions (*Tui Ding Shi Ni Zhi*) have dual attributes of legal fictions and legal presumptions.” “Presumptive fiction is actually a kind of legal presumption. Its presumptive feature depends on that it is utilized in the form of a fiction, which means it can not be overturned by evidence to the contrary. If this kind of fiction is truly implemented in the form of presumption, it is the so-called ISP. The significance of showing this fiction in the form of ISP lies in that, for this type of cases, it clearly shows that the inferred legal facts by using a fiction like that may actually be consistent with the truth. In this regard, it is fundamentally different from the common fictions. However, it is different from presumptions as far as its conclusions can not be overthrown by evidence to the contrary. Therefore, a presumption that can not be discredited by proof has both the nature of presumption (which may be consistent with the facts) and the nature of fiction (not to be overturned by disproving evidence).” (Liu Fengjing, 2010). For this author, this kind of conceptual confusion is not only a bad news for the further study of relevant theories, but also gravely worsens the chaos of their identification and use in judicial practice.

This paper holds the opinion that there are fundamental differences between legal fictions and ISPs, and they should not be confused with each other. These differences are mainly manifested in four aspects:

First, in the related law articles, is there a normal connection between two facts pursuant to rules of thumb? “Although both fiction and ISP involve a similar inference process from fact A to fact B, the connection between the former and the latter is not the same. As far as fiction is concerned, there is no causal relationship between the first fact and the second fact in the sense of logic, no deriving relationship from the basic conditions to the final conclusion, and no probability relationship either. The way of their association is similar to a kind of cross connection or analogical reference, which points the latter fact directly and concisely to the former so that the latter can acquire the status of the former. It does not consider the reasoning of the conditions on which the relationship is established, and only focuses on whether the final effect meets the legislative goal or not.” (Qiao Guangyao & Liu Wanqi, 2016). In other words, “the possibility (in legal fiction) is not the cause-effect logic between or among things that is peculiar to presumption, but only the possibility permitted by laws. Therefore, if the presumption is deemed as a logical possibility, the fiction shall be considered as a legal possibility that is not necessarily possible in the sense of logic.” (Lu Peng, 2003).

Second, whether the conclusion should be based on the process of the legislator's logical derivation? "The ISP is a procedural method, while fiction is embodied in provisions of initiation." (Qiao Guangyao & Liu Wanqi, 2016). As far as the ISP is concerned, the so-called "procedural method" means that the legislator should demonstrate the logical reasoning behind the deduction from the basic facts to the presumed facts and relevant rules of thumb in law articles. Only when this requirement is met can the adjudicators directly apply the corresponding law articles when the basic facts are established. In contrast, the meaning of the so-called "provisions of initiation" is: the legal fiction is only an expression of legislators' clear order, in which there is no logical reasoning process based on the usage of any rule of thumb.

Third, as far as the two facts in a legal fiction are concerned, it is beyond the doubt that one is different from the other. Here, the so-called "different from" has three specific manifestations: one is to regard "no existing" as "existing", or to do exactly the opposite, and then give the conclusive part of an applied legal fiction the same legal effect enjoyed by the related premise fact; the second is to impose the same legal effect upon apparently different facts; the third is to impose the same legal effect upon different facts with certain similarities. As far as the basic facts and presumptive facts in an ISP are concerned, legislators do not pay attention to whether the said two are quite different or very similar. One of the focuses of their attention is the possibility that basic facts lead to presumptive facts.

Fourthly, as for the ISP, the BSP should bear the burden of persuasion for the establishment of the basic facts. As for that same issue, the PAASP only bears the burden of producing evidence (for direct or indirect denial). At the same time, because the presumptive facts in the ISP are irrefutable, for them, there is no so-called assumption of burden of persuasion or the "shift" of the burden of producing evidence (*Beweislastumkehr*). In contrast, "the legal fiction is a kind of decisive fiction, that is, a legislative measure or policy that makes two different facts have the same legal effect according to certain practical needs or certain value pursuits." (Lu Peng, 2003). Consequently, the legal fiction has nothing to do with the assumption of the burden of persuasion or the so-called "shift" of the burden of producing evidence.

## 5. Theoretical Analyses of Denials against Presumptions and Fictions

### 5.1 *Is the Evidence for Refutation Disproving Evidence (Gegenbeweis)? Or Proving Evidence (Hauptbeweis)?*

This paper holds that, more or less, all presumptions can be refuted. There are two basic reasons behind that assessment: first, "from the perspective of epistemology, the presumption is an indirect fact finding with reasoning as a connecting bridge, and its cognitive conclusion is shaded by probability and falsity." (He Jiahong, 2008). Second, it is also based on the protection of the PAASPs' lawful interests and the remedy of their rights. This is the concrete embodiment of the principle of litigants' equality provided in Article 8 of *the Civil Procedure Law of China* and Article 5 of *the Court Constitutive Law of China* in the system of presumptions. Of course, for different types of presumptions, the object, meaning and legal effect of rebuttal are different.

In terms of the RSPs, judges and legislators should pay attention to the following two matters when the PAASP files refutation against the presumed facts: first, "this situation is feasible in theory and practice, but it is comparatively difficult to launch. There are two reasons behind it: one is that it is difficult to determine the abnormal state of facts; the other is, when enacting the RSP, the scope of the abnormality C that the refuter needs to prove is not normally specified. On the surface, it is beneficial to the refuter, but the actual effect is opposite. Because of the lack of a clear object of proof, the refuter's rebuttal may not be accepted. From this point of view, this author thinks that when setting up the RSPs, the scope of the object to prove the existence of the abnormality C should be made clear at the same time, which can not be simply provided as 'unless there is evidence to the contrary'." (Bian Jianlin, Li Shuzhen & Zhong Dezhi, 2009). Second, as far as the RSP is concerned, "there are three feasible refutation ways: (1) discrediting A, that is, confirming that A is false; (2) proving that the fact belongs to an abnormal situation C; (3) proving that B is false by using the independent evidence D." (Bian Jianlin, Li Shuzhen & Zhong Dezhi, 2009). This paper holds that the above situation (1) is a rebuttal against the basic facts, which is supported by the direct disproving evidence; while the situation mentioned in (2) is a refutation against a presumed fact, which is an indirect denial and is supported by the indirect disproving evidence; In addition, from that scholar's point of view<sup>4</sup>, the above situation (3) should be a defense in nature.

In the theory of civil evidence, refutation includes denials (direct denials and indirect denials) and defenses. Denials and defenses are different institutions and cannot be confused. The essential distinction between defenses

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<sup>4</sup> "In fact, this situation does not constitute a real refutation to the presumed fact. The legal effect of that presumptive fact is barely touched. Whether the presumed fact B exists or not depends on the confrontation between that presumed fact and the independent rebuttal evidence D." (Bian Jianlin, Li Shuzhen & Zhong Dezhi, 2009).

and two types of denials is whether to recognize the opposite party's allegations in the first place. Defense is a new and independent challenge on the basis of admitting the opposing party's assertion, while the two types of denials are completely founded on the total negation of the opposite party's assertion. Specifically, direct denial is launched by using the direct disproving evidence, and the refuter only bears the burden of producing evidence for the contested factual issue. As far as indirect denial is concerned, the rebuttal evidence put forward by a refuter is indirect disproving evidence in terms of presumptive facts, so the indirect refuter only bears the burden of producing evidence for the contested factual issue, too.

There are hot debates among German scholars of evidence law as to whether the PAASP should bear the burden of persuasion for his/her/its indirect denial. Prof. Leo Rosenberg held that: "Refuting the statutory presumption through the negative proof is not the disproving evidence, but the proving evidence." "The fact that has been presumed can only be proved to the contrary. Since the negative proof is the proving evidence, it must provide the basis for the judge to have the complete internal convince of the untruthfulness of the presumed fact." (Rosenberg Leo, 2018). In other words, the provider of the indirect disproving evidence (the PAASP) should bear the burden of persuasion for that refutation (that indirect denial). Professor H. Pruetting criticized this, in his opinion, "Through the above argument, Rosenberg has come to a surprising conclusion: when his system for the allocation of the burden of persuasion, that is, the theory of the grouped legal elements, encounters the situation created by the indirect disproving evidence, it needs a kind of 'gap filling'. The so-called 'gap filling' means that the provider of the indirect disproving evidence bears a pure confirmation liability for his or her factual allegation (according to the current buzzwords, the distribution of Objektive Beweislast). However, the fact is that in the case of the indirect disproving evidence, the judge has already had temporary internal convince for the important facts related to the judgment to be made. Or it can be put like that, if the adduced indirect disproving evidence is ineffective, the judge will make a judgment based on the filed proving evidence, and will never render a judgment on the materialization of allocated burden of persuasion against the provider of the said disproving evidence." (Pruetting H., 2000). In principle, this author agrees with Prof. Pruetting's opinion, but thinks that it is necessary to make detailed amendments to its contents. The necessary logical precondition for the judge to acquire the temporary internal convince of the presumptive facts is as follows: "the legal presumption is a direct order to the judge.....The legal presumption orders the judge to regard a given ultimate fact as proved, although in fact, the judge can not obtain his/her internal convince of the said ultimate fact from the facts of life." (Pruetting H., 2000). This shows two things: first, the statutory exemption of the burden of persuasion for presumed facts does not mean either the inversion or so-called "shifting" of the related burden of persuasion. Logically, the two are quite different and cannot be confused. The second is that the temporary internal convince judge acquired from the presumptive facts, which is not the result of the BSP's proving activities to the presumptive facts, but the result of the direct application of the relevant law articles. In this case, there is no such thing as professor Pruetting said, the possibility of "if the adduced indirect disproving evidence is ineffective, the judge will make a judgment based on the filed proving evidence." In fact, we can only say that when the disproving evidence can not effectively overturn the temporary internal convince of the judge for the presumed facts, the said temporary internal convince will be transformed into a permanent and firmly held one. The judge can make the corresponding judicial conclusions on the basis of the latter. At the same time, Prof. Pruetting's view also reasonably explains the following phenomena: since there is no provision on the distribution of burden of persuasion in advance for the presumed facts in the statutory presumption, the standard of proof reached by the rebuttal (e.g. an indirect denial) of the PAASP should be the standard of the preponderance of evidence (the high probability of truthfulness), rather than making the presumed facts "in a state of inconclusiveness (non liquet)".

In a word, either for the direct disproving evidence or the indirect disproving evidence, its provider does not bear the corresponding burden of persuasion. "The burden of proving the truthfulness of the refuting evidence always falls on the party who does not bear the Objektive Beweislast." (Pruetting H., 2000).

### 5.2 Interpretations of the Meaning of "Refuting Presumptions and Legal Fictions"

As for the RSP, according to the law, as long as the BSP can prove the basic fact, the court shall directly determine the existence of the related presumptive fact. In this case, the judge temporarily exempts the BSP from the burden of persuasion that should have borne by the latter in accordance with the law (i.e. the law assumes the existence of "presumed facts" in such a situation). At this time, in order to prevent the presumptive fact from having adverse legal effect on himself/herself/itself, the PAASP should bear the corresponding burden of producing evidence, adducing direct or indirect disproving evidence to overturn the aforesaid presumptive fact. In terms of the degree of proof, the standard of reproof reached by the refutation of the PAASP should be the preponderance of evidence, rather than making the presumptive facts "in a state of inconclusiveness (non liquet)". In addition, if the PAASP refutes by way of defense, that PAASP shall bear the burden of persuasion for his/her/its defense assertion, and

the related evidence shall be the proving evidence. If the final result of the trial proof and debate of both parties leads to the said defense falls in a state of inconclusiveness (non liquet), the judge should render a substantively unfavorable decision against the PAASP on that issue.

As far as the RSP is concerned, the party who asserts the presumed fact should bear the burden of persuasion for the related basic fact. After the basic fact is proved to be tenable, the opposite party can refute it in two ways: (1) directly or indirectly to prove that the basic fact is not tenable. In this case, as far as the basic facts are concerned, the PAASP only bears the burden of producing evidence. It is not necessary for the PAASP to reach a high degree of probability to refute the presumed fact, as long as the refutation can make the existence of the basic facts fall into the state of “inconclusiveness (non liquet)”, the legitimacy basis of the judge’s application of the related statutory presumption will be lost. (2) When the PAASP files a defense supported by the relevant evidence, he/she/it should bear the burden of persuasion for that defense allegation, and the proof it provides is the proving evidence. In addition, it should be noted that the rebuttal against the basic facts is only “a question against the lawfulness of that statutory presumption’s usage” in nature.

As far as the judicial presumption is concerned, the burden of persuasion, whether it is for the basic fact or for the presumed fact, has been allocated by the legislator in substantive law or procedural law in advance. Consequently, for such types of presumptions, the BSP should assume the burden of persuasion both on the basic facts and on the presumptive facts respectively. Under that circumstance, if the rebuttal put forward by the PAASP is a typical indirect denial, the related proof is not proving evidence, but indirect disproving evidence. In other words, as far as presumptive facts are concerned, their burden of persuasion is still borne by the BSP, while the PAASP only bears the burden of producing evidence for his/her/its indirect denial assertion. In the case of indirect denial, if the presumptive facts can be put into the state of “inconclusiveness (non liquet)”, then the refutation filed by the PAASP has met the standard of proof provided by law. In other words, under that situation, the rebuttal alleged by the PAASP does not need to reach the criterion of the preponderance of evidence. Furthermore, if the PAASP refutes by the way of defense, that party shall bear the burden of persuasion for his/her/its defense assertion, and the corresponding proof provided by he/she/it shall be the proving evidence. As to the question whether the presumptive fact can be ultimately confirmed or not, the judge should base his/her decision on the comprehensive analyses of evidence production, evidence examination and trial debates linked to the related factual allegations. For judicial presumptions, “after the presumed fact has been overturned because the opposing party has provided sufficient disproving evidence, there may still be inferences based on the proved facts. At this time, it can be deemed that the aforesaid presumed fact has been weakened into a kind of circumstantial evidence.” (He Jiahong, 2008).

As far as the ISP is concerned, although the opposite party can not disprove its presumptive facts, it can indeed discredit its basic fact (the minor premise). Of course, that refutation can either be a direct denial or be an indirect denial. Specifically, as for the basic facts, the PAASP only bears the burden of producing evidence. As long as the refutation can make the existence of the basic facts fall into the state of “inconclusiveness (non liquet)”, the legitimacy basis of the judge’s application of that statutory presumption will be lost. If the PAASP refutes by the way of defense, that party shall assume the burden of persuasion for that defense assertion, and the corresponding proof provided by he/she/it shall be the proving evidence. In addition, it should be noted that the rebuttal against the basic facts only constitutes “a challenge against the lawfulness of that statutory presumption’s usage” in nature. As far as presumptions are concerned, in addition to the above rebuttal methods, there is another contradicting method, which is to question and challenge the rules of thumb hidden behind those presumptions. However, “this refutation can only exist in the case of factual presumptions. If the related rule of thumb is proved to be untrustworthy and the probability is very low, then the presumption itself will not exist. However, because of the difficulty of launching such refutation, it is seldom used.” (Zhao Gang & Liu Haifeng, 1998). From the perspective of evidence jurisprudence, this refutation is not a defense, but a denial (a direct denial or an indirect denial). In contrast, if the judge applies the statutory presumption, it is generally not allowed to rebut the relevant rules of thumb. The reason is that: in the two kinds of statutory presumptions, the relevant rules of thumb and particular value pursuits have been incorporated into the related law articles. In the application of a statutory presumption, the related law article is actually the major premise of syllogism. Under that situation, it is almost impossible to doubt and challenge the said law article as the major premise. Of course, there are exceptions to everything. In some cases, if the opposite party’s doubt and challenge against the relevant law article are justified, and local courts in different regions have accumulated a certain number of similar decided cases, they may attract the attention of the relevant authorities, so as to deal with the related legal issues by formulating relevant judicial interpretations or even amending the relevant law severally.

By comparison, the fundamental reason why legislators prohibit the parties from questioning and challenging the

legal effect of a legal fiction lies in: “it is a rule of substantive law, and has nothing to do with the burden of proof.” (Lao Dongyan, 2007). This author believes that the so-called “burden of proof” mentioned in the preceding quotation includes both the burden of persuasion and the burden of producing evidence that have been fully discussed in this paper. In addition, as mentioned above, as far as the legal fiction is concerned, the party adversely affected by the application of the related rules can disprove the premise facts, but that refutation is essentially a “challenge to the lawfulness of the applied legal fiction”.

### 5.3 Does the Application of Statutory Presumptions Lead to the reversed Distribution of Burden of Persuasion?

The so-called reversed burden of persuasion refers to the fact that, in view of the problems existing in judicial practice, such as “a situation of majority of evidence physically controlled by one party” and “lack of means of proof by the parties who are actually assigned with the corresponding burden of persuasion”, in order to overcome those problems that the rigid normal distribution of burden of persuasion fails to address, which is bad for the realization of the value of justice in the trials of a related lawsuit, the legislator or the judicial interpretation drafter, through special provisions, will adopt the following legislative techniques, that is to say, a set of positive facts which should be verified by one party to be existent shall be converted into a set of negative facts which shall be proved by the opposite party to be non-existent. At the same time, we can also regard the inversion of burden of persuasion as a kind of evidence rule or adjudication rule. Only the burden of persuasion involves the arrangements of “normal distribution” or “inversion”, the burden of producing evidence has nothing to do with such kind of mechanism.

What the legislator or the judicial interpreter inverts is the burden of persuasion of a part of ultimate issues in the same type of cases, not the burden of persuasion of all its ultimate issues. In this regard, the issue of subjective fault and the issue of causality are quite typical. For example, Article 1230 of *the CCC* assigns the burden of persuasion that there is no causal relationship between the acts of pollution and the consequence of damage to the polluter. It belongs to the reversed burden of persuasion of the issue of causation in environmental tort cases. Another example is the second paragraph of Article 1165 of *the CCC*. This is a law article embodies the usage of the principle of presumptive fault. Originally, it is the victim (plaintiff) who is legally responsible for the verification of the subjective fault of the alleged infringer (defendant). However, it is extremely difficult for the victim to prove the opposite party’s subjective fault objectively, so the legislator reversed the burden of persuasion of that issue, and demanded the doer (defendant) to prove his “no fault” from the negative side. Yet another example is Article 1253 of *the CCC*. In this article, in order to discredit the conclusion obtained by applying the principle of presumptive fault (it is presumed that the owner, administrator or user of the relevant building has subjective fault for the plaintiff’s loss), the persons who are identified as defendants shall prove that they have not committed the presumed negligence.

Statutory presumptions can not achieve the legal effect of inversion of the related burden of persuasion. As mentioned above, under the RSP, the PAASP only bears the burden of producing evidence against the presumed facts. Next, we will take a concrete judicial interpretation as an example to analyze the rationality of this author’s point of view. Article 27 of *SPC’s Interpretations on Certain Matters Concerning How to Apply Laws to the Trials of Cases of Infringement of Patent Right* (Fa Shi [2016] No.1) provides that: “If it is difficult to determine the actual loss of the obligee due to the infringement, the people’s court shall, in accordance with paragraph 1 of Article 65 of *the Patent Law*, require the obligee to provide evidence for the interests obtained by the alleged infringer due to the said infringement; if the obligee has adduced the prima facie evidence of the interests obtained by the infringer, and the account books and materials related to the asserted patent infringement are mainly in the possession of the infringer, the people’s court may order the infringer to provide such account books and materials; if the infringer refuses to provide or provides false account books and materials without justifiable reasons, the people’s court may, on the basis of the claims and evidence provided by the obligee, determine the interests obtained by the infringer as a result of the alleged infringement.”

The above article do not involve the “shift” or inversion of the burden of persuasion of “the issue concerning the interests obtained by the alleged infringer” between the parties in a case of patent right’s infringement. This author thinks that the article is actually the result of the combination of two legislative technicalities, namely, “the statutory presumption” and “the reduction of proof standard”. These two methods are used by judicial interpretation makers to solve the problem faced by “the parties who are actually assigned with the corresponding burden of persuasion but lack the related means of proof”. Specifically, the plaintiff should initially bear the burden of persuasion to adduce “prima facie evidence” on the corresponding issue (i.e. the interests obtained by the infringer due to the alleged infringement), and then it is the defendant’s turn to prove the existence of the opposite state of the same issue. Under that situation, the proof presented by the defendant is the disproving evidence. If the defendant’s disproving evidence finally makes the judge’s temporary internal convince fall into in a state of

inconclusiveness (non liquet), the judge should make a judgment in favor of the defendant.

Based on the analyses in the preceding paragraph, we can draw two related conclusions here: (1) As far as the aforesaid Article 27 is concerned, the standard of proof applicable to the plaintiff is relatively low (higher than more or less clarified, but not to a high probability of truthfulness), while the standard of proof applicable to the defendant's rebuttal is comparatively higher (the preponderance of evidence). (2) The application of a specific statutory presumption does not affect a party's assigned burden of persuasion. Therefore, as far as the aforesaid Article 27 is concerned, the burden of persuasion of the fact that "the actual loss caused by the infringement is difficult to determine" is still normally allocated to the plaintiff. It is not an reversed one, and it is impossible "to be reversed" by the presiding judge while he/she tries to make use of a statutory presumption in a given case.

The theoretical foundation for supporting this author's view in the preceding paragraph is a viewpoint expressed by Prof. Bi Yu Qian, that is, "the burden of persuasion is usually pre-set by the legislators in law before the initiation of a particular litigation. This rigid mode commonly takes neither the far and near distance between the parties and the relevant evidence, nor the difficulty of obtaining evidence into consideration. Sometimes, it is not conducive to the realization of the fairness and justice values cherished by the procedural law. Therefore, it is necessary to adjust the distribution of the burden of persuasion to a moderate extent by using the form of presumption. Based on situations like the information asymmetry between or among the parties as well as the majority of evidence physically possessed by one party, the relevant laws, based on the consideration of ensuring the equality of arms between the two parties in the trial, remove the corresponding burden of persuasion for the party who is literally liable for the proof of the related ultimate issue, but is neither objectively able to obtain nor under any condition to acquire the related evidence. At the same time, the party who physically controls or possesses the said evidence should assume the burden of producing evidence accordingly, and (if necessary, the presiding judge) could even assign the burden of persuasion for certain ultimate issues to that party, so as to materialize the fairness and just values in the area of burden of persuasion's allocation." (Bi Yuqian, 2013).

#### *5.4 Analyses of the Relationship between the Principle of Fault Presumption and the Statutory Presumptions*

The so-called principle of fault presumption is one of the imputation principles in the civil law. Although the word "presumption" also exists in its name, the said principle of fault presumption is different from both judicial presumptions and statutory presumptions that are intensely studied in this paper. The main differences between them are as follows: first, the judicial presumption is the reasoning and corresponding inference made by judges in the light of the basic facts and relevant rules of thumb and formal logic methods in a given case, which has nothing to do with the principle of fault presumption. Secondly, as far as the statutory presumption is concerned, the biggest intersection between it and the principle of fault presumption is that many statutory presumptions, just like the principle of fault presumption, are set up by civil substantive laws. However, the difference between the two is obvious: if a civil substantive law indicates that the principle of fault presumption should be applied to a specific substantive legal relationship, then the burden of persuasion of the corresponding issue that should originally be borne by one party is reversed to the opposite party by the legislator. The opposite party should prove that he/she/it is not at fault from the perspective of passive negativity, and the corresponding proof should be deemed as the proving evidence. In this regard, the most typical examples are Article 1165 (2) and Article 1253 of *the CCC* mentioned above. In addition, the judge directly applies the principle of fault presumption in line with the corresponding law articles, without taking the so-called "basic facts" as the necessary premise. In contrast, in the application of the statutory presumption, the BSP should first prove that "the basic facts" are tenable (or it belongs to one of the issues need not to be proved, or it is a legally admitted factual assertion, etc.). Take Article 623 of *the CCC* as an example. That Article provides that: "Where the parties do not agree on the inspection period, and the delivery note, confirmation slip, etc. signed by a buyer states the quantity, model number, specifications of the subject matter, the buyer shall be presumed to have inspected the quantity and checked whether there is any visible defect, in the absence of sufficient evidence to the contrary." This Article is a typical RSP. The burden of persuasion for the presumptive fact (i.e. the buyer is deemed to have inspected the quantity and checked whether there is any visible defect) has temporarily been removed (that is, the judge will form a temporary internal convince for the existence of "those presumed facts"). After that, the burden of producing evidence shall be borne by the PAASP to refute (in the form of direct denial or indirect denial). Accordingly, the proof adduced by the PAASP is either the direct disproving evidence or the indirect disproving evidence. It can be seen from this analysis that the burden of persuasion of the presumed facts related to Article 623 has not been "shifted" or "inverted" to the PAASP by the legislator or judge. This kind of situation is definitely different from the one in which the principle of presumption of fault is applied.

In a word, when the principle of fault presumption is applied, the reversed burden of persuasion will be inevitably applied to find out whether the defendant has the related subjective fault. By comparison, in the application of

statutory presumptions, there will be no inversion of burden of persuasion in terms of relevant issues. This is the biggest difference between the two. This paper holds that when the burden of persuasion of the key issue of causation is reversed in legislation (such as Article 1230 of *the CCC*), the relationship between the said reversed burden of persuasion and the statutory presumption should be dealt with by observing the contents of this subsection.

## 6. Analyses and Classification of Statutory Presumptions and Legal Fictions in *the CCC*

### 6.1 *An Analysis of Statutory Presumptions in the CCC*

According to statistics, there are 28 statutory presumptions in the newly promulgated *CCC*. Next, based on the theoretical analyses of the 5th section of this paper, the author will make a theoretical assessment and sorting of the related *CCC* Articles.

In line with the fact that whether the presumptive facts in statutory presumptions are refutable, they can be divided into two categories: the RSPs and the ISPs.

#### 6.1.1 There are 7 RSPs in the *CCC*

Article 15: “The time of birth and the time of death of a natural person shall be the ones recorded on his or her birth certificate or death certificate; or in the absence of a birth certificate or death certificate, the time shall be the one recorded in the household registration or any other valid identity registration. If there is any other evidence sufficient to overturn the aforesaid time, the time proved by such evidence shall prevail.” This Article is a RSP, which in essence is a presumption of state of affairs (*Shi Tai Tui Ding*). The statutory presumption does not affect the distribution of burden of persuasion, so the burden of persuasion for the basic facts (in the absence of a birth certificate or death certificate) in this Article shall be borne by the BSP. At the same time, the rebuttal put forward by the PAASP (if there is any other evidence sufficient to overturn the aforesaid time) is essentially a denial (a direct denial), and the corresponding proof is a disproving evidence. If the PAASP aims his/her/its refutation against the basic facts, it is “a challenge against the lawfulness of that statutory presumption’s usage”.

Article 40: “If a natural person’s whereabouts have been unknown for two years, an interested person may apply to a people’s court for a declaration that the natural person is a missing person.” This Article is a RSP, which in essence is a presumption of state of affairs. The PAASP can not only doubt and challenge the legitimacy of the application of that presumption by putting the basic fact (the whereabouts of a natural person has been unknown for two years) in the state of inconclusiveness (*non liquet*), but also can discredit the presumed fact by adducing sufficient disproving evidence (the said natural person is not missing, his/her whereabouts is known, that natural person has been found, etc.).

Article 46: “(para. 1) Under any of the following circumstances, an interested person may apply to the people’s court for a declaration that a natural person is dead: (1) the natural person’s whereabouts have been unknown for four years; or (2) the natural person’s whereabouts have been unknown for two years due to an accident. (para. 2) If a natural person’s whereabouts become unknown due to an accident and it is impossible for such person to survive as certified by relevant authorities, the application for declaration of death is not subject to the aforesaid provisions of two years.” This Article is a RSP, which in essence is a presumption of state of affairs. The PAASP can not only doubt and challenge the legitimacy of the application of that presumption by making the basic facts (i.e. items (1) and (2) in the 1st paragraph of Article 46, or if a natural person’s whereabouts become unknown due to an accident and it is impossible for such person to survive as certified by relevant authorities) in the state of inconclusiveness (*non liquet*), but also can discredit the presumed fact by adducing sufficient disproving evidence (the natural person is not dead, and has been found).

Article 491: “(para. 2) Where the information of any commodity or service released by one party via the internet or other information network meets the conditions of offer, the contract shall be established when the other party successfully selects such commodity or service and submits an order, unless otherwise agreed by the parties.” That 2nd paragraph of this Article of is a RSP. The reason behind the related refutation is “unless otherwise agreed by the parties”. As far as such statutory presumptions are concerned, the so-called rebuttal put forward by the opposing party, if it is aimed at the basic facts, is not a refutation against the related presumed fact, but “a challenge against the lawfulness of that statutory presumption’s usage”. Only when the disproof is directly lodged against the presumptive facts, it shall be considered as is a typical refutation.

Article 623: “Where the parties do not agree on the inspection period, and the delivery note, confirmation slip, etc. signed by a buyer states the quantity, model number, specifications of the subject matter, the buyer shall be presumed to have inspected the quantity and checked whether there is any visible defect, in the absence of sufficient evidence to the contrary.” This Article is a RSP. If it is aimed at the basic facts, it is not a refutation

against the presumptive fact, but “a challenge against the lawfulness of that statutory presumption’s usage”.

Article 831: “Upon taking delivery of the cargoes, the consignee shall inspect the cargoes at the agreed time. Where the time for inspection is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 510 of this Law, the consignee shall inspect the goods within a reasonable time limit. The failure of the consignee to raise any objection against the quantity or any damage of the goods within the agreed time limit or within a reasonable time period shall be deemed as prima facie evidence that the carrier has delivered the goods in conformity with the description in the transport documents.” Although the phrase “shall be deemed/*Shi Wei*” is used in this Article, it should be considered as a typical RSP by analyzing the context (prima facie evidence). As for the basic facts (if the failure of the consignee to raise any objection against the quantity or any damage of the goods within the agreed time limit or within a reasonable time period), its burden of persuasion is normally distributed to the BSP (carrier). If the PAASP (the consignee) desires to overturn the said “prima facie evidence”, his/her/its disproving evidence should put the judge’s corresponding internal convince for the basic fact in the state of inconclusiveness (non liquet).

Article 1199: “Where a person without civil conduct capacity sustains any personal injury during the period of studying or living in a kindergarten, school or any other educational institution, the kindergarten, school or other educational institution shall assume the tort liability unless it can prove that it has fulfilled its duties of education and management.” This Article is a RSP. In its contents, “a person without civil conduct capacity sustains any personal injury during the period of studying or living in a kindergarten, school or any other educational institution” is the basic fact, while “the kindergarten, school or other educational institution shall assume the tort liability” is the presumed fact. “Unless it can prove that it has fulfilled its duties of education and management” is the rebuttal alleged by the PAASP against the said presumed fact.

#### 6.1.2 There are 21 ISPs in the CCC

Article 140: “(para. 1) An actor may expressly or tacitly declare his or her intent. (para. 2) Intent may be deemed tacitly declared only when it is in accordance with any law, is agreed upon by the parties, or conforms to the trading practices between the parties.” The basic fact in the 2nd paragraph of that Article is “the tacitly declared intent either based on related law or on an agreement reached by the parties, or in conformity with the trading practices between the parties”. On the one hand, that basic fact and the related presumptive fact are not two totally unrelated legal facts. On the other hand, when the BSP proves the existence of that basic fact by adducing sufficient proving evidence, in line with the rule of thumb, the presumed fact (Intent may be deemed tacitly declared) is more likely to be established than not. Therefore, despite the usage of the phrase “may be deemed” in the 2nd paragraph of this Article, it is still a statutory presumption, and is an ISP in essence.

Article 145: “(para. 1) A civil transaction performed by a person who has limited capacity for civil conduct shall be valid provided such act relates to the pure acquisition of benefits or is made according to his or her age, intelligence and mental health; other civil transactions performed by such a person may become valid upon consent or acknowledgment of his or her statutory guardians. (para. 2) The opposite party may urge statutory guardians to make acknowledgment within 30 days upon receipt of the notice. Where the (said) statutory guardians do not respond, subsequent confirmation shall be deemed to have been refused. Before the acknowledgment of the (said) civil transaction, the bona fide opposite party has the right to revoke it. The revocation shall be made by giving a notice.” In the 2nd paragraph of this Article, “statutory guardians may be urged to make acknowledgment within 30 days upon receipt of the notice” and “where the (said) statutory guardians do not respond” are the two basic facts, and the ensuing part (shall be deemed to have been refused) is the related presumed fact. From the perspective of the rule of thumb, it is more likely than not to assume that the said presumed fact is true after the verification of those two basic facts. Therefore, there is a normal relationship between them. As a result, despite the usage of the phrase “shall be deemed” in the 2nd paragraph of this Article, it is still a statutory presumption, and is an ISP in essence.

Article 171: “(para. 1) Any acts of agency continually performed by an actor without the power of agency, beyond the scope of his or her power of agency or after his or her power of agency has expired shall not be binding on the principal without the acknowledgement of such principal. (para. 2) The counterparties may urge the principals to confirm the conducts within 30 days of the date of receipt of the notice. Where the principal does not respond, subsequent confirmation shall be deemed to have been refused. Before the acknowledgment of the acts performed by an actor, the bona fide opposing party enjoys the right of revocation. The revocation shall be made by giving a notice.” In the 2nd paragraph of this Article, “the counterparties may urge the principals to confirm the conducts within 30 days of the date of receipt of the notice” and “where the principal does not respond” are the two basic facts, and the ensuing part (shall be deemed to have been refused) is the related presumed fact. From the perspective



of the rule of thumb, it is more likely than not to assume that the said presumed fact is true after the verification of those two basic facts. Therefore, there is a normal relationship between them. As a result, despite the usage of the phrase “shall be deemed” in the 2nd paragraph of this Article, it is still a statutory presumption, and is an ISP in essence.

Article 172: “For any acts of agency continually performed by an actor without the power of agency, beyond the scope of his or her power of agency or after his or her power of agency has expired, such acts of agency shall be valid if the opposite party has reasons to believe that the actor has the power of agency.” The involved ostensible agency (*Biao Jian Dai Li*) is a typical ISP. In the contents of this Article, “the opposite party has reasons to believe that the actor has the power of agency” is the basic fact, which can be disproved by the PAASP to challenge the legitimacy of the application of the related statutory presumption. Meanwhile, “such acts of agency shall be valid” is the corresponding presumed fact, which is not allowed to be refuted, and objectively it can not be refuted, either.

Article 490: “(para. 1) Where the parties conclude a contract in written form, the contract is established when both parties have signed it, affixed their seals thereon or have affixed their fingerprints thereon. A contract is established when one party has performed its principal obligations before signing, sealing or affixing its fingerprint and the other party accepts them. (para. 2) Where a contract is to be concluded in written form as provided for by laws and administrative regulations or as agreed by the parties, and the parties fail to conclude the contract in written form, but one party has performed its principal obligation and the other party has accepted it, the contract is established.” As far as the 1st paragraph is concerned, the basic fact is “when one party has performed its principal obligation.....and the other party accepts them”. In paragraph 2, the basic fact is “the parties fail to conclude the contract in written form, but one party has performed its principal obligation and the other party has accepted it”.

Article 551: “(para. 1) Where the obligor assigns all or part of its obligations to a third party, the consent of the obligee must be obtained. (para. 2) The debtor or a third party may urge the creditor to give his consent within a reasonable period. If the creditor does not respond, his consent shall be deemed not to have been given.” The 2nd paragraph of this Article is a statutory presumption, which is an ISP in nature. In the contents of this Article, “the creditor may be urged to agree within a reasonable period of time, but the creditor has not responded accordingly” is the basic fact, and “his consent shall be deemed not to have been given” is the related presumptive fact. Despite the usage of the phrase “shall be deemed” in the 2nd paragraph of this Article, it is still a statutory presumption, not a legal fiction.

Article 621: “(para. 1) Where the parties have agreed on an inspection period, the purchaser shall, within the said inspection period, notify the seller of any circumstances whereby the quantity or quality of the subject matter is not as agreed. Where the buyer is negligent in notifying the seller, the quantity or quality of the subject matter shall be deemed to comply with the contract.” The 1st paragraph of this Article is an ISP. Specifically, “the quantity or quality of the subject matter shall be deemed to comply with the contract” is the irrefutable presumed fact. The PAASP (the purchaser) can produce the disproving evidence to support his/her/its refutation against the asserted basic facts (where the buyer is negligent in notifying the seller). Despite the usage of the phrase “shall be deemed” in the 1st paragraph of this Article, it is still a statutory presumption, not a legal fiction.

Article 621: “(para. 2) Where the parties have no agreement on an inspection period, the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer discovered or should have discovered the quantity or quality non-compliance. Where the buyer fails to notify within a reasonable period or fails to notify within two years from the date of receipt of the subject matter, the quantity or quality of the subject matter shall be deemed to comply with the parties’ agreement. However, if the subject matter has a quality guarantee period, the said quality guarantee period shall apply, and the said two-year provision shall not apply.” The 2nd paragraph is an ISP. In the contents of this paragraph, “the buyer fails to notify within a reasonable period”, “fails to notify within two years from the date of receipt of the subject matter” are the first two choices among three mutually independent basic facts. “The quantity or quality of the subject matter shall be considered as to comply with the parties” is the unified irrefutable presumed fact. The third choice of the said three mutually independent basic facts is “if the subject matter has a quality guarantee period, the said quality guarantee period shall apply, and the said two-year provision shall not apply”. The PAASP (the buyer) can discredit any claimed basic fact alleged by the BSP (the seller). In essence, the said discredit is “a challenge against the lawfulness of that statutory presumption’s usage”. Despite the usage of the phrase “shall be deemed” in the 2nd paragraph of this Article, it is still a statutory presumption, not a legal fiction.

Article 622: “(para. 1) Where the inspection period agreed upon by the parties is too short, and it is difficult for the buyer to complete the inspection within the inspection period due to the nature of the subject matter and transaction practice, the period shall be deemed only as the period for the buyer to raise objection to the visible

defects of the subject matter.” The phrase “shall be deemed” is not a legal fiction, but an ISP. “Where the inspection period agreed upon by the parties is too short, and it is difficult for the buyer to complete the inspection within the inspection period due to the nature of the subject matter and transaction practice” is the basic fact of the said ISP. From the perspective of the rule of thumb, there is a normal relationship between the said basic fact and the corresponding presumptive fact (the period shall be regarded only as the period for the buyer to raise objection to the visible defects of the subject matter).

Article 638: “(para. 1) A buyer who purchases items on a trial basis may either purchase the subject matter or refuse to purchase the subject matter during the trial period, as appropriate. Upon expiration of the trial period, if the buyer fails to express whether or not to purchase the subject matter, it shall be deemed to have purchased the subject matter.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP enacted on the basis of the rule of thumb. In the theoretical classification of statutory presumptions, it is identified as the presumption of ideas (*Yi Si Tui Ding*). It actually means that the presumed fact (shall be deemed to have purchased the subject matter) cannot be disproved, but the PAASP is entitled to discredit the basic fact (the buyer fails to express whether or not to purchase the subject matter after the expiry of the trial period). Essentially, the refutation against the said basic facts is “a challenge against the lawfulness of that statutory presumption’s usage”.

Article 638: “(para. 2) Where the buyer to a sales transaction by trial has already made partial payment or has sold, leased, or created a Security Right over the subject matter during the trial period, it shall be deemed that the buyer has agreed to buy.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP. In the theoretical classification of statutory presumptions, this paragraph is identified as the presumption of ideas. The presumptive fact is “it shall be deemed that the buyer has agreed to buy”, and the basic fact is “the buyer to a sales transaction by trial has already made partial payment during the trial period” or “the buyer has sold, leased, or created a Security Right over the subject matter during the trial period”.

Article 718: “Where the lessor knows or should know about the sublease of the lessee but fails to raise any objection within six months, it shall be deemed that the lessor agrees to the sublease.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP. The basic fact of that statutory presumption is that “the lessor knows or should know about the sublease of the lessee but fails to raise any objection within six months”. From the perspective of the rule of thumb, there is a normal relationship between the said basic fact and the presumed fact (it shall be deemed that the lessor agrees to the sublease).

Article 726: “(para. 2) Where the lessee does not clearly express to purchase the house within 15 days after the lessor performs the obligation of notice, the lessee shall be deemed to waive his/her/its pre-emptive right.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP. The basic fact of that statutory presumption is “the lessee does not clearly express to purchase the house within 15 days after the lessor performs the obligation of notice”. From the perspective of the rule of thumb, there is a normal relationship between the basic fact and the presumed fact (the lessee shall be deemed to waive his/her/its pre-emptive right). In the theoretical classification of statutory presumptions, it is identified as the presumption of rights (*Quan Li Tui Ding*).

Article 757: “The lessor and the lessee may agree on ownership of the leased goods upon the expiry of the lease period. Where there has been no agreement or no clear agreement as to ownership of the leased goods, and the issue cannot be determined by reference to the provisions of Article 510 of this Law, the lessor shall own the leased goods.” This Article is an ISP, which is a presumption of rights in theory. The basic fact of that statutory presumption is “there has been no agreement or no clear agreement as to ownership of the leased goods, and the issue cannot be determined by reference to the provisions of Article 510 of this Law”. From the perspective of the rule of thumb, there is a normal relationship between the basic fact and the presumed fact (the lessor shall own the leased goods).

Article 759: “Where the parties agree that at the expiration of the lease term the lessee only needs to pay a symbolic price to the lessor, the ownership of the lease item shall belong to the lessee after the agreed rent obligation has been performed.” This Article is an ISP. Theoretically, it is a presumption of rights. “The parties agree that at the expiration of the lease term the lessee only needs to pay a symbolic price to the lessor” is the basic fact of this statutory presumption. From the perspective of the rule of thumb, there is a normal relationship between the basic fact and the presumed fact (the ownership of the lease item shall belong to the lessee after the agreed rent obligation has been performed).

Article 1079: “(para. 5) Where, after the People’s Court has made a judgment that divorce shall not be granted, both parties live separate and apart for more than one year and one party files a divorce suit again, divorce shall

be granted.” This paragraph 5 is an ISP. In its contents, “after the People’s Court has made a judgment that divorce shall not be granted, both parties live separate and apart for more than one year” is the basic fact, and the related presumptive fact is “the mutual affection between the husband and wife no longer exists”.

Article 1124: “(para. 1) A successor who, after the opening of succession, disclaims inheritance should make known his decision in writing before the disposition of the estate; if he does not do so, he shall be deemed to have accepted the succession.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP. Theoretically, it is both a presumption of conduct (*Xing Wei Tui Ding*) and a presumption of ideas. “If he does not do so” is the basic fact of that statutory presumption. From the perspective of the rule of thumb, there is a normal relationship between the basic fact and the presumed fact (he shall be deemed to have accepted the succession).

Article 1124: “(para. 2) A legatee should, within 60 days from the time he learns of the legacy, indicate whether he accepts it or disclaims it; in the absence of such indication within the specified period of time, he is deemed to have disclaimed the legacy.” Although the phrase “is deemed” is used in this paragraph, it is not a legal fiction, but an ISP. Theoretically, it is both a presumption of conduct and a presumption of ideas. The reasoning for the analysis of this paragraph 2 is the same as that for Article 1124 (1), so it won’t be repeated here.

Article 1142: “(para. 2) After a will is made, a testator who makes an act of civil law contrary to the content of the will shall be deemed to have revoked the relevant content of the will.” Although the phrase “shall be deemed” is used in this paragraph, it is not a legal fiction, but an ISP. Theoretically, it is both a presumption of conduct and a presumption of ideas. The reasoning for the analysis of this paragraph 2 is the same as that for Article 1124 (1), so it won’t be repeated here.

Article 1222: “If a patient is harmed in the course of diagnosis and treatment, it is presumed that the (related) medical institution is at fault under one of the following circumstances: (1) Violation of the provisions of laws, administrative regulations, rules, etc., relating to diagnostic and treatment practices; (2) Concealment of or refusal to provide medical records related to the dispute; and (3) Loss, forgery, falsification or illegal destruction of medical records.” This Article is an ISP. As the analysis of this Article has been fully discussed in the “Conclusions” part of this paper, so it won’t be repeated here.

## 6.2 An Analysis of Articles Concerning Legal Fiction in the CCC

According to statistics, in the newly promulgated CCC, there are a total of 30 legal fictions. Next, based on the theoretical analyses of the 5th section of this paper, the author will make a theoretical assessment and sorting of the related CCC Articles.

This author holds the opinion that legal fictions can be divided into three types: the quoted legal fictions (*Yin Yong Shi Ni Zhi*), the ostensible legal fictions (*Biao Jian Ni Zhi*) and the legal fictions for clarification (*Cheng Qing Shi Ni Zhi*). Among them, the so-called “quoted legal fictions refer to that for different cases, the legislator treats them in the same manner based on the same value judgment, but also uses the quoted legislative technology for the sake of simplicity in legislative affairs, which has the characteristics of both quotation and fiction. For example, in China’s civil law theory, ‘a legal act that has been revoked shall be deemed invalid from the very beginning’.” (Mao Shuling, 2010).

### 6.2.1 In the CCC, There are 5 Quoted Legal Fictions

Article 16: “Where the protection of the interests of a fetus is involved in, among others, an inheritance or acceptance of a gift, the fetus shall be deemed to have capacity for civil rights. However, if the fetus is dead at birth, its capacity for civil rights does not exist from the very beginning.” In this Article, “the fetus shall be deemed to have capacity for civil rights” is a legal fiction. At the same time, as far as the proviso (if the fetus is dead at birth, its capacity for civil rights does not exist from the very beginning) of this Article is concerned, it is the second legal fiction.

Article 155: “An act of civil law that is null and void or revoked shall not be legally binding from the very beginning.”

Article 542: “Any act of a debtor that affects the fulfillment of the obligee’s rights shall be null and void from the very beginning.”

Article 1054: “(para. 1) Invalid or revoked marriages shall have no legal binding force from the very beginning, and the parties shall have no rights or obligations of a husband and a wife.”

Article 1113: “(para. 2) Invalid adoptions are not legally binding from the very beginning.”

### 6.2.2 In the CCC, There is One Ostensible Legal Fiction

The so-called “ostensible legal fiction, also known as the legal fiction by definition (*Ding Yi Xing Ni Zhi*), refers to a kind of ‘ostensible situation’ created by legislators in order to maintain the appearance of continuity of the original articles.” (Mao Shuling, 2010). There is only one ostensible legal fiction in *the CCC*, namely Article 159. This Article provides that: “For a conditional act of civil law, if a party concerned prevents the fulfillment of a condition by improper means for the sake of his/her/its own interests, the condition shall be deemed to have been fulfilled; whereas a party concerned hastens the fulfillment of a condition by improper means, the condition shall be deemed not to have been fulfilled.” In this Article, the related legal fiction has become a kind of punitive measure against malicious offender, which is an embodiment of the legal policies’ requirements.

### 6.2.3 In the CCC, There are 24 Legal Fictions for Clarification

The so-called legal fictions for clarification refer to the situation that the legislator, when the truth or falsehood as well as the existence or non existence of a specific fact is not clear, directly adopts the fictitious assumption to make it not affect the matters to be stipulated and the values to be achieved. Specifically speaking, when the parties concerned have not voiced their intention or their intention is not expressed clearly, then this type of legal fiction will be utilized to assume the existence of a particular intention or to assume the ambiguous intention as having a definite and concrete content.

Article 18: “(para. 2) A minor who has reached the age of 16 and whose main source of income is his or her own labor shall be deemed as a person with full capacity for civil conduct.” This Article is a legal fiction concerning the subject of legal relations.

Article 25: “The domicile of a natural person shall be his or her residence recorded in the household registration or in any other valid identity registration; if the habitual residence is not the same as the domicile, the habitual residence shall be deemed as the domicile.” This Article is a legal fiction concerning an ultimate issue in civil cases.

Article 27: “(para. 2) If the parents of a minor are dead or have no competence to be guardians, one of the following persons who have the competence to be guardians shall act as the guardian in the listed sequence: 1. paternal or maternal grandparents; or 2. elder brothers or sisters; or 3. other individuals or organizations which are willing to act as guardian, provided that it is approved by the neighborhood or village committee in the place of the minor’s domicile or the (local) civil affairs department.” The meaning of this paragraph is that those eligible subjects specified in paragraph 2 may be deemed as guardians like parents in paragraph 1 of this Article.

Article 48: “For a person who is declared dead, the date when the people’s court renders the judgment to declare the person’s death shall be deemed as the date of death of that person; if the person is declared dead due to his/her unknown whereabouts caused by an accident, the date when the accident occurs shall be deemed as the date of death of that person.”

Article 57: “A legal person is an organization that has capacity for civil rights and capacity for civil conduct, and independently enjoys civil rights and assumes civil obligations in accordance with the law.”

Article 308: “Where the co-owners of a co-owned real property or movable property have not agreed on whether the real property or movable property is under divided co-ownership or joint co-ownership, or such agreement is unclear, unless a family relationship exists between the co-owners, the real property or movable property shall be deemed as under divided co-ownership.”

Article 309: “A divided co-owner’s share of a commonly owned real property or movable property shall be determined according to his/her/its amount of capital contribution in the case of no or unclear agreement. Where it is impossible to determine the amount of capital contribution, each divided co-owner shall be deemed to enjoy an equal share.”

Article 397: “(para. 2) Where a mortgagor fails to mortgage the properties in accordance with the provisions in the preceding paragraph, the properties not mortgaged shall be deemed to be mortgaged together.”

Article 492: “(para. 2) If a contract is concluded in the form of electronic messages, the main business place of the recipient shall be the place of establishment of the contract; if there is no main business place, the domicile thereof shall be the place of establishment of the contract. Where the parties agree otherwise, their agreement shall prevail.” This Article is a legal fiction. In its contents, “a contract is concluded in the form of electronic messages” or “if a contract is concluded in the form of electronic messages and if there is no main business place” is the two mutually independent premise facts. “Where the parties agree otherwise, their agreement shall prevail” is the rebuttal put forward by the party adversely affected by this legal fiction against either of the above two premise facts. In nature,

that rebuttal is an indirect denial.

Article 493: “Where the parties conclude a contract in written form, the place of establishment of the contract shall be the place where the parties last sign or affix their seals on it or place their fingerprints on it, except as otherwise agreed upon by the parties.” The interpretation of the meaning of this Article is the same as the 2nd paragraph of the aforesaid Article 492.

Article 519: “Where it is difficult to determine the shares held among the joint and several debtors, they shall be deemed to be the same.”

Article 544: “Where an agreement by the parties on the contents of a modification is unclear, the contract shall be presumed as not having been modified.” This Article is a legal fiction, not a statutory presumption. The reason is: when the parties want to change the contents of a contract, it is necessary for them to reach a clear agreement on the things need to be changed. If the parties are not clear about the things they desire to change, it means that the parties have reached a consensus to change the said contract, but the content of that consensus is not clear. Under a situation like that, there is no normal relationship between “where an agreement by the parties on the contents of a modification is unclear” and “the contract shall be presumed as not having been modified”, but two facts of completely different nature. Therefore, that Article is not a statutory presumption but a legal fiction, that is, the law intentionally takes the alteration of the contract with uncertain contents as the contract has not been changed. In this Article, “shall be presumed as” shall be replaced by “shall be deemed” in the future.

Article 571: “(para. 2) Where the deposit is admissible, the obligor shall be deemed to have delivered the subject matter within the scope of the deposit.”

Article 586: “(para. 2) The amount of the monetary deposit shall be determined by the parties; however, it shall not exceed 20 per cent of the value of the subject matter of the principal contract, and the excess portion shall not be valid as a monetary deposit. Where the actual payment of the monetary deposit is more or less than the stipulated amount, the stipulated amount shall be deemed to be changed.”

Article 680: “(para. 2) Where the loan contract does not stipulate the payment of interest, the loan shall be deemed interest free.”

Article 680: “(para. 3) Where the agreement on payment of interest in a loan contract is unclear, and the parties concerned are unable to reach a supplementary agreement, interest shall be determined in accordance with the transaction method, transaction practice, market interest rate etc. of the locality or the parties concerned; where a loan is between natural persons, no interest shall be deemed.” The premise fact of that legal fiction mentioned in this Article is “where the agreement on payment of interest in a loan contract is unclear, and the parties concerned are unable to reach a supplementary agreement”.

Article 692: “(para. 2) The creditor and the guarantee provider may agree on the guarantee term, however, if the stipulated term of guarantee expires earlier than the term for performing the principal obligation or at the same time as the term for performing the principal obligation, such term shall be deemed to have not been agreed; if there is no agreement or such agreement is unclear, the guarantee term shall be six months from the date of expiration of the term for performing the principal obligation.” There are two parallel legal fictions in this Article. The first premise fact is that “if the stipulated term of guarantee expires earlier than the term for performing the principal obligation or at the same time as the term for performing the principal obligation”, and the irrefutable conclusion is “such term shall be deemed to have not been agreed”. The second premise fact is “if there is no agreement or such agreement is unclear”, and the corresponding irrefutable conclusion is “the guarantee term shall be six months from the date of expiration of the term for performing the principal obligation”.

Article 707: “Where the lease term is six months or longer, the lease shall be in writing. If the parties fail to adopt a written form, and it is impossible to determine the term of lease, the lease shall be deemed as an open-ended lease.”

Article 730: “Where the term of a lease is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 510 of this Law, such lease is deemed an open-ended lease; the parties may terminate the contract at any time, provided that they notify the other party a reasonable time in advance.” In this Article, the part before the semicolon is a legal fiction. Its premise fact is that “where the term of a lease is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 510 of this Law”.

Article 1071: “(para. 1) Children born out of wedlock shall enjoy the same rights as children born in wedlock, no organization or individual may harm or discriminate against the formers.” The part before the comma in this Article is a legal fiction. For this legal fiction, the premise fact is “children born out of wedlock”.

Article 1072: “(para. 2) The provisions of this Law governing the relationship between parents and children shall apply to the rights and duties in the relationship between step-fathers or step-mothers and their step-children who receive care and education from them.”

Article 1077: “(para. 2) Within 30 days after the expiration of the above prescribed period, both parties shall in person apply to the marriage registration bureaus for the issuance of divorce certificates; those who fail to make the application shall be deemed to have withdrawn the application.”

Article 1111: “As of the date of establishment of the adoptive relationship, the provisions of this Law governing the relationship between parents and children shall apply to the rights and duties in the relationship between adoptive parents and adopted children; the provisions of this Law governing the relationship between children and close relatives of their parents shall apply to the rights and duties in the relationship between adopted children and close relatives of the adoptive parents.” In this Article, there are two legal fictions: one is before the semicolon; the other is after the semicolon.

Article 1121: “(para. 2) If several persons who have the right of succession to each other die in the same event and it is difficult to determine the time of death, it shall be presumed that the person without any other successor dies first. Where there are other successors and they are of different generations, the elder shall be presumed to die first; if they are of the same generation, they shall be presumed to die at the same time and no succession shall occur to each other.” Although the phrase “shall be presumed” is used in this Article repeatedly, it is actually a group of three legal fictions. As for the three mutually independent premise facts (if several persons who have the right of succession to each other die in the same event and it is difficult to determine the time of death; if several persons who have the right of succession to each other die in the same event and it is difficult to determine the time of death, there are other successors and they are of different generations; if several persons who have the right of succession to each other die in the same event and it is difficult to determine the time of death, and they are of the same generation), there is no normal relationship between them and their respective conclusions (it shall be presumed that the person without any other successor dies first; the elder shall be presumed to die first; they shall be presumed to die at the same time and no succession shall occur to each other). In addition, the condition of “it is difficult to determine the time of death” exists in every premise fact. This also signifies that there is no connection of comparatively high probability between those premise facts and their corresponding so-called “presumed” conclusions. By enacting this Article, the legislators try to realize the following two value pursuits: first, to facilitate the smooth transfer of inherited properties and interests, to reduce the number of heirless estate, and to protect the legitimate rights and interests of the parties concerned. Second, to prevent the occurrence of litigation deadlock that will be caused either by the lack of relevant evidence or by the serious disproportion between input and output of litigation proof in inheritance cases.

## 7. Conclusions

The first section of this paper indicated that: As far as the nature of Article 58 of *the TLL* (currently the partially revised Article 1222 of *the CCC*) is concerned, there is a hot debate between two rival theories: one is “the theory of refutable presumptive fault”, the other is “the theory of irrefutable fault determination”. More or less, these two kinds of theories have their own reasons, but they also demonstrate some shortcomings of their own. For example, “the theory of refutable presumptive fault” fails to specify what on earth does the adversely affected party intends to overturn: is it the presumed fact? Or is it the related basic fact? What are the reasons behind the related choice and assessment? As another example, can the adversely affected party discredit the basic fact? What is the legal consequence of disproving the basic fact for the applied presumption? Unfortunately, on these issues, “the theory of irrefutable fault determination” fails to provide us with a satisfying explanation, either.

Based on the theoretical analyses of the 5th section of this paper, the author believes that the said Article in the preceding paragraph an ISP. The reasons for this assessment are as follows: first, this author agrees with Mr. Hu Kang Sheng, Chairman of the Constitution & Law Committee of the NPC, that is, “the medical institution shall be presumed to be at fault” in Article 58 of *the TLL* is different from the so-called “if the actor presumed to be at fault” provided by the 2nd paragraph of Article 6 of the same law. Specifically speaking, Article 58 of the original *TLL* (Article 1222 of *the CCC*) has nothing to do with the application of the principle of presumptive fault, but a typical statutory presumption. Therefore, as far as this Article is concerned, its presumptive fact (i.e. the PAASP/ the related medical institution has subjective fault in respect of the damage suffered by the opposite party) has nothing to do with the reversed burden of persuasion. As long as the BSP (the patient or the close relatives of the deceased patient) can prove the truthfulness of one of the three mutually independent basic facts (violation of the provisions of laws, administrative regulations, rules, etc., relating to diagnostic and treatment practices; concealment of or refusal to provide medical records related to the dispute; loss, forgery, falsification or illegal destruction of medical

records), the presiding judge then has the duty to presume that the defendant has subjective fault in line with the law. This is essentially a kind of law application activity carried out by the judge. In other words, when the basic facts are substantiated, the “burden of persuasion for the establishment of the related presumptive facts”, which should have been borne by the BSP, has been temporarily relieved due to the direct application of relevant laws. Second, if we desire to refute the presumed fact directly (i.e. the related medical institution is presumed to have subjective fault), the assertion of the PAASP should be expressed as “the related medical institution has no subjective fault”. This author believes that the specific facts used to prove “the PAASP has no subjective fault” are limited to the scope of the three basic facts stipulated in Article 58 of the original *TLL* (now Article 1222 of *the CCC*). If this author’s point of view is accurate, the target of the rebuttal of the PAASP is not the presumed facts, but the relevant basic facts. In the light of the theoretical analyses of the section 5.1 of this paper, the refutation of those basic facts is a denial. It can be either a direct denial or an indirect denial. Under that situation, the BSP assumes the burden of persuasion for the verification of the basic facts, while the PAASP only bears the burden of producing evidence for their disproof. Of course, the PAASP may also launch defense to discredit those three mutually independent basic facts. In this case, the PAASP bears the burden of persuasion for that alleged defense, and the corresponding proof presented by the refuter is the proving evidence. Third, the effect of successful refutation against the basic facts of an ISP is that because the application of that statutory presumption has been proved to be unlawful, the relevant presumed facts will also become untenable.

In view of the above three grounds, as far as the statutory presumption in Article 58 of the original *TLL* (Article 1222 of *the CCC*) is concerned, objectively, it is impossible for the PAASP to disprove the related presumptive facts. From this point of view, “the theory of irrefutable fault determination” is reasonable. At the same time, the PAASP does have the right and chance to refute the basic facts. From this point of view, it can be argued that “the theory of refutable presumptive fault” is not totally unreasonable. However, it should be noted that the rebuttal against the basic facts is not a real refutation, but “a challenge against the lawfulness of that statutory presumption’s usage”. Therefore, on the whole, this author’s theory is based on “the theory of irrefutable fault determination”, and absorbs certain reasonable elements of “the theory of refutable presumptive fault” at the same time.

All in all, all statutory presumptions can be refuted to some extent. The distinctions between them are as follows: firstly, the scope of refutation is different; secondly, the difficulty of rebuttal is different. Of course, the following technical details should be complied with when identifying and differentiating between statutory presumptions and legal fictions: (1) The legal effect of the successful refutation against the basic facts of a judicial presumption is that those basic facts are overturned, but there may be other evidence in the case to support the related presumed facts, so those presumptive facts do not necessarily have to be considered as untenable, too. (2) The legal effect of the successful refutation against the presumptive facts of a judicial presumption is: the presumed facts are overturned, but the basic facts have not been weakened due to the support of other relevant evidence, and could continue to be one of the bases for judges to do the so-called free evaluation of evidence. (3) The successful effect of disproving basic facts of a RSP: the usage of that presumption lacks legitimacy, so the corresponding presumptive facts are untenable, too. (4) The successful effect of disproving presumed facts of a RSP: those presumed facts are overturned, but the related basic facts will be considered as confirmed continually (just like the situations stipulated in Article 15, Article 40, Article 46, Article 621.2 and Article 831 of *the CCC*). (5) The successful effect of disproving basic facts of an ISP: Because it has been proved that the application of this ISP lacks legitimacy, the relevant presumed facts can not be sustained, too. (6) Litigants are forbidden to refute the conclusive part of an applied legal fiction, but they can disprove its premise fact. By nature, that refutation is “a challenge against the lawfulness of that legal fiction’s usage”. (7) The using of statutory presumptions will not lead to the reversed burden of persuasion for the corresponding ultimate issues in a given case. (8) When the principle of fault presumption is applied, as for the issue of whether the defendant has subjective fault or not, the related burden of persuasion will be reversed to be assumed by the defendant. By comparison, in the usage of statutory presumptions, there will be no inversion of burden of persuasion.

While this preliminary research on the relations between statutory presumptions and legal fictions in *the CCC* draws the above conclusions, more research on those ideas is required.

## References

- Bi, Y. Q. (2013). *Research on the Principally Basic Theories of Evidence* (1st ed.). Beijing: Peking University Press.
- Bian, J. L., Li, S. Z., & Zhong, D. Z. (2009). From Logic to Legal Rule: What is Changed by Presumption. *Nanjing University Law Review*, 1, 35-54.
- Chen, R. H. (2015). On Presumptions in criminal laws. *Law Science*, 5, 105-116.

- Chu, F. M. (2011). Quasi Legal Presumption – the Intermediate Field Between Factual Presumption and Legal Presumption. *Contemporary Law Review*, 149(5), 107-114.
- Du, B. Q. (2013). On Legal Presumption and Factual Presumption. *Legal System and Society*, 2, 1-2.
- He, J. H. (2008). From Natural Presumption to Artificial Presumption- Reflection on the Related Concepts of Presumptions. *Chinese Journal of Law*, 4, 110-125.
- Jauernig, O. (2003). *Zivil Prozessrecht* (27th ed.). trans. by Zhou Cui. Beijing: Law Press of China.
- Jiang, P. (1987). Be Regarded as, Presumption and Burden of Proof in Civil Law. *Tribune of Political Science and Law*, 4, 1-5.
- Lao, D. Y. (2007). Misunderstandings in the Study of Presumptions. *Science of Law*, 5, 117-126.
- Li, K. (2013). Presumption and Legal Fiction: From the View of Rape Statutory. *Journal of Hunan Police Academy*, 25(2), 103-107.
- Liu, F. J. (2010). Jurisprudence and Creation of “Being Regarded as”. *Peking University Law Journal*, 22(2), 198-213.
- Long, Z. Z. (2008). The Dividing Line and Application of Presumptions. *Chinese Journal of Law*, 1, 106-125.
- Lu, P. (2003). The Difference between the Conclusive Presumption and the Fiction. *Tongji University Journal (Social Science Section)*, 14(1), 63-68.
- Mao, S. L. (2010). Presumption and Legal Fiction. *Journal of Heilongjiang Administrative Cadre Institute of Politics & Law*, 86(11), 11-15.
- Pruetting, H. (2000). *Gegenwartsprobleme Der Beweislast* (1st ed.). trans. by Wu Yue. Beijing: Law Press of China.
- Qiao, G. Y., & Liu, W. Q. (2016). From Classification to the Dividing Line - on Presumption and Legal Fiction. *Journal of People's Public Security University of China (Social Sciences Edition)*, 183(5), 57-63.
- Rosenberg, L. (2018). *Die Beweislast* (5th ed.). trans. by Zhuang Jinghua. Beijing: China Legal Publishing House.
- Sun, M. J. (2014). A Comparative Study on the Provisions of “Presumption” and “Be Regarded as” in China's Civil Law. *The Pedagogical Science Forum of Huai Yin Normal University*, 1-2, 5-11.
- Wang, X. F. (2008). On the Fact Inference and the Presumption of Law. *Hebei Law Science*, 26(6), 181-187.
- Wang, X. M. (2004). On Logic Foundation of Presumption- And on the Relationship between Presumption and Fiction. *Tribune of Political Science and Law*, 22(1), 165-172.
- Ye, M. Y. (2007). Presumptions of Fault and Causality & Inversion of Burden of Persuasion-A Thinking Progressed from Facts to Values. *Northern Legal Science*, 1(4), 143-151.
- Zhang, H. Y. (2012). Interpretation on “Presumption” and “Being Regarded As”: Analysis on the Existing Civil Legal Rules in China. *Law & Social Development (Bimonthly)*, 105(3), 104-116.
- Zhang, Y. P. (2013). Questions on Quasi Legal Presumption – a Discussion with Chu Fumin. *Journal of Liaoning University (Philosophy and Social Science)*, 41(3), 107-112.
- Zhang, Y. P., & Xu, J. (2007). Regulation Approaches for Fact Assumption. *Contemporary Law Review*, 21(2), 24-30.
- Zhao, G., & Liu, H. F. (1998). On Presumptions in Evidence Law. *Science of Law*, 85(1), 90-96.

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