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Theory and Application of Burden of Proof Presumptions in the Philippines

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I.

Spanish rules of law on burden of proof and presumptions made their way to the Philippines through the Spanish Civil Code. The original edition of this code took effect in Spain on May 1, 1889. It was revised in the following year, and in its revised form was extended to the Philippines by the royal decree of July 31, 1889. In Chapter V, Title I, Book IV of this code, under the caption "Proof of Obligations", was contained the Spanish law on burden of proof and presumptions. The Spanish code of criminal procedure and that of civil procedure were extended to the Philippines one year earlier than the civil code, but they contained no provisions on the subject. Apparently, the Spanish lawmakers regarded rules on burden of proof and presumptions more as rules of substantive, than of adjective, law.¹

A.—*Burden of Proof.*

The rule is thus expressed in art. 1214 of the Spanish Civil Code:

"The burden of proving the existence of an obligation is on him who demands its performance, while the burden of proving its extinction is on him who refuses performance".²

The broad scope of this rule will be realized when it is considered that the term "obligation" refers not only to con-

¹ "The articles (under "Proof of Obligations") are not mere procedural rules which the rules in the Code of Civil Procedure have rendered unnecessary; * * * the latter are adjective while the former relate to the essential and substantive. 8 Manresa, Comentarios al Código Civil Español, pp. 422-3. (trans. mine)

² "Incumbe la prueba de las obligaciones al que reclama su cumplimiento, y la de su extinción al que la opone". (Spanish original). Above translation is mine.

tractual obligations, but also to those arising from statute, quasi-contracts, crimes and torts.³

A noted commentator on the Spanish Civil Code regards art. 1214 as merely declaratory of the maxim, The burden of proof is on him who affirms, not on him who denies.⁴ This article is equivalent to saying, He who affirms the existence of an obligation must prove it, and so must he who affirms its extinction. However, it does not necessarily follow that a party has never the burden of proving a negative because an obligation may have for its basis a negative fact, e.g. payment of what is not due; the burden of proving a negative, though exceptional, is not impossible.⁵

B.—*Presumptions.*

Spanish law classifies them into:

1. Presumptions not created by law. art. 1253, Civ. C., provides:

“Presumptions not created by law shall not serve as a means of proof, unless between the fact proved and the fact sought to be presumed there exists a precise and direct connection according to rules of human judgment.” (trans. mine)

That the term “presumpton” is used in this article in the sense of a logical inference which a trier of fact would be justified, but is not compelled, to draw is shown clearly by the following commentary:

“The law does not, and cannot, enumerate or classify these presumptions; each party is at liberty to suggest them, and the trier (juzgador) is at liberty to determine when they arise and when they do not arise.

³ See art. 1089, Civ. C.

⁴ The evolution of the maxim is traced in the following passage:

“Jors gives the following example: When the burden of proof was first considered theoretically, a regula was framed to the effect that the plaintiff had the burden of proving his assertion. Dig. XXII, 3, 21. This continued to be used and the question as to proof of exceptions (equitable defenses) was met by another regula that ‘in an exception the defendant is a plaintiff’. Dig. XLIV, 1, 1. But this did not suffice to meet cases where the defendant contended that he had paid or where the exception was met by a replication. After further regulæ for these cases (Dig. XXII, 3, 25, 2), the jurists came ultimately to the general proposition that ‘the burden of proof lies on one who asserts not on one who denies’. Dig. XXII, 3, 2.” Pound, *The Maxims of Equity*, 34 Harv. L. Rev. 809, note 29 at p. 814.

⁵ 8 Manresa, op. cit. p. 423.

"These presumptions differ from presumptions of law in that even after the antecedent fact has been established, the consequent fact does not follow as a matter of law; the trier (juzgador) is not compelled to make the deduction; the party proving the antecedent fact is not necessarily relieved of establishing by other evidence the fact sought to be presumed.

"As the article says, whether there is such a precise or direct connection as to justify the presumption must be determined in accordance with the rules of human judgment,—a criterion far from being inflexible and definite. * * *

"The Supreme Court of Spain has on various occasions refused to interfere with the judgment of the trial judge as to when there is a precise or direct connection between the antecedent fact and the fact sought to be presumed. * * *"
8 Manresa, op. cit. pp. 559-562. (trans. mine)

The wide discretion given to the trier of fact to give or not to give effect to these so-called presumptions is also implied in the use of the phrases "presunciones judiciales", "presunciones ab homine", and "presunciones de hombre" which the rich vocabulary and variegated taste of Spanish civilians have invented to express the same idea contained in art. 1253 of the Civil Code.⁹

2. Presumptions created by law. Art. 1250, Civ. C., provides:

"Presumptions created by law relieve the party favored by them from making proof". (trans. mine)

The distinction between this class and the preceding one is explained thus:

"Presumptions are classified into legal and judicial; more technically, they are known in the schools as presumptions of law (de derecho) and of man (de hombre). The first are deductions which the law requires; * * * they limit the discretion of the trier (juzgador); and, excepting presumptions which the law allows to be rebutted, they are

⁹ See 8 Manresa, op. cit. pp. 423, 544.

It may be noted here that American commentators have found no fault with the classification of presumptions into *presumptio juris* and *presumptio hominis*. See Thayer, *Prel. T. on Ev.* 341; Fisk, *Presumptions*, 11 *Cornell L. Q.* 20-40 (1925).

more in the nature of substantive law than rules of evidence.

"Presumptions of man are or are not given effect, according as the connection between the antecedent and consequent facts is or is not precise and direct * * *" 8 Manresa, op. cit. p. 544. (trans. mine)

In other words, the trier of fact has no choice in the application of these presumptions; once the basic fact is proved, he must find the fact sought to be presumed. It must be repeated, however, that the basic fact must first be proved:

"Presumptions are not admissible unless the fact from which they are deduced is completely established". Art. 1249, par. 1, Civ. C.⁷

This class of presumptions is subdivided into: (a) those which are rebuttable, and (b) those which are conclusive:

"Presumptions created by law may be rebutted by proof to the contrary, except in those cases where such proof is prohibited". Art. 1251, Civ. C. (trans. mine)

The following commentary brings out the distinction, but without superadding borrowed Latin trappings⁸ to the simple language of the law:

"Legal presumptions may be classified into *juris et de jure*, which do not admit of proof to the contrary, and *juris tantum*, which admit of such proof. This traditional classification is recognized in par. 1, art. 1251, Civ. C. * * *" 8 Manresa, op. cit. p. 546.

The language of arts. 1249 and 1215 of the Civil Code⁹ seems to indicate that Spanish law treats presumptions, of whatever class, as evidence.

II.

Nine years after the extension of the Spanish Civil Code to the Philippines the Spanish flag was hauled down from the

⁷ Above is a literal translation of the following Spanish original: "Las presunciones no son admisibles sino cuando el hecho de que han de deducirse esté completamente acreditado".

⁸ "Barbarous latin" were the words used by one writer in criticizing "presumptio juris et de jure" and "presumptio juris tantum". See Thayer, op. cit., note 3 at p. 342.

⁹ As to art. 1249, see note 1. Art. 1215 provides: "Proof may be made by: documents, confession, personal inspection of the judge, experts, presumptions". (trans. mine)

seat of government at Manila and the Stars and Stripes was unfurled in its place. During those nine years, there was practically no judicial development of the rules contained in the code; the doctrine of *stare decisis* was not recognized in Spanish law; there were no reported decisions of the Audiencia (the Supreme Court in the Philippines then); the Filipinos had lost faith in Spanish administration of justice and since 1870 the country had been in a ferment of revolt.

Among the first tasks undertaken by American administrators, soon after Spain ceded the Philippines to the United States, were the enactment of new procedural laws and the reorganization of the courts. President McKinley had directed their attention to this.¹⁰ The Spanish system of procedure had to be changed; it afforded too much opportunity for dilatory tactics and technicalities which had resulted too often in delay and injustice.¹¹

On April 23, 1900, the Military Governor¹² issued G. O. No. 58 which provided a complete system of criminal procedure in compact and concise form. On October 1, 1901, Act No. 190 of the Philippine Commission took effect; this Act became the new Code of Civil Procedure.

On May 29, 1899, the Military Governor issued G. O. No. 20 constituting a Supreme Court of nine judges, six of whom were Filipino lawyers, and three American army officers with legal experience; Cayetano Arellano, a Filipino, was appointed chief justice.¹³ On June 11, 1901, the membership of the court was reduced to seven; Arellano was again appointed chief justice, but this time the American justices were in the majority—four Americans to three Filipinos.¹⁴ On October 1, 1917, the membership of the court was restored to nine;¹⁵ the chief jus-

¹⁰ "The main body of laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure, and in the criminal laws to secure speedy and impartial trials, and, at the same time, effective administration, and respect for individual rights".

¹¹ See Forbes, *Philippine Islands*, vol. I, pp. 298-9.

¹² The Philippines was under military occupation from August 13, 1898, to Sept. 1, 1900. During this period, the Military Governor exercised legislative powers.

¹³ See Malcolm, *The Government of the P. I.*, pp. 198-9; Forbes, *op. cit.*, vol. I, p. 295.

¹⁴ See sec. 8, Act No. 136; Malcolm, *op. cit.*, p. 282; Forbes, *op. cit.*, pp. 299-300.

¹⁵ See sec. 133, Act No. 2711.

tice continued to be a Filipino, and the Americans retained their majority of one.

The first reported decision of the Philippine Supreme Court was handed down on August 8, 1901. In 1903 there came for decision by the court a case that has an important bearing on our subject. This was *U. S. v. Dorr*, 2 Phil. 269. Dorr and O'Brien, two Americans who were respectively proprietor and editor of a newspaper in Manila, were prosecuted for libel. They demanded a trial by jury. The trial court refused their demand. On appeal to the Philippine Supreme Court, they contended that this was an infringement of their constitutional right to a trial by jury. The Philippine Supreme Court, per J. Cooper, held that the provisions of the Constitution of the United States relating to jury trials were not in force in the Philippines. On appeal to the United States Supreme Court, the decision was affirmed (*Dorr v. U. S.*, 195 U. S. 138 (1904), per J. Day; J. Harlan dissenting). Thus was the system of trial by jury which played a leading role in the development of common-law rules of evidence prevented from ascending the stage of Philippine legal history. We shall have later occasion to see how the membership of the Philippine Supreme Court and the absence of trial by jury affected the development of Philippine law on burden of proof and presumptions.

Both G. O. No. 58 and Act 190 were of American origin. Both contained provisions on burden of proof and presumptions. They were the vehicle through which Anglo-American law on this subject made its entrance to the Philippines. Did this entrance result in the exit of Spanish law on burden of proof and presumptions? No. The two new procedural codes were enacted with a view to supplanting the old Spanish procedural laws, and supplant these old laws they did. But, as we have said before, the Spanish rules of law on burden of proof and presumptions were to be found not in the Spanish procedural codes, but in the Spanish Civil Code; and as the latter code dealt mainly with the regulation of private rights, its provisions on burden of proof and presumptions escaped the fate of those Spanish laws which were political or procedural in character and were thus allowed to continue in force even after the change of sovereignty. The repealing section

of Act No. 190¹⁸ could very well have been construed to have swept down the Spanish Civil Code provisions on burden of proof and presumptions; but—as will be seen later—the Philippine Supreme Court so far from taking this step have cited and applied said provisions. A two-fold explanation for the judicial recognition thus accorded suggests itself: first, most of the Filipino justices were indoctrinated in the civil law and were naturally disposed to give effect to every Spanish legal provisions which did not appear to have been clearly repealed; secondly, the fact that the Spanish legal provisions on burden of proof and presumptions were subsumed in the Law of Obligations may have induced the belief in the minds of the American, and perhaps also of some of the Filipino, justices that the former form an inseparable and integral part of the latter. Thus, at the outset of its career the Philippine Supreme Court had at its disposal two sets of statutory rules on burden of proof and presumptions—one Spanish-derived, the other American-derived.

We have already discussed the Spanish legal theory on burden of proof and presumptions; we shall now turn our attention to Anglo-American theory on the same subject.

III.

A. *Burden of Proof.*

1. Distinction between the two burdens.

Before the publication of Professor Thayer's book¹⁷ in 1898, the looseness and ambiguity of the phrase "burden of proof" was a thing unsuspected and undreamt of by Anglo-American courts and textwriters;¹⁸ as with so many legal terms,¹⁹ "burden of proof" was used indiscriminately and ingenuously to express

¹⁸ "Repeal of Existing Codes, and so forth.—All codes, statutes, acts, decrees, and orders and parts thereof, heretofore promulgated, enacted or enforced in the Philippine Islands, prescribing the procedure in civil actions or special proceedings in any court or tribunal are hereby repealed, and the procedure in all civil actions and special proceedings in all courts and tribunals shall hereafter be in accordance with the provisions of this Act: * * *" Sec. 795, Act No. 190.

¹⁷ Preliminary Treatise on Evidence. This book has been aptly described as "epoch-making".

¹⁸ The same ambiguity for the phrase "onus probandi" existed in Roman law. Thayer, *op. cit.* 364-6.

¹⁹ For loose usage of other legal terms, see Hohfeld, *Fundamental Legal Conceptions*, pp. 27-31.

two different ideas. Thayer brought about the awakening of bench and bar to the two-fold meaning of the term:

“It marks, (1) the peculiar duty of him who has the risk of any given proposition on which parties are at issue,—who will lose the case if he does not make this proposition out, when all has been said and done. In saying ‘the peculiar duty’, I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion”.²⁰

We shall hereafter refer to the first as the burden of persuasion, and to the second as the burden of producing evidence.

2. Burden of persuasion.

Sec. 297 of the present Philippine Code of Civil Procedure²¹ makes the form of the pleadings the primary test for locating the burden of persuasion. As a general rule, a party has no burden of establishing a negative allegation; the exception is where such an allegation is essential to the party's case.

A noted American commentator, however, rejects the idea of one invariable test for deciding which party has the burden of persuasion on a given issue.²² The rules of substantive law bearing on the particular issue, the principles of pleading, the

²⁰ Thayer, *op. cit.* 355.

In 1892, Prof. Austin Abbott worked out Thayer's view as to the two burdens with special reference to jury trials and denominated them respectively as (1) the burden of satisfying the jury, and (2) the burden of satisfying the judge to let the case go to the jury. (Two Burdens of Proof, 6 *Harv. L. Rev.* 125). Wigmore, following Abbott's specialized treatment, uses (1) “risk of non-persuasion of the jury” and (2) “duty of producing evidence to the judge” to denominate the two burdens. Secs. 2485, 2487, *Evidence* (2nd ed.)

²¹ This section provides: “Party must Prove his Affirmative Allegations.—Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document the custody of which belongs to the opposite party”.

In criminal cases, the prosecution has the burden of establishing the guilt of the accused beyond a reasonable doubt. Secs. 57, 59, *G. O. No.* 58.

²² Sec. 2486, *Wigmore on Evidence* (2nd ed.)

form of the pleadings in the case, the rules of practice in the particular jurisdiction handling the case, considerations of policy and fairness based on experience—all these, singly or conjointly with the others, affect the allocation of such burden.²³ The familiar tests—such as put the burden of persuasion on the party who has the affirmative of the issue, or on the party to whose case the fact is essential, or on the party having peculiar means of knowing the fact—which courts apply now and then cannot safely be regarded as stating a universal rule applicable in all situations; each one may reign supreme, through judicial usage, in certain classes of cases, but cannot hold sway in all.²⁴

Does the burden of persuasion on a given issue ever shift? Thayer maintains it cannot, though the burden of producing evidence may as the trial progresses.²⁵ But some later commentators, looking more to what courts actually do than to what courts are told ought to be done, contend that the rule thus broadly stated by Thayer must be qualified so as to fit in a respectable number of cases where some presumptions—e.g., presumption of legitimacy, presumption of validity of marriage from cohabitation, presumption of negligence—were given the effect of shifting the burden of persuasion.²⁶

The burden of persuasion is sustained by proof beyond reasonable doubt in criminal cases,²⁷ and by proof by a preponderance of the evidence in Civil Cases.²⁸

3. The burden of producing evidence.

Wigmore says that Anglo-American rules as to this burden would have no reason for existence but for the peculiar make-up of the common-law tribunal and the line drawn between the functions of the judge and those of the jury.²⁹ The clear

²³ Thayer, *op. cit.* 366-376; secs. 2485, 2486, Wigmore on Evidence (2nd ed.)

Thayer thinks that rules as to the burden of persuasion have no place in the law of evidence, and can more properly be discussed under the law of pleading.

²⁴ Sec. 2486, Wigmore on Evidence (2nd ed.)

²⁵ Thayer, *op. cit.* 370.

²⁶ Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. of Pa. L. Rev. 307 (1920); Morgan, *Some Observations on Presumptions*, 44 Harv. L. Rev. 906 (1930).

²⁷ Sec. 2497, Wigmore on Evidence (2nd ed.); sec. 57, G. O. No. 58.

²⁸ Sec. 2498, Wigmore on Evidence (2nd ed.); sec. 273, C. C. P.

²⁹ Sec. 2487, Wigmore on Evidence

implication is that such rules will not take root in countries with one-man tribunals. How far this has been verified in Philippine judicial experience will later be discussed.

The party having the burden of persuasion on a given issue has the initial burden of producing evidence on that issue.³⁰ How is this initial burden sustained? Our answer must depend on the character of the tribunal trying the case. In jury trials, the case is submitted to the jury if, and only if, the evidence that has been taken presents a question on which fair-minded men may differ.³¹ Whether the evidence that has been taken is in that condition or not is a question of law and is decided by the judge. If the proponent—that is to say, the party having the initial burden of producing evidence—gives no evidence, the judge directs a verdict against him; the case does not reach the jury because there is no evidence on which fair minds may differ. So, where the proponent gives evidence of such little amount or weight as not to satisfy the judge that it presents a question on which fair minds may differ. If the proponent gives evidence sufficient to satisfy the judge to let the case go to the jury, then he is said to have sustained the initial burden of producing evidence. If the proponent goes further and produces evidence so overwhelming that fair-minded men cannot render a verdict to the contrary, the burden of producing evidence is said to have shifted to the opponent; unless he (the opponent) sustains this burden or shifts it back in like manner as the proponent had done, the judge will direct a verdict for the proponent. The question, then, of whether a party has or has not sustained the initial burden of producing evidence is a question of law which it is the function of the judge to decide. The question of whether that same party has or has not sustained the burden of persuasion is a question of fact which it is the function of the jury to decide. A ruling by the judge in the one can by no means be equivalent to a verdict by the jury in the other.

Suppose, instead, that the case was tried before a judge who acts as trier of fact as well as trier of law. Here, too, the party having the burden of persuasion on a given issue has the burden of producing evidence on that issue. The difference lies in the amount of evidence he must produce to sustain the

³⁰ Thayer, *op. cit.* 369-370; sec. 2488, *Wigmore on Ev.* (2nd ed.)

³¹ See *Abbott, op. cit. supra.*

initial burden. Proof by a preponderance of the evidence³² or beyond a reasonable doubt is necessary for that purpose:

“In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary’s contention and setting up an affirmative defence, takes the role of actor (*reus excipiendo fit actor*,)—must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law. But he, in every case, who is the true reus or defendant holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him. He has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong, and yet he may gain and his adversary lose, simply because the actor has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt”. Thayer, *op. cit.* 369.

The judge in a one-man tribunal has no function like the common-law judge of not submitting the case to the jury unless the evidence presents a question on which fair-minded men may reasonably differ. This function of the common-law judge was designed to enable the judge to exercise some control and supervision over the jury and in that way avoid the necessity of setting aside verdicts which are manifestly against the weight of the evidence. The judge in a one-man tribunal, then, does not need to determine in the first instance whether the evidence produced by the proponent presents a question on which fair minds may differ. In so far as he is concerned, the question of whether a party has or has not sustained the initial burden of producing evidence is a question of fact indistinguishable from the question of whether that same party has or has not sustained the burden of persuasion. What effect this has in obscuring the distinction between the two burdens will be

³²“Preponderance of the evidence” is used here in the sense of greater balance of probability. Since D has offered no evidence yet, the preponderance of the evidence (literally speaking) is on the side of P after he has put in his evidence in chief; and yet, the greater balance of probability may not be on his side due to the fact that the evidence he has put in may be negligible in quantity or wanting in credibility. See sec. 373, C. C. P. and note therein the phrase “preponderance or superior weight of evidence”.

later discussed in connection with cases decided by the Philippine Supreme Court.

B. *Presumptions.*

The term "presumption" has been used by Anglo-American courts and textwriters in a variety of senses:³³

1. A logical inference. In this sense, it belongs more to the domain of logic than that of law.³⁴ A trier of fact may, but is not compelled to, draw a logical inference. E.g., the fact that a person was found standing over a wounded man with a bloody knife in his hand raises an inference, which the trier of fact may or may not draw, that the former killed the latter. A logical inference passes not infrequently under the name of "presumption of fact".³⁵

2. A rebuttable presumption, i.e. a rule compelling a trier of fact to assume the existence of one fact on account of the existence of another fact or group of facts, standing alone, until the existence of the assumed fact is disproved.³⁶ Thayer maintains that a rebuttable presumption is a rule of substantive law subsidiary to, and serving as an aid in the construction of, another and more fundamental rule of substantive law;³⁷ he endorses for this reason the suggestion that they be treated under the different subjects of the substantive law to which they are related than under the law of evidence.³⁸ A rebuttable presumption differs from a logical inference in that the trier of fact is compelled to make the *prima facie* assumption once the basic fact or group of facts, without more, is proved. Common-law judges have made use of these presumptions to

³³ Bohlen, *op. cit. supra*; Chafee, *Progress of the Law on Ev.* 1919-21, 35 *Harv. L. Rev.* 302, at pp. 310-317.

³⁴ "The law has no mandamus to the logical faculty; it orders nobody to draw inferences,—common as that mode of expression is". Thayer, *op. cit.* note 1 at p. 313. Cf. Bohlen, *op. cit.* at p. 311: Inference, "if part of the law of evidence at all, are part of that portion of it which of it deals with the relevancy or weight of evidence.

³⁵ See Appendix A to Thayer, *op. cit.* For a criticism of classifying presumptions into "presumption of law" (which has been used to comprise both conclusive and rebuttable presumptions) and "presumption of fact", see Thayer, *op. cit.* 339.

³⁶ This definition and that of conclusive presumption, *infra*, are suggested by the definition in Morgan, *op. cit. supra*. It must be noted that Morgan's definition cover conclusive as well as rebuttable presumptions.

³⁷ Thayer, *op. cit.* 314, 326. In support of this view, he cites statutes stated in the form of rebuttable presumptions. *Id.*, pp. 327-331.

³⁸ Thayer, *op. cit.*, note 1 at p. 313.

control the jury in the function of fact-finding.³⁹ E.g., presumption that a child born in lawful wedlock is legitimate.⁴⁰

Thayer maintains that a rebuttable presumption cannot shift the burden of persuasion on a given issue; if a judge gives a rebuttable presumption such an effect, he is really laying down a rule of substantive law as to the amount of evidence needed to overcome the presumption in addition to stating the rule as to the effect of the presumption; a rebuttable presumption, as such, merely shifts the burden of producing evidence.⁴¹ He also views the adoption of the theory of conflicting presumptions by Anglo-American courts and writers as an unfortunate importation from continental law; he seems to concede the possibility of conflicting presumptions occurring due to unusual facts in the case, but instead of balancing them he would omit them from all consideration and weigh the basic facts for whatever probative value they may have, due regard being had to the burden of persuasion.⁴² Subsequent commentators, however, observed that a great many courts persisted in giving certain rebuttable presumptions the effect of shifting the burden of persuasion and in adopting the theory of conflicting presumptions, the views of Thayer notwithstanding. From this arose the recent movement to subdivide rebuttable presumptions according to the reasons which led to their creation; to qualify the theory that a rebuttable presumption cannot shift the burden of persuasion by creating an exception in favor of rebuttable presumptions created to subserve important social ends; to accept the theory of conflicting presumptions and to balance them with reference to the reasons for creating them.⁴³ The movement is symptomatic of the revolt now widespread in the modern world against fundamentals and absolute theories, whether in law or in other fields of knowledge.⁴⁴

3. A conclusive presumption, i.e. a rule compelling a trier of fact to assume permanently the existence of one fact on

³⁹ Thayer, *op. cit.*

⁴⁰ See sec. 334, C. C. P. enumerating 37 rebuttable presumptions.

⁴¹ Thayer, *op. cit.* 343-345, 347-351.

⁴² *Id.* 346-7. A conceivable reason why the theory of conflicting presumptions is anathema to Thayer is because it is at war with his other view that a presumption is not evidence and cannot be weighed as and with evidence. *Id.* 337-339.

⁴³ Bohlen, Morgan, both *op. cit. supra.*

⁴⁴ For extremists' views against legal fundamentalism, see J. Frank, *Law in the Modern Mind*. (1930); K. N. Llewellyn, *A realistic jurisprudence—the next step*, 30 *Col. L. Rev.* 431 (1930). For a moderatist view, see Kocourek, *Introduction to the Science of Law* (1930), where the author argues for "relative certainty in the law".

account of the existence of another fact or group of facts, standing alone. A conclusive presumption is a rule of substantive law, although couched in evidential language.⁴⁵ Common law judges have made use of it to make changes in the substantive law without appearing guilty of judicial legislation. E. g., sec. 16 of Act No. 2031 of the Philippine Legislature, otherwise known as the Uniform Negotiable Instruments Law, provides:

“Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed”.⁴⁶

Before we discuss the judicial development of Philippine law on burden of proof and presumptions, we note the following striking differences and similarities between Spanish and Anglo-American legal theories on the subject:

As regards burden of proof—

(1) Spanish law does not distinguish between the burden of persuasion and the burden of producing evidence, while Anglo-American law does.

(2) The Spanish Civil Code lays down a broad test for determining which party has the burden of persuasion; it makes the rules of substantive law the ultimate test. On the other hand, the present Philippine Code of Civil Procedure, which is of American origin, makes the form of the pleadings the primary test; modern Anglo-American commentators, however, reject the idea of an invariable iron-clad rule for fixing the burden of persuasion.

As regards presumptions—

(1) The three senses in which the term “presumption” is used in Anglo-American law have each their counterpart in the Spanish law.

(2) Spanish law apparently treats presumptions as evidence; in Anglo-American theory, they are not evidence, and are not to be weighed as and with evidence.

(To be continued in next issue).

⁴⁵ Sec. 2492, Wigmore on Ev. (2nd ed.)

⁴⁶ See also sec. 333, C. C. P. enumerating four conclusive presumptions.