

On the Use of Rules of Thumb in Private Lending Disputes

Tingting Jin*

School of Law, China Jiliang University, Hangzhou, Zhejiang, China

**Corresponding Author.*

Abstract: Rule of thumb as an effective means to carry out the free heart, in promoting social fairness and justice played a significant role, its meaning is in the process of litigation, according to the law, daily life experience or determine the fact and derived another fact, then the fact can rely on high cover without proof can be determined as true. The application of rules of thumb plays a very important position in litigation at home and abroad, but because it belongs to the free evidence of judges to a large extent, it is easy to deviate due to various factors, such as ignoring application and wrong application. This paper will discuss the role and limitations of the rule of thumb in the private lending disputes. Through the study and summary of past cases, we try to analyze the performance and reasons of the improper application of empirical rules, and how they should be applied in civil lending disputes.

Keywords: Rule of Thumb; Civil Lending; Litigation Practice; Justice; Free Evaluation of Evidence

1. Introduction

Rule of thumb, as a technical term in the law of evidence, means that in the process of litigation, based on the express provisions of the law, the experience of daily life, or the fact that has been determined and deduced another fact, then the fact can be determined by virtue of a high degree of probability without the need to prove the truth of the case. Rule of thumb belongs to the civil law system of procedural law concept, and free evidence system is inextricably linked. However, China's current research on the rule of thumb is still mostly in the more abstract theoretical level, for how to combine the rule of thumb with specific cases, the rule of thumb how to play a role in practice research, is still relatively lack of.

The purpose of this paper is to discuss the role and limitations of the rule of thumb in private lending disputes from the private lending disputes. By studying and summarising past cases, it attempts to analyse the performance and reasons for the improper application of the rule of thumb, and how it should be applied in civil lending disputes. This will lead to the conclusion of how to make better use of the rule of thumb to protect the legitimate rights and interests of the parties, to determine the facts of the case, to limit the judge's discretionary judgement to protect the legitimate rights and interests of the parties, and to ensure the fairness of the judiciary.

2. The Role of Rules of Thumb

The correct use of rules of thumb is conducive to the promotion of the determination of the facts of the case, can make the handling of the case twice as effective with half the effort, the role of the rules of thumb in general terms there are three points. [1] First, the intermediary role of the rule of thumb, specifically refers to the rule of thumb in the presumption of fact can be used as an intermediary. Because in judicial practice, due to many complex reasons, the parties often very difficult to prove, for example, the parties did not keep important evidence, resulting in the lack of evidence; There is also a party in possession of evidence is unfavourable to their own, and therefore unwilling to provide; Or some witnesses know about the case, but because of the fear of retaliation, too much trouble and unwilling to testify and so on. Therefore, in the parties are unable to provide conclusive evidence, the facts of the case is difficult to distinguish between true and false, the judge can be known through the facts, the use of rules of thumb for reasoning, and thus come up with the truth, often also with the facts are not very different. [2]

Secondly, the rule of thumb can be used to judge the credibility of the evidence, which is

particularly clear in civil law countries or regions.

Obvious. This is because civil law countries in the evaluation of evidence in the implementation of the principle of free conscience, that is to say, the law did not formulate rigid rules to require the judge, but by the judge according to the actual situation of the case, the use of rules of thumb to their own conscience to make judgements and give and take. In free conscience, the rule of thumb works mainly by judging the credibility of the evidence. Because a case of various evidence is usually intricate and complex, sometimes it is difficult to make a correct judgement on the basis of a certain aspect of the evidence alone, and if you encounter the situation of forged evidence, it is necessary for the judge to make use of their own experience and conscience to make a rational judgement. Such as judging the correctness of a witness's testimony, examining the witness and his or her behaviour and words, the testimony of witnesses who comply with the rules of thumb is usually credible. [3]

3. Conditions for the Use of Rules of Thumb in Private Lending Disputes

The use of rules of thumb for reasoning need to have certain conditions, and in the case of private lending disputes, there are the following points: first, with the real underlying facts. [4] Facts in the presumption of fact 'facts' by the basic facts and the presumption of facts together. And in the three-part theory of the role of the small premise, is the basic facts, basic facts is the basis of the rule of thumb, so only objective and true basic facts, in order to make the presumption of fact become credible. Judges must be careful to identify and examine the underlying facts when applying rules of thumb to a case. [5] Basic facts include: facts that are already known to all, facts that both parties agree on, facts that have been proved by evidence, facts that are known to the court in the course of the trial, facts that have been agreed upon by the parties, and so on.

Secondly, the rule of thumb must be highly probative. Rule of thumb of the cover directly affects the presumption of the fact of truth

The truth of the high and low, judge the rules of thumb cover high and low method, there are many different views on the theory. Among

them, the 'rule of preference' refers to the fact that among the normal connection and abnormal connection, only the normal connection can be used, so that the probability of choosing the right one is much higher than choosing the wrong one. [6] However, in the specific application, due to the complexity of various situations in judicial practice, it is difficult to assert the cover of how much belongs to a high degree of cover, so the choice of normal contact, adopt the principle of choice of the way, it is feasible.

Thirdly, the facts presumed by the rule of thumb may be overturned. Since the inevitability of the presumed fact is not 100 per cent, the other party should be allowed to challenge or disprove the rule of thumb. When the presumption of fact is established, the burden of proof shifts and the other party suffers the adverse consequences. The unfavourable party can shake the judge's mind by rebutting the rule of thumb, the underlying facts, in order to overturn the presumed facts.

4. Analysis of the Problems and Reasons for the Application of Rules of Thumb in the Settlement of Private Lending Disputes in China

The use of rules of thumb in foreign litigation has long occupied a very important position, but in China's early research on rules of thumb is not very in-depth, until the 2014 'the supreme people's court on the application of the interpretation of the <public people's republic of china civil procedure law>' and the introduction of the 'supreme people's court on the evidence of civil litigation in a number of provisions of the supreme people's court' in 2019, only to lay down it's in the process of judicial important position. [7]

4.1 Problems with the Application of Rules of Thumb I: Neglecting to Apply Them

For the improper application of the rule of thumb, the first point is to ignore the application. [8] This point is reflected in a case in 2012, the plaintiff Mr. Li said he lent gold source company 200000 yuan in April 2012, after Mr. Li on behalf of the repayment of 20,000 yuan, so to the court for the defendant Mr. Jin source company as well as Mr. Sun repayment of the loan of 180,000 yuan and interest. Li in support of their own claims submitted evidence of a loan note and banking

vouchers, Sun is their own debt to Mr. Jin source company has been fully repaid, Mr. Jin source company defence that although the plaintiff Li signed with their own loan, but in fact did not pay the loan. The court required the plaintiff Mr. Li on their own payment of the burden of proof, Mr. Li due to evidence cannot be dismissed by the court.

In this case, the judge of the rule of thumb of the improper application is reflected in the neglect, in the plaintiff Li submitted banking vouchers and debit notes, it can be regarded as the completion of the burden of proof. The next doubtful facts judge can use the rule of thumb for reasonable inference, but the court of first instance but ignored a lot of important facts that can promote the actual determination, also did not apply the rule of thumb, but directly to pay the borrowing this is the burden of proof pushed to the plaintiff Mr. Li, this treatment is not only to Mr. Li is unfair, but also the court shirked its responsibility to not act as a manifestation of the court. The court expects the parties to be able to provide all the required evidence, by which the evidence is very complete restoration of the facts of the case.

4.2 Problems with the Application of Rules of Thumb II: Misapplication

Another problem with the use of rules of thumb is their misapplication. [9] Plaintiff Mr. Gao v. Mr. Huang, Mr. Liang couple signed six loan contract, the first two loan contract have receipt, loan contract notary certificate, transfer certificate as evidence, but the latter four loan contract is not. Mr. Huang, Mr. Liang two argued that the amount of the latter four loan contracts is the first two loans generated by the high interest, they did not actually receive the loan, the reason why the receipts are produced because of the amount of coercion by the Mr. Gao. The court in all aspects of the examination, that Huang and Liang if the coercion, then in the coercion of the end of the act should be when the police station immediately after the police, and the two in the 'borrowing' after the occurrence of up to six months of time did not report, although there is no record of the transfer of funds, but there is the possibility of cash transactions. Mr. Huang, Mr. Liang two people provided three of the four loans calculation, but because there is still a loan cannot provide

the calculation, so the court ruled that Mr. Gao claimed four loans is true.

In fact, the judgement in this case is biased, the first two loans both sides have no objection, according to these two loans have been confirmed can be derived from both sides of the habit of borrowing: Mr. Gao for borrowing very carefully, with Mr. Huang, Mr. Liang, even if the amount of borrowing relationship, even if the amount is not very huge, Mr. Gao still with the contract signed and receipts, and even notarised. However, in the latter four loans, in the amount is obviously higher than the first two loans, high and did not continue her cautious habit. And for the number of loans, the first two are integers, in line with the common habit of borrowing, while the latter four have zero and whole, respectively, is 71,160 yuan, 28,015 yuan, 8610 yuan and 32,217 yuan. Although the defendants did not give the calculation of one of the loans, the other three loans were in line with the calculation shown by the two. The defendant two people claimed coercion fact itself exists on the difficulty of proof, high borrowing interest for the normal interest rate of four times, according to the daily experience of the general public, only in desperate circumstances will choose to borrow such usury, and the court that the coercion occurs with the police between the six months is too long, in fact, after the last loan occurs in this case after the police is no more than two months interval, belongs to a normal In fact, the last loan in this case was only two months after the police were called, which is a normal time interval. There was such a large deviation between the first two loans and the next four, but the judge ignored this fact and blindly applied a rule of thumb, resulting in an unfair judgement.

4.3 Analysis of Causes

There are three main reasons for the erroneous application: first, the Tribunal's understanding of 'truthfulness and objectivity' is erroneous. [10] For a long time, 'objective truth' as a philosophical concept has been applied in many legal disciplines that are highly topical and practical. However, the pursuit of 'objective truth' is never-ending, and it is not always possible to obtain true and objective facts directly and accurately. Secondly, because the judge's profession has a great risk, civil law system pursues a judge-led

authoritarian trial mode, such a model relies heavily on the role of the judge, so the rights and responsibilities of judges in China is also very large, and the same risk is also very large. It is not difficult to see in the social news in the parties because of dissatisfaction with the results of the referee and the court trouble or even retaliation against the judge, under multiple pressures as a judge in the work of the judge is also more and more 'cautious', in the process of dealing with the case is only 'iron evidence', do not dare to carry out the Reasoning, this excludes the judge's personal judgement of the trial, making some evidence difficult to play a role.

Second, the lack of comprehensive quality of judges. For example, the case of Mr. Gao and Mr. Huang, Mr. Liang produced the error is because the judge on the rule of thumb characteristics of insufficient understanding. Another reason is that the judge himself is not enough experience, do not understand the human world, resulting in a shallow understanding of the rule of thumb, a life experience is not enough people, how to use the rule of thumb?

Third, the rule of thumb itself has uncertainty, can be applied to the rule of thumb countless, their cover is also different, and in different conditions of application, will inevitably produce different effects, such differences greatly increase the difficulty of the rule of thumb.[11] In different times, places, conditions under the case, are to make every aspect of the rule of thumb this rule are compatible with it, specific problems specific analysis. In this process, if the rules of the road, do not know how to adapt, will cause the rules of thumb and the facts of the case detached, affecting the impartiality of the decision.

5. Exploring the Optimisation Path for the Use of Rules of Thumb

As mentioned above, the rule of thumb belongs to a large extent to the judge's free evidence, in the use of the judge is very easy because of the uneven quality of the bias, so the optimisation of the use of the rule of thumb path to be explored, the author puts forward the following ideas.

5.1 Open-mindedness and Enhanced Adjudicative Reasoning

In trial practice, judges should disclose the

results of their judgements and the reasons for their judgements to the public in the judgement documents. [12] In particular, the part of the judge's judgement that is based on a rule of thumb should be made public, so that the parties concerned can understand in detail the judge's decision, which is based on the judge's experience of life and the whole process of logical reasoning. This has many advantages, not only can make both parties spontaneously obey the authority of the law, but also can reduce many unnecessary complaints, appeals or conflicts, and promote the construction of a harmonious society. [13] Judges, in their judgement documents, will try their own reasons and reasoning process clearly and clearly, layer by layer, embodied in the judgement documents, the reasons are sufficient, clear logic, can greatly strengthen the parties to the case handling results of the conviction, not only the trial of understanding, but also let the parties to the case to see understand.

5.2 Strengthening Case Guidance

Although China is a country of statutory law, the content of the law is abstract and general, and there may be differences in the interpretation of the same law among courts and even among trial staff. In 2005, the Supreme People's Court of China proposed for the first time the establishment of a case guidance system. [14] In 2005, the Supreme People's Court first proposed the establishment of a case-guidance system, under which the Supreme People's Court issues typical cases to guide trial practice, summarise and refine rules of thumb, and provide reference and guidance for judges in applying the rules of thumb. Therefore, the courts should take into account the legal relationship involved in each case and summarise the rules of thumb in relation to it. Therefore, the courts should summarise the relevant rules of thumb for each case in the light of the legal relationship involved and make them available to the public for easy reference. In this way, the discretionary power of judges can be limited, and the arbitrariness of judges' free opinions can be reduced. At the same time, the typology of rules of thumb, that is, the classification of rules of thumb, is conducive to the parties to predict the outcome of the trial, so that the parties can maintain a rational judgement on the outcome of the

litigation, and to prevent the emergence of contradictions and conflicts.

5.3 Establishment of a Review and Gate-Keeping System

In today's court supervision and management system, the trial management function of the president and chairman is very easy to be ignored in judicial practice, but it is one of the most direct and authoritative. Play the role of the president, the president of the review of the gatekeeper, that is, to strengthen the uniformity of judicial standards, play the role of management within the court system. [15] In practice, the implementation of the president of the audit responsibility, for some complex and difficult cases, large amount of cases and social impact of the case, the president should undertake to supervise the trial of the work. At the same time, the implementation of the president of the specific case review responsibility, in the process of trial, the identification of evidence, factual judgement, the application of rules of thumb, should be strictly controlled, so as to avoid the abuse of rules of thumb.

5.4 Improving the System of Challenge and Disproof of Rules of Thumb

Due to a number of factors, there is no guarantee that a rule of thumb will not produce errors in its application. However, the slightest deviation in the judgement of a case can have a huge impact on the parties, so after the judge has applied the rule of thumb to make a judgement on the case, it is necessary to inform both parties of their own application of the rule of thumb, so that both parties can understand how the judge applies the rule of thumb and other specific circumstances. If the parties do not understand or are not convinced in any way, they should be given the right to challenge and refute. [16] The necessary challenges and rebuttals are made through the parties re-stating their opinions. In this way, the doctrine of argumentation in court is implemented, and it also serves to limit the judge's subjective and arbitrary judgement in the use of his or her discretionary power.

6. Conclusion

With the advancement of judicial reform, the courts are demanding more and more fairness and justice, and the public is calling for it more

and more enthusiastically. The rule of thumb, as an effective means to carry out proper free evidence, has played an indispensable role in promoting social justice. More in-depth study of the rule of thumb, so that it can play a better role in civil loan disputes, is China's judicial practice and theory is always determined to move forward in the direction.

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