THAYER AND MORGAN V STEPHEN
HOW PRESUMPTIONS OPERATE UNDER THE INDIAN EVIDENCE ACT, 1872

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ABSTRACT

The operation of presumptions is a largely unexplored area under the Indian Evidence Act, 1872. However, its application has huge consequences for the manner in which we understand the 'burden of proof' of the prosecution and defence. Recent penal legislations have seen a dramatic rise in the inclusion of 'reverse onus' clauses, which have placed a persuasive burden of proof on the accused. At the heart of such clauses lies raising a presumption of guilt. However, the questions of when and how such a burden shifts and when such clauses are valid remain unresolved.

The Thayer-Morgan debate on presumptions provides some insight into the working of presumptions in civil proceedings. However, there is no detailed study on how they would apply in criminal proceedings, quite possibly because they were not contemplated then. Nevertheless, criminal presumptions are a reality today and the dearth of authoritative case law in the Indian context necessitates a detailed study of the Indian Evidence

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Act, 1872. This paper attempts to revisit this complex issue, to look for answers on the operation of presumptions in criminal cases in light of this background.

I. INTRODUCTION

The law on 'presumptions' has been considered to be a conundrum despite volumes of academic debate on it. Most advanced pieces of legal writing on the topic begin with a caveat, highlighting the complexity of the issue. As the operation of presumptions also affects the burden of proof on the parties, both evidentiary[1] and persuasive[2], it assumes greater significance in the appreciation of evidence in criminal trials in jurisdictions that follow the adversarial system. Moreover, the interpretation of presumptions could also have an effect on substantive rules of law such as the 'presumption of innocence' in a criminal trial. Despite this, some scholars have gone as far as to state that 'presumptions' is an empty concept and their conditional nature makes them no different from 'burden of proof'.[3]

1 When a burden is evidential in nature, the opponent may rebut the presumption by introducing evidence against the presumed fact sufficient to amount to a *prima facie* case, upon which the presumed fact will be decided according to the applicable rule as to the burden and standard of proof as any other fact in the case.

2 When a burden is persuasive in nature, the opponent may rebut the presumption only by disproving the presumed fact to the appropriate standard of proof.

3 C.A. Harwood, *Burden of Proof and the Morgan Approach to Presumptions*, Vol.19, WILLIAMETTE L. REV. 361, 390 (1983). However, this would not apply to conclusive presumptions and is limited to rebuttable presumptions.

Two of the most detailed yet divergent expositions on this complex area are by Professor James B. Thayer[4] and Professor Edmund M. Morgan[5]. Their debate resulted in what are popularly referred to as Thayer presumptions and Morgan presumptions, which went on to form the basis of the Federal Rules of Evidence in the United States. However, the drafting of the Indian Evidence Act, 1872 ["IEA"] by James Stephen pre-dated the debates regarding presumptions and a perusal of the statute would indicate as much. No subsequent legislation has further discussed or clarified the nature and operation of presumptions in India. Consequently, there is minimal nuanced discussion in India on the operation of presumptions.

The debate between Thayer and Morgan arose out of a difference of opinion regarding instructions on presumptions to the jury. However, this aspect of the debate has little bearing on this issue as the jury system which has since been abolished in India. Nevertheless, a study of the IEA suggests that the text and interpretation of this statute favours Morgan's approach. Therefore, a persuasive burden is placed on the party against whom the presumption operates to rebut the presumption. It will also be argued that the limited exhaustive case law discussing this issue indicates that courts in India have gravitated towards the standard of proof of 'preponderance of probabilities' once the persuasive burden shifts, irrespective of the nature of the proceedings.

4 James B. Thayer, *Presumptions and the Law of Evidence*, Vol. 3(4), H LAW. REV., 141 (1889).
5 Edmund M. Morgan, *Presumptions*, Vol. 10(3) RUTGERS LAW REV., 512 (1955-56).

II. WHAT IS A PRESUMPTION?

A 'presumption' as defined by Thayer is "*a rule of law that courts and judges shall draw a particular inference from a particular fact or from a particular piece of evidence unless and until the truth of such inference is disproved*." [6] Some statutes or provisions, like the Indian Evidence Act, 1872, could also provide that the court may draw an inference from a particular fact or piece of evidence. Often, presumptions have an evidential effect which is in excess of the true probative worth of the basic fact as they cause an inference to be drawn from a basic fact and thus gives it a 'preternatural weight'.[7] These presumptions which can be used to draw an inference must be differentiated from a different kind of presumption which operates to allocate the burden of proof in a criminal trial such as the presumption of innocence or a presumption of sanity.[8] In the latter, the distinction between the inference (presumed fact) and the particular fact or particular piece of evidence based on which the inference is drawn (basic fact) does not exist.

Common law has recognised different categories of presumptions such as presumptions of law and fact, as well as rebuttable[9] and conclusive presumptions.[10] The uncertainty surrounding presumptions arose from differences in decisions on whether the judge or the jury should draw the

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6 *Supra* note 4, at 154.

7 CROSS AND TAPPER ON EVIDENCE, 123 (Colin Tapper ed., 9th edn, 1999).

8 Ian Dennis, THE LAW ON EVIDENCE, 511-512 (5th edn, 2013).

9 They could be of two kinds, that is, 'may presume' and 'shall presume'.

10 James Fitzjames Stephen, THE INDIAN EVIDENCE ACT: WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE, 131, 132 (1902). Stephen followed this categorisation as early as 1872, however, he does not name them specifically.

presumption.[11] The ambiguity between the judge's and the jury's role gave rise to the debate on when and how a presumption operates and how the burden to displace it should shift. A rebuttable presumption always arises only on the proof of certain basic facts, subsequently requiring the opposite party to displace it by adducing contrary evidence.

In order to displace such a presumption, the opposite party might have to meet a persuasive or an evidentiary burden. The result of a shifting of a persuasive burden is that the presumption can be rebutted only by meeting the appropriate standard of proof. On the other hand, a shift in the evidentiary burden (or where a tactical burden is created[12]) could require contrary evidence sufficient to *prima facie* create a reasonable doubt to be adduced by the party against whom the presumption operates.[13] However, no clear formula has been established on the appropriate standard of proof required to discharge an evidential burden.[14]

English scholars opined that the standard of proof would be different depending on the kind of presumption,[15] while American scholars argued that

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11 S.L. Phipson, LAW ON EVIDENCE, 662 (Rolan Burrows KC ed., 8th edn., 1942).

12 *Supra* note 7, at 125-126.

13 Peter Murphy, A PRACTICAL APPROACH TO EVIDENCE, 80 (3rd edn., 1988).

14 *Supra* note 7, at 152. Cases in the UK have held that as a general rule "*such evidence as, if believed, and if left uncontradicted and unexplained could be accepted by the jury as proof*" is required to discharge an evidential burden. Here, 'proof' could mean beyond reasonable doubt, a preponderance of probabilities or even a prima facie standard. It is only admitted that the standard of proof in criminal proceedings must be higher than what is required to be discharged to displace an evidential burden in civil proceedings.

15 However, Stephen's view seems to have been different as the Indian Evidence Act, 1872 does not indicate a difference in standard of proof depending on the type of presumption. This will be discussed in greater detail in the section on the Indian Evidence Act.

there is a universal principle that applies to all presumptions.[16] Professor Thayer and Professor Morgan, both American scholars, disagreed on these core issues of which burden would shift and which standard of proof would be sufficient to displace a presumption.

III. THE THAYER-MORGAN DEBATE

Thayer argued that when a basic fact is proved leading to the operation of a presumption, it leads to an evidential burden being placed on the party who is silenced by it, to adduce sufficient evidence to create reasonable doubt regarding the presumed fact.[17] If the opposite party succeeds in doing so, the presumption disappears and the 'bubble bursts'.[18] Subsequently, the burden of proof shifts back to the party making the claim, as if the presumption never existed. Thayer also argued that this entire exercise should take place before the judge and the issue of the presumption did not have to go to the jury at all.

Morgan disagreed with Thayer on two levels. *First*, he believed that the question of presumptions should go to the jury and they should decide whether upon proof of the basic fact(s), the presumption begins to operate or not.[19] Once the jury was convinced that the basic facts exist, they were instructed that they must find the existence of the presumed fact.[20]

16 *Supra* note 13, at 80.
17 *Supra* note 4, at 166.
18 *Supra* note 13.
19 *Supra* note 5, at 518-521.
20 *Supra* note 3, at 386.

Secondly, in order to displace the presumption, his theory required the satisfaction of a persuasive burden, that is, the applicable standard of proof, which he set as one of 'preponderance of probabilities'.[21] Additionally, he argued that merely adducing contrary evidence is insufficient, as the point of the presumption would be lost if the balance could be tilted so easily against it.[22]

The difference in their theories can be explained using the example of the presumption of death of a person if he/she is unheard of for a period of seven years or more by those who would normally be aware of the person's existence.[23] According to Thayer, once absence or lack of knowledge of the person's existence by kith and kin is established, the presumption operates. Thereafter, the evidential burden on the opposite party is only a *prima facie* one whereby they need to introduce evidence which casts a doubt on the story of the party claiming death. This could be in the form of a testimony of a person who would normally have seen him/her alive.

However, Morgan's theory would require the opposite party to adduce sufficient evidence to make the fact of him/her being alive more probable than the fact of death, at the very least. There are two main aspects that distinguish Morgan's theory. The *first* concern is that a Thayer presumption that is created because of the strength of the inference can be destroyed just as easily, often

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21 Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, Vol. 68(4), UNIVERSITY OF PENNSYLVANIA LAW REV., 307, 319 (1920).

22 *Supra* note 5, at 521,522.

23 *Supra* note 4, at 151.

even on false testimony.[24] Therefore, the Thayer test is based on sufficiency and not credibility.[25]

The *second* is that Thayer's theory and its modified versions cause great difficulty in instructing the jury on the presumption.[26] It had often led to situations where the jury confused the presumption itself to be evidence. Even if it did make the distinction, it faced difficulty in weighing it against other direct evidence.[27] However, Morgan's theory has also been criticised as it requires the shifting of the persuasive burden which traditionally never shifted once fixed.[28]

The debate between Thayer and Morgan was primarily in relation to civil cases and certain aspects of criminal trials only, as the persuasive burden is rarely ever shifted in the latter. However, due to the manner in which the IEA has been drafted, the possibility of different standards for the two does not exist. Courts have construed statutes in a manner resulting in a shift of the persuasive burden in many criminal cases as well, which will be dealt with in the next section.

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24 WIGMORE ON EVIDENCE, 2493c (Arthur Best ed., 4th edn., 1985).

25 Neil S. Heicht, *Rebutting Presumptions: Order Out of Chaos*, Vol. 58, B.U.L. REV. 527, 536 (1978).

26 This is in a situation where no contrary evidence is adduced and hence the presumption continues to operate. Here, the jury is informed only of the inference.

27 *Supra* note 3, at 386.

28 *Supra* note 25, at 539, 553.

IV. POSITION UNDER THE INDIAN EVIDENCE ACT

In India, the various presumptions that can be permissibly drawn are listed in the IEA. The Act does away with the traditional distinction that existed in English Law between presumptions of law and fact and only divides presumptions into 'may presume', 'shall presume' and 'conclusive proof' under Section 4.

On a bare perusal of Section 4[29], it would appear that the difference between 'may presume' and 'shall presume' is the extent of discretion given to the courts to draw the particular presumption. In fact, in the former, the court can call for further proof before it raises the presumption. It is fundamental under both categories that the basic facts (which will give rise to the presumed fact) have to be proved by the party claiming the existence of such facts and the presumption can be raised only following this.

However, subsequent to drawing the presumption, the provision does not seem to indicate that there is any difference in its effect in terms of the burden to be satisfied by the opposite party.[30] The definition of both 'may

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[29] May Presume- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
Shall presume- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
Conclusive proof- Where one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[30] Syad Akbar v. State of Karnataka, 1980 (1) SCC 30 seems to suggest that a presumption of fact shifts only the evidential burden and a presumption of law shifts the persuasive burden. However, this distinction between presumption of law and fact is not followed under the IEA. Therefore, there suggested effect cannot result and the distinction between 'may' and 'shall' is the only relevant difference under the IEA.

presume' and 'shall presume' refers to two words in Section 3, which are 'proved'[31] and 'disproved'[32]. For the purpose of displacing the burden, it is the latter that is of concern to a judge or jury, as the case may be. The definition of 'disproved' uses two phrases that are of interest, that is, "…*Court either believes that it does not exist*…" and "…*considers its non-existence so probable that a prudent man ought…to act upon the supposition that it does not exist*…". Any evidence adduced by the party attempting to displace the operation of presumption has to meet this standard.

A perusal of the definition of 'disproved' in the IEA would indicate that the standard imposed by it for rebutting a presumption is one of 'preponderance of probabilities'.[33] Admittedly, the IEA was drafted prior to the debate between Thayer and Morgan however, a comparison of their theories is instructive in understanding the standard that Stephen sought to introduce. Morgan states clearly that simply establishing that the 'non-existence of the presumed fact is as probable as its existence'[34] is insufficient and that a standard of preponderance of probabilities would be preferable.

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31 Proved- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

32 Disproved- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

33 The analysis of reverse onus clauses by Glanville Williams is instructive in this regard as presumptions often have the effect of placing such a persuasive burden on the opposite party or accused, as the case may be. *See* Glanville Williams, *The Logic of "Exceptions"*, Vol. 47 CAMBRIDGE L.J., 263 (1988).

34 *Supra* note 4, at 165.

On the other hand, Thayer also uses the word 'probable' without qualifying it by a degree of proof. He states that a presumption "…*goes no further than to call for proof of that which it negatives i.e., for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence*…"[35]

The definition in the IEA goes beyond Thayer's standard of 'calling for proof' and requires the proof adduced to be so probable so as to convince a prudent man as to its non-existence. An interesting feature of this provision is the incorporation of the belief of the 'prudent man'. The provision suggests that a prudent man would at least require evidence to be adduced to make one (set of) facts more probable than another. That is, here too it would be a test of credibility and not merely sufficiency.

Further, it would seem that this abstraction of a prudent man would further complicate matters by laying down an uncertain standard. However, a reason for its inclusion could be that Stephen was attempting to make instructions to the jury easier.[36] One of the greatest difficulties with the operation of presumptions was the issue of communication of its operation and effect to the jury, which Stephen seems to have recognised and endeavoured to simplify, through this definition.

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35 *Supra* note 5, at 514.

36 There is no authority which indicates the same. However, given that India did have the jury system until the middle of the 19th century, the difficulty in instructing the jury on presumptions could have played in the mind of Stephen when he drafted the Indian Evidence Act.

An additional issue that directly arises from the standard of proof that satisfies the 'prudent man' is whether the same standard of proof would be applicable in civil proceedings and in criminal trials in the operation of presumptions.[37] The wording of the definition of 'disproved' in the IEA could be interpreted as intending to divide the standard of proof into one of 'beyond reasonable doubt'[38] and 'preponderance of probabilities'[39] for criminal and civil proceedings respectively. While the difference in burdens of proof has existed for many years now, it was authoritatively laid down only a few years after Stephen framed the IEA.[40]

Admittedly, the Thayer-Morgan debate focused on civil proceedings. Further, all the provisions that raised a presumption in the IEA as it existed in 1872, pertained only to documents. It is only in recent times that onerous provisions such as Section 111A[41] have shifted the persuasive burden on to the accused. However, as the definitions in IEA do not suggest that there is a difference between the two in the operation of presumptions, it may be argued that there is little strength to the claim that such a shifting of persuasive burden in criminal cases is excessive or unconstitutional. Further, Indian law has also

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37 The popular view is that in criminal trials, the burden of persuasion can never be placed on the accused, except in some situations such as the defence of insanity.

38 "…the Court either believes that it does not exist…" in Section 4, INDIAN EVIDENCE ACT, 1872.

39 "…or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

40 Woolmington v. DPP, [1935] A.C. 462; R v. Davies, 8 C.A.R. 211.

41 This provision provides that where any person is accused of an offence specified in the section in a disturbed area, it shall be presumed that he committed the offence, upon the satisfaction of certain conditions specified in the section. The provision contains a 'shall presume' and the conditions to be proved by the prosecution are limited and simple. However, the punishment for the offences described in the provision is high and an onerous burden is placed on the accused to rebut the presumption.

recognised the possibility of shifting of the burden of proof in cases of statutory exceptions,[42] as reflected in Sections 111A-114A. Therefore, Section 3 supports the conclusion that the persuasive burden of proof, one of a preponderance of probabilities, is transferred to the accused once a presumption is raised.

This conclusion is to be examined in light of two main factors. *First*, some scholars have taken the view that that the reason for differing standards of proof of a fact in a civil and criminal proceeding is unclear, and in order to prove or disprove something, the standard must be the same irrespective of the nature of the proceeding.[43] *Secondly*, Stephen himself has stated that the standard should be flexible because a strict distinction might be arbitrary in certain situations, such as in serious civil disputes or trivial criminal actions.[44] Thus, he chose the standard of prudent man and what such a person thinks is most probable.

In *Krishna* v. *State*,[45] one of the counsels made a similar argument on Stephen's intention regarding the standard under Section 3 when he framed the Act. The court was unwilling to accept that point of view and held instead that Section 3 encapsulates the different standards for civil and criminal proceedings. However, it is important to refer to the text of the IEA to

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42 Willie Slaney v. State of Madhya Pradesh, AIR 1956 SC 116. *See also* Rahul Singh, *Reverse Onus Clauses: A Comparative Law Perspective*, Vol. 13, STUDENT ADVOCATE, 148, 170 (2001).

43 *Supra* note 7, at 141.

44 185th Law Commission Report, REVIEW OF THE INDIAN EVIDENCE ACT, 1872 (2003).

45 2012 (2) KLT 769.

understand what Section 3 seeks to do as the court's decision may be incorrect in light of the following reason.

A plain reading for Section 3 suggests that there is no clear difference. This is supported by a comparison with other statutes of evidence that Stephen has framed such as the Singapore's Evidence Act (Cap 97, 1997 Rev Ed).[46] The flexibility that he incorporated into the definition takes into account the inherent difficulties in having such rigid and fixed standards of proof.[47] Therefore, if a standard has to be identified in the definition of 'disproved' under Section 3, it would be one of a preponderance of probabilities from the perspective of a prudent man. Thus, through the statute, Stephen does take Morgan's side on the operation and effect of presumptions.

Indian courts have shed little light on this issue, often blurring the distinction between an evidentiary burden and a persuasive burden. On the one hand, these cases use the words 'preponderance of probabilities' to describe the standard that is required to be met to displace a presumption. At the same time, at numerous places, these judgements seem to suggest that it is only an evidential burden that has to be shifted.[48] However, irrespective of the nature of the proceedings, courts have uniformly upheld the standard of

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46 J. Pinsler, *Approaches to the Evidence Act: The Judicial Development of a Code*, Vol. 14, SACLJ 365 (2002).

47 *Id*, at 368.

48 Regi Isac v. Philomina Pious, AS.No. 370 of 1996 (Kerala High Court); Jnanaprakash v. T.S. Susheela, 2012 (6) KarLJ 588. Subbarayulu v. Lakshmanan, (2011) 4 TNLJ 128. These decisions are some examples of how these decisions are essentially a medley of all the phrases discussed in this paper and how the courts have not distinguished between them. Therefore, there is no way of knowing how the burden shifts and what the standard of proof is in Indian courts.

preponderance for disproof such as in cases of corruption[49], cheque bouncing[50] and negligence[51]. Therefore, courts too appear to have ultimately adopted the Morgan standard while addressing the question of presumptions.

In the cases relating to Sections 113A[52], 113B[53] and 114A[54], the focus of the analysis has only been on proof of the facts that gave rise to the presumption and whether that was sufficient or not. A discussion on the evidence adduced to disprove such a presumption is noticeably absent in these cases.[55] However, these decisions are not instructive in themselves in coming to any conclusions regarding the standard, as an 'evidentiary burden' and 'preponderance' are often confused and used interchangeably.

Two decisions of the Supreme Court highlight the confused nature of the decisions on this area of criminal law. Recently, the Court discussed the operation of presumptions under Section 113B of the IEA in *Sher Singh* v. *State of Haryana*.[56] The court held, contrary to an established line of precedent on

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49 State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61.

50 Regi Isac v. Philomina Pious, AS.No. 370 of 1996 (Kerala High Court); Subbarayulu v. Lakshmanan, (2011) 4 TNLJ 128.

51 The National Small Industries v. Bishambar Nath, AIR 1979 All 35.

52 Mangat Ram v. State of Haryana, AIR 2014 SC 1782; Hans Raj v. State of Haryana, AIR 2004 SC 2790.

53 In Kansraj v. State of Punjab, CRAN No. 443 of 2013, the court opined that in order to disprove a presumption under this provision, the court would be satisfied if the presumption was dislodged either by cross-examining the witness or by adducing proof to the contrary. While this does appear similar to a prima facie evidential burden that is cast upon the accused, the court has at no point discussed such a possibility in detail. Such exceptional decisions do exist but the trend does appear to be that courts will be satisfied only if a standard of preponderance is met. That is, it would be insufficient if evidence alone is adduced but the party must go ahead and prove the evidence as well.

54 Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689; Munna v. State of Madhya Pradesh, (2014) 10 SCC 254.

55 *Supra* note 48.

56 AIR 2015 SC 980.

burdens in a criminal trial, that the prosecution would only have to prove the basic facts to a preponderance of probabilities, on which the burden would shift to the accused. The accused would then have to prove that the death was not caused due to cruelty and was not a case of dowry death beyond reasonable doubt. While the court held that a persuasive burden has been cast on the accused to displace the burden, the nature of such burden is excessive. This understanding of how presumptions operate is untenable, particularly in light of the purpose they have historically served.

On the other hand, in *Abdul Rashid Ibrahim* v. *State of Gujarat*[57], the Court held that an accused can discharge his burden under Section 35 of the Narcotics and Psychotropic Substances Act, 1985 ["NDPS Act"] by cross-examining prosecution witnesses or by relying on other evidence and on materials in the prosecution evidence. This, however, appears to reflect the standard that Thayer prescribed for displacing a presumption.[58] Therefore, this inconsistency in the decision of Indian courts takes the discussion back to the statute and a strict reading of the definition under Section 3 must be adopted, as argued earlier.

Despite the interpretation that is suggested by the provision itself, a potential constitutional challenge to such a shifting of the persuasive or legal burden in cases of presumptions in criminal cases is not unforeseeable.[59] The

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57 (2000) 2 SCC 513.

58 *Infra*, page 5, 6.

59 Prof. Glanville Williams was also of the opinion that no developed and civilised society that believes in a rule of law could possibly be in favour of and support reverse onus clauses. *See* Glanville Williams, *The Logic of "Exceptions"*, Vol. 47 CAMBRIDGE L.J. 263-66 (1988).

court dealt with a similar situation in *Noor Aga* v. *State of Punjab*,[60] and such a challenge can be raised in relation to presumptions as well. The issue before the Supreme Court was whether the NDPS Act was constitutional, given that Sections 35 and 54 of the NDPS Act placed the burden of proof on the accused i.e. they were reverse onus clauses and therefore were in violation of the rule of presumption of innocence.[61]

The court held the NDPS Act to be constitutional and upheld such reverse onus clauses as valid on two grounds: *first*, that the needs of protecting societal values and people has to be balanced against the rights of the accused and *second* that in any case, the prosecution still needs to prove the basic elements of the offence to a 'standard of beyond reasonable doubt'.[62] It is only after this that the evidentiary or persuasive burden shifts to the accused, depending on what has been prescribed by the statute, following which the accused has to meet the appropriate burden of proof. Therefore, the provisions are not placing the persuasive or legal burden on the accused at the outset, and the prosecution still needs to meet a standard of beyond reasonable doubt for the presumption to be raised, thus protecting the sanctity of the rule of presumption of innocence.

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60 2008 (9) SCALE 681.

61 The 'presumption of innocence' is not to be confused with 'presumptions' as has been discussed in the rest of the paper and the former is a substantive rule of law. *See supra* note 7.

62 The rationale of the court here is that while individual facts have to be proved to a standard of preponderance first, by the prosecution and the entire narrative or set of facts have to meet a standard of beyond reasonable doubt. Thereafter, the burden shifts to the accused.

This conclusion was supported in the recent Bombay High Court decision in *Shaikh Zaid Mukhtar*.[63] The constitutional challenge was against Section 9B which placed the burden of proof on the accused to show that the slaughter, transport, export etc. of bovine flesh was not against the statute. The decision contains an elaborate discussion on the place of the presumption of innocence under the Constitution. In addition, the court discussed the interaction of presumptions and burdens in a criminal trial.

It held that statutes sometimes place the burden of proof, whether evidential or persuasive, on the accused for reasons such as situations where knowledge of a special fact is with the accused, the relative ease of the accused in discharging the burden or to ensure that the prosecution need not discharge a negative burden. Nevertheless, even in such situations, the prosecution is expected to prove foundational facts which establish a probative connection between these basic facts and the facts that are presumed. Therefore, it laid down four tests to determine whether a provision placing a burden of proof on the accused is constitutionally sound:

> *"1. Is the State required to prove enough basic or essential facts constituting a crime so as to raise a presumption of balance facts (considering the probative connection between these basic facts and the presumed facts) to bring home the guilt of the accused, and to disprove which the burden is cast on the accused?*

[63] Writ Petition No. 5731 of 2015 dated May 6, 2016.

2. *Does the proof of these balance facts involve a burden to prove a negative fact?*
3. *Are these balance facts within the special knowledge of the accused?*
4. *Does this burden, considering the aspect of relative ease for the accused to discharge it or the State to prove otherwise, subject the accused to any hardship or oppression?"*

A culpable mental state is almost always within the special knowledge of the accused[64] and such a test could result in allowing provisions that always require the accused to bear the persuasive burden of proof. However, by incorporating the fourth condition, the court avoids this consequence.[65] Further, a line of decisions were cited by the Judge which held that the accused only has to meet the standard of preponderance of probabilities once the burden shifts to him. In light of the tests laid down and the catena of decisions cited Justice Gupte held Section 9B to be unconstitutional, as it did not require the prosecution to prove any foundational facts and directly allowed for raising a presumption.

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64 Section 30 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO") provides that where any provision requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such a state and it shall be a defence for the accused to prove that he had no such mental state with respect to the offence. This is a classic example of the problem that the fourth condition laid down by Justice Gupte seeks to address. Section 30 of the statute, if challenged, is likely to be held to be unconstitutional for very similar reasons as in the beef ban decision of the Bombay High Court i.e. violation of the presumption of innocence and lack of proof of foundational facts.

65 Abhinav Sekhri, *The Bombay High Court's Beef Ban decision-II: On the Unconstitutionality of Reverse Onus Clauses*, (May 8, 2016), INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, *available at* https://indconlawphil.wordpress.com/2016/05/08/the-bombay-high-courts-beef-ban-decision-ii-on-the-unconstitutionality-of-the-reverse-onus-clause/ (Last visited on May 31, 2016).

The conclusion of the court applies to the IEA as well where similarly the persuasive burden shifts to the opposite party once a presumption is raised who is then required to satisfy the burden of preponderance of probabilities by introducing evidence to rebut and displace the presumption. The court, that is the judge, will consider the basic facts which have been proved and the presumed fact(s), together with the evidence adduced by the opposite party to determine whether the presumption will continue to operate or not.

V. CONCLUSION

The extended debate between these two stalwarts of the law of evidence would appear to have a limited impact on the Indian position today. While the debate was instrumental in the drafting of many evidence statutes in the United States of America, from the text of Section 3, it seems that Stephen made a choice much before the discussion on presumptions took on the significance that it did in the 20th Century. In India, the application of a standard of preponderance can be seen even in cases where a jury had to be instructed.[66] This choice made matters of instructions to the jury much simpler, thereby solving one of the core points of contention between Thayer and Morgan.

Admittedly, this clarity in position may also be due to the dearth of case law that thoroughly examines such an issue and even the 185th Law Commission Report did not comprehensively deal with the law on

[66] Public Prosecutor v. A. Thomas, AIR 1959 Mad 166.

presumptions. This lack of engagement becomes more prominent in light of the discussion on cases under Sections 113A and 113B, where the report barely scratches the surface of the potential legal issues that were discussed threadbare by Thayer and Morgan. This becomes particularly significant in criminal cases where there is little margin for error. Therefore, the importance of understanding presumptions, burdens of proof and how they shift can hardly be overstated, and a survey of decisions by Indian courts on this issue, specifically in criminal cases, obviates the need for clarity.

This is where an understanding of the nuanced discussions on presumptions by Thayer and Morgan could be helpful as it would provide a principled basis for the decisions of courts on how presumptions should work. However, as it stands today, the conclusion that one would reach on an analysis of the law on presumptions would be that anyone "…*would do great service to our law who should thoroughly discriminate, and set forth the whole legal doctrine of burden of proof*…"[67]

[67] Daniel M. Reaugh, *Presumptions and the Burden of Proof*, Vol. 36 III. L. REV. 703 (1941).