but the child with whom the choice rests cannot be expected to view it that way.

It seems that a better method could be devised than one which places so much emphasis on the choice of the child. Restoring the court's discretion would be a step in the right direction. The use of specially trained workers to thoroughly investigate the facts surrounding each case would be helpful.[10] In any event we should remember that proper custody is important to the child and to society as well and merits more consideration than the mechanical solution furnished by Ohio G.C. sec. 8033. J. P. M.

EVIDENCE

Admissibility of Hospital Records

In an action for personal injuries caused by the defendant's automobile, the trial court permitted the plaintiff to introduce in evidence a hospital record showing the value of services rendered by the hospital and containing on its face the notation "Man promised to pay hospital bill." The Supreme Court held that the admission of such record over objection duly made was reversible error.[1]

The term "hospital records" in general means the records and charts kept as a part of the case history of all patients in the hospital.[2] They are usually made by several doctors and nurses who at various times enter on these records items which pertain to the care or progress of the patient. It is obvious that if the record is offered as evidence without calling all of the individuals who made the notations or entries it is hearsay, and also it is inadmissible unless it can be placed under some exception to the hearsay rule.

In the principal case the Supreme Court said that the trial court had admitted the hospital record on the basis of the so-called shop book rule, and that under this doctrine such records were not admissible because the hospital was not a party.[3] Admitting this, it does not follow that the record might not be admissible under some other exception to the hearsay rule.

The common law recognized an exception for entries in the usual

[10] Ohio G. C. sec 11979-4, which provides that the court may, in its discretion, appoint one of its officers to make an investigation as to the character, family relations, past conduct, earning ability and financial worth of the parties in divorce or alimony cases, is suggestive of what might be done along this line in connection with problems involving the custody of children.

[1] Petterson v. Lake, 136 Ohio St. 481, 26 N.E. (2d) 763 (1940).

[2] American Jurisprudence, tit. Hospitals, sec. 6.

[3] Peterson v. Lake, 136 Ohio St. 481, 483, 26 N.E. (2d) 763 (1940).

course of business, if the absence of the persons who made the entries was accounted for, and if there was a circumstantial probability of trustworthiness.[4] As to the first requirement, necessity, the calling of all the doctors and nurses who had helped make the record would be a serious interference with the conduct of the hospital as well as a practical impossibility. As to the second requirement, circumstantial probability of trustworthiness, the records are relied upon every day by the hospital staff as being truthful. In Ohio a hospital record was admitted on this ground, the court saying in *Kellogg* v. *Industrial Commission*[5] that where a hospital record satisfies the requirements of necessity and trustworthiness which form the basis for the exception to the hearsay rule, it is admissible. In *Pickering* v. *Peskind*[6] the court held that hospital records kept in the regular and usual course of business were admissible to show the age of the plaintiff, it being shown that it was the rule of the hospital that the age of the patient be recorded.

Hospital records have also been admitted in Ohio under the public document exception to the hearsay rule. In *Cassidy* v. *Cincinnati Traction Co.*[7] the court said the "Statutory provision for the maintenance and control of a free public hospital . . . , and a rule requiring the receiving physician to make a written report . . . , renders such report a public document or record, and therefore admissible. . . ." In neither this case nor the cases where the record was admitted as an entry in the usual course of business was the hospital a party to the action.

But it does not follow from these cases that Ohio has admitted everything found on a hospital record. In *Reed* v. *Henzel*[8] the portion of a hospital record relative to the diagnosis of the plaintiff's case was admitted, but a portion was excluded which contained statements made by the plaintiff's daughter as to the cause of the accident and of the effect on her father, the court saying that it was an attempt to introduce pure hearsay since the statements did not refer to any transaction occurring in the course of the public duty of anyone connected with the hospital. In *Netzel* v. *Todd*[9] a hospital record was offered to show the character of an operation on the plaintiff, but the record was held inadmissible because there was no evidence as to who made the record or from what source the information was derived.

[4] WIGMORE, EVIDENCE (3d ed. 1940), secs. 1521, 1522 and 1707.
[5] 60 Ohio App. 22, 13 Ohio Op. 384, 19 N.E. (2d) 511 (1938).
[6] 43 Ohio App. 401, 31 Ohio L. Rep. 439 (1930).
[7] 21 Ohio N.P. (N.S.) 125, 29 Ohio Dec. (N.P.) 6 (1917).
[8] 26 Ohio App. 79, 159 N.E. 843 (1927).
[9] 30 Ohio App. 200, 165 N.E. 47 (1928). *See* Dickson v. Gastl, 64 Ohio App. 346, 18 Ohio Op. 142, —N.E. (2d)— (1940), where the court held that statements on the hospital record given to the attendant as to the nature of his injuries and the manner of receiving them were self-serving and lacked the elements of trustworthiness and necessity upon which the entries in hospital records are admissible.

These cases would seem to indicate that parts of hospital records, at least, have been admitted if a proper foundation has been laid and if the items were those usually contained in hospital records.

In other jurisdictions there is some conflict as to whether such hospital records are admissible at all, although it would seem that a larger number of courts would admit hospital records as evidence.[10] In the jurisdictions which have refused to admit such evidence there is confusion as to reason; in some cases it seems that the only reason for so holding was the lack of a proper foundation for admitting it under an exception to the hearsay rule.[11]

In 1939 the general assembly of the state of Ohio passed the Uniform Business Records as Evidence Act[12] which was designed to facilitate proof of various business records. The purpose of the act was to permit the proof of various records on the evidence of the custodian, or the person who made the record, or the one under whose supervision the record was made, without calling for the attendance of everyone who contributed to it. If such people are called, they can usually add little or nothing to the record and their attendance would tend to disrupt the orderly procedure of the institution from which they were called. The hospital record in the principal case would seem to fall squarely within the provision of this act, for the cashier was the custodian of the record and testified that the record was made in the regular course of business. It would seem that in a new trial of the principal case that the record should be admitted. It may be that the statement "Man promised to pay hospital bill" is objectionable because it is not the usual type of entry in a hospital bill, but this scarcely seems a justification for barring the whole record. It is to be hoped that the Uniform Business Records as Evidence Act will receive a more liberal construction in the future. F. A. R.

Presumptions — Burden of Proof to Show Negligence or Lack of Negligence in Case of Stolen Car

The owner of an automobile parked it in a garage for the day, as was his custom. In the evening he returned and demanded his car but the garageman could not deliver it, since it had been stolen during the day. The insurance company paid the owner for his loss, became subrogated to his rights and sued the garage for negligence in permitting the car to be stolen. At the trial the evidence was not clear as to

[10] See 75 A.L.R. 378 and 120 A.L.R. 1124.
[11] See 75 A.L.R. 378, 386 and 120 A.L.R. 1124, 1136.
[12] Ohio General Code, sec. 12102-23.

whether the car was actually in the garage at the time it was stolen, there being some evidence that it had been taken out at least once during the day by an employee of the owner. Assuming that the car was in the garage at the time it was stolen, the trial court charged that upon demand by the owner and a refusal to deliver by the garage, there arose a presumption of negligence against the bailee, that this was met by a showing that the car had been stolen, and then the burden was on the bailor to show that the bailee was negligent. On appeal this statement of the amount of evidence necessary to rebut the presumption was repudiated, but the decision was sustained because of insufficient proof that the car was in the garage at the time it was stolen.[1]

The case is important because of its discussion of the weight to be given a presumption. It is universally agreed that "a 'presumption' may be used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone."[2] Thus, where fact C is necessary to be proved, if a party proves the existence of facts A and B, fact C is presumed to exist. Once the presumption is admitted to exist, the authorities differ as to its function and the amount of evidence necessary to meet it.[3]

Professor Wigmore holds that a presumption is merely a procedural device which, while it shifts the burden of going forward with the production of more evidence, never shifts the burden of proof. As soon as the party against whom the presumption operates produces *some* evidence to the contrary, the presumption vanishes and the case proceeds as if the presumption had never arisen.[4] This view is apparently the one adopted by Thayer.[5] It is the orthodox view and is followed by several states[6] and by the United States Supreme Court.[7]

[1] The North River Insurance Co. of New York v. Ohmer, D.B.A. The Ohmer Garage, 63 Ohio App. 346 (1939).

[2] Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906.

[3] "One ventures the assertion that 'presumptions' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'." McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N.C.L.REV. 291, 295.

[4] The effect of the presumption is "merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence) the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." 9 WIGMORE, EVIDENCE (3d ed. 1940) sec. 2491.

[5] THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) p. 313.

[6] Alabama G.S.R. Co. v. Taylor, 129 Ala. 238 (1901); State v. Gargano, 99 Conn. 103, 121 Atl. 657 (1923); Graves v. Colwell, 90 Ill. 612 (1878); Moore v. Ryan, 188 Ind. 345, 123 N.E. 642 (1919); Prudential Ins. Co. v. Tuggles' Adm'r, 254 Ky. 814 (1934); Gaffney v. Coffey, 81 N.H. 300, 124 Atl. 788 (1924); Kennell v. Rider, 225 App. Div. 391, 233 N.Y. Supp. 252 (1929); Clark v. Feldman, 57 N.D. 741 (1929); Brown v. Henderson 285 Mass. 192, 189 N.E. 41 (1934).

[7] New York Life Ins. Co. v. Gamer, 303 U.S. 161, 82 L.Ed. 726, 58 Sup. Ct. 500 (1938); "Inferences and presumptions speak in the absence of evidence, but cannot be

Other authorities are inclined not to limit the effect of the presumption so much. Professor Morgan says that there is nothing inherent in a presumption to keep it from having probative value and that where a presumption is applicable at all, it should continue to operate against the party until he has produced at least enough evidence which, when weighed in the minds of the jury, will convince them at least that the nonexistence of the presumed fact is as probable as its existence. He contends that such a view would not contravene the dogma that the burden of proof must never shift.[8] But there are instances when in the interest of public policy, the presumption should even shift the burden of proof. His views apparently are shared by other writers.[9] And many cases do expressly or impliedly give weight to a presumption.[10]

In the principal case the Court of Appeals held that where the owner of an automobile leaves it with a garage, a bailor-bailee relationship arises, and that when the garage cannot return the car on demand, the law raises a presumption that this failure is due to the negligence of the bailee. In this view practically all courts and writers concur, though cases will be found where the bailee is not even presumed to be negligent.[11] While nearly all courts agree that the presumption places on the bailee the burden of going forward with the evidence, they do not agree as to the degree of proof necessary to dissipate the presumption or to counterbalance it. Under the Wigmore theory it would seem that the production of *any* evidence at all would satisfy this requirement. When the bailee has shown that the goods bailed have been destroyed by fire or stolen he has satisfied the requirement and the burden then shifts back to the bailor to go forward with more evidence and to prove that the bailee was negligent. In the principal case the lower court held this view of the law. By the great weight of authority this is the law.[12] But the upper court held that this was

weighed in the balance as against evidence." Guaranty Trust Co. v. Minneapolis and St. L. R. Co., 36 F. (2d) 747 (C.C.A. 8th, 1930), *cert. denied*, 281 U.S. 756.

[8] Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59.

[9] See McCormick, *op. cit.*, and Bohlen, *The Effect of Rebuttable Presumptions of Law upon Burden of Proof* (1920) 68 U. OF PA. L. REV. 307.

[10] Smellie v. Southern Pacific Co., 212 Cal. 540, 299 Pac. 529 (1931); People v. Chamberlin, 7 Cal. (2d) 257, 60 P. (2d) 299 (1936); Freeman v. Blount, 172 Ala. 655 (1911); City Motor Trucking Co. v. Franklin Fire Ins. Co., 116 Ore. 102 (1925); Sather v. Giaconi, 110 Ore. 433 (1924) (Whether or not presumption has been overcome is jury question); Johnson v. Johnson, 187 Ill. 86 (1900); Clifford v. Taylor, 204 Mass. 358 (1910).

[11] Knights v. Piella, 69 N.W. 92 (Mich. 1896); Mills v. Gilbreth, 47 Me. 320 (1860); Staley v. Colony Union Gin Co., 163 S.W. 381 (Tex. Civ. App. 1914).

[12] Carscallen v. Lakeside Highway District, 260 Pac. 162 (Idaho 1927); Hogan v. O'Brien, 208 N.Y. Supp. 477 (1925); Galowitz v. Magner, 203 N.Y. Supp. 421, 208 App. Div. 6 (1924); Metropolitan Electric Service Co. v. Walker, 102 Okla. 102, 226 Pac. 1042 (1924); Munger Auto Co. v. American Lloyds, 267 S.W. 304 (Tex. Civ. App. 1924).

not enough. It did not find it necessary to determine how much evidence the bailee must produce, it merely stated that the presumption of his negligence had not been met when he showed that the car had been stolen.[13]

Judge Learned Hand, while holding that the presumption is merely a procedural device, has expressed an opinion that is in accord with the view taken by the Court of Appeals in the principal case—that a mere showing that the property is not returned because of theft will not satisfy the presumption of negligence against the bailee. In a case where a barge sank while in the custody of the bailee, and the bailor sued the bailee for damages alleging negligence, Judge Hand stated that the bailee to meet the presumption of negligence must show how the loss or damage occurred, or that it was not due to the bailee's negligence, or, as an alternative, the bailee could prove everything which had happened to the barge while it was in the bailee's custody. If the bailee accounts for every minute of time and all occurrences, and there is no evidence of his negligence, he has met the presumption; if he does not account for all the time and the injury or loss may have occurred during the time unaccounted for, he has not met the presumption.[14]

This view approaches the view held by Professor Morgan and Professor Bohlen. Each of these writers holds that in certain instances the presumption should go to the jury as probative evidence. One such instance is the case of bailed property where all the circumstances surrounding the loss are peculiarly within the knowledge of the bailee and, because of the relationship, it would be virtually impossible for the bailor to show any negligence.[15] To allow the bailee to meet the presumption of his negligence merely by showing that the bailed goods have been stolen would seem to place on the bailor a task almost impossible to accomplish since it is most unlikely that he will have any knowledge of the circumstances surrounding the loss. Professor Morgan would relieve the bailor by allowing the presumption of the bailee's

[13] The North River Insurance Co. of New York v. Ohmer, D.B.A. Ohmer Garage, 63 Ohio App. 346 (1939); (Burden on bailee to show due care to keep goods from being stolen); Savin v. Butler, 19 Ohio App. 68 (1924); Rudy v. Quincy Market Cold Storage and Warehouse Co., 249 Mass. 492 (1924) (Statute shifted burden of proof to bailee).

[14] Alpine Forwarding Co. v. Penn. R. R., 60 F. (2d) 734 (C.C.A. 2d, 1932) "The presumption on which the bailor may rely is a mere rule for the conduct of the trial. It puts upon the bailee the risk of a directed verdict if he does not meet it, but it does no more; once he has done so, it disappears from the case. Thus it can never concern the jury; if the judge is satisfied that the bailee has met the presumption by substantial evidence, the bailor has lost his initial advantage; he must prove the issue, which is the bailee's fault, though he may use the bailee's evidence, so far as it will help him, which ordinarily it will not." p. 736; see also Cummings v. Penn. R. R., 45 F. (2d) 152 (C.C. A. 2d, 1930).

[15] See Bohlen, *op. cit.*, and Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906.

negligence to persist and go to the jury, and the bailee must produce enough evidence that he was not negligent to convince the jury of that fact.[16] If we say that the amount of evidence necessary is just enough to counterbalance the presumption, we are still within the limits of the dogma that the burden of persuasion does not shift from the bailor; if we say that to produce enough evidence to convince the jury that there was no negligence does actually shift the burden of persuasion, it would seem that in equity no violence has been done, since the bailee having knowledge of all the circumstances should be able to show that he was not negligent if, in fact, he were not. D. R. T.

INSURANCE

Interim Insurance Arising from Issuance of Preliminary Receipt

Twenty days before his death, Dell B. Duncan, deceased husband of the plaintiff,[1] applied in writing for a life insurance policy with the John Hancock Mutual Life Insurance Company, paid an advance premium of one dollar and designated the plaintiff, his wife, as beneficiary. The insurance company was investigating the applicant's occupation at the time of his death, but had taken no other action on the application, either by way of acceptance or rejection. In her suit to collect the amount of insurance applied for ($720.00), the plaintiff contended that the provisions of a preliminary receipt[2] issued at the time of the application created a present contract of interim or temporary insurance.

The Supreme Court of Ohio construed the receipt[3] as providing temporary protection commencing immediately upon the signing of the application and payment of the premium. This interim insurance was to continue until such time as the insurer had considered the application and announced its determination to accept or reject the risk. One clause

[16] Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59.

[1] Duncan v. John Hancock Life Ins. Co., 137 Ohio St. 441 (1940).

[2] The receipt issued by the insurer provided that "it is understood and agreed that no liability is assumed by the company on account of this payment nor until it shall issue a policy, but if death occurs after the date of the application from which this receipt is detached and prior to the date of issue of such policy, payment in accordance with and subject to the conditions and provisions of the policy applied for shall be made; provided the applicant is insurable under the company's rules and the application is approved and accepted by it at its home offices as to plan, premium and amount of insurance. If a policy is issued, the deposit will be applied to payment of the premiums thereon from its date, otherwise the deposit will be returned to the payer thereof upon surrender of this receipt."

[3] *Ibid.*