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Lethea R. Fredrickson v. Dr. E. B. Maw and Dr. Floyd F. Hatch et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LETHEA R. FREDRICKSON,
Plaintiff and Respondent,

vs.

**DR. R. B. MAW and DR. FLOYD F.
HATCH, DR. L. E. VIKO, DR. J.
RUSSELL WHERRITT, DR. R.
B. MAW, DR. T. C. BAUERLEIN,
and DR. V. A. CHRISTENSEN,**
doing business under the firm name
and style of INTERMOUNTAIN
CLINIC, a co-partnership,
Defendants and Appellants.

FILED **APPELLANTS' BRIEF**

APR 27 1936

Clerk, Supreme Court, Utah

**EARL J. GROTH AND SKEEN,
THURMAN AND WORSLEY**
Attorneys for Appellants

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Case No.
7452

APPELLANTS' BRIEF

STATEMENT OF FACTS

Respondent commenced the instant action on October 23, 1948, to recover both special and general damages alleged to have been suffered following a tonsillectomy performed by one of the appellants, Dr. R. B. Maw.

The gravamen of the complaint was that Dr. Maw, "after the making of an incision or opening in the body of plaintiff," failed to remove from respondent's throat one or more of the pieces of gauze used in the course of the operation, and discharged respondent while in that condition.

After alleging the facts relating to Dr. Maw's employment to treat respondent, paragraph V of the complaint (Rec. 3) sets forth the acts of negligence in the following language:

"That in the course of said operation, and after the making of an incision or opening in the body of plaintiff in or about the area surrounding said tonsils of plaintiff, said defendants inserted gauze, threads or sutures in said wound or incision, and negligently and carelessly left, and caused and permitted to be left, in said wound, incision or cavity so caused by defendants in the performance of said operation, the said gauze, dressings, threads, sutures and other materials unknown to plaintiff, and defendants negligently and carelessly failed to remove the same, and negligently and carelessly caused and permitted the wound, incision or cavity in plaintiff's body to become and remain closed with such gauze, dressings, threads, sutures and other materials therein; and said defendants negligently and carelessly failed to discover the presence thereof or to advise plaintiff thereof, and negligently and carelessly discharged and released plaintiff from the further treatment of defendants with the said foreign substances within the body of plaintiff."

Appellants, by their answer, denied each and all of the alleged acts of negligence. (Rec. 13).

The cause was tried before a jury, resulting in a verdict in favor of respondent, on October 26, 1949, in the amount of \$5,199.00.

From the judgment entered on the verdict appellants' appeal.

In our statement of the facts of the case, we shall abstract, as concisely as possible, the testimony of all of the witnesses called by the parties.

RESPONDENT'S EVIDENCE

Respondent, who, for some time prior to the operation, had been afflicted with arthritis (Rec. 273-274), testified that prior to July, 1945, her health was good except for stiffness about the knees; that on July 6, 1945, she went to the Intermountain Clinic, in which Dr. Maw was one of the partners; that she went to the Clinic because of her arthritis (Rec. 236); that she was examined by Dr. Maw, and was told that there was pus in the tonsils and that the same should be taken out. (Rec. 81 to 83). Respondent submitted to the operation at the Intermountain Clinic on the morning of July 17, 1945, leaving the Clinic in the early afternoon.

She further testified (Rec. 87) that the nurse in charge told her to return in about three weeks; that during that period her throat remained sore; that when she returned she was informed that Dr. Maw was on his

vacation, and that she told the nurse that her throat felt like there was a lump in it; that she 'phoned the Clinic about ten days later, the nurse, a Miss Armour, answering; that she heard Miss Armour say, presumably to Dr. Maw, that it was Mrs. Fredrickson calling and that she, the nurse, a week before had seen an ulcer down her throat, and that Dr. Maw directed the nurse to tell respondent to come in to the Clinic; that respondent did go to the Clinic and saw Dr. Maw, and was told that a little drainage from the tonsil area and from the head was causing the throat to be sore. A salt water mouth wash was prescribed.

Continuing with her testimony (Rec. 92 to 96), respondent stated that she made further visits to Dr. Maw, at intervals of about three weeks, for a year and a half, during all of which time her throat remained sore, the last visit to the Clinic being on June 29, 1948.

Between July 17, 1945, the date of the tonsillectomy, and the Fall of 1948, respondent consulted, and submitted herself to examinations and was treated by, not less than twelve dentists and medical doctors, both general practitioners and specialists, beginning in the fall of 1945. (Rec. 162). Drs. W. L. Wright, Victor Sears, Ernest W. Browning and J. L. Calvert, were the dentists; and Drs. Boucher, R. O. Johnson, R. M. Muirhead, E. W. Boggess, E. M. Argyle, J. E. Nielsen, L. R. Cowan and D. A. Dolowitz, were the medical doctors. A Dr. Morgan, a dentist, and other dentists, had treated respondent prior to 1945; also Dr. Wright.

On January 22, 1946, six months after the tonsillectomy, Dr. Wright extracted all of respondent's then remaining teeth, ten front teeth from one jaw and eight front teeth from the other. All other teeth, three molars on each side, lower and upper, had been extracted prior to the tonsillectomy in July, 1945. Respondent at first testified (Rec. 96) she could not remember when her rear teeth, meaning the molars, had been extracted, but said that it was a good many years back. On cross examination, respondent's attention was directed to her deposition. She there stated that two or three rear teeth had been taken out by Dr. Wright before the operation, sometime between 1935 and 1945. (Rec. 166). When asked by her counsel if Dr. Wright had placed any fabric materials in the mouth at the time of extracting the front teeth, respondent replied "To my knowledge he put nothing in my mouth." (Rec. 97). In April, 1946, Dr. Wright made dentures for respondent. These she was unable to wear. A year later Dr. Wright made a second set of dentures, but respondent was still unable to use them. Her gums continued sore. (Rec. 99-100).

Respondent visited her family doctor, Dr. Boucher, in March or April, 1946. At that time, she stated, "there was an ulcer on the right — right in the hole of the tonsil, in the right." (Rec. 99). Afterward respondent consulted Dr. Muirhead (erroneously appearing in transcript as Moorhead), a dentist, in April, 1946, and also in 1947. The next doctor visited was Dr. Browning, an oral surgeon. This was in July, 1947. "He opened up the gums (lower jaw) just in, right in the ripper edge, just

a little bit to the left of the center, clear around, and just took a little fine needle and cleaned out the infection." Three days later the doctor cleaned out the socket of the eye tooth, respondent, referring to the upper jaw, stating that there was "just a little pus up there." No packs, gauze, absorbent cotton or any kind of fabrics were inserted or used in the mouth, nor was anything done around the tonsil area or the palate, Dr. Browning testified. Dr. Sears, also an oral surgeon, was present, and remodeled the dentures. These dentures also hurt her.

Still other doctors were visited by respondent, including Doctors Cowan and Nielsen, cancer specialists. Dr. Nielsen advised her that she didn't have a cancer; that it was purely infection. (Rec. 108).

Respondent visited Dr. Dolowitz, a throat specialist (Rec. 110), on May 10, 1948. She still complained of her throat. There was a big ulcer, she stated, about the size of a dime on the left side above the tonsil area. At the time of another visit, June 24, 1948, a biopsy was taken. Two days later, June 26, respondent said she had a terrific ulcer. While at home she was washing off the ulcer with peroxide and water, and, she stated, " * * * It just popped right open and I could see something hanging. I think I took a tweezers and pulled on that thing, and there was this ungodly ragged thing, all dripping with pus. It was terrible. * * * I washed it off with peroxide and water to get the things off, and I had this little mirror and I could see it. It looked like a piece of gauze or white material about $\frac{3}{4}$ of an inch

long." Respondent then went over to the neighbors, 'phoned to Dr. Dolowitz, and later visited him at his office, after seeing a neighbor and her daughter-in-law. (Rec. 114). At that time respondent thought the gauze was still in her throat "but evidently," she said, "I had swallowed it, and all that was left was the fragments. * * * He (the doctor) picked out the strings and sprayed it with penicillin and cleaned it out." On the occasion of further visits at the doctor's office, respondent stated that he pulled out other threads and showed them to her. On another occasion, when the doctor said that he didn't see any gauze hanging out, respondent watched her stool, and on June 29, she found some threads and put them in water in a pint fruit jar. Three or four weeks later, "it was all disintegrated and wasn't much left of it." (Rec. 117-118). Alcohol was then substituted for water and the material was retained by respondent.

Dr. Dolowitz, respondent further stated, never put any packs in her mouth, nor did he use any gauze or cotton.

The material seen in Exhibit A, respondent said, was what had come out of her mouth about six months ago. The ulcer would break and little pieces and fragments of material would stick out, and respondent would put them in alcohol, and Exhibit A is one of the bottles respondent used for that purpose. (Rec. 119-120).

Exhibits B, C, D, E and F, each containing a few threads or fabric, were offered and received in evidence, respondent stating that they came from sores and ulcers

in her mouth. Respondent first saw the material in Exhibit F on November 8, 1948. It was seen in the mouth on November 8 and recovered in the stool on November 10, 1948. (Rec. 121-126).

On cross-examination (Rec. 133) respondent stated that by reason of having looked into her mouth, she pretty much knew where the tonsil fossa or area was located. Her attention was called to Exhibit 1, being a photograph of a printed diagram or cut of the open mouth, showing the throat, tongue, tonsil area and the teeth on both sides not covered up by the protruded tongue. When ever she looked at her own mouth, respondent stated, she probably had her tongue extended out of the mouth, the same as the tongue appears in Exhibit 1. She knew the location of the uvula, and that there was a tonsil on each side. In referring to the depth of what she understood to be the tonsil area, respondent stated "It was just scooped out," and that she saw the scooped out condition on both sides of the mouth. After the tonsillectomy, respondent stated that she began to make observations in the mouth about a month later. Since then, she had looked at her mouth many, many times. (Rec. 137-138). Further in her cross-examination (Rec. 144), respondent said that when she first started to look at her throat about one month after the tonsillectomy, the tonsil area was a little deeper than the rest of the throat.

The ulcer on each side, the witness said, would disappear and then come back, pretty much in the same place. One was *just above the tonsil area* on the left

side; another was on the right side and *behind the tongue*. The ulcer on the right side spread onto the tongue. The one on the left side was higher, *just above the tonsil area*, somewhere midway between the place where the last tooth had been and the tonsil area. The ulcer on the right side was hooked on back of the tongue, that is, back into the side of the tongue where the tongue hooks onto the teeth. Respondent couldn't tell how many strings she pulled out from the ulcer on the left side; once in a while the strings would be caught in her false teeth. (Rec. 149-150). The first material respondent pulled out from any of the ulcers was on December 31, 1948. (Rec. 151). That would be from the ulcer on the left side. Respondent reached back into her mouth with her fingers and pulled out a string or a piece of material. This material is shown in Exhibit A. (Rec. 152-153). The material in Exhibit B was taken out between April 28 and May 22, 1949, and the material in Exhibits C and D was taken from the ulcer on the left side. (Rec. 154). The material in Exhibit E was on respondent's tongue, she stated, and she reached in and pulled it out. Exhibit F was the material recovered in the stool. (Rec. 155).

Respondent, during the four years prior to the trial of the case, consulted and visited the doctors and dentists hereinbefore named, and went back to most of them many times. To each she explained that a tonsillectomy had been performed and to each she complained about her continuing sore throat. They looked into her mouth and made an examination of the throat. (Rec. 164-165).

In January, 1946, Dr. Wright extracted the eighteen front teeth. All of the back teeth were extracted prior to that time. But as to when respondent was unable to say definitely. (Rec. 167-169).

The doctors whom respondent visited, beginning a few months after the tonsillectomy, would examine the throat and give dosages of penicillin. Dr. Wright, in January, 1946, when he extracted the eighteen front teeth, did not, respondent said, to the best of her knowledge, put any packs or sponges in her mouth. Upon being interrogated further, she stated it was as far as she wanted to go, to say that "I didn't see anything that would give me an idea he would do it." (Rec. 175).

Dr. Davis Augustus Dolowitz was next called and testified for respondent. (Rec. 182). He first became acquainted with respondent on May 10, 1948, on the occasion of a visit to his office. He examined respondent's ears, nose and throat. In the mouth there was a small lesion about a c.m. square, at the junction of the hard and soft palate, on the left side. The lesion, pointing to Exhibit 1, he stated, "would be about $\frac{2}{3}$ of the way to the tooth, about a third from the tooth and $\frac{2}{3}$ from the tonsil." In making this statement, reference was made to the last upper tooth. (Rec. 186-187).

On cross-examination (Rec. 193), the doctor marked, by red curved lines on exhibit 1, the position of the front pillar of each of the two tonsils. The Exhibit, he stated, showed fairly accurately the relative position of the teeth, the upper teeth to the lower teeth, and their posi-

tion in the mouth. Right in the center of the diagram, on Exhibit 1, the uvula, protruding downward, is seen. (Rec. 194). The doctor said that in using the terms right and left, in fixing the location of an ulcer or abcess in the mouth, he did that from the standpoint of the patient; that the dark area back of the uvula, on Exhibit 1, was the gullet or air space; that the width of the gullet would be about 2 or 2½ inches, and the depth of the gullet from the lower tip of the uvula to the rear of the mouth would be about a half inch; that the uvula is separated from the back of the mouth. (Rec. 196). On Exhibit 1, beginning near the center of each side of the uvula, and extending downward toward the tongue, there is a series of curved lines. The line nearest the center on each side, and joining the dark area, indicates the position of the back pillar. (Rec. 197). Between the front and back pillar on each side is the tonsil fossa, in which the tonsil is located. The red line on Exhibit 1, intersected by red crosses, and extending latterly somewhat above the front pillars of the two tonsils, represents the division between the soft and hard palates. Above the line would be the hard palate; below, the soft palate. (Rec. 203).

On further cross-examination (Rec. 201) Dr. Dolowitz, testifying with his daily record before him, summarized his findings of respondent's mouth as follows:

May 10, 1948. One small lesion about a c.m. square at the junction of the hard and soft palate on the left side. A lesion represents anything abnormal. Later, when it was found the lesion was not a cancer, it was

identified as an ulcer. This was the first ulcer shown to or seen by the doctor. At the time of the doctor's examination, respondent had no teeth.

The position of the ulcer which the doctor saw on May 10 is shown on the Exhibit by a red circle, identified with the figure 1, placed just to the side; the circle is approximately the size of the ulcer. (Rec. 204). The position of that ulcer is closer to the normal position of the rear molar on the upper left side than it is to the front pillar of the tonsil, the doctor stated.

May 14, 1948. On this day the doctor saw a good sized ulcer, slightly closer to the gum. Its position is shown on Exhibit 1 by a red circle, marked with the figure 2. Part of that ulcer was taken out in the biopsy. (Rec. 207). Ulcers Nos. 1 and 2 were in fact but one; the second was the enlargement of the first; in taking out the section on May 10, a larger area was made. The ulcer, as seen on that day, was half in the soft and half in the hard palate. No other lesions, up to May 14, were seen by the doctor. (Rec. 208-209).

May 20, 1948. The entire ulcer area was healing.

May 29, 1948. The ulcer area of May 10 and 14 had healed. A further small ulcer had appeared. This is identified by the figure 3 on Exhibit 1, below the position of the last tooth on the left side of the upper jaw. (Rec. 211).

June 24, 1948. Both ulcers Nos. 1 and 2 had reopened. Another biopsy was taken. (Rec. 211).

June 26, 1948. A small ulcer, between Nos. 1 and 2 on Exhibit 1 was seen. It was smaller than one c.m. in diameter. (Rec. 213-215).

June 28, 1948. Respondent stated she had pulled out a slough of dry blood and cotton. On June 28 the abscess was deeper than the one seen on the 26th. The foreign material, seen by the doctor, was thread. He saw respondent off and on between June 26 and July 5, 1948, and little change was noted. (Rec. 216-217).

July 29, 1948. An ulcer had broken out on the right side and a little bone chip came loose. The position of this ulcer, on Exhibit 1, is shown by a circle marked 4. The bone chip, about the size of 2 or 3 pinheads, was imbedded under the ulcer. Respondent insisted it had a feeling of a piece of gauze, but none was found; instead, the bone chip was found. (Rec. 219).

August 31, 1948. Another tiny bone fragment, about the same size as the other, was protruding from ulcer No. 4. The fragment was removed. (Rec. 219-220).

September 16, 1948. Ulcer No. 4 was still draining; it was probed and a small bit of bone removed. This was the third piece from No. 4. (Rec. 220).

September 23, 1948. On this day a small white mass had worked its way out to the surface; it looked like cartilage with a small green core, which would be infected material. Cartilage is found, the doctor stated, pointing to a place near ulcer No. 4, in the palate region and elsewhere. (Rec. 221).

November 16, 1948. The doctor stated he observed "a small ulcerated area left, coming level with the left buckle surface, a small granulation was removed with a thread in the center." This, he further stated, would be in the area of the last tooth, on the outside, and is shown on Exhibit 1 as ulcer No. 5, located on the left side of the upper jaw. Proud flesh, diseased tissue, was removed and the thread found. (Rec. 222-224.)

Mrs. Vera Mathews (Rec. 241), and Mrs. Ellen Rupp (Rec. 255), friends of respondent, Sherman Fredrickson (Rec. 259), husband of respondent, Betty H. Fredrickson (Rec. 270) daughter-in-law of respondent, testified that respondent, after the summer of 1945, lost weight, suffered with a sore throat and mouth, was depressed a lot, and, at times, that they saw pieces of gauze and threads on the sides of her mouth; also, that respondent was having trouble with her gums and had her teeth extracted in 1946. Respondent's condition improved after 1948.

Betty H. Fredrickson, respondent's daughter-in-law, when asked as to where the sores she saw in respondents mouth were located, testified as follows:

"A. Well, there have been so many occasions that I have been shown them. I just have a recollection of a lot of them on various occasions, and I would say they showed up in several places, but, when you just have a throat and it is around in there, it is around the gums and up into the sides; that is about—I can't locate them definitely." (Rec. 273).

Again, in replying to the question as to whether she had noticed any difference in respondent's physical condition in 1945, she said:

"A. Well, I know that before she had the tonsillectomy, she had been having a great deal of trouble with arthritis, and she was in a rather bad mental state because she had such a fear of arthritis, and we were all very concerned about that; and, after the tonsillectomy, I think she started showing some relief, and definitely, later on, she did, got better gradually, I believe, and till she got relief from the arthritis." (Rec. 273-274).

When asked to locate a small piece of material, the tip of which she stated she had seen in respondent's mouth, the witness said:

"A. It was still imbedded in the mouth.

Q. On which side?

A. Well, it was on the right side of her mouth, I believe.

MR RICH: You pointed to the left.

A. Well, I was looking at it this way; it would be on her right. I was looking into her mouth; wait a minute, oh, dear, oh, I can't say that I remember because there was another sore.

Q. In the mouth at the same time?

A. No, later on; as I say, I have seen so many of them.

Q. All right.

A. I can just remember this piece of thing sticking out in her mouth, and the whole area around there was red and inflamed, and it looked bad.

Q. And do you recall where this particular difficulty was, where you described the gauze with reference to the tonsil area of the mouth?

A. It was above the tonsil area." (Rec. 278).

N. E. McLachlan, a chemist for Salt Lake City, testified (Rec. 296) he had made an examination of the sedimentary material in Exhibit I, and found it showed some cotton threads. He found no small fragments of bony substance in the exhibit. (Rec. 297).

Dr. Browning, an oral surgeon, testified for respondent. He was consulted on July 21, 1947 (Rec. 302); the doctor took two x-ray pictures of the mouth, and stated, "the lower anterior ridge was opened, had a very spiney sharp edge which was removed—making a smooth surface, because she was having difficulty in wearing her dentures." (Rec. 303). The opening made extended from the first double tooth on one side to the first double tooth on the opposite side. A flap was laid back, where the spines were sticking up, and they were filed down and made smooth for the denture to ride on. (Rec. 303-4). On July 25, 1947, Dr. Browning made an inch incision around the region from which the upper left front molar, sometime prior to 1945, had been extracted, scraping the bone and cleaning out the infection from the socket. No packs or sponges were used by Dr. Browning, nor

did he do any other work in the rear of respondent's mouth. (Rec. 305-7).

On cross-examination the doctor testified that respondent visited him over a period of one year; that her mouth was inflamed, and, on one occasion, that there was a lesion at a point about half way between the tonsil fossa and the ridge of the right upper jaw bone. The fossa in which the tonsil rests when in place was described as an indentation in the mouth with a front and rear pillar. (Rec. 313-14). After making the incision from the one side of the lower jaw to the other side, the doctor further stated he removed certain bony fragments or spicules, about the size of a pin point, smoothed off the fragments and sutured the soft tissues together over the jaw bone, and that it was his opinion that had the fragments not been removed, they would have broken off and come through the gum; that in his office he has x-ray pictures of bony fragments which showed up after a period of thirty years. (Rec. 324). The doctor first saw respondent in July, 1947, 18 months following the extraction of the front teeth, and, based upon the appearance of the x-ray pictures of respondent's mouth at that time, he gave it as his opinion that she had had quit a bit of pyorrhea at the time of the extraction. The diseased condition shown in the x-ray might have extended back a matter of months or a year, and it could be years. Pyorrhea, he stated, was a disease of the alveola process and the soft tissue, the soft tissue including the gums. The alveola process is the bony formation in which the teeth are imbedded. (Rec. 327-328).

Dr. Wright followed Dr. Browning as a witness. (Rec. 329).

He had known respondent since 1939. On January 22, 1946, he did the extraction work of eighteen front teeth. No gauze during that extraction, he stated, was used. (Rec. 330).

On cross-examination (Rec. 330) he said he used gauze if, after the extraction, the patient returned and was bleeding. The doctor has always had gauze and cotton in his office. He said he had no recollection of using a gauze pack to stop bleeding. "I use cotton ones, packs," he stated. (Rec. 333). In case of bleeding, he further stated, he would leave gauze or cotton in a socket overnight; leave it in all night and take it out the next morning. (Rec. 334). It is left in until the patient returns. (Rec. 335). Before doing the extracting, respondent told Dr. Wright she was having trouble; the doctor examined her teeth and said, "Your teeth are not very good, I don't believe they are causing this trouble, but they might be." (Rec. 339). Dr. Wright examined and treated respondent in May, 1939, in 1940, in 1942, in September, 1943, in June, 1944, and again in August, 1944. X-ray pictures were taken. In the fall of 1944, and on a half dozen occasions in 1945, respondent made further visits to the doctor's offices and received treatments. Pyorrhea was found. The doctor stated that in the fall of 1945 he was seeing if he could "get her (respondent's) teeth in shape to save them." (Rec. 342). (Never did Dr. Wright, in his testimony state whether he did or did not use or

leave gauze or other foreign material in the sockets of respondent's teeth *prior to the tonsillectomy*; nor was he asked concerning that matter.)

APPELLANTS' EVIDENCE

Appellant, Dr. Maw, described the anatomy of the throat, referring to Exhibit 1. (Rec. 369-371). The human mouth, he stated, was filled with infection, from streptococcus to the most minor. The only cure for a badly infected tonsil was its removal. Diseased tonsils produce both rheumatism and arthritis. Tonsils are fastened to the fossae by connective tissue. (Rec. 372-373).

On July 17, 1948, in performing the tonsillectomy on respondent, a grasping fork was used to take hold of the tonsil, which was then separated from the connective tissue with instruments, including a surgical snare. The tonsil was bisected away from the connective tissue, down to the base of the tongue, and then clipped off with a snare. The tonsil part of the throat is just a big open space. It is all muscle. When the tonsil is removed, Dr. Maw stated, "these muscles go in the proper shape, the plain curvature of the throat; there is no cavity, this goes into the lower part of the larynx." (Rec. 383). When "you take food and water, you swallow that, it just takes every thing along with it, it is part of the throat, there is no way for foreign material to stay in it," appellant further testified. (Rec. 384). After the tonsil is detached, if it is not removed and the patient sits up, the patient will either spit out or swallow the

tonsil; if it is not removed and the patient still remains on his back, the tonsil will remain in place only until the patient swallows. There is no hole there, there is no place for anything to stay. (Rec. 385-396). The anaesthetic used for respondent was mono caine. In addition to an anesthetic preparation, it contained adrenalin, which had the effect of shrinking the muscles and reducing the bleeding. Gauze sponges were used in the operation, identical with Exhibit 3. (Rec. 387-389). In case of minor bleeding, the sponges are cut into smaller pieces. With every local there is a certain amount of bleeding. Both the large and small pieces of gauze were held by a locked hemostat, such as Exhibit 4, during their use in the mouth. The little bleeders are tied off with cat gut. Never was the gauze released or undone from the hemostat while in the tonsil fossa. (Rec. 392-393). The kind of cat gut used is shown in Exhibit 5. In operating on respondent, Dr. Maw stated, there never was a piece of gauze put or left, detached from the hemostat, in the tonsil fossa. (Rec. 396). Except for the tying off of the bleeders, with cat gut, no suturing was done in respondent's mouth on July 17, 1945. (Rec. 399).

On August 18, 1945, when appellant next saw respondent, there was complete healing in the area of the tonsils; the tonsil was flat, no open cavity, it had gotten to its natural position, running straight down into the throat. The pillars were in their natural position. (Rec. 403). On September 4, 1945, when respondent was next seen, some pus was seen coming from sinuses. This tended to make the membrane very inflamed. (Rec. 404-

407). The tonsil area, both to the right and left, was perfectly normal. On October 28, 1947, respondent saw Dr. Maw and complained of pain in the area of what would be the position of the second and third upper molar teeth, on the right side, back of the gums. No mention was made of tonsils. (Rec. 412-413).

Chromic cat gut is called 20 day chromic. It totally dissolves in three weeks. That is the kind of cat gut that lasts the longest in the tissue.

Dr. R. M. Muirhead, an ear, nose and throat specialist, testified for appellants. (Rec. 374) The doctor had had experience in post operative treatment of tonsillectomy cases. Respondent called on him on April 5, 1946, and he examined her throat. The tonsil area was clean, and on the doctor's daily record this note appears: "The tonsils were out cleanly." (Rec. 377). Respondent came to the doctor, saying she had had her teeth extracted and complaining of difficulty in her gums, no difficulty in swallowing, and complaining of swelling and discomfort in throat. (Rec. 378).

Dr. Robert G. Snow, also an ear, nose and throat specialist, testified for appellants. (Rec. 418). The tonsils are shown in Exhibit 1; roughly, they are about the size of the thumb, from the first joint to the finger nail. The front and rear pillars are really two muscles. The tonsil fossa, the space between the pillars, is shaped like a triangle, with the apex at the top. (Rec. 424). When the tonsil is severed, if no instrument held it in place, it would fall by gravity. (Rec. 426). When the patient is

erect, the back of the fossa would be vertical. After a tonsillectomy, the pillars remain apart. If any depression remains it fills with scar tissue and is skinned over with mucous membrane, like the lining of the throat. (Rec. 429). If during a tonsillectomy a sponge in some way were left in the fossa, it would not stay there more than 15 or 20 minutes after the patient sat up or stood erect. Swallowing would force it out. (Rec. 431). The maximum time such a piece of gauze could remain in the fossa, with the patient taking a local anesthetic, would probably be an hour—certainly a day would be the outside. (Rec. 433). If a piece of gauze were left in the fossa and the edges of the pillars sewed together over it, the maximum time would be five or six days. Before that time the stitches in the pillars would slough away, cut through the pillars, and the pillars would separate and assume their normal position, expelling the gauze from the fossa. This would result no matter what kind of stitches were used. The edges of the pillars are thin, much like the web between the fingers; the pillars naturally stand apart; they can be brought together only by force and then are constantly tending to pull apart. (Rec. 434-435). If pieces of gauze or thread had in fact been left in the fossae, Dr. Snow gave it as his opinion that it could not have migrated through the tissue to any of the ulcer areas shown in Exhibit 1, and identified as ulcers Nos. 1 to 5, inclusive. (Rec. 436-438).

On cross-examination (Rec. 438), Dr. Snow said that the insertion of a pack sutured in the tonsil area, to control bleeding, had been described and damned in

the literature, but that he had never seen it done. (Rec. 440).

If without sewing together the edges of the pillars, a piece of gauze was sutured into the fossa, after the removal of the tonsil, the gauze would be visible to one looking into the mouth. So also would the seam brought about by sewing together the edges of the pillars be visible to one looking into the mouth. (Rec. 443).

One of the jurors, Juror Emery, requested permission to ask Dr. Snow a question. Permission was granted.

“JUROR EMERY: The question I have: in the event sutures were taken to stop bleeding in any small blood vessels, and assuming in the course of swallowing something adheres to the exposed end of this suture, and assuming further from the time the operation was performed to a period of thirty days hence, would the normal healing process of the body heal that particular portion over and completely obliterate its presence?

A. You mean—

JUROR EMERY: If it would attach—

A. To what, a foreign body?

JUROR EMERY: Take a piece of string or anything.

A. Attached there, sew it in place?

JUROR EMERY: No, —say in ordinary swallowing, when you tie it, there is an end of catgut—

A. Yes.

JUROR EMERY: If anything should adhere to this end and arrest its movement then in the process of healing, what length of time would it take to heal over?

A. It couldn't heal over?

JUROR EMERY: Never would?

A. Never would. You see in the process of healing in the tonsil fossa, the fossa is covered with a leathery scab like we see on cold sores, and when you bite your tongue, a greyish scab appears, and in a few days the scab comes off and everything attached to it would come off.

JUROR EMERY: How about the suture?

A. The scab would form in a matter of minutes after the suture is placed, the suture is there exuding through the scab, and anything on that suture would come off with the scab.

JUROR EMERY: There would be absolutely no possibility of that happening?

A. I have never seen it happen. I don't see how it is possible." (Rec. 445-446.)

(Dr. Snow's direct examination then continued. (Rec. 446).) Following the removal of a tonsil from the fossa one sometimes finds bleeders. Little vessels bleeding. They are taken care of by holding, with a locked hemostat, a sponge against the bleeder until a clot forms at the opening of the blood vessel. When it is considered a clot has formed the hemostat is withdrawn, the vessel inspected and if there is any more bleeding, more gauze is applied against the bleeder. The next step is to isolate

the bleeding vessel, take hold of it with a hemostat, and frequently you can hold onto the vessel two or three minutes and you will have a sufficient clot formed at the end of the vessel. If you have to take hold of it with a hemostat, you take a little suture, and tie a loop around the top of the vessel. The hemostat is then released and the suture is cut off. When you tie a vessel off on the surface of tissue you destroy the blood vessel; it dies and sloughs off like a scab, and at the same time the ligature disappears too. Absorbable sutures are most frequently used. Catgut absorbs in three to eight days and chromic catgut in eight days to three weeks. Cloth sutures are also used. They remain indefinitely, unless removed, and do not migrate from one area to another. The part of the ligature cut off would slough off with the scab. (Rec. 446-449).

On cross-examination (Rec. 450) Dr. Snow testified that the surface of the tongue was the base of the triangular area, made by the fossa. If gauze were placed within the fossa on the surface of the exposed muscle you would not find that gauze subsequently migrating through the muscle. If the thickness of the gauze was a quarter of an inch and the length half an inch, that would certainly form an abcess within a few weeks, certainly within a month, and the gauze might remain a little longer than thirty days, with thirty days as the average. Sixty days would be way over the maximum. If a piece of gauze came out of the ulcers marked Nos. 1 and 2 on Exhibit 1 it would have been placed there within sixty days. That would not be true of threads. Some pieces

of cotton thread have been found in people's bodies years after they have been inserted. (Rec. 452). In Exhibit F there is a large mass of threads, and it is my opinion, the doctor further said, that nature would attempt to exude from the body a mass of thread such as that within thirty to sixty days. (Rec. 453).

On re-direct examination, the doctor stated that "nature would attempt to get rid of foreign bodies—if you get a sliver in your finger, pus forms around that and it breaks out." That, he stated, was what he meant by "exude." (Rec. 453).

Dr. James A. Cleary, another ear, nose and throat specialist, was called by appellants. (Rec. 454). If a piece of gauze, following a tonsillectomy, were left, unattached by sutures, in the back of the fossa, between the two pillars, the patient, if he sat up or stood erect, would either spit it out or swallow it—there would only be those two possibilities. If the gauze were left in the cavity, and the edges of the two pillars sutured together with cat gut, the sutures would soon dissolve or be absorbed, due to the digestive action of the saliva, and the material would come out in a matter of a few days. If sutured over a gauze pledget (a folded cloth or pad), the catgut sutures would tear out within 24 hours, relieve the pillars of their tension and cause them to go back to their normal position. And then, when the patient sat or stood up, the gauze would be exuded or dropped into the pharynx, and entirely disappear from the fossa. The cutting action of suturing with silk, cotton, linen, nylon or any other non-absorbable type, is even more marked.

The pillars are very fragile, very thin, and you can't put a suture, with any tension on it, through a thin band of tissue, without having it tear through. When the stitches cut through, the pillars go back into their normal position, and, irrespective of the position of the patient, whether sitting or standing, the swallowing action, the constricting action of the throat, would force the gauze out of the fossa. (Rec. 456-561).

Mrs. Alice Emery, formerly Alice Armour, was called to testify by appellants. (Rec. 481). She was the registered nurse who assisted in the tonsillectomy on July 17, 1945. She commenced her services at the Clinic in September, 1942, and was assigned to appellant, Dr. Maw. It was her practice to assist appellant in all surgical operations, and did assist him many times in tonsillectomies. During the course of the tonsillectomy performed for respondent, appellant used a sponge to tap the blood as it came from the area. A sponge is a little piece of gauze, very likely just enough to absorb the blood; a pack, usually a solid piece that is used for pressure. The witness, upon examining Exhibit 4, a hemostat with a piece of gauze attached between the ends, stated that the gauze was the kind used by Dr. Maw in respondent's tonsillectomy. The witness had looked into the mouths of the patients following many tonsillectomies. It is a dark red area where the tonsil has been removed. If a small pack, any size pack, or sponge, were there, it would be observable by anyone looking into the tonsil fossa. (Rec. 487-488). The witness further stated that she was unable to recall whether any

arteries or blood vessels had been tied off in respondent's mouth. If any were tied off, no notation was made of that fact on the chart.

Dr. Dolowitz, a witness testifying for respondent, was also called by and testified for appellants. (Rec. 495). After September, 1948, the doctor stated that, in subsequent examinations of respondent's mouth, he found no additional ulcers; nor did respondent complain to him of any additional ulcers. Since the doctor was last in court, he stated, he had made a careful check of his record. When on the stand before he showed on Exhibit 1 the position of all of the ulcers which he had observed in respondent's mouth and also the position of all of the ulcers concerning which respondent had complained about. Altogether, there were five, numbered from 1 to 5, inclusive. It was in these ulcers in which he had seen gauze and in which respondent had stated she had seen gauze. Respondent complained of no other places where ulcers had appeared; she told the doctor that she had revealed the places of all of the ulcers that had developed in her mouth. The doctor was asked if he had an opinion as to whether the gauze and threads which he had seen, and which respondent had told him she had seen, could be the gauze and thread which, for the purpose of the question, it might be assumed were left in the tonsil fossa at the time of the tonsillectomy. The doctor's answer was "I think it unlikely that gauze could have migrated that far." (Rec. 499-500).

On cross-examination (Rec. 500), the doctor, upon being questioned as to whether it was possible for the

gauze to migrate that far, stated that "weird things happen, but usually the migration is downward." Was it possible for it to go upward, that is, migration, he was asked, and his answer was, "My experience is very limited with this; those I have seen have always been downward." It would be possible, he said, to go "laterally." On June 28, he found a few pieces of string in the left side of respondent's mouth. On July 1, 1948, he found six threads. On November 15, 1948, one thread was taken from the left side, and, on the 16th, another thread was removed from the left side. The doctor last saw respondent on September 15, 1949, and there was an ulceration on that date. The doctor further stated that he had never inserted any gauze in respondent's mouth. (Rec. 500-502).

On re-direct examination (Rec. 502), when reference was made to what he saw on July 1, 1948, the doctor stated there was gauze or threads "apparently working up from beneath." By this he explained that the direction would be from the back of the mouth to the front of the mouth and not vertically, upward. On November 8, 1948, respondent reported to the doctor that a large mass of material sloughed out of the right side of the throat; that would be the region of ulcer No. 4. The thread he saw on November 15, 1948, was from ulcer No. 2. On November 16, another thread came out of ulcer No. 5; that would be the one located somewhat to the side nearest the cheek in the position of the left wisdom tooth on the upper jaw. On September 15, 1949, there was no thread, but there was an ulceration in Nos. 1, 2 and 5.

At no time in his examinations of respondent, the doctor stated, did he see any thread or gauze come out of an area which was within the tonsil fossa; the threads that he saw were all located at the points identified as Nos. 1, 2, 3, 4 and 5 in Exhibit 1. These points were relatively far removed from the tonsil areas and close to the positions of the molar teeth. (Rec. 502-507).

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

Appellants rely upon the following points:

Point No. 1

The trial court erred in denying appellants' motion for a non-suit. (Rec. 352-353).

Point No. 2

The trial court erred in denying appellants' motion for a directed verdict. (Rec. 516-518).

Point No. 3

The trial court erred in giving the following language appearing in the tenth line of Instruction No. 12 (Rec. 37), to the giving of which language appellants excepted (Rec. 523):

“or permanent.”

Point No. 4

The trial court erred in sustaining respondent's objection to the following question propounded by appellants on cross examination, to the witness, Dr. August Dolowitz (Rec. 327) :

“Q. Could gauze, or threads, migrate from one fossa area on either side to these points where you saw some thread, or where Mrs. Fredrickson told you she saw some thread?”

Point No. 5

The trial court erred in sustaining respondent's objection to the following question propounded by appellants on cross examination, to the witness, Dr. August Dolowitz (Rec. 328) :

“Q. (By Mr. Thurman:) Now, Doctor, assuming the same question I have just put to you, which you have not answered, and add to that the assumption that gauze or strings, or thread had been left in the tonsil area, could those threads, or gauze or string migrate to these ulcer areas you have identified by the figures “1” to “5” inclusive, on Exhibit “1”?”

ARGUMENT

Points Nos. 1 and 2

These points are directed to the trial court's ruling, denying appellants' motion for a non-suit and mo-

tion for a directed verdict, and will be argued together. The following grounds were embraced within each motion, and are the grounds relied upon by appellants in this appeal:

“1. That there is a want of evidence to show that at the conclusion of the tonsillectomy, Dr. Maw left or caused to be left in the incision or cavity opened by Dr. Maw in plaintiff’s mouth, or throat, certain gauze dressings, threads or sutures or any other material whatsoever used by Dr. Maw in the performance of said tonsillectomy.

“2. That there is a want of evidence to show that at any time after the performance of the tonsillectomy there was any foreign material in the incision or cavity in plaintiff’s mouth, or throat, that Dr. Maw in the performance of the obligations and duties devolved upon him was required or should have removed.

“3. That there is a want of evidence to show that Dr. Maw caused or permitted the incision or cavity to be, or to remain closed with foreign material, or materials therein.

* * * *

“7. That there is a want of evidence to show that any material that was left, or might have been left in the tonsil area worked upon by Dr. Maw, could have moved therefrom and traveled to any of the areas in plaintiff’s mouth and throat in or from which material was removed.”

Stripped of all redundancy, the complaint alleges that Dr. Maw, in performing the tonsillectomy, left in

the wound in respondent's throat, gauze, threads and sutures.

Before proceeding with a discussion of the two points under consideration, we wish to state that the case in hand is clearly not one of the type commonly known and referred to as a sponge or gauze case, where such foreign material, after an operation, *was left inclosed in the wound.*

The statement of facts reflects fully the evidence bearing upon the matters involved. The burden was on respondent to prove the alleged negligence; this she failed to do. At every stage of the case, we submit, the evidence showed directly and positively that upon completion of the tonsillectomy and the releasing of respondent no foreign material was left in either tonsil fossa.

No witness testified that he saw Dr. Maw leave any foreign material; no witness testified that, at any time subsequent to the tonsillectomy, he removed, or assisted in removing, or was present when some other person removed, any foreign material from the tonsil fossae.

The most that can be said for the case of the opposition is that respondent, together with two members of her family (Sherman Fredrickson, her husband, and Betty H. Fredrickson, her daughter-in-law) two of her friends (Vera Mathews and Ellen Rupp), and Dr. David A. Dolowitz, at the close of respondent's evidence in chief, had testified that they had seen, *in certain areas* in respondent's mouth, pieces of gauze and thread, and, in some instances, had removed, or assisted in removing,

gauze and thread from certain areas in respondent's mouth.

But no witness, at the close of said evidence, had testified that a single piece of gauze, or that a single thread, or any other foreign material, had been seen in, or had been removed from, the area of either fossa.

And no witness, at the close of said evidence, had testified that such foreign material could migrate or travel from the tonsil fossae to the ulcer areas.

A description of the anatomy of the mouth, including the tonsils and the tonsil fossae, is found in the testimony of Dr. Snow and Dr. Dolowitz. Exhibit 1 is an enlarged diagram of the open mouth; it was frequently referred to by both doctors. The openness of the tonsil areas and the visibility of the tonsils are shown; also, the relative positions of the structural parts of the mouth.

Roughly, Dr. Snow (Rec. 423) stated, a tonsil is about the size of the thumb from the first joint to the finger nail, and the tonsil itself lies between two muscular pillars, called front and rear pillars. The space between the pillars, is triangular in shape, with the apex at the top, and the bottom of the triangle being near the base of the tongue. The doctor further stated that the tonsils are fastened to the fossae with connective tissue, and, before severance, have somewhat the appearance of growths protruding out into the throat between the pillars.

To remove a tonsil, Dr. Snow stated, all that is required to be done is to cut the tissue holding the tonsil

in its fossa; that when the operator looks into the mouth of the patient, the tonsils are clearly visible; that in effecting their removal, he is not required to make any incision or opening whatever, and that, for that reason, after completing the operation, there are no wounds or incision to be sutured or sewn together.

If a tonsil, following the severance, is left in its place, between the two pillars, the doctor stated that it would remain at most but a few minutes, and this would be so whether the patient remained on his back or sat or stood erect; if on his back, the tonsil would be dislodged as soon as the patient commenced swallowing, whether voluntarily or involuntarily (Rec. 431); if erect, the tonsil would fall from its position by force of gravity. (Rec. 426). In either case, the patient would swallow or spit out the tonsil. When the patient is erect, the back of the fossa would be vertical.

If a piece of gauze had in fact been left in the tonsil fossa, and, further, if the edges of the pillars had been sewn together over the fossa, Dr. Snow gave it as his opinion that the maximum time the gauze could remain in the fossa would be five or six days. In all probability, he stated, the stitches in the pillars, before that time, would cut through and slough away, and the pillars would separate and assume their normal position, expelling the gauze from the fossa; and this would be the result no matter what kind of material was used for the stitches; the pillars naturally remain apart; they can be brought together only by force and then are constantly tending to pull apart. (Rec. 434-435).

But in the instant case, there was not one word of evidence tending to show, even in the remotest degree, that the pillars had ever at any time been brought or sutured together.

On cross-examination, Dr. Snow described an imbedded tonsil as one having a fossa, the pillars of which would protrude outward approximately as far as the surface of the tonsil. Upon being asked whether one of the methods of taking care of excessive bleeding, during the performance of a tonsillectomy, consisted of "packing the tonsil, giving it what you call a light suture," the doctor stated that no such method was followed. Pressed further, he was asked "Whether or not your practice around here to stop bleeding is by packing?" To this the doctor replied: "It is not by packing, except to hold gauze sponge in place by a hemostat." Packing, as a method of controlling the bleeding, the doctor added, had been described in the literature and damned. (Rec. 439-440.)

And here again, we say, there was not one word of evidence in this case tending to show, even in the remotest degree, that Dr. Maw, in order to control the bleeding following the tonsillectomy, or for any other purpose, resorted to the method of holding a pack in place in the fossa by suturing.

Doctor Snow further testified (Rec. 436-438) that it was his opinion that gauze or thread or other foreign material, if left in the fossae, following a tonsillectomy,

could not travel or migrate through the tissue from the fossae to any of the ulcer areas shown in Exhibit 1.

Appellants, Dr. Maw testifying (Rec. 383), stated that the tonsillectomy was performed by taking hold of the tonsil with a grasping fork, severing the tonsil from the connective tissue with surgical instruments, including a snare, and by controlling the bleeding vessels by the pressure of gauze held in place with a hemostat, or by tying off the bleeders with cat gut ligatures. No suturing whatever was done, Dr. Maw further testified, except the tying off of the bleeders, and never was a piece of gauze or thread, detached from the hemostat, used in the tonsil fossae, and never was such material left there. (Rec. 396-399.)

Dr. Cleary, an ear, nose and throat specialist, also gave expert testimony as to what would happen if gauze or thread, attached or unattached, or in some way covered over, were left in the fossa following a tonsillectomy. (Rec. 456-561.) The opinion of that expert confirmed that given by Dr. Snow.

And no evidence whatever was offered by respondent, nor did respondent attempt in any way, to refute, contradict, change or modify the opinion given by Dr. Cleary.

On the point as to what would happen if gauze material were left in the tonsil fossa after removal of the tonsil, and the edges of the two pillars sutured together with cat gut, that doctor stated that the sutures would dissolve or be absorbed in a few days, due to the diges-

tive action of the saliva; that if a folded cloth or pad were sutured over, the catgut sutures would tear out within twenty-four hours, relieving the pillars of their tension and causing them to go back to their normal position. There would then be nothing to hold the material in the fossa. The cutting action of silk, cotton, linen, or nylon sutures, would be even more marked, the doctor stated.

Dr. Dolowitz was called as a witness by both respondent and appellants. A substantial part of his testimony is reflected on Exhibit 1. All of the marks, lines, circles and figures, shown in red, were placed on the exhibit by him. The four small red circles indicate the size and positions of all of the ulcers which the doctor himself had observed in respondent's mouth, and also all of the ulcers about which respondent herself had made complaint. Respondent complained of none other. She stated she had revealed to Dr. Dolowitz all of the points at which ulcers had developed. (Rec. 499-500.) These ulcers were the sources of all of the gauze and threads seen in or taken from respondent's mouth. Ulcers Nos. 1 and 2 are shown with a double circle, one inside the other; this was done for the reason that, as the doctor explained, they were in fact but one, the second being an enlargement of the first. Therefore, on Exhibit 1, only four separate ulcerated areas are shown, three on the left side and one on the right side. (Rec. 208-209.) All of the ulcers, the evidence and Exhibit 1 discloses, were located considerably outside of the tonsil areas, and much closer to the positions of the molar

teeth than to the tonsils. That fact must be accepted; no single witness offered any testimony to the contrary.

Dr. Dolowitz, while testifying for respondent, gave a detailed statement as to the ulcers in respondent's mouth, refreshing his recollection of the examinations made by him from copious notes taken at the time. (Rec. 203-224.)

While testifying in behalf of appellants, he stated that since testifying for respondent he had made a further study of his notes, and that there were no additional ulcers seen by him or complained of by respondent. (Rec. 495-496.)

The doctor gave it as his opinion that the gauze and threads which he had seen, and which respondent told him she had seen, could not have come from the tonsil fossae. To quote the language of the doctor: "I think it unlikely that gauze could have migrated that far." (Rec. 499-500.) "Usually the migration is downward, * * * those I have seen have always been downward." It was also possible, the doctor thought, for them to go "laterally." (Rec. 500.)

When the trial of the case had reached this point, it was no more than natural for the average mind to begin to wonder. At least, such appeared to be the case with Juror Emery. He requested permission to ask a question of Dr. Dolowitz, and the permission was granted. (Rec. 512-514.)

"JUROR EMERY: In the performing of this tonsillectomy, assuming this foreign material

was in the roof of Mrs. Fredrickson's mouth, is there anything about the tonsillectomy performed that would aggravate a pre-existing condition that would bring about this ulceration? In other words, would there be anything of a disturbing nature that would create the causes that actuated these ulcers?

A. (By Dr. Dolowitz) I don't see how a tonsil could cause the ulcers at all.

JUROR EMERY: In other words, the removal of the tonsil could not aggravate the—you might say the inception of this ulcerous condition? In other words, when the teeth were pulled originally some thirty, or twenty years ago—whenever this was—in the event some of this material was left in the teeth when removed, could the removal of the tonsil cause this condition?

A. It might have, and the inflammation could conceivably have caused the gauze to be stirred up, if it was in there.

JUROR EMERY: That is all.

(By Mr. Thurman) You mean the gauze in the teeth?

A. Yes.

JUROR EMERY: It isn't unreasonable to conceive it could have travelled from the point where the tooth was extracted to the point where it was exuded?

A. That would be possible; it was in a downward or lateral direction. (Rec. 512-514.)

Dr. Dolowitz further testified that the inflammation resulting from the tonsillectomy could have started

enough irritation to agitate any gauze that might have been placed in the sockets of molar teeth and left there at the time of the removal of the teeth a number of years back. There is always inflammation in the case of a tonsillectomy, as you are cutting tissue, it was further stated, and in the performance of a tonsillectomy that condition cannot be avoided. It is very possible, the doctor said, that the tonsillectomy could have started up inflammation in the sockets of the molar teeth if gauze or some foreign material had been left in the sockets at the time of the extraction years before. (Rec. 514.)

The quoted testimony of Dr. Dolowitz, elicited by the searching questions of the juror, together with the further explanation made by the doctor as to the possible origin of the inflammation found in respondent's mouth sometime after the tonsillectomy, speaks for itself.

There is no evidence in the record, tending to vary or refute that testimony in the least degree.

The answer made to the very first question propounded by the juror, brought forth the answer:

"I don't see how a tonsil could cause the ulcers at all."

What the doctor said was the opinion of an expert, and involved a subject matter about which only an expert was qualified to express an opinion.

The second question of the juror had to do with whether the tonsillectomy could have stirred up the

gauze, assuming such had been left in the mouth at the time of the extraction of the teeth, "some thirty or twenty years ago—whenever this was," and caused the condition found in respondent's mouth. The answer to that question was in the affirmative; and in the answer given we find a sound and logical explanation of the condition in respondent's mouth.

Admittedly, prior to the tonsillectomy in July, 1945, all of respondent's molar teeth had been extracted. Both Drs. Morgan and Wright, dentists, had, in that order, treated respondent before July, 1945.

Dr. Wright examined and treated the teeth in May, 1939, in 1940, in 1942, in September, 1943, in June and again in August, 1944, and later in the Fall of 1944, and a half dozen times in the fall of 1945. (Rec. 340-342.) In the fall of 1945, Dr. Wright stated he was seeing if he could "get her teeth in shape to save them." (Rec. 342.) He extracted respondent's eighteen front teeth (no molars) in January, 1946. On direct examination, he said no gauze was used. On cross-examination, however, upon being asked as to his general manner of extracting teeth, the doctor said that he used gauze if, after the extraction, the patient returned and was bleeding; that he had always had gauze and cotton in his office; that he had no recollection of using a gauze pack to stop bleeding; that he used "cotton ones, packs;" that in case of bleeding, he would leave gauze or cotton in a socket overnight, leaving it in all night and taking it out the next morning; that he would leave

it in until the patient returned. Here again, we say, this testimony also speaks for itself.

Admittedly, it was the practice of Dr. Wright to keep and use gauze, for the purposes specified, in his office. The practice of doing that is so general among dentists that had he denied the practice, no one would be naive enough to believe him.

On her cross-examination, respondent's attention was directed to her deposition taken some little time prior to the trial. She then testified (Rec. 166) :

“Q. What I am talking about is how many teeth did Dr. Wright extract for you between 1935 and July 5, 1945?

A. That would be hard for me to say.

Q. What is your best judgment?

A. Oh, I would say two or three at the most.”

Whatever number it was, they were all rear or molar teeth, as in January, 1946, when respondent again called on Dr. Wright, she had all her front teeth.

The testimony of witnesses (both Dr. Wright and respondent) is no stronger than what they testified to on cross examination. Such was the holding in *Porter v. Hunter*, 60 Utah 222, 207 Pac. 153, where the court said:

“Plaintiff's testimony is no stronger than what he testified on cross-examination, and the evidence elicited from him on cross-examination must be regarded as part of the evidence given by him in chief. *Wilson v. Wagar*, 26 Mich. 452.”

Nowhere in the record is there any evidence tending to contradict or to refute appellants' positive and direct testimony as to the technique used in performing the tonsillectomy. Other than respondent, three persons only were present at the time of the operation—Dr. Maw, Mrs. Alice Emery, formerly Alice Armour, the nurse, and respondent's sister. Respondent was free to admit that she saw little of what went on, and it can therefore be said there were but three eye witnesses. Mrs. Emery, in her testimony, verified the technique used as described by appellant. (Rec. 481.) Respondent's sister, although seated at the foot of the operating bed during the operation, was not called by respondent as a witness in the case.

Respondent herself testified that after the tonsillectomy in July, 1945, she consulted and was treated by, including Dr. Maw, no less than twelve dentists and medical doctors, all residing in Salt Lake County. (Rec. 162.) To each of these practitioners, respondent explained that a tonsillectomy had been performed. (Rec. 164-165.) Each, in examining respondent's mouth, could not have avoided seeing any abnormal condition, had one existed. But none of these practitioners contradicted or refuted the technique claimed to have been used. None was called upon to testify by respondent, except only two of the dentists, Dr. Wright and Dr. Browning, and one of the medical doctors, Dr. Dolowitz.

Dr. Wright, respondent's family dentist, examined and treated respondent at frequent intervals during the latter part of 1945. He had every opportunity of observ-

ing the condition of respondent's mouth. While on the witness stand, he did not contradict or refute in any degree the technique claimed to have been used. Dr. Browning saw and treated respondent, beginning in July, 1947; nor did he contradict or refute the technique. All of the other twelve dentists and medical doctors, except only Dr. Dolowitz, saw and treated respondent in the Fall of 1945 and during 1946.

Dr. Muirhead, an eye, ear, nose and throat specialist, testified that respondent called on him, and that he examined her throat, on April 5, 1946, approximately nine months after the operation. Reading from his daily record, made at the time of the examination, he stated, "The tonsils were out cleanly." (Rec. 377.)

No attempt was made to contradict or refute that testimony.

Dr. Morgan's dental treatment of respondent was prior to that of Dr. Wright. It was he who extracted most of the molar teeth. Other dentists had also treated respondent. The record is silent as to the extent of Dr. Morgan's use of gauze and cotton in the extraction of respondent's molar teeth, but does disclose that foreign material, if imbedded in the gums, might remain in place for many years, Dr. Browning testifying (Rec. 324), as long as thirty years. "Small pieces of cotton thread," Dr. Snow testified, "have been found in people's bodies, years after they have been inserted." (Rec. 452.)

Thus, it will be seen, if we ignore entirely the positive and direct testimony of the eye witnesses to the tonsillectomy, and go so far as to admit the appellant's field of operation *was as near to the ulcers in respondent's mouth* as was the field of operation of either Dr. Wright or Dr. Morgan, which admission, it must be said, would run counter to what is clearly shown on Exhibit 1 and to every word of testimony bearing on that point in the entire record, two possibilities, it might be argued, would be presented: (1) that gauze or cotton was left in one or more of the tooth sockets, at the time of extracting the molar teeth; or (2) that such material was left in the tonsil fossae following the tonsillectomy.

To argue the first possibility, one would have no difficulty in seeing how that very thing could happen, as, if left in the socket, swallowing would have little effect upon it; nor could it be seen by the patient or any one else, looking into the mouth, except by the use of the all-seeing dental mouth mirror; and it might remain in place for a long time, as nature has a most effective and expeditious way of healing over and closing the socket when once a permanent tooth has been extracted.

And to argue the second possibility, one would be required to indulge in a degree of speculation and conjecture, not justified by, but contrary to, every word and thought developed in the evidence, as to the type of surgical practice and technique followed by Dr. Maw.

We earnestly contend that in this case, it would be far too liberal to say that the two possibilities, advanced above, stand on a parity. But even if that should be admitted, the trial court nevertheless erred in its rulings. The Supreme Court of this state has held that when a wrong or injury has been brought about from one or the other of two occurrences, either one of which may have been the sole proximate cause, *and the defendant in the case is or could be responsible for one only*, the plaintiff must prove by a preponderance of the evidence, before he is entitled to have his case submitted to a jury, that the defendant's wrong was the sole proximate cause.

Such was the holding in *Tremelling vs. Southern Pacific*, 51 Utah 189; 170 Pac. 80, decided on December 4, 1917. There, the plaintiff, on behalf of herself and infant child, sued to recover damages for the death of her husband, a brakeman of the defendant railroad. The sole negligence charged was that the defendant constructed and maintained one of its side tracks so near to the main line, and left a large freight car thereon, that the deceased, while riding on a fast moving freight train on the main line, came in contact with the freight car standing on the side track, and was instantly killed. No one saw the accident. Some time later, the body of the deceased was found near the track, with the head badly crushed, *and it was plaintiff's theory that the deceased, while keeping a lookout for a hot box, which he had been told to do, came in contact with the standing freight car*. This car was covered with a thick

coating of frost, and an object touching the car at any point would have left its mark. No mark, however, was discovered. From all the facts and circumstances, the Court observed, it was as probable that the deceased fell backward from the moving car and crushed his head on the ground, as it was that his body came in contact with the standing car on the side track. In support of the rule, holding that where the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law, our court cited a number of cases from various jurisdictions throughout the country, including an early Utah case, *Charles Edd v. Union Pacific Coal Company*, 25 Utah 293, 71 Pac. 215, decided in January, 1903. From that case, we quote the following language, the underscored portion of which was quoted, with approval, in the opinion of the *Tremelling* case:

“* * * Whatever combination of causes may be charged as having resulted in an injury, the author of one of them can only be held liable when his act or negligence was the proximate or immediate cause, for if it was remote, and did not directly contribute to the injury, no liability attaches. It is the proximate, and not the remote, cause that the law recognizes. *And when an injury may have come from either one of two causes, either of which may have been the sole proximate cause, it devolves on the plaintiff to prove by a preponderance of the evidence that the cause for which the defendant was liable was culpable and the proximate cause.* 16 Am. and Eng. Enc. Law, 428-431, 445; *Searles vs. Railway Co.*, 101 N.Y. 661, 5 N.E. 66; *Ohlenkamp v. Railroad Company*, 24 Utah 232, 67 Pac. 411.”

As in the *Tremelling* case, the respondent in the case at bar relied *upon an inference* to establish that Dr. Maw left the gauze or thread in the tonsil fossae, to wit, that by some means—a means wholly unexplained in the record—the material found its way from the tonsil fossae to the ulcer areas, located higher up than the fossae, and nearer to the position of the molar teeth in the upper jaw than to the fossae.

The problem in the *Tremelling* case was disposed of by the Court in the following language (page 208 of the *Utah Report*):

“* * * The witnesses produced both by the plaintiff and the defendant, however, all agree that the car standing on the side track was covered all over with a thick coating of frost; that any person, object, or substance touching the car at any point or place interfered with the coating of frost and disturbed it so that it was easily seen by any one that someone or something had come in contact with the car; that after careful examination, lasting a considerable length of time, no mark of any kind was discovered indicating that any one or anything had come in contact with the car at any point, and that experiments were made to determine whether, if any one or anything or substance had touched the frosting on the car, evidence of the fact would appear in the frosting. The assumed fact that the body of the deceased came in contact with the car was thus clearly, if not conclusively, negatived. Moreover, it is clear that the skull of the deceased could have been crushed by a fall from the moving train upon the frozen ground, precisely as it was shown by the evidence

to have been crushed. Indeed, if the effect of the natural forces are kept in mind, it is quite probable that if the deceased had come in contact with the standing car while he was on the moving train, that by the force of the impact his body would have been thrown away from the standing car and would not have fallen to the ground between the two tracks so near the standing car, as indicated by the evidence. *From all the facts and circumstances the inference is certainly as rational, and quite as probable, that the deceased fell backward from the moving car, and in doing so struck the hard ground with the back of his head, and that the momentum of his body, which was imparted to it by the fast moving train, caused it to turn over and slide, precisely as indicated by the evidence, as it is that his body came in contact with the car standing on the side track. The cause of his death is therefore left to conjecture merely, and in view of that fact the judgment cannot prevail.*"

In the instant case, appellants' position is stronger and more conclusive than that of the defendant in the *Tremelling* case. There was not a scintilla of direct evidence, either at the close of respondent's case, or at the close of appellants', that Dr. Maw left any foreign material in the fossae.

At the close of respondent's case, all that can be said is that gauze or threads were seen in and removed from ulcers located higher up and nearer to the upper molar teeth than to the fossae, *with no evidence whatever that the material could migrate from the fossae to the ulcer areas.* Such was the state of the evidence when respondent closed her case.

At the close of appellants' case, we have, in addition to the direct and positive testimony of Dr. Maw that he left no foreign material in the fossae, the statement of two expert witnesses, testifying concerning a matter about which an expert only was qualified to express an opinion: Dr. Dolowitz (Rec. 499-500) testified that it was unlikely that gauze or threads could migrate from the tonsil fossae to the positions of the ulcers; and Dr. Snow (Rec. 436-438) gave it as his opinion that such material, if left in the fossae, could not have migrated through the tissues to any of the ulcers. Neither expert nor layman contradicted that testimony.

Appellants, in proving their case, it will be seen, discharged a burden which, under every rule of law, was imposed upon respondent.

Any inference, therefore, that Dr. Maw did leave foreign material in the fossae, was, to paraphrase a line from the *Tremelling* case, clearly negatived. And, from all the facts and circumstances of the case, the inference that the gauze and thread, seen in and taken from the ulcers, was material which, at some time or other, had been left in the sockets of respondent's molar teeth, is even more rational and probable than that such material came from the tonsil fossae.

We also refer to the case of *Reid vs. S.P.L.A. & S.L.R.R.*, 39 Utah 617, 118 Pac. 1009.

In that case plaintiff commenced an action, stating several separate causes, to recover damages for the killing of cattle by the trains of the defendant. The first

cause of action had to do with a cow that was being pastured on land that was fenced, owned and improved by a private party and through which defendant's railroad was constructed and maintained. The fence enclosing defendant's right of way was down and out of repair about one mile west of the point where the cow was killed, but there were two gates opening into the right-of-way in the immediate vicinity of the place of the accident, which gates had been installed and were maintained by defendant for the benefit and convenience of the owner of the land upon which the cow was being pastured. These gates had been left open almost continuously prior to the accident, and it was not contended that the gates in question were used or left open by the defendant; in fact, it appears from the evidence that the defendant was in no wise responsible for the gates being left open. Under the Utah statute, if the cow entered upon the right of way through the open gate, defendant could not be held liable for her loss. In disposing of the question, the court, at page 621 of the *Utah report*, said:

“There is no direct evidence as to where the cow got onto the right of way. It is conceded, however, that she was killed in the immediate vicinity of the gate mentioned, and, as shown by the evidence, about one mile from the point where the fence inclosing the right of way was down and out of repair. The inference, therefore, is just as strong, if not stronger, that she entered upon the right of way through the open gate as it is that she entered through the fence at the point where it was out of repair. The plaintiff held the affirmative, and the burden was on her

to establish the liability of the defendant by a preponderance of the evidence. It is a familiar rule that where the undisputed evidence of the plaintiff, from which the existence of an essential fact is sought to be inferred, points with equal force to two things, one of which renders the defendant liable and the other not, the plaintiff must fail. So in this case, in order to entitle respondent to recover it was essential for her to show by a preponderance of the evidence that the cow entered upon the right of way through the broken down fence. This the respondent failed to do.

“We are of the opinion that the verdict rendered on the first cause of action is not supported by the evidence, and that the trial court should have directed a verdict for appellant on that cause of action in accordance with appellant’s request.” (Cases cited)

Point No. 3.

This point is directed to a portion of the Court’s Instruction No. 12 (Rec. 37), to the inclusion of which portion appellants excepted (Rec. 523). The instruction dealt with the question of respondent’s damages in the event it was found she was entitled to a verdict. We quote from the instruction, italicizing the two words embraced within the exception:

“You are instructed that in the event you shall find, after a conclusion of all of the evidence in the case, that plaintiff is entitled to a verdict against defendants, then you should award to her such damages as will compensate her for

any injury or detriment sustained or proximately caused by the negligence, if any, of the defendants as alleged.

“In estimating or determining the amount of any such damages you may take into consideration the character of the injury sustained by plaintiff, if any; the nature, extent and severity thereof and the temporary or permanent character thereof. * * *”

It was error, we submit, for the court to tell the jury that in determining the damages to be awarded respondent, they could take into consideration the “permanent” character of her injuries.

The only injury, having any permanency, suffered by respondent at any time, was the loss of her front teeth, extracted by Dr. Wright six months after the tonsillectomy. But no causal connection was shown between that loss and the work done in respondent’s mouth by Dr. Maw. In fact, nowhere in the evidence does it appear that respondent claimed that the loss of teeth resulted from the alleged negligence of Dr. Maw.

The following facts clearly establish the absence of any causal connection:

1. That respondent, prior to the tonsillectomy, called on Dr. Maw in July, 1945, complaining of arthritis; that her throat was examined and pus was found in the tonsils; that prior to said examination all of respondent’s molars had been extracted, and that there was still remaining in her mouth eighteen front teeth, ten in one jaw and eight in the other.

2. That between 1939 and July, 1945, the date of the tonsillectomy, Dr. Wright, respondent's family dentist, treated respondent's teeth many times (Rec. 340); that during the period in question, the doctor scaled and x-rayed respondent's teeth, something about the teeth suggesting the advisability of x-rays (Rec. 340-1); that in the fall of 1944, respondent visited the doctor about six times, and that he "would scale her teeth, put a little medicine on it, to see if we could save them." (Rec. 342); that in respondent's teeth the doctor found the presence of pyorrhea (Rec. 342); that pyorrhea, he stated, had the effect of eating "the bone away between the teeth, and eats pockets down there;" that during the fall of 1945 respondent continued to visit and receive treatments from the doctor, half a dozen times, the doctor again testifying that he was seeing if he could "get her teeth in shape to save them" (Rec. 342).

3. That Dr. Browning commenced treating respondent in July, 1947, making an incision from one side of the lower jaw to the other, and removing certain bony fragments or spicules, smoothing off fragments and suturing the soft tissues together over the jaw bone (Rec. 320-324); that in the doctor's office he has x-ray pictures of bony fragments which showed up after a period of thirty years (Rec. 324); that based upon the appearance of her x-rays, the doctor stated respondent had had quite a bit of pyorrhea at the time of the ex-

traction of her teeth, and that the diseased condition of her mouth might have extended back a matter of months or a year, or it could be years; that pyorrhea was a disease of the alveola process and the soft tissue, the soft tissue including the gums and the alveola process being the bony formation in which the teeth are imbedded (Rec. 327-8).

From the record thus disclosed there is no escape from the conclusion that such necessity as existed for the extraction of respondent's teeth in January, 1946, was the long existing diseased condition of her mouth, and was not chargeable to anything claimed to have been done or omitted by Dr. Maw in the performance of the tonsillectomy.

The evidence is wholly barren of the slightest suggestion that such was the case. Yet that very element was submitted to the jury; they were told that, in arriving at their verdict, they could take into consideration the nature, extent and severity of respondent's injuries, and the permanent, as well as the temporary, character thereof. The word "permanent" meant nothing short of something that would continue throughout the entire lifetime. Before the inclusion of that as an element of damage, it was incumbent upon respondent to establish by the evidence that she had actually sustained permanent injuries *that were proximately caused by Dr. Maw's work* during the course of the tonsillectomy. And the burden was on respondent to prove that fact; it was not upon appellants to disprove it. To do this, respondent wholly failed.

That one should experience pain and soreness of throat, following a tonsillectomy, is inevitable, but it is wholly unwarranted to contend that such pain and soreness were any justification for the inclusion of the word "permanent" in the court's Instruction No. 12.

It mattered not that the pain and soreness continued up to the time of the trial. While the existence of that fact would be sufficient to justify the court in instructing the jury that they could take into consideration the probable time that respondent might still continue to experience pain and soreness, the authorities nevertheless teach us that a permanent injury is something entirely different from future pain and suffering. If one has experienced such for a period of time, and still continues so to do, it is not unreasonable to conclude that the pain and suffering will continue for some additional time. But this does not mean that the condition is permanent and that it will last during all the after life of the injured party.

The principle for which we contend is found in a Wisconsin case, *Ducate vs. The Town of Brighton*, 114 N.W. 103. There the Supreme Court had under consideration a situation involving personal injuries, where the trial court had instructed the jury that they might consider the extent and duration of plaintiff's injuries and whether they were permanent or not. No testimony tending to show a permanent condition was found in the evidence, but the pain and suffering was shown to have

continued up to and existed at the time of the trial. We quote the following:

“* * * It must be kept in mind that permanent injury is something different from future pain and suffering, and relates to a condition lasting during all the after life of the party injured. A jury might well infer that pain and suffering caused by an injury and continuing up to and existing at the time of trial would continue for some time in the future and estimate the damages accordingly, but the jury could not infer permanent injury from any such testimony as is here quoted, where there are no visible wounds, nothing in the nature of a disability or disease commonly known to be permanent, and no opinion evidence tending to show permanency. (Cases cited.) The respondent apparently relies upon the smallness of the verdict to show that the jury did not include any damage for permanent injury, and hence that the error was harmless; but we are unable to affirm the correctness of this view upon the record present here. * * *”

Points Nos. 4 and 5

These points embrace the same matter and will be argued together. They are directed to the ruling of the trial court, sustaining respondent's objections to the questions propounded by appellants on cross-examination, to the witness Dr. August Dolowitz. In order that the court may be advised, we quote in full, in addition .

to the two questions, the comments of counsel in making their objections (Rec. 227-228) :

“Q. (By Mr. Thurman) Let me ask one final question.

Could gauze, or threads, migrate from one fossa area on either side to these points where you saw some thread, or where Mrs. Fredrickson told you she saw some thread?

“A. That is a pretty hard question to answer, Sir.

“Q. What is your opinion on that?

“A. I think—

MR. RICH: We haven't asked this witness for an opinion, he is here primarily to state the facts, we have no objection to counsel asking him to do so.

Your Honor, he has been subpoenaed here merely to state the facts he found, not for the purpose of appearing as an expert to state his opinion.

I have no objection if counsel makes him his witness for that purpose.

MR. THURMAN: This is part of my cross examination.

MR. ELTON: It is not cross examination of anything we questioned on.

MR. THURMAN: Oh, yes —

MR. ELTON: We didn't ask about that, we object to it.

MR. THURMAN: Counsel took five or ten minutes to ask about diseases of the mouth.

(Argument by counsel).

MR. THURMAN: We have the right to have his opinion.

THE COURT: The objection is sustained.

MR. RICH: You don't have to take an exception we will give it to you.

MR. THURMAN: Read the question.

(Thereupon the question is read as follows:

“Q. What is your opinion on that?”

“Q. (by Mr. Thurman:) Now, Doctor, assuming the same question I have just put to you, which you have not answered, and add to that the assumption that gauze or strings, or thread had been left in the tonsil area, could those threads, or gauze or string migrate to these ulcer areas you have identified by the figures “1” to “5” inclusive, on Exhibit “1”?

MR. ELTON: That is exactly the same question with no variation and the same objection.

THE COURT: The objection is sustained.”

Before being asked the two questions, Dr. Dolowitz, on direct examination, after qualifying as an expert, specializing in eye, ear, nose and throat (Rec. 183), had

testified that he had been consulted by respondent in the spring of 1948, and, at intervals, during the remainder of that year and part of 1949, had treated respondent and removed from the ulcers shown on Exhibit 1 pieces of gauze or thread and chips of bone. He was called by respondent to testify, and did testify, among other things, as to the condition of the mouth, the ulcers seen by him and the ulcers which respondent herself had seen, and the foreign material which had been seen in and removed from the ulcers.

As to all of the above matters the doctor was interrogated on direct examination. Obviously, such testimony was primarily, if, in fact, not solely, asked for the purpose of establishing certain facts from which an inference, it was hoped, might be drawn that the foreign material appearing in the ulcers was material which had been left there by Dr. Maw upon the completion of the tonsillectomy. Had that not been the purpose of the testimony, then it would have been immaterial and have had no place whatever in the instant case.

The fact that the doctor was not asked on direct examination for an opinion relative to the possibility or probability of the foreign material migrating from the tonsil fossae to the ulcers, certainly cannot be successfully advanced as a reason for denying appellants, on cross-examination, the opportunity of developing from the doctor whether, in his opinion, such foreign material could or could not so migrate. It cannot be said that the doctor was not qualified to express an

opinion; he was an expert, and, as such, testified for respondent.

In relation to the whole of the body, the mouth is of small area. The nearest ulcers were but 1 to 2 inches distant from the tonsil fossae. The location of the ulcers, as fixed by the doctor in his direct examination, might have been sufficient, in the absence of testimony to the contrary, to cause the average layman to reach the conclusion that foreign material might possibly migrate from the tonsil fossae to the ulcers. Appellants, in asking the questions, were not embarking upon a new field; the field itself had been opened by respondent, and the very purpose of cross-examination was defeated when the court denied appellants the right to develop the whole story. To permit the possibility of such inference to stand, we earnestly contend, was highly prejudicial.

In the case in hand, there was no conflict whatever, at any stage of the case, on the one question that was vital to the establishment of the negligence charged in the complaint against Dr. Maw: could foreign material migrate from the tonsil fossae to the ulcers? This was a matter about which experts only were qualified to express an opinion.

Respondent rested her case without calling or asking a single witness as to the possibility of such migration. The mere showing that in and from the ulcers found in respondent's mouth, certain gauze and threads

had been seen and removed, was wholly inadequate to sustain the trial court's ruling in denying appellant's motion for a non-suit. What is there in human experience, unsupported by expert testimony, what was there at the close of respondent's evidence, to justify anyone in concluding that gauze or threads could migrate from the one position to the other?

On the other hand, appellants, during their case, went forward and produced two expert witnesses specializing in ear, nose and throat, each negating the very thing, the burden of proving which rested upon respondent.

We submit that the trial court erred in each of the rulings specified under the points herein presented and argued.

Respectfully submitted,

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Dated April 19, 1950.