Malpractice: Sponge Left in Pelvic Cavity.—The physician-defendant operated to remove a tumor from the plaintiff's pelvic cavity. He walled off the bowels by "retractor pads," on which were sewed pieces of tape about 14 inches long, the ends of which hung outside the patient's body, attached to surgical instruments. To arrest capillary hemorrhage in the operative area he "wadded up" other gauze pads and placed them against the bleeding tissue, but he "wadded up" with the gauze the tape attached to the pads or sponges so used, so that the ends did not protrude outside the body. The patient had been on the operating table about one hour and thirty-five minutes when the anesthetist reported that the patient was showing signs of shock and advised that the operation be completed as soon as possible. The peritoneum had already been completely sutured, when a nurse reported that one sponge was missing. Immediately the peritoneal sutures were removed and for about five minutes a search was made for the missing sponge, but it could not be found. About ten weeks after the operation the patient passed through her rectum a sponge similar to those used to arrest bleeding. She sued her physician, and a judgment was rendered in her favor. Her physician then appealed to the district court of appeals, fourth district, California.

The appellate court called attention to the fact that, in the absence of an express contract, a physician does not warrant a cure. He represents only that he has the ordinary training and skill possessed by physicians practicing in the same or similar communities and that he will employ such training, skill and care in the treatment of his patient. A physician who holds himself out as a specialist in the treatment of a certain organ, injury or disease is bound to bring to the aid of a patient employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease in the same general locality, having regard to the state of scientific knowledge at the time. The evidence, said the appellate court, indicates that the physician-defendant was a specialist in abdominal operations.

On behalf of the patient-plaintiff, a physician testified that good practice in the locality where the operation was done required a physician to retain manual control of sponges used to arrest bleeding in operations such as the one here involved or else to bring the end of a tape attached to each sponge to the outside of the patient's body and to have it attached there to a metal ring or a surgical instrument. It is admitted, said the court, that the defendant did not use this method in operating; that of itself is sufficient to support the trial court's finding of negligence; it is evidence that the physician-defendant did not use the care and skill used by physicians performing similar operations in the same or similar communities. But the number of witnesses who testified for the defendant exceeded the number who testified for the plaintiff, and the defendant insisted that the evidence as to the correctness of the methods employed by him so greatly preponderated in his favor as to overcome completely the evidence offered on this question on behalf of the plaintiff. The district court of appeals pointed out, however, that a case cannot be decided in an appellate court on the numerical strength of witnesses; conflicts of evidence are settled in the trial court and a judgment cannot be reversed where there is competent and material evidence in the record to support it.

The appellate court was not impressed by a suggestion made on behalf of the plaintiff that her evidence disclosed numerous things that could have been done, but that were not done, to relieve the operative shock and to permit a prolongation of the search for the lost sponge until it was found and removed. The physician-defendant was confronted with a great emergency. His patient was in a very serious condition, her life was in danger, and the element of time was most important. Under such circumstances, the physician had to rely on his own skill, knowledge and best judgment in choosing the course to pursue. Nevertheless, the judgment of the trial court in favor of the patient-plaintiff was supported by the evidence concerning the manner in which the physician-defendant used sponges to arrest bleeding, and the judgment was accordingly affirmed.—*McLennan v. Holder (Calif.), 36 P. (2d) 448.*

Malpractice: Reliance on Sponge Count by Nurses No Defense.—The patient and her husband sued the physician-defendant, alleging that in the performance of an abdominal operation a sponge was left in the patient's abdomen. The "sponge" was described as "a gauze pack or pad, six inches wide and about eighteen inches long—6 ply gauze in thickness, with a tape attached to one corner, about four inches long." To it was attached a metal ring. From a judgment for the plaintiffs, the physician appealed to the supreme court of New Jersey, alleging that the trial court erred in not directing a verdict in his favor.

The physician-defendant operated on his patient in a public hospital, over which he had no control, and the hospital supplied two nurses from its staff, to assist in the operation. He asserted that by recognized custom it was the duty of the nurses who assisted him to keep count of the sponges and the duty of the head nurse to report, before the operation wound was closed, as to the correctness of the sponge count. He contended that the head nurse had so reported to him in this case and he argued that he was entitled to rely on that report, as the nurses were not in his employ or furnished by him. He claimed that under the circumstances he was not required to make any extended examination of internal conditions after the operation and was not responsible for an erroneous count of the sponges used. Any duty of independent examination that rested on him, he contended, was shown to have been adequately performed, so that nothing in the evidence justified the jury in finding that he was negligent, and the case therefore should not have been submitted to the jury.

The supreme court of New Jersey, however, did not agree with the defendant's contentions. Notwithstanding the nurse's count, said the court, a duty remained with the defendant to examine independently, to make sure that no foreign body remained in the abdominal cavity. The existence and non-discovery of so considerable an object as the pad that was left in the patient's body in this case, particularly in view of the testimony of expert witnesses as to the usual practice of an independent examination by operating physicians, presented a case for submission to the jury. The very fact that the physician-defendant was operating with nurses not in his employ nor, so far as appears, of his own selection, seemed to the court to give emphasis to this view.

The court affirmed the judgment in favor of the plaintiff.—*Stawicki v. Kelley (N. J.), 174 A. 896.*

Malpractice: Sponge Left in Abdomen.—The physician-defendant performed a cesarean operation on the plaintiff. The incision did not heal properly; it ulcerated and discharged pus. About four months later another physician discovered a sponge in her abdomen. Thereafter the plaintiff sued the defendant and the case was tried by the court without a jury. The physician-defendant testified that the sponge found was of the type used for sponging "before entering an incision" and which should never be allowed to get loose in the body. He was unable to account for its presence in the patient's abdomen save that "its presence was the result of some accident about which witness can only advance a theory." The court rendered a judgment in favor of the physician and the patient appealed to the Supreme Court of Florida, division A.

It is negligence per se, said the Supreme Court, for a physician to leave a sponge in a patient's body in the course of the performance of an operation. In such a case the burden of showing due care is on the physician. He cannot relieve himself from liability unless the sponge was so concealed that reasonable care on his part would not have disclosed it, and the patient's condition was such that, in his judgment, a special exploration for the sponge would have endangered the safety of the patient. Where a patient's condition is critical and the paramount requirement is to complete the operation in the shortest possible time, a failure to remove a sponge may or may not constitute actionable negligence, depending on the circumstances of the case, the burden being on the physician to show to the satisfaction of the jury that the particular act was not blameworthy because of the supervening necessity to complete the operation without delay. In the present case, the court continued, the defendant contended that a physician should not be deemed negligent when he has exercised every precaution, under the exigencies of the case, to remove from the body of the patient all sponges, packs and other objects used in the operation, by removing all such objects discoverable by the sense of sight and touch and by keeping mental note of all such objects as were placed in the patient's body, and removing all of them to the best of his recollection at the time the incision is closed. But, answered the Supreme Court, the evidence does not support this contention. The

defendant himself testified that he had to conclude the operation hurriedly for fear that the patient would die on the operating table before he could get the incision sewed up. But at the same time he admitted that the particular sponge, later found in the patient's body, was not an article that he had placed, or was required by any standard medical usage or practice to have placed, in the patient's abdominal cavity. On the contrary, he admitted in effect that the sponge was of a type used for sponging before entering an incision and had been allowed to get into the abdominal cavity as the "result of some accident about which witness can only advance a theory."

Even if it had been shown, said the court, that the defendant was required by the urgent necessities of the case to leave a sponge in the patient's abdomen, it was his legal duty so to inform his patient within a reasonable time thereafter so that she might seek as early relief as possible. The removal of all sponges used is part of a surgical operation and when a physician fails to remove a sponge he has used in the course of the operation he leaves his operation uncompleted and creates a new condition which imposes on him the legal duty of informing his patient and endeavoring with the means he has at hand to minimize and avoid untoward results likely to ensue therefrom.

The Supreme Court concluded that the trial court misapprehended the probative weight and legal effect of the evidence offered, reversed the judgment in favor of the physician, and ordered a new trial.—*Smith v. Zeagler (Fla.), 157 So. 328.*

The court of appeals affirmed the verdict against the defendants, but only on condition that the plaintiff would consent to a reduction in the judgment from $4,000 to $2,500. Otherwise a new trial was to be granted the defendants.—*Barry v. Maxey (Tenn.), 75 S. W. (2d) 823.*

Malpractice: Sponge Left in Operation Wound.—The defendants removed the plaintiff's left kidney. In the course of the operation they used small sponges, so-called "fluffs," and larger laparotomy sponges. After her discharge from the hospital, the patient did not recuperate as it was expected that she would, and Dr. Hunsucker, her family physician, was consulted. He found the wound healed, except where an opening had been left for drainage. He enlarged this opening and packed it with iodoform gauze, but the wound continued to give trouble. He called in Dr. Shuford, who, on opening the wound its entire length and probing it, found a sponge similar to the "fluffs" employed in the original operation. He threw this sponge away and repacked the wound, but with gauze dissimilar to that in the sponges used in the original operation. A few days later Dr. Hunsucker removed from deep in the wound another sponge of the "fluff" type. The patient, claiming that the operating physicians had left two sponges in her body, instituted this action for malpractice. From a judgment in her favor, the physician-defendants appealed to the court of appeals of Tennessee, eastern section.

At the trial, the defendants testified that they did not leave sponges in the wound. In this they were corroborated by the anesthetist and by a nurse. As there was only circumstantial evidence to show that they did so, the defendants argued that the suit should be dismissed because of the absence of evidence to support the verdict. The facts of the case, however, said the appellate court, made it incumbent on the defendants to do more than to deny positively that they left gauze within the wound; since it is conceded that it is negligence for a physician to leave gauze within a wound, the defendants must show before they can escape liability that some one else had an opportunity to place the gauze where it was found. The defendants insisted that the evidence did not exclude an inference that Dr. Hunsucker might have packed gauze through the small opening left for drainage, and that the gauze removed by Dr. Shuford was gauze packed in the wound by Dr. Hunsucker. But, said the court of appeals, both Dr. Hunsucker and Dr. Shuford testified that they did not leave sponges in the wound and that the sponges found were not of the same type as the gauze or sponges used by them. Except for a bare possibility that Drs. Hunsucker and Shuford left gauze in the wound, there was no circumstance supporting the inference attempted to be drawn by the defendants, and other proved circumstances negatived this inference and supported the positive and uncontradicted testimony of Drs. Hunsucker and Shuford. The court called attention to a letter written by one of the defendants soon after the first sponge had been removed from the wound, in which he said:

> I am indeed greatly humiliated over the gauze being left in. Would you mind asking the doctor whether it was a gauze pack or a gauze sponge.
>
> . . . These unfortunate occurrences happen in the best hospitals, but of course does not keep one from feeling very badly about such an accident. . . .

It must be conceded, said the court, that either one of the physician-defendants, or Dr. Hunsucker, or Dr. Shuford left the gauze in the wound, and the case presented therefore an issue for the jury to determine from the preponderance of evidence.

Malpractice: Gauze Pack Intentionally Left in Abdomen.—The physician-defendant, the chief surgeon of a hospital owned and operated by the defendant Pittsburgh Plate Glass Company, removed the plaintiff's gallbladder and appendix, Nov. 18, 1930. Three weeks after the operation the plaintiff was discharged from the hospital to her family physician. The incision did not heal; it continued to discharge pus and a "boil-like" formation developed. In February 1931, about four months after the operation, the plaintiff's condition became so serious that she returned to the hospital, where she was again under the care of the physician-defendant. At that time he alone knew that a gauze pack was in her abdomen. He treated the wound by cleansing it and applying hot applications, but he did nothing toward removing the gauze. After about ten days the plaintiff again returned to her home. On March 11 the wound opened and a gauze pack appeared at the surface. The plaintiff was immediately returned to the hospital, where the physician-defendant opened the abdomen and removed the gauze. The plaintiff thereupon sued the physician-defendant and the company operating the hospital. From a judgment of the trial court in favor of the plaintiff, for $10,000, the defendants appealed to the Supreme Court of Missouri.

The plaintiff charged the physician-defendant with negligence in leaving the gauze pack in her abdomen and thereafter failing promptly to discover it. The physician testified, however, according to the record, that in the course of the operation there was dangerous bleeding and that "to stop the hemorrhage he fastened this gauze sponge or part of it to the liver, and intentionally left it there after he sewed up the wound, except a small hole about as large as a finger left open for the purpose of drainage." He admitted that he made no record to show that he left a gauze pack in the plaintiff's abdomen and that he told no one of his having done so. He admitted, too, that it was not possible to heal a wound with a foreign body in it, and he sought to justify his failure to remove the pack by pointing out that it would have been necessary to open the wound in order to do so and that that might have caused further hemorrhage. But according to the plaintiff's testimony the physician-defendant, when he removed the sponge, remarked "Let's not let that happen again" and requested the plaintiff not to mention it, as it would harm him professionally if she did so.

If the physician-defendant's testimony is believed, said the court, that he purposely left the gauze in the wound to stop a dangerous hemorrhage and that this was necessary and proper treatment, it would refute the plaintiff's charge of negligence so far as it was based only on the defendant's duty to remove all gauze before closing the incision. The physician-defendant contended that the plaintiff had complained only of his failure to remove the gauze before closing the incision. He contended, therefore, that the instruction given by the trial court to the jury was in error so far as it permitted the jury to bring in a verdict against him if it found that he was negligent if he permitted the gauze to remain in the plaintiff's abdomen for an unreasonable length of time. With this contention, however, the Supreme Court did not agree. The plaintiff charged negligence based on the defendant's failure to discover in proper time that gauze had been left in the abdomen. Moreover, the physician-defendant himself, when he testified that it was proper to leave the gauze in the abdomen in this case, raised the issue as to the length of time it might be left in; while it might not be negligence to leave a gauze pack in the abdomen long enough to stop hemorrhage, it was a grave question of negligence to leave it in for five months.

The physician-defendant objected to the instruction given by the trial court authorizing a finding of negligence if the defendant did not exercise "*reasonable* skill and care" in failing to remove the gauze. He insisted that the degree of care required of physicians is more accurately expressed as being "such skill and care as is ordinarily possessed and exercised by members of that profession in good standing practicing in similar localities." But no one can complain, said the Supreme Court, that a given instruction imposes on him a less degree of care than that imposed by law, and the court could not say that an instruction imposing on a physician the exercise of "*reasonable* skill and care" imposed a higher degree of skill and care than that used by ordinary skilful and careful surgeons in like operations under like circumstances in the same and similar localities.

The judgment of the trial court for $10,000 against the physician-defendant and the corporation operating the hospital was, in the judgment of the Supreme Court, not unreasonable. It was therefore affirmed.—*Null v. Stewart (Mo.), 78 S. W. (2d) 75.*

Malpractice: Sponge Left in Patient.—The appellant, a physician, performed an appendectomy on the appellee, June 19, 1931. During the course of the operation the physician discovered that the patient had gallstones, and a second incision several inches above the first was made and the gallstones were removed. The second incision healed quickly and normally. The lower wound continued to discharge pus and did not heal. About six months later, the physician removed from the appendectomy wound a gauze sponge. Thereafter the wound healed in about two weeks. The patient sued the physician and obtained judgment for $9,896, from which the physician appealed to the Supreme Court of Oklahoma.

The physician argued that if he adopted and used the recognized and customary method of keeping track of sponges, he could not be considered negligent even if a sponge was left in the patient's body. While there is substantial authority, said the court, to the effect that the leaving of a sponge in the body of a patient constitutes negligence per se, the better rule is that a physician, like other persons, is bound to exercise ordinary care to avoid injuring any one with whom he comes in contact. The fact that a physician adopts and uses the recognized and customary method of keeping count of sponges will not afford a complete shield from liability, if in fact a sponge is left in the patient's body. The real test is whether the physician, and the nurses acting under his authority, exercise ordinary care in keeping track of the sponges and seeing to it that they are all removed before the incision is closed. The fact that in the present case one of the nurses who was assigned the task of keeping count of the sponges might have made a miscount would not alter the situation. The physician admitted that the nurses were employed and directed by him and he would therefore be liable for their acts of negligence in connection with the operation.

The physician further contended that an instruction given by the trial court imposed on the jury the duty to segregate the injuries suffered by the patient due to the negligence of the physician in leaving a sponge in her body from her injuries due to the operation itself, and that there was no evidence to support such segregation. It was admitted, said the Supreme Court, that the incision made for the removal of the gallstones, where no sponge was involved, healed promptly and completely, and that the other wound drained pus and caused the patient pain and suffering continuously until the sponge was removed. Under these circumstances, the court said, it would be unreasonable to say that there was no evidence of extra suffering on account of the sponge.

After reviewing all the evidence, it was the opinion of the Supreme Court that the question of the physician's negligence was properly submitted to the jury. There was, however, no evidence, either lay or expert, to support the plaintiff's allegation that her injuries were permanent. Up to the time the appendectomy wound healed, there was objective evidence of suffering, a part of which, at least, could be attributed to the presence of the sponge. After the wound healed, her sufferings were largely subjective, and both the continuance of such sufferings and their connection with the sponge would be matters to be established by expert testimony. There was no such testimony offered and whatever suffering the patient may have endured after the wound healed could not be charged to the fact that a sponge had been left in the body, except as a pure surmise. In the opinion of the court, it clearly appeared from the size of the verdict that the jury must have taken into consideration probable future suffering. There being no competent evidence to support a finding of future suffering, the verdict was excessive. The court ordered, therefore, that if the patient consented to a reduction of the verdict to $5,000

the judgment of the trial court, as thus modified, would be affirmed. Otherwise the judgment would be reversed and the cause remanded for a new trial.

The patient's husband filed a separate suit against the physician to recover damages for expenses and loss of services of his wife due to the alleged negligence of the physician. The trial court gave judgment for the husband in the amount of $734, and this judgment was affirmed by the Supreme Court of Oklahoma.—*Aderhold v. Stewart (Okla.), 46 P. (2d) 340; Aderhold v. Stewart (Okla.), 46 P. (2d) 346.*