In *Bissett v. Knights of the Maccabees* (1912), 22 O. W. R. 89, I pointed out that since the change in the Rule "the Judge in Chambers is called upon to exercise his judgment as to how the case might be tried, he cannot pass that responsibility over to anyone else—and if it appears to him that the case should be tried without a jury he must—he "shall"—direct accordingly."

I have no kind of doubt that an action of malpractice against a surgeon or physician should be tried without a jury—and I am strengthened in that opinion by the almost if not quite universal practice for twenty years.

At the bar I had very many cases of this kind; and I never saw one tried with a jury since about 1887.

*Town* v. *Archer* (1902), 4 O. L. R. 383; *Kempffer* v. *Conerty* (1901), 2 O. L. R. 658 (n); *McNulty* v. *Morris* (1901), 2 O. L. R. 656, may be looked at.

It is said, however, that this case will or may turn upon one simple question of fact: "Did the operating surgeon leave a piece of gauze in the body of the patient?" But while that may be so as regards one surgeon, it is not so as regards the other—and in any case it may have been good surgery to leave the gauze as it is alleged to have been left.

Even if it were the case that there would be but the one question, and that a question of fact, to try in addition to the damages, I should still be of the opinion that such a fact should be passed upon by a Judge.

Shortly before leaving the Bar a case of malpractice in which I was counsel, came on for trial before Mr. Justice Meredith at Brampton. The sole question (outside of damages) was one of fact. Did the operating surgeon direct the nurse to fill the rubber bag (upon which the patient was to lie during the operation) with boiling water?" Mr. Justice Meredith, the trial Judge, nevertheless, dismissed the jury and tried the case himself.

The present is by no means so simple a case; and I think the jury notice should be struck out.

Costs in the cause.